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NATIONAL ENDOWMENT FOR THE ARTS v. FINLEY: Challenging the Facial Challenge

I. INTRODUCTION

The Federal government has long subsidized many of America's greatest treasures. Art is one of the primary beneficiaries of that funding. American culture has in many ways developed pursuant to organizations, programs, and interest groups sponsored through federal funds. Without these funds many valuable programs would dissolve and the innovations that shape our society would be lost. As to be expected, the question of what to subsidize and the conditions placed thereon has troubled the American people, Congress and the Courts. The Supreme Court has struggled with the question of, "How free is speech when the government pays?" Thus far, the Court has failed to provide a clear answer.

The gamut of government subsidized speech is too diverse to define one unified theory on how the government can control it. Art speech, subsidized by the government, must meet standards accepted by and representative of American values. The current members of the Supreme Court confronted a recent challenge regarding the constitutionality of this provision. The major issue before the Court was whether the government may control the content of art produced by artists receiving federal grants. The case arose from a facial challenge to a 1990 congressional amendment, codified at 20 U.S.C. § 954(d)(1). Applying the standards of a facial challenge, the Court dissected the advisory language guiding discretionary funding decisions. The advisory language was held constitutional on its face, however Justice O'Connor, writing for the majority, implied that the provision will be narrowed if, on a case-by-case basis, a court finds unconstitutional applications. Art is an institution that models American freedoms and, "gradu-

4. Justice Scalia in his concurring opinion states, "The operation was a success, but the patient died." Id. at 2180.
5. Id. at 2178.
ally cutting away the unconstitutional aspects of the statute by invalidating its improper applications case by case . . . does not respond sufficiently to the peculiarly vulnerable character of activities protected by the First Amendment."6 Indeed this leaves freedom of artistic expression and speech in a compromising position, but until a satisfactory solution exists the problem is only amenable to as-applied adjudication.7

This Note examines the facial challenge in National Endowment for the Arts ("NEA") v. Finley 8 and how an as-applied challenge may have produced a different outcome. In particular, this Note will analyze the inadequacy of a facial challenge to the "decency & respect" provision,9 and in the alternative how an as-applied challenge would have invalidated the provision when applied to artists such as the Respondents in Finley. In Part One, the majority opinion written by Justice O'Connor is reviewed. Part Two discusses the standards in which statutes may be constitutionally challenged: facial and as-applied. In Part Three, the facial challenge in Finley is contrasted against the standard of an as-applied challenge. Finally, Part Four demonstrates how in contrast to the facial challenge, the application of amended § 954(d)(1)10 will have unconstitutional results. The Supreme Court was correct in addressing the facial challenge. However, when the standards of an as-applied challenge are utilized, it is unequivocally clear that the statute compromises the very purposes and foundations on which Congress founded the NEA. Congress intended to promote artistic excellence, not to impose governmental control of the arts when it created the NEA.11

8. Finley, 118 S.Ct. 2168
10. Id.
11. "Congress has clearly indicated the NEA's purpose is to support a diverse array of artistic expression. Even the most cursory review of the NEA's enabling statute reveals this intent. In it's findings, Congress emphasized that a democracy must 'honor and preserve its multi-cultural artistic heritage as well as support new ideas' and declared its intent 'to help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry.' Finley v. Nat'l Endowment for the Arts, 100 F.3d. 671, 681 (1996) (citing 20 U.S.C. § 951 (10), (7) (1965)).
II. NEA v. FINLEY—THE CASE

The current members of the Supreme Court have struggled with the issue of federal funding on a case by case basis, leaving narrow guidelines and no solutions to the problem of government control over the speech it subsidizes. The question of how free is speech when the government pays has been raised at the post office, the park, streets, universities, but never in the context of a discretionary institution. The Finley Court confronted a new hurdle in the line of patronage cases: the impact advisory language has on funding decisions. The issue before the Finley Court was whether the advisory language of § 954(d)(1), on its face, interferes with First Amendment rights guaranteeing freedom of speech and expression through art.

A. NEA Background

The National Foundation on the Arts and Humanities Act of 1965 authorized the creation of the National Endowment for the Arts. The NEA was created as an institution to promote and foster the arts and humanities. Open inquiry and experimentation was the original spirit of the NEA and pursuant to such spirit, the Senate required that “in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression.” When the Endowment was created, President Lyndon Johnson emphasized the importance of funding artistic speech while at the same time limiting government interference. In response to this calling, a policy of noninterference

12. Farber, supra note 7, at 202-203.
16. Id.
18. “We fully recognize that no government can call artistic excellence into existence. It must flow from the quality of society and the good fortune of the nation. Nor should any government seek to restrict the freedom of the artist to pursue his calling in his own way.” 111 Cong. Rec. 4594 (1965); quoted in Projects,” National Endowment for the Arts,”Authorizing Legislation and Legislative History Regarding Non-interference in the Content of Projects (19XX).
was incorporated into the law creating the NEA. The law required that in the administration of the Act, no official or department of the United States shall exercise any direction, supervision, or control over the administration or operation. To insulate art from politics, institutional safeguards such as the unilateral acts of the Chairperson and National Arts Council were imposed on the decision-making process. The Chairperson, who ultimately makes the final decision, cannot approve funding without first receiving a positive recommendation from the National Arts Council. The initial administration of the grant program made decisions based upon the “artistic merit” of the grant proposals.

The NEA came under fire in 1989 after federal funds were issued to assist photography exhibits of Robert Mapplethorpe and Andres Serrano. In response to a conservative campaign to deny grants to dangerous or offensive art, Congress amended § 954(d) of the Act to include the “decency and respect” consideration at issue in Finley. The amended section now provides:

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

1. artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

The “decency and respect” clause was included as a direct response to the funding of art expressing viewpoints similar to

22. Id.
24. The controversial work of Robert Mapplethorpe was a photography exhibit considered to include homoerotic images and Andres Serrano’s “Piss Christ” was considered sacrilegious or blasphemous. See Steven C. Dubin, Arresting Images: Impolitic Art and Uncivil Actions 96-101, 176-179 (1992).
those expressed by Mapplethorpe and Serrano. The partisan clash over federal funding of the arts settled grounds by amending § 954(d)(1) to include the “decency and respect” considerations; more importantly without the amended provision conservatives would have teamed up to abolish the NEA. The strong attempt to insulate the arts from government control began to wear down and with the amended provision of “decency and respect” the envisioned dangers of government art became a reality.

B. Factual Basis and Procedural History

Performance artists Karen Finley, John Fleck, Holy Hughes, and Tim Miller applied for NEA grants before §954(d)(1) was enacted. After recommended approval of funding from the advi-

27. Senator Helms, in support of his amendment to prohibit the use of appropriated funds for the dissemination, promotion, or production of obscene or indecent materials, stated, “I believe we are all aware of the controversy surrounding the use of Federal funds, via the [NEA], to support so-called works of art by Andres Serrano and Robert Mapplethorpe. My amendment would prevent the NEA from funding such immortal trash in the future.” 135 Cong. Rec. S8762-01, (daily ed. July 26, 1989) (statement of Sen. Helms).

28. The dispute was whether “Congress should specify categories of art that could not be funded or instruct NEA to consider general standards of ‘decency and respect’ in judging the artistic merit of grant application. Congress settled on the latter.” Finley v. NEA, 100 F.3d 671, 677 (9th Cir. 1996), rev’d 118 S.Ct. 2168 (1998).

29. Ironically, the same day the Supreme Court held § 954(d)(1) valid on its face, the House Appropriations Committee reversed the decision of its subcommittee to remove funds from the agency. See Jacqueline Trescott, Groups Shiver at ‘Chilling Effect’: Plaintiff’s Warn of Consequences for Freedom of Expression, The Washington Post, June 26, 1998, at A18.

30. “Government art—art officially sanctioned and inoffensive, totally apolitical, and capable of pleasing all voters who make a practice of writing their representatives—is virtually guaranteed to be art that history quickly forgets. The endowment knew that by attempting the essentially dangerous undertaking of supporting and encouraging the best the arts had to offer, it was courting trouble and trouble came . . . .” Nicols Fox, NEA Under Siege, New Art Examiner, Summer (1989), reprinted in Richard Bolton, Culture War 48 (1992).

31. Finley, 100 F.3d at 671; The plaintiffs of this case have been nicknamed the “NEA 4”. Their rejected controversial performances are as follows: Karen Finley’s, “We Keep Our Victims Ready,” advances her “aggressive feminism”. The performance presents Finley in a multitude of personas, from male to female and victim to victimizer, while she exhorts tales of violence, sexual abuse, and racial hatred. Holly Hughes’ art advances lesbianism in her monologue “World Without End”. Artist Tim Miller aims to increase awareness and education of the homosexual community in his performance, “Some Golden
sory panel and Chairman Frohnmayer, a majority of the Council disapproved and denied funding to the artists.\footnote{32} The artists filed suit against the NEA, alleging violation of First Amendment rights, failure to follow statutory procedures for selecting grant applicants, and violation of the Privacy Act of 1974.\footnote{33} Respondents later amended their complaint after Congress enacted §954(d)(1) challenging the provision as facially invalid for vagueness and impermissible viewpoint discrimination.\footnote{34} The statutory and as-applied constitutional claims were settled by paying the artists the amount of vetoed grants, damages, and attorney fees.\footnote{35} The District Court then granted summary judgment in favor of the respondents and enjoined enforcement of §954(d)(1) as unconstitutional.\footnote{36} The Court of Appeals for the Ninth Circuit affirmed, holding that §954(d)(1) was facially invalid as it impermissibly discriminated on the basis of viewpoint and was void for vagueness under the First and Fifth Amendments.\footnote{37} A writ of certiorari was granted and the Supreme Court reversed.\footnote{38} The Court held that §954(d)(1) is facially valid, it neither interferes with First Amendment rights nor violates constitutional principles.\footnote{39}

\section{The Majority Opinion}

Justice O'Connor delivered the opinion of the Court and first confronted this issue by acknowledging the heavy burden and disfavored view that accompanies a facial constitutional challenge.\footnote{40} In order to overcome their burden and invalidate §954(d)(1) on its face, the respondents must demonstrate a "substantial risk that application of the provision will lead to the suppression of speech."\footnote{41}

\footnote{32} Id.
\footnote{33} \textit{Finley}, 118 S.Ct. at 2174.
\footnote{34} Id.
\footnote{35} Id. This Note makes the argument that if the as-applied challenge had not been settled the Supreme Court would be left with no choice but to strike the provision down as unconstitutional.
\footnote{36} Id.
\footnote{37} Id.
\footnote{38} \textit{Finley}, 118 S.Ct. at 2180.
\footnote{39} Id. at 2175-2180.
\footnote{40} Id. at 2175.
\footnote{41} Id.
The majority began its analysis on respondents' claim by noting that the plain language of §954(d)(1) merely adds "considerations" when reviewing grant applications. Focusing on the NEA's interpretation, the majority concluded that the "decency and respect" provision is merely hortatory, neither prohibiting nor denying the benefits of funding to certain categories of speech. The majority accepted the interpretation of the language as advisory, but made a point to note that this acceptance does not extend to matters implementing §954(d)(1).

The Court then moved from the plain language of the statute to the political atmosphere surrounding the adoption of §954(d)(1). The legislative intent was to reform procedural devices rather than to preclude speech. The Court did not accept respondents' argument that the "decency and respect" clause makes it necessary for the NEA to deny funding on the basis of viewpoint. The Court reasoned that upon the advice of the Independent Commission, Congress did not impose isolated restrictions on funding, but rather incorporated into the selection process additional criteria for assessing artistic merit.

It was under this approach to the §954(d)(1) language as criteria for the selection process that the Court distinguished cases where legislation has been struck down as facially unconstitutional. The majority compared the discretionary language of §954(d)(1) to provisions that "set forth a clear penalty, proscribed views on particular 'disfavored subjects,' and suppressed 'ideas conveyed by a distinctive message.'" Comparing these provisional extremes, the Court could not find the realistic danger evident in a penalizing provision within the advisory language of §954(d)(1) that would compromise First Amendment rights.

The provision has no concrete demands it is merely advisory. It neither defines the subjective criteria of "decency and respect"

42. Id.
43. Id.
44. *Finley*, 118 S.Ct. at 2176. The Court focuses in on the facial challenge and makes a point to divert its holding from any application of the statute by refusing to discuss whether or not the way the NEA implements the provision is in fact a reasonable reading of the statute.
46. *Finley*, 118 S.Ct. at 2176.
47. Id. at 2176.
48. Id.
50. Id. at 2176
nor demands the criteria to be utilized. The provision simply exhorts that the criteria be "taken into consideration" and therefore does not justify facial invalidation. The Court continued its pursuit to facially validate § 954(d)(1) by listing permissible applications of the statute, such as funding of educational programs and symphony orchestras. The Court declined to hypothesize impermissible applications, but subsequently stated that it was not persuaded that such applications would give rise to the suppression of protected expression. The Court left open the issue of the constitutionality of § 954(d)(1) under an as-applied challenge warning that, "If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case."

Finally, the Court conceded that the terms of the provision were vague, but found that the vagueness doctrine had no application to a discretionary provision. Vagueness concerns are significant in the context of criminal statutes or regulations, "But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." Thus, the majority in Finley held that § 954(d)(1) is not on its face unconstitutional, but rather the advisory language is a consequence of the nature of arts funding.

III. CONSTITUTIONAL CHALLENGES OF A STATUTE: FACIAL AND AS-APPLIED

Constitutional challenges to a statute are governed by two standards: facial and as-applied to a particular set of facts. Although both standards determine whether or not a statute is

51. Finley, 118 S.Ct. at 2177.
52. Id. at 2177. The rationale behind the Court’s attempt to list permissible applications is to satisfy the “no set of circumstances” test. See U.S. v. Salerno, 481 U.S. 739 (1987).
54. Id. This is without merit because the Court did not give itself a chance to be persuaded that § 954(d)(1) would result in impermissible applications.
55. Id. at 2178.
56. Finley, 118 S.Ct. at 2179.
57. Id. at 2179.
58. Constitutional cases divide into categories of “facial” and “as-applied” challenges, and no bright line rule exists for all possible situations of each category. Salerno, 481 U.S. 739
Challenging the Facial Challenge

constitutional, the difference is in the outcome—is extreme. A decision that holds a statute unconstitutional on its face has the effect of invalidating the statute as a whole. On the other hand, the less extreme result is the decision that holds the statute unconstitutional as-applied to a particular set of facts. There, the result is that the statute remains to have permissible applications and is therefore constitutional on its face.

The categorizing of constitutional challenges are judge-made standards to help focus the analysis of a particular statute. Consequently, there are neither set guidelines nor legal standards for a facial challenge and as a result, the Court’s treatment of facial challenges is often contradictory. One commentator has alluded that the proper disposition to a facial challenge involves questions of substantive constitutional law, institutional competence, and statutory interpretation. Another theory suggests that the government may abridge protected speech if, on its face, government action is targeted at suppressing disfavored ideas or if government action, neutral on its face, was motivated by an intent to single out constitutionally protected speech for control or penalty.

Even the Supreme Court developed a “no set of circumstances” test requiring a facial challenge to fail if the statute has any constitutional application. However, the “no set of circumstances” test was not utilized consistently in subsequent facial challenges. One traditional principle governing constitutional adjudication is that constitutional rights are personal and may not be asserted vicariously. Nevertheless, a facial challenge is permitted without having to wait for unconstitutional applications. It is “strong medicine” eliminating the disease that infringes constitutional rights. “It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a

59. See Madsen v. Women’s Health Center, Inc., 512 U.S. 753 (1994) (there the Court utilized both facial and as-applied standards in determining the validity of a statute).
60. Id.
61. Id.
63. Tribe, supra note 6 § 12-2, at 789.
64. Salerno, 418 U.S. 739.
66. Id. at 612.
limiting construction has been or could be placed on the chal-
lenged statute." 67

As a practical matter, facial challenges to statutes are more
difficult to resolve than an as-applied challenge. Facial challenges
consider "whether the statute's overreach is substantial, not only
as an absolute matter, but judged in relation to the statute's
plainly legitimate sweep, and therefore requires consideration of
many more applications than those immediately before the
court." 68 Thus, in order to preserve judicial economy and promote
judicial efficiency, an as-applied challenge should ordinarily be
decided first. 69

The as-applied challenge, as its name suggests, is determined
on a case-by-case basis. Simply, but broadly stated, an as-applied
challenge will prevail if the implemented statute suppresses disfa-
vored viewpoints or imposes a burden calculated to drive "certain
ideas or viewpoints from the marketplace." 70

A. Finley's Facial Challenge

A facial challenge to a statute is "the most difficult challenge
to mount successfully, since the challenger must establish that no
set of circumstances exists under which the [statute] would be
valid." 71 The standards courts use can significantly affect the suc-
cess of a constitutional challenge. 72 The Court in Finley, held that
§ 954(d)(1), on its face, was constitutional. 73 Applying the stan-
dards of a facial challenge, the Court came to a legally sound
result. However, the very reasons the Court held § 954(d)(1) valid
on its face, creates the inference that a facial challenge was not
the appropriate standard to apply. The advisory character of the
provision raises the presumption that such a statute cannot be
invalid on its face.

The heavy burden that accompanied respondents' facial chal-
lenge is the first indicator. The respondents had the burden of
demonstrating a substantial risk that application of § 954(d)(1) by

67. Id.
68. Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 485
(1989).
69. Id.
70. Finley, 118 S.Ct. at 2178, (citing Simon & Schuster, Inc. v. Members of
71. Salerno, 481 U.S. at 745.
72. Id.
73. Finley, 118 S.Ct. at 2180.
the agency would lead to the suppression of speech. However, the provision is toothless. It fails to make demands in the selection process and merely exhorts that such criteria be "taken into consideration." The provision's language falls short of mandatory application in the grant-making process, the same way an advisory opinion by a court of law is not a binding statement. Therefore the risk of application alone cannot be guaranteed.

Although there are no legal standards or guidelines used in facial attacks, a primary purpose of such a challenge is to monitor statutes that prohibit or penalize the expression of particular views. As the majority recognizes, the challenged provision does not prohibit the NEA from funding indecent or offensive art, § 954(d)(1) merely requires general standards of decency and diverse beliefs be considered when making the discretionary decisions of what art the agency will fund.

Legislative motive or purpose for § 954(d)(1) evidences a second reason why a facial challenge was the improper course of action. The majority opinion notes that the legislation was aimed at reforming the procedures of the granting-making scheme to reserve funding for art more decent and respectful of American values than the works of Mapplethorpe and Serrano. Addition of the "decency and respect" clause was a procedural move, not substantive. A basic canon of constitutional adjudication is that statutes should be construed as constitutional. However another premises of constitutional adjudication holds that "although this Court will often strain to construe legislation so as to save it against constitutional attacks, it must not . . . carry this to the point of perverting the purpose of a statute." The purpose of § 954(d)(1) was to reform procedure in the decision-making process. However, the procedural guidelines, coupled with subjective criteria for decision-making, are not vulnerable to facial invalidation.

The procedural aspects of § 954(d)(1) can only be challenged for unconstitutional applications to particular individuals. The Court attempts to avoid this problem by assessing permissible applications of § 954(d)(1). It is often considered in a facial challenge.
lenge "whether the statute's overreach is substantial, not only as an absolute matter, but judged in relation to the statute's plainly legitimate sweep, and therefore requires consideration of many more applications than those immediately before the court."\(^{80}\) Tipping the scales of possible applications, the *Finley* court refused to consider hypothetical applications in reviewing the facial challenge, while proposing permissible applications of the provision in applications by educational programs.

The Court agrees that the considerations are susceptible to multiple interpretations, which only reinforces their advisory content.\(^{81}\) Individual standards of decency and respect vary greatly, making it impossible to define what is expected from these considerations. The Court purports that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe . . . In the context of subsidies, it is not always feasible for Congress to legislate with clarity."\(^{82}\) Recognizing the room for vagueness in provisions that enforce discretionary decisions indicates the lack of room for a facial challenge.

B. The As-applied Challenge

Providing "general standards of decency and respect for diverse beliefs" to be considered when selecting what the NEA funds is a permissible government purpose.\(^{83}\) Nevertheless, the Court has claimed, "the existence of a permissible purpose cannot sustain an action that has an impermissible effect."\(^{84}\) The standards of an as-applied challenge would have clearly articulated impermissible effects. First, an as-applied challenge would provide evidence of how denial of a grant would be the product of individual viewpoint discrimination. Second, the provision will impose financial burdens on artists that find their viewpoints banned from the marketplace. Finally, when applied to whom it is relevant, the provision is unconstitutional.

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80. *Fox*, 492 U.S. at 485.
81. *Finley*, 118 S.Ct. at 2177.
82. *Id.* at 2179.
83. *Id.*
The NEA plans to implement § 954(d)(1) by providing a panel that represents a variety of "geographical areas, aesthetic views, professions, areas of expertise, races and ethnic groups and gender." The rationale being that because advisory panels were composed of individuals with diverse backgrounds, the decisions of these panels would "reflect general standards of decency and show respect for the diverse beliefs and values of the American public." However, the advisory panel does not have final power. The Chairperson, possessing ultimate authority to approve or deny grants, merely utilizes the advisory panels to review applications. However, the Chairperson cannot approve any application disapproved by the National Council. The fact that the President, with consent of Congress appoints both the Chairperson and National Council, indicates that the advisory panel is a mask appearing to insulate art from politics. As a result, denial of applications will display government hostility towards certain viewpoints.

In the Court's own words, "even in the provision of subsidies, the Government may not aim at the suppression of dangerous ideas, and if a subsidy were "manipulated" to have a "coercive effect," then relief could be appropriate." Conservative politicians have used the NEA debate as a platform to promote traditional American values, which for them is identical to their personal campaigns: patriotism, profamily, prochurch, and antigay.

While Finley's application was under review, Chairperson Fronhayer told his staff that the NEA had to live in a "political world" and to reject some applications to reassure the NEA's con-

85. The District Court enjoined enforcement of § 954(d)(1), and consequently the NEA has not applied the provision since June 1992. Finley, 118 S.Ct. at 2174.
86. Id. at 2175.
87. Finley, 100 F.3d at 676.
90. "If the First Amendment requires an extraordinary justification of government action which is aimed at ideas or information that the government does not like, the constitutional guarantee should not be avoidable by government action which seeks to attain the unconstitutional objective under some other guise." Tribe, supra note 6 § 12-5, at 814.

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From the Chairperson's comment one can draw the conclusion that Congress' lingering threats to sever all government support of the arts manipulated and coerced the agency to deny benefits of funding to art encompassing provocative ideas. Furthermore, assume that reasons given for the denial were that the art work was considered not to rise to a level of decency and respect for diverse beliefs. In its own words, the Court conceded that the language added "imprecise considerations" but its nature being advisory did not employ the doctrine of vagueness. However, once applied, the advisory language will violate the principle that once government chooses to subsidize, it cannot do so in a manner that rises to a level of vagueness that violates the First and Fifth Amendment. Here, the considerations noted in § 954(d)(1), when utilized, will result in an inconsistent and vague standard that effectively precludes expression of particular views.

The government may subsidize speech only if it does so in way that is viewpoint neutral. Congress expressed an original intent that the NEA, an institution embodying freedoms of expression and speech, receive allocation of funds to "help create and sustain ... a climate encouraging freedom of thought, imagination, and inquiry." Thus, conditions attached to the expenditure of subsidies is restricted since art falls within the realm of protected expression that is fundamental to the functioning of a free society. Section 954(d)(1) awards funds on the condition that the art reflect majoritarian values. Indisputably, this is contrary not only to the ideals of the First Amendment, but also the very purpose of the NEA which is to encourage freedom of expression. Furthermore, government has declared its intent to "encourage a diversity of views from private speakers." Denial of a grant, pursuant to standards requiring the agency to consider general standards of decency and respect for American beliefs is not only punitive, but also a product of individual viewpoint discrimination. In prac-

93. Finley, 100 F.3d at 676 n. 7.
94. Finley, 118 S.Ct. at 2180.
98. Rust, 500 U.S. at 200.
100. For example, the provision as applied to the "NEA 4" would result in discrimination against the non-traditional ideology of homosexuality, feminine sexuality and racism and furthermore undercut the very purpose of the NEA, to
tice, the language coupled with legislative history, allows the NEA “to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints.”¹⁰¹ The standard set forth by § 954(d)(1) is manufactured in such a way, cloaked as merely hortatory, to withstand a facial attack. However, the existence of the statute will inevitably have a chilling effect on freedom of expression that can only be proved when courts consider the statute “as-applied” to a particular artist.

Furthermore, a substantial constitutional issue arises because application of §954(d)(1) in granting-making decisions will unduly burden artists expressing non-traditional and provocative ideas so as to eliminate them wholly from the artistic marketplace.¹⁰² The goals of the NEA are, among other things, to promote the availability of the arts and to stimulate private support for the arts. The President’s Committee on the Arts and Humanities stated in a 1997 report, that the NEA provides the largest source of funds for the arts available today.¹⁰³ Once an artist receives approval from the NEA, many doors open in the private sector that provide the artist with many financial and exhibit opportunities. Financial obstacles resulting from the application of the “decency and respect” clause will be similar to the chilling effects caused by the certification provisions once required by the NEA.¹⁰⁴ In Bella, the court agreed that grant applicants rely on funding from the NEA well beyond the dollar value of a particular grant.¹⁰⁵ Moreover, “NEA grants lend prestige and legitimacy to projects and are therefore critical to the ability of artists and companies to attract non-federal funding sources.”¹⁰⁶ The court held that the NEA’s influential role in the arts community meant that, “if an artist chooses not to be bound by the NEA’s obscenity restriction, he will not be able to obtain private funding, and therefore, will be worse off than if he had not applied for an NEA grant at all. This is the type of obstacle in the path of the exercise of fundamental speech rights that the consti-

¹⁰¹ Finley, 118 S.Ct. at 2178.
¹⁰³ See Respondents’ Brief at 2, Finley (No. 97-371).
¹⁰⁵ Id. at 782.
¹⁰⁶ Id. at 783.
tution will not tolerate."\textsuperscript{107} Similarly, by imposing a financial obstacle in the pursuit to exercise freedom of expression, the "decency and respect" clause will be detrimental to innovative and experimental art. Although the Court in \textit{Finley} noted that content-based considerations are a consequence of arts funding, it previously held, "a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."\textsuperscript{108} The decency clause will place intolerable burdens on art that cultivates ideas and poses questions. Whether indecent or not, such art defines American culture.

The "decency and respect" clause, when applied to whom it is relevant, is unconstitutional. The decency clause is inapplicable when making funding decisions concerning symphony orchestras or educational programs. Educational programs are already guaranteed factors of decency, there is no need for it to be "considered" any further. Legislative history clearly indicates that the sole motivation for the decency clause was to eliminate art projects considered by Congress as "indecent" or "sacrilegious."\textsuperscript{109} The decency clause is only relevant in considering art such as the respondents.'

IV. Conclusion

In response to a facial challenge, the Supreme Court's opinion in \textit{Finley} was correct. However application of the "decency and respect" provision will compromise the very purpose of the NEA; to promote artistic excellence.

Reliance on a facial challenge to establish the unconstitutionality of the "decency and respect" clause was procedurally, a wrong move. Advisory language guiding discretionary decisions is susceptible to a constitutional challenge once it has been implemented. Since the provision may be implemented in many different ways, the problem can only be addressed as it arises. The decision making process of what art to subsidize must be structured to provide insulation from governmental control; however application of the "decency and respect" standards runs the risks of transforming art into government propaganda.

\textsuperscript{107} Id. at 785.
\textsuperscript{109} See Respondents' Brief at 3, \textit{Finley} (No. 97-371).
The arts are “at the core of a democratic society’s cultural and political vitality.”110 In legislation accompanying the enactment of the NEA, Congress recognized art as a repository of freedom.111 The Senate emphasized that freedom of artistic expression was to be given “the fullest attention” and that “conformity for its own sake is not to be encouraged, and . . . no undue preference should be given to any particular style or school of thought or expression.”112 Contrary to this legislative intent, Justice O’Connor writing for the majority in Finley stated, “as a practical matter, that artists may conform their speech to what they believe to be the decision-making criteria in order to acquire funding.”113 Even though the words of the Court note otherwise, it is hard to image that one of America’s repositories of freedom will be set aside when the choice of what to subsidize is at hand.

Gloria F. Taft

112. Id.
113. Finley, 118 S.Ct. at 2179.