National Endowment of the Arts v. Finley: The Propriety of Viewpoint in Arts Funding Still Unknown

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NATIONAL ENDOWMENT OF THE ARTS v. FINLEY: THE PROPRIETY OF VIEWPOINT IN ARTS FUNDING STILL UNKNOWN

I. INTRODUCTION

In National Endowment for the Arts v. Finley, the Supreme Court ruled that the National Endowment for the Arts (NEA) can consider general standards of decency and the "values of the American public" in deciding which artists should receive cash grants. The Court's decision in Finley II may have marked the end of a near decade long battle over the constitutionality of the so-called "decency and respect" clause, but did it end the war? One might be hopeful that it has, considering that the Finley II decision has both sides claiming a victory of their own. For politicians like former House Speaker Newt Gingrich and organizations such as the Catholic League for Religious and Civil Rights, Finley II represents a triumph for common sense and family values. Conversely, for the American Civil Liberties Union (ACLU) and others, Finley II stands for the principle that the government may not use the decency clause to discriminate against viewpoints. These conflicting spins


4. See id. McClennon states that "[t]he ruling seems to have a little something for everyone." Id. The Catholic League for Religious and Civil Rights praised Finley II as a victory for common sense and decency. See id. House Speaker Gingrich and the Family Research Council praised it as well. See id.

5. See id. The ACLU, at the other end of the political spectrum, issued a press release entitled, "ACLU sees silver lining in court's ruling for funding for the arts." Id. ACLU Staff Attorney Marjorie Heins, one of the attorneys who represented the National Association of Artists Organizations (NAAO) and the four artists challenging the NEA's decency clause stated "the Court's reading of the law is unrealistic, ... [b]ut does relatively little damage to the First Amendment principle that when the government is supporting free expression ... it cannot discriminate in its funding decisions against unconventional or controversial ideas." ACLU Sees Silver Lining in Court's Ruling on Funding for the Arts, ACLU PRESS RELEASE, June 25, 1998.
on the Court’s decision in *Finley II* seem to indicate that the Court failed to articulate the precise nature of the constitutional limits on governmental funding of the arts\(^6\) and that this war over the proper balance between free expression and majority interests will wage on.\(^7\)

The Supreme Court’s decision in *Finley II* is part of a larger ongoing debate over indecency, not just in the fine arts, but in films, television, books and the Internet.\(^8\) This Note will consider the *Finley II* Court’s contributions to the ongoing debate over what restrictions the government may legitimately place on subsidies when the First Amendment is implicated. Part II sets the stage for consideration of this issue by explaining the circumstances leading up to the constitutional attack on NEA funding.\(^9\) The initial basis for the challenge should become clear when considered against the framework provided by the Supreme Court in recent decisions. Part III provides this framework by discussing limitations the Supreme Court has placed on governmental regulations affecting First Amendment rights generally and in the context of selective governmental subsidies.\(^10\) Part IV examines the Supreme Court’s analysis in *Finley II*.\(^11\) Part V is a critical analysis of the Court’s opinion in light of previous decisions.\(^12\) Part VI considers the impact

David Cole, a Georgetown University law professor, and another attorney who argued the case on behalf of the artists, saw reasons to be heartened by the ruling. *See* McClennon, *supra* note 3, at E1. The spectrum of voices interpreting the statute with a positive, although conflicting spin is an indication of the subjectivity of the decency standard, McClennon reasoned. *See id.* As a result, Gingrich and company get to claim victory for their version of family values, while Cole and his side claim enforcement of the standards as meaningless. *See id.*


The ramifications of this decision will undoubtedly go beyond the issue of NEA funding, however. Such overwhelming Supreme Court support for the proposition that viewpoint discrimination is constitutional will embolden those trying to criminalize the sale and/or performance of certain “offensive” music. Local governments will find solace in this decision when imposing zoning restrictions against clubs offering “offensive” music. Legislation against the sale of “offensive” music, especially rap, to minors will be passed with much less concern about constitutionality. *Id.*


9. *See infra* notes 14-32 and accompanying text.

10. *See infra* notes 33-149 and accompanying text.

11. *See infra* notes 150-259 and accompanying text.

12. *See infra* notes 260-293 and accompanying text.

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the decision will have on the future of arts funding and on governmental subsidies affecting free expression generally.19

II. Facts

In 1990, the Performance Artists Program Peer Review Panel (the "Panel") convened to consider ninety applications for funding under the Performance Artists Program of the National Endowment for the Arts.14 The Panel chose eighteen performance artists for funding.15 In early May 1990, NEA Chairperson John Frohnmayer asked the Panel to reconsider its recommendations to fund three particular grants.16 The Panel, after reconsidering the applications of John Fleck, Holly Hughes and Tim Miller, unanimously reaffirmed its funding recommendations.17

Normally, such recommendations would have guaranteed the granting of Fleck’s, Hughes’s and Miller’s applications.18 Since 1989, however, the NEA had been embroiled in a highly publicized political controversy surrounding the funding of two controversial projects: a photography exhibit by Robert Mapplethorpe, which included homoerotic images, and an exhibit by Andres Serrano entitled “Piss Christ,” which was criticized as being sacrilegious.19 The

13. See infra notes 294-307 and accompanying text.
15. See Finley I, 795 F. Supp. at 1462. The NEA Chairperson was authorized to utilize such panels of experts to review funding applications. See 20 U.S.C. § 959(a)(4). The 1990 Amendments made mandatory the Chairperson’s use of advisory panels to review funding applications. See 20 U.S.C. § 959(c).
17. See id. The Chairperson arranged for the Panel to meet by teleconference and personally participated in the meeting. See id.
18. See id. “As a matter of practice and custom, recommendation by a peer review panel has been tantamount to the granting of an application.” Id. However, Congress has set out formal procedures for awarding funding. See id. The Chairperson, who is the ultimate decision-maker, is prohibited from approving or disapproving any grant application until he or she has received the recommendation of the 26-member Council. See id.
19. See Finley II, 569 U.S. at 2172. Congress reacted to the controversy surrounding the Mapplethorpe and Serrano projects by eliminating $45,000 from the agency’s budget, the exact amount given to the exhibits by the NEA. See id. at 574-75. The 1990 appropriations bill also included the creation of an independent commission of constitutional law scholars to review NEA grant-making procedures and assess the possibility of more stringent standards for public arts funding. See id. at 575.
controversy was still raging in the spring of 1990 when Fleck, Hughes and Miller applied for funding.20

The NEA failed to abide by its former custom of basing funding decisions on the recommendation of a peer review panel.21 When the Council convened to act on the recommended grants in May, it deferred consideration of the Performance Artists Program fellowships.22 Shortly thereafter, Frohnmayer polled members of the Council regarding the Performance Artists Program fellowships by telephone.23 Because a majority of the Council recommended not funding their applications, the NEA advised Fleck, Hughes, Miller, as well as a fourth artist, Karen Finley, that their grants had been denied.24

20. See Finley I, 795 F. Supp. at 1462. Not only were members of Congress condemning the grant-making process, but private special interest groups ran advertisements and circulated flyers calling for the defunding of the NEA. See id. In fact, Karen Finley, the performance artist who, along with Fleck, Hughes and Miller, had been approved by the 1990 Panel, became the topic of a syndicated column report that criticized the content of her work and its pre-approval by the NEA. See id. "The column also stated that Frohnmayer had been 'advised' by 'friends' of the NEA to veto several grants, including Finley's, to 'ease President Bush's deepening troubles with conservatives on his suspect cultural agenda.'" Id.

21. Finley I, 795 F. Supp. at 1462. As previously stated, the Chairperson is authorized to use expert panels to review funding applications. See 20 U.S.C. § 959(a)(4). Although the Chairperson is the ultimate decision-maker, he or she is prohibited from approving or disapproving any grant application until he or she has received the recommendation of the 26-member Council. See 20 U.S.C. § 950(f). The Council is required to meet at the call of the Chairperson. See 20 U.S.C. § 955(d).

22. See Finley I, 795 F. Supp. at 1462.


24. See id. The artists' projects, that were denied grants, have been described as follows:

Finley's controversial show, "We Keep Our Victim's 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 realizations 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 a shining altar out of the 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.

The four artists filed suit against the NEA, alleging that the organization had failed to follow statutory procedures under the Privacy Act of 1974 and that the statute was unconstitutional as it applied to them.\(^{25}\) In November 1990, Congress enacted Section 954(d)(1), the “decency clause,” in response to the ongoing public debate concerning NEA funding.\(^{26}\) The National Association of Artists’ Organizations (NAAO), fearing that the provision would have a chilling effect on the artistic work of many of its members, joined the plaintiffs in their suit.\(^{27}\) The plaintiffs amended their complaint to allege that Section 954(d)(1) was void for vagueness and impermissibly viewpoint-based, and thus, deprived the artists of their First Amendment guaranty of freedom of speech.\(^{28}\)

\(^{25}\) See Finley II, 524 U.S. at 577. The artists also alleged that the NEA had breached the confidentiality of their grant applications through the release of quotations to the press, in violation of the Privacy Act of 1974, 5 U.S.C. § 552(a). See id. Plaintiffs sought reconsideration of their applications or restoration of their grants, as well as damages for the alleged Privacy Act violations. See id.

\(^{26}\) See Finley II, 524 U.S. at 576. Title 20 U.S.C. § 954(d) provides:

No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; 20 U.S.C. § 954(d).

The predecessor of § 954(d)(1) included the following language that Congress added to the 1990 NEA Appropriations Act:

None of the funds . . . may be used to promote, disseminate, or produce materials which may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary artistic, political, or scientific value.

Department of the Interior and Related Agencies Appropriation Act of 1990 (Pub. L. No. 101-21, Title III, § 304(a), 103 Stat. 741). The NEA required that grant recipients certify that they would not use the grant fund “to promote, disseminate, or produce obscene materials.” Government Funding and the First Amendment (visited Sept. 13, 1998) <http://www.csulb.edu/~jvancamp/freedom3.html>. Many artists and arts organizations challenged the restrictions as an abridgment of their freedom of speech. See id. In a suit against the NEA by the Bella Lewitsky Dance Foundation, the court held that the requirement was unconstitutionally vague and that it violated the First Amendment. See Bella Lewitsky Dance Foundation v. Frohnmayer, 754 F. Supp 774 (C.D. Cal. 1991). The Government did not appeal the decision. See id.

\(^{27}\) See Finley I, 795 F. Supp. at 1470.

\(^{28}\) See Finley II, 524 U.S. at 577-78. Thereafter, the district court denied the NEA’s motion for judgment on the pleadings. See id at 578. After discovery, the NEA agreed to settle the individual plaintiff’s statutory and as-applied constitutional claims. See id.
The Supreme Court granted review after favorable decisions for the plaintiffs in both the District Court and Court of Appeals. The Supreme Court, in an 8-to-1 decision, overruled the Court of Appeals, holding that the government can consider "general standards of decency" when determining the propriety of an NEA grant because there is no realistic danger that such criteria will be used to punish the expression of particular views. Furthermore, the Court held that the First Amendment does not prohibit the government from allocating competitive funding according to the decency criteria because Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." The Court not only rejected the respondents' First Amendment challenge, but also found the provision to be constitutional with respect to their vagueness challenge.

III. BACKGROUND

A. Government Regulation and the First Amendment

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." The Supreme Court has declared that, at the heart of this right, is the principle that the government cannot regulate speech based on its content. The Court has defended this principle by requiring greater judicial scrutiny of content-based laws but has also recognized that government restrictions based on the content of speech are often permissible.

In addition to the Court's broad condemnation of content discrimination, the Court has "focused emphasis on viewpoint discrim-

29. See Finley II, 524 U.S. at 579-80. The district court granted summary judgment in favor of the plaintiffs on their facial constitutional challenge to § 954(d)(1). See id at 579. The NEA appealed and the Ninth Circuit affirmed, holding that § 954(d)(1), on its face, impermissibly discriminates on the basis of viewpoint and is void for vagueness under the First and Fifth Amendments. See id.

30. See Finley II, 524 U.S. at 583. "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." See id. at 587.


32. See Finley II, 524 U.S. at 588.

33. U.S. Const. amend. I.

34. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 758 (Richard A. Epstein et al. eds., Aspen Law & Business 1997).

ination as the ultimate First Amendment evil." 36 Thus, it is clear that the Constitution prohibits viewpoint discrimination. 37 Unfortunately, the cases have not been "a model of clarity" regarding the distinction between content and viewpoint discrimination, often using the terms interchangeably. 38

In Police Department of Chicago v. Mosley, 39 the Court considered the constitutionality of a city ordinance that prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. 40 Thus, the ordinance allowed peaceful picketing on the subject of a school's labor-management dispute, but prohibited all other peaceful picketing. 41 The Court observed that "[t]he operative distinction is the message on a picket sign. But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." 42 Because the ordinance clearly discriminated based on the content of the expression involved, the Court held that it was unconstitutional. 43

36. Id.

37. See id. at 100. "The constitutional prohibition against 'viewpoint discrimination,' and the jurisprudential pursuit of its converse, 'viewpoint neutrality,' arise from the most basic values underlying the First Amendment." Id.


40. See id. at 92-93. Earl Mosley, a postal employee, who for seven months prior to the enactment of the ordinance had frequently picketed Jones Commercial High School, brought the suit. See id. at 93. Mosley's peaceful protests consisted of his walking the public sidewalk adjoining the school carrying a sign that read: "Jones High School practices black discrimination; Jones High School has a black quota." Id.

41. See id. at 92-93.

42. Mosley, 408 U.S. at 95. The Court explained the justification for this rule: To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship [sic]. The essence of this forbidden censorship [sic] is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open." Id. at 95-96 (citing New York Times v. Sullivan, 376 U.S. 259, 270 (1964)).

43. Mosley, 408 U.S. at 102. The Court did concede that there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. See id. However, these justifications for selective exclusions must be carefully scrutinized to tell whether they are narrowly tailored to serve a substantial governmental interest. See id. at 99. The Equal Protection Clause requires no less. See id. at 101. The Court concluded that the ordinance imposed a selective restriction on free speech "far 'greater than is essential to the furtherance of (a substantial governmental) interest.'" Id. at 102. (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).
In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, the Court faced another city ordinance that implicated the First Amendment. In *Taxpayers for Vincent*, the ordinance prohibited the posting of signs on public property. A group of supporters of a Los Angeles City Council candidate challenged the ordinance as an abridgement of its freedom of speech under the First Amendment. The Court stated that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." The Court, however, found this principle unmarred by the city ordinance at issue. The Court observed that there was no indication of censorship or bias in either the enactment or enforcement of the statute. The statute had neither been designed to suppress distasteful ideas nor applied to the campaign workers because of their views. Furthermore, the text of the statute was silent concerning any speaker's point of view. For these reasons, the Court held that the statute was content-neutral and thus constitutional.

45. See id. at 792. Section 28.04 of the Los Angeles Municipal Code states, in pertinent part:

Sec. 28.04. Hand-bills, signs-public places and objects:
(a) No person shall paint, mark or write on, or post or otherwise affix, any hand-bill or sign to or upon any sidewalk, crosswalk, curb, curbstone, street lamp post, hydrant, tree, shrub, tree take or guard, railroad trestle, electric light or power or telephone or telegraph or trolley wire pole, or wire appurtenance thereof or upon any fixture of the tire alarm or police telegraph system or upon any lighting system, public bridge, drinking fountain, life buoy, life preserver, life boat other life saving equipment, street sign or traffic sign.

*Id.* (citing *Los Angeles, Cal., Code § 28.04* Section 28.04).

46. See *Taxpayers for Vincent*, 466 U.S. at 792. The group supported Roland Vincent by attaching 15 by 44-inch cardboard signs to utility poles at various locations by draping them over crosswires and stapling the cardboard together at the bottom. See *id.* The signs read "Roland Vincent – City Council." *Id.* at 793. City employees removed the signs, acting under the authority of § 28.04 of the Municipal Code. *Id.* The group filed suit in the United States District Court for the Central District of California against the City and others. See *id.* The District Court concluded that the city ordinance was constitutional. See *id.* On appeal, the Court of Appeals reversed holding that the ordinance was presumptively unconstitutional because First Amendment interests were involved and the City had failed to justify the total ban. See *id.* at 795-96.

47. *Id.* at 804.
48. See *Taxpayers for Vincent*, 466 U.S. at 804.
49. See *id.*
50. See *id.*
51. See *id.* at 805. The Court set forth the following framework for reviewing a viewpoint-neutral regulation:

A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the
In *Turner Broadcasting System v. FCC*, the Court expounded on the ramifications of the determination that a law is content-based or content-neutral. The Court stated that, generally, content-based restrictions on speech must satisfy strict scrutiny, while content-neutral regulations need only satisfy intermediate scrutiny. The Court determined that the law, which prohibited the posting of all signs on public utility poles, was content-neutral because it would apply to every sign regardless of its subject matter or viewpoint. The Court declined to apply strict scrutiny.

The Court did apply strict scrutiny, however, to the "Son of Sam" law at issue in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*. This New York law required that the income received by any accused or convicted criminal from works describing his crime, be deposited in an escrow account for the benefit of crime victims and creditors of the criminal. The Court

suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 805. (citing *O'Brien*, 391 U.S. at 377). The Court's analysis under *O'Brien* and its additional rejection of plaintiffs' arguments that the "overbreadth" and "public forum" doctrines applied, led the Court to rule in favor of the constitutionality of the ordinance. *Id.* at 800-17.

52. 512 U.S. 622 (1994).

53. *See id.* at 642. In this case, numerous cable operators and programmers challenged the constitutionality of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 which required cable television systems to devote a specified portion of their channels to the transmission of local commercial and public broadcast stations. *See id.* at 626.

54. *Turner Broadcasting System*, 512 U.S. at 642. The Court used "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.* But, "[i]n contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."

55. *See id.* at 662. The Court not only examined the statute on its face to determine if it was content-based, but it looked at its purpose as well. *See id.* at 645. The Court rejected the arguments presented that the law was content-based on its face or in its purpose. *See id.* at 645-53.

56. *Id.* at 662. The Court applied the *O'Brien* analysis to the content-neutral regulation at issue, but deferred ruling on their constitutionality until such time as the district court developed a more thorough factual record. *Id.* at 662-68. For the *O'Brien* analysis, *see supra* note 52.

57. 502 U.S. 105, 118 (1991). To justify the differential treatment, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 118. (citing Arkansas Writers' Project v. Ragland, 481 U.S. 221, 231 (1987)).

58. *See Simon & Schuster*, 502 U.S. at 109. The Son of Sam law stated:

Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live
stated that such a law is "presumptively inconsistent with the First Amendment" because "it imposes a financial burden on speakers because of the content of their speech." Thus, the Court analyzed the law under strict scrutiny. Because the Son of Sam law was not "narrowly tailored" to advance the State's legitimate objective of compensating crime victims, it did not survive strict scrutiny and was, therefore, unconstitutional.

In R.A.V. v. City of St. Paul, the Court applied strict scrutiny to a St. Paul, Minnesota ordinance that prohibited the display of any symbol "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The Court's justification for applying strict scrutiny was that the ordinance not only discriminated based on content, but actually rose to the level of viewpoint discrimination. Justice Scalia, writing for the Court, illustrated this obser-

entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of the contract to the board and pay over to the board any moneys which would otherwise, by terms of the contract, be owing to the person so accused or convicted or his representatives. Id. (citing N.Y. Exec. Law § 632-a(1) (McKinney 1982)). The statute was a product of the publicity surrounding the hunt and apprehension of serial killer David Berkowitz, popularly known as the Son of Sam. See Simon & Schuster, 502 U.S. at 108. Berkowitz's story was worth a substantial amount of money by the time he was caught and his opportunity to profit from his notoriety did not go unnoticed by the state legislature. See id.

59. Id. at 115 (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991)). The underlying rationale for this principle is "that the government's ability to impose content-based burdens on speech, raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." Simon & Schuster, 502 U.S. at 116.

60. Id. at 118.

61. Id. at 121-23. The Court concluded that although the State had a compelling interest in compensating victims from the fruits of the crime, the statute was not narrowly tailored because it was "significantly overinclusive." Id. at 121. Interestingly, the Court observed that if the Son of Sam law had been in effect at the times of their publications, "it would have escrowed payment for works such as The Autobiography of Malcolm X, . . . Civil Disobedience . . . and even the Confessions of Saint Augustine." Id.


63. Id. at 380. (citing St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). The challenge to the ordinance stemmed from a decision by the city of St. Paul to charge the petitioner under the ordinance for allegedly burning a cross inside the fenced yard of a black family. See R.A.V., 505 U.S. at 379-80. The trial court granted petitioner's motion to dismiss on the grounds that the ordinance was substantially overbroad and impermissibly content-based and, therefore, invalid under the First Amendment. See id. at 380. The Minnesota Supreme Court reversed, upholding the constitutionality of the statute. See id. at 380-81.

64. See id. at 391.
vation by reasoning that the law would allow fighting words to be used by those arguing in favor of racial tolerance but would not allow fighting words to be used by their opponents.\textsuperscript{65} The Court concluded that "[s]electivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid . . . ."\textsuperscript{66} Because the city failed to rebut the presumption of invalidity, the Court held that the ordinance was unconstitutional.\textsuperscript{67}

These cases illustrate the ongoing concern that the Court has had about content neutrality.\textsuperscript{68} Specifically, the fear is that the government will target certain speech and try to control thoughts on a topic by regulating speech.\textsuperscript{69} As the Court stated in \textit{Turner Broadcasting System}, "laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion."\textsuperscript{70} The Court's use of strict scrutiny in the above cases illustrates this concern.\textsuperscript{71} Certain contexts, however, such as a governmental subsidy scheme, may alter the consequences of a content-based regulation, as demonstrated by the following cases.

\section{B. When Selective Subsidies Meet the First Amendment}

 Restrictions based on content and viewpoint are also generally disfavored in the context of governmental subsidies.\textsuperscript{72} There exist, however, a number of competing principles that complicate the inquiry into the nature of the restriction. For example, the govern-

\begin{itemize}
\item \textsuperscript{65} See \textit{id.} at 391-92.
\item \textsuperscript{66} \textit{Id.} at 394.
\item \textsuperscript{67} See \textit{R.A.V.}, 505 U.S. at 395-96. The Court stated that "[t]he dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not." \textit{Id.}
\item \textsuperscript{68} See \textit{Chemerinsky}, \textit{supra} note 34, at 759.
\item \textsuperscript{69} See \textit{id.}
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} For an explanation of the basis for the content-based, content-neutral distinction, see Geoffrey Stone, \textit{Content-Neutral Restrictions}, 54 U. Chi. L. Rev. 46 (1987).
\item \textsuperscript{72} See Heins, \textit{supra} note 35, at 168. Heins states that the Supreme Court has ruled that viewpoint neutrality "governs the constitutionality not only of criminal laws and other direct forms of government regulation of speech, but also the provision of government subsidies and other benefits." \textit{Id.; see also} Perry \textit{v. Sinderman}, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable government benefit . . . , [government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.").
\end{itemize}
ment can choose how to use its resources. It can choose to fund one activity at the exclusion of the other. Furthermore, the government can set conditions on grants to ensure that subsidies are only used for authorized purposes. The following cases illustrate the manner in which the Court has applied these principles.

In Regan v. Taxation with Representation, a non-profit corporation, Taxation with Representation of Washington (TWR), sued the Commissioner of Internal Revenue, the Secretary of the Treasury and the United States, claiming that Section 501(c)(3) of the Internal Revenue Code was unconstitutional because the provision conditioned tax-exempt status on the abstention from substantial lobbying activities. The Supreme Court rejected TWR's argument that the denial of 501(c)(3) status amounted, under Spieser, to an "unconstitutional condition." The Court stated that "the Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies."
The Regan Court relied on its decision in Cammarano v. United States\(^{81}\) for the proposition that the First Amendment does not require Congress to subsidize lobbying.\(^{82}\) The withholding of funds does not infringe on free expression because the First Amendment does not require expenditure of governmental funds.\(^{83}\) Congress can choose not to pay for TWR's lobbying because they have no duty to do so.\(^{84}\)

Additionally, the Regan Court stated that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'"\(^{85}\) The Court enunciated this principle in response to TWR's argument that individual taxpayers were allowed tax exemptions under the Code for contributions made to qualifying veterans' organizations.\(^{86}\) The Court, however, still concluded that the statute did not violate the First Amendment because it found no indication that Congress intended the statute to suppress expression of certain ideas or that the statute actually had that effect.\(^{87}\)

Less than a year after Regan, the Court considered FCC v. League of Women Voters.\(^{88}\) League of Women Voters involved a challenge by owners and operators of noncommercial educational broadcasting stations against Section 399 of the Public Broadcasting Act,\(^{89}\) which prohibited any "noncommercial educational broadcasting station that receives a grant" from "engag[ing] in editorializing."\(^{90}\) The Government, in seeking to uphold the provision, argued that Regan permitted Congress, in the proper exercise of its spending power, to determine that it "will not subsidize public broadcasting

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82. See Regan, 461 U.S. at 546. Similarly in Cammarano, the Court upheld a Treasury regulation that denied business expense deductions for lobbying activities. See Cammarano, 358 U.S. at 513.
83. See Regan, 461 U.S. at 546.
84. See id. The Court explained: "[W]e again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" Id. (citing Cammarano, 358 U.S. at 515 (Douglas, J., concurring)).
85. See Regan, 461 U.S. at 548 (citing Cammarano, 358 U.S. at 513).
86. See Regan, 461 U.S. at 546-47. TWR had specifically argued that because Congress had subsidized the lobbying activities of veterans' organizations, it was obligated to subsidize the lobbying activities of § 501(c)(3) organizations. See id.
87. See id. The Court concluded that the Internal Revenue sections at issue did not use a suspect classification. See id. The distinction between veterans' organizations and other charitable organizations is not at all similar to distinctions that are based on race or national origin. See id.
station editorials." The Court explained that the spending power would sustain the present statute if it were possible to limit the use of federal funds to non-editorializing activity. The spending power could not justify Section 399 because the statute barred broadcasting stations from using private funds to finance editorial activity without losing federal grants.

Although the Regan Court rejected any contention that the applicable statute regulated the content of speech, the Court reached a different conclusion in League of Women Voters. The content-based nature of Section 399 provided the Court with the basis for applying strict scrutiny to the statute. In applying strict scrutiny to Section 399, the Court concluded that the complete ban on editorializing was both under-inclusive and over-inclusive as a means of avoiding government propagandizing and the use of public broadcasting to further the partisan viewpoints of private interest groups. The Court struck the statute down because the specific interests underlying Section 399's ban on editorializing were not sufficiently substantial "to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects."

91. League of Women Voters, 469 U.S. at 399. The League of Women Voters Court explained that in Regan, the Court found that Congress could reasonably refuse to subsidize the lobbying of tax-exempt charitable organizations from using tax-deductible contributions to support their lobbying efforts in the exercise of its spending power. See id.

92. See id. at 400. If such was possible, the statute would be valid under Regan because "public broadcasting stations would be free, in the same way that the charitable organization in [Regan] was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneeditorializing broadcast activities." Id.

93. See League of Women Voters, 468 U.S. at 401.

94. See id. at 383. The Court reasoned that the law was content-based because "[i]n order to determine whether a particular statement by station management constitutes an 'editorial' proscribed by § 399, enforcement authorities must necessarily examine the content of the message that is conveyed." Id.

95. See id at 380.

As a result of these [content] restrictions . . . the absolute freedom to advocate one's own positions without also presenting opposing viewpoints . . . is denied to broadcasters. But as our cases attest, these restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest.

Id.

96. See id. at 398-99.

97. League of Women Voters, 468 U.S. at 402. The Court expressly stated that if Congress were to adopt a revised version of § 399 which permitted noncommercial educational broadcasting stations to establish affiliates to editorialize with nonfederal funds, such a statute would be valid under Regan. See id. at 400.
A few years later, the Court considered *Arkansas Writers' Project, Inc. v. Ragland*. In *Ragland*, a publisher challenged as unconstitutional a state sales tax levied against it, which taxed general interest magazines but did not tax newspapers and religious, professional, trade, and sports journals. The Court relied on *League of Women Voters* to conclude that the tax was content-based because it required enforcement officials to "necessarily examine the content of the message that is conveyed." As in *League of Women Voters*, the Court applied strict scrutiny. The Court held that the tax was invalid because Arkansas could not point to any compelling state interest for the content-based taxation of certain magazines.

In 1991, the Court considered whether another Arkansas tax scheme violated the strictures of the First Amendment. In *Leathers v. Medlock*, the Court examined whether the Arkansas Gross Receipts Act, which imposed a generally applicable sales tax on all tangible personal property and specified services, including cable television and satellite services, but exempted all print media, violated the First Amendment. In approaching the issue, the Court reviewed several precedents, including *Ragland*, which stand for the proposition that "differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoint." The Court reiterated its duty to apply strict scrutiny to the Arkansas tax if it did in fact discriminate based on the content of the taxpayer speech involved. The Court stated that while a tax on a small number of speakers runs the risk of "distort[ing] the market for ideas," there was no danger present because the tax affected approximately one

98. See *Ragland*, 481 U.S. at 224. At the time of the challenge, the rate of tax was four percent of gross receipts. See id.
99. Id. at 229. The Court stated that the tax is not exempt from First Amendment constraints just "because it does not burden the expression of particular views by specific magazines." Id. at 230. The Court reiterated the principle that "the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of an entire topic." Id.
100. See id. at 231. "Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Id.
101. See id. at 232.
102. See *Leathers*, 499 U.S. at 444.
104. See *Leathers*, 499 U.S. at 442-43.
105. Id. at 447.
106. See id. "Absent a compelling justification, the government may not exercise its taking power to single out the press." Id.
hundred suppliers of cable television services. Furthermore, there was nothing in the statute that singled out mass media communications based on whether a message was communicated by satellites, newspapers or magazines. Thus, the Court found it unnecessary to apply strict scrutiny, observing that the tax was based on neither viewpoint nor content.

In 1991, the Court decided Rust v. Sullivan, which involved a facial challenge to regulations promulgated under Title X of the Public Health Service Act. Title X placed three principal conditions on the grant of federal funds for Title X projects. Those conditions prohibited federally funded family planning projects from (1) engaging in abortion counseling or referring pregnant women to abortion clinics; (2) taking part in activities that encourage, promote or advocate abortion; and (3) being anything less than "physically and financially separate from abortion activities." The Title X grantees and doctors argued that the regulations violated the First Amendment guarantee of freedom of speech.

107. Leathers, 499 U.S. at 448-49. Thus, the tax structure was not one that resembled a penalty for particular ideas or speakers. See id. at 449.

108. See id at 449. There being nothing in the statute that referred to the content of mass media communications, the Arkansas sales tax was not content-based. See id.

109. See id. The Court held that because the tax presented "none of the difficulties that have led us to strike down differential taxation in the past," the petitioners had to point to some additional basis for concluding that the State violated their First Amendment rights. See id. Petitioners argued that intermedia and intramedia discrimination violated the First Amendment, even in the absence of intent to suppress speech or any effect of the expression of ideas. See id. The Court, after reviewing several precedents concluded that "differential taxation does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing ideas." Id. at 455. Such was the case in Arkansas Writers' Project, the Court reasoned, but not here. See id.


111. See Rust, 500 U.S. at 177-78. The Court in Rust stated: A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the regulations might operate unconstitutionally under some conceivable set of circumstances is insufficient to render them wholly invalid. Id. at 183 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

112. Rust, 500 U.S. at 179-80.

113. See id. at 192. The Court summarized their argument as follows: "They assert that the regulations violate the 'free speech rights of private health care organizations that receive Title X funds, of their staff, and their patients' by impermissibly imposing 'viewpoint-discriminatory conditions on government subsidies' and thus penalize speech funded with non-Title X monies." Id. (citing Brief for Petitioners at 13, 14, 24). Additionally, in Rust, the challengers relied on the Court's previous decision in Regan for the proposition that because "Title X continues to fund speech ancillary to pregnancy testing in a manner that is not even-
Their challenge, however, was unsuccessful. The Court held that the prohibition on abortion-related speech was unquestionably constitutional. The Court stated that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." The Court further reasoned that such a decision did not constitute viewpoint discrimination because "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." The Court distinguished Ragland, in which the tax was held to be discriminatory and on which the challengers in Rust relied. The Court stated: "We have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded."

The Court also rejected the contention that the restrictions on abortion-related speech subsidization were impermissible because they were an "unconstitutional condition." The Court relied on

114. See Rust, 500 U.S. at 203.

115. See id. at 192. The Court reiterates its decision in Maher v. Roe, 432 U.S. 464 (1979), a case in which it upheld a state welfare regulation under which Medicaid recipients received payments for childbirth related services, but not for non-therapeutic abortions. See Rust, 500 U.S. at 192. In rejecting the claim that unequal subsidization amounted to a violation of the Constitution, the Court held "that the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'" Id. at 193. Thus, in Rust, the government was simply exercising its authority under Maher. See id.

116. Rust, 500 U.S. at 193. The Court stated that "[t]here is a difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Id. (citing Maher, 432 U.S. at 475.

117. Rust, 500 U.S. at 193 (citing Regan, 461 U.S. at 549). The Title X program was not designed for prenatal care, but to encourage family planning. See Rust, 500 U.S. at 193. Therefore, it is clear under the statute that a doctor employed by the project may be prohibited from counseling abortion or referring for abortion because such activities are outside of the project's scope, not because the Government is trying to suppress "a dangerous idea." See id. at 193-94.

118. See id. at 194. The Court explained that the tax in Ragland was held to be unconstitutional because it discriminated based on the content of speech and targeted a small group within the press. See id.

119. Id. at 194.

120. See id. at 196. The Title X grantees and doctors relied on Perry v. Sinderman, 408 U.S. 593 (1972), for the contention that "even though the government may deny a . . . benefit for any number of reasons, . . . [i]t may not deny a benefit
the dichotomy between its decisions in *League of Women Voters* and *Regan* to explain that an unconstitutional condition will only exist when there is a total deprivation of a constitutional right. Under the law in *League of Women Voters*, the recipient of federal funds was “barred from using even wholly private funds to finance its editorial activity,” whereas under the law in *Regan*, the recipient of federal money remained free to receive deductions for non-lobbying activity and at the same time still pursue lobbying efforts without governmental contributions. This choice in *Regan* led the Court to conclude that Congress had “not infringed on any First Amendment rights or regulated any First Amendment activity; it has simply chosen not to pay for appellee’s lobbying.” In keeping with its teachings in *Regan* and *League of Women Voters*, the *Rust* Court explained that Congress had not denied Title X grantees the right to engage in abortion related activities, but had only required that the grantee “engage in abortion-related activity separately from activity receiving federal funding.”

The Court’s decision in *Rust*, as well as decisions in prior cases such as *Regan* and *Taxation Without Representation* suggest the existence of several essential principles in the jurisprudence of government subsidies and the First Amendment. First, the government can impose conditions on the funding of expression as long as those conditions leave open adequate alternative channels whereby the recipient of the funds can, without losing funding already granted, also engage in speech that does not qualify for funding. A second emerging principle is that conditions on funding must not discriminate on the basis of the speaker’s viewpoint.

to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.” *Id.* (citing *Perry*, 408 U.S. at 597).

121. See *Rust*, 500 U.S. at 197-98. The Court stated that in contrast to the present case, “unconstitutional condition” cases involve situations in which the government has placed a condition on the recipient of the subsidy, thus denying the recipient any opportunity to engage in the protected conduct outside of the scope of the federally funded program, rather than on a particular program or service. *See id.* at 197.

122. *Id.* at 197-98.

123. *Id.* at 198.

124. *Id.* The Court stated that the doctor could make it clear to patients that advice regarding abortion is beyond the scope of the program. *See id.* at 200. The Court concluded the First Amendment issue by stating that “[i]n these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force.” *Id.*
C. The Court's Most Recent Pronouncement: Rosenberger v. Rectors and Regents of the University of Virginia

One of the most recent decisions involving the First Amendment's implications for governmental subsidization of speech is Rosenberger v. Rectors and Visitors of the University of Virginia. In Rosenberger, a Christian student group called Wide Awake Productions (WAP) submitted a request to the University of Virginia's Student Activities Fund (SAF) for the costs of printing its newspaper. The SAF's purpose was to fund "a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'" Certain University Guidelines, however, which governed the SAF, provided that certain activities of qualifying student organizations were not reimbursable. Among the activities excluded from reimbursement by the SAF were religious, political, and philanthropic activities. The Appropriations Committee refused to reimburse the group for the costs of printing its paper because it determined that WAP was a religious activity under the Guidelines and that the newspaper "promoted or manifested a particular belief in or about a deity or an ultimate reality."

The Court observed that the principles governing the legitimacy of content-based laws also provide the "framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation." While the pur-

126. See id. at 827. Before a student group is eligible to submit bills to the SAF for payment, it must become a "Contracted Independent Organization" (CIO). See id. at 823. A group may become a CIO if the majority of its members are students, its managing officers are fulltime students, and it complies with certain procedural requirements. See id. Under the University Guidelines, not all CIO's can submit disbursement requests to the SAF. See id. at 824.
127. Rosenberger, 515 U.S. at 824.
128. See id. at 824-25.
129. See id. at 825. These activities were excluded because they would jeopardize the University's tax exempt status. See id. The only political activities exempted from reimbursement by the SAF were electioneering and lobbying. See id. The Guidelines make it clear that the restrictions on the funding of political activities are not meant "to preclude funding of any otherwise eligible student organization which ... espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted." Id. at 825 (citing University Guidelines). By contrast, a religious activity is an activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." Id. (citing University Guidelines) (emphasis added).
130. Rosenberger, 515 U.S. at 827.
131. Id. at 829. Public forums are government-owned properties that the government is constitutionally obligated to make available for speech, such as sidewalks and parks. See Chemerinsky, supra note 34, at 927. The following are the
pose of a forum may justify the State in acting to preserve its limits, the State may neither prohibit speech where the distinction is unreasonable in light of its purpose nor discriminate against speech on the basis of viewpoint. Viewpoint discrimination is presumed to be impermissible.

The Court noted that the SAF qualified as a public forum, albeit in a "metaphysical" rather than in a "spatial or geographic" sense, and thus applied the foregoing principles. The Court concluded that the University policy amounted to viewpoint discrimination because it did not exclude religion as a subject matter but instead disfavored student publications with religious editorial viewpoints. It did not matter that the unfunded publications such as WAP discussed subjects that were otherwise within the approved category of publications.

The University cited the Court's decisions in Rust and Regan to support the proposition that the State has substantial discretion to determine how to distribute scarce resources and accomplish its mission. The Court, however, rejected this argument, and distinguished Rust. In Rust, the government did not create a program to foster private speech but instead used private speakers to convey principles that have been recognized by the Court regarding the regulation of speech in public forums:

First, the regulation must be content neutral unless the content restriction is justified by strict scrutiny. Second, it must be a reasonable time, place, or manner restriction that serves an important government interest and leaves open adequate alternative places for speech. Third, a licensing or permit system for the use of public forums must serve an important purpose, give clear criteria to the licensing authority that leaves almost no discretion, and provide procedural safeguards such as a requirement or prompt determination of license requests and judicial review of license denials.

Id.

132. See Rosenberger, 515 U.S. at 829.
133. See id. at 830. The Court has observed a distinction between content discrimination, which may be permissible if it preserves the purposes of the limited forum, and viewpoint discrimination, which is presumed to be impermissible when aimed at speech otherwise within the forum's limitations. See id. at 829-30. This observation had been adhered to when determining whether the exclusion of a class of speech from a public forum is a legitimate effort at preserving the limits of the forum. See id.
134. See id. at 830.
135. See Rosenberger, 515 U.S. at 831.
136. See id.
137. See id. at 832. The University relied on these authorities in arguing that content-based funding decisions are lawful and inevitable. See id. at 833.
138. See id. In Rust, the Court held that the government's prohibition on abortion-related advice when federal funds were disbursed for family planning counseling was constitutional. See id. For a discussion of Rust, see supra notes 110-24 and accompanying text.
information on its own program. When the government appropriates public funds to promote its own policy, it is entitled to say what it wants. The government can also take legitimate and appropriate steps to protect its own message when the government enlists private entities to convey its message. It does not follow, however, that when the University spends its own funds to encourage a diversity of views, viewpoint restrictions are proper.

The Court also distinguished its holding in Regan. Although the Court acknowledged, in Regan, that the Government need not subsidize the exercise of constitutional rights, the Court also affirmed the requirement of viewpoint neutrality in the context of governmental funding. Additionally, Regan relied on a distinction based on preferential treatment of certain speakers and not on the content or messages of speech. In contrast, the University’s regulation carried no similarly legitimate distinction; instead, a speech-based restriction was the University’s sole rationale.

Additionally, scarce funding could not justify the viewpoint-based decisions. The Court identified several dangers in allowing the government to engage in viewpoint discrimination that is otherwise impermissible:

The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the

139. See Rosenberger, 515 U.S. at 833.
140. See id.
141. See id.
142. See id. at 834.
143. See id. For a discussion of the Court’s holding in Regan, see supra notes 77-89 and accompanying text.
144. See Rosenberger, 515 U.S. at 834. In Regan, the Court stated that "the case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'allocate] at the suppression of dangerous ideas.'" Id. (citing Regan, 461 U.S. at 548).
145. See Rosenberger, 515 U.S. at 834.
146. See id. at 834. According to the Court, there was a clear distinction between the University’s message and the private speech of students. See id. The University has, in fact, ensured this distinction by stating in the CIO agreement that the student groups eligible for payment from the SAF are not the University’s agents, are not subject to its control, and are not its responsibility. See id. at 834-35. The University has offered to pay third-party contractors on behalf of speakers who convey their own messages and may not, in turn, silence only select viewpoints. See id. at 835.
147. See id. at 835. The Court stated that “the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.” Id.
State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression.148

Thus, the Court concluded that the University's provision amounted to a viewpoint-based restriction that unconstitutionally abridged WAP's freedom of speech.149

IV. NARRATIVE ANALYSIS

A. The Court

Justice O'Connor, writing for the majority in Finley, addressed two distinct constitutional challenges to Section 954(d)(1).150 First, the Court addressed the assertion that Section 954(d)(1) is viewpoint-based, and thus at odds with the First Amendment.151 Second, the Court considered the argument that the provision is vague and therefore unconstitutional under the First and Fifth Amendments.152

Before addressing the merits of the First Amendment challenge, the Court noted the "heavy burden" the respondents confronted in advancing their facial constitutional challenge.153 The Court further articulated the artists' burden of proof: "To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech."154

The Court then addressed the substance of the parties' conflicting arguments. While the respondents argued that Section 954(d)(1) is "a paradigmatic example of viewpoint discrimination" because it constrains the NEA from funding entire categories of expression, the NEA argued the provision is "merely horatory" and "stops well short of an absolute restriction."155 The Court adopted the latter view: "Section 954(d)(1) adds 'considerations' to the grant-making process; it does not preclude awards to projects that

148. Id. The Court observed that the danger of viewpoint discrimination is "especially real" in the context of the University, because the State "acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." Id.

149. See id. at 837.

150. See Finley II, 524 U.S. at 572-73.

151. See id. at 580.

152. See id. at 588.

153. Id. at 580. (citing Rust, 500 U.S. at 183).

154. Finley II, 524 U.S. at 580. "Facial invalidation ... 'has been employed by this Court sparingly and only as a last resort.'" Id. (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

155. Finley II, 524 U.S. at 580.
might be deemed ‘indecent’ or ‘disrespectful,’ nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application.” 156 The Court demonstrated the clarity of this non-categorical characterization by juxtaposing Section 954(d)(1) against Section 954(d)(2), a provision in which Congress intended to prohibit the funding of obscenity.157

In further support of constitutionality, the Court observed that Section 954(d)(1) was proposed as a compromise to amendments that were aimed at eliminating the NEA’s funding or its grant-making authority.158 Such legislative intent, as evidenced by comments made by various members of Congress, as well as 954(d)(1)’s advisory language, dissuaded the Court from finding that the provision would be used to discriminate against various viewpoints.159 As R.A.V. v. St. Paul illustrates, to be facially unconstitutional, legislation must present dangers that are more evident and more substantial than the present case.160 In R.A.V., the “provision set forth a clear penalty, proscribed views on particular ‘disfavored subjects,’ and suppressed ‘distinctive idea[s], conveyed by a distinctive message.’”161 In contrast, the decency and respect criteria do not expressly silence speakers.162

In addition, the Court rejected respondents’ argument that the criteria in Section 954(d)(1) are subjective enough to be used by the agency to discriminate on the basis of viewpoint.163 According to the Court, the diversity of possible interpretations of the criteria

156. Id. at 580-81. The Court enumerated, as support for this interpretation, the NEA’s method of implementing § 954(d)(1) through the use of advisory panels consisting of members of various backgrounds and with different viewpoints. See id at 581. The Court refused to consider whether such a formulation is a reasonable reading of the statute by the NEA. See id.

157. See id. at 581. Section 954(d)(2) states that “[o]bscenity is without artistic merit, is not protected speech, and shall not be funded.” Id. (quoting 20 U.S.C. § 954(d)(2)). Thus, when Congress has intended to restrict the NEA, it has done so clearly. See Finley II, 524 U.S. at 581.

158. See Finley II, 524 U.S. at 581.

159. See id. at 581-82. One sponsor, before the vote on § 954(d)(1), said: “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.” Id. at 582 (citing 136 Cong. Rec. 28626, 28674 (1990)).

160. See Finley II, 524 U.S. at 582. In R.A.V., the Court struck down on its face a municipal ordinance that made it a crime to place a symbol on private or public property “which one knows . . . arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.” Id. (quoting R.A.V., 505 U.S. at 380).


162. See Finley II, 524 U.S. at 583.

163. See id.
and the fact that the statute merely recommends that finding decision-makers consider those criteria, make it unlikely, as a practical matter, that Section 954(d)(1) would suppress certain viewpoints.\textsuperscript{164} The Court, furthermore, expressed reluctance to strike down the statute on the basis of hypothetical situations.\textsuperscript{165}

The Court enumerated several constitutionally permissible constructions of the "decenty" prong of Section 954(d)(1) and its reference to "respect for the diverse beliefs and values of the American public."\textsuperscript{166} The Court recognized that such legitimate applications were not enough, alone, to sustain the statute, but concluded that in other applications Section 954(d)(1) will not tend to suppress free speech.\textsuperscript{167} Not only may the NEA decide to fund projects for any variety of reasons, the Court stated, but the very nature of arts funding forces the NEA to consider the content of a project.\textsuperscript{168}

The Court next revisited its decision in \textit{Rosenberger}.\textsuperscript{169} The Court distinguished \textit{Rosenberger} because of the competitive process by which the NEA distributes grants.\textsuperscript{170} The NEA does not "indiscriminately 'encourage a diversity of views from private speakers,'" but instead makes "aesthetic judgments" to determine what art meets "the inherently content-based 'excellence' threshold" for support.\textsuperscript{171} Such considerations set the NEA grant-making process apart from the subsidy in \textit{Rosenberger}, which was available to all student organizations related to the educational purpose of the University.\textsuperscript{172}

\textsuperscript{164} See id. The criteria could not, for example, punish viewpoints in the funding of symphony orchestras, for "one could hardly anticipate how 'decenty' or 'respect' would bear" on such applications. \textit{Id.}

\textsuperscript{165} See id. at 584.

\textsuperscript{166} Id. The NEA's activities include children's festivals and museums, art education, at-risk youth projects, and artists in schools. See id. It is an established principle that decency can be considered when "educational suitability" is at issue. \textit{Id.} (citing Board of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982)). As for the "diverse beliefs and values of the American public" prong, one purpose of the NEA is to preserve the nation's "multicultural artistic heritage," and it is not disputed that the criteria are permissibly applied when used to evaluate a project with an intended audience. \textit{Id.} at 585 (citing 20 U.S.C. § 951(10)).

\textsuperscript{167} See \textit{Finley II}, 524 U.S. at 585.

\textsuperscript{168} See id. With such limited resources, the NEA must deny the majority of the grant applications it receives and thereby denies funds to speech that is constitutionally protected. See \textit{id.}

\textsuperscript{169} See id. at 586. For a discussion of \textit{Rosenberger}, see \textit{supra} notes 125-49 and accompanying text.

\textsuperscript{170} See \textit{Finley II}, 524 U.S. at 586.

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} \textit{Id.} See also Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 386 (1993) (making objective decisions to permit access to school
After concluding that Section 954(d)(1) did not itself constitute viewpoint discrimination, the Court examined the constitutionality of the provision in relation to its role in the government subsidy scheme. The Court stated that "[i]f 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." The Court, however, elected to uphold the provision as constitutional until the NEA applies Section 954(d)(1) in a manner that raises concern about viewpoint discrimination.

The Court expanded on the role of provisions like Section 954(d)(1) in the context of a governmental subsidy scheme. While recognizing the First Amendment’s application to government subsidies, the Court stressed the wide latitude given to Congress to set spending priorities and the government’s ability to distribute competitive funding. The Court quoted Rust v. Sullivan for the proposition that such latitude allows Congress to “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” Accordingly, the NEA’s declaration of purpose provides that “arts funding should ‘contribute to public support and confidence in the use of taxpayer funds . . . .’” By acting with such a purpose, the Government has merely chosen to fund one activity over another and has not discriminated on the basis of viewpoint.

173. See Finley II, 524 U.S. at 587.
174. Id. The Court stated that “even in the provision of subsidies, the Government may not ‘aim at the suppression of dangerous ideas . . . .’” Id. (citing Regan, 461 U.S. at 550). “[I]f a subsidy were ‘manipulated’ to have a ‘coercive effect,’ then relief could be appropriate.” Finley II, 524 U.S. at 587 (citing Ragland, 481 U.S. at 237 (Scalia, J., dissenting)).
175. See Finley II, 524 U.S. at 587.
176. See id. at 587-88. This portion of the opinion was not joined by Justice Ginsburg. See id. at 572.
177. See id. at 587-88. “[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.” Id. at 588. Such power is only limited by the government’s inability to infringe on other constitutional rights during this process. See id. at 588.
178. Id. (citing Rust, 500 U.S. at 193).
179. Finley II, 524 U.S. at 588 (citing 20 U.S.C. § 951(5)).
180. See Finley II, 524 U.S. at 588.
Having concluded that Section 954(d)(1) does not constitute viewpoint discrimination and is therefore valid under the First Amendment, the Court next considered the vagueness challenge.\(^1\) In holding that the lower courts erred by finding Section 954(d)(1) unconstitutionally vague, the Court again observed that the provision involves a government subsidy.\(^2\) The Court observed that the unclear terms of the provision *would* raise substantial vagueness concerns *if* they appeared in a criminal statute or regulatory scheme.\(^3\) The Court held that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."\(^4\) Having so concluded, the Court reversed the judgment of the Court of Appeals, holding that Section 954(d)(1) does not, on its face, infringe on First or Fifth Amendment rights.\(^5\)

### B. The Concurrence

In concurrence, Justice Scalia stated that the Court must evaluate Section 954(d)(1) as it was written.\(^6\) Applying such an evaluation, Justice Scalia reached two conclusions: first, that Section 954(d)(1) establishes both content-based and viewpoint-based restrictions; and second, that such restrictions are nonetheless constitutional.\(^7\)

In concluding that Section 954(d)(1) constitutes viewpoint discrimination, Justice Scalia focused on the language of Section 954(d)(1).\(^8\) Its language makes clear that the decency and respect factors are to be considered in evaluating *all* applications.\(^9\) While the effect of such a construction does not impose a categori-

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1. *See id.*
2. *See id.*
3. *See id. at 589.*
4. *Id.* Additionally, the Court observed that "[i]n the context of selective subsidies, it is not always feasible for Congress to legislate with clarity," and "[t]o accept respondents' vagueness argument would be to call into question the constitutionality of these valuable government programs and countless others like them." *Id.* at 589.
5. *See Finley II, 524 U.S. at 590.*
6. *See id.* (Scalia, J., concurring).
7. *See id.*
8. *Id.* at 591. "The law at issue in this case is to be found in the text of § 954(d)(1) . . . [a]nd that law unquestionably disfavors – discriminates against – indecency and disrespect for the diverse beliefs and values of the American people." *Id.* at 595.
9. *Finley II, 524 U.S. at 592.* (Scalia, J., concurring). ("The statute requires the decency and respect factors to be considered in evaluating – not for example, just those applications relating to educational programs, . . . or intended for a particular audience.").
cal requirement, Section 954(d)(1) is nonetheless discriminatory. 190 "To the extent a particular applicant exhibits disrespect for the diverse beliefs and values of the American public or fails to comport with general standards of decency, the likelihood that he will receive a grant diminishes." 191 Thus, the language "taken into consideration" has the effect of favoring applications that display decency and respect and disfavoring those applications that do not. 192 For Justice Scalia, this undoubtedly constitutes viewpoint consideration. 193

The constitutionality of Section 954(d)(1) was not redeemed the elusive nature of the decency and respect factors. 194 Similarly, the political context surrounding the adoption of the clause did not affect the meaning or constitutionality of Section 954(d)(1), as the Court suggests. 195 In fact, according to Justice Scalia, the Court should not have considered the legislative history at all. 196

Having concluded that Section 954(d)(1) constitutes viewpoint discrimination, Justice Scalia sought to demonstrate that the existence of such a provision in a governmental subsidy scheme does not violate the Constitution. 197 The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." 198 In enacting Section 954(d)(1), Congress did not abridge speech because "[t]hose who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute." 199 The concurrence cites several authorities for the proposition that the mere deprivation of taxpayer subsidy cannot be equated with measures that are designed to suppress "dangerous ideas." 200 Justice Scalia proposed that even if one accepted the argument that a threat of rejection by the only possible

190. See id.
191. Id.
192. See id. at 593.
193. See id.
194. See Finley II, 524 U.S. at 593 (Scalia, J., concurring).
195. See id. at 594. Conversely, if one does look at the legislative history of § 954(d)(1), it becomes evident that the provision "was prompted by, and directed at, the public funding of such offensive productions as Serrano's 'Piss Christ,' and Mapplethorpe's show of lurid homoerotic photographs." Id. Thus, if the legislative history shows anything, it shows that the statute was meant to discriminate against such productions. See id.
196. See Finley II, 524 U.S. at 594 (Scalia, J., concurring).
197. See id. at 595.
198. Id. (citing U.S. CONST. amend. I).
199. Finley II, 524 U.S. at 595 (Scalia, J., concurring).
200. Id. at 596. (citing Regan, 461 U.S. at 550 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1958), in turn quoting Spieser, 357 U.S. at 519)).
source of free money would amount to coercion and hence an abridgement of one's freedom of speech, it would not apply here because the NEA is not the only source of funding for art.201 Thus, Justice Scalia asserts that the government may choose to fund only projects it believes to be in the public interest without abridging speech.202

Furthermore, Section 954(d)(1) and nearly every other funding enactment passed by Congress are constitutional because "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program."203 Just as it is constitutional for Congress to fund the NEA despite views to the contrary, it is likewise constitutional for Congress to favor decency and respect over other views.204 For Justice Scalia, this is true because such preferential treatment does not violate an individual's First Amendment rights.205

Like the majority, Justice Scalia addressed respondents' reliance on Rosenberger.206 Justice Scalia disagreed with the artists' argument that under Rosenberger, "viewpoint-based discrimination is impermissible unless the government is the speaker or the government is 'disburs[ing] public funds to private entities to convey a governmental message.' "207 For Justice Scalia, not only is it the government's job to favor and disfavor viewpoints, but it does not matter whether government officials do so "directly," "advocat[e] it officially," or "giv[e] money to others who achieve or advocate it."208 Rosenberger, Justice Scalia explained, turned on the government's establishment of a limited public forum, to which the NEA's highly selective grant-making process simply does not compare.209 Thus, Justice Scalia would have held that the government may allocate competitive and noncompetitive funding at its pleasure be-

201. See Finley II, 524 U.S. at 597 (Scalia, J., concurring).
202. See id.
203. Id. (citing Rust, 500 U.S. at 193).
204. See Finley II, 524 U.S. at 597-98 (Scalia, J., concurring). "[T]he NEA itself is nothing less than an institutionalized discrimination against" the point of view espoused by John Adams that "the fine arts were like germs that infected healthy constitutions." Id. at 597 (citing J. Ellis, After the Revolution: Profiles of Early American Culture 36 (1979)).
205. See Finley II, 524 U.S. at 598 (Scalia, J., concurring).
206. See id.
207. Id. (citing Rosenberger, 515 U.S. at 833).
208. Finley II, 524 U.S. at 598 (Scalia, J., concurring).
209. See id. at 599.
cause the First Amendment does not impose limitations on governmental funding.\textsuperscript{210}

C. The Dissent

Justice Souter was the only member of the Court who dissented in \textit{Finley II}.\textsuperscript{211} Like the members of the majority and concurrence, Justice Souter considered whether Section 954(d)(1) constitutes viewpoint discrimination and what the effect such a characterization has on governmental subsidization.\textsuperscript{212} Additionally, Justice Souter discussed the appropriate standard of review.\textsuperscript{213} In essence, Justice Souter determined the following: first, Section 954(d)(1) is viewpoint based; second, governmental subsidization of art is subject to First Amendment constraints; and finally, Section 954(d)(1) is facially unconstitutional because it is substantially overbroad.\textsuperscript{214}

Before beginning his analysis, Justice Souter stated that “the First Amendment means that the government has no power to restrict expression because of its message or its ideas.”\textsuperscript{215} Not only does this principle apply to affirmative efforts at suppression of speech, but it applies to disqualification of governmental favors as well.\textsuperscript{216} Artistic expression is a category of speech protected from viewpoint discrimination.\textsuperscript{217}

Because this concept of “governmental viewpoint neutrality” applies in the present context, the primary inquiry is “whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government’s purpose is the controlling consideration.”\textsuperscript{218} Section 954(d) is, \textit{on its face}, viewpoint based. Justice Souter observed.\textsuperscript{219} Remarks made by various congressional supporters of Section 954(d)(1) indicate that

\begin{itemize}
  \item \textsuperscript{210} See \textit{id}. In addressing respondents' vagueness challenge, Justice Scalia similarly determined that the vagueness doctrine has no application to governmental funding. \textit{See id.} at 599-600.
  \item \textsuperscript{211} See \textit{Finley II}, 524 U.S. at 560 (Souter, J., dissenting).
  \item \textsuperscript{212} See \textit{id}. at 600-16.
  \item \textsuperscript{213} See \textit{id}. at 617-22.
  \item \textsuperscript{214} See \textit{id}. at 622.
  \item \textsuperscript{215} \textit{Id.} at 601 (citing \textit{Mosley}, 408 U.S. at 95).
  \item \textsuperscript{216} See \textit{Finley II}, 524 U.S. at 601 (Souter, J., dissenting).
  \item \textsuperscript{217} See \textit{id}. at 602.
  \item \textsuperscript{218} \textit{Id.} at 603 (citing \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 791 (1989)).
  \item \textsuperscript{219} See \textit{Finley II}, 524 U.S. at 603 (Souter, J., dissenting).
\end{itemize}
Congress included the decency and respect criteria to prevent funding for art that conveys an offensive message.\textsuperscript{220}

Justice Souter examined three attempts by the Court to explain why Section 954(d)(1) does not constitute viewpoint discrimination.\textsuperscript{221} First, Justice Souter considered the Court's statement that the phrase "general standards of decency and respect for the diverse beliefs and values of the American public" is susceptible to various interpretations, and thus, does not constitute viewpoint discrimination.\textsuperscript{222} Justice Souter disagreed and asserted that, rather, restrictions based on decency are viewpoint-based because "they require discrimination on the basis of conformity with mainstream mores."\textsuperscript{223} Justice Souter also dismissed the counter-argument that decency criteria only limit the "mode, form, or style" of artwork, and not its underlying point of view.\textsuperscript{224} For Justice Souter, the nature of artistic expression and viewpoints conveyed by such expression are inextricably linked; thus, he worried that enforcement of the criteria would "[s]tarve the mode," and thereby "starve the message."\textsuperscript{225} The statute is viewpoint discrimination because it favors art that does not reflect the ideology, opinion, or convictions of many Americans.\textsuperscript{226}

Justice Souter next examined the Court's observation that the NEA may comply with Section 954(d) by staffing advisory panels with members of diverse backgrounds.\textsuperscript{227} The statutory language and legislative history, Justice Souter pointed out, are at odds with such a reading.\textsuperscript{228} Assuming that the statute could be satisfied by the use of diverse panels, "that would merely mean that selection for decency and respect would occur derivatively through the inclinations of the panel members, instead of directly through the intentional application of the criteria; at the end of the day, the

\textsuperscript{220} See id. at 603-604. The dissent cited a comment made by the proviso's author that the bill "add[s] to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account." Id. at 604 (citing 136 CONG. REC. 28631 (1990)).

\textsuperscript{221} See Finley II, 524 U.S. at 605-610 (Souter, J., dissenting).

\textsuperscript{222} Id. at 605.

\textsuperscript{223} Id.

\textsuperscript{224} Id. (citing Brief for Petitioners at 39-41).

\textsuperscript{225} Finley II, 524 U.S. at 606 (Souter, J., dissenting).

\textsuperscript{226} See id.

\textsuperscript{227} See id. at 607.

\textsuperscript{228} See id.
proviso would still serve its purpose to screen out offending artistic works." 229 For Justice Souter, this outcome is unconstitutional. 230

Finally, Justice Souter examined the Court's contention that the provision merely "adds 'considerations' to the grant-making process; it does not preclude awards, . . . place conditions on grants, . . . or even specify that those factors must be given any particular weight." 231 Justice Souter finds this reading of the statute unfair in light of the legislative history. 232 He concluded that, even if he could agree that the statute only mandated consideration, the statute would still be unconstitutional because the First Amendment does not allow the government to consider viewpoint in deciding whether to subsidize the speech of private citizens. 233

Having determined that the provision constitutes viewpoint discrimination, Justice Souter next examined whether placement of the provision in the context of a governmental subsidization scheme enables the provision to escape First Amendment requirements. 234 Justice Souter noted that, when the government assumes the role of "government-as-speaker" or "government-as-buyer," it can legitimately engage in viewpoint discrimination. 235 The government does not speak through the art subsidized by the NEA, however. Nor does it buy anything for itself. 236 Rather, by subsidizing artistic expression the government acts as a patron. 237 The problem for Justice Souter was that the government-as-patron role does not fit into the already existing categories in which the govern-

229. Id. at 608.
230. See Finley II, 524 U.S. at 608 (Souter, J., dissenting).
231. Id. at 609.
232. See id. "[T]here was nothing naïve about the Representative who said he voted for the bill because it does 'not tolerate wasting Federal funds for sexually explicit photographs [or] sacrilegious works.'" Id. (citing 136 Cong. Rec. 28676 (1990)).
233. See Finley II, 524 U.S. at 610 (Souter, J., dissenting).
234. See id. Justice Souter observes that the Court and the concurrence assume that "whether or not the statute mandates viewpoint discrimination, there is no constitutional issue here because government art subsidies fall within a zone of activity free from First Amendment restraints." Id.
235. Id. at 612. For example: [I]f the Food and Drug Administration launches an advertising campaign on the subject of smoking, [it is assuming the role of government-as-speaker and] it may condemn the habit without also having to show a cowboy taking a puff on the opposite page; and if the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, [he is acting in the role of government-as-buyer and] he is free to prefer George Washington over George the Third.
236. See id. at 611.
237. See Finley II, 524 U.S. at 611 (Souter, J., dissenting).
ment can engage in viewpoint discrimination, but rather “falls embarrassingly on the wrong side of the line between government as a buyer or speaker and government as a regulator of private speech.”

Justice Souter listed several precedents, the most recent of which is *Rosenberger*, to demonstrate that the government may not discriminate in its allocation of subsidies to suppress ideas unless the government is itself acting as a buyer or speaker. Unlike the majority and concurrence, Justice Souter concluded that *Rosenberger* governs this case. Justice Souter reads *Rosenberger* to hold that the “government may not act on viewpoint when it ‘does not itself speak or subsidize transmittal of a message it favors but instead funds to encourage a diversity of views from private speakers.’” Like the student activities fund in *Rosenberger*, Congress created the NEA to encourage a diversity of views from private speakers. Thus, as long as Congress decides to subsidize artistic endeavors expansively through the NEA, it cannot base funding decisions on viewpoint popularity without violating the First Amendment rule articulated in *Rosenberger*.

Justice Souter confronted the majority’s argument that *Rosenberger* is distinguishable on the basis that the student activities funds in *Rosenberger* were obtainable by most applicants, whereas NEA funds are distributed selectively and competitively to only a few. Justice Souter stated that the Court in *Rosenberger* held that the government cannot rely on scarcity to justify viewpoint discrimination.

238. Id. at 612. The Government had apparently argued that the Court should recognize a new category of speech liberated from First Amendment strictures “by analogy” to those already accepted. Id. Justice Souter rejected this proposal because “the Government has offered nothing to justify recognition of a new exempt category.” Id. at 612.

239. See id. at 612-13. (citing Regan, 461 U.S. at 548). *Rosenberger* held that the University of Virginia could not discriminate on the basis of viewpoint in underwriting the speech of student-run publications. See id. at 613.

240. See Finley II, 524 U.S. at 613 (Souter, J., dissenting).

241. See id.

242. See id. To support this contention, Justice Souter cited several other provisions of the NEA funding statute and its legislative history. See id. Specifically, Souter stated that “Congress brought the NEA into being to help all Americans ‘achieve a better analysis of the present, and a better view of the future.’” Id. (citing 20 U.S.C. § 951(d) (3)). Moreover, Souter noted that “[t]he NEA’s purpose is to ‘support new ideas’ and ‘to help create and sustain a climate encouraging freedom of thought, imagination, and inquiry.’” Id. (citing 20 U.S.C. §§ 951(d)(7),(10)). The legislative history states that “[t]he intent of this act should be the encouragement of free inquiry and expression.” Id. (citing S. Rep. No. 89-300, at 4 (1965).

243. See Finley II, 524 U.S. at 614 (Souter, J., dissenting).

244. See id. at 614.
among private speakers. While the Court in *Finley II* describes NEA funding in terms of competition, such an attempt cannot work because “[c]ompetition implies scarcity, without which there is no exclusive prize to compete for.” Thus, the fact that NEA funding is competitive does not justify choices made on the basis of viewpoint.

Finally, the dissent argues that Section 954(d)(1) is unconstitutional on its face under the overbreadth doctrine. Justice Souter recognized, as did the Court, that facial challenges to legislation are disfavored. Accordingly, the Court found the provision constitutional on its face, in part because there are a number of constitutional applications of the provision. However, Justice Souter noted that the overbreadth doctrine, which renders a statute that is invalid in any of its applications invalid in all of its applications, is an exception to this rule. The law should be invalidated for overbreadth if it has a number of impermissible applications. In Justice Souter’s opinion, the few permissible applications offered by the Court do not alter his conclusion that the statute has a number of impermissible applications, thus rendering Section 954(d)(1) facially invalid.

Bolstering his view of the applicability of the overbreadth doctrine is the likelihood that speech will be chilled. Justice Souter observed that, because of Section 954(d)(1), artists will edit their funding applications to avoid anything likely to offend, or refrain

245. See id. (citing Rosenberger, 515 U.S. at 835).
246. *Finley II*, 524 U.S. at 614 n.8 (Souter, J., dissenting).
247. See id. at 614-15.
248. See id. at 617.
249. See id. (citing FW/PBS, Inc. v. Dallas, 493 U.S. 215, 223 (1990)). “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *Id.* (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). Justice Souter observed that the Court freely conceded that such a rule “does not limit challenges brought under the First Amendment’s speech clause.” *Id.* at 617.
250. See *Finley II*, 524 U.S. at 617 (Souter, J., dissenting). Justice Souter noted that the Court conceded that the valid applications enumerated by them “would not alone be sufficient to sustain the statute.” *Id.* at 618. The Court “upholds the statute because it is not ‘persuaded that, in other applications, the language of § 954(d)(1) itself will give rise to the suppression of protected expression.’” *Id.* at 620 n.15. Justice Souter invokes the Court’s statements to point out that the Court’s arguments for upholding the statute have already been refuted by him. See id.
251. See id. at 618.
252. See id. at 619.
254. See *Finley II*, 524 U.S. at 621 (Souter, J., dissenting).
from applying for NEA grants altogether.\textsuperscript{255} Furthermore, the impact felt by those "chilled" will be magnified because NEA grants are often matched by funds from private donors.\textsuperscript{256} For these reasons, Justice Souter would have struck Section 954(d)(1) down as facially invalid.\textsuperscript{257}

V. CRITICAL ANALYSIS

The Court's conclusion that Section 954(d)(1) is merely advisory and not impermissibly viewpoint-based on its face is significant because it allows the Court to avoid precisely defining First Amendment restrictions on government funding for the arts. That this conclusion results in an ambiguity, however, is evidenced by the Court's reasoning that any viewpoint-based decisions in funding would receive consideration by the Court,\textsuperscript{258} but at the same time the government has "wide latitude to set spending priorities."\textsuperscript{259} This analysis focuses, first, on the Court's reasoning under the First Amendment that the decency clause is not viewpoint-based, and then examines the Court's pronouncements about the meaning of viewpoint discrimination in the context of government subsidies.\textsuperscript{260}

A. Section 954(d)(1) Does Not Constitute Viewpoint Discrimination

Although the Court did not explicitly say so in such terms, it evaluated the facial challenge to Section 954(d)(1) under the overbreadth doctrine.\textsuperscript{261} Thus, respondents did not have to prove, as with most facial challenges, that no constitutional applications of

\textsuperscript{255} See id.

\textsuperscript{256} See id. "[M]ost non-federal funding sources regard the NEA award as an imprimatur that signifies the recipient's artistic merit and value. NEA grants lend prestige and legitimacy to projects and are therefore critical to the ability of artists and companies to attract non-federal funding sources." Id. at 2194 (quoting Bella Lewitsky Dance Foundation v. Frohnmayer, 754 F. Supp. 774, 783 (C.D. Cal. 1991)).

\textsuperscript{257} See Finley II, 524 U.S. at 622 (Souter J., dissenting). Justice Souter did not address respondents' vagueness challenge to § 954(d)(1) because he agreed with the Court that the provision is not unconstitutionally vague. See id. at 622 n.17.

\textsuperscript{258} See Finley II, 524 U.S. at 587. The Court stated that "[i]f 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." Id.

\textsuperscript{259} Id. at 588.

\textsuperscript{260} This analysis will not discuss the Court's treatment of the vagueness challenge because the issue was disposed of swiftly by all of the Justices who agreed that the provision was not unconstitutionally vague.

\textsuperscript{261} Finley II, 524 U.S. at 580. ("To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of the speech.").
the provision existed. The Court conceded this when, after reciting three instances in which the provision could be permissibly applied, it stated "that reference to these permissible applications would not alone be sufficient to sustain the statute against respondents' First Amendment challenge."

Requiring something more to uphold the statute, the Court concluded that, even in other applications, the provision would not suppress free speech. The Court was influenced by the fact that the provision is not rigidly "categorical." This distinction seems plausible in light of the many precedents that involved categorical restrictions and were deemed to be either content-based or viewpoint-based.

The problem with the lack of a categorical distinction as the basis for finding the law constitutional is that it ignores the motivation behind the prohibition on viewpoint-based laws. Underlying First Amendment analysis is the danger that "the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." Whether the restriction is categorical becomes inconsequential if the danger of government exclusion of viewpoints is given priority.

The Court has recognized this consideration in the past by asking "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it con-

262. See id. at 617-18 (Souter, J., dissenting) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). The "overbreadth" doctrine is an exception to this rule. See id. at 618.

263. Finley II, 524 U.S. at 585.

264. See id.

265. See id. at 581. "Section 954(d)(1) adds 'considerations' to the grant-making process; it does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application." Id. at 580-81. Furthermore, the Court stated "that § 954(d)(1) admonishes the NEA merely to take 'decency and respect' into consideration . . . undercut[s] respondents' argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination." Id. at 582.

266. See Mosley, 408 U.S. at 92-93 (allowing peaceful picketing on school's labor-management dispute, but prohibiting all other peaceful picketing is content-based law) (emphasis added); R.A.V., 505 U.S. at 380 (prohibiting display of any symbol "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" is viewpoint-based law and thus unconstitutional) (emphasis added).

267. Turner Broadcasting System, 512 U.S. at 641. For a discussion of this case, see supra notes 52-65 and accompanying text.
veys."\textsuperscript{268} The Court seems to have viewed the purpose of the provision as important, since it examined the legislative history of Section 954(d)(1).\textsuperscript{269} This led the Court to conclude that the legislation was "aimed at reforming procedures rather than precluding speech."\textsuperscript{270} But, as the concurrence and dissent point out, such a reading plainly ignores that the adoption of Section 954(d)(1) was instigated by the public funding of works such as Serrano's "Piss Christ" and Mapplethorpe's homoerotic photographs.\textsuperscript{271}

The Court was persuaded that both the non-categorical nature of the provision and the legislative history undermined the danger of viewpoint suppression.\textsuperscript{272} With these propositions in question, however, it seems that the Court has not eradicated the danger of viewpoint suppression. Perhaps one can view the Court's contrary conclusions as stemming from its longstanding practice of construing statutes narrowly to avoid constitutional problems.\textsuperscript{273}

The problem with this practice is that it ignores the pragmatic effect that Section 954(d)(1) has on speech that does not comport with the decency clause. In seeking to ensure that certain ideas are not driven from the marketplace, the Court has stated the general rule that the government may not "regulate speech in ways that favor some viewpoints or ideas at the expense of another."\textsuperscript{274} This standard clearly takes into consideration the underlying goals of the provision. When Section 954(d)(1) is examined under this standard, the First Amendment is undermined because, as Justice Scalia stated in his concurrence, "the decisionmaker, all else being equal, will favor applications that display decency and respect, and disfavor applications that do not."\textsuperscript{275}

The Court conceded that content-based restrictions are an inevitable part of arts funding, but used this conclusion as a basis to distinguish \textit{Rosenberger} from \textit{Finley II}.\textsuperscript{276} The issue presented in \textit{Finley II} was reminiscent of the Court's recent decision in \textit{Rosenberger}, because it involved both an alleged viewpoint-based law and a selec-

\begin{itemize}
  \item \textsuperscript{268} \textit{Id.} at 642 (citing \textit{Rock Against Racism}, 491 U.S. at 791).
  \item \textsuperscript{269} \textit{See Finley II}, 524 U.S. at 581. For a discussion of the Court's analysis of the legislative history, see \textit{supra} notes 158-59 and accompanying text.
  \item \textsuperscript{270} \textit{Id.} at 582.
  \item \textsuperscript{271} \textit{See id.} at 594 (Scalia, J., concurring); \textit{See also id.} at 603 (Souter, J., dissenting).
  \item \textsuperscript{272} \textit{See Finley II}, 524 U.S. at 581-82.
  \item \textsuperscript{273} \textit{See Taylor}, \textit{supra} note 6.
  \item \textsuperscript{274} \textit{Taxpayers for Vincent}, 466 U.S. at 804. \textit{See supra} notes 44-51 and accompanying text.
  \item \textsuperscript{275} \textit{Finley II}, 524 U.S. at 593 (Scalia, J., concurring).
  \item \textsuperscript{276} \textit{See id.} at 586.
\end{itemize}
tive subsidy scheme. 277 *Rosenberger* seemed clear enough to the challengers in *Finley II*, for it held that viewpoint-based restrictions are improper when the government "expends funds to encourage a diversity of views from private speakers." 278 The Court, however, distinguished *Finley II* on the basis that absolute content-neutrality was "inconceivable" in arts funding because of the competitive process in which grants are allocated. 279 Justice Souter, however, made a strong argument that *Rosenberger* expressly rejected this distinction by stating that viewpoint discrimination could not be justified on the basis of scarcity, which is essentially only a byproduct of competition. 280

The Court did suggest that any actual viewpoint discrimination in arts funding would be improper. 281 This assertion reflects precedent that has clearly established that viewpoint discrimination contravenes the First Amendment. 282 However, the Court's subsequent statements in *Finley II* concerning government subsidies and the First Amendment make the Court's assertion questionable. 283

B. Government Subsidies and Viewpoint

Immediately following condemnation by the Court of the application of viewpoint discrimination is a passage regarding the First Amendment and government subsidies that seems to cut in the opposite direction. 284 The Court states that, "[a]lthough the First Amendment certainly has application in the subsidy context, . . . the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." 285 This assertion confuses the majority's analysis because, up to this point, the Court has suggested that it is because Section 954(d)(1) is not viewpoint-based

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277. For a discussion of *Rosenberger*, see *supra* notes 125-49 and accompanying text.
279. *Finley II*, 524 U.S. at 586.
280. See *id.* at 614-15 (Souter, J., dissenting).
281. See *id.* at 587.
282. See *Ragan* 461 U.S. at 550 (stating that even in the provision of subsidies, Government "may not aim at the suppression of dangerous ideas"); *Ragland*, 481 U.S. at 221 (concluding that if a subsidy were manipulated to have a coercive effect then relief could be appropriate); see also *Leathers*, 499 U.S. at 447 ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.").
283. See *infra* notes 286-94 and accompanying text.
284. See *Finley II*, 524 U.S. at 587-88.
285. *Id.*
that it is constitutional.286 The statement suggests, instead, that a viewpoint-based restriction might be allowed in arts funding. The Court cites Rust for the principle that, without violating the First Amendment, the government may selectively fund projects it believes to be in the public interest without funding an alternative activity.287 Furthermore, the Court suggests that the NEA’s enabling act provides the public interest goal that would allow a viewpoint-based restriction.288

The Court found it unnecessary to work through this analysis because it determined that Section 954(d)(1) was not viewpoint-based.289 If, in the future, an arts funding restriction is found to be viewpoint-based, an analysis of such a consequence might invoke portions of the decision in Rust. As the Court similarly reasoned in Rust, in Finley II the government has not denied artists the right to create indecent art; rather, the government has only required artists who create indecent art to do so without federal funding.290

Justices Souter and Scalia both examined the government subsidy issue more fully than the majority, because they determined that the decency clause was indeed based on viewpoint.291 The Court’s opinion suggests that Rust would be comparable in such a situation and Justice Scalia and Thomas clearly endorse it.292 The Court’s suggestion therefore, that viewpoint-based restrictions would be unconstitutional if applied by the NEA is not only unsettled, but doubtful.

VI. IMPACT

The Finley II decision will not affect the way the NEA distributes funds. While Finley II was meandering through the legal system, the NEA underwent a number of political and structural changes that make the Supreme Court’s ruling moot as applied to that

286. See id. at 587 (“Unless and until § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision.”).
287. See id. at 588 (citing Rust, 500 U.S. at 193). For a discussion of Rust, see supra notes 110-24 and accompanying text.
288. See Finley II, 524 U.S. at 588.
289. See id. at 587 (stating that “[u]nless and until § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision.”).
290. See supra notes 110-24 and accompanying text for a discussion of Rust.
291. See Finley II, 524 U.S. at 595-600 (Scalia, J., concurring); Id. at 600-22 (Souter, J., dissenting).
292. See id. at 588-97.
agency. At its height in 1992, the agency's budget was $176 million, but its 1999 budget consisted of only $98 million in appropriations. NEA review panels, once consisting of artist peers with experience in the disciplines they were reviewing, have been restructured to include non-artists as representatives of community standards. Grants to individual artists, the kind that triggered the legislation in the first place, have been eliminated. In other words, any changes that Finley II could implement, have already been made.

While the impact of Finley II on the NEA will be negligible, its effect on the rest of the arts community is not as certain. While the Court did intimate that an as-applied challenge on the basis of viewpoint discrimination would receive consideration by the judiciary, the very nature of arts funding suggests such an option is unlikely. As the Court noted, the NEA may decide whether or not to fund projects for "a wide variety of reasons 'such as the technical proficiency of the artist, the creativity of the work, the work's contemporary relevance, [or] its educational value.'" Additionally, the NEA's determination of "artistic excellence" itself is a subjective conclusion, that involves personal aesthetic values. The presence of these factors will make it very difficult for an individual litigant to prove definitively that his or her particular viewpoint led to the denial of funding.

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294. See id.
295. See id.
296. See id.
297. See Conrad, supra note 295. Walter Weber, litigation counsel for the American Center for Law and Justice, stated that "[i]f it had come out in the other direction, it would have been a landmark decision with pernicious consequences," putting the Court in the position of telling the agency it must fund indecent and immoral art. Id. Instead, "[i]t's news because it's a prevention of something that would have been an innovation." Id.
298. See Finley II, 524 U.S. at 587. This proposition may be undermined by Justice O'Connor's subsequent conclusion 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." Id. at 588.
299. Id. at 585.
300. See id. at 584. See also Taylor, supra note 5. Taylor states that "[a] time when much 'art' exudes political messages and little else, assessments of 'artistic merit' are often steeped in viewpoint discrimination." Id. Stuart finds it hard to believe that the NEA advisory panelists who supported Karen Finley's performance, would have recommended the funding of "a painter who used her technical virtuosity to preach that a mother's place is at home with her children." Id.
301. See Bernard James, The 'Forbes' and 'NEA' Decisions Approve Greater Governmental Control Over Forms of Speech, 20 Nat'L J. 50, August 10, 1998, at B15. James states that "[a] wide range of reasons can be given to justify the rejection of a grant..."
The practical consequence of business as usual at the NEA with virtually no individual redress is that artists may be engaging in self-censorship in order to obtain government funds. Indeed, many artists attest that the promulgation of the decency and respect criteria and controversy surrounding NEA funding has produced a chilling effect in the art world. Thus, the message of *Finley II* merely reaffirms this practice. Justice Souter's prediction that "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" has apparently come true.

While *Finley II* does not warrant a close look on the basis of its relation to arts funding, at least for the present time, it nevertheless deserves a careful reading. *Finley II* is the latest of a long line of cases including *Rosenberger*, *Rust*, and *Regan*, in which the Court is defining the contours of the government's ability to participate in the free marketplace of ideas through its power of the purse. The contribution of *Finley II* to the subsidized speech cases remains undetermined, however, because of the Court's uncertain analysis of the First Amendment in the subsidy context.

Such confusion about where the Court stands on this important issue will surely lead to future litigation. As Congress continues to respond to public indignation by legislating standards that affect mediums such as television, music, film and the Internet, the government will find itself again defending its right to place restrictions on free expression in the interest of majority values. The pertinent question after *Finley II* is just how far the government can go in this pursuit. In other words, if Congress were to pass a restriction that was not merely "advisory," would the Court find it constitu-

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302. For an interview with several such artists, see *All Things Considered* (National Public Radio broadcast, July 21, 1998).

303. *Finley II*, 524 U.S. at 621.

304. See *supra* notes 286-94 and accompanying text.

All that is certain is that, if such a case comes before the current Court, the opinions of Justices Souter and Scalia will loom large.

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