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"Don't pooh-pooh our poo poo": penalty, subsidy, and refusal to fund in the aftermath of National Endowment for the Arts v. Finley

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“DON’T POOH-POOH OUR POO POO”: PENALTY, SUBSIDY, AND REFUSAL TO FUND IN
THE AFTERMATH OF *NATIONAL ENDOWMENT FOR THE ARTS V. FINLEY*

A Thesis

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James Gaddy
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ABSTRACT

Legal scholars said the *National Endowment for the Arts v. Finley* decision would create a “chilling effect” in government subsidy programs, and it unlawfully expanded the government speech doctrine. By analyzing cases that subsequently use *Finley* for a substantive part of their rationale, this article argues the opposite: the courts have rejected the government’s attempts to interpret the decision as one that allows viewpoint discrimination and have not allowed the government to further a broad reading of the decision. The article also argues that, under the government speech doctrine, *Finley* provides the controlling precedent for truly “hybrid speech” cases where the government and private voices are equally responsible for the speech that occurs. These cases involve an “excellence criteria,” in which private voices are selectively chosen by the government. In these cases, the *Finley* rationale should apply.

I. Introduction

On June 29, 1990, a year after New York Senator Alphonse D'Amato ripped up Andres Serrano's exhibition catalog and threw the pieces in front of the Senate,¹ National Endowment for the Arts Chairman John Frohnmayer rejected grant applications for four solo performance artists whom the NEA advisory panel had unanimously recommended for funding because their work was considered too controversial and without artistic merit.² The artists sued, beginning one of the most disputed cases in recent Supreme Court history.

Scholars decried the Supreme Court's 1998 decision to uphold Congress' restrictions on the NEA in *National Endowment for the Arts v. Finley*,³ and those denouncements fell roughly into two categories. The first group argued that the clause asking the NEA to consider general standards of decency and respect in grant decisions would chill artistic and individual expression.⁴ They argued that the "artful" compromise that saved the NEA also gutted its ability to fund worthwhile artistic expression because "decency and respect" were politics, the antithesis

¹ 135 Cong. Rec. S5594 (daily ed. May 18, 1989). Sen. D'Amato said, "Mr. President, several weeks ago, I began to receive a number of letters, phone calls, and postcards ... concerning artwork by Andres Serrano. They express a feeling of shock, of outrage, and anger... I am somewhat reluctant to utter its title. This so-called piece of art is a deplorable, despicable display of vulgarity. The artwork in question is a photograph of the crucifix submerged in the artist's urine." See e.g., Kim Shipley. *Comment: The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms*. 40 EMORY L.J. 241, 241 (1991) (observing that the distinction between the right of free speech and the privilege of subsidization to facilitate free speech is such that subsidized expression is accorded less First Amendment protection).

² Boston Globe, July 12, 1990, at 74, col. 5.

³ *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

⁴ Kristine M. Cunnane. *Note: Maintaining Viewpoint Neutrality for the NEA: National Endowment for the Arts v. Finley*. 31 CONN. L. REV. 1445, 1446 (1999) ("The *National Endowment for the Arts v. Finley* holding essentially invited government censorship wherever public funds flow. This significantly threatens the First Amendment rights of American citizens."); See also Gary Allison. *Symposium: The Cultural War over NEA Funding: Illogical Statutory Deconstruction Erodes Expressive Freedom*. 34 TULSA L.J. 233 (1999) ("...the majority's solution produces the worst First Amendment consequences. It hints at an outrageous expansion of government-as-speaker doctrine."); Eric

of art.⁵ Justice O'Connor's arguments were disingenuous, they argued, it relied superficially on *Rust v. Sullivan*,⁶ misread *Rosenberger v. Rector and Visitors of the University of Virginia*,⁷ failed logical common sense, and served merely as a "rubber stamp" on Congress's move to put a popular restriction on the NEA.⁸ Artists would now shape their work to conform to whatever parameters they thought the government would require.⁹ Artists whose aesthetic impulses led them into territory that the government disfavored because of indecency or disrespect might not even try for an NEA grant. Without the NEA to correct deficiencies in the market — since many artists, especially controversial ones, are not commercially viable — these artists would have little

Cleary. *Note: In Finley's Wake: Forging a Viable First Amendment Approach to the Government's Subsidization of the Arts*. 68 FORDHAM L. REV. 965 (1999) ("Both viewpoint discrimination analysis and the unconstitutional conditions doctrine do not account for the role of funded institutions in the process of self-government. This failure threatens to undermine the First Amendment core principle of preserving the marketplace of ideas."); David Hungerford. *Note: The Fallacy of Finley, Public Fora, Viewpoint Discrimination, and the NEA*. 33 U.C. DAVIS L. REV. 249 (1999) ("The Finley decision promotes a much more expansive view ... than that to which the Court had previously subscribed."); Matthew Mustokoff. *Note: The National Endowment for the Arts v. Finley: Striking a Balance Between Art and the State or Sealing the Fate of Viewpoint Neutrality?* 9 TEMP. POL. & CIV. RTS. L. REV. 135 (1999) ("While governments are in the business of making funding decisions for the public interest, they must not be permitted to be sophic ventriloquists who offer funding to the full spectrum of private expression, only to hide behind the guise of a vague statutory standard and deny substantial financial support to those artists whose viewpoints threaten hegemonic values."); Robert Vosburgh. *Comment: Government Subsidies of Controversial Art: Dung, The Virgin Mary, and Rudy Giuliani*. 11 TEMP. POL. & CIV. RTS. L. REV. 221 (2001) ("Particularly in the area of artistic expression, such a furtherance of the government's agenda is directly at odds with the nature of a duplicitous democracy."); Neil C. Patten. *Note: The Politics of Art and the Irony of Politics: How the Supreme Court, Congress, the NEA, and Karen Finley Misunderstand Art and Law In National Endowment for the Arts v. Finley*. 37 HOUS. L. REV. 559 (2000) ("Clearly the Court's decision in Finley will have a chilling effect on artistic expression.").

⁵ Patten, *supra* note 4, at 562.

⁶ *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁷ *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

⁸ Patten, *supra* note 4, at 585.

⁹ *Id.* at 597 (citing *Finley*, *supra* note 3, at 621, Souter, J., dissenting). "In the world of NEA funding, this is so because the makers or exhibitors of potentially controversial art will either trim their work to avoid anything likely to offend, or refrain from seeking NEA funding altogether."

recourse to secure private funding.¹⁰ Some even argued that this viewpoint discrimination would spill over into entertainment areas.¹¹

Those in the second group may have agreed with the decision, or at least remained neutral, but they rejected its logic and rationale.¹² For some, the conflicting spins from both the religious right and the American Civil Liberties Union over the Court's decision¹³ seemed to indicate that the Court "failed to articulate the precise delineation of the government's role in funding for the arts."¹⁴ Others were less kind, tripping over adverbial superlatives to describe the vacuity of the decision. Justice O'Connor's majority opinion, they concluded, was one that appeared to follow the individual rights approach, but "applied it in a wholly unpersuasive way, clearly revealing the incoherence and disarray of the Court's subsidized-speech jurisprudence;"¹⁵ attempted to decide the case on the narrowest possible grounds but resulted in an opinion of

¹⁰ *Id.* at 597-598 (citing *Finley*, *supra* note 3, at 622, Souter, J., dissenting).

¹¹ Jay Rosenthal, "Music Industry Should Rally Against NEA Ruling," 110 *Billboard* 32 (1998) (predicting that the "overwhelming Supreme Court support for the proposition that viewpoint discrimination is constitutional" would empower those who were trying to criminalize "offensive" rap and popular music).

¹² Stuart Taylor, Jr. *Savoring Judicial Fudge*. 220:3 N.Y. L. J. 2 (1998); Steven J. Heyman. *Article: State-Supported Speech*. 1999 WIS. L. REV. 1119 (1999); Randall P. Bezanson and William G. Buss. *Article: The Many Faces of Government Speech*. 86 IOWA L. REV. 1377 (2001); Editorial, "Art and the First Amendment," *Washington Post*, June 26, 1998, at A26; Lackland H. Bloom, Jr. *Article: NEA v. Finley: A Decision in Search of a Rationale*. 77 WASH. U.L. Q.1, 1 (1999).

¹³ The Catholic League for Religious and Civil Rights, House Speaker Newt Gingrich and the Family Research Council praised it as a victory for common sense and decency. The ACLU released a press release entitled, "ACLU sees silver lining in court's ruling for funding for the arts." See Douglas McClennon, "Supreme Court Ruling on Decency Leaves Everybody Claiming Victory," *Seattle Post-Intelligencer*, July 6, 1998.

¹⁴ Taylor, *supra* note 12, at 2.

¹⁵ Heyman, *supra* note 12, at 1129.

almost “Sibylline obscurity;”¹⁶ created a “morass of unpredictability;”¹⁷ and was “profoundly unclear on virtually every point.”¹⁸ It was a “masterpiece of confusion;”¹⁹ a “muddle beneath its surface;”²⁰ a “classically O’Connor-esque exercise in muddled moderation, lacking elegant analysis or memorable lines;”²¹ one that, from a doctrinal and theoretical standpoint, was “extraordinarily unsatisfying;”²² and one that “made many salient points but failed to pull them together into a coherent rationale.”²³

Ultimately, Congress’ changes to the NEA funding scheme and the Supreme Court’s subsequent decision were the final compromise in a fierce battle over federal arts funding.²⁴ So perhaps *Finley* is best understood as a prudential decision validating a political compromise that sought to, and has largely succeeded in, ending the arts funding controversy, as well as insulating the NEA from further and possibly fatal attacks.²⁵ As a matter of constitutional law, however, the Court “confronted a very messy area of First Amendment jurisprudence and left it even messier, suggesting that the Court decided to reach a result it found difficult to justify under existing precedent and produced an opinion that through obscurity might cause as little damage

¹⁶ *Id.* at 1178.

¹⁷ Cleary, *supra* note 4, at 1007.

¹⁸ Heyman, *supra* note 12, at 1179-1180.

¹⁹ Bezanson and Buss, *supra* note 12, at 1455.

²⁰ Editorial, “Art and the First Amendment,” *Washington Post*, June 26, 1998, at A26.

²¹ Taylor, *supra* note 12, at 2.

²² Bloom, *supra* note 12, at 1.

²³ *Id.* at 2.

²⁴ Bezanson and Buss, *supra* note 12, at 1454.

²⁵ Bloom, *supra* note 12, at 1-2.

as possible to the existing doctrinal framework.”²⁶ Stuart Taylor, Jr., in his article “Savoring Judicial Fudge,” however, argued that the decision was still preferable to the polar, ideologically opposite positions of Justices Scalia and Souter because it kept the *status quo* intact.²⁷

This article will not reopen the question of whether the Court’s ruling in *Finley* was right or wrong, or whether it has chilled artistic expression in other federally funded arts programs. Rather, it will explore how federal courts have applied the decision and whether the fears of scholars, worried that the decision would grant the government freedom to engage in viewpoint discrimination, have been realized.²⁸ This article will strictly analyze expression within government funding programs through the parameters of the courtroom and case law. By analyzing cases since 1998 that use *Finley* in a substantive part of their rationale, this paper will argue that, although the government has attempted to use it for discriminatory purposes, the courts have distinguished it from cases involving censorship of artistic speech. The early fears of government censorship have largely been proven wrong. *Finley* has, however, fallen into a line of cases that form the government’s argument for greater leeway when it facilitates private speech. This “hybrid speech” forum is much more ambiguous. Section II will give a brief history of the NEA and the events that led to the case. Section III will follow the jurisprudential history of modern government speech doctrine. Section IV will analyze 15 cases that have used *Finley* for their rationale.

²⁶ *Id.*

²⁷ Taylor, *supra* note 12, at 2.

²⁸ Whether artists are censoring themselves from the NEA, however, is a different topic, and one outside the purview of this article. One could argue that artists are being less controversial, thus resulting in fewer cases involving censorship. This article assumes that position is untrue and, as will be discussed later, in the context of the culture wars, censorship issues in the arts are alive and well.

Three of these are cases in which the government tried to use *Finley* to support broader powers of viewpoint discrimination, but the courts rejected their argument and held conversely that the government had engaged in unconstitutional viewpoint discrimination, or censorship. The other 12 cases occupy a more ambiguous position within the government speech doctrine. The question the courts asked themselves in each case was whether the government's action was a penalty against the speaker or simply a refusal to fund. Although that distinction is not always clear, this section will also delineate the various court definitions of "penalty" and "refusal to fund." The section also will apply the case analysis from Section III and argue that, within the most contested cases within the hybrid speech forum, *Finley* represents the controlling precedent. Despite its disputed rationale, the cases that involve the presence of excellence criteria should apply the *Finley* decision because it represents the middle ground between two opposing doctrines: the right of the government to speak, and the right of private speakers to not be discriminated against. The evidence suggests that the *Finley* precedent has not had, nor will not have, a chilling effect on private expression.

II. Background

A. History

Although art has had a significant role in American history, funding for artists prior to the 20th century came from only one source: the benevolence of wealthy patrons.¹ It was not until Congress created the National Endowment for the Arts in 1965, under the auspices of creative and cultural diversity, that artists first had a federal agency dedicated to the financial support of their craft.² As the first federal agency dedicated to the development and support of the arts, the NEA's main purpose was the promotion of excellence in the arts and culture in order to fulfill a "broadly conceived national policy of support for the arts in the United States."³ Congress

¹ Thomas Leff. *Article: The Arts: A Traditional Sphere of Free Expression? First Amendment Implication of Government Funding to the Arts in the Aftermath of Rust v. Sullivan*. 45 AM. U.L. REV. 353, 361-362 (1995). Leff notes that much of artistic patronage came from aristocrats such as Benjamin Franklin, a lifelong patron of the arts who founded the United States' first library, first hospital, and the Pennsylvania Academy of the Arts. Other forms of patronage came from the emerging upper-class, people such as Cornelius Vanderbilt, Solomon Guggenheim, John Rockefeller, J.P. Morgan and Andrew Mellon. See also Linda A. Mellina. *Note: Decency v. The Arts: And The Winner Is ... The National Endowment for the Arts?* 29 SETON HALL L. REV. 1513, 1517 (1999) (arguing that the Finley decision is troubling because of the history of support for the arts and the viewpoint-discriminatory nature of the decency and respect clause).

² See National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, 2, 79 Stat. 845 (1965) (codified as amended at 20 U.S.C. § 951-959 (1994)) This Act also established the National Council on the Arts, the National Endowment for the Humanities, the Federal Council on the Arts and Humanities, and the Institute of Museum Services. For an in-depth account of the formation and regulations of the NEA, and the underlying rationale and political pressures concomitant with a national cultural policy, see Kevin Mulcahy and Margaret Wyzomirski, *America's Commitment to Culture*, 1995. See, generally, Michael Brenson. *Visionaries and Outcasts: The NEA, Congress, and the Place of the Visual Arts in America* (2001); Mellina, *supra* note 29, at 1517.

³ See 20 U.S.C. § 954(a). Congress explained the role of the National Foundation on the Arts and Humanities as follows:

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

(11) To fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people, the Federal Government must transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art.

declared that the government's help was necessary to "create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent."⁴ In response to concerns that government support for the arts might lead to attempts at political control of culture, Congress took steps to protect the agency from political pressures and shield private grantees' speech from government control.⁵ It formed the NEA as an agency composed of professionals in the arts who would base funding on artistic merit — an agency where art experts would make the funding decisions rather than politicians.⁶ It gave the NEA substantial discretion to award grants by identifying broad funding priorities, such as artistic and cultural significance, emphasis on American creativity, and professional excellence.⁷ Grant applications were to be reviewed by advisory panels, which in turn would make recommendations to the NEA Chairperson.⁸ Thus, Congress's

Cunnane, *supra* note 4, at 1447; Constance Hofland, *Case Comment: Constitutional Law – First Amendment – Freedom of Speech: The National Endowment for the Arts Can Require Consideration of "Decency and Respect" in Funding Decisions Without Abridging Freedom of Speech*, 75 N. DAK. L. REV. 893, 894 (1999) (arguing that the decency and respect clause, in the context of the NEA's mission, was acceptable criteria, but the courts should not use the provision to aim at the suppression of ideas).

⁴ 20 U.S.C. § 951(5) (1994).

⁵ 20 U.S.C. § 953(c) (1994).

⁶ 20 U.S.C. § 954(c) (1994).

⁷ See 20 U.S.C. 954(c) (1)-(10) (1994); Hofland, *supra* note 31.

⁸ See 20 U.S.C. 959(c) (1994). NEA panels were expected to avoid the problems associated with some New Deals arts programs by offering advice informed by "neutral competence," rather than politics or ideology. Instead of insulating public funding for the arts from partisan or ideological interference, however, the panels system stood accused of imposing its minoritarian cultural values on the American public. During the 1990 reauthorization hearings, the panels were the subject of persistent attention. The main criticism was that the NEA maintained a system of advisory panels that was exclusive and incestuous, composed of individuals from a small number of cultural centers who shared similar aesthetic values and who promoted each other's artistic interests and careers. See Kevin Mulcahy, "The Public Interest and Arts Policy," *America's Commitment to Culture*, *supra* note 30, at 212, 218.

intent was to have government assistance to facilitate public participation, not serve as a substitute for public participation or as a determining factor in what would be produced. The funding decisions would be left to the artists and the panels.⁹ And until 1989, the NEA operated smoothly, with only a few formal complaints about funding decisions.¹⁰

B. Mapplethorpe and Serrano

The incidents that led to the controversy in the 1990s have been described in detail elsewhere,¹¹ thus only a brief description is necessary here. Two grants in particular led to the public controversy in 1989 and Congress' subsequent revaluation of the NEA's funding procedure.¹² The NEA gave \$30,000 to the Institute of Contemporary Art at the University of Pennsylvania to present a posthumous retrospective of works from the artist Robert Mapplethorpe, titled "The Perfect Moment."¹³ The exhibit consisted primarily of Mapplethorpe's well-known photographs of flowers and celebrities, but also included photographs depicting various acts of sadomasochistic homosexual activity and photographs of a young girl with her

⁹ See 111 Cong. Rec. H23969 (1965) (Cong. Monagan responding that government "will supply the money, but the artists and their organizations will suggest the proposals ... and do all the planning."). 111 Cong. Rec. H23665 (1965) (Rep. Annunzio stating, "Government support of the arts and humanities is not to replace private initiative, reduce private responsibility, or restrict artistic freedom."). Cunnane, *supra* note 4, at 1449.

¹⁰ *Finley*, *supra* note 3, at 574.

¹¹ John H. Garvey. *Black and White Images*. 56 LAW & CONTEMP. PROBLEMS 189 (1993); Cleary, *supra* note 4; Mellina, *supra* note 29; Shipley, *supra* note 1; Renee Linton. *Comment: The Artistic Voice: Is It in Danger of Being Silenced?* 32 CAL. W.L. REV. 195 (1995); See generally, Wendy Steiner, *The Scandal of Pleasure*, The University of Chicago Press (1995).

¹² *Finley*, *supra* note 3, at 574.

¹³ *Id.*

vagina exposed.¹⁴ The other grant was awarded to the Southeast Center for Contemporary Art. SECCA, in turn, then awarded Andres Serrano \$15,000, which he used to produce a photograph of a crucifix immersed in urine, titled "Piss Christ."¹⁵ The controversy gained momentum in April 1989, when the executive director of the American Family Association discovered that the NEA had funded an exhibit that included Serrano's photograph.¹⁶ The Religious Right clamored for the complete abolition of the NEA and began a write-in program to alert its elected representatives.¹⁷ On Thursday, May 18, 1989, Senator Alfonse D'Amato took the floor of the U.S. Senate with Serrano's catalog.¹⁸ Within 15 minutes, 38 senators had signed a letter to the NEA condemning SECCA's display of Serrano's photograph and demanded an overhaul of the NEA's 25-year-old federal funding disbursement procedure.¹⁹ Senators Jesse Helms and D'Amato led the charge:²⁰ "The so-called 'art' that I have been opposing and continue to oppose and will oppose until we cut off funding for it, is so rotten, so crude, so disgusting, so filthy, that it turns the stomach of

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Garvey, *supra* note 39 at 190-191.

¹⁷ *Id.*

¹⁸ 135 Cong. Rec. S5594 (daily ed. May 18, 1989). "I have a catalog of the show and Senators you need to see it to believe it," Senator D'Amato said. "This is not a question of free speech. This is a question of abuse of taxpayer's money. If we allow this group of so-called art experts to get away with this, to defame us and to use our money, well, then we do not deserve to be in office." Shipley, *supra* note 1, at 241.

¹⁹ 135 Cong. Rec. at S5595.

²⁰ 135 Cong. Rec. S5594 (daily ed. May 18, 1989). "I do not know Mr. Andres Seranno (sic), and I hope I never meet him. Because he is not an artist, he is a jerk" (Helms statement). Of Mapplethorpe, Sen. Helms said, "His exhibit endangered Federal funding for the arts because the patently offensive collection of homo-erotic pornography and sexually explicit nudes of children was put together with the help of a \$30,000 grant from the Endowment..."

any normal person,” Helms said.²¹ This war cry pitted political conservatives against progressive artists in the culture wars.²²

The Helms amendment originally sought to prohibit the funding of “obscene” and “indecent” works of art, “material which denigrates the objects or beliefs of the adherents of a particular or nonreligion” and “material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age or national origin.”²³ A federal district court invalidated his amendment under the First and Fifth Amendments.²⁴ When Congress considered reevaluating the NEA’s funding priorities in the appropriations for fiscal year 1990, members first eliminated \$45,000 from the agency’s budget — the exact amount contributed by the NEA to the Mapplethorpe and Serrano shows.²⁵ Congress then created an independent commission of constitutional law scholars to advise Congress on permissible restrictions on NEA funding to “assess the possibility of more focused standards for public arts funding.”²⁶ The Commission’s report, issued in September 1990, suggested procedural changes and cautioned against legislation setting forth any content restrictions.²⁷ With the Commission’s recommendations in hand, Congress considered a variety of amendments. The House rejected one amendment that proposed further content-based restrictions, and another that would have

²¹ 137 Cong. Rec. 23,464 (1991) (Sen. Helms’ statement).

²² Cleary, *supra* note 4, at 965; Mellina, *supra* note 29, at 1518; Linton, *supra* note 39, at 202.

²³ 135 Cong. Rec. S8862 (daily ed. July 26, 1989).

²⁴ *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774 (1991).

²⁵ *Finley*, *supra* note 3, at 574-575.

²⁶ *Id.* at 575.

²⁷ *Id.*

eliminated the NEA altogether.²⁸ Ultimately, Congress adopted a bipartisan compromise between members favoring some NEA guidance and those opposing any funding restriction.²⁹

In September 1990, Congress adopted several of the changes recommended by the Commission and added the “decency and respect” clause, which gave a mandate to the NEA Chairperson to ensure that:

- 1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
- 2) applications are consistent with the purpose of this section. Such regulations shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded.³⁰

In December 1990, the NEA implemented the resolution, but only after interpreting the clause to mean that members of advisory panels would represent geographic, ethnic, and aesthetic diversity.³¹

Shortly before Congress passed the “decency and respect” clause, NEA Chairman Frohnmayer denied fellowships to four solo performance artists -- Karen Finley, John Fleck, Holly Hughes, and Tim Miller -- against the unanimous recommendations of an NEA Peer Advisory Panel.³² The artists subsequently filed suit. All had been described as “radical” artists – the work of Fleck, Hughes, and Miller contained homosexual themes, while Finley’s performances addressed subjects like rape and incest.³³ After the NEA adopted Section 954(d)(1),

²⁸ *Id.* at 576; See also 136 Cong. Rec. 28656-28657 (1990).

²⁹ *Id.*

³⁰ 20 U.S.C. § 954(d) (1994).

³¹ *Id.*

³² *Finley, supra* note 3, at 577.

the plaintiffs, joined by the National Association of Artists' Organizations (NAAO), amended their lawsuit to challenge the clause, arguing it was impermissibly vague under the Fifth Amendment, and violated the First Amendment on its face by imposing content-based restrictions on protected speech.³⁴

Two years later, the NEA still faced heavy scrutiny from the government and artists alike,³⁵ and in June 1992, the U.S. District Court for the Central District of California granted summary judgment in favor of the artists.³⁶ On appeal, a divided panel of the Ninth Circuit affirmed that judgment.³⁷ The Supreme Court agreed to hear the case, and on June 25, 1998,

³³ More specifically, Karen Finley, in her show "We Keep Our Victims Ready," smears her semi-nude body with chocolate, which is supposed to look like excrement while recounting a sexual assault in graphic terms. Holly Hughes' monologue "World Without End" is a recollection of her realization of her lesbianism and memories of her mother's sexuality. John Fleck's performance consists of urination on stage while putting a photograph of Jesus Christ on the lid of a toilet. He also simulates masturbation. Tim Miller uses vegetables to represent sexual symbols and recounts his life as a homosexual living with the threat of AIDS. *Finley*, *supra* note 3, at 596 (Scalia, J., concurring); William H. Honan, "Judge Overrules Decency Statute," N.Y. Times, June 10, 1992, at A1.

³⁴ *Finley*, *supra* note 3, at 569, 577-578.

³⁵ In 1989, Frohnmayer had already revoked a \$10,000 grant to the Artists Space, a New York gallery. The grant had been awarded by the NEA to fund an AIDS exhibit entitled, "Witnesses: Against Our Vanishing." Frohnmayer decided to revoke the grant solely on the exhibit's political content, arguing that the exhibition had changed its focus after the grant had been approved. The arts community cried censorship, included Leonard Bernstein, who threatened to refuse the Presidential Medal of the Arts in protest, despite the fact that President Bush was scheduled to present him the award that week. See N.Y. Times, Nov. 19, 1989, Sect. 2, at 1, col. 1; Shipley, *supra* note 1, at 244.

In 1992, the NEA's advisory council was accused of content-based disapproval of two grants. Both grants involved sexually explicit visual materials that were a part of the applicants' overall applications, one by a "bastion of avant-garde art" Franklin Furnace in which the performer invited an audience member to rub lotion over her nude body. The other application by Highways in Los Angeles contained 25 homoerotic photographs, some of them of men engaged in oral sex. Even though the panels were rarely overturned, the NEA argued that the applications were denied on artistic merit. Later, the new NEA chairperson admitted she had overturned the recommendations of NEA expert advisors said she was acting to keep Congress from dismantling the NEA. See Kim Masters, "Arts Agency Rejects 2 Grants; Chairman Questions 'In Your Face' Tactics," Washington Post, Feb. 4, 1992, at D1. See also Kim Masters, "NEA Chief Defends Grant Vetoes; Further Conflict Likely, Radice Says," Washington Post, May 29, 1992, at D1; Allison, *supra* note 4, at 258-259.

almost eight years to the day after Frohnmayer’s decision to overrule the panels, the Court reversed the lower courts’ decisions in an 8-1 vote, upholding the “decency and respect” clause.³⁸

³⁶ *Finley*, *supra* note 4, at 569.

³⁷ *Id.* at 578-579.

³⁸ *Id.* at 569.

III. Legal Relevance

A. Context of the Culture Wars

During the Mapplethorpe and Serrano controversy, Congress operated under two interests: to protect citizens from offensive speech, and to protect taxpayers from unwanted expenditures.¹ Critics have argued that conservative Congress members have used the “taxpayer’s money” slogan unfairly in order to suppress unwanted speech.² And although the Supreme Court has repeatedly struck down the “taxpayer’s money” premise,³ legislators have used that slogan to galvanize constituents, especially when Congress has funded programs to which a large, vocal number of voters object.

The Religious Right appeared in the late 1970s, reacting to the hedonism, feminism, and war protests of that era, especially the series of court decisions legalizing abortion and outlawing mandatory prayer in schools.⁴ Jerry Falwell, Jimmy Swaggart, Pat Robertson, Tim La Haye, the Moral Majority and the Religious Roundtable took over the personal evangelism begun by Billy Graham and steered it sharply to the political right.⁵ Generally, it opposes issues such as

¹ Linton, *supra* note 39, at 214.

² Dan Mayer. *The Religious Right and Arts Funding*, 21 J. ARTS MGMT. & L. 341, 344 (1992). In April 1991, at a hearing held by the House Appropriations Interior Subcommittee, Reverend Sheldon said, “There is a war raging in America...The elitist avant-garde arts community uses the NEA to advertise and disseminate their political beliefs. The NEA then uses our scarce tax dollars to fund works which are intended to shock Americans into an acceptance of dysfunctional behavioral lifestyles and to destroy the family.” See also statements by Sen. D’Amato, *supra* note 46. Linton, *supra* note 39, at 217.

³ *Buckley v. Valeo*, 424 U.S. 1 (1976) (ruling that virtually every congressional appropriation will to some extent involve using public money to promote policies to which some taxpayers may object); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (ruling that taxpayer money may be sued to promote views on public radio with which they may disagree). Voters do not have a constitutionally protected right to enjoin those expenditures to which they object, nor could that interest be invoked to justify a congressional decision to suppress speech. *Id.* at 385. Linton, *supra* note 39, at 214-216.

⁴Tom Sine. *Cease Fire: Searching for Sanity in America’s Culture Wars*, Grand Rapids, MI: William B. Eerdmans Publishing Company, (1995).

gay rights, safe sex education, abortion, separation of church and state, and affirmative action. It is in each of these policy arenas that conservatives and liberals engage in what James Davison Hunter calls “culture wars” and Ken Meier calls “morality politics.”⁶ They are disputes grounded in moral concerns, rooted in deep-seated moral values. Social conservatives are attracted to these issues largely because proposals or existing practices are viewed as an affront to religious belief or a violation of a fundamental moral code. They can take sides on easily summarized positions. The often extraordinarily passionate debates about morality policy involve uncompromising clashes over values, and activists in culture war issues are typically galvanized in ways that make compromise difficult.⁷

And it seems that even today, the culture wars are alive and well — even taking over the courts, according to no less a personage than Justice Scalia. In his vitriolic dissent from the *Lawrence v. Texas*⁸ decision in 2003, he wrote: “One of the most revealing statements in today’s opinion is the Court’s grim warning that the criminalization of homosexual conduct is ‘an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.’ It is clear from this that the Court has taken sides in the culture war, departing from its

⁵ *Id.* at 16-17. The most visible part of the reborn conservative movement was Pat Robertson’s Christian Coalition. Since it was founded in October 1989, this organization dedicated to conservative political action has reportedly garnered a mailing list of over 30 million and an active membership of over 1.5 million. The Christian Coalition, having learned from the failure of the religious right during the 80s to shape national policy, shifted its focus to influencing politics on the local level.

⁶ Elaine B. Sharp, ed. *Culture Wars and Local Politics*. “Introduction,” by Elaine B. Sharp. University Press of Kansas, 1999. Elaine B. Sharp, page 3) See also James Davison Hunter. *Culture Wars*. New York: Basic Books, 1991. See also Kenneth J. Meier, *The Politics of Sin: Drugs, Alcohol, and Public Policy*. Armonk, N.Y.: M.E. Sharpe, p. 7, 1994.

⁷ Hunter, *supra* note 72.

⁸ *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

role of assuring, as neutral observer, that the democratic rules of engagement are observed.”⁹

Supreme Court nominee and conservative critic Robert Bork agreed. Writing a year earlier, Bork bemoaned the lack of responsibility that judges have taken: “We lawyers all feel diminished because our contribution to cultural collapse has not been recognized. The role of courts in the culture wars, too, is often overlooked ... Since about 1950 we have had a Supreme Court that has gone into high gear with activist decisions ... what hangs in the balance in our culture war is nothing less than the civilization of the West.”¹⁰ Legal conservative Bradley Watson also agreed that the culture wars have spilled over into the courts. “In the routinely occurring seesaw battles that result in 5-4 or 6-3 outcomes from a bench unchastened by a sense of modesty about its purpose, limits, or the changed circumstances in which it operates, the Court’s members become the prime culture warriors in our society,” he wrote.¹¹

Even those who are less strident agree that the confusion in the *Finley* decision was exacerbated by the fact that it was a product of a cultural war, between those who espouse traditional religious values and artists who portray various aspects of alternative sexual choices and feminist critiques.¹² The Supreme Court’s decision was part of a larger debate over

⁹ *Id.* at 2496-2497 (Scalia, J., dissenting).

¹⁰ Robert Bork, “Courts and the Culture Wars,” *Courts and the Culture Wars*, Bradley C.S. Watson, ed. p. 4-5. Lanham, Maryland: Lexington Books, 2002.

¹¹ Bradley C.S. Watson, “Introduction,” *Courts and the Culture Wars*, Bradley C.S. Watson, ed., p. xiii, Lanham, Maryland: Lexington Books, 2002.

¹² Marjorie Heins, *Sex, Sins, and Blasphemy: A Guide to America’s Censorship Wars* 5 (1993). She discusses several contributing factors to the art crisis, including the problem of scapegoating speech for social ills. Typically, this is a breeding ground for those who want to distract attention from social ills by attacking artists and other dissenters. Another is an American distrust of cultural elites and academics. See also Lewis Hyde, “The Children of John Adams: A Historical View of the Fight Over Arts Funding,” *Art Matters: How the Culture Wars Changed America*, Brian Wallis, ed., (1999); Linton, *supra* note 39, at 202.

indecenty, not just in the fine arts, but in film, television, books and the Internet,¹³ even if it was an essentially symbolic skirmish in the culture wars. It gave both sides their soapbox moment, while “letting the NEA get back to its usually benign if boring business of funding orchestras and the like.”¹⁴ The Court avoided a collision between two vital principles that can co-exist only if neither is carried to the limits of its logic, resulting in an ambiguous, inconclusive muddle, but one — again — preferable to the extremism of Scalia and Souter.¹⁵

And since *Finley*, almost all decisions that use its rationale feature contentious, highly emotional issues — abortion funding, gay rights, animal rights, hate speech, Internet pornography, and religion in the public sphere — where the citizenry disagrees with the use of public money because it disagrees with the speech that the money has advanced. With the return of these cultural controversies like gay marriage and “innocent victims” laws to the forefront of political campaigns in this election year, a discussion of the application of *Finley* seems highly appropriate.

B. The government speech doctrine

Finley now resides within the government speech doctrine, although the Supreme Court’s decision significantly broadened the doctrine when it decided the case. At its core, the government speech doctrine states that the government does not infringe on citizens’ First

¹³ Joan Bikuspic. “‘Decency’ Can Be Weighed in Arts Agency’s Funding,” *Washington Post*, June 26, 1998, at A1.

¹⁴ Taylor, *supra* note 12, at 2.

¹⁵ *Id.*

Amendment rights when it simply chooses not to subsidize private expression out of public funds.¹⁶ As long as the government is not discriminating “invidiously” in its subsidies to “aim at the suppression of dangerous ideas,” it has broad power to choose which groups receive funds.¹⁷

Seven years before *Finley*, the Supreme Court significantly expanded the government speech doctrine in *Rust v. Sullivan*,¹⁸ where, in a 5-4 decision, it upheld a federal law denying funding to family planning clinics that provided abortion counseling.¹⁹ In what would become known as the government-as-speaker doctrine, Chief Justice Rehnquist, writing for the majority, held that the government could selectively fund one program without funding an alternative program that addressed the problem in another way.²⁰ Government subsidies are, after all, discriminatory by nature, the Court stated. If the government wanted to encourage childbirth over abortion, it had the right to fund those programs that encouraged childbirth. “In so doing, the government had not discriminated on the basis of viewpoint,” Rehnquist argued.²¹ It had merely chosen to fund one activity to the exclusion of the other.²² In other words, this was merely

¹⁶ *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding the IRS’ denial of TWR’s application for tax-exemption on the grounds that much of their work would consist of lobbying, something not allowed by 501(c)(3) status. The Court held that the regulations were viewpoint-neutral and that TWR could establish an affiliate to lobby on its behalf without a tax subsidy.).

¹⁷ *Id.* at 548, quoting *Speiser v. Randall*, 357 U.S. at 513, 519 (1958) (in which veteran’s benefits were denied to those who refused to swear they did not advocate the violent overthrow of the government). The Court found no indication that the statute was intended to suppress any ideas or any demonstration to that effect. Rehnquist argued that when government subsidies were not aimed at the suppression of ideas, its power was broader. *Id.* at 544; *Buckley*, *supra* note 69; *Maher v. Roe*, 432 U.S. 464 (1977).

¹⁸ *Rust*, *supra* note 6.

¹⁹ *Id.* at 173.

²⁰ *Id.* at 193.

²¹ *Id.*

a refusal to fund — not a penalty. Justice Blackmun, however, in his dissent, argued that the *Rust* regulations were clearly viewpoint-based because they only targeted those who provided abortion counseling, creating an unconstitutional condition for grant receipt.²³ *Rust* epitomized the difficulty in determining the difference between a penalty and a mere refusal to fund.

The Court distinguished *Rust* four years later in another 5-4 decision, *Rosenberger v. Rector and Visitors of the University of Virginia*,²⁴ which held that a university could not discriminate against students who wanted to produce a religious publication using student funds. This time, viewpoint discrimination was unconstitutional because the university had created a limited public forum, then penalized students with religious viewpoints by not allowing them to participate.²⁵ In this case, the government entity had not enlisted private

²² *Id.*

²³ *Id.* at 207-208 (Blackmun, J., dissenting). The doctrine of unconstitutional conditions finds its precedent in *Speiser*, *supra* note 83, at 518-519, in which veteran's benefits were denied to those who refused to swear they did not advocate the violent overthrow of the government. The doctrine holds that the government may not predicate the receipt of a grant in order to forfeit one's constitutional rights, or, the government may not penalize their employees by reducing their First Amendment rights. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech ... The denial is 'frankly aimed at the suppression of dangerous ideas,'" (quoting *American Communications Assn. V. Douds*, 339 U.S. 382, 402 (1950)).

²⁴ *Rosenberger*, *supra* note 7.

²⁵ *Id.* at 829-830. The public forum doctrine received its sharpest elucidation in *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). The Court developed three categories of fora: the traditional public forum, usually any public land where the government has allowed open discourse, such as a park or sidewalk; the limited public forum, limited to a certain class of speakers for whom the forum was designed, such as a university's bulletin board for students; and last, the nonpublic forum, the most restrictive forum, which is usually a limited forum but must be narrowed in order to maintain the original purpose of the forum, like a lecture series at a university that cannot accommodate every student who attends the university. Viewpoint discrimination is unconstitutional in any forum.

speakers to convey its own message, but had rather allocated funds “to encourage a diversity of views from private speakers.”²⁶

Thus, prior to *Finley*, *Rust* and *Rosenberger* were the two shaky cornerstones on which the government speech doctrine teetered. On one side, *Rust* held that the government has broad authority over content when the government itself is the speaker, and either directly or indirectly, has a message to convey. On the other side, *Rosenberger* ruled that when the government allocates funding or space for diverse private expression, the rights of private speakers are paramount. The government cannot set up a forum for expression and then discriminate. Viewpoint discrimination is unconstitutional in any forum.

It should not be surprising that the Court’s rationale in *Finley*, then, would be disputed. Based on the contentious decisions in *Rust* and *Rosenberger*, the Court obviously had a difficult time establishing the parameters of the government speech doctrine. On top of that, *Finley* is neither wholly like either *Rust* or *Rosenberger*, but rather somewhere in the middle. At first glance, it would appear that *Rosenberger* should control *Finley*, since the NEA was encouraging private speech. But Justice O’Connor, writing for the majority, distinguished *Rosenberger*, arguing that the competitive process involved in the NEA grant-making procedure made *Finley* different because the NEA was not encouraging a diversity of speakers but rather a very select group of speakers.²⁷ Thus, she applied *Rust*, even though it was equally clear that the government was not speaking through the NEA. In the context of selective subsidies, O’Connor argued, Congress could not always legislate with clarity, and the decency and respect clause merely added some imprecise considerations to an already subjective process.²⁸ Additional advisory guidelines were fine

²⁶ *Id.* at 833.

²⁷ *Finley*, *supra* note 3, at 586.

because the process, by nature, was already highly subjective. She held that the language of the decency and respect clause was not penalizing artists because it only asked the NEA to “consider” common standards of decency when making decisions — a narrow interpretation of the clause.²⁹

Two additional opinions from *Finley* warrant mention. In his concurring opinion, Justice Scalia mocked the Court for claiming the provision was not viewpoint discriminatory, and he argued for a much broader interpretation than O’Connor’s: that viewpoint discrimination is “perfectly constitutional” when it is expanding the use of speech through subsidies.³⁰ Justice Souter, in his lone dissent, agreed that the provision was viewpoint discriminatory but reached the opposite conclusion, that Congress may not “discriminate by viewpoint in deciding who gets the money,” once it decides to spend public funds.³¹ He argued that the controlling precedent was *Rosenberger*, where the Court ruled that when the government acts as patron, or a facilitator of speech, it may not prefer one lawfully stated view over another.³² It would be difficult to argue, however, that the NEA was a limited public forum in the mold of *Rosenberger*, because the panel recommendations were so highly selective. The NEA was not encouraging a diverse group of speakers — it was encouraging a very specific type of speaker, one who had artistic excellence. At the same time, the NEA was certainly not an arm of the government, enlisting those speakers

²⁸ *Id.* at 590.

²⁹ *Id.* at 580-581.

³⁰ *Id.* at 595 (Scalia, J., concurring) (quoting *Regan*, *supra* note 82, at 549). “It is the very nature of government to favor and disfavor points of view ... None of this has anything to do with abridging anyone’s speech.” *Id.* at 598. Scalia applied the *Rust* rationale. “Avant-garde artistes ... remain entirely free to *épater les bourgeois*; they are merely deprived of the addition satisfaction of having the bourgeoisie taxed to pay for it. ... It is preposterous to equate the denial of taxpayer subsidy with measures ‘aimed at the suppression of dangerous ideas’” *Id.* at 596.

³¹ *Id.* at 604 (Souter, J., dissenting).

³² *Id.* at 611 (Souter, J., dissenting).

to convey a governmental message. It existed in the nether regions somewhere between *Rust* and *Rosenberger*.

Although Justice Souter glossed over the excellence criteria, which was the primary difference between *Rosenberger* and *Finley*, his dissent was still largely consistent with current doctrine and under different circumstances might have attracted a majority of the Court.³³ Yet he failed to round up even one additional vote. At least one scholar felt that the Court rejected an all-or-nothing approach that might kill arts funding altogether because that decision would result in greatly diminished participation by the artistic community.³⁴ The simplest, common-sense explanation of the *Finley* opinion is that a majority of the court examined the existing state of affairs at the NEA, concluded that it worked well enough and decided to leave it alone. The majority opinion, then, seems to be an attempt to preserve the status quo and minimize any long-term damage to First Amendment doctrine. Once the Court releases an opinion, however, it cannot control how it will be used by judges in future cases, much less how lower federal and circuit courts will use it.³⁵

This ambiguity within the government speech doctrine has led to the idea of the government as patron, or government as editor, as in *Arkansas Educational Television Commission v. Forbes*.³⁶ This category, however, is equally problematic because, as Randall Bezanson argued, "...the very enterprise of drawing a line between government as manager/regulator and

³³ Bloom, *supra* note 12, at 23.

³⁴ Allison, *supra* note 4, at 264.

³⁵ Bloom, *supra* note 12, at 26.

³⁶ *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) (concerning a state public television commission's ability to select participants in a political debate); *Finley*, *supra* note 3, at 569 ("when the government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe").

government as speaker is fraught with danger.”³⁷ Broad categories like “government-as-patron” are rarely inclusive. The government speech doctrine tends to resist categorization, and instead resembles shifting sand in which judges must draw lines.³⁸ At any rate, *Finley* rests firmly in the government speech doctrine, and the courts must engage the decision whenever any subsidized speech is at issue, not just artistic speech. Some elements appear relatively settled. When the government itself seeks to convey a message, either directly or through private surrogates, it will be allowed to control what is said.³⁹ There is also general agreement that when the government funds expression, it has wide latitude over aspects of content (such as subject matter) that the Court regards as relatively neutral.⁴⁰ On the other hand, viewpoint discrimination is impermissible in programs that ostensibly support a diversity of private expression.⁴¹ As the government conceded, NEA grants are not intended to enlist private speakers to convey a governmental message; hence, the case is not one of government speech.⁴² Yet the Court applied the *Rust* government speech rationale in *Finley*, and this inconsistent application of the doctrine has confounded courts and scholars alike.⁴³ The Court’s government speech doctrine has become

³⁷ Randall P. Bezanson. *Article: The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*. 83 IOWA L. REV. 953, 962 (arguing that the danger is that the government as speaker enjoys broader powers of discretion, and without proper guidelines to know the difference, the Court may be investing the government with more power than it should have).

³⁸ *Gay Guardian v. Ohoopee Regional Library*, 235 F. Supp. 2d 1362, 1379 (2002).

³⁹ *Finley*, *supra* note 3, at 613 (Souter, J., dissenting); *Rosenberger*, *supra* note 7, at 833-834.

⁴⁰ *Rust*, *supra* note 6, at 173; *Arkansas Writer’s Project v. Ragland*, 481 U.S. 221, 237-238 (1987) (Scalia, J., dissenting).

⁴¹ *Finley*, *supra* note 3, at 586.

⁴² Heyman, *supra* note 12, at 1180.

⁴³ Vosburgh, *supra* note 4, at 225.

theoretically and analytically stuck in an endless circle, “at the edge of a chasm between government speech and the public forum.”⁴⁴ The courts agree that penalties, not subsidies, allow the government to monopolize the marketplace of ideas. Determining the difference between the two is the ambiguous part.

In his article, “Leaving Things Undecided,” Cass Sunstein argued that the Court sometimes writes “incompletely theorized agreements” in which it decides the case but leaves to subsequent courts the task of explaining how the decision fits into the existing doctrinal and theoretical framework.⁴⁵ This has certainly happened with *Finley*. District and Circuit courts have faltered under the weight of the government speech doctrine, their own rationales stretched in trying to determine what constitutes a penalty and what is a mere refusal to fund. At its basic level, a penalty occurs when the government opens a forum for expression, then closes it for certain speakers. A refusal to fund can be two-fold: the government can pick and choose certain speakers to convey its message, or it can close a forum as long as it does so in a viewpoint-neutral manner.

It should be noted that many cases have cited the *Finley* precedent. This article does not seek to outline all 78 cases that have done so. Many of them use Justice O’Connor’s definition of a “facial challenge.”⁴⁶ Others vary, using *Finley* to clarify minor definitions⁴⁷ or to illustrate

⁴⁴ Bezanson and Buss, *supra* note 12, at 1381.

⁴⁵ Cass R. Sunstein. *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 20-25 (1996).

⁴⁶ *McGuire v. Reilly*, 260 F.3d 36 (2001); *Spingola v. Vill. of Granville*, 39 Fed. Appx. 978 (2002); *New Orleans Towing Ass’n v. City of New Orleans*, 2000 U.S. Dist. LEXIS 1550 (2000).

⁴⁷ *Microsoft Corp. v. United Computer Res. of N.J., Inc.*, 216 F. Supp. 2d 383 (2002) (defining “sporkin”); *Marche’ v. Parrachak*, 2000 U.S. Dist. LEXIS 14804 (2000) (defining “chutzpah”); *City of Los Angeles v. United States DOC*, 307 F.3d. 859 (2002) (defining “consideration”).

overbreadth or vagueness challenges.⁴⁸ The cases this article examines, however, are those that use *Finley* within the government speech doctrine, and specifically, 15 cases that concern subsidized speech when the government acts as speech facilitator.

These cases fall into two categories. First, the government has attempted to use *Finley* to discriminate against viewpoints and content with which it disagrees, most notably in *Brooklyn Institute v. Giuliani*,⁴⁹ *Esperanza v. City of San Antonio*,⁵⁰ and *United Foods Commercial Workers Union v. Southwest Ohio Regional Transit Authority*.⁵¹ In all three cases, however, the courts distinguished the government's broad application of *Finley* and held that under the Supreme Court's narrow rationale, the government could not discriminate according to viewpoint.⁵² The feared "invidious discrimination," at least from the judicial side, has not occurred.

The second line of cases are neither solely the government's speech nor solely private, but a "hybrid speech of both."⁵³ Within these 12 cases, there are three general categories: when the government is primarily responsible for the speech, when private speakers are primarily responsible, and when responsibility cannot be fully determined. These cases include expression

⁴⁸ *Smith v. Mount Pleasant Pub. Schs.*, 2003 U.S. Dist. LEXIS 17639 (2003) ("vagueness"); *King Enters v. Thomas Twp.*, 215 F. Supp. 2d 891 (2002) ("vagueness"); *Commodity Trend Serv. v. CFTC*, 149 F.3d 679 (1998) ("overbreadth"); *Ruggiero v. FCC*, 317 F.3d 239 (2003) ("overbreadth").

⁴⁹ *Brooklyn Institute of Arts & Scis. v. City of New York and Rudolph W. Giuliani*, 64 F. Supp. 2d 184 (1999).

⁵⁰ *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 2001 U.S. Dist. LEXIS 6259 (2001).

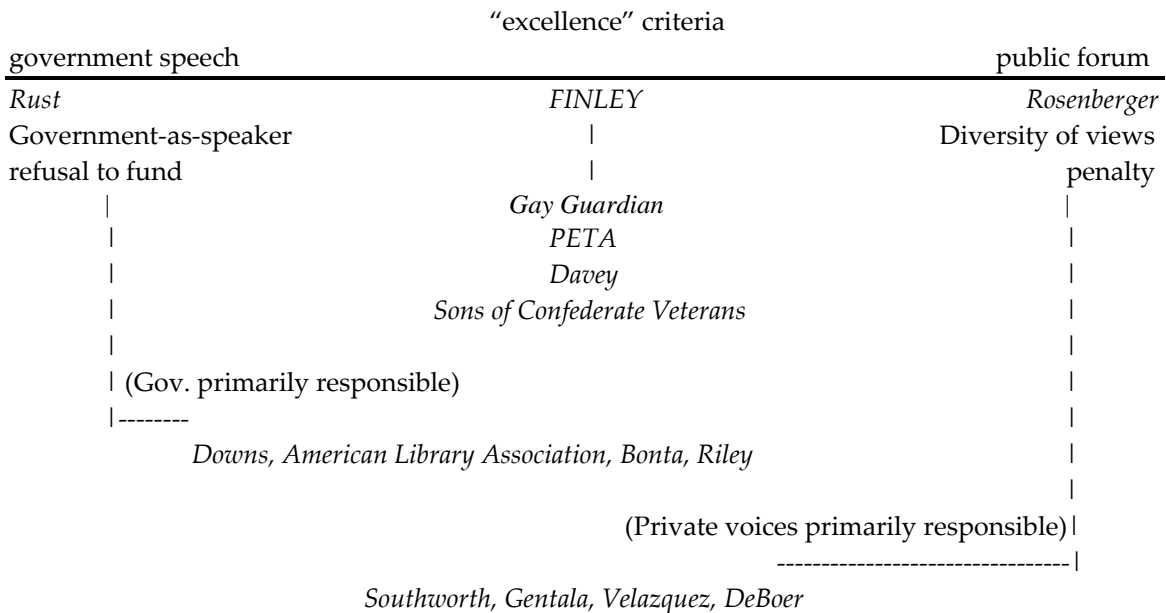
⁵¹ *United Foods Commercial Workers Union v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341 (1998).

⁵² *Brooklyn*, *supra* note 115, at 53-54; *Esperanza*, *supra* note 116, at 62; *Id.* at 356.

⁵³ *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV*, 305 F.3d 241, 245 (2002) (Luttig, J., concurring in respect to a denial of rehearing en banc, arguing that the speech at issue is neither exclusively private or exclusively government, but rather, a "hybrid speech of both").

in library lobbies⁵⁴ and computers,⁵⁵ city parks⁵⁶ and parades,⁵⁷ courtrooms,⁵⁸ and license plates,⁵⁹ among others. It may be helpful to think of these cases along a continuum. Purely government speech would constitute one end of the spectrum and purely private speech would be on the opposite end. None of the cases within the *Finley* universe are completely on one end or the other, but rather occupy various points along this continuum.

Figure 1.
The government speech doctrine schema



⁵⁴ *Gay Guardian*, *supra* note 104.

⁵⁵ *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003).

⁵⁶ *DeBoer v. Village of Oak Park*, 267 F.3d 558 (2001).

⁵⁷ *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294 (2000).

⁵⁸ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

⁵⁹ *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV*, 288 F.3d 610 (2002).

Although the government will always use *Finley* in its attempt for greater discrimination over the speech it facilitates, this article will argue that *Finley* is particularly applicable in the third category, the purely “hybrid” cases, which are in the middle of this continuum. As in *Finley*, however, the question of whether a government action constitutes a penalty or a mere refusal to fund is still the determining factor, and the Supreme Court has left it up to the lower courts to decide this difference for themselves.

IV. Case Analysis

A. Three Attempts to Penalize Viewpoints

It is true that the *Brooklyn* and *Esperanza* cases are fairly straightforward examples of First Amendment violation.¹ New York District Judge Nina Gershon and San Antonio District Judge Orlando Garcia both immediately recognized the pertinent question: Whether the government can engage in viewpoint discrimination within its funding programs.² The answer, from both judges, was a resounding no. Sixth Circuit Judge Karen Moore, though not ruling in an arts funding matter in *UFCW*, also recognized that a government entity, in her case a public transit authority, could not engage in viewpoint discrimination once it had decided to fund private voices.³

In *Brooklyn*, the city of New York, acting with Mayor Giuliani, argued that it had the right to eject the Brooklyn Museum from public land solely on its perception of an artwork's content in the "Sensation" exhibit, and that the First Amendment did not prohibit them from refusing to subsidize artworks that were offensive and "religiously intolerant."⁴ In *Esperanza*, the city of San

¹ Vosburgh, *supra* note 4, at 223.

² *Esperanza*, *supra* note 116, at 39. (Garcia, J., "Having noted that the City cannot discriminate against an arts organization based on its viewpoint, the Court must next decide whether the City actually did so.")

³ *UFCW*, *supra* note 117, at 361. (Moore, J., "We therefore must carefully examine whether the advertising policy's prohibition conceivably could lead SORTA's officials to reject a proposed advertisement because of the viewpoint expressed, a power they do not have under the First Amendment.")

⁴ *Brooklyn*, *supra* note 115, at 193. Mayor Giuliani argued, "You don't have a right to a subsidy to desecrate someone else's religion. And therefore we will do everything that we can to remove funding from the [museum] until the director comes to his senses and realizes that if you are a government subsidized enterprise, then you can't do things that desecrate the most personal and deeply held views of the people in society." *Id.* at 191. The mayor, an outspoken Catholic, defended his decision to terminate funding for the museum based largely on Ofili's portrait of the Virgin Mary, which used elephant dung as one of its materials. There were small

Antonio argued that it could refuse funding to arts organizations that “advocated a gay and lesbian lifestyle” in order to appease a public that disagreed with that message.⁵

Both cities asked the courts to apply *Finley*, arguing that the Court’s ruling permitted viewpoint discrimination in subsidizing the arts. Both Gershon and Garcia rejected this interpretation of *Finley*, calling that reliance on *Finley* “misplaced”⁶ and “mistaken,”⁷ because *Finley* made it “crystal clear that viewpoint discrimination in subsidy programs was not permissible.”⁸ The only reason the decency and respect clause was constitutional was because the Court interpreted it as merely advisory and not permitting viewpoint discrimination.⁹ Although *Finley* did allow the government considerable discretion to fund programs that have competitive selection criteria like arts programs, this action was constitutional only “so long as

photographs of buttocks and female genitalia scattered on the background as well. See also W.J.T. Mitchell, “Offending Images,” *Unsettling “Sensation”: Arts-Policy Lessons from the Brooklyn Museum of Art Controversy*. Laurence Rothfield, ed. (2001).

⁵ *Esperanza*, *supra* note 116, at 15-16. These accusations came primarily from conservative Christian groups. During August and early September 1997, Christian talk-radio host Adam McManus undertook radio and lobbying effort to oppose City funding for Esperanza, and he interviewed several council members on his program. Martha Breeden, executive director of the Christian Pro-Life Foundation, sent a flyer to about 1,200 people on the mailing list urging opposition to City funding for Esperanza because she opposed the City funding a gay and lesbian program. Most council members received letters and phone calls. One member said the opposition calls he had received were mean and vicious, with callers threatening to vote against him and have their families, neighbors, and churches do the same if he voted to fund the plaintiffs. The council voted to defund those arts organizations entirely, the only organizations to lose all their funding. *Id.* at 18-22.

⁶ *Brooklyn*, *supra* note 115, at 202.

⁷ *Esperanza*, *supra* note 116, at 61.

⁸ *Id.* at 60 (quoting *Finley*, *supra* note 3, at 587 (“even in the provision of subsidies, the Government may not ‘aim at the suppression of dangerous ideas...”)) (quoting *Regan*, *supra* note 81, at 550).

⁹ *Brooklyn*, *supra* note 115, at 202.

legislation did not infringe on other constitutionally protected rights..."¹⁰ In *Brooklyn* and *Esperanza*, however, the government engaged in obvious and egregious penalization of particular viewpoints. This, the courts ruled, was unconstitutional.

Judge Moore also interpreted *Finley* on narrow grounds in *UFCW v. SORTA*, ruling that an advertising policy that prohibited "controversial" ads was unconstitutional because it would vest the government entity with an "impermissible degree of discretion."¹¹ SORTA had refused a bus advertisement for United Foods Commercial Workers Union (UFCW) after its members held a protest and used the buses to carry union members to and from the protest.¹² Moore applied *Finley's* argument that vague terms like "decency" and "respect," and in this case, "controversial" would raise concerns as part of a regulatory, as opposed to a funding, scheme.¹³ The policy's broad prohibition against "controversial" advertisements would, she concluded, chill expressive activity.

What was clear from the two arts cases is that both cities attempted to penalize grant recipients because of their content or viewpoint expressed. Clearly, neither case passes constitutional muster. It is interesting to note, however, that the government tried to apply Scalia's concurring opinion in *Finley* — a broad, overreaching interpretation of the case — to its own. Both judges rejected this interpretation of *Finley* and instead, applied O'Connor's narrow

¹⁰ *Finley*, *supra* note 3, at 588; *Esperanza*, *supra* note 116, at 61-62.

¹¹ *UFCW*, *supra* note 117, at 359 (quoting *Finley*, *supra* note 3, at 569). Judge Moore ruled that SORTA's advertising policy was vague and clearly regulatory in nature. *Id.* at 360 (ruling that the advertising Policy invited "subjective or discriminatory enforcement" by allowing the government to speculate the amount of impact a controversial advertisement may have).

¹² *Id.* at 346-347.

¹³ *Id.* at 360.

ruling. *UFCW* was decided a mere six months after *Finley*, and Moore, with an opportunity to grant governmental entities more discretion regarding a vague term such as “controversial,” refused to do so and applied the *Finley* rationale against broad government speech rights.

Where *Finley* has been more contested has been in the area of “hybrid speech,” in which the government provides a forum for speech indirectly and when governmental penalties on speech are less direct.

B. “Hybrid Speech”

The lower courts, to whom the Supreme Court has left the decision to formulate the jurisprudence for the government speech doctrine, have been outspoken about having no real precedent to follow.¹⁴ They complain that the Court has spoken in terms that are “remarkably open-ended” and that they, as judges, cannot acknowledge the government speech doctrine “without also expressing ... serious reservations about its undefined and open-ended nature.”¹⁵ Especially difficult for judges is the nebulous nature of forum analysis. The hybrid nature of government/private collaborations has rendered forum analysis a torturous exercise for the courts. The *Gay Guardian v. Ohoopee Regional Library* court, unable to comfortably designate the library lobby either a limited forum or a nonpublic forum, gave up and called it a “hybrid limited/nonpublic forum.”¹⁶ The District Court in *PETA v. Giuliani* was equally flummoxed. “To say that the ambiguities described have left this Court benumbed and bewildered is only

¹⁴ *Gay Guardian*, *supra* note 104; *PETA*, *supra* note 123; *Sons of Confederate Veterans*, *supra* note 119.

¹⁵ *R. J. Reynolds v. Bonta*, 272 F. Supp. 2d 1085, 1101 (2003).

¹⁶ *Gay Guardian*, *supra* note 104, at 1370. The court went on to ask rhetorically whether their decision would ultimately repress speech. “Such questions make lawyers rich and law reviews thick. Judges, meanwhile, must draw lines in the shifting sands of First Amendment law.” *Id.* at 1379.

modestly overstated.”¹⁷ In *Sons of Confederate Veterans v. Comm’r of the Va. DMV*, the court also bemoaned the dearth of clear doctrine, saying “No clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is ‘speaking’ and thus able to draw viewpoint-based distinctions...”¹⁸ That court, at the denial of an en banc rehearing, also labeled the government/private collaboration a “hybrid speech.”¹⁹ Scholars such as Leslie Gielow Jacobs have tried to reconcile the hybrid speech conundrum, arguing that “disentangling” government speech from private speech is much more difficult than sterile doctrinal categories will allow.²⁰ The “real-life manifestations” are less clear.²¹ Jacobs suggests looking at who is “primarily responsible” for the speech.²² Most hybrid speech, by definition, will include a volatile mixture of private and government expression, and the 12 cases within the *Finley* universe of hybrid speech demonstrate that it is sometimes easier to categorize cases by whether the speech is “primarily” private or governmental. This section explores the depths of this continuum.

1. When the Government Is Primarily Responsible

In all subsidized speech cases, the courts must answer two questions. First, whose speech is it? Is it primarily the government’s speech or has the government opened a forum for private

¹⁷ *PETA*, *supra* note 123, at 300.

¹⁸ *Sons of Confederate Veterans*, *supra* note 125, at 618.

¹⁹ *Sons of Confederate Veterans*, *supra* note 119, at 245 (*rehearing en banc denied*).

²⁰ Leslie Gielow Jacobs. *Article: Who’s Talking? Disentangling Government Speech and Private Speech*, 36 U. MICH. J.L. REF. 35 (2002).

²¹ *Id.* at 35.

²² *Id.* at 43-55.

expression? In four cases within the *Finley* universe, the courts ruled that the government was “opening up its own mouth.”²³ These cases follow the *Rust* rationale. In *Downs v. Los Angeles Unified School District*, the Ninth Circuit decided that the First Amendment did not compel a public high school to share the podium with a teacher with antagonistic and contrary views when the school had decided to speak.²⁴ The school board, quite clearly, sought to convey messages of tolerance towards gays and lesbians and had no obligation to allow a teacher to contradict its message. In *United States v. American Library Association*, the U.S. Supreme Court held, in a plurality opinion, that the government could refuse funding for libraries that refused to install Internet pornography filtering software on their computers, in accordance with the Children’s Internet Protection Act.²⁵ Congress also had an agenda — to limit children’s access to pornography on library computers, and it enacted CIPA to further this goal by deciding to refuse to fund libraries that did not install Internet filtering software. The other two cases — *R.J. Reynolds v. Bonta*²⁶ and *Summit Medical Center v. Riley*²⁷ — were obvious instances of

²³ *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1012 (2000).

²⁴ *Id.* at 1005. The Los Angeles School District had issued a memorandum to the public schools designating the month of June as “a time to focus on gay and lesbian issues” and would provide posters and materials for school bulletin boards in support of Gay and Lesbian Awareness Month. Robert Downs, a teacher, objected to the recognition of Gay and Lesbian Awareness Month and created his own bulletin board titled “Redefining the Family” across the hall from his classroom. He posted portions of the Declaration of Independence, newspaper articles and excerpts from Bible verses denouncing homosexuality, statements regarding the immorality of homosexuality, and quotes arguing that the anatomical structures of men and women indicate that they were made for each other. *Id.* at 1005-1007.

²⁵ *American Library Association*, *supra* note 121.

²⁶ *Bonta*, *supra* note 140. California imposed a tax, approved by California citizens, on tobacco wholesalers and providers in order to fund their anti-smoking campaign.

²⁷ *Summit Medical Center v. Riley*, 284 F. Supp. 2d 1350 (2003). Alabama charged abortion providers a fee, which would provide the revenue to produce videos and pamphlets encouraging childbirth over abortion.

government speech, since they both involved the government imposing taxes and fees on private entities to fund government programs with which these private speakers disagreed.

The second question, then, is to what extent can the government control its speech when it is speaking? Once the courts have determined that the government itself is primarily responsible for the speech, the government is granted wide latitude to discriminate according to viewpoint or content when the government itself is the speaker. Three factors play a pivotal role, in descending importance: first, alternative channels must exist for expression outside the government forum. Second, the government should be able to prove it has a compelling interest as justification for the speech restrictions. Last and not least, democratic alternatives should be available for the private speakers to choose different elected representatives. If these conditions apply, the government may pick and choose which programs it wishes to subsidize and which expression it will allow. Penalization is difficult to prove when the government is primarily responsible for the expression. *Downs* represents the clearest example of this within the *Finley* universe, where the anti-gay teacher asked the court to apply *Rosenberger*. The court instead applied *Rust*, ruling that “simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.”²⁸ Since the school district had not opened a forum for private expression, it could decide “that *Downs* may not speak as its representative.”²⁹ The court cited *Finley* in that it upheld government rights when it controls its speech. Though perhaps not exactly what Justice Scalia had in mind when he wrote his concurring opinion in *Finley*, the Ninth Circuit applied his reasoning to *Downs*: “It is the very business of government to favor and disfavor points of view...”³⁰

²⁸ *Downs*, *supra* note 148, at 1013.

²⁹ *Id.*

Likewise, the Supreme Court in *American Library Association* applied the *Finley* and *Rust* rationale and distinguished *Rosenberger* because the “broad discretion” involved in making grant decisions was analogous to public libraries making collection decisions.³¹ The government was not encouraging a diversity of speakers, but rather advocating a specific position. It was impossible for libraries to surrender First Amendment rights, the Court argued, because, as governmental entities, they do not *have* First Amendment rights.³² Congress was merely insisting, by refusing to fund those libraries that disagreed with its message, that the funds be spent for the purposes for which they were authorized.³³ The government’s action, importantly, also would fulfill a compelling interest — to protect children from pornography.

The other two cases, *Bonta* and *Riley*, illustrate the limitations of government speech even when it is the speaker, namely, the government cannot force private speakers to convey a message with which they disagree. In *Bonta*, a district court held that California’s voter-approved policy of charging a tax on cigarette wholesalers in order to fund anti-smoking campaigns was constitutional.³⁴ *Bonta*, however, stands out as the anomaly in the *Finley* universe, relying heavily on the fact that the voters had approved the tax, rather than whether the tax severely abridged the tobacco companies’ speech. It should have applied the rationale of *Riley*, a similar case, in which a district court in Alabama held that the state’s direct fee on abortion providers to pay for anti-abortion materials was unconstitutional.³⁵

³⁰ *Id.* at 1014 (quoting *Finley*, *supra* note 3, at 598 (Scalia, J., concurring)).

³¹ *American Library Association*, *supra* note 121, at 2304.

³² *Id.* at 2307 (emphasis added).

³³ *Id.* at 2308.

³⁴ *Bonta*, *supra* note 140, at 1085.

³⁵ *Riley*, *supra* note 152, at 1353-1354.

The *Bonta* court held that the government had not opened a forum for a diversity of opinion, and using the *Downs* rationale, determined correctly that the government was primarily responsible for the advertisements.³⁶ The court argued that the government had instituted the tax for a specific purpose, to advocate an anti-smoking lifestyle, and therefore had wide latitude to discriminate against expression.³⁷ The court, however, wrongly applied the Supreme Court decision *Board of Regents v. Southworth*³⁸ ruling, which held that the government, when advancing its own policies, is accountable to the electorate and that “newly elected officials later could espouse some different or contrary positions.”³⁹ The court cited Scalia’s assertion that the government could have many instances in which it is required to take a side and advocate a position. The government also had a compelling interest: working toward saving the state \$5.6 billion a year in health care costs related to smoking-related illnesses.⁴⁰

Riley got right what *Bonta* got wrong. Although the *Bonta* court made many salient points, it failed to recognize that *Southworth* was a case of a university charging a fee in order to open a viewpoint-neutral forum for diverse opinions. The *Riley* court conceded that the government could use tax revenue and fees and put them to any particular purpose in order to govern effectively, even though citizens may disagree with the message content.⁴¹ The court also

³⁶ *Bonta*, *supra* note 140, at 1100 (quoting *Downs*, *supra* note 148, at 1011-1012) (ruling that because the bulletin board material was directly traceable to the school district, the school was responsible for the speech and could choose not to speak or speak “through the very act of removal” of adversarial materials from its hallways).

³⁷ *Id.* at 1101.

³⁸ *Board of Regents v. Southworth*, 529 U.S. 217 (2000).

³⁹ *Id.* at 1103 (quoting *Southworth*, *supra* note 163, at 235).

⁴⁰ *Id.* at 1088.

⁴¹ *Riley*, *supra* note 152, at 1359.

allowed that *Finley* held that it was the very business of government to favor and disfavor points of view.⁴² The government had crossed the line, however, by not only advocating a position, but by charging a direct fee on those private speakers who disagreed with the government's position.⁴³ The government action, at that point, moved beyond a mere refusal to fund speech it found objectionable, but exacted a penalty on it. And that, *Riley* held, was unconstitutional. *Bonta's* reliance on the citizen vote that agreed to the tax vested the government with too much power to punish views.⁴⁴ First Amendment rights are not majority votes.

Downs and *American Library Association* represent the position that the government can refuse to fund certain expression or refuse to allow certain expression to take place if it has a particular program it is advocating. The government has merely refused to fund certain types of speech on the basis that it does not fit in the program the government is advocating. *Bonta* and *Riley* rest on the other side of the continuum, ruling that private speaker cannot be penalized for their views. The government went beyond merely refusing to fund them. It actively required payment to fund speech that they found objectionable.

2. When Private Voices Are Primarily Responsible

Private expression is primarily responsible when the government seeks to create a forum

⁴² *Finley*, *supra* note 3, at 598 (Scalia, J., concurring).

⁴³ *Riley*, *supra* note 152, at 1360. "The State has interfered with the Plaintiff's free speech rights by compelling them to contribute money that is subsequently used to fund government speech that the Plaintiffs find objectionable." *Id.*

⁴⁴ *Bonta* also relies superficially on Justice Souter's dissenting opinion in *Finley*, in which he uses anti-smoking campaign as an example when the government can advocate a position without advocating the alternative. Souter, however, says nothing about charging tobacco companies to fund those positions. *Finley*, *supra* note 3, at 610-611 (Souter, J., dissenting) ("The government is of course entitled to engage in viewpoint discrimination: if the Food and Drug Administration launches an advertising campaign on the subject of smoking, it may condemn the habit without also having to show a cowboy taking a puff on the opposite page.").

to include a diversity of viewpoints. Although determining this purpose is sometimes contentious,⁴⁵ the cases within the *Finley* universe bear out that when the government extends itself into the private sphere to allow for diverse viewpoints, it may not discriminate on the basis of viewpoint in a way that would drive certain ideas out of the marketplace. These cases apply forum analysis and the *Rosenberger* rationale. The government can set content-neutral time, place, and manner restrictions on fora that it creates, but viewpoint discrimination is unconstitutional in any forum.

Board of Regents v. Southworth is the least contentious example of this side of the *Finley* continuum. In *Southworth*, the Court held that a public university could, under the First Amendment, charge students a mandatory student activity fee that is used to fund a program to facilitate free and open exchange of student speech that is viewpoint-neutral and engaged in religious, political, and social subjects.⁴⁶ In *Legal Services Corporation v. Velazquez*, the United States Supreme Court held that Congress' denial of funding to lawyers who represented indigent clients' attempt to change or modify existing welfare law was unconstitutional.⁴⁷ Both programs, the Court argued, were designed to facilitate discussion from a diversity of speakers. In *Southworth*, the school had protected the speech rights of objecting students in two ways: it made the funding viewpoint-neutral and allowed for funding or defunding based on a majority vote from the students. The court rejected the government speech doctrine laid out in *Rust* and applied *Rosenberger* because the university was not advancing a particular message but rather

⁴⁵ *Velazquez*, *supra* note 124.

⁴⁶ *Southworth*, *supra* note 164, at 217.

⁴⁷ *Velazquez*, *supra* note 124.

fostering viewpoint-neutral expression for its students.⁴⁸ *Velazquez*, a much more contentious case, differed from a case like *American Library Association*, a case where the Court upheld funding denials, in three ways: the government had a specific and compelling interest when it enacted the Children’s Internet Protection Act at issue in *American Library Association*. Second, lawyers and their clients were private speakers, not government entities, and third, the subsidies were designed to help those who could not normally afford legal counsel. Unlike *Rust*, the majority argued, “There may be no alternative source of vital information ... where a person could receive both governmentally subsidized counseling and consultation.”⁴⁹ The majority rejected the dissent’s argument that the denial of a subsidy does not “coerce belief,”⁵⁰ and held that the denial of subsidy designed for indigent populations would in fact drive ideas from the marketplace.⁵¹

Two other cases reside in the “primarily private” side of the continuum, and both involve the relationship of the government speech doctrine to the Establishment Clause, just like *Rosenberger*. Not surprisingly, both cases sought to apply *Rosenberger* to their case. In *Gentala v. Tucson*, the Ninth Circuit decided that a city should not be required, using tax funds and public employees, to provide funding for a religious organization’s prayer service held in a local park.⁵² The city did not stop the Prayer Committee from holding its prayer service in the park, but the organizers wanted the city to cover \$340 worth of lighting and sound equipment, the fee for which the city charges groups who want to use it.⁵³ By contrast, the *DeBoer v. Oak Park* case serves

⁴⁸ *Southworth*, *supra* note 164, at 218.

⁴⁹ *Velazquez*, *supra* note 124, at 536.

⁵⁰ *Id.* at 552 (Scalia, J., dissenting) (quoting *Lyng v. Automobile Workers*, 485 U.S. 360, 369 (1988)).

⁵¹ *Id.* at 548.

⁵² *Gentala v. City of Tucson*, 244 F. 3d 1065 (2001).

as the opposite of *Gentala*.⁵⁴ The DeBoers were denied access to a public hall for their National Day of Prayer activities, as opposed to the Gentalas denial of funding.⁵⁵ The Seventh Circuit overturned the district court's ruling that the activities were not "civic" enough and that the Oak Park's Use Policy was viewpoint-discriminatory because it denied access in a viewpoint-discriminatory manner, making forum analysis irrelevant.⁵⁶ Citing *Finley* and *Rosenberger*, the court held that Oak Park could not penalize the expression of particular views.⁵⁷ But in *Gentala*, the court cited the line of reasoning from *Rust* in *Finley*, holding that the government was involved in a communicative activity and was afforded a degree of viewpoint selection criteria, or selectivity, when dispensing funds.⁵⁸ Along the imaginary continuum, the courts drew a line between allowing a religious organization access to a public forum and funding a religious organization's activities in a public park. The difference between a penalty and a refusal to fund was the difference between access and funding.

3. When Responsibility Cannot Be Determined

It should surprise no one that within the *Finley* universe, cases would cite both *Rust* and *Rosenberger*. *Finley* certainly has aspects of both. Where the previous two categories fail, however, is in the truly hybrid category. And it is here that *Finley* is most helpful. These four cases refute simple categorization to determine when the government or private voices are primarily

⁵³ *Id.* at 1067-1068, 1070-1071. The city often provided this equipment free of charge for various civic organizations, but, in the case of the Gentalas' National Day of Prayer activities, funding the equipment would be the equivalent of "paying the church's bills." *Id.* at 1071.

⁵⁴ *DeBoer*, *supra* note 122.

⁵⁵ *Id.* at 561-562.

⁵⁶ *Id.* at 567.

⁵⁷ *Id.* at 583.

⁵⁸ *Gentala*, *supra* note 177, at 1073.

responsible, and they are the ones most like *Finley*. When *Finley* was decided, the Supreme Court distinguished it from its closest counterpart, *Rosenberger*, arguing that the excellence criteria in *Finley* was selective enough to keep out too many voices for it to be clearly labeled a forum for a diversity of speakers. All four cases that follow have a level of selectivity that, if the courts had applied the excellence criteria at issue in *Finley*, would have saved several ink cartridges. One case would have been decided correctly.⁵⁹ The *Finley* application would allow the government greater discretion when excellence or selective criteria is involved.

Of the four cases, *Gay Guardian v. Ohoopee Regional Library System* is the clearest example.⁶⁰ The court upheld a library's decision to restrict the free literature table in its lobby to only government and library materials after receiving complaints about a gay rights publication, "The Gay Guardian."⁶¹ A court in New York expanded on this decision in *PETA v. Giuliani*, where a district court held that the city could refuse the animal-rights group's display for the Cow Parade because it was "inappropriate," "aggressively political," "profane," and "too graphic and violent" for public display in public parks and on school property, where the public at large and of all ages would encounter it without seeking it out.⁶² The courts ruled in both cases that the government could open a forum to the public and then close it solely to avoid disruption and litigation over issues, even if viewpoint discrimination drove all or part of that decision.⁶³

Both courts agonized over what type of forum the government had created, and both were unable to come to a satisfactory decision.⁶⁴ The forum analysis in excellence criteria cases is

⁵⁹ *Sons of Confederate Veterans, Inc.*, *supra* note 125.

⁶⁰ *Gay Guardian*, *supra* note 104.

⁶¹ *Id.* at 1362.

⁶² *PETA*, *supra* note 123.

⁶³ *Gay Guardian*, *supra* note 104, at 1362.

tangential at best, and is an exercise in futility most of the time. Since these cases involve funding or space allotment, the government entity should be afforded a degree of discretion. Egregious viewpoint discrimination is unconstitutional in any forum. Both *Gay Guardian* and *PETA* held that, as long as there were alternative channels of information,⁶⁵ the government could, having created a hybrid forum, “constitutionally close it, even with censorious intent, where the resulting effect is content-neutral.”⁶⁶ The *PETA* case ostensibly only affected one group, however. The *PETA* court did cite *Finley* for its justification that when the government establishes selective criteria, it may exercise broad discretion in its selection judgments,⁶⁷ but both courts emphasized that the private speakers also must have alternative channels of communication. The *Gay Guardian* court reasoned that the newspaper was widely read on the Internet, and librarians could direct people to the site once in the library (though perhaps after the *American Library Association* decision, people would have to ask the librarians to remove the filters as well).⁶⁸ The library, the court argued, simply chose a low-cost, conflict-avoiding maneuver — that of affecting all private groups equally. The *PETA* members were certainly free to post their message wherever they wanted outside the Cow Parade. They could post it mere feet away from the

⁶⁴ *Id.* at 1370; *PETA*, *supra* note 123, at 300.

⁶⁵ *Id.* at 1368 (quoting *Kreimer v. Bureau of Police*, 958 F. 2d 1242, 1262 (1992) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

⁶⁶ *Id.* at 1379.

⁶⁷ *PETA*, *supra* note 123, at 321 (quoting *Finley*, *supra* note 3, at 569, 589) (arguing that “when the government acts as a patron allocating competitive grants to the arts according to legislative criteria, First Amendment concerns somewhat analogous to those presented here frequently arise...Inevitably, such imprecise criteria allow for the government exercise of broad discretion and subjective judgments.”). The guidelines set up for the Cow Parade were viewpoint neutral, the court contended, not against just *PETA* but against any religious, political, or sexual expression. *Id.* at 321.

⁶⁸ *American Library Ass’n*, *supra* note 121.

forum the government had designated. Since the parade organizers had accepted one of the designs, PETA could not prove egregious viewpoint discrimination.

In a similar case, *Locke v. Davey*, decided in February 2004, the Supreme Court upheld Washington's scholarship denial to a student seeking a theology degree.⁶⁹ *Davey* also asked the Court to apply *Rosenberger*, contending that the state's restrictions were unconstitutional viewpoint restrictions on speech. The majority, however, distinguished *Rosenberger*, arguing that the Promise Scholarship was not a forum for speech.⁷⁰ It was not designed to "encourage a diversity of views from private speakers."⁷¹ Yet the Promise Scholarship did not wholly encourage private expression because it was only extended to students in the top 15 percent of their class. This excellence criteria necessarily eliminated 85 percent of the other students who wished to partake in this forum. The Court should have applied the excellence criteria in *Finley*. Although the Court reached the correct decision, it failed to articulate a clear precedent for its decision, except to distinguish the cases that *Davey* sought to apply. *Finley* should have been that precedent.

In *Sons of Confederate Veterans v. Commissioner of Virginia Department of Motor Vehicles*, the Fourth Circuit ruled the logo restriction on Virginia's specialty license plates, which would have prohibited the display of the Confederate flag, was unconstitutional.⁷² The court argued that the logo was private speech, and although they considered the selective criteria rationale at issue in *Finley*, the court held that the restriction was viewpoint discrimination because it impermissibly

⁶⁹ *Locke v. Davey*, 2004 U.S. LEXIS 1626 (2004).

⁷⁰ *Id.* at 15. (Pagination subject to change pending release of the final published version.)

⁷¹ *Id.* at 15. *American Library Association*, *supra* note 121, at 206 (quoting *Rosenberger*, *supra* note 7, at 834).

⁷² *Sons of Confederate Veterans*, *supra* note 125.

burdened the speech rights of only one speaker in the forum.⁷³ In a 6-5 decision to deny a rehearing of the decision en banc, in which three judges wrote concurring opinions and two judges wrote dissenting opinions, the majority held that though the General Assembly approved over one hundred special plates, the Sons of Confederate Veterans plate was the only one with design or logo restrictions. “When a legislative majority singles out a minority viewpoint in such pointed fashion, free speech values cannot help but be implicated.”⁷⁴ Again, forum analysis is inconsequential. The Supreme Court, wrongly, “has never held that a message can be both that of a private individual and that of the government.”⁷⁵ In this case, “the forum and the message are essentially inseparable, making it difficult, if not impossible, to separate what is indisputably private speech act from what is indisputably government speech.”⁷⁶

The license plates, though an expression of a personal viewpoint, were still the property of the government, and the court should have applied *Finley*. The state was not enlisting a diversity of speakers, so the private speakers were not primarily responsible. To receive a specialty license plate was like a reward, much like being awarded a spot in the Cow Parade, or a Promise Scholarship. The state of Virginia allowed only 100 plates out of surely many more civic groups and organizations, like the Promise Scholarship, which was available only to students who were in the top 15 percent of their class. All of these criteria are highly embedded in process. Although the Cow Parade, a Promise Scholarship, or Virginia’s specialty plate requirements are

⁷³ *Id.* at 625.

⁷⁴ *Sons of Confederate Veterans*, *supra* note 119 (*rehearing en banc denied*).

⁷⁵ *Id.* at 245 (Luttig, J., concurring).

⁷⁶ *Id.*

not as selective as an NEA grant, they require more than just filling out a form for access. All three are the equivalent of a reward, and the courts should not treat denying a reward like a penalty.

Sounding eerily like Scalia, one dissenting judge wrote, “Those who wish to display the Confederate Flag logo, even on their motor vehicles, remain free to do so. They are merely deprived of the right to demand that the Commonwealth of Virginia endorse their message by issuing license plates containing that logo.”⁷⁷ There are alternative channels for the Sons of Confederate Veterans, and there is no evidence that their speech will be hindered. Virginia had simply set limitations as part of its guidelines. The government, however, cannot close a forum unless it is viewpoint neutral. This sets *Sons of Confederate Veterans*, *PETA*, *Davey*, and *Gay Guardian* apart from *Brooklyn*, *Esperanza*, and *UFCW*.

⁷⁷ *Id.* at 250 (Niemeyer, J., dissenting).

V. Conclusion

Despite all the hand-wringing about the *Finley* decision when it came out, the decision has not had as much of an adverse effect on First Amendment expression as originally thought. The Mapplethorpe and Serrano controversies, however, did affect the NEA. One could easily argue that the *Finley* decision was part of a chilling effect on artists and artistic expression since Congress, as part of the NEA's punishment, revoked all grants to individual artists. Perhaps this is one reason the NEA has not had a *Finley*-like scenario since then – the artists who wish to *épater les bourgeois* know better than to apply for a federal grant.¹ The NEA is being praised at the present time for its conservative funding decisions, such as funding the works of Shakespeare. In this sense, *Finley* stands as an example of a chilling effect.

The Court, however, attempted to decide the case as narrowly as possible, and mitigated some of the potential negative results by doing so. It essentially made the best decision it could, by taking the teeth out of the decency and respect clause and keeping the prospect of funding for the arts intact. The courts have rejected the government's attempts to use *Finley* as a tool for censorship of unwanted speech. It should be noted, however, that the government's actions in the name of *Finley* in cases like *Brooklyn* and *Esperanza* should give everyone pause. The action that the Brooklyn Institute and *Esperanza* had to take just to receive their funding should never have been necessary. That the courts ruled in favor of the private voices is a testament to the First Amendment.

¹ Mulcahy, *supra* note 30, at 220. The interests of public support for the arts cannot be well served when public arts agencies appear to support aesthetic values that are seen to be deeply at odds with the moral and religious beliefs of a significant proportion of the public. ... The balance sought is to have a public culture that is not an official culture. The solution would seem to rest with basing public support for the arts on a policy of cultural pluralism that recognizes the diversity of expressions of artistic excellence and respects the autonomy of artists and the art world, while also respecting the diverse beliefs and traditions of the American people. *Id.* at 224.

Within the hybrid speech forum, the four truly “hybrid” cases within the *Finley* universe should have applied (or did apply) the selective criteria argument found in *Finley*. The courts ruled in *Gay Guardian* and *PETA* that the government had created a forum for speech and could close or limit it as long as the effect was viewpoint-neutral, even if the intent was viewpoint-discriminatory.² The government could, however, set prior limits on the speech it allowed to take place in its own limited space. *PETA* could take its cow parts and plant them all along the sidewalk if it wished, and *Gay Guardian* could publish and distribute the newsletter, but neither could force the government to allow their expression where the government had already set viewpoint-neutral limits. This was the rationale of the Court in *Finley*.³ The Cow Parade was a competition and the library by necessity ruled out certain voices. Both cases, like *Finley*, were unable to come up with a definite type of forum that the government had created. In hybrid expression, the type of forum becomes inconsequential, because the selective criteria makes it similar to a limited public forum but not quite a nonpublic forum, rendering the three types of fora delineated by the Court practically useless. The Promise Scholarship in *Davey* was also selectively based, as were the specialty license plates in *Sons of Confederate Veterans*, and the courts should have applied *Finley* to both because of the competitive nature of the forum.

To what extent can the government engage in viewpoint discrimination? Although the government cannot engage in viewpoint discrimination when a diversity of views are at stake, the government can, if the speaker, close off certain avenues if the effect is viewpoint-neutral. If the government is granting expression on a competitive basis, it should be able to selectively

² *Gay Guardian*, *supra* note 104, at 1379.

³ *Finley*, *supra* note 3, at 569.

discriminate among private speakers, so long as there are alternate channels of expression available and the government is not usurping the market. There is no evidence that this will abridge anyone's speech. The irony is that what was widely held as such a loathsome decision five years ago, *National Endowment for the Arts v. Finley* may be the clearest hope for discerning the hybrid speech minefield of today.

REFERENCES

¹ 135 Cong. Rec. S5594 (daily ed. May 18, 1989). Sen. D'Amato said, "Mr. President, several weeks ago, I began to receive a number of letters, phone calls, and postcards ... concerning artwork by Andres Serrano. They express a feeling of shock, of outrage, and anger... I am somewhat reluctant to utter its title. This so-called piece of art is a deplorable, despicable display of vulgarity. The artwork in question is a photograph of the crucifix submerged in the artist's urine." See e.g., Kim Shipley. *Comment: The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms*. 40 EMORY L.J. 241, 241 (1991) (observing that the distinction between the right of free speech and the privilege of subsidization to facilitate free speech is such that subsidized expression is accorded less First Amendment protection).

² Boston Globe, July 12, 1990, at 74, col. 5.

³ *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

⁴ Kristine M. Cunnane. *Note: Maintaining Viewpoint Neutrality for the NEA: National Endowment for the Arts v. Finley*. 31 CONN. L. REV. 1445, 1446 (1999) ("The *National Endowment for the Arts v. Finley* holding essentially invited government censorship wherever public funds flow. This significantly threatens the First Amendment rights of American citizens."); See also Gary Allison. *Symposium: The Cultural War over NEA Funding: Illogical Statutory Deconstruction Erodes Expressive Freedom*. 34 TULSA L.J. 233 (1999) ("...the majority's solution produces the worst First Amendment consequences. It hints at an outrageous expansion of government-as-speaker doctrine."); Eric Cleary. *Note: In Finley's Wake: Forging a Viable First Amendment Approach to the Government's Subsidization of the Arts*. 68 FORDHAM L. REV. 965 (1999) ("Both viewpoint discrimination analysis and the unconstitutional conditions doctrine do not account for the role of funded institutions in the process of self-government. This failure threatens to undermine the First Amendment core principle of preserving the marketplace of ideas."); David Hungerford. *Note: The Fallacy of Finley, Public Fora, Viewpoint Discrimination, and the NEA*. 33 U.C. DAVIS L. REV. 249 (1999) ("The *Finley* decision promotes a much more expansive view ... than that to which the Court had previously subscribed."); Matthew Mustokoff. *Note: The National Endowment for the Arts v. Finley: Striking a Balance Between Art and the State or Sealing the Fate of Viewpoint Neutrality?* 9 TEMP. POL. & CIV. RTS. L. REV. 135 (1999) ("While governments are in the business of making funding decisions for the public interest, they must not be permitted to be sophic ventriloquists who offer funding to the full spectrum of private expression, only to hide behind the guise of a vague statutory standard and deny substantial financial support to those artists whose viewpoints threaten hegemonic values."); Robert Vosburgh. *Comment: Government Subsidies of Controversial Art: Dung, The Virgin Mary, and Rudy Giuliani*. 11 TEMP. POL. & CIV. RTS. L. REV. 221 (2001) ("Particularly in the area of artistic expression, such a furtherance of the government's agenda is directly at odds with the nature of a duplicitous democracy."); Neil C. Patten. *Note: The Politics of Art and the Irony of Politics: How the Supreme Court, Congress, the NEA, and Karen Finley Misunderstand Art and Law In National Endowment for the Arts v. Finley*. 37 HOUS. L. REV. 559 (2000) ("Clearly the Court's decision in *Finley* will have a chilling effect on artistic expression.").

⁵ Patten, *supra* note 4, at 562.

⁶ *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁷ *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

⁸ Patten, *supra* note 4, at 585.

⁹ *Id.* at 597 (citing *Finley*, *supra* note 3, at 621, Souter, J., dissenting). “In the world of NEA funding, this is so because the makers or exhibitors of potentially controversial art will either trim their work to avoid anything likely to offend, or refrain from seeking NEA funding altogether.”

¹⁰ *Id.* at 597-598 (citing *Finley*, *supra* note 3, at 622, Souter, J., dissenting).

¹¹ Jay Rosenthal, “Music Industry Should Rally Against NEA Ruling,” 110 *Billboard* 32 (1998) (predicting that the “overwhelming Supreme Court support for the proposition that viewpoint discrimination is constitutional” would empower those who were trying to criminalize “offensive” rap and popular music).

¹² Stuart Taylor, Jr. *Savoring Judicial Fudge*. 220:3 N.Y. L. J. 2 (1998); Steven J. Heyman. *Article: State-Supported Speech*. 1999 WIS. L. REV. 1119 (1999); Randall P. Bezanson and William G. Buss. *Article: The Many Faces of Government Speech*. 86 IOWA L. REV. 1377 (2001); Editorial, “Art and the First Amendment,” *Washington Post*, June 26, 1998, at A26; Lackland H. Bloom, Jr. *Article: NEA v. Finley: A Decision in Search of a Rationale*. 77 WASH. U.L. Q.1, 1 (1999).

¹³ The Catholic League for Religious and Civil Rights, House Speaker Newt Gingrich and the Family Research Council praised it as a victory for common sense and decency. The ACLU released a press release entitled, “ACLU sees silver lining in court’s ruling for funding for the arts.” See Douglas McClennon, “Supreme Court Ruling on Decency Leaves Everybody Claiming Victory,” *Seattle Post-Intelligencer*, July 6, 1998.

¹⁴ Taylor, *supra* note 12, at 2.

¹⁵ Heyman, *supra* note 12, at 1129.

¹⁶ *Id.* at 1178.

¹⁷ Cleary, *supra* note 4, at 1007.

¹⁸ Heyman, *supra* note 12, at 1179-1180.

¹⁹ Bezanson and Buss, *supra* note 12, at 1455.

²⁰ Editorial, “Art and the First Amendment,” *Washington Post*, June 26, 1998, at A26.

²¹ Taylor, *supra* note 12, at 2.

²² Bloom, *supra* note 12, at 1.

²³ *Id.* at 2.

²⁴ Bezanson and Buss, *supra* note 12, at 1454.

²⁵ Bloom, *supra* note 12, at 1-2.

²⁶ *Id.*

²⁷ Taylor, *supra* note 12, at 2.

²⁸ Whether artists are censoring themselves from the NEA, however, is a different topic, and one outside the purview of this article. One could argue that artists are being less controversial, thus resulting in fewer cases involving censorship. This article assumes that position is untrue and, as will be discussed later, in the context of the culture wars, censorship issues in the arts are alive and well.

²⁹ Thomas Leff. *Article: The Arts: A Traditional Sphere of Free Expression? First Amendment Implication of Government Funding to the Arts in the Aftermath of Rust v. Sullivan*. 45 AM. U.L. REV. 353, 361-362 (1995). Leff notes that much of artistic patronage came from aristocrats such as Benjamin Franklin, a lifelong patron of the arts who founded the United States' first library, first hospital, and the Pennsylvania Academy of the Arts. Other forms of patronage came from the emerging upper-class, people such as Cornelius Vanderbilt, Solomon Guggenheim, John Rockefeller, J.P. Morgan and Andrew Mellon. See also Linda A. Mellina. *Note: Decency v. The Arts: And The Winner Is ... The National Endowment for the Arts?* 29 SETON HALL L. REV. 1513, 1517 (1999) (arguing that the Finley decision is troubling because of the history of support for the arts and the viewpoint-discriminatory nature of the decency and respect clause).

³⁰ See National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, 2, 79 Stat. 845 (1965) (codified as amended at 20 U.S.C. § 951-959 (1994)) This Act also established the National Council on the Arts, the National Endowment for the Humanities, the Federal Council on the Arts and Humanities, and the Institute of Museum Services. For an in-depth account of the formation and regulations of the NEA, and the underlying rationale and political pressures concomitant with a national cultural policy, see Kevin Mulcahy and Margaret Wyzomirski, *America's Commitment to Culture*, 1995. See, generally, Michael Brenson. *Visionaries and Outcasts: The NEA, Congress, and the Place of the Visual Arts in America* (2001); Mellina, *supra* note 29, at 1517.

³¹ See 20 U.S.C. § 954(a). Congress explained the role of the National Foundation on the Arts and Humanities as follows:

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

(11) To fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people, the Federal Government must transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art.

Cunnane, *supra* note 4, at 1447; Constance Hofland, *Case Comment: Constitutional Law – First Amendment – Freedom of Speech: The National Endowment for the Arts Can Require Consideration of “Decency and Respect” in Funding Decisions Without Abridging Freedom of Speech*. 75 N. DAK. L. REV. 893, 894 (1999) (arguing that the decency and respect clause, in the context of the NEA's mission, was acceptable criteria, but the courts should not use the provision to aim at the suppression of ideas).

³² 20 U.S.C. § 951(5) (1994).

³³ 20 U.S.C. § 953(c) (1994).

³⁴ 20 U.S.C. § 954(c) (1994).

³⁵ See 20 U.S.C. 954(c) (1)-(10) (1994); Hofland, *supra* note 31.

³⁶ See 20 U.S.C. 959(c) (1994). NEA panels were expected to avoid the problems associated with some New Deals arts programs by offering advice informed by “neutral competence,” rather than politics or ideology. Instead of insulating public funding for the arts from partisan or ideological interference, however, the panels system stood accused of imposing its minoritarian cultural values on the American public. During the 1990 reauthorization hearings, the panels were the subject of persistent attention. The main criticism was that the NEA maintained a system of advisory panels that was exclusive and incestuous, composed of individuals from a small number of cultural centers who shared similar aesthetic values and who promoted each other’s artistic interests and careers. See Kevin Mulcahy, “The Public Interest and Arts Policy,” *America’s Commitment to Culture*, *supra* note 30, at 212, 218.

³⁷ See 111 Cong. Rec. H23969 (1965) (Cong. Monagan responding that government “will supply the money, but the artists and their organizations will suggest the proposals ... and do all the planning.”). 111 Cong. Rec. H23665 (1965) (Rep. Annunzio stating, “Government support of the arts and humanities is not to replace private initiative, reduce private responsibility, or restrict artistic freedom.”). Cunnane, *supra* note 4, at 1449.

³⁸ Finley, *supra* note 3, at 574.

³⁹ John H. Garvey. *Black and White Images*. 56 LAW & CONTEMP. PROBLEMS 189 (1993); Cleary, *supra* note 4; Mellina, *supra* note 29; Shipley, *supra* note 1; Renee Linton. *Comment: The Artistic Voice: Is It in Danger of Being Silenced?* 32 CAL. W.L. REV. 195 (1995); See generally, Wendy Steiner, *The Scandal of Pleasure*, The University of Chicago Press (1995).

⁴⁰ Finley, *supra* note 3, at 574.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Garvey, *supra* note 39 at 190-191.

⁴⁵ *Id.*

⁴⁶ 135 Cong. Rec. S5594 (daily ed. May 18, 1989). “I have a catalog of the show and Senators you need to see it to believe it,” Senator D’Amato said. “This is not a question of free speech. This is a question of abuse of taxpayer’s money. If we allow this group of so-called art experts to get away

with this, to defame us and to use our money, well, then we do not deserve to be in office.” Shipley, *supra* note 1, at 241.

⁴⁷ 135 Cong. Rec. at S5595.

⁴⁸ 135 Cong. Rec. S5594 (daily ed. May 18, 1989). “I do not know Mr. Andres Seranno (sic), and I hope I never meet him. Because he is not an artist, he is a jerk” (Helms statement). Of Mapplethorpe, Sen. Helms said, “His exhibit endangered Federal funding for the arts because the patently offensive collection of homo-erotic pornography and sexually explicit nudes of children was put together with the help of a \$30,000 grant from the Endowment...”

⁴⁹ 137 Cong. Rec. 23,464 (1991) (Sen. Helms’ statement).

⁵⁰ Cleary, *supra* note 4, at 965; Mellina, *supra* note 29, at 1518; Linton, *supra* note 39, at 202.

⁵¹ 135 Cong. Rec. S8862 (daily ed. July 26, 1989).

⁵² *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774 (1991).

⁵³ *Finley*, *supra* note 3, at 574-575.

⁵⁴ *Id.* at 575.

⁵⁵ *Id.*

⁵⁶ *Id.* at 576; See also 136 Cong. Rec. 28656-28657 (1990).

⁵⁷ *Id.*

⁵⁸ 20 U.S.C. § 954(d) (1994).

⁵⁹ *Id.*

⁶⁰ *Finley*, *supra* note 3, at 577.

⁶¹ More specifically, Karen Finley, in her show “We Keep Our Victims Ready,” smears her semi-nude body with chocolate, which is supposed to look like excrement while recounting a sexual assault in graphic terms. Holly Hughes’ monologue “World Without End” is a recollection of her realization of her lesbianism and memories of her mother’s sexuality. John Fleck’s performance consists of urination on stage while putting a photograph of Jesus Christ on the lid of a toilet. He also simulates masturbation. Tim Miller uses vegetables to represent sexual symbols and recounts his life as a homosexual living with the threat of AIDS. *Finley*, *supra* note 3, at 596 (Scalia, J., concurring); William H. Honan, “Judge Overrules Decency Statute,” N.Y. Times, June 10, 1992, at A1.

⁶² *Finley*, *supra* note 3, at 569, 577-578.

⁶³ In 1989, Frohnmayer had already revoked a \$10,000 grant to the Artists Space, a New York gallery. The grant had been awarded by the NEA to fund an AIDS exhibit entitled, "Witnesses: Against Our Vanishing." Frohnmayer decided to revoke the grant solely on the exhibit's political content, arguing that the exhibition had changed its focus after the grant had been approved. The arts community cried censorship, included Leonard Bernstein, who threatened to refuse the Presidential Medal of the Arts in protest, despite the fact that President Bush was scheduled to present him the award that week. See N.Y. Times, Nov. 19, 1989, Sect. 2, at 1, col. 1; Shipley, *supra* note 1, at 244.

In 1992, the NEA's advisory council was accused of content-based disapproval of two grants. Both grants involved sexually explicit visual materials that were a part of the applicants' overall applications, one by a "bastion of avant-garde art" Franklin Furnace in which the performer invited an audience member to rub lotion over her nude body. The other application by Highways in Los Angeles contained 25 homoerotic photographs, some of them of men engaged in oral sex. Even though the panels were rarely overturned, the NEA argued that the applications were denied on artistic merit. Later, the new NEA chairperson admitted she had overturned the recommendations of NEA expert advisors said she was acting to keep Congress from dismantling the NEA. See Kim Masters, "Arts Agency Rejects 2 Grants; Chairman Questions 'In Your Face' Tactics," Washington Post, Feb. 4, 1992, at D1. See also Kim Masters, "NEA Chief Defends Grant Vetoes; Further Conflict Likely, Radice Says," Washington Post, May 29, 1992, at D1; Allison, *supra* note 4, at 258-259.

⁶⁴ Finley, *supra* note 4, at 569.

⁶⁵ *Id.* at 578-579.

⁶⁶ *Id.* at 569.

⁶⁷ Linton, *supra* note 39, at 214.

⁶⁸ Dan Mayer. *The Religious Right and Arts Funding*, 21 J. ARTS MGMT. & L. 341, 344 (1992). In April 1991, at a hearing held by the House Appropriations Interior Subcommittee, Reverend Sheldon said, "There is a war raging in America...The elitist avant-garde arts community uses the NEA to advertise and disseminate their political beliefs. The NEA then uses our scarce tax dollars to fund works which are intended to shock Americans into an acceptance of dysfunctional behavioral lifestyles and to destroy the family." See also statements by Sen. D'Amato, *supra* note 46. Linton, *supra* note 39, at 217.

⁶⁹ *Buckley v. Valeo*, 424 U.S. 1 (1976) (ruling that virtually every congressional appropriation will to some extent involve using public money to promote policies to which some taxpayers may object); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (ruling that taxpayer money may be used to promote views on public radio with which they may disagree). Voters do not have a constitutionally protected right to enjoin those expenditures to which they object, nor could that interest be invoked to justify a congressional decision to suppress speech. *Id.* at 385. Linton, *supra* note 39, at 214-216.

⁷⁰ Tom Sine. *Cease Fire: Searching for Sanity in America's Culture Wars*, Grand Rapids, MI: William B. Eerdmans Publishing Company, (1995).

⁷¹ *Id.* at 16-17. The most visible part of the reborn conservative movement was Pat Robertson's Christian Coalition. Since it was founded in October 1989, this organization dedicated to conservative political action has reportedly garnered a mailing list of over 30 million and an active membership of over 1.5 million. The Christian Coalition, having learned from the failure of the religious right during the 80s to shape national policy, shifted its focus to influencing politics on the local level.

⁷² Elaine B. Sharp, ed. *Culture Wars and Local Politics*. "Introduction," by Elaine B. Sharp. University Press of Kansas, 1999. Elaine B. Sharp, page 3) See also James Davison Hunter. *Culture Wars*. New York: Basic Books, 1991. See also Kenneth J. Meier, *The Politics of Sin: Drugs, Alcohol, and Public Policy*. Armonk, N.Y.: M.E. Sharpe, p. 7, 1994.

⁷³ Hunter, *supra* note 72.

⁷⁴ *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

⁷⁵ *Id.* at 2496-2497 (Scalia, J., dissenting).

⁷⁶ Robert Bork, "Courts and the Culture Wars," *Courts and the Culture Wars*, Bradley C.S. Watson, ed. p. 4-5. Lanham, Maryland: Lexington Books, 2002.

⁷⁷ Bradley C.S. Watson, "Introduction," *Courts and the Culture Wars*, Bradley C.S. Watson, ed., p. xiii, Lanham, Maryland: Lexington Books, 2002.

⁷⁸ Marjorie Heins, *Sex, Sins, and Blasphemy: A Guide to America's Censorship Wars* 5 (1993). She discusses several contributing factors to the art crisis, including the problem of scapegoating speech for social ills. Typically, this is a breeding ground for those who want to distract attention from social ills by attacking artists and other dissenters. Another is an American distrust of cultural elites and academics. See also Lewis Hyde, "The Children of John Adams: A Historical View of the Fight Over Arts Funding," *Art Matters: How the Culture Wars Changed America*, Brian Wallis, ed., (1999); Linton, *supra* note 39, at 202.

⁷⁹ Joan Bikuspic. "'Decency' Can Be Weighed in Arts Agency's Funding," *Washington Post*, June 26, 1998, at A1.

⁸⁰ Taylor, *supra* note 12, at 2.

⁸¹ *Id.*

⁸² *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding the IRS' denial of TWR's application for tax-exemption on the grounds that much of their work would consist of lobbying, something not allowed by 501(c)(3) status. The Court held that the regulations were viewpoint-neutral and that TWR could establish an affiliate to lobby on its behalf without a tax subsidy.).

⁸³ *Id.* at 548, quoting *Speiser v. Randall*, 357 U.S. at 513, 519 (1958) (in which veteran's benefits were denied to those who refused to swear they did not advocate the violent overthrow of the government). The Court found no indication that the statute was intended to suppress any ideas or any demonstration to that effect. Rehnquist argued that when government subsidies were not

aimed at the suppression of ideas, its power was broader. *Id.* at 544; *Buckley*, *supra* note 69; *Maier v. Roe*, 432 U.S. 464 (1977).

⁸⁴ *Rust*, *supra* note 6.

⁸⁵ *Id.* at 173.

⁸⁶ *Id.* at 193.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 207-208 (Blackmun, J., dissenting). The doctrine of unconstitutional conditions finds its precedent in *Speiser*, *supra* note 83, at 518-519, in which veteran's benefits were denied to those who refused to swear they did not advocate the violent overthrow of the government. The doctrine holds that the government may not predicate the receipt of a grant in order to forfeit one's constitutional rights, or, the government may not penalize their employees by reducing their First Amendment rights. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech ... The denial is 'frankly aimed at the suppression of dangerous ideas,'" (quoting *American Communications Assn. V. Douds*, 339 U.S. 382, 402 (1950)).

⁹⁰ *Rosenberger*, *supra* note 7.

⁹¹ *Id.* at 829-830. The public forum doctrine received its sharpest elucidation in *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). The Court developed three categories of fora: the traditional public forum, usually any public land where the government has allowed open discourse, such as a park or sidewalk; the limited public forum, limited to a certain class of speakers for whom the forum was designed, such as a university's bulletin board for students; and last, the nonpublic forum, the most restrictive forum, which is usually a limited forum but must be narrowed in order to maintain the original purpose of the forum, like a lecture series at a university that cannot accommodate every student who attends the university. Viewpoint discrimination is unconstitutional in any forum.

⁹² *Id.* at 833.

⁹³ *Finley*, *supra* note 3, at 586.

⁹⁴ *Id.* at 590.

⁹⁵ *Id.* at 580-581.

⁹⁶ *Id.* at 595 (Scalia, J., concurring) (quoting *Regan*, *supra* note 82, at 549). "It is the very nature of government to favor and disfavor points of view ... None of this has anything to do with abridging anyone's speech." *Id.* at 598. Scalia applied the *Rust* rationale. "Avant-garde artistes ... remain entirely free to *épater les bourgeois*; they are merely deprived of the addition satisfaction of

having the bourgeoisie taxed to pay for it. ... It is preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the suppression of dangerous ideas'" *Id.* at 596.

⁹⁷ *Id.* at 604 (Souter, J., dissenting).

⁹⁸ *Id.* at 611 (Souter, J., dissenting).

⁹⁹ Bloom, *supra* note 12, at 23.

¹⁰⁰ Allison, *supra* note 4, at 264.

¹⁰¹ Bloom, *supra* note 12, at 26.

¹⁰² *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) (concerning a state public television commission's ability to select participants in a political debate); *Finley*, *supra* note 3, at 569 ("when the government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe").

¹⁰³ Randall P. Bezanson. *Article: The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*. 83 IOWA L. REV. 953, 962 (arguing that the danger is that the government as speaker enjoys broader powers of discretion, and without proper guidelines to know the difference, the Court may be investing the government with more power than it should have).

¹⁰⁴ *Gay Guardian v. Ohoop Regional Library*, 235 F. Supp. 2d 1362, 1379 (2002).

¹⁰⁵ *Finley*, *supra* note 3, at 613 (Souter, J., dissenting); *Rosenberger*, *supra* note 7, at 833-834.

¹⁰⁶ *Rust*, *supra* note 6, at 173; *Arkansas Writer's Project v. Ragland*, 481 U.S. 221, 237-238 (1987) (Scalia, J., dissenting).

¹⁰⁷ *Finley*, *supra* note 3, at 586.

¹⁰⁸ Heyman, *supra* note 12, at 1180.

¹⁰⁹ Vosburgh, *supra* note 4, at 225.

¹¹⁰ Bezanson and Buss, *supra* note 12, at 1381.

¹¹¹ Cass R. Sunstein. *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 20-25 (1996).

¹¹² *McGuire v. Reilly*, 260 F.3d 36 (2001); *Spingola v. Vill. of Granville*, 39 Fed. Appx. 978 (2002); *New Orleans Towing Ass'n v. City of New Orleans*, 2000 U.S. Dist. LEXIS 1550 (2000).

¹¹³ *Microsoft Corp. v. United Computer Res. of N.J., Inc.*, 216 F. Supp. 2d 383 (2002) (defining "sporkin"); *Marche' v. Parrachak*, 2000 U.S. Dist. LEXIS 14804 (2000) (defining "chutzpah"); *City of Los Angeles v. United States DOC*, 307 F.3d. 859 (2002) (defining "consideration").

¹¹⁴ *Smith v. Mount Pleasant Pub. Schs*, 2003 U.S. Dist. LEXIS 17639 (2003) (“vagueness”); *King Enters v. Thomas Twp.*, 215 F. Supp. 2d 891 (2002) (“vagueness”); *Commodity Trend Serv. v. CFTC*, 149 F.3d 679 (1998) (“overbreadth”); *Ruggiero v. FCC*, 317 F.3d 239 (2003) (“overbreadth”).

¹¹⁵ *Brooklyn Institute of Arts & Scis. v. City of New York and Rudolph W. Giuliani*, 64 F. Supp. 2d 184 (1999).

¹¹⁶ *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 2001 U.S. Dist. LEXIS 6259 (2001).

¹¹⁷ *United Foods Commercial Workers Union v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341 (1998).

¹¹⁸ *Brooklyn*, *supra* note 115, at 53-54; *Esperanza*, *supra* note 116, at 62; *Id.* at 356.

¹¹⁹ *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. DMV*, 305F.3d 241, 245 (2002) (Luttig, J., concurring in respect to a denial of rehearing en banc, arguing that the speech at issue is neither exclusively private or exclusively government, but rather, a “hybrid speech of both”).

¹²⁰ *Gay Guardian*, *supra* note 104.

¹²¹ *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003).

¹²² *DeBoer v. Village of Oak Park*, 267 F.3d 558 (2001).

¹²³ *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294 (2000).

¹²⁴ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

¹²⁵ *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. DMV*, 288 F.3d 610 (2002).

¹²⁶ *Vosburgh*, *supra* note 4, at 223.

¹²⁷ *Esperanza*, *supra* note 116, at 39. (Garcia, J., “Having noted that the City cannot discriminate against an arts organization based on its viewpoint, the Court must next decide whether the City actually did so.”)

¹²⁸ *UFCW*, *supra* note 117, at 361. (Moore, J., “We therefore must carefully examine whether the advertising policy’s prohibition conceivably could lead SORTA’s officials to reject a proposed advertisement because of the viewpoint expressed, a power they do not have under the First Amendment.”)

¹²⁹ *Brooklyn*, *supra* note 115, at 193. Mayor Giuliani argued, “You don’t have a right to a subsidy to desecrate someone else’s religion. And therefore we will do everything that we can to remove funding from the [museum] until the director comes to his senses and realizes that if you are a government subsidized enterprise, then you can’t do things that desecrate the most personal and deeply held views of the people in society.” *Id.* at 191. The mayor, an outspoken Catholic, defended his decision to terminate funding for the museum based largely on Ofili’s portrait of

the Virgin Mary, which used elephant dung as one of its materials. There were small photographs of buttocks and female genitalia scattered on the background as well. See also W.J.T. Mitchell, "Offending Images," *Unsettling "Sensation": Arts-Policy Lessons from the Brooklyn Museum of Art Controversy*. Laurence Rothfield, ed. (2001).

¹³⁰ *Esperanza*, *supra* note 116, at 15-16. These accusations came primarily from conservative Christian groups. During August and early September 1997, Christian talk-radio host Adam McManus undertook radio and lobbying effort to oppose City funding for *Esperanza*, and he interviewed several council members on his program. Martha Breeden, executive director of the Christian Pro-Life Foundation, sent a flyer to about 1,200 people on the mailing list urging opposition to City funding for *Esperanza* because she opposed the City funding a gay and lesbian program. Most council members received letters and phone calls. One member said the opposition calls he had received were mean and vicious, with callers threatening to vote against him and have their families, neighbors, and churches do the same if he voted to fund the plaintiffs. The council voted to defund those arts organizations entirely, the only organizations to lose all their funding. *Id.* at 18-22.

¹³¹ *Brooklyn*, *supra* note 115, at 202.

¹³² *Esperanza*, *supra* note 116, at 61.

¹³³ *Id.* at 60 (quoting *Finley*, *supra* note 3, at 587 ("even in the provision of subsidies, the Government may not 'aim at the suppression of dangerous ideas...") (quoting *Regan*, *supra* note 81, at 550).

¹³⁴ *Brooklyn*, *supra* note 115, at 202.

¹³⁵ *Finley*, *supra* note 3, at 588; *Esperanza*, *supra* note 116, at 61-62.

¹³⁶ *UFCW*, *supra* note 117, at 359 (quoting *Finley*, *supra* note 3, at 569). Judge Moore ruled that SORTA's advertising policy was vague and clearly regulatory in nature. *Id.* at 360 (ruling that the advertising Policy invited "subjective or discriminatory enforcement" by allowing the government to speculate the amount of impact a controversial advertisement may have).

¹³⁷ *Id.* at 346-347.

¹³⁸ *Id.* at 360.

¹³⁹ *Gay Guardian*, *supra* note 104; *PETA*, *supra* note 123; *Sons of Confederate Veterans*, *supra* note 119.

¹⁴⁰ *R. J. Reynolds v. Bonta*, 272 F. Supp. 2d 1085, 1101 (2003).

¹⁴¹ *Gay Guardian*, *supra* note 104, at 1370. The court went on to ask rhetorically whether their decision would ultimately repress speech. "Such questions make lawyers rich and law reviews thick. Judges, meanwhile, must draw lines in the shifting sands of First Amendment law." *Id.* at 1379.

¹⁴² *PETA*, *supra* note 123, at 300.

¹⁴³ *Sons of Confederate Veterans*, *supra* note 125, at 618.

¹⁴⁴ *Sons of Confederate Veterans*, *supra* note 119, at 245 (*rehearing en banc denied*).

¹⁴⁵ Leslie Gielow Jacobs. *Article: Who's Talking? Disentangling Government Speech and Private Speech*, 36 U. MICH. J.L. REF. 35 (2002).

¹⁴⁶ *Id.* at 35.

¹⁴⁷ *Id.* at 43-55.

¹⁴⁸ *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1012 (2000).

¹⁴⁹ *Id.* at 1005. The Los Angeles School District had issued a memorandum to the public schools designating the month of June as “a time to focus on gay and lesbian issues” and would provide posters and materials for school bulletin boards in support of Gay and Lesbian Awareness Month. Robert Downs, a teacher, objected to the recognition of Gay and Lesbian Awareness Month and created his own bulletin board titled “Redefining the Family” across the hall from his classroom. He posted portions of the Declaration of Independence, newspaper articles and excerpts from Bible verses denouncing homosexuality, statements regarding the immorality of homosexuality, and quotes arguing that the anatomical structures of men and women indicate that they were made for each other. *Id.* at 1005-1007.

¹⁵⁰ *American Library Association*, *supra* note 121.

¹⁵¹ *Bonta*, *supra* note 140. California imposed a tax, approved by California citizens, on tobacco wholesalers and providers in order to fund their anti-smoking campaign.

¹⁵² *Summit Medical Center v. Riley*, 284 F. Supp. 2d 1350 (2003). Alabama charged abortion providers a fee, which would provide the revenue to produce videos and pamphlets encouraging childbirth over abortion.

¹⁵³ *Downs*, *supra* note 148, at 1013.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1014 (quoting *Finley*, *supra* note 3, at 598 (Scalia, J., concurring)).

¹⁵⁶ *American Library Association*, *supra* note 121, at 2304.

¹⁵⁷ *Id.* at 2307 (emphasis added).

¹⁵⁸ *Id.* at 2308.

¹⁵⁹ *Bonta*, *supra* note 140, at 1085.

¹⁶⁰ *Riley*, *supra* note 152, at 1353-1354.

¹⁶¹ *Bonta*, *supra* note 140, at 1100 (quoting *Downs*, *supra* note 148, at 1011-1012) (ruling that because the bulletin board material was directly traceable to the school district, the school was responsible for the speech and could choose not to speak or speak “through the very act of removal” of adversarial materials from its hallways).

¹⁶² *Id.* at 1101.

¹⁶³ *Board of Regents v. Southworth*, 529 U.S. 217 (2000).

¹⁶⁴ *Id.* at 1103 (quoting *Southworth*, *supra* note 163, at 235).

¹⁶⁵ *Id.* at 1088.

¹⁶⁶ *Riley*, *supra* note 152, at 1359.

¹⁶⁷ *Finley*, *supra* note 3, at 598 (Scalia, J., concurring).

¹⁶⁸ *Riley*, *supra* note 152, at 1360. “The State has interfered with the Plaintiff’s free speech rights by compelling them to contribute money that is subsequently used to fund government speech that the Plaintiffs find objectionable.” *Id.*

¹⁶⁹ *Bonta* also relies superficially on Justice Souter’s dissenting opinion in *Finley*, in which he uses anti-smoking campaign as an example when the government can advocate a position without advocating the alternative. Souter, however, says nothing about charging tobacco companies to fund those positions. *Finley*, *supra* note 3, at 610-611 (Souter, J., dissenting) (“The government is of course entitled to engage in viewpoint discrimination: if the Food and Drug Administration launches an advertising campaign on the subject of smoking, it may condemn the habit without also having to show a cowboy taking a puff on the opposite page.”).

¹⁷⁰ *Velazquez*, *supra* note 124.

¹⁷¹ *Southworth*, *supra* note 164, at 217.

¹⁷² *Velazquez*, *supra* note 124.

¹⁷³ *Southworth*, *supra* note 164, at 218.

¹⁷⁴ *Velazquez*, *supra* note 124, at 536.

¹⁷⁵ *Id.* at 552 (Scalia, J., dissenting) (quoting *Lyng v. Automobile Workers*, 485 U.S. 360, 369 (1988)).

¹⁷⁶ *Id.* at 548.

¹⁷⁷ *Gentala v. City of Tucson*, 244 F. 3d 1065 (2001).

¹⁷⁸ *Id.* at 1067-1068, 1070-1071. The city often provided this equipment free of charge for various civic organizations, but, in the case of the Gentilas' National Day of Prayer activities, funding the equipment would be the equivalent of "paying the church's bills." *Id.* at 1071.

¹⁷⁹ *DeBoer*, *supra* note 122.

¹⁸⁰ *Id.* at 561-562.

¹⁸¹ *Id.* at 567.

¹⁸² *Id.* at 583.

¹⁸³ *Gentala*, *supra* note 177, at 1073.

¹⁸⁴ *Sons of Confederate Veterans, Inc.*, *supra* note 125.

¹⁸⁵ *Gay Guardian*, *supra* note 104.

¹⁸⁶ *Id.* at 1362.

¹⁸⁷ *PETA*, *supra* note 123.

¹⁸⁸ *Gay Guardian*, *supra* note 104, at 1362.

¹⁸⁹ *Id.* at 1370; *PETA*, *supra* note 123, at 300.

¹⁹⁰ *Id.* at 1368 (quoting *Kreimer v. Bureau of Police*, 958 F. 2d 1242, 1262 (1992) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

¹⁹¹ *Id.* at 1379.

¹⁹² *PETA*, *supra* note 123, at 321 (quoting *Finley*, *supra* note 3, at 569, 589) (arguing that "when the government acts as a patron allocating competitive grants to the arts according to legislative criteria, First Amendment concerns somewhat analogous to those presented here frequently arise...Inevitably, such imprecise criteria allow for the government exercise of broad discretion and subjective judgments."). The guidelines set up for the Cow Parade were viewpoint neutral, the court contended, not against just PETA but against any religious, political, or sexual expression. *Id.* at 321.

¹⁹³ *American Library Ass'n*, *supra* note 121.

¹⁹⁴ *Locke v. Davey*, 2004 U.S. LEXIS 1626 (2004).

¹⁹⁵ *Id.* at 15. (Pagination subject to change pending release of the final published version.)

¹⁹⁶ *Id.* at 15. *American Library Association*, *supra* note 121, at 206 (quoting *Rosenberger*, *supra* note 7, at 834).

¹⁹⁷ *Sons of Confederate Veterans*, *supra* note 125.

¹⁹⁸ *Id.* at 625.

¹⁹⁹ *Sons of Confederate Veterans*, *supra* note 119 (*rehearing en banc denied*).

²⁰⁰ *Id.* at 245 (Luttig, J., concurring).

²⁰¹ *Id.*

²⁰² *Id.* at 250 (Niemeyer, J., dissenting).

²⁰³ Mulcahy, *supra* note 30, at 220. The interests of public support for the arts cannot be well served when public arts agencies appear to support aesthetic values that are seen to be deeply at odds with the moral and religious beliefs of a significant proportion of the public. ... The balance sought is to have a public culture that is not an official culture. The solution would seem to rest with basing public support for the arts on a policy of cultural pluralism that recognizes the diversity of expressions of artistic excellence and respects the autonomy of artists and the art world, while also respecting the diverse beliefs and traditions of the American people. *Id.* at 224.

²⁰⁴ *Gay Guardian*, *supra* note 104, at 1379.

²⁰⁵ *Finley*, *supra* note 3, at 569.

VITA

Born in Dalton, Georgia, James Gaddy still considers himself a native son of Louisiana. He graduated as valedictorian of his class at Ben's Ford Christian School in Bogalusa, Louisiana, with a 4.0 grade point average. He graduated *cum laude* from Louisiana State University in 2000 with a degree in English and a minor in art history. Unable to find suitable employment with his degree, he returned to Louisiana State University to gain a degree in journalism. He has always wanted to write, so he figured he could write and edit with a degree in journalism. Already fascinated by art and culture, his interest in funding for the arts and the National Endowment for the Arts has grown since his classes in cultural policy. He found that the Mapplethorpe and Serrano imbroglio contributed to the intense scrutiny of the NEA, and that scrutiny was unwarranted. His interest in communication law and the First Amendment also brought the NEA into his attention. The combination of these interests has culminated in this thesis. He intends to pursue his love for writing, learning, and journalism through magazines, and he will intern with Boston Magazine upon graduation.