SYMPOSIUM: ART, DISTRIBUTION & THE STATE: PERSPECTIVES ON THE NATIONAL ENDOWMENT FOR THE ARTS*

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AMY SCHWARTZMAN:

In June 1998, the Supreme Court decided *National Endowment for the Arts v. Finley*.[1] The case was brought by the National Association of Artists' Organizations and four individual respondents:[2] Karen Finley, John Fleck, Holly Hughes, and Tim Miller.[3]

Finley presented a facial challenge to the constitutionality of decency criteria that Congress had enacted and imposed on the National Endowment for the Arts ("NEA" or "Endowment").[4] This

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1 118 S. Ct. 2168 (1998).

2 The individual respondents were performance artists who applied for NEA grants before 20 U.S.C. § 954(d)(1), the statute at issue in *Finley*, was enacted in 1990.

3 *See Finley*, 118 S. Ct. at 2174.

4 *See id.* at 2175-80. The National Foundation for the Arts and Humanities Act, as amended in 1990, requires the Chairperson of the National Endowment for the Arts to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . . ." 20 U.S.C. § 954(d)(1) (1994).

statute was enacted in response to public controversy in 1989 over two provocative works, which led to a congressional re-evaluation of the NEA's funding priorities and efforts to increase oversight of its grant making procedures.[5] The two controversial works were: a retrospective of the work of photographer Robert Mapplethorpe entitled "The Perfect Moment," which included homoerotic photographs that several members of Congress condemned as pornographic;[6] and a subgrant that exhibited artist Andres Serrano's work, "Piss Christ," a photograph of a crucifix purportedly immersed in urine.[7]

The standard, as it was enacted, instructed the NEA to take into account "general standards of decency and respect for the diverse beliefs and values" of the American people when promulgating regulations on granting funds.[8]

The Supreme Court's decision was rather interesting. Essentially, the Court held that the plaintiffs did not meet the burden of bringing a facial challenge to the statute.[9] The statute was not found to be unconstitutionally vague,[10] and the First Amendment challenges were not sustained.[11]

However, the Court welcomed, or certainly made reference to, the fact that an as-applied challenge could indeed be brought.[12] Justice O'Connor wrote that a "different constitutional question"[13] would be presented to the Court in the case of "an as-applied challenge . . . where the denial of a grant could be shown to be the product of invidious viewpoint discrimination."[14] So, suppression of disfavored viewpoints, or some disproportionate burden, calculated to drive certain ideas and viewpoints from the marketplace, may after *Finley* be struck down as unconstitutional.

Some people believe that the holding of the case, while sustaining the criteria, rendered it virtually meaningless. Justice Scalia, joined by Justice Thomas, wrote a rather scathing concurrence.[15] "The operation was a success, but the patient died";[16] he

5 *See Finley*, 118 S. Ct. at 2172.

6 *See id.* at 2172. The Institute of Contemporary Art at the University of Pennsylvania had used $30,000 of a visual arts grant it received from the NEA to fund Mapplethorpe's exhibit. *See id.*

7 Serrano had been awarded a $15,000 subgrant from the Southeast Center for Contemporary Art, an organization that received NEA support. *See id.*

8 20 U.S.C. § 954(d)(1); *see Finley*, 118 S. Ct. at 2171.

9 *See Finley*, 118 S. Ct. at 2180.

10 *See id.* at 2179.

11 *See id.* at 2180.

12 *See id.* at 2178.

13 *Id.* at 2170.

14 *Id.* at 2178.

15 *See id.* at 2180-85 (Scalia, J., concurring, joined by Thomas, J.).

felt that the majority sustained the constitutionality of section 954(d)(1) by gutting it.[17] Justice Scalia would hold that the statute on its face established content and viewpoint-based criteria upon which grant applications are to be evaluated, and that is "perfectly constitutional."[18]

Justice Souter, in his dissent, found that, in fact, the majority was rather fatuous and, indeed, the statue was unconstitutional.[19]

JOHN TUSKEY:

Part of the materials that I was sent in preparation for this discussion tonight was a special report from Americans for the Arts.[20] I want to make it clear that my writing a brief taking an opposite view from Americans for the Arts in the *Finley* case[21] does not mean that I am an American against the arts. I do not think that anybody is against the arts. Simply because one would defend the decency or respect standards does not mean that he or she necessarily opposes the arts.

The special report from Americans for the Arts was titled *Not an Armageddon for the Arts.*[22] The point of this report was essentially summed up in the title, meaning that the *Finley* decision is not an Armageddon for the arts. I agree. In fact, it was not a blow to the arts at all.

I have several reasons for saying this. As Americans for the Arts note in their report, *Finley* is a rather toothless decision.[23] When Congress passed the decency and respect provisions, the NEA essentially decided that in order to comply with the standard they would include many diverse viewpoints without actually considering respect and decency in any particular case.

I do not know if these panels are actually considering these factors. The Supreme Court majority seemed to accept that the NEA could simply comply with the standard to ensure respect and decency in all funding decisions by not even considering respect and decency.

I think that on that point Justices Scalia and Souter, even

16 *Id.* at 2180.

17 *See id.*

18 *Id.*

19 *See id.* at 2185 (Souter, J., dissenting).

20 JAMES F. FITZPATRICK, AMERICANS FOR THE ARTS, SPECIAL REPORT, JULY 1998: NOT AN ARMAGEDDON FOR THE ARTS (visited Apr. 2, 1999) <http://www.artsusa.org/advocacy/jimfitz.html>.

21 *See* Brief Amicus Curiae of the American Center For Law and Justice Supporting Petitioners, *Finley* (No. 97-371).

22 FITZPATRICK, supra note 20.

23 *See id.* at 2.

though they came to opposite conclusions in the case, were absolutely right. The statute clearly requires the NEA to consider respect and decency in art funding decisions.

All things being equal, art that demonstrates respect for the diverse values of American culture, and that is not indecent, is to be favored over art that does not. So, I think that Justices Scalia and Souter were absolutely right on that point.

I think that the majority was wrong. However, given that the majority's decision is now the law, I believe that the holding in *Finley* does not order the NEA to do what the statute directs.

Given the most recent election, I do not see any danger to this course of action by the NEA. I certainly do not see any danger to the NEA itself. I cannot see this Congress, being duly chastised after this election, taking any steps to defund the NEA. In that respect as well, *Finley* is absolutely not an Armageddon for the Arts.

However, I think that would be the case even if Justice Scalia's view had prevailed. Justice Scalia took the view that, in fact, the statute does call for viewpoint discrimination, but even so, it does not violate the Constitution.[24]

Even this view would not represent an Armageddon for the Arts. I hope that no one uses the word "censorship" tonight, although I suspect that somebody on this panel will. However, I want to make clear that there is no censorship here. *Black's Law Dictionary* defines censorship as "review of publications, movies, plays and the like, for the purpose of prohibiting the publication, distribution, or production of the material, deemed objectionable."[25] The requirement that the NEA, in making funding decisions take respect and decency into consideration,[26] does not have anything to do with prohibiting art. Rather, it has to do with funding art. Simply because art is not funded does not necessarily mean that it is prohibited. Even if Karen Finley does not receive government money for smearing chocolate on herself, she is still perfectly free to do so. There is no censorship at all.

ROBERT PETERS:

Morality in Media ("MIM") does not have a position on the issue of whether government should or should not support the arts. MIM does support the prohibition on government funding of sexual material that is legally obscene and did submit an amicus

24 *See Finley*, 118 S. Ct. at 2182-83 (Scalia, J., concurring, joined by Thomas, J.).
25 BLACK'S LAW DICTIONARY 244 (6th ed. 1990).
26 *See* 20 U.S.C. § 954(d)(1) (1994).

brief in the *Finley* case in support of the government.[27]

We think the *Finley* decision is basically a reflection of what most Americans would regard as plain common sense—namely, that while the First Amendment protects "art" that is not obscene or that does not fall within some other recognized exception to First Amendment protections (e.g., child pornography, copyright, counterfeiting, fraud, incitement, libel, misleading ads, soliciting prostitution, treason, etc.), it does not require the government to fund it.

In my view, had the *Finley* Court determined that the "decency and respect" clause[28] impermissibly discriminates on the basis of viewpoint and is void for vagueness, the Court would also have to rule that the "artistic excellence and merit" clause[29] is unconstitutional for the same reason.

There is a wide disagreement as to what constitutes "artistic excellence and merit." Some go so far as to say that there are no standards for determining what constitutes "art." Others say it is solely up to the "artist" to make that determination. Others believe that the political message is as important, if not more important, then the artistic quality of the work conveying the message. Many NEA critics say that works with politically correct messages are more likely to get funding than those with "incorrect" messages. As Edward Rothstein wrote in the *New York Times*:

> The very idea of artistic quality has become open to question. Many artists have become preoccupied with making ideological statements. And advocates of multiculturalism have questioned the priority of Western standards and styles. In such a landscape, what sort of patron of the arts has the NEA become? . . . . It retains the notion of "excellence" but makes that idea contingent on the opinions of its constituencies . . . . As a consequence, there appears to be no central vision, simply the clamor of political forces.[30]

Or, as Andy Grundberg wrote:

> One consequence of the uproar over art labeled obscene, blasphemous or otherwise offensive is that the careers of . . . artists whose work is at issue have been given a rocket-powered boost. . . . Unfortunately, the increased attention these artists

27 Brief Amicus Curiae of Morality in Media, Inc. Supporting Petitioner, *Finley* (No. 97-371).
28 20 U.S.C. § 954(d)(1).
29 *Id.*
30 Edward Rothstein, *Where a Democracy and Its Money Have No Place*, N.Y. TIMES, Oct. 26, 1997, *available in* 1997 WL 8009845.

> and performers have gained makes it nearly impossible to evaluate their work. . . . Instead of arguing about aesthetics, critics now spend their time defending the notion that artists can do and say whatever they please . . . . In an era when "political correctness" has become the criterion for judging art, this response is doubly dangerous . . . . [I]t encourages artists of limited talent to shortcut to success by cultivating outrageousness for its own sake.[31]

Or, as James F. Cooper, Editor of the *American Arts Quarterly*, put it in a letter to the editor:

> The [NEA] peer-panel review process . . . bases its decisions on content, not artistic merit. The issue is not 20 "objectionable" grants, but thousands of mediocre works of art funded by the [NEA]. In the yearlong controversy over government funding for the arts, the Endowment has failed to produce one example of evidence of artistic excellence the Endowment is mandated to finance.[32]

In my view, the *Finley* decision will not dampen artistic creativity, since the decency and respect clause does not restrict use of new art forms. Just as the great Renaissance and impressionist painters revolutionized the art world without applying their great talents, training, and creativity to depicting hardcore sex or to rank blasphemies, so too can the great artists of our own era.

I do not oppose government funding of the arts. I do think that if government funds the arts, it should stick with art that enjoys widespread community acceptance or, at the least, that does not deeply offend a significant part of the community.

I would add that larger metropolitan areas, where most art is exhibited, tend to be more accepting than some smaller communities and that time often has a way of causing true artistic excellence to triumph—and, along with it, community acceptance—over subject matter that initially shocks or offends. As Carl Goodman, curator of digital media at the American Museum of the Moving Image, said, "'[t]here is a lot of stuff out there that is calling itself "art" that isn't . . . . Most of it is crap and not enough time has passed anyway' for the work to be validated."[33]

My closing comment is that if, instead of funding a steady

[31] Andy Grundberg, *Art Under Attack; Who Dares Say It's No Good?*, N.Y. TIMES, Nov. 25, 1990, *available in* 1990 WL 2014528.

[32] James F. Cooper, *Real Arts Endowment Issue is Not Obscenity, but Mediocrity*, N.Y. TIMES, Nov. 23, 1990, at *Letters*. I am not an art critic, and am not in a position to verify the accuracy of Mr. Cooper's views.

[33] Austin Bunn, *Machine Age*, VILLAGE VOICE, Apr. 14, 1998, at 31 (quoting Carl Goodman).

trickle of "art" that offends religious conservatives, the NEA began to fund a steady trickle of "art" that was anti-Semitic, homophobic, misogynistic and racist, many of the NEA's current defenders would be saying: "Correct this problem or eliminate the NEA altogether." As Steve Chapman wrote:

> The people who complain about the suffocating conformity imposed by the appeal to decency didn't gripe when the NEA was upholding a different set of values. Joseph Epstein, a Northwestern University professor who served on the National Council of the NEA, recalls [that] "[t]ime and again, when arguments about standards and quality came up against what was taken to be democratic fairness and sensitivity to minorities, the latter invariably won the day . . . ." The NEA officers, writes Epstein, felt a "special obligation" toward "cutting edge" art—which, he says, "almost invariably was anti-capitalist, anti-middle class, anti-American." What the critics [of the "decency and respect" clause] mind is not NEA discrimination against certain attitudes and beliefs but NEA discrimination against *their* attitudes and beliefs.[34]

HOPE O'KEEFFE:

The first question given the panel for consideration was, "as a policy matter, is the National Endowment for the Arts a good institution?" Not surprisingly, my answer is yes. The NEA is still the single largest funder of non-profit arts in this country, and we desperately need it. You have probably all heard the statistics before; the government of Sweden spends $45.60 per capita on the arts, Germany $39.40, France $35, Canada $28.50, Great Britain $16, and the United States $3.30, of which thirty-six cents goes to the NEA.[35] Berlin's opera subsidy is over twice the Endowment's entire budget.

But does the answer to "is the NEA worth preserving?" change after *Finley*? At what point do we compromise the integrity of public funding for the arts so far that it is not worth supporting any more? Not surprisingly, my answer is that we have not reached that point, or anything near it. The post-*Finley* NEA is still an organization that I am proud to support and to work for.

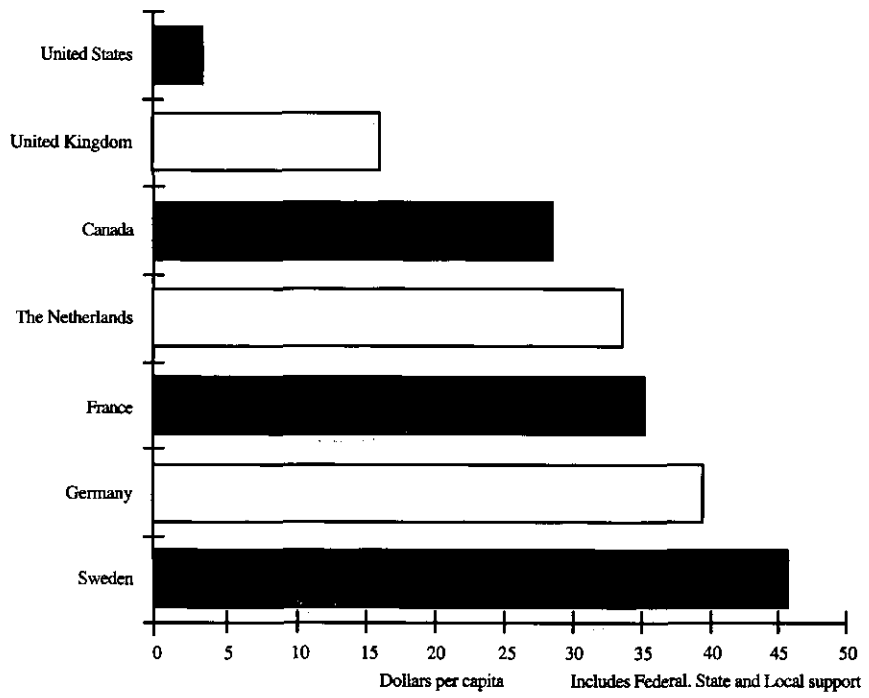
In large part, that is because the *Finley* decision has had virtually no effect on the Endowment's day-to-day operations, and no

[34] Steve Chapman, *Art and the Taxpayers' Money*, CHI. TRIB., June 28, 1998, at 15, *available in* 1998 WL 2871030.

[35] *See* NEA FACTSHEET, DIRECT PUBLIC EXPENDITURE ON THE ARTS AND MUSEUMS, Figure I, *infra*, p. 712.

effect whatsoever on our decision-making on grants. The real censorship of public arts funding and of the NEA is something that far eclipses either the *Finley* decision, or the decency language that spawned it. This is the cutting of our budget and our staff by fifty percent, and the removal of the power to fund individual artists.[36] We are still suffering the repercussions of those restrictions. Do grant applications get more scrutiny now than they did a few years ago? You bet, but this is not because panels are scrutinizing grants for indecency. It is because we have half of the funds that we used to have and there is not enough money to spread around. Could the plaintiffs get NEA funding today? Absolutely not, but that is because Congress has forbidden us to make grants to any individuals, decent or otherwise.[37]

FIGURE I
NEA FACTSHEET, DIRECT PUBLIC EXPENDITURE ON THE ARTS AND MUSEUMS



36 Congress has recently restricted the availability of federal funding for individual artists, confining grants primarily to qualifying organizations and state arts agencies, and constraining sub-granting. *See* Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, § 329, 111 Stat. 1600. *See also* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2172 (1998).

37 *See* NATIONAL ENDOWMENT FOR THE ARTS, GUIDELINES AND APPLICATIONS: GRANTS TO ORGANIZATIONS (visited Mar. 8, 1999) <http://arts.endow.gov/guide/Orgs00/OrgIndex.html> ("Under these guidelines, funding is not available for direct grants to individuals.").

However, *Finley* itself has not made a difference. We did not scrutinize applications for decency prior to the decision, and we are not scrutinizing applications for decency now. The NEA enforces the decency provision by assuring that its application review panels are aesthetically, geographically, ethnically, and culturally diverse.[38] Each of these panels includes experts in the particular art form, plus at least one layperson, and each panel includes a wide range of individuals who truly represent "the diverse beliefs and values of the American public."[39] Recent panelists have included ministers and retired members of Congress, including one of the authors of the "decency and respect" provision. These carefully composed panels provide the first level of review to assess whether an application meets the statutory standards, and make the initial recommendations to the National Council on the Arts, which in turn advises the Chairperson.[40] However, decisions are not made on the basis of decency. Panelists are instructed to make their decisions based solely upon the review criteria set forth in the guidelines, "artistic excellence and artistic merit."[41]

So the real question is, why are the headlines shrieking that the Court has upheld censorship, and why the disconnection between the headlines and actuality? I think it is due to a misunderstanding of the most important and most neglected fact about *Finley*; that it was a facial challenge, not an as-applied one.[42] The "decency" clause was never applied to the four individual plaintiffs because their applications were rejected before the statute even passed,[43] and it was never applied to anyone in the way that the

38 The Chairperson shall issue regulations and establish procedures—

> (1) to ensure that all panels are composed, to the extent practicable of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals as reflecting diverse artistic and cultural points of view;
>
> (2) to ensure that all panels include representation of lay individuals who are knowledgeable about the arts but who are not engaged in the arts as a profession and are not members of either artists' organizations or arts organizations.

20 U.S.C. § 959(c)(1)-(2) (1994).

39 *Id.* § 954(d)(1).

40 "The Chairperson has the ultimate authority to award grants but may not approve an application as to which the Council has made a negative recommendation." *Finley*, 118 S. Ct. at 2172 (citing 20 U.S.C. § 955).

41 20 U.S.C. § 954(d)(1).

42 *See Finley*, 118 S. Ct. at 2170.

43 The four individual respondents in this case, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, are performance artists who applied for NEA grants before § 954(d)(1) was enacted in September 1990. An advisory panel recommended approval of respondents' projects, a majority of the Council subsequently recommended disapproval and, in June 1990, the NEA informed respondents that they had been denied funding. *See id.* at 2174.

plaintiffs predicted.

From a litigant's perspective, this was a topsy-turvy case. The plaintiffs, who might have been expected to argue for a statutory interpretation that most favored artistic self-expression, instead took the most extreme anti-artist interpretation of the statue possible. They claimed that it mandated a litmus-test scrutiny of each grant application for indecency or offensiveness,[44] insisting that this was the only possible interpretation. The government, which might have been expected to argue for the maximum power possible to condition these grants, instead argued that the statute did not mean that. They claimed that all it meant was that the Chairman had to take decency into account in establishing the grant review process.[45] However, when the decision was handed down, the headline writers interpreted it to mean that the Endowment would immediately start rejecting any grant applications that might not pass what I think of as "my Aunt Millie test."

The Court did not say that. Perhaps alone on this panel, I can agree with NEA chairman Bill Ivey's statement that we are quite pleased with the majority decision. The majority walked a very uneasy middle line that is consistent with the middle line that the agency has been walking for the past decade. As a result, the Court settled upon somewhat muddled legal reasoning that was unabashedly result-oriented. In the process, the majority recognized that there is a legitimate role for public arts sponsorship, and acknowledged the importance of what the Endowment has accomplished in the past thirty years.[46]

The Endowment was also pleased that the vagueness challenge, which persuaded both courts below,[47] did not get a single vote from the Supreme Court. It was an issue that we were quite concerned about because of the statutory language that immediately precedes the decency clause, "artistic excellence and artistic merit are the sole criterion by which applications shall be judged."[48] There is no meaningful way to distinguish between the

[44] *See* Brief for Respondent at 18-19, *Finley* (No. 97-371) (arguing that section 954(d)(1) does not establish a litmus test for NEA funding).

[45] *See Finley*, 118 S. Ct. at 2173. The amendment requires the Chairperson of the NEA, in establishing procedures to judge the artistic merit of grant applications, to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . . ." 20 U.S.C. § 954(d)(1).

[46] *See Finley*, 118 S. Ct. at 2172 ("Since 1965, the NEA has distributed over three billion dollars in grants to individuals and organizations, funding that has served as a catalyst for increased state, corporate, and foundation support for the arts.").

[47] *See* Finley v. National Endowment for the Arts, 100 F.3d 671, 680-81 (9th Cir. 1996); Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1472 (C.D. Cal. 1992).

[48] 20 U.S.C. § 954(d)(1).

degree of vagueness in "decency and respect" and the degree of vagueness in "artistic excellence." We can fund less than a quarter of what we are asked for, and in some categories it is running at about four percent. Grantmaking is necessarily, as the Court recognized, a highly subjective process,[49] and we were quite pleased to have our ability to judge excellence reaffirmed.

We were also pleased that the Court gave the agency an extraordinary amount of flexibility in applying the statute, but to a point. That is where the *Finley* decision has teeth. That point is viewpoint discrimination. The Court clearly signaled, several times, that it would not tolerate viewpoint discrimination in public arts funding and that it would uphold the decency clause only "[u]nless and until section 954(d)(1) is applied in a manner that raises concerns about the suppression of disfavored viewpoints . . . ."[50] Even the concurring justices were quite clear that an artist can do whatever he or she wants without federal funds.[51]

In essence, the *Finley* decision affirms the status quo, but draws specific lines that the agency cannot cross in reinterpreting the decency provision as anything beyond "hortatory."[52] This is a ruling that we can live with at the Endowment, one that reaffirms that we are still an agency that can "help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent."[53]

I cannot speak on behalf of the agency, but I personally would not have been happy if the concurring Scalia-Thomas opinion, which stated that the statute mandated content and viewpoint discrimination,[54] had prevailed. On the other hand, the one thing that we heard over and over again on the Hill while this case was pending was that if the plaintiffs won, it would be the end for the Endowment. Whether or not that was true, I am glad that we did not have to test that threat.

So, for the Endowment, the majority's affirmation of the status quo may have been the best possible outcome. I do not want to be excessively rosy; I think that the combination of *Finley* and funding

[49] *See Finley*, 118 S. Ct. at 2179.

[50] *Id.*

[51] *See id.* at 2183 (Scalia, J., concurring, joined by Thomas, J.) ("Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. Avant-garde artistes such as respondents remain entirely free to *epater les bourgeois*; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it.") (footnote omitted).

[52] *Finley*, 118 S. Ct. at 2175.

[53] 20 U.S.C. § 951(7).

[54] *See Finley*, 118 S. Ct. at 2180 (Scalia, J., concurring, joined by Thomas, J.).

cuts has led to more cautiousness, and perhaps self-censorship, by arts organizations in deciding for what projects Endowment funding should be sought. I see part of my job as General Counsel at the Endowment as making sure that the "as-applied" challenge to the decency provision never has to be brought. We certainly do not want to live through another nine years of litigation.

However, from my perspective, the main effect of *Finley* is that we have come a long way towards moving on to a place where once in a while I can read "NEA" in the newspapers without seeing an "embattled" in front of it. This year, both the House and the Senate resoundingly voted by a two to one margin to keep the Endowment alive and funded. That is due to many factors, including the strong economy, our new Chairman, and lots of hard advocacy work by our supporters. However, I am not sure that those votes would have happened if *Finley* had come out differently. Because of the *Finley* decision, we can now move forward to rebuilding the Endowment, restoring its funding levels, and hopefully convincing Congress to restore funding for individual artists.

ROBERTO BEDOYA:

I am not a lawyer. I do not think I ever would have wanted to be one. I do not think that way. I am cursed by sentimentality. I am a poet. I wrote something to my members after the decision was made. So I decided to read that here tonight.

There are about 700 members of National Association of Artists' Organizations ("NAAO"). Half of these members are organizations, and the other half consist of individual artists. We are the experimental arts community throughout the country. I wrote this letter to them.[55]

> We lost and we won. We lost the lawsuit; we won respect. However, the loss is still a defeat, and all the Polyanna spin one can put on this loss cannot measure my anger, and yes, sadness with the ruling. Our victory is our courage, our tenacity, our willfulness. For most of the '90s, our community has been engaged in a battle with our government and conservative powers over the meaning and content of certain art works.
>
> This battle is at the essence of the *Finley* lawsuit, on which the Supreme Court has just ruled. The Court has upheld in an eight to one decision that the decency and respect language of the NEA's re-authorization legislation is permissible, not unconstitutionally vague, and not a form of viewpoint discrimination. Justice Souter's dissenting opinion speaks to the truth in this matter and understands the effect that this language has had upon the arts community. In the aftermath of the decision, our commitment to the world of imagination has taken on another layer of responsibility and meaning as we move forward in our work. Immediately after the decision was handed down, I spoke with many members of the press, and explained to them the NAAO's role in the lawsuit. Yet, upon reading the articles, I was surprised how, in news reports across the country, the NAAO is rarely talked about[—b]ecause we, as the fifth co-plaintiff, are not an individual artist, but a community. We are the community of artists organizations throughout the country that have represented the works of Karen Finley, Tim Miller, Holly Hughes, John Fleck, Andres Serrano, Robert Mapplethorpe, and other artists who examine our world. How do we talk about a community of exhibition spaces and performance venues, and the chilling effect that this [decency and respect] clause[56] has had upon us, when it is so much easier to speak about a controversial image, or to characterize an artist as a freak? The discussion about arts organizations, where vanguard works are presented, has not occurred in the press. Yet we know how our organizations, along with the artists we support, have faced the chilling effect of this decency respect law, as manifested in the acts of political and economic censorship. The four artists who initiated the suit challenged the NEA on two points: one was the denial of the fellowships due to political intervention,[57] and on this point they won; the second was the decency and respect language. The members of NAAO entered into this lawsuit specifically to challenge the decency respect language,[58] believing it to be unconstitutionally vague and in violation of the First and Fifth Amendments. The lower courts agreed.[59]
>
> We entered into this lawsuit to support Karen, Holly, Tim, and John, with the memory of the attacks by Congressional conservatives upon Serrano and Mapplethorpe, which manifested itself by the organizations that presented their works losing fundings.
>
> Throughout this decade, organizations like Artists Space in New York, Highways in Santa Monica, Hallwalls in Buffalo, Canyon Cinema in San Francisco, and many others across the country, have had to defend themselves from the harassment of a

55 Roberto Bedoya, *Letter to the Field*, NAAO BULL., summer 1998, at 4. [The footnotes accompanying the *Letter* did not originally accompany the *Letter*.]

56 *See* 20 U.S.C. § 954(d)(1).

57 *See Finley*, 118 S. Ct. at 2174.

58 *See id.*

59 *See id.* at 2170.

Member of Congress who found the arts presented by these organizations to be indecent.

In this battle, there is a history of organizations losing their NEA funding, which was first approved by peer panels, and later denied by government officials. Even the decency and respect language has not been put on the books officially, it has been in place as a form of government intervention into the aesthetics of our lives. We must continue to challenge this reality.

The chilling effect of this law is that the democratic principle of free expression is itself chilled in its meaning, and must operate in that confusing authoritarian, "You know what I mean, so behave!"

The Court's decision not to clarify the meaning of this clause[60] allows it to operate as a tool of discrimination and censorship against ideas brought to the public by artists and the organizations that present them. Judge Souter is correct when he says, "[t]he Court's conclusions that the proviso is not viewpoint based, that it is not a regulation and that the NEA may permissibly engage in viewpoint-based discrimination, are all patently mistaken."[61]

Ask any contemporary arts organization in this country that presents new artists, new art ideas, and new art forms, about the chilling effect of this language, and you will hear stories that reveal the process of self-censorship that these organizations must now engage in, because the NEA is no longer an agency that fully supports diverse American cultural expressions.

The agency may say that it does, but an honest look at this nation's cultural infrastructure finds many arts organizations committed to the new, struggling to keep the doors open due to the loss of patronage support. Death by malnutrition is what some organizations are experiencing.

Congress has figured out that economic censorship is a method to silence a public they do not like, a public that is us. In the last eight years, Congress has reduced the NEA budget by forty percent, eliminated support to most individual artists, eliminated NEA regranting art programs that supplied support to emerging artists and under-served communities, eliminated general operating support for arts organization, and restructured the NEA's National Council on the Arts, which advises the agency on it's grant and procedures, by importing Congressional members to the council in a non-voting capacity to act as "Big Brother." We know this history, we have all lived it. We know that all these NEA changes are aimed at erasing support

60 *See* 20 U.S.C. § 954(d)(1) ("decency and respect").
61 *Finley*, 118 S. Ct. at 2185 (Souter, J., dissenting).

for art that asks questions, art that asks the public to re-imagine our world as a more humane society, art which asserts acts of cultural citizenship.[62]

The growing homogenization of viewpoint discrimination that government is asserting runs contrary to the work of artists who explore the possible, and the arts organizations who would support these explorations.

The "new" in art and culture is being muzzled by the chilling effect of the NEA's language. The ruling denies how our government is going about the business of silencing Americans' creative voices. It mirrors what is most problematic in our society; America's pathology of denial.

I am glad to be part of a community that knows how to speak truth to power, and lives to support creativity without fear of the art that is born out of imagination. This is us.

DAVID COLE:

I am a lawyer. I also think that I am cursed by sentimentality and optimism, which may be what made me think that we might actually have had a chance of winning this case. In the end, of course, we did not. What I would like to address is whether the arts community itself actually won or lost at the end of the day.

The bottom line is that we got one vote. Only Justice Souter felt that the "decency and respect" language was unconstitutional.[63] Eight justices held that this language was constitutional. However, as a number of people have suggested, beyond the bottom line, who won and who lost is a much more complicated issue.

Justice Scalia, for example, appears to believe that we won. He concurred in the result that the statute was constitutional.[64] However, his is the angriest concurrence you are ever likely read. It reads as if it were a dissent. He opens by saying that "[the majority] sustains the constitutionality of the [decency statute] by gutting it. Its most avid opponents could not have asked for more. I write separately because, unlike the Court, I think that Section 954(d)(1) must be evaluated as written, rather than as distorted by the agency it was meant to control."[65]

There are significant aspects of the decision that are favorable to our position. The majority clearly states that First Amendment

62 For a description of "cultural citizenship" see *infra* text following note 95.
63 *See Finley*, 118 S. Ct. at 2185 (Souter, J., dissenting).
64 *See id.* at 2182 (Scalia, J., concurring, joined by Thomas, J.) (noting that Congress did abridge speech).
65 *Id.* at 2180 (Scalia, J., concurring, joined by Thomas, J.).

constraints do apply to government funding of artists.[66] It rejects the view that John Tuskey articulated, and the view that Justice Scalia adopted, that a denial of funding cannot possibly constitute censorship, and that therefore, when only a denial of funding is involved, the First Amendment is irrelevant.[67]

That position, which is one I think many members of Congress hold, was adopted by only two members of the Court—Justices Scalia and Thomas—and rejected by the other seven. So, the majority adopted our view that the First Amendment applies to government funding decisions. The majority also adopted our view that the government may not discriminate on the basis of viewpoint in how it allocates arts funding.[68]

However, the majority disagreed with our characterization of the statute as viewpoint discriminatory.[69] They managed to avoid that characterization by interpreting the statute to be essentially meaningless. They called it merely "hortatory."[70] That is why Justice Scalia said that the Court gutted the statute in saving it.

What was most frustrating to me in litigating the case was the disingenuity of that position. As both Justices Souter and Scalia make clear in their separate opinions, it was abundantly clear to everyone that this statute was designed to discriminate against art that expressed disrespectful and indecent points of view. At oral argument, the Court ridiculed the Solicitor General's argument that the statute was meaningless. Yet in the end, the majority adopted the very interpretation it had ridiculed

Now the question is, why were they so disingenuous? I think that there are two things going on. One is that the Court was simply unwilling to expend the political capital that it would take to announce to the public that the Supreme Court has declared that "arts funding decisions cannot be based on decency." That would have been a difficult proposition for the public to swallow. The Court was simply not willing to expend the political capital to attain that result, even if it was the right result under the First Amendment. The government gave the Court a way out, by interpreting the statute as meaningless, which allowed the majority to avoid confronting the constitutional question.

It is not just a matter of political capital, though. There is also

66 *See id.* at 2178.
67 *See id.* at 2184 (Scalia, J., concurring, joined by Thomas, J.) ("[The First Amendment"] has no application to funding.").
68 *See id.* at 2178.
69 *See id.*
70 *See id.* at 2180.

a great deal of confusion on this issue. On the one hand, the government obviously has to spend money all the time in viewpoint based ways. Every time Bill Clinton makes a speech, he is expressing a viewpoint. It is usually a partisan viewpoint, and it is a viewpoint we pay for with our taxpayer dollars. That is how government works. So, government has to be able to engage in viewpoint discrimination in funding speech, at least in certain settings.

On the other hand, if it were the case that, as Justice Scalia says,[71] when the government funds rather than directly regulates speech, the First Amendment is simply irrelevant, then the public debate would be greatly impoverished, because every serious substantial aspect of free speech in this country is supported by government dollars.

The print press is subsidized by mailing privileges. The broadcast media is subsidized by free access to the air waves. Public broadcasting is also subsidized by tax payer dollars. Political organizations are subsidized by free access to public property for demonstrations. Non-profit organizations and advocacy groups are subsidized through tax exemptions. Public universities are subsidized through the public payroll. Private universities are subsidized through tax subsidies, grants, and financial aid for students. That is where the public debate takes place—in the press, in the universities, and in political organizations. Every one of those organizations is ultimately speaking with government funds. If the government could impose whatever restrictions it wants on who gets funding to speak, we would have a much less free public debate. So, this is a tough issue.

I think the long-term effects of the *Finley* decision will be mixed. Legally, it appears to allow the government to engage in what Justice Kennedy referred to in oral argument as "wink wink, nudge nudge"[72] censorship. (I believe this is the first time a Supreme Court justice has ever quoted Monty Python.)

On the other hand, *Finley* disallows absolute categorical bars on funding indecent art. If Congress were to pass a law saying, "[t]he NEA shall not fund any indecent art," that would be unconstitutional under *Finley*.[73] In that respect, I think it supports arts agencies, like the NEA, which believe in artistic freedom. In effect,

71 *See Finley*, 118 S. Ct. at 2184 (Scalia, J., concurring, joined by Thomas, J.).
72 *See* Transcript of Oral Argument at 24, *Finley* (No. 97-371).
73 *See Finley*, 118 S. Ct. at 2178.

the decision says, "[y]ou may not engage in discriminatory funding."

Culturally, however, I think *Finley* is a very problematic decision because it basically approves the status quo. The reality is that there has been a very significant chill on funding of controversial speech for many years. That chill went way beyond the statute. From 1992 to 1998, for example, the statute was enjoined.[74] However, that does not mean that the NEA was funding controversial artists during this period. The decency statute was simply the most important symbol of what was going on, of an NEA which was constrained, which was afraid, which was no longer living by the principle of artistic freedom upon which it was founded.

The greatest disappointment is that the Court missed an opportunity in this case. I think back to an analogous situation with public universities in the 1950s. At that time, McCarthyite, anti-communist forces targeted scholars at public universities, using the same arguments that NEA critics made: "These people have the right to say whatever they want, to be as Communist as they want to be, but not on our dollar. We should not have to pay with our tax dollars for a public university professor who advocates and espouses communism." And so state legislatures started making loyalty oaths mandatory for public university positions.

Well, those oaths were challenged in the courts. The Supreme Court then did not duck the question by interpreting the loyalty oaths to be meaningless. Instead, it took a strong stand, and said that academic freedom is part of the First Amendment.[75]

At least in part because the Court did that, public universities have a great deal of freedom now. The notion of academic freedom is entrenched in public universities. Even though many scholars at public universities say controversial things, we rarely if ever hear calls to cut the funding of public universities.

By interpreting the statute to be meaningless and by ducking the issue, the *Finley* Court missed a similar opportunity to establish an analogous principle of artistic freedom. That opportunity was lost with respect to this case. That is the really sad legacy of *National Endowment for the Arts v. Finley.*

MARCI HAMILTON:

I would like to begin with constitutional fundamentals and

74 *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1475-76 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *reh'g denied*, 112 F.3d 1015 (9th Cir. 1997).

75 *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

then move into what I think is the problem with both sides of the debate. Frequently, in our debates in constitutional law, we end up with just two sides. This is an instance where I offer a third side.

If one returns to the framing of the Constitution and the constitutional debates, there is one word that is repeated almost as often as "tyranny." That word is "distrust." The Framers distrusted every entity in the society that would hold power. They distrusted the government, they distrusted every branch of government, whether it was executive, judicial, or legislative.[76]

The Framers had multiple examples of the errors in history in which various types of government had been abused or used incorrectly. They distrusted the people more than they distrusted government. They distrusted religion. If you carefully read the notes of the debates transcribed by James Madison, they are not talking about religious liberty, but rather, why we cannot trust religion in the public sphere. The Convention was basically a feast of distrust.

If one is going to distrust an entity, and I think that one is probably wise to do so, one ought to distrust the entity with a large purse. That takes us to the NEA.

The Framers set up the constitutional system to impede those entities from abusing power. They assigned various entities a certain amount of power, placed limits on that power, and laid the groundwork for a free market system. The question in our free market system is, how to produce the best art? How do we generate the greatest diversity, the greatest quality, and the greatest quantity?

What the history of the NEA tells us is that government can play two roles when it holds money with respect to art. It can be a purchaser. And here is where I think that Justice Scalia is on target.[77] When the government acts as purchaser, it ought to be able to do whatever it wants. If it wants to put art deco in the Department of Justice building, that should be fine. Here, government would be acting as a *purchaser* in the market.

However, the current NEA poses a very different situation. Here, the government is acting as a *financier* in the open marketplace. As we have heard tonight, the government is the largest financier in the marketplace. Here is where Justice Scalia is simply wrong. It is not constitutionally acceptable for the government to act with complete discretion with its large purse in the free

76 *See* Marci A. Hamilton, *The Paradox of Calvinist Distrust and Hope at the Constitutional Convention, in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Angela Carmella et al., eds., forthcoming).

77 *See generally Finley*, 118 S. Ct. at 2183-84 (Scalia, J., concurring, joined by Thomas, J.).

market.[78]

Giving the government power to act as financier skews what the free market would have accomplished; it skews the diversity, the quality, and the quantity of the works. The irony here is that the government's language insists on diversity,[79] but the result of the current system is to diminish the real diversity of art works that are created in the marketplace.

I do not want to lead you to think, however, that what I am talking about is a notion that suppression of art is unconstitutional per se, because it certainly is not. The copyright system creates a scheme wherein the government, through the Constitution, is permitted to give a private right of action to authors to suppress those who copy their works.[80]

We have a constitutionally sanctioned system that suppresses both copying and the creation of new works based on existing works.[81] It is not that suppression of art, per se, is the problem. The problem is when the government enters the marketplace and skews the quality, quantity, and diversity in the marketplace of art.

The problem with the standard that was challenged in *Finley*, which we said in the Volunteer Lawyers for the Arts' brief,[82] was that this was, in fact, a coercion of the market, and it undermines what the Copyright Clause and the First Amendment are intended to engender. In my view, aspects of the decision are unfortunate.

First, *Finley* says that there are plenty of instances where viewpoint discrimination is fine, such as in the case of children.[83] It is not surprising that my former boss, Justice O'Connor, said that. She has always been concerned about children's issues. But the Court, knowing the way that the NEA operates, crafts an opinion in a way that creates a nearly impossible means to challenge the NEA on an as-applied basis. Proof of the viewpoint discrimination will be difficult to establish. Granted, there is considerable promising language about potential as-applied challenges, but the Court erects substantial barriers to success.

Second, the truly unfortunate part of the decision, in my view, is that it encourages the NEA to be present in the marketplace, and implicitly encourages it to inhabit a position that skews the arts marketplace. On the other hand, the Court does seem to invite an

78 *Cf.* Marci Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996).
79 *See* 20 U.S.C. § 954 (d)(1) (1994).
80 *See generally* 17 U.S.C. §§ 101-1101 (1994).
81 *See id.* § 106; U.S. CONST. art. I, § 8, cl. 8.
82 *See* Brief Amicus Curiae of Volunteer Lawyers for the Arts Supporting Respondent, *Finley* (No. 97-371).
83 *Finley*, 118 S. Ct. at 2177.

as-applied challenge. For example, I take it there is a situation in San Antonio where the city government has ceased funding an arts group altogether, and they were foolish enough to tell everyone they were doing it because they did not like the group.[84] This promises to be an as-applied challenge that might well meet the burden of proving viewpoint discrimination.[85] At the federal level, I fear that under the NEA and the way that it operates, we will never be able to meet that burden, and we will continue to have this untoward influence in the marketplace.

AMY SCHWARTZMAN:

Thank you, everyone, for your opening statements. Robert Peters is going to give a rebuttal at this point.

ROBERT PETERS:

I reiterate that all of the arguments that are made against the decency and respect clause can also be made against the artistic excellence and merit clause and all of them have been made. Many groups over the years have criticized the NEA for making supposedly artistic judgments on the basis of political viewpoints. I think that is one reason why the Court hesitated in knocking down the indecency clause.

The Supreme Court really did not want to come to a conclusion that said that the NEA has to fund Nazi art in Brooklyn. And, on the other hand, I do not think that the Supreme Court wanted to say that the NEA has to fund every type of evangelistic Christian art either.

I think the Court wanted to leave the NEA with a bit of leeway to make some decisions that are based on content. I do not fully know what the Court meant. But, I would distinguish between a concerted effort to banish a particular viewpoint, whether it would be a view sympathetic to gay rights, or sympathetic, perhaps, to a Christian perspective on life, versus a decision on an individual basis based on the manner or place in which the view is expressed. I believe that, in certain circumstances, the NEA can take viewpoint into consideration.

84 *See* Esperanza Peace and Justice Center v. San Antonio, No. SA98CA0696 (W.D. Tex. filed Aug. 4, 1998); ESPERANZA CENTER, GOVERNMENT MAY NOT SUPPRESS "DISFAVORED VIEWPOINTS" IN MAKING ARTS FUNDING DECISIONS (last modified Jan 8, 1999) <http://www.esperanzacenter.org/fundingcut/Finley1.html> [hereinafter ESPERANZA CENTER].
85 As of the summer of 1999, the Esperanza Center has filed a motion for summary judgment. *See* ESPERANZA CENTER (visited Aug. 10, 1999) <http://www.esperanzacenter.org> (providing Plaintiff's Motion for Summary Judgment).

Before you decide you want to ban all viewpoint discrimination, you have to sit and ask yourself, "[w]hat is the most offensive, obnoxious, ugly, disgusting, depraved, disrupting work that you could imagine some so-called artist coming up with?" Then ask yourself whether you would want to force the government to fund it.

If you conclude that government should be required to do so then, presumably, Justice Souter is your man. If you believe that there has to be a middle road between the two extremes—on the one hand, banning everything that some group does not like; and on the other hand, no viewpoint discrimination whatsoever, in any circumstance—presumably, Justice Souter is not your man.

AMY SCHWARTZMAN:

Along those lines, we have been talking a bit about this notion of an as-applied challenge. I would like the panelists to explore that a little further. Given the Court's decision, and the realities of various other criteria that govern the NEA at this point in time, can an as-applied challenge actually be brought, and if so, what would it look like?

DAVID COLE:

The *Finley* case actually began as an as-applied challenge, and was successful as such. The case originally began when Karen Finley and three other performance artists were denied funding by the NEA.

This was after Rowland Evans and Robert Novak, two conservative columnists, wrote an editorial, based upon a leak from the NEA, saying that these artists were going to be funded, and that they addressed issues of sexuality in their work in ways that people might find offensive.[86]

It was a very inflammatory piece. In response to it, Congress got up in arms. John Frohnmayer, who was then the Chairman of the NEA, decided that, notwithstanding unanimous recommendations to fund these artists, he would deny funding based on what he called "political realities."[87] He actually got the NEA Council together, polled them, and they talked about why they were going to deny funding. And then he denied the funding.

86 *See* Rowland Evans & Robert Novak, *Editorial: NEA Faces Tough Funding Decisions*, CHI. SUN-TIMES, May 11, 1990, at 33.

87 *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1462 (C.D. Cal. 1992).

We sued on the artists' behalf, arguing that they were denied funding for impermissible political viewpoint considerations, because of the controversial sexual subject matter of their art, and that this was both invalid under the NEA statute and unconstitutional.[88]

The District Court held that such a decision would be invalid if we could prove that it was based upon political considerations, and allowed us to conduct discovery.[89] We had discovery, and lo and behold, there were all kinds of memos and documents which showed that the NEA did indeed take this action for purely political reasons.[90]

In the light of that evidence, the NEA agreed to settle the case.[91] It paid the artists the money that they had been denied, paid damages, and paid our attorney's fees.[92] So, we won the as-applied challenges. But as-applied challenges are extremely difficult to win. Once you have got a decision out there that says that it is unconstitutional to deny funding based on political considerations, the agency is obviously not going to say that that is what they are doing. The agencies are going to say that they are denying grants based on artistic merit. Thus, proving impermissible intent will be extremely difficult.

When you couple that with the fact that the NEA does not issue reasons for why it denies grants, there are extraordinary barriers to bringing an as-applied challenge. An artist generally has no idea why she is being denied. It is only when you get a very celebrated case like *Finley*, where there was a lot of press, and where some people in the NEA made statements, that we were able to have an inkling that the denial was done for political reasons, and that we were able to bring a case.

That may be the case as well with the current situation in San Antonio regarding the Esperanza Center.[93] But I do not think that is going be a very fruitful endeavor in the long run. I think more hopeful is the fact that the Court has said, contrary to Mr. Peters, that you cannot deny funding based on viewpoint,[94] even if it is Nazi art in Brooklyn.

88 *See id.* at 1462-63.

89 *See id.* at 1464.

90 *See id.* at 1476.

91 *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2174 (1998).

92 *See id.* ("[T]he NEA agreed to settle the individual respondents' statutory and as-applied constitutional claims by paying the artists the amount of the vetoed grants, damages, and attorney's fees.").

93 *See* Esperanza Peace and Justice Center v. San Antonio, No. SA98CA0696 (W.D. Tex. filed Aug. 4, 1998); ESPERANZA CENTER, *supra* note 84; *supra* notes 84-85.

94 *See Finley*, 118 S. Ct. at 2178.

Of course, whenever you are defending the First Amendment, you come up against the Nazi example. It gets trotted out every time. But the Court has said that you cannot deny on the basis of viewpoint. And I hope that statement will give arts agencies the courage and strength not to bow to political pressures.

What the NEA did in the *Finley* case was bow to political pressures. The Court has now said that this cannot be done, even if it was unwilling to confront the statute that Congress enacted.

HOPE O'KEEFFE:

I think that you are correct, it is going to be hard to bring an as-applied challenge. I see part of my job as general counsel as ensuring that such a case does not get brought. I do not want to spend the next nine years embroiled in litigation on something like that. I do, however, want to correct you. For any grant denial, the artist can get a summary of the panel discussion. Council meetings are open to the public and transcripts of council meetings are available.

So, to the degree that there is any sort of viewpoint discrimination reflected in the panel summary or the Council, one would have access to that proof. The Council is not a closed session. The panel is a closed session, but it is not an arbitrary decision. . . .

DAVID COLE:

Right. However, the important point is that the government official knows that there are some things he cannot say, such as, "I am firing you because you are black." You are not going to find many cases where government officials say, "I am firing you because you are black." The same thing is going to be true with the arts agency.

HOPE O'KEEFFE:

Absolutely.

DAVID COLE:

You do not have to be very smart to know to avoid saying, "I am going to deny this because I do not like the viewpoint it encompasses." As long as you do not say that, it is going to be very difficult to bring an as-applied challenge.

AMY SCHWARTZMAN:

What is your feeling about whether or not, as a practical matter, an as-applied challenge could be brought now, in the climate as it exists?

ROBERTO BEDOYA:

I agree with David Cole. I do not think that anybody is going to be very overt about it. It is all going to be sort of hidden and behind closed doors. This is a way in which you can silence a view that you do not support.

I think our members are aware of that. Sometimes people just hang themselves, and it appears that may be the case in San Antonio. The City Council publicly stated that they did not like the Esperanza Center because it supported a gay and lesbian film festival, and that was the city's rationale for denying funding.[95]

But, I feel like my position on this panel is just to sort of talk to you about psychological and emotional after-effects of this lawsuit and this litigation upon the arts community, and what it means in terms of what artists produce, and the freedom that they feel they have.

That is very, very broad, because, as Mr. Peters said, the issues of taste are also very subjective. He may find something very offensive that does not bother me. But it may bother the person across the street.

So taste does come into play when decisions are made as to what gets supported, either in the NEA or state arts councils, or in local arts councils, or in any of those public agencies that support the arts.

I think there is one thing that the arts community will not back away from—the notion of what I will call "cultural citizenship." Let me give you an example. When the AIDS epidemic became prevalent in the mid-80s, it was the artist's community that created a red ribbon. This was a very simple little visual icon, but it was a radical gesture. This was an assertion made by artists into the public sphere, about what they wanted to let the public know. Simultaneously, the government at that moment in time was denying that there was an epidemic going on. These are acts of cultural citizenship. An artist comes, and he paints a mural in town, and it shows the history of a neighborhood. And in that history, maybe there is a history of some racialized historical moment that was

95 *See* ESPERANZA CENTER, *supra* note 84; *supra* notes 84-85.

contentious. That is an assertion, made into the public sphere, which I would characterize as an act of cultural citizenship. The government itself may find it does not want to engage this truth, this assertion, and may work to silence it.

I think that this probably will happen again. So, in some ways, my association is to safeguard those freedoms and the right to make those kinds of assertions.

JOHN TUSKEY:

I do not know if Mr. Bedoya is mistaking what the government does with what private citizens do. Certainly there is nothing in *Finley* which would at all suggest that if I owned a building, and I commissioned an artist to paint a mural of the history of my neighborhood, that the government could suppress that mural, because there was something in the mural the government did not like.

I do not know if you were driving at that or not. I just want to make that clear. *Finley* basically addresses the *government's* role in providing money to artists. That is why I go back to the point I originally made. I just do not see censorship in *Finley*.

I presume that market distortion is one thing. But it seems to me that we are not in the situation where the empirical claim of any market distortion is so great that it amounts to censorship. The information we had when we were writing our brief is that the NEA funds roughly two percent of the projects of the applicants. Is that correct?

HOPE O'KEEFFE:

It was roughly four percent of individual applications at this point, but it was roughly one-fourth of applications overall.

DAVID COLE:

Historically, the NEA has granted two of every seven applications it has received.[96]

HOPE O'KEEFFE:

I actually would disagree quite vehemently with any perception of a skew in the marketplace, or diminution in diversity. We are the single largest funder. But we are also a pathetically small funder compared to all of the private funding that is out there.

[96] Between 1965 and 1988, the NEA funded 85,000 grants and received 302,000 applications. *See* 136 Cong. Rec. S17979 (Oct. 24, 1990) (statement of Sen. Jeffords).

Our total budget is ninety-eight million dollars.[97] I do not know the numbers off the top of my head, but there are something like 10.62 billion dollars in private donations to the arts.[98]

JOHN TUSKEY:

It would seem to me to be one thing to say that if the government had a monopoly, or close to a monopoly, on the funding of art, the withholding of that funding certainly would be censorship. I do not have any real problem with that reasoning.

But, it seems to me that with the small amount of funding the NEA actually provides, the empirical claim on that score has not been proven.

I understand the argument about the multiplier effect. I am wondering if that is realistic at all. I certainly suspect most people who patronize art, buy art, go to the opera, or go to the symphony, do not ask themselves, "Hey, did the government fund this? Oh, the government funded this. This must be good. So I will buy it." Or, "I will pay for it." Or, "I will patronize it."

It would seem to me that it would be an incredible admission of weakness on the arts community's part to say that we have to have this government imprimatur so that we can obtain other money to fund our art.

MARCI HAMILTON:

As a factual matter, there are matching requirements in many scenarios. And so, John Tuskey's reasoning does not wash. There is a synergy between government and private funding. Secondly, what we are debating is where to draw the line. John Tuskey's line seems to be that the government has a complete monopoly of the arts marketplace.

JOHN TUSKEY:

Or close to complete.

MARCI HAMILTON:

In my book, that is totalitarianism. You cannot draw the line at totalitarianism. You have to draw the line much closer to a liber-

[97] *See* NATIONAL ENDOWMENT FOR THE ARTS, BASIC FACTS ABOUT THE NEA: SUMMARY OF APPROPRIATED FUNDS 1966-1999 (visited Apr. 3, 1999) <http://www.arts.endow.gov/learn/Facts/AppropriationsZ.html>.

[98] GIVING-USA 1998 (estimate of total private contributions to the art and culture in 1997).

tarian perspective, if the values of the First Amendment and the Copyright Clause taken together are going to be validated. So, it cannot be that you are looking only for a monopoly. Government should exercise much less control in the marketplace.

The fact that the NEA does not have a lot of money does not change the constitutional analysis. The answer cannot simply be, "well, they are small, and therefore we will not worry about it." In fact, they are quite powerful, in leading the marketplace.

There are studies that show that when the government purchases particular artwork, it becomes more valuable in the art marketplace. This is because private investors are risk-averse, and if the government invested in it, then it has to be pretty safe.

That is a dangerous leadership position, and it reduces the importance of money the government wields. More is worse, but little may also harm constitutional values. The NEA's risk-averse seal of approval indicates what was wrong with the NEA in the first place.

JOHN TUSKEY:

I would agree with you that, if that is the case, then it is an argument against the NEA in the first place.

DAVID COLE:

One fact to take into account when considering the empirical effect of NEA funding denials on institutions and artists is that the NEA itself is the largest single funder of the arts. Furthermore, the NEA has repeatedly stated that because of matching grant requirements, for every dollar it spends, ten dollars of private funds follow.[99] So, the NEA actually leverages an incredible amount of financial effect with every dollar it spends.

However, I do not think that is really the critical question. For example, there are many private universities in this country, and there are many public universities. Public universities do not have monopoly control over education. Nonetheless, I think that if a public university adopted a standard that said, "we are going to make tenure and admission decisions based on academic merit, but we are going to take into account negatively whether the teacher or the applicant for admission has expressed a religious

99 *See Dep't of Interior and Related Agencies Appropriations Act, 1995, Hearings on H.R. 4602, Pub. L. No. 103-322, 108 Stat. 2499, Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations*, 103d Cong. 297 (1994) (testimony of Jane Alexander, Chair, NEA).

point of view," I think we would all find that unconstitutional as a First Amendment matter. And I think the American Center for Law and Justice would be leading the attack.

JOHN TUSKEY:

Absolutely.

DAVID COLE:

That is indistinguishable from the decency criteria. What the decency criteria says is that decisions will be based on artistic excellence and artistic merit, taking into consideration, negatively, whether your work is consistent with general standards of decency and respect for the diverse beliefs and values of the American public.[100]

If you express viewpoints which are disrespectful or indecent, you are disfavored. Just as in my hypothetical, if you express religious point of views, you are disfavored. These are both examples of viewpoint discrimination.

If the government is telling you that you cannot have a religious viewpoint, they are just saying that you are not going to get a public benefit if you express a religious viewpoint. I think that those are really identical kinds of cases.

Yet, the American Center for Law and Justice fights tooth and nail, and quite successfully, when religious discrimination is at stake. But when it is "indecency and respect" discrimination, they are on the other side.

HOPE O'KEEFFE:

Let me say, David, that you are still arguing for an interpretation of the statute that the Supreme Court rejected, and that the Agency has never applied.

AMY SCHWARTZMAN:

If the Agency has never applied viewpoint discrimination, what does, alternately, the statute mean? What are we talking about, anyway?

ROBERT PETERS:

Can I ask Mr. Cole whether, in his opinion, the Court's decision absolutely prohibits all consideration of the viewpoint that

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

message is communicating? And if so, what did the Court uphold? The statute says that the NEA shall take into consideration general standards of decency and respect. If there is absolutely no right, no ability to take into consideration what is being said, and how it might affect any audience, what did the Court uphold?

HOPE O'KEEFFE:

The Court upheld the Agency's interpretation of the statute as we were applying it.

ROBERT PETERS:

The Court specifically held that it was not deciding whether the NEA approach was right. The opinion by Justice O'Connor said that specifically.[101]

HOPE O'KEEFFE:

The Court also specifically said that the Agency has very broad discretion and flexibility; that they interpreted the statute as purely advisory; and that if the Agency did not interpret it as purely advisory, then it would be a different case.[102]

ROBERT PETERS:

What do you mean by "advisory?"

HOPE O'KEEFFE:

As not mandating viewpoint discrimination.

ROBERT PETERS:

I agree that it does not require that all indecent art or offensive art not be funded. "Taking into consideration" is not a prohibition. The question is whether Mr. Cole is correct in arguing that the NEA can never take into consideration what the message of a proposed art project is.

I would say that if the Court's decision means anything, Mr. Cole is wrong in his interpretation of that decision. I think it will be proved that there are some limits on the message of art that the government has to fund. I think that is the whole purpose to *Finley*. It rejected Mr. Cole's viewpoint that government cannot consider the message, in any circumstance.

101 *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2175 ("We do not decide whether the NEA's view—that the formulation of diverse advisory panels is sufficient to comply with Congress' command—is in fact a reasonable reading of the statute.").
102 *See id.* at 2178.

DAVID COLE:

If I could just respond. It is certainly not unconstitutional for an agency, in deciding what to grant, to take into consideration the viewpoint, and decide whether it is done well, and whether this is appropriate for a particular audience. The Court said that is perfectly appropriate.[103]

What the Court said is, it is not permissible to deny grants because of their viewpoint.[104] You can certainly consider it, but you cannot deny them *because* of their viewpoint. If it is a good work of art, and if it is otherwise qualified, then the fact that it expresses a viewpoint that I might find offensive, or that Mr. Peters might find offensive, is not a permissible ground for denying funding.

I wanted to get back to the question that Hope O'Keeffe and Amy Schwartzman raised, about what the statute actually means. What the statute says is that the NEA shall ensure that artistic excellence and artistic merit are the criteria by which applications are to be judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.[105]

Now, when we challenged this law, we looked at that law, and we said, "this means that they are going to be considering decency and respect. That has a chilling effect on artists across the country. We think that is unconstitutional. We are going to go into court and challenge it." And we did, for that reason.[106]

We also have evidence of what the NEA was in fact doing under this law, before it was enjoined by the courts. The NEA expressly instructed peer review panel members to bring to the table those values that the statute states: "general standards of decency and respect for the diverse beliefs and values of the American public . . . ."[107]

The basic instruction that the panels received is that you bring your general standards of decency from your communities, from your backgrounds, and from your ethnic backgrounds. So, they were instructing the panel members to bring their own standards

103 *See id.* at 2177-78.
104 *See id.* at 2178.
105 *See generally* 20 U.S.C. § 954(d)(1).
106 *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1462-63 (C.D. Cal. 1992).
107 20 U.S.C. § 954(d)(1).

of decency to the table in making these decisions. They were not saying, "ignore decency." They were saying, "consider decency." When John Frohnmayer, then Chairman of the NEA, was asked in Congress, "are you considering decency or not?", he said, "no one individual is wise enough to be able to consider general standards of decency and the diverse values of the American people all by him or herself. These are group decisions. They are made by the National Council on the Arts, as well as by the panelists."[108]

And then he was pressured to answer the question, "well, are you going to make any decency determination?" And he said, "well, I will review what they have done. And if I think they've made a mistake, I will send it back to them."[109] Of course, the Chair cannot review to determine whether the Council and panels have made a mistake on whether decency is being appropriately considered unless she or he personally considers decency.

Once we brought the lawsuit, the agency changed its tune, and took a position that all it was doing was picking diverse panelists. This was directly contrary to the language of the statute, which says that, in judging applications, you must ensure that decency and respect are considered. It was directly contrary to what the evidence demonstrated that they had been doing. And it was contrary to what Frohnmayer had told Congress. And in fact, what I find in some ways most troubling is that the Court itself understood that this was a disingenuous reading of the statute. When Seth Waxman, the Solicitor General, argued this case in the Supreme Court, virtually to a person, the Court derided the interpretation that he was advancing.

I am just going to quote the justices who were in the majority. Justice O'Connor: "That the interpretation suggested by the agency that just setting up the panels differently was enough strikes me as possibly in conflict with the language of the statute."[110] That is not very strong language. But then, Justice O'Connor does not use very strong language. Justice Stevens: "Are you trying to persuade us that even after the statute was passed, Andres Serrano would have the same chance of getting a grant as he did before?[111] . . . [Y]ou're going to have a hard time persuading me the statute's

108 *Dep't of Interior and Related Agencies Appropriations for 1992, Hearings Before the Subcomm. on Dep't of Interior and Related Agencies of the House Comm. on Appropriations*, 102d Cong. 234 (1991) (testimony of John Frohnmayer, Chair, NEA).

109 *Id.*

110 Transcript of Oral Argument at 10, National Endowment for the Arts v. Finley, 118 S. Ct. 2168 (1998) (No. 97-371).

111 *Id.* at 16.

essentially meaningless."[112] Justice Kennedy: "I have the same problem."[113] Justice Ginsburg: "[T]he message that comes from the whole history of this is, don't fund Serrano or Mapplethorpe."[114] Justice Kennedy: "Is it constitutionally principled for the Government to do this by a wink-wink, nudge-nudge approach, which is what you're suggesting, that they pass a statute which is really meaningless, but everybody knows what it means?"[115]

That is what the Justices said to the Solicitor General when he was advancing this interpretation of the statute. Then they come around to writing the decision, and they apparently realized that this is a way to avoid having to confront the issue.

So, the majority adopted an interpretation which they themselves ridiculed during the oral argument, which is contrary to the language of the statute, and to all evidence of what the NEA was doing before. They did this in order to avoid deciding the real question of the case, which is, "can the government discriminate on the basis of viewpoint in arts funding?" Justice Scalia[116] and Justice Souter[117] say, I think much more honestly, that this is a statute that discriminates on the basis of viewpoint. And then they disagree about whether it is constitutional or not. I think that is a much more honest approach.

It would have been worse, obviously, if the majority had chosen Justice Scalia's position. I do think that it buttresses what I think the arts agencies really want to do here, which is not to discriminate on the basis of viewpoint and make their decisions on the basis of artistic merit. But it is still troubling, as a process matter.

AMY SCHWARTZMAN:

I would like to get John Tuskey's and Robert Peters's feelings about whether the Court's opinion and treatment is disingenuous or not. And Marci Hamilton's, too.

MARCI HAMILTON:

The opinion is not disingenuous. It is vintage Justice O'Connor.

112 *Id.* at 18.

113 *Id.*

114 *Id.* at 22.

115 *Id.* at 24.

116 *See Finley*, 118 S. Ct. 2168, 2181 (1998) (Scalia, J., concurring, joined by Thomas, J.).

117 *See id.* at 2185 (Souter, J. dissenting).

Remember when you were a kid, and it is five-thirty, and you are really hungry. Dinner is close, but not soon enough. You go into the kitchen, and your mother, halfway across the house with her radar ears, hears, "jingle, jingle." "Are you in the cookie jar?" The answer is, click, "No, I am not in the cookie jar."

What Justice O'Connor is doing is saying, "I have just about got you to rights. Do not do it." The day the opinion came down, I thought it was very telling that the new director of the NEA, Mr. Ivey, said that the NEA takes the First Amendment very seriously.[118]

He told the Court, through the newspapers, "We *may* have had our hands in the cookie jar, but they are now out." So, I do not think the opinion is disingenuous.

There is another way that this is a vintage O'Connor opinion. She, once again in the First Amendment context, engages in context-dependent determinations. She has explicitly espoused such an approach in the Establishment Clause arena, where she rejected a "Grand Unified Theory."[119] She is now doing it in the art context. She makes it very clear that if children are involved, viewpoint discrimination will not breach constitutional guarantees.[120]

As a result, we can be certain that Serrano's work need not be displayed in the public schools. There is, very likely, a majority of the Court for that proposition. There are, likely, other contexts as well where they would be willing to say that viewpoint discrimination is okay, in this particular context. The Court in *Finley* has indicated its willingness to weigh the value of the art against the role and the goals of government.

In addition, there are other contexts where viewpoint discrimination will not be appropriate. Thus, *Finley* opens the door. We now know that we must figure out in which context the government can engage in viewpoint discrimination and in which it cannot. It will take a number of years to fill in the categories. In any event, this is vintage O'Connor both with the cookie jar and with the context-dependent balancing.

JOHN TUSKEY:

First off, as a matter of statutory construction, if the Court was

118 *See* Calvin Woodward, *Court Upholds Decency Standards for Arts Funding Finds No Violations of Free Speech Rights*, THE PLAIN DEALER (Cleveland), June 26, 1998, at 6A, *available in* 1998 WL 4141975 ("[The NEA] remains committed to full First Amendment protection of freedom of expression.") (quoting William Ivey, Chair, NEA).

119 Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part & concurring in the judgment).

120 *See Finley*, 118 S. Ct. at 2172.

adopting that interpretation as its own, then I would probably agree, yes, indeed it was disingenuous. At least it was certainly wrong.

I think that one thing both Justice Souter and Justice Scalia did agree on was that it is not a correct interpretation of the statute. That statute does require the NEA to place a thumb on the scale.

So, in that respect, I do not know if I would go so far as to say "disingenuous," because I am not sure that I can read the motives of the Court. I am not a mind reader. You do have, what is in essence, a political decision.

There is one other point I want to make. As a matter of fact result, I think that you may be able to justify this result on a quasi-standing ground. Basically, the NEA was not putting its thumb on the scale, or at least it said so, and the Court accepted the claim that the NEA was not engaging in viewpoint discrimination. But there is no harm. There is no foul. So, there really is no reason to strike the statute down on that basis.

I agree with something Professor Hamilton said about the Court's balancing which I think ties into the Court's entire approach—not just to the First Amendment, but to the Constitution in general. The First Amendment says, "Congress shall . . . make no law abridging the freedom of speech . . . ."[121] Now, "no law abridging the freedom of speech" seems to mean no law abridging the freedom of speech. If viewpoint discrimination against artists in funding decisions really is a law abridging the freedom of the speech based on the original meaning of that amendment, there should be no question that the Court should strike down the statute. I do not care whether you think it is good, bad, or indifferent. Strike it down. That is what the Constitution requires. That is the Court's role. Interpret the Constitution, and apply it to the facts at hand.

However, what the Court seems to have done over the history of its First Amendment jurisprudence, or at least in this century, is to turn the phrase "Congress shall make no law abridging the freedom of speech" into "Congress shall make no law abridging the freedom of speech unless we the Court determine that Congress has a good enough reason to abridge the freedom of speech."

That is what this balancing is all about. The protection of children is a good enough reason to abridge the freedom of speech. I

121 U.S. CONST. amend. I.

do not accept that, but I will assume it is. But some other reason is not good enough.

That is how the Court seems to have interpreted the entire Constitution. That is the thrust of the Court's Fourteenth Amendment jurisprudence; different balancing tests for different situations. The Court sees the Constitution as a bunch of majestic generalities which it has the power to specify. You do not leave these decisions in the political process because, my gosh, no important decisions concerning human life in this country can be left to mere politicians and the people who vote for them. No, it is we wise nine on the Court who have to make this decision.

That is something that bothers me about First Amendment jurisprudence in general. I am saying this from a personal, rather than an institutional, perspective.

ROBERT PETERS:

It was a facial challenge and, because the government took the position that this clause really did not make much difference, it was not a very clear cut case for the Court to come down on a very important issue: what are the limits, if any, on government funding in terms of restrictions?

I am not the Constitutional expert that others here are. However, I remember from law school that the Court likes concrete facts and circumstances so it can try to build. It did not have that here. This was a wide open case.

Secondly, I still think that the Court would like to find a balance between what I call the two extremes. The one extreme is that one special interest group, whether it be the gay community or the Christian community, effectively determines which viewpoints get expressed with public funding.

I am almost positive that the Court is not going to permit that type of viewpoint discrimination. On the other hand, I disagree with Mr. Cole that the Court requires the NEA to be totally blind in terms of what that art is all about. Now, we can differ, but I do not think that is what the Court is saying.

AMY SCHWARTZMAN:

I would like to pose one more question to the panel. In each of your opinions, what role should the government be playing in regard to the arts and funding the arts?

HOPE O'KEEFFE:

Whither the NEA? Onward, upward. Yea, long live. I think that what we would like to do is put the last ten years behind us and move to rebuild the agency to a point where we can support the incredibly diverse range of art that is produced in this country.

Our current focus is on building and preserving our living culture heritage. And that is something that is very important to Chairman Ivey. The other point, which I referenced earlier, is finding some way to support individual artists.

MARCI HAMILTON:

The NEA has such a minuscule budget that this is a perfect time in history to cut it altogether. That would not be a great loss to either our cultural heritage or the marketplace of expression. In fact, I think it would be a fine day for the marketplace of expression, which is now being driven very nicely by a very successful copyright regime and an international marketplace that is making our marketplace more interesting every day.

ROBERTO BEDOYA:

I remember a conversation I once had with a journalist. He asked me: "You sued the agency and you are a part of this lawsuit, but why are you engaged with them?" I replied: "I vote for candidates who may not win, but I still vote." I still believe in an agency that may not be supporting my constituency and the kind of art that I find very interesting. But, I still believe in the agency and I believe it should grow and expand.

I also do not believe in the totalitarianism of the marketplace. I believe the non-profit sector has a very important role. I think the kind of artistic expressions that come out of the non-profit sphere is very, very good.

So, I do not like privileging the marketplace in such a way as to say that it can support some artistic forms, but that other, new forms must find their patronage in other ways. I believe in the value of what the non-profit economic systems can do.

ROBERT PETERS:

I do not oppose government funding of the arts. I think that if government is to fund the arts, however, there should be some limits. I think that is good policy in a society where so many different groups want to attack each other. If they want to attack each other, for the most part, they should use private funds.

However, the NEA clause does not say that government can never fund an art project that may deeply offend somebody, or that it can never fund an art project that is indecent. I think the NEA would be wise if, generally speaking, it did not do either. We all have deep sensibilities. The gay community can be deeply offended, and so can the Jewish and Christian communities, and the African American and Latino communities as well.

I think when it comes to public funding of art, it is a wise course of action, as much as possible, to avoid deeply offending important communities in this nation. I think that is what Congress wants to do. It is not saying that all viewpoints on one point can never have art.

However, there should be some discretion in art funding. And I think it is a wise course of action.

JOHN TUSKEY:

I agree with Professor Hamilton that if the NEA disappeared tomorrow that would not be any great loss. The arts would flourish in the marketplace without government support. I do need to clarify one thing. The marketplace does not just mean the commercial marketplace. I did not take Professor Hamilton's comments to mean that. I think she probably meant marketplace in a much broader way, which is really just the sum total of the numerous daily interactions and communications between people that occur day to day. In that regard, I think that Professor Hamilton is probably correct that the NEA's disappearance would not harm the arts.

I can see a place for government funding for the arts, but not at the expense of saying that we cannot distinguish between art that serves the common good and art that harms the common good. I am not going to trot out the Nazis in Brooklyn. However, I think we can all think of examples. Imagine a D.W. Griffith film festival, for instance, being put on by White Artists For White Supremacy. The centerpiece of the festival is the racist classic *The Birth of a Nation*,[122] Griffith's early twentieth century tribute to the Ku Klux Klan. I do not think that is something the government should fund. I would hope nobody would think that is something the government should fund. Stirring up racial animosity does not serve the common good of our society. But if the government is

122 THE BIRTH OF A NATION (David W. Griffith Corp. 1915). The film generally is considered to be *both* one of the most blatantly racist movies ever and one of the great leaps forward in narrative cinematic art. *See generally* JAMES MONACO ET AL., THE ENCYCLOPEDIA OF FILM 235 (1991).

disabled from saying, "no, we will not fund that, because that just simply does not serve the common good," then I would agree that we should do away with governmental funding.

DAVID COLE:

I believe it is important to have public funding of expression generally, and I do not think artistic expression is any exception. A lot of expression cannot be funded in the private marketplace, but is nonetheless very valuable. Public television and public radio are constant reminders of that. So I think it is important to continue with the NEA.

I think it is also important, however, that it not be driven by political pressures to become an art of majoritarian values. That was said by virtually everybody when they created the NEA thirty years ago.

The best argument for that is a work done by Vitaly Komar and Alex Melamid, two conceptual artists who attempted to find out what American people really want in their art. They took a poll, asking one thousand and one people what they liked in paintings.[123] They found that America's favorite color is blue, that they wanted realistic looking paintings, dishwasher-sized, with some wild animals in their natural setting, with some ordinary and famous people, visible brush-strokes and blended colors.[124]

On the basis of those poll results, they then constructed a painting which was actually submitted to the Supreme Court by one of the *amici*. It is called *America's Most Wanted Painting*.[125] It is a landscape, of course, with mountains, a lake and a blue sky, a posed George Washington figure, a hippopotamus, a deer frolicking through the lake, and a group of people walking. That is what I fear for the future of publicly funded art.

JOHN TUSKEY:

In other words, what you fear is that what we have in this country is just a bunch of philistines, and we have to be saved from our bad taste by people of superior taste.

123 *See* Kenneth Baker, *"What do Americans Like the Most? Take a Poll"*, THE SAN FRAN. CHRON., Dec. 28, 1997, at D1.

124 *See id.*

125 Brief of Amicus Curiae of [20 Artists] Supporting Respondents at App. 17a, National Endowment for the Arts v. Finley, 118 S. Ct. 2168 (1998) (No. 97-371).

AMY SCHWARTZMAN:

On that note, I would like to actually open it up to the audience for any questions.

AUDIENCE MEMBER:

One question I have for Professor Hamilton is about skewing. Is there any substantial governmental push in one direction that is enough? Does it have to be over a certain point? Does it have to have proof?

MARCI HAMILTON:

When the government enters the market as a private actor, as a financier, there should be some showing that there has been some effect on the market. The constitutional problem occurs when the government comes in and skews the market in some meaningful way.

David's goal in the *Finley* case was to find a way to let the government come into the marketplace, but in a way that would not skew it or harm the diversity, the quality, and the quantity of that which is created. This is Justice Souter's opinion.[126] He would have found viewpoint discrimination in the current NEA regulations.

But that is not what happened. The Court came up with this more complex holding in which sometimes such a system generates viewpoint discrimination and sometimes it does not.

There is plenty of proof right now that there is skewing in the marketplace.

DAVID COLE:

I think the "skew" notion is useful as a conceptual way of thinking about what the concern might be here. However, I do not think it is something that can be subject to any kind of empirical proof. I do not think a court could say, "well, if it skews, we are going to strike it down, but you have to show that it skews." The reality is that there is nothing to measure "skew" against. We cannot really know what the market would look like without the NEA, and so, I think the concept of skewing as an empirical matter is very difficult.

I do think that the notion that it is dangerous to let the government use its purse-strings to support speech it likes and not support speech it does not like, is based on a concern about skewing. I do not think it requires any proof of skewing. If it did, you would never be able to win a case.

126 *See Finley*, 118 S. Ct. at 2185-95 (Souter, J., dissenting).

Instead, what the Court has done is to try to draw some categorical presumptions. The Court says that where the government is not acting as speaker, but rather as a supporter of private expression, it may not discriminate on the basis of viewpoint in its allocation of funds.

Where I disagree with the Court is in its assessment of whether the NEA statute did that. But I think the Court agrees that is the appropriate principle to apply.

MARCI HAMILTON:

I doubt it would be too difficult to identify economists who could provide models and explain how the market would work differently without the NEA present.

One of the faults that I find in the Copyright Office, the copyright system, and our studies of art in the United States, is that we rarely bring in these economic models and econometric ways of approaching these questions to try to figure out really what is going on in the marketplace. A frank understanding that we are dealing with the marketplace would be a nice beginning. Then let us use these instruments to win these cases. I think it is unfortunate that we do not.

HOPE O'KEEFFE:

On the marketplace-skewing question, I think there are undoubtedly areas on a very micro level where we have a substantial marketplace effect. Ironically, it is exactly in the area of traditional cultural heritage, where you have projects like the cowboy poetry gathering in Nevada every year. We funded the first one. It is an idea that exploded. To some degree, Arts Endowment funding can serve as a catalyst in regenerating particular pieces of cultural tradition that otherwise would be lost. I have a hard time criticizing that.

AUDIENCE MEMBER:

It is a somewhat rhetorical question, but if this country were more literate than it is, do you think the NEA would still be funding individual artists?

HOPE O'KEEFFE:

That actually is a wonderful point. Maurice Sendak, the author of *Where The Wild Things Are*,[127] won the National Medal of Arts a couple of years ago, and his comment was to the effect "how can they possibly believe that writers are not subversive?"

I think what happened is that there are a lot of writers out there, and a lot of people who think of themselves as writers. They mounted a substantial advocacy effort. And they hired a lobbyist. That is why writers are still getting fellowships. It is a purely political decision.

AUDIENCE MEMBER:

It occurs to me that one of the things that the NEA might be doing would be to help Americans understand that visual art, like literature, food, wine, and conversation, is an important part of human culture. And so that we do not get knee-jerk reactions, unfortunately, like Mr. Tuskey just made about Komar and Melamid, that we are all philistines and we need to be told what to do. I never have to have conversations with Europeans, regardless of what part of Europe they come from, about art, that I have to have with Americans about art.

This to me is what the NEA should be doing. I think it is extremely important, because we are becoming not only visually illiterate, but culturally illiterate as well. It seems to me that should be the function of NEA.

HOPE O'KEEFFE:

Roughly forty percent of our budget goes to the states, but about a quarter of our budget goes to art education.

MARCI HAMILTON:

Right. Even if the NEA necessarily need not exist to further the arts, there is still a public need for education about the arts. Under the Constitution, the government could enter into that with a lot more alacrity than it can where it is funding as a financier.

JOHN TUSKEY:

By the way, I was not at all denying that art is an important aspect of life and that art has a lot to teach us. I guess what I was commenting on with Mr. Cole was that there is a certain elitism in

127 MAURICE SENDAK, WHERE THE WILD THINGS ARE (1963).

this country. We are all just presumed to love Velvet Elvises or something. Yes, you are right. Maybe we should be more educated in the arts. But I think that there is a lot of art out there that just is not very good that people are pushing at us, and telling us that it is great art.

AUDIENCE MEMBER:

What I think is funny about this is Mr. Cole using Komar and Melamid as an example. These are two guys who left the Soviet Union twenty years ago and have made a career on making pop art out of Stalin and Lenin. Their problem is that people in this country, for the most part, do not know who the hell Lenin and Stalin are. So, they had to come up with a new gimmick. What is their gimmick? They hired a public relations firm and interviewed people in Indiana, and came up with the perfect painting.

JOHN TUSKEY:

I am not criticizing the perfect painting.

AUDIENCE MEMBER:

All I am saying is, look at what these guys are doing. This is not about elitism. Understanding quality, understanding connoisseurship, being able to make a distinction between what is good and what is bad, is not elitist. It is intelligence.

JOHN TUSKEY:

I absolutely agree. That is one of the problems with the NEA and a regime that says you cannot make viewpoint based distinctions. It does not allow for people making the funding to make distinctions. Not all art is good, and not all technically sound art is good. Not all technically sound art is art that serves the common good, that actually serves the interests of the people in society. I would submit to you that the government would certainly be within the bounds of reason to say that, for instance, Artists for White Supremacy, who are sponsoring a D.W. Griffith film festival, should not receive a dime of public money.

ROBERTO BEDOYA:

I have been very quiet, because as I said, in the very beginning, I am not lawyer. My passions lie some place else—basically, in creating a space that values artists and what they do, and in trying to

support the mechanisms of that empowered talent, whether it be state or federal patronage or the marketplace.

I am often told: "Well, the marketplace will take care of your artists." But, you know, not all of my artists. Believe me.

Where my passion lies is with this total disinvestment in American creativity that has been led by the conservatives in this country who have also turned the agency into a fundraising machine for their politics and their ideology. That is how it has been played out.

For the moment, this last election, things have shifted. We will see what goes on. But, as the director of my organization, I know that every spring when the NEA was up for debate in the House, I had to get my ducks in line because I knew my members were going to be paraded as being blasphemous. And inevitably, they were.

You know, last year, it was Representative Hoekstra who went after thirteen artists and twenty-six organizations. Fortunately, this is where I empathize with the NEA staff. They have to respond to the slash and burn attitude from this man who says, "see, give me these files, give me these files, give me these files."

HOPE O'KEEFFE:

We produced something over twenty thousand pages.

ROBERTO BEDOYA:

Basically, this is the politics of arts funding.

The lawsuit was my response to the politicization of the arts. The chilling effect of the NEA language is what we wanted to talk about. The lawyers argued it, and that is how it got played out. But the experience of living in this atmosphere is what we have got to work with. Artists will continue to do work. Artists will ask more from the NEA. Thank God that they will. But, as you know, artists will do what they do.

MOTION PICTURES, MORAL RIGHTS, AND THE INCENTIVE THEORY OF COPYRIGHT: THE INDEPENDENT FILM PRODUCER AS "AUTHOR"

I. INTRODUCTION

The Visual Artists Rights Act of 1990[1] ("VARA") marked a historic departure in U.S. copyright law. For the first time[2] at the federal level,[3] certain moral rights[4] were guaranteed to specified classes of artists. This was an apparent break with our intellectual property law tradition, under which rights resembling moral rights could only be secured through contract.[5] Striking as VARA is, however, it does not encompass all authors and works of art. It excludes, for example, all audiovisual works such as motion pictures.[6] A number of rationales for this exclusion can be gleaned from VARA's legislative history and from commentaries on VARA. The most formidable argument is that motion picture production is a collaborative art. According to this view, because of the sheer number of potential moral rights claimants, it would be inefficient and unwieldy to grant moral rights to the numerous creators of a motion picture.[7] However, not all films are produced in the same manner—some are independently made while others are studio-produced.[8] The argument in this Note is that, with respect to in-

[1] Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101, 106A, 113(d), 301(f)).

[2] *See* MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 12.4[B][5] at 378 (2d ed. 1995) ("Finally, in 1990, with [VARA], the U.S. for the first time gave explicit, but hardly complete, recognition to a moral right.").

[3] Prior to VARA's enactment, a number of states enacted artists' rights statutes granting limited moral rights to authors of certain classes of art. *See, e.g.*, CAL. CIV. CODE § 987 (West 1997); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1996).

[4] The term "moral rights," from the French *droit moraux*, refers to the personal, noneconomic rights of the author of a copyrightable work. Depending on the jurisdiction, there are generally three or four moral rights, two of which, the right of attribution (granting an author the right to claim or disclaim authorship in a work) and the right of integrity (granting the author the right to sue for alterations to the work that cause dignitary or reputational harm to the author), are incorporated into VARA. For further discussion of moral rights, see *infra* Part II.A.

[5] *See* Gilliam v. American Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation. . . . Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law . . . .") (citations omitted).

[6] VARA limits protection to "work[s] of visual art," the definition of which expressly excludes motion pictures. *See* 17 U.S.C. § 101 (1994) ("A work of visual art does not include . . . any . . . motion picture or other audiovisual work. . . .") (definition of "work of visual art").

[7] *See infra* Part II.B.4.

[8] *See infra* Part V.