

Performing Art: *National Endowment for the Arts v. Finley*

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Karen Finley claims to be an artist. A performance artist.
Not everyone agrees.

Finley's art is who she is. She grew up in a Chicago suburb and was educated at the San Francisco Art Institute.¹ She describes herself as the child of a "not white" mother and a "manic-depressive jazz musician [father] who eventually committed suicide . . . 'I have used that information in my art-making I think very well' . . . 'I had to get out that emotion somewhere.'"²

Her most infamous performance was described in the *Harvard University Gazette* in an article following a public lecture she gave at Harvard in 2002. The title was *We Keep Our Victims Ready*.

She took her inspiration from Tawana Brawley, the 16-year-old who was found alive in a Hefty bag covered with feces near her home in upstate New York. Finley was moved when Brawley was accused of perpetrating this act herself. "Was this the best choice? What was the worst choice? What was the other choice?" she said of Brawley's apparent desperation. "All of us have that moment where puttin' the shit on us is the best choice we have."

At the end of the piece, after smearing herself with the feces-symbolic chocolate, Finley covers herself with tinsel because, she said, "no matter

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1. Beth Potier, *Karen Finley Provokes, Reveals in Lecture*, *HARVARD UNIVERSITY GAZETTE*, Feb. 14, 2002.

2. *Id.*

how bad a woman is treated, she still knows how to get dressed for dinner.”³

The *Gazette* article described other, thematically related works. One is “The Body as Rorschach Test.”

[It] showed Finley at work in a studio, surrounded by paintbrushes and other tools. Instead of using them, however, she pulls her breast out from behind her apron and “paints” on a black page with her breast milk, growing increasingly animated and ultimately using both breasts.

Another piece features large, close-up photographs of her daughter’s birth surrounded by Post-it Notes of quotes by the practitioners who assisted the drug-free delivery of her 9-pound baby. “I couldn’t believe that people were telling me to relax,” she said. “This was the most dismissive piece of crap I ever heard.”⁴

Finley discussed some of her more overtly political work in an interview in *The Nation* with Bryan Farrell.⁵

[*Question:*] George & Martha [one of her performances about George Bush and Martha Stewart] had a brief theatrical run in 2004, in which you played the Martha character. Was it difficult to perform such an intense yet insidious psychosexual relationship? Did audiences react the way you expected?

[*Finley:*] Well, I did perform it nude. And I did diaper Bush. That was a lot of fun . . .

I think we also have to look at our national narratives. We have to be seeing that with Reagan, who was the child of an alcoholic. And when Clinton had his acceptance speech, he was talking about standing up to his father. We vote in a national narrative that we relate to. That’s why I was wondering . . . how did this guy get in? . . .

. . . Why is he so simple? Why does he act so stupid? I think it’s to make himself stay like a child . . . Even Laura is like his mom. She’s a librarian. It’s like marrying the teacher. . . I think everyone likes the fact that he’s the black sheep . . . Everyone thought he was the dumb kid. And he showed them. That’s one reason I’m against inherited wealth. The playing field would have been even, so he could have just started on his own resources and self-generated what he was doing rather than what he was afforded by the family dynasty. I think he could have had a great bar in Houston.

Finley’s performances are bawdy, lewd, dirty, political, powerful. The critic C. Carr described his reaction in a *Village Voice* review.⁶

When I first saw Finley performing in the clubs in 1985, she was doing scabrous trance-rap monologues that seemed to burst right from the id. First she’d walk out in some godforsaken prom dress or polyester glad rag, presenting herself as the shy and vulnerable good girl. Then the

3. *Id.*

4. *Id.*

5. Bryan Farrell, *The World According to Karen Finley*, THE NATION, Apr. 7, 2006, available at <http://www.thenation.com/doc/20060424/farrell>.

6. C. Carr, *The Karen Finley Makeover*, THE VILLAGE VOICE, Nov. 8-14, 2000.

deluge. While the pieces were heart-stopping in their sexual explicitness, they were never about sex so much as “the pathos,” as she called it, the damage and longing in everyone that triggers both desire and rage. She could take a subject like incest and push it to surreal extremes. Above all, she would address it without euphemism. For me, these performances were cathartic, amazing.

But not everyone agreed that Finley was an artist and that her performances were art. As controversy exploded in 1989 over the National Endowment for the Arts (“NEA”) grant funding to support the exhibition of Robert Mapplethorpe’s homoerotic photographs and Andres Serrano’s work, *Piss Christ*, Karen Finley got caught in the aftershocks. Her request for NEA support for her performance art was rejected by the NEA after consideration of “general standards of decency and respect for the diverse beliefs and values of the American public.”⁷ Prior to 1990, the NEA funded art based on its artistic merit as art. After 1990, Congress required that grant decisions of the NEA also take into account “general standards of decency and respect.”⁸ Karen Finley’s work was judged indecent and disrespectful, a conclusion not only supported but widely voiced by such personages as Senator Jesse Helms of North Carolina, who led the fight to enact and thus impose the decency and respect requirement on the judgments of artistic merit made by artistic panels of the National Endowment.

Having “smeared herself with chocolate, painted with her own breast milk, put Winnie the Pooh in S&M gear, and locked horns with conservative Sen. Jesse Helms,”⁹ Finley was subjected to criticism not only from the political and religious right, but also from gallery owners and from the National Organization for Women (“NOW”), which objected to Finley’s “The Virgin Mary Is Pro-Choice” design for a T-shirt.¹⁰ She claims to have been blindsided by the opposition to her work and the resulting political conflagration, saying, “When I finally realized that Jesse Helms was actually having a public sexually abusive relationship with me and I [became a free speech advocate and symbol] . . . , I changed the relationship and I think that I’ve been healthier ever since”¹¹

Performance, not diplomacy, it appears, is her forte.

7. 20 U.S.C. § 954(d) (2000). See *infra* note 25 for the text of the prior law and the amendment.

8. *Id.*

9. Potier, *supra* note 1.

10. *Id.*

11. *Id.*

Karen Finley ultimately joined other artists in a lawsuit seeking to prohibit the NEA from considering decency and respect as part of its grant-funding decisions. As the lawsuit wound its way through the federal courts, she lost at first, and then won, finally arriving on the doorstep of the United States Supreme Court where, at shortly after 10:00 a.m. on Tuesday, March 31, 1998, the Justices turned their attention to the oral argument in the *Finley* case. To describe her case as much-watched and much-argued would be a colossal understatement.

Before turning to the *Finley* case, two important matters need to be touched upon. The first is the focus with which we will explore Finley's claim. Our interest here is with the central questions of art, aesthetics, and how, when, why, and if government should ever intrude into the artistic and aesthetic realms when regulating expression. Are these ineffable, or simply prohibited, domains for government? Were Finley's performances "art"; if so, what accounts for that conclusion, and what consequence should the conclusion have for art's protection from government regulation under the First Amendment? Karen Finley's claim is that her work is art. Is the stripper's work in a bar art? What if the stripper covers her nude body with chocolate, as does Finley? Or shouts obscenities? Or intends by her work not just to titillate, but to symbolize the desperate role of women in a conventional and male society? Does a cognitive "message" strengthen the claim that something is art, or is its effect exactly the opposite?

The Oxford English Dictionary ("OED") defines "art" by employing many layers of potential meaning. The term's most ordinary usage is, according to the OED, "Skill; its display or application," or "learning of the schools," as in the liberal arts.¹² The more fitting definitions for our purposes are, again according to the OED, "[t]he application of skill to subjects of taste, as poetry, music, dancing, the drama, oratory, literary composition, and the like. . . : Skill displaying itself in perfection of workmanship, perfection of execution *as an object in itself*."¹³ Similarly, art is "[t]he application of skill to the arts of imitation and design. . . ; the skilful production of the beautiful in visible forms."¹⁴

From these definitions we might conclude that art has to do with skill as to form, in itself, as in perfection of form and execution; and as to the beautiful, in matters of taste. Beauty and taste, moreover, go not only (or not so much) to a message conveyed (cognition), but to perception itself, as in beauty, pleasure, comfort, or evoked emotion. Art rests on emotion, or aesthetic perception, rather than cognition, or rational understanding.

12. See Oxford English Dictionary, <http://www.oed.com/> (last visited April 23, 2008) (see "art" entry I.1).

13. *Id.* (see "art" entry I.5) (emphasis added).

14. *Id.* (see "art" entry I.6).

“Aesthetic,” in turn, according to the OED, means “[o]f or pertaining to sensuous perception, received by the senses,” or “[o]f or pertaining to the appreciation or criticism of the beautiful.”¹⁵ And aesthetics is “[t]he science which treats of the conditions of sensuous perception,” and “[t]he philosophy or theory of taste, or of the perception of the beautiful in nature and art.”¹⁶

Classical and traditional philosophers from Plato to Kant have linked aesthetics to ideas of beauty *and ugliness*, to perceptions of pleasure or disgust, growing out of form and structure itself in a largely sensuous sense.¹⁷ A competing, and more “modern” school of philosophers rejects the very idea “that an artwork might be good because it is pleasurable, as opposed to cognitively, morally or politically beneficial . . .”¹⁸ It is the “message” of a work of art, not its form and sensory perception, that counts. We will see clear signs of this conflict between art as beauty (or ugliness) and art as politics in *Finley*. Is a work that appeals in a powerful sensory way but lacks “redeeming social value,” as the Supreme Court’s definition of obscenity once put it,¹⁹ therefore not *art*?

A third view of art is more utilitarian: what function does art perform, how does it operate, and what does it do that is distinct from other forms of expression? As Karol Berger puts it in his wonderful book, *A THEORY OF ART*:

[E]ver since Plato philosophers have been much exercised by the question of what art is. . . , of getting art’s ontological status right, of finding a way to distinguish art from other entities. *** [But] even if we grant this [defined] object the status of art, we still do not know whether and why we should bother ourselves with it.²⁰

We should bother ourselves, Karol suggests:

because of art’s ability to evoke imaginary worlds, and not representation in the strict and narrow sense . . . In an act of cognition whereby we get to know an object, the . . . powers of imagination . . . and understanding . . . are engaged like two gear wheels. But in an act of aesthetic contemplation, the two wheels spin without engaging and the cognitive mechanism runs on idle. . . . Aesthetic pleasure is “in the harmony of the cognitive faculties,” in “the quickening of both faculties (imagination and

15. *Id.* (see “aesthetic” entries A1 and A2).

16. *Id.* (see “aesthetic” entries B1 and B2).

17. Nick Zangwill, *Aesthetic Judgment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Feb. 28, 2003, <http://plato.stanford.edu/entries/aesthetic-judgment/>.

18. *Id.*

19. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

20. KAROL BERGER, *A THEORY OF ART* 236 (2000) (quoting EMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* (James Creed Meredith, trans. 1952)).

understanding) to an indefinite, and yet, thanks to the given representation, harmonious activity.”²¹

Art spurs imagination and re-representation of the objective; it is, perhaps, intrinsic to creativity.

How do we choose among these definitions (and other ones we’ll see along the way)? Must we choose? We will do our best to find out in the stories that follow. And in that quest we will find, too, that we must grapple with another and related concept: emotion. As Justice Harlan said in 1971 in the famous *Cohen v. California* case, which involved a jacket with the words “Fuck the Draft” on the back,

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.²²

Emotion, force, or feeling embodied or evoked in an expression may be part of the connecting fibre between art and politics. Can the same be said of art in the form of dancing, painting, acting, and the like?

These are the questions we will only begin to explore in Karen Finley’s case.

Before we do so, however, a further bit of groundwork should be laid. It may come as a surprise to some readers that the Supreme Court rarely addresses such questions as the meaning of art and the role of aesthetics in expression under the First Amendment, and when it does, the Court does not delve deeply. Instead, the Court relies on technical or procedural—lawyerly, one might say—standards of decision. These standards should be briefly catalogued so that we know them when we see them.

First are concerns about a law’s overbreadth or underinclusiveness, a feature of speech regulations that sweep too broadly or narrowly, and thus should be stricken and rewritten more carefully so as to aim only at that speech which can be restricted, leaving other speech free. The government might wish to prohibit camping in protest on the National Mall in Washington, D.C., but it can’t do so by prohibiting camping—for protest or otherwise—everywhere. Nor can it ban only anti war protestors from camping on the Mall, for the very narrow (or overbroad) application of the restriction suggests that its purpose is to censor an idea, not to alleviate a traffic problem.

A second standard is vagueness. The First Amendment requires precision in the language used by the government to restrict speech. Vague terms are

21. *Id.*

22. *Cohen v. California*, 403 U.S. 15, 26 (1971).

potentially too broad and leave too much discretion to the law interpreter or law enforcer. Imagine, for example, that a town enacts a law prohibiting its residents from using insulting words. Because of the sheer number of possible words and settings in which they might be used, and the ambiguity of terms such as “insulting,” such a law would likely be unconstitutionally vague. But a defamation—a knowing falsehood about another that harms them in their reputation or business—could be prohibited because “knowing,” “falsity,” and provable harm place fairly exacting and judicially enforceable limits on the kinds of verbal exchanges being regulated.

The third standard involves the *capacity* in which the government is acting when it selectively restricts or funds speech. Is the government acting as a censor? An educator? A protector of the rules of order by which others are also permitted to express themselves? A manager or owner of an enterprise? In the last instance, for example, government can surely acquire art for the walls of government buildings, and in doing so, government can make aesthetic choices and exercise artistic preferences. Can public schools exercise no judgment about art that is appropriate for children, or suitable to the educational mission of the school in which it would be displayed? As we will see, this is tricky and very important business under the First Amendment.

These three standards, and others we will note along the way, are themselves very important matters that we will explore. But not yet. They are employed by the law in order to avoid having to answer the underlying questions: the meaning of art; the role played by aesthetic communication; the value of expression; and more. Our purpose is to focus on the central question—whether Karen Finley’s acts are art, and whether the government has the power to restrict it.

The Justices who gathered in the marble courtroom of the Supreme Court building on the morning of Tuesday, March 31, 1998, were a singularly disputatious and deeply fractured group. The Chief Justice was William Rehnquist, originally appointed by President Nixon in 1972 and then appointed Chief in 1986 by President Reagan. As the Chief Justice, he was widely liked as an individual, widely respected for his sheer intelligence, and widely regarded as conservative. Joining him in the conservative quarter of the Court were Justices Kennedy, Scalia, and Thomas. Kennedy was often unpredictable. Scalia was brilliant, arrogant, and acerbic. Thomas was radical in his eagerness to re-examine long-settled assumptions underlying constitutional doctrine. On the more liberal side of the ledger were Justices John Paul Stevens, the most senior Justice; Stephen Breyer, a former Harvard professor; Ruth Bader Ginsburg, a former Columbia University professor; and David Souter, formerly a judge in New Hampshire. Stevens tended to write the

most creative, activist, and ambiguous opinions, Breyer and Ginsburg tended to write careful and craftsmanlike opinions consistent with a more limited idea of the judicial role, and Souter tended to the intellectual and complex, if not arduous, form of discourse when explaining himself. Finally, Sandra Day O'Connor, appointed by President Reagan in 1981, sat squarely in the middle, and wrote opinions reflecting that analytically untidy posture.

The lawyers charged with constructing and defending an argument before this divided group of Justices were Seth Waxman, the United States Solicitor General, who defended the NEA's denial of grant funding to Karen Finley, and David Cole, a professor of law at Georgetown University, who argued that the denial violated the First Amendment guarantee of free speech.

The Chief Justice called the case, entitled *National Endowment for the Arts v. Karen Finley*, and invited the Solicitor General to begin.²³

[*General Waxman:*] ²⁴ Mr. Chief Justice, and may it please the Court:

Since 1965, the National Endowment for the Arts has selectively provided . . . public funding to arts projects on the basis of aesthetic judgments in order to enrich the lives of all Americans and to expand public appreciation of art.

The question presented in this case is whether, although it thus expands the opportunities for artistic expression, Congress violated the First Amendment-- that is, made a law abridging the freedom of speech--by directing that the NEA ensure, "that artistic excellence and artistic merit are the standards by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

The way the NEA did this was a bit peculiar, as we will see from the oral argument exchanges. The NEA traditionally made grant selections through a tiered process. Proposals or applications were first considered by advisory panels, consisting heavily of artists and people involved in the arts. The panels made recommendations based on artistic excellence and merit to the Arts Council, the final decision maker, passing the recommendations first to the Chairperson, who reviewed them and forwarded his or her recommendation to the Council along with the panel's.

23. The oral argument in this case is taken from the official transcripts maintained by the Supreme Court. The author has selectively edited the transcripts for purposes of this Article, and has also made detailed changes in the text for purposes of grammar, syntax, and clarity only. Where the changes are of possible use to the reader, appropriate editing marks have been included.

24. The Supreme Court's transcripts of oral argument do not identify the Justice who is asking the question. This practice is longstanding, and stems in part from the idea that it is the Court, not the individual members, who are asking questions, and that to identify the individual Justice would undermine this principle and would perhaps encourage or discourage Justices' participation in oral argument.

In the case of the “decency and respect” amendment added by Congress to the NEA statute, the process was modified. The amendment, often referred to here as Section 954(d) and indicated in italics below, provides that:

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

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

(2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded.²⁵

In light of Congress’ addition of the decency and respect criteria, the NEA decided that, instead of requiring panel members and the Council expressly to judge a proposal’s “decency and respect,” the Chairperson would reconstitute the panels to assure that their membership consisted of persons who would likely reflect those values in their judgment of artistic merit without any need for instruction or for specific attention to “decency and respect” in their decision. The Chairperson might then, as he did with the positive panel recommendation in Karen Finley’s case, review the panel’s recommendation to assure that “decency and respect” were, in fact, reflected in the panel’s decision. If he were uncertain, as he was in Finley’s case, he would send the recommendation back to the panel for reconsideration in light of his concerns. The panel reconsidered Finley’s application and forwarded a positive recommendation once again. The recommendation then went to the Council, where the “decency and respect” criteria could be judged independently, and the panel recommendation for funding was disapproved by a majority of the Council.

The NEA’s response to the “decency and respect” amendment, in other words, was to bury it in the panel selection criteria, and hope for the best.

QUESTION: How do you take into account standards of decency in selecting the panel?

GENERAL WAXMAN: In the process of deciding which proposals will be granted on the basis of merit and excellence, and here’s how the NEA has construed the statute to work.

19. 20 U.S.C. § 954(d) (2000) (emphasis added).

The NEA Chair thus far has concluded that whatever factors an individual takes into consideration in deciding whether something is art, [not to mention artistically excellent and artistically meritorious, such] considerations [may include] the mode and form of expression in the case [as distinguished from the message or point of view expressed].

It's not dispositive, but if it includes a mode or form of communication, . . . the NEA [has] concluded that many, if not most, if not all, certainly at least some people in deciding whether something is really artistically excellent or meritorious or how much it is, will at least think about the mode or form of the presentation that the artist is using²⁶

We will see many references to "mode" of communication (its time and place and its genre (performance art, painting, or drama, for example), as well as the manner of presentation (nudity, profanity, and violent or non violent)), as opposed to the substantive message, or the point of view expressed (women are abused); or the content of the message, which is a bit more general category of message (the subordinate role of women in society); or the subject matter of the message (equality). Under the First Amendment, restrictions on speech because of its specific point of view (don't say women are abused) are highly disfavored, and restrictions based on content and subject matter, respectively (no discussion of inequality and women), are less disfavored and require application of a less strict or rigorous scrutiny of the government's justification and the narrowness of the means used to achieve it. Finally, restrictions based on the mode or manner of speech (no lewd words or pictures when discussing sex discrimination in a classroom) are subjected to a fairly light scrutiny testing only the "reasonableness" of the government's purposes and legislative means.

Laws that are imperfect in their overbreadth, yet represent a reasonable and good faith effort to achieve a goal, are often valid. This is why the Solicitor General seeks to characterize the "decency and respect" amendment as a law focused on mode or manner of expression, not subject or content, and particularly not point of view. The "decency and respect" amendment is embodied in the NEA's choice of means. The NEA's decision to embody the decency and respect aims in the panel composition determination clearly qualifies as an imperfect, if not downright messy, means of carrying out Congress' purposes, but it might just pass the lightest form of First Amendment scrutiny.

Two related matters should be noted at this point. First, the inconvenient fact that it was the Council, not the expert panel, that rejected the favorable recommendation in Finley's case, undercuts the Solicitor General's panel

26. Transcript of Oral Argument at 7-8, *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (No. 97-371).

composition argument, which is that “decency and respect” are not expressly judged and are reflected only in terms of “mode.”

Second, and more fundamentally, the Solicitor General’s argument assumes that there is a clear distinction in artistic expression between mode and message, and that for purposes of the First Amendment, message is the most important of the two when it comes to art. This is a doubtful proposition. If art and aesthetics go to beauty (or ugliness) in form and sensual perception quite independent of *any* “message,” indeed of the *need for any* cognitive “message,” then with art, “mode” and “manner” *are* the message. The First Amendment rule that point-of-view regulations of a message are most forbidden, which is based on a cognitive model of expression, simply doesn’t fit purely emotional and sensory expression. What is the point of view of a Jackson Pollock painting? Karen Finley’s performance had a cognitive message, but does her claim that it is art depend on that? Or does it depend on the skill and the aesthetic and emotional force contributed by the performance itself—the mode or manner of the message’s communication?

If art relates to manner of presentation and noncognitive perception by an audience, then traditional First Amendment rules that mainly protect cognitive messages and prohibit point-of-view restrictions will sweep much art into a category that receives minimal, if any, First Amendment protection.

QUESTION: Are you saying, General Waxman, that if the law is as you say it is, then nobody is being hurt because these words [decency and respect] are largely hortatory, is that essentially your position . . . ?

GENERAL WAXMAN: Well, that’s--that’s the essence. . . .

. . . .

QUESTION: General Waxman, are you trying to persuade us that, even after the statute was passed, Andres Serrano²⁷ would have the same chance of getting a grant as he did before?

. . . .

GENERAL WAXMAN: Well, . . . we don’t think actually that he would have a lesser chance. . . .

Congress rejected a provision that would have denied funding to the Merchant of Venice or Rigoletto, or D.W. Griffiths’ *Birth of a Nation*. It wanted those provisions to be funded.

It just wanted to make sure that in the process of deciding what is the most excellent art in a program which is designed to benefit the American

27. Andres Serrano is the artist who created *Piss Christ*, a photograph of the Crucifix in Serrano’s urine.

people and expose people, including young people and people in rural areas, to the benefits of artistic expression, that . . . [decency and respect] were taken into account.

The agency's view, Justice Stevens, is that many people--I know it would be true of me--who go into an evaluative process as to whether something is art, or excellent art, or meritorious art, or art that's--that the Congress can spend taxpayer's money to fund, one of the things you think about is the mode of expression. It can either add to or detract from the merit of the proposal, but it's not irrelevant.

QUESTION: [Y]ou're going to have a hard time persuading me the statute's essentially meaningless, which is basically what you're arguing .

. . . .

Suppose the statute said that each and every grant must meet the following standard, and then it set forth the statutory standard, and that each panel member will certify that as to each particular artist whose work has been approved, that this statute has been met, is your position the same?

. . . .

GENERAL WAXMAN: [B]ecause we think that standards of decency, or general standards of decency and respect for diverse values can be defined in a manner that does not take account of viewpoint, that [standard] is not viewpoint discriminatory, [and] for that reason the provision would be constitutional.

. . . .

This Court has recognized on several occasions that decency . . . is distinct from viewpoint. Yes, use of indecent speech or controversial speech may very, very well add to or subtract from the force of the message, but it's not the same as viewpoint. . .²⁸

We are now deeply immersed in the conceptual terrain of mode versus viewpoint, or manner versus message—with message meaning a cognitive, reasoned message, not a sensuous or aesthetic one. Where does “force” fit in? Is it emotional and sensory, going to questions of taste on matters of beauty or ugliness, as the definitions of art and aesthetics imply? Or is it part of a cognitive message, altering or reframing the propositional meaning of a work of art? In the *Cohen* case, involving a jacket with “Fuck The Draft” on the back, Justice Harlan said that emotion was an important part of expression—“Fuck The Draft” versus “I Detest The Draft”—that contributed inextricably to the message's meaning and force.²⁹ But Harlan was dealing with a cognitively-grounded free speech claim—the message was against the draft. Much art has a cognitive message; much doesn't. Much art does no more than “express” feelings and evoke emotional response in the viewer or listener. Does a Bach cello solo performed by Yo Yo Ma communicate a cognitive message to me, like “the woods are dark and mysterious,” or “a storm's coming”? Or does the

28. Transcript of Oral Argument at 11-19, *Finley*, 524 U.S. 569 (No. 97-371).

29. *Cohen v. California*, 403 U.S. 15, 26 (1971).

music express only emotional and perceptual feelings—feelings in Bach’s case wound up in such things as perfection, beauty, symmetry? And Yo Yo Ma’s performance of Bach? Isn’t it attractive to me because it is so skillful that it evokes feelings of awe and sublime satisfaction? To attach either Bach or YoYo Ma to a rational message would be to utterly disrespect their art.

The Justices will return to this deep enigma of mode versus message presented in Karen Finley’s case: is her performance covering her nude body with chocolate and then with tinsel while speaking and swearing and writhing to be judged by its skill and force and emotional power, or instead as but one instrumental means by which to communicate a cognitive message to the audience (women are objects, or something even stronger than that)? Even if the answer is “both,” as in *Cohen*, the latter measure of judging seems fundamentally wanting.

For the moment, however, the questions turn to another puzzle: in what capacity was the government (NEA) acting when it judged Karen Finley’s performances, and should that matter under the First Amendment?

QUESTION: Well, will you help me with . . . [a] basic inquiry?

If the Federal Government wants to buy artwork to put in the Capitol, I assume it can go out and select works of art that its committee thinks are decent and represent diversity, and can spend the Federal money for that kind of art, and it isn’t open to challenge, is that right?

GENERAL WAXMAN: Assuredly right.

QUESTION: Now, if the Government wants to educate children, or people, and chooses to speak by way of paying for certain kind of artistic expression as a means of the Government speaking and educating, and insists on decency and diversity, it can do that.

GENERAL WAXMAN: We believe that it can.

QUESTION: All right. Here, it has a limited amount of money to give away. Now, what is it that makes it impossible for the Government to give a limited amount of money away on the same standards? Is the Government not speaking? I mean, what do we have here?

GENERAL WAXMAN: I will state the obvious and suggest that the question probably would be better answered then [by] my friend Professor Cole, because we don’t think that there is any constitutional problem here with this provision.³⁰

This answer is really no answer. The Solicitor General wants very much to avoid the subject altogether because there is a newly emerging First

30. Transcript of Oral Argument at 19-20, *Finley*, 524 U.S. 569 (No. 97-371).

Amendment doctrine of “government speech,” which applies when the government itself is speaking, not when the government is restricting or regulating the speech of other private persons. Conversation in a democracy must be two-way, from people to government and vice versa. Thus, government can sponsor TV ads favoring sexual abstinence or opposing smoking; it can select speakers who will speak at a public university, or a graduation; it can buy art for its buildings; it can select the artists and performances for its theaters and museums. In these capacities, the government is not subject to the normal viewpoint/content/subject matter First Amendment rules, for the act of speaking necessarily implies choices about subject and content and point of view. The Constitution does not require a government speaking against smoking to also speak for it.

The question being raised by the Justice is whether the NEA’s selection of art and artists to support is an instance of government speaking—expressing its own preferences—and thus not subject to First Amendment scrutiny at all. This will turn out to be a hotly debated topic in the oral argument and among the Justices. There are a few problems with the government speech theory that are worth pointing out at the beginning. First, few, if any, persons seeing or hearing art that has been supported by an NEA artist grant are aware of the funding, much less where it came from. Second, the decision to support an artist with a NEA grant does not mean that the government endorses or sponsors the resulting art; it simply means that need for support and artistic quality have been determined by expert panels. By analogy, a faculty member who gives a student an A for a paper should not be understood to agree with the paper or to endorse its views through the rewarding of a high grade.

When the government speaks, the argument goes, it must mean to do so and be understood to do so. So when the University of Virginia establishes a student activity fund that supports, among other things, student newspapers of all stripes, but then refuses to fund religious newspapers, the University as government should not be able to claim its own right to speak by discriminating against religious papers, because there is no evidence that the University intended to speak a message against religion. In any event, no reasonable person would understand the University as an arm of government to be speaking. Universities tend to distance themselves as far as possible from signaling any support or endorsement of the student groups that are supported. Instead of speaking, the University has opened up a forum for all student newspapers, and having done so, its act of disqualifying religious student newspapers can only be seen as an act of government regulation of speech, not as government itself speaking.³¹

31. The Supreme Court chose to treat the University of Virginia case as a free speech case rather than a free exercise of religion, or an establishment clause, case. This was a debatable choice, but for our purposes we will accept it. The Author has written on the case and the

Against that background, the Justices bore in pretty hard on the Solicitor General.

QUESTION: General Waxman, may I suggest that maybe there is something different? Maybe if a faithful executive is trying to carry out the legislative will, the message that comes from the whole history of this is, don't fund Serrano or Mapplethorpe.

I think that that's the concern . . . that, if I am an executive who is trying to be faithful to the legislative will, I know what prompted this, so why don't I say, well, that's my marching orders. I know what the legislature didn't want.

GENERAL WAXMAN: Well, I guess I have a couple of answers: 1) a chairperson could have done that. Chairpersons, as the other side points out, were highly cognizant of political concerns without the enactment of this rather innocuous amendment. . . Number 2, what the 1990 legislative debate shows is exactly the opposite. . . [The view] that certain art that is viewpoint discriminatory or denigrates religion or races won't be funded was rejected.

And the legislative history is shot through and through with the fact that what Congress wanted . . . is that you change the procedures, you [do] not employ specific content or viewpoint prohibitions, and to the extent you want things like decency to be considered, . . . [they should] be embedded in the subjective, aesthetic judgments about what's meritorious and excellent.³²

The Solicitor General's argument is a good one—to a point. Decency and respect are different from racist content. But are they different in degree or kind? One is a message in a work of art about race; the other (decency and respect) is the way in which any message is conveyed—its force, for example. But what about the message that is conveyed in a racist way, thus transforming the message of the art to a racist one? The two are hard to separate, perhaps because they are really part of the same thing. Can it be that “decency and respect” aren't a message, if they alter the intended message by their presence? If Cohen had worn “The Draft Is Unwise, Vote For An All Volunteer Army,” the message would have been quite different from “Fuck the Draft,” both in manner and, as a consequence, in meaning.

Justice Scalia doesn't like the muddy distinction, so he characteristically and with enthusiasm enters the fray.

speech versus religion problem elsewhere. RANDALL P. BEZANSON, *HOW FREE CAN RELIGION BE?* (2006).

32. Transcript of Oral Argument at 20-21, *Finley*, 524 U.S. 569 (No. 97-371).

QUESTION [Justice Scalia]: General Waxman, I thought your first response to Justice Ginsburg's question was going to be, so what? I thought that what you responded to Justice O'Connor was, the Government doesn't have to buy Mapplethorpe pictures to hang up itself, and so also when it funds the arts, it doesn't have to fund Mapplethorpe, and it can say we don't like Mapplethorpe.

GENERAL WAXMAN: I knew that that would—I knew you would support—

(Laughter.)

QUESTION: You knew I was going to say that.

. . . .

GENERAL WAXMAN: Well, if you're talking about—if we're talking about whether Congress can say, okay, the NEA is going to apply the following standards but it's not going to fund Robert Mapplethorpe, that raises many different constitutional concerns that don't have—in other words, going to single out one particular person, at that point may violate—it would have to be scrutinized. . . .

QUESTION: Well, is it constitutionally principled for the Government to do this by a wink-wink, nudge-nudge-

(Laughter.)

GENERAL WAXMAN: That's—that is not—that's not, Justice Kennedy, what we're suggesting was done here.³³

The Solicitor General seems a little taken aback in this exchange, but his caution may be understandable. If he agrees that the government could not simply (or with a wink and a nod) exclude Mapplethorpe, he's leading himself down a slippery slope: Why not Mapplethorpe? Because that would be point-of-view discrimination? Is that because of his message, which is homoerotic? No, speech with that message wouldn't be excluded. Is it because he communicates that message in an indecent and nonrespectful way? I suppose so. So it's the mode and manner that really count, and thus content or point-of-view-based discrimination, which he acknowledges happened in *Finley*, is unconstitutional? Oops.

On the other hand, the Solicitor General doesn't really want to get on the bandwagon of government speech, which he is being invited to argue as a justification for point-of-view discrimination against Mapplethorpe. Why? Because the government isn't really the speaker; it's providing support to the speech of private artists, hardly a sufficient connection to transform the artist's speech into the government's message. And the government isn't buying speech for its own use or for its expression by another expressly on the government's behalf. Instead, the government speech argument would have to be that the government is acting as a patron of the arts through its selective support for private artists and art it likes, while keeping its patronage tastes pretty well to itself. The only message (emotional or cognitive) is the art and

33. Transcript of Oral Argument at 21-23, *Finley*, 524 U.S. 569 (No. 97-371).

the art isn't the government's but the private artist's, who controls it in the private market. The idea of patronage as speech is thus something new—a policy or preference unarticulated and inchoate that may affect expression, but does not itself express anything. It's like setting the price of admission for a government-owned hall: the price may affect the type of speech that occurs there, and thus affect expression, but of itself the price is not expression.

Thus, making the government speech argument on the arts patron theory would be to tread on entirely new and highly controversial ground. It would open up the possibility that Congress or the executive branch could impose lots of general and specific limits on the NEA's funding in the name of aesthetic preferences, and could change them with each new administration or Congress. But Justice Scalia won't let the Solicitor General off the hook so easily.

QUESTION: But you assume that . . . [excluding and artist by name is] unconstitutional. What if Congress doesn't name names? It just says, no crucifixes in urine. Can it say that?

GENERAL WAXMAN: I--Justice Scalia, I--

QUESTION: Can it say that? It doesn't name any names.

GENERAL WAXMAN: Justice Scalia, I am not assuming--I'm not standing up here arguing that it would be unconstitutional. I think it may well be that in the unique circumstances of public arts funding . . . , viewpoint distinctions may be constitutionally defensible.

QUESTION: So you in effect are saying, I'm not going to rest my argument on the claim that the Government is hiring anyone to speak here, or that what it's doing bears an analogy to that, or that in fact the Government is buying art, or that it bears an analogy to that.

You're really saying there's a third rule, . . . the Government as distributor of largesse to the arts, and that, that's a third rule, but you're not saying that the Government is either the speaker or the buyer, is that correct?

GENERAL WAXMAN: Well, I think the Government is the buyer. . . .

QUESTION: What's it buying?

. . . .

What does it own after the grant?

GENERAL WAXMAN: . . . I think this is a distinction without a difference to our argument, . . . but in fact it's behaving as Governments and sovereigns as arts patrons always have.

When the Medicis--

QUESTION: Yes, but the King ended up with the picture. The Government is not ending up with the picture.

GENERAL WAXMAN: The King did not necessarily end up with the picture. The Medicis, for example, funded art that was placed . . . all over their realm. The same people who funded and allowed to flourish the great university, that forum, that community where free and uninhibited expression of debate and views occurred, were also arts patrons, and they bought and funded what they liked.

QUESTION: Okay, then you are saying there is an art patrons rule. I take it you're not hitching your argument either to the claim that the Government is buying, or the claim that the Government . . .

. . . .

Is itself the speaker.

. . . .

GENERAL WAXMAN: Yes. . . . [I]f you're asking whether we're suggesting that there is something unique, particularly unique about the Government funding of the arts for First Amendment purposes, the answer is yes, and for a variety of reasons.

For one thing, and most critically, this is an area in which Government decision makers are expected and required to make precisely the kind of aesthetic judgments which are subjective and may take content and viewpoint into account, and which the Government is ordinarily prohibited from doing. . . .

QUESTION: Why . . . [is the Government] required, when they're not required to . . . [fund the arts] at all? Where does the requirement come from?

GENERAL WAXMAN: Unless . . . , Justice Souter, . . . the NEA is simply disestablished because of a belief that the First Amendment wouldn't permit funding of the arts, or unless you can set up a program where, you know, the proposals that were on the thickest paper, or the ones that came in . . . first were granted, inevitably the decision maker is going to be making the kind of aesthetic judgments that . . . [it has made here.]

Thank you.

[CHIEF JUSTICE REHNQUIST:] Thank you, General Waxman.³⁴

Well! The foundations of the Solicitor General's argument were pretty shaky—mode v. message; manner v. point of view; panel composition v. speech restriction—and the edifice built on them was pretty ugly, but he made it through alive. The fact of the matter is that shaky foundations, judged by logic and internal consistency, are more common in the Supreme Court than one might expect. The reason is that the lawyers have to calibrate their arguments not only to the prior cases and settled doctrine, but also to the multiple schools of thought that exist within the present Court. One has to get five votes to prevail in a case and this means, on the current Court, that at least two different views of the Constitution must often be brought together to form

34. Transcript of Oral Argument at 23-26, *Finley*, 524 U.S. 569 (No. 97-371).

a majority. That makes for compromise and untidiness, and also great care in taking positions. It's not very aesthetically pleasing.

The argument now turns to Karen Finley's side.

[CHIEF JUSTICE REHNQUIST:] Mr. Cole, we'll hear from you.

MR. COLE: Mr. Chief Justice, and may it please the Court:

As the Government concedes, this is not a case about Government speech. It's not a case about the Government hiring artists to express a Government message. Rather, it's a case about the Government selectively subsidizing private speakers speaking for themselves. . . .³⁵

This distinction is the key to Cole's argument. The NEA program is not an instance of government speech for which the normal strict rules of the First Amendment would be suspended. The question presented in *Finley* is not whether the government, as the author of its own message, would be able to choose its own point of view, as any speaker must. In *Rosenberger*, it will be recalled, the University of Virginia set up a program to subsidize, among other things, all student newspapers that served the educational and social purposes of the University, but then it excluded religious newspapers even though they met the qualifications.³⁶ In setting up the general subsidy program, the University was not expressing any views; it was simply trying to encourage an active and engaged student culture. Thus, excluding religious newspapers represented a content-based restriction of speech—some Justices said point-of-view but the excluded papers could have related to any religion and indeed could have been antireligious papers, so content is the better term. The exclusion was therefore stricken down under the First Amendment for lack of any compelling justification.³⁷

Cole must characterize the NEA subsidy program in similar terms. The program provides funding for art judged meritorious, based on decisions by the art panels and the Council. Congress then added by amendment the additional requirements that the art be decent and respectful of American values. The decency and respect criteria, Cole must argue, are not relevant to artistic merit. They are instead just like the exclusion of religious newspapers in *Rosenberger*, which could not be justified by the general educational goals of the student activities subsidy. The exclusion of indecent and disrespectful art was thus a content or point-of-view restriction on speech—even in the form of

35. Transcript of Oral Argument at 27, *Finley*, 524 U.S. 569 (No. 97-371).

36. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

37. *Id.*

a subsidy rather than a direct ban—prohibited by the First Amendment unless the purpose of the decency and respect exclusion were compelling, unrelated to restricting expression itself, and narrowly tailored to exclude only speech that threatened the compelling interest, no more and no less. Promoting decency and respect in art may be valid interests, but they are not likely compelling, especially when the exclusion’s purpose is to limit speech that, while perhaps upsetting to many, is nevertheless fully protected. And the means used to achieve the government’s “higher” standard of taste in subsidized art were grossly overbroad and underinclusive. Some offensive (though not indecent) art—for example, art with a racial undertone, or nudity in the play “Hair”—is not excluded, and vice-versa. This is a necessary byproduct of the vague contours of “taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”³⁸

Professor Cole must hold tightly to this line of argument, or he will lose the case.

MR. COLE: . . . [When the government established a program in which it selectively subsidizes private speakers who are speaking for themselves,] two fundamental First Amendment principles apply, and the decency and respect clause violates both.

First, the Government subsidies must be viewpoint neutral. This Court has held that in . . . *Rosenberger*. . . .

QUESTION: *Rosenberger* was quite different from this, Mr. Cole. . . . [E]verybody was going to get something in *Rosenberger* except the people who wanted to do something religious.

Here, the Government doesn’t purport to say we’re going to give grants to everybody that wants it. There’s a definite degree of selectivity involved.

MR. COLE: There is a degree of selectivity involved here but there was also, Chief Justice Rehnquist, a degree of selectivity in *Rosenberger*. Approximately 9 of 10 applicants were funded in *Rosenberger*. Approximately 2 of 7 applicants to the NEA are granted.

. . . .

QUESTION: Yes, but I think the Chief Justice is correct in making the distinction. There were no aesthetic judgments to be made. There were no subjective judgments to be made. If you were a student newspaper you fell within the program. That was it.

And I think your statistical analysis is misleading, because NEA statistics are that they have only so many funds and they base it on aesthetics. The only reason there were rejections in *Rosenberger* was, . . . [that overtly religious newspapers] weren’t the kind of newspapers that . . . [qualified] under the program. So I think the Chief Justice is correct in the distinction he makes.

MR. COLE: Well, I’m not sure, Justice Kennedy, whether there’s a distinction between a Government agency which makes judgments about

38. See *supra* note 25 and accompanying text.

educational purpose and allocates funds selectively on that basis, or academic merit, which is what public universities do in hiring, and the NEA, which makes judgments base on artistic merit. All of those programs are selective. They take into account [content] . . .

But what this Court has said is that . . . when subsidizing private speakers, when the Government is not speaking itself you cannot engage in viewpoint bias. . . .

QUESTION: Mr. Cole, may I suggest that one is a prize or an award, and there really is a difference between a student activity fund that if you're not social and you're engaged in some respectable student activity you get it, and an award, a prize, a grant that is highly selective, and so I quite agree, and I don't think that you can maintain that this is just like Rosenberger, just like a bulletin board, anybody can put up their names or draw from that pot except certain people.³⁹

The distinction being suggested by the Justices is between a highly individualized determination of quality, or merit, or even decency and respect, as in the NEA case, and a more categorical exclusion, such as whether a newspaper is predominantly a religious publication, whatever its specific articles say and whether or not it is a good or bad newspaper qualitatively. The distinction is real, though slippery.

Assuming the distinction is correct, however, should it be relevant to the First Amendment question? Which is more dangerous from a First Amendment perspective: government making an individualized qualitative judgment about a specific, known work of art, or government determining whether the art fits into a general category, such as postmodern or Native American paintings? Are particularized judgments about quality better than judgments about subject? The latter restrict more speech, the former less, but the potential for abuse (hidden political censorship, for example) runs the other way. And are judgments about decency and respect individual ones, like merit, or more categorical ones, like religious newspapers? Are judgments about merit different from decency and respect, in the sense that merit is more relevant to "art," more inescapable with "art" and less focused on the message or meaning that might be drawn from a work of art? Does "merit" as the NEA statute employs the term, and as applied to the art panels, more neatly focus attention on the aesthetic dimension of the art—color, tone, skill, emotional force, beauty or ugliness—and not on messages or politics or contemporary moral values?

39. Transcript of Oral Argument at 27-29, *Finley*, 524 U.S. 569 (No. 97-371).

MR. COLE: Okay. Well, Justice Ginsburg, I don't think that the *Rosenberger* case would have come out differently if the University of Virginia had a limited pot of funds and it said, based on that limited pot of funds we're going to give funding to those groups which best further the educational purpose of the university, and they--it turned out they gave them out to 2 of 7 applicants, but they excluded religious groups, groups with religious perspectives.

That would still be an exclusion based upon viewpoint, which would be impermissible, and I don't think the case would have come out differently if it [only gave money to] 2 of 7. The Court in *Rosenberger* said scarcity is not a justification for viewpoint discrimination.

QUESTION: You're a better predictor than I am. I'm not at all sure it wouldn't have come out differently.⁴⁰

The attempted distinction between the NEA program and *Rosenberger* is getting muddled. The argument is not delving into the deeper issue of individual aesthetic judgments versus categorical subject matter or form judgments. Why isn't the individual aesthetic quality judgment more dangerous in government hands because it is highly discretionary and incapable of being subjected to external, judicially enforceable, standards? Decency can be explained, examined, and judicially superintended. The judicial branch has been doing so for many years—indecent in television, for example. Judgments of quality or perfection of form or emotional and aesthetic power can't be well overseen.

But if this is so, how can the NEA's judgments about artistic merit be justified under the First Amendment? The answer, at this point, seems to be that such judgments are made by the panels that consist of artists and professionals in the art world, people knowledgeable and experienced in judging art and its quality. To take another example, judgments about academic tenure at a state university are based on scholarly quality of published work and the quality of teaching, both of which are essentially subjective and, in a sense, aesthetic. Is the government's involvement in such judgments less dangerous if they are placed, in significant measure, in the hands of an independent professional group, say a faculty tenure committee, and checked by that group's judgments?

Are decency and respect analogous criteria? Would a "professional" panel of experts in moral precepts and American values be different, and thus no justification for government speech restrictions based on the group's judgments? If so, is this because the criteria are intrinsically different—merit versus values—or because one is more social and political than the other, and thus smacks of censorship? If so, the NEA's solution of putting people whose

40. Transcript of Oral Argument at 29-30, *Finley*, 524 U.S. 569 (No. 97-371).

antennae are sensitive to decency (moral and social tolerances) and American values would hardly be acceptable for purposes of the First Amendment.

And finally, is it altogether clear that there is no room in “merit” for judgments about values and decency? If merit has to do with taste, then whose taste is applied? The critics’? The community’s? In a democratic government, with respect to democratically funded art, perhaps the values should be those of the democratic majority, or perhaps some common denominator of its taste and value. Must the standard of taste—of what is acceptable—be the same in Peoria as it is in Times Square?

More might be said, but the point is that the arguments never dig this deep beneath the surface. They are trapped in the straightjacket of conventional First Amendment analysis, which deals with messages, not aesthetics, and such categories as point of view, content, subject matter, and manner (time, place) discrimination.

MR. COLE: [T]here’s a very big difference between the Government speaking for itself, where it can make viewpoint decisions . . . and where the Government is facilitating private expression.

Why is that an important distinction? I think that’s an important distinction because there’s a very big difference between the Government participating in the marketplace with the power of its ideas on the one hand and the Government engaging in a kind of deceptive ventriloquism in which it says it’s funding a broad range of private expression, but then it uses viewpoint-based criteria to exclude--

QUESTION: Well, I’m not sure that decency or indecency is viewpoint-based.

. . . .

I’m not sure that respect is a viewpoint-based thing, or diversity. I don’t even know what this is

. . . .

MR. COLE: Well, I’ll answer your questions in turn, Justice O’Connor. First, decency and respect are inherently, as they are used in this statute, viewpoint based. Its common definition of decency is conformity to accepted standards of morality. That’s what this Court has said in . . . [other cases dealing with indecency]. Whether something conforms or not is a viewpoint distinction. The same subject matter, if it’s treated in a way that conforms to accepted standards of morality, is permitted. If it’s treated through a viewpoint that does not, it is not.

The same with respect. The respect clause requires respect of American beliefs and values. If you are disrespectful of American beliefs

and values, you are disadvantaged. If you are respectful, you are advantaged.⁴¹

This is a good argument, but does it work with art? If the question is one's freedom to place the words "Fuck the Draft" on his jacket and wear it in public, one can argue that saying "I Detest the Draft" instead conveys a similar message, just more politely. But with art, the standard of judgment isn't focused on "The Draft," but on the power and emotion in the word "Fuck." So excising the disrespectful part excises the heart of the art. Even more to the point, the Supreme Court in the "Fuck the Draft" case, *Cohen v. California*, struck down the law prohibiting offensive words.⁴² Professor Cole may therefore not have to dwell on the evanescent distinction between viewpoint and subject, manner and force. The *Cohen* case seems to support him even if "decency" isn't viewpoint but is instead an element of the emotional impact of the message. Karen Finley's message about the place of women would be less powerful if she didn't smear herself with chocolate, just like "Fuck" makes objection to the draft more powerful.

QUESTION: I think I would agree with you if the agency here were applying the law the way you interpret it and the way the lower courts interpret it, but I do find it strange that where you have a law which, however unrealistic the interpretation may be, the agency says, we're interpreting it in such a way that we will fund Mapplethorpe and everything else.

....

[W]hy did that hurt you?

MR. COLE: Well, it hurts us for the following reason, Justice Scalia. The Government has been quite ambiguous about its statutory construction, and what it has said is that the statutory construction it is advancing to this Court today is the same statutory construction that they applied for the year-and-a-half before the statute was declared unconstitutional, so let's look at what they did for the year-and-a-half before the Court struck it down.

They instructed each panelist to bring . . . [his and her] own standards of decency to the table in making these decisions. They went to each panel, they read them the statute, they said the statute says that you must consider artistic excellence and artistic merit, taking into consideration general standards of decency. . . .

....

. . . [NEA] Chairman Frohnmayer testified before Congress [and] was asked, how do you take into consideration general standards of decency? He said

41. Transcript of Oral Argument at 30-32, *Finley*, 524 U.S. 569 (No. 97-371).

42. *Cohen v. California*, 403 U.S. 15 (1971).

[N]o one individual is wise enough to be able to consider general standards of decency and the diverse beliefs and values of the American public all by his or herself. These are group decisions. They are made by the National Council on the Arts as well as the panelists.

Now, if the chair was making decisions about decency in selecting panels, he wouldn't say these are group decisions made by the Council on the Arts as well as the panelists.

. . . .

He [w]as then asked, well, what would you do--are you abdicating your responsibility in applying this statute? What would you do if something came up to you and it was indecent or disrespectful?

He said, I would send it back to the panels and the council if I thought they made a mistake. So he's saying, I'll look at decency to make sure that they've not made a mistake.

The next Chair, who was also enforcing the statute before it was struck down, Ms. Radice, testified in Congress that she would be happy to and would apply decency to the grant-making process.

So I think you have to look . . . at how the agency has in fact applied the statute. There's no dispute about it.

And they're quite vague, actually, in this Court in what they say.

. . . .

What's problematic about this statute is, it singles out art precisely because it has a nonconforming or disrespectful viewpoint and, as this Court has said, even when the Government is allocating subsidies, if it's doing it to private speakers it can't skew the marketplace by attempting to . . . [impose] that kind of ideological screen.

. . . .

QUESTION: Now, is it the case [that] . . . if, in fact, the NEA wants to give a grant for somebody to produce something that's public work, and suppose what they do is a white supremacist group, and they want to have racial epithets all over the picture . . . [T]he most horrible ones you can possibly think of . . . [and] the person gets up there and he says, I'm a member of the Ku Klux Klan, or whatever, and this is my point of view . . . [and the NEA says we think that's an inappropriate use of this money], . . . is it your view that the Constitution requires the NEA to fund that, that particular applicant?

. . . .

MR. COLE: Right.

QUESTION: Tough. . . [Assuming that] everything you say is correct, and then we get to this point, and the panel's sitting there and saying, you know, I grant you it's as good a work of art as anything else, purely

artistically, but I don't think that this particular work of art is appropriate for a school, for a public place, for a television program.

....

MR. COLE: If it's a program for a school, I think it's appropriate to consider what is suitable for children.

I don't think it's appropriate to use viewpoint as a proxy for suitability for children. . . .

....

In the school setting . . . this Court has recognized that there's a legitimate inculcative role that the school board plays, and can therefore make all kinds of viewpoint . . . [judgments related to education because] it is engaged in Government speech, but the NEA--this is not--this is a--the breadth of this statute I think distinguishes it from anything like that . .

..

....

QUESTION: Well then . . . I take it . . . that you would say that if general standards of decency were left out of the statute so the statute read, NEA must take into consideration respect for the diverse beliefs and values of the American people, same problem, unconstitutional viewpoint?

....

MR. COLE: On your hypothetical--on your hypothetical, Justice Kennedy, if what it means is that it is favoring those artistic expressions which are--

QUESTION: But that's the problem, what it means . . . and the Government tells us, this is what it means, and you say no, it can't mean that, and two courts have said it can't mean that.

And yet the Government is saying, here were words decent and respect. They can be interpreted different ways, and usually I thought it was the obligation of a Government officer to give words a meaning that renders them consistent, not inconsistent with constitutional limitations, and yet you're insisting that Government officers take the position with respect to these two words that they interpret them in the way that would be most offensive to the Constitution.

MR. COLE: Well, I'm just saying what they did, and I'm saying that the suggestion that decency and respect might be considered simply through picking diverse panels and no more, and not taking decency and respect even into account in choosing the panels is completely inconsistent with the statute.

....

Congress in the statute said, decency and respect are the criteria by which applications are to be judged

....

QUESTION: No, they're funding artists, but artists who just portray particular . . . topics that they've designated.

MR. COLE: Right. Topics--there's no problem with topics. The Court has held that repeatedly. It's viewpoint discrimination which is

impermissible, and it's when you take one side or another on a given subject matter.

Under this statute, . . . if an artist . . . presents a nude which is disrespectful or indecent, that viewpoint is disadvantaged. If it's respectful or decent, it's advantaged. That is viewpoint discrimination.⁴³

At the risk of repetition, it is worth emphasizing that all of this viewpoint, content, subject matter business applies to speech whose value is a cognitive message. Art seems different: it is noncognitive, it goes to perceptions and emotion and feeling related to beauty, perfection of form, perception, and the like. The viewpoint, etc., categories don't easily seem to fit judgments based on the quality or nature of art.

QUESTION: Why is it that the word decency or respect is somehow more vague than the words, artistic excellence?

MR. COLE: Well, for two reasons, Justice Breyer. First, artistic merit has been applied by a profession so that there is a set of people, the people who are--

QUESTION: You mean, people who are professionals know more about what's artistically good than the average person? I would have thought there's a strong view, isn't there, that what is good and beautiful is accessible to everyone?⁴⁴

Aha! Justice Breyer is a Kantian! Kant argued that true aesthetic standards of taste are universal.

MR. COLE: Well, I think there's a strong view, Your Honor, that artistic merit, like academic merit, and like character and fitness--

QUESTION: Oh, my good[ness!] . . . But if the Government says what we want is that which ordinary people believe is beautiful, doesn't the Government have a right to fund that kind of program?

MR. COLE: I think what the Government does not have the right to do is to exclude viewpoints

. . . .

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cole. The case is submitted.⁴⁵

On that note, Professor Cole ended just where he began. He hadn't budged an inch. And having planted his feet firmly in the soil of conventional First Amendment doctrine, he couldn't afford to budge. It should be said that the Solicitor General's feet were also planted there. Thus, the entire oral

43. Transcript of Oral Argument at 34-51, *Finley*, 524 U.S. 569 (No. 97-371).

44. Transcript of Oral Argument at 52, *Finley*, 524 U.S. 569 (No. 97-371).

45. Transcript of Oral Argument at 52-53, *Finley*, 524 U.S. 569 (No. 97-371).

argument came down to a disagreement about whether “decency and respect” are viewpoint criteria, or content, subject matter, or manner criteria—not whether they have anything to do with art and aesthetics. Such an argument would be pretty boring if only so much didn’t turn on it.

The Supreme Court’s decision came at the very end of the Term, on June 25, 1998. The Court was not deeply divided on the result in the case. Eight of the Justices voted to uphold the decency and respect provision. Only Justice Souter dissented. But there the apparent near-unanimity came to a halt, for the Justices disagreed quite sharply on the reasons supporting the result. Justice O’Connor wrote the majority opinion upholding the decency and respect requirements.

Justice O’CONNOR delivered the opinion of the Court.

. . . .

[T]he “decency and respect” criteria do not silence speakers by expressly “threaten[ing] censorship of ideas.” Thus, we do not perceive a realistic danger that § 954(d)(1) will compromise First Amendment values. As respondents’ own arguments demonstrate, the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face. Respondents assert, for example, that “[o]ne would be hard-pressed to find two people in the United States who could agree on what the ‘diverse beliefs and values of the American public’ are, much less on whether a particular work of art ‘respects’ them”; and they claim that “[d]ecency’ is likely to mean something very different to a septegenarian in Tuscaloosa and a teenager in Las Vegas.” The NEA likewise views the considerations enumerated in . . . [the decency and respect provision] as susceptible to multiple interpretations. Accordingly, the provision does not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views. Indeed, one could hardly anticipate how “decency” or “respect” would bear on grant applications in categories such as funding for symphony orchestras.

Respondents’ claim that the provision is facially unconstitutional may be reduced to the argument that the criteria . . . are sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination. Given the varied interpretations of the criteria and the vague exhortation to “take them into consideration,” it seems unlikely that this provision will introduce any greater element of selectivity than the determination of “artistic excellence” itself. And we are reluctant, in any event, to invalidate legislation “on the basis of its hypothetical application to situations not before the Court.”

. . . .

Permissible applications of the mandate to consider “respect for the diverse beliefs and values of the American public” are also apparent. In setting forth the purposes of the NEA, Congress explained that “[i]t is vital to a democracy to honor and preserve its multicultural artistic heritage.” The agency expressly takes diversity into account, giving

special consideration to “projects and productions . . . that reach, or reflect the culture of, a minority, inner city, rural, or tribal community,” . . . as well as projects that generally emphasize “cultural diversity,” Respondents do not contend that the criteria . . . are impermissibly applied when they may be justified, as the statute contemplates, with respect to a project’s intended audience.

We recognize, of course, that reference to these permissible applications would not alone be sufficient to sustain the statute against respondents’ First Amendment challenge. But neither are we persuaded that, in other applications, the language . . . itself will give rise to the suppression of protected expression. Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose “artistically excellent” projects. The agency may decide to fund particular projects for a wide variety of reasons, “such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work’s contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form.” As the dissent below noted, it would be “impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression. The “very assumption” of the NEA is that grants will be awarded according to the “artistic worth of competing applicants,” and absolute neutrality is simply “inconceivable.”

. . . .

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

. . . .

We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding. But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.

*It is so ordered.*⁴⁶

Justice O'Connor's majority opinion, both wide-ranging and analytically ungainly, garnered the full votes of four other Justices: Chief Justice Rehnquist and Justices Stevens, Kennedy, and Breyer, a diverse group each of whom must have found enough to their liking in the grab-baggyish menu of rationales that Justice O'Connor included in her opinion. She says the decency and respect clause doesn't necessarily mean what it says; if it does, it doesn't cut very deep because the grant judgments still would be based on mode and manner, not point of view; there may be instances of unconstitutional grant decision-making, but the Court need not worry about them here, where the government must choose because of limited funds, so it must have some room to operate; and in any event the government plays the historic role of a great patron of the arts, like the Medicis. Government is therefore not regulating or even limiting speech and art; it is facilitating and broadening it. Government is a patron-speaker.

Justice O'Connor also obtained the limited agreement of Justice Ginsburg, who found much to her liking in the majority opinion but objected to one of the rationales on the menu (Justice O'Connor's broad description of Congress's power to subsidize speech based on its point of view).

Justices Scalia and Thomas agreed with the result but rejected the menu altogether and explained their views on the basis of quite different reasons than those offered up by Justice O'Connor:

Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment.

"The operation was a success, but the patient died." What such a procedure is to medicine, the Court's opinion in this case is to law. It sustains the constitutionality of 20 U.S.C. § 954(d)(1) by gutting it. The most avid congressional opponents of the provision could not have asked for more. . . . By its terms, [the "decency and respect" requirements] establish content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.

. . . .

The phrase "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public" is what my grammar-school teacher would have condemned as a dangling modifier: There is no noun to which the participle is attached (unless one jumps out of paragraph (1) to press "Chairperson" into service). Even so, it is clear enough that the phrase is meant to apply to those who do the judging. The application reviewers must take into account "general standards of decency" and "respect for the diverse beliefs and values of the American public" when evaluating artistic excellence and merit.

46. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 583-90 (1998) (*citations omitted*).

One can regard this as either suggesting that decency and respect are elements of what Congress regards as artistic excellence and merit, or as suggesting that decency and respect are factors to be taken into account *in addition to* artistic excellence and merit. But either way, it is entirely, 100% clear that decency and respect are to be taken into account in evaluating applications.

. . . .

This unquestionably constitutes viewpoint discrimination. That conclusion is not altered by the fact that the statute does not “compe[.]” the denial of funding, any more than a provision imposing a five-point handicap on all black applicants for civil service jobs is saved from being race discrimination by the fact that it does not compel the rejection of black applicants.

. . . .

The First Amendment reads: “Congress shall make no law ... *abridging* the freedom of speech.” To abridge is “to contract, to diminish; to deprive of.” T. Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796). With the enactment [of the “decency and respect” provision], Congress did not *abridge* the speech of those who disdain the beliefs and values of the American public, nor did it *abridge* indecent speech. Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute.

Avant-garde artistes such as respondents remain entirely free to *epater les bourgeois*; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it. It is preposterous to equate the denial of taxpayer subsidy with measures “aimed at the *suppression* of dangerous ideas.”

. . . .

One might contend, I suppose, that a threat of rejection by the only available source of free money would constitute coercion and hence “abridgment” within the meaning of the First Amendment. . . . But even if one accepts the contention, it would have no application here. The NEA is far from the sole source of funding for art—even indecent, disrespectful, or just plain bad art. Accordingly, the Government may earmark NEA funds for projects it deems to be in the public interest without thereby abridging speech.

[The decency and respect requirement] . . . is no more discriminatory, and no less constitutional, than virtually every other piece of funding legislation enacted by Congress. “The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program” [W]hen Congress chose to establish the National Endowment for Democracy it was not constitutionally required

to fund programs encouraging competing philosophies of government – an example of funding discrimination that cuts much closer than this one to the core of *political* speech which is the primary concern of the First Amendment. It takes a particularly high degree of chutzpah for the NEA to contradict this proposition, since the agency itself discriminates—and is required by law to discriminate—in favor of artistic (as opposed to scientific, or political, or theological) expression. Not all the common folk, or even all great minds, for that matter, think that is a good idea. In 1800, when John Marshall told John Adams that a recent immigration of Frenchmen would include talented artists, “Adams denounced all Frenchmen, but most especially ‘schoolmasters, painters, poets, & C.’ He warned Marshall that the fine arts were like germs that infected healthy constitutions.” J. Ellis, *After the Revolution: Profiles of Early American Culture* 36 (1979). Surely the NEA itself is nothing less than an institutionalized discrimination against that point of view. Nonetheless, it is constitutional, as is the congressional determination to favor decency and respect for beliefs and values over the opposite because such favoritism does not “abridge” anyone’s freedom of speech.

Respondents . . . argue that viewpoint-based discrimination is impermissible unless the government is the speaker or the government is “disburs[ing] public funds to private entities to convey a governmental message.” It is impossible to imagine why that should be so; one would think that directly involving the government itself in the viewpoint discrimination (if it is unconstitutional) would make the situation even worse. Respondents are mistaken. It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary. And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doctors perform abortions); or by advocating it officially (establishing an Office of Art Appreciation, for example, or an Office of Voluntary Population Control); or by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood). None of this has anything to do with abridging anyone’s speech.

. . . .

The nub of the difference between me and the Court is that I regard the distinction between “abridging” speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable. The Court, by contrast, seems to believe that the First Amendment, despite its words, has some ineffable effect upon funding, imposing constraints of an indeterminate nature which it announces (without troubling to enunciate any particular test) are not violated by the statute here—or, more accurately, are not violated by the quite different, emasculated statute that it imagines. “[T]he Government,” it says, “may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.” The Government, *I*

think, may allocate both competitive and noncompetitive funding *ad libitum*, insofar as the First Amendment is concerned.

. . . .

In its laudatory description of the accomplishments of the NEA, the Court notes with satisfaction that “only a handful of the agency’s roughly 100,000 awards have generated formal complaints.” The Congress that felt it necessary to enact . . . [the decency and respect criteria] evidently thought it much *more* noteworthy that *any* money exacted from American taxpayers had been used to produce a crucifix immersed in urine or a display of homoerotic photographs. It is no secret that the provision was prompted by, and directed at, the funding of such offensive productions. Instead of banning the funding of such productions absolutely, which I think would have been entirely constitutional, Congress took the lesser step of requiring them to be disfavored in the evaluation of grant applications. The Court’s opinion today renders even that lesser step a nullity. For that reason, I concur only in the judgment.⁴⁷

Justice Scalia’s opinion can only be described as acerbically dismissive of Justice O’Connor’s opinion. For Scalia, the statute means what it says—no indecent and disrespectful art should receive grants. If viewpoint versus content or manner discrimination were relevant, which it isn’t, this is indisputably viewpoint discrimination. But the fact is that government, as the representative of the people in a democratic society, can spend its money any way it chooses. As long as it isn’t regulating or prohibiting speech but just giving money, the First Amendment poses no obstacle. Congress can fund the expression of prodemocracy ideas and not socialist, monarchist, or communist ideas—a clear point-of-view preference. Karen Finley’s speech isn’t being restricted or abridged or prohibited. It’s just not getting support from the government. It will have to seek support from other, true patrons, public or private, or else make it on its own by attracting a paying audience or otherwise competing in the private marketplace.

Justice Souter was alone in dissent, accompanied only by a classical view of the First Amendment and virtually all of the Supreme Court’s prior decisions. Strange and lonely spot, that.

Justice SOUTER, dissenting.

. . . .

One need do nothing more than read the text of the statute to conclude that Congress’s purpose in imposing the decency and respect criteria was

47. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 590-600 (1998) (*citations omitted*).

to prevent the funding of art that conveys an offensive message; the decency and respect provision on its face is quintessentially viewpoint based, and quotations from the Congressional Record merely confirm the obvious legislative purpose. In the words of a cosponsor of the bill that enacted the proviso, “[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds.” Another supporter of the bill observed that “the Endowment’s support for artists like Robert Mapplethorpe and Andre[s] Serrano has offended and angered many citizens,” behooving “Congress . . . to listen to these complaints about the NEA and make sure that exhibits like [these] are not funded again.” Indeed, if there were any question at all about what Congress had in mind, a definitive answer comes in the succinctly accurate remark of the proviso’s author, that the bill “add[s] to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account.”

The Government’s . . . suggestion that the NEA’s decency standards restrict only the “form, mode, or style” of artistic expression, not the underlying viewpoint or message, may be a tempting abstraction But here it suffices to realize that “form, mode, or style” are not subject to abstraction from artistic viewpoint, and to quote from an opinion just two years old: “In artistic . . . settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying otherwise inexpressible emotions. . . . Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power.”

[T]he government may act on the basis of viewpoint “when the State is the speaker” or when the State “disburses public funds to private entities to convey a governmental message.” But we explained that the government may not act on viewpoint when it “does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.” When the government acts as patron, subsidizing the expression of others, it may not prefer one lawfully stated view over another.

The NEA . . . is a subsidy scheme created to encourage expression of a diversity of views from private speakers. Congress brought the NEA into being to help all Americans “achieve a better understanding of the past, a better analysis of the present, and a better view of the future.” The NEA’s purpose is to “support new ideas” and “to help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry.” Given this congressional choice to sustain freedom of expression, *Rosenberger* teaches that the First Amendment forbids decisions based on viewpoint popularity. So long as Congress chooses to subsidize expressive endeavors at large, it has no business requiring the NEA to turn down funding applications of artists and exhibitors who devote their “freedom of thought, imagination, and inquiry” to defying our tastes, our beliefs, or our values. It may not use the NEA’s purse to “suppres [s] . . . dangerous ideas.”

[Footnote 9:] While criteria of “artistic excellence and artistic merit” may raise intractable issues about the identification of artistic worth, and could no doubt be used covertly to filter out unwanted ideas, there is

nothing inherently viewpoint discriminatory about such merit-based criteria. We have noted before that an esthetic government goal is perfectly legitimate. Decency and respect, on the other hand, are inherently and facially viewpoint based, and serve no legitimate and permissible end. The Court's assertion that the mere fact that grants must be awarded according to artistic merit precludes "absolute neutrality" on the part of the NEA is therefore misdirected. It is not to the point that the Government necessarily makes choices among competing applications, or even that its judgments about artistic quality may be branded as subjective to some greater or lesser degree; the question here is whether the Government may apply patently viewpoint-based criteria in making those choices.⁴⁸

Dissenting all alone, Justice Souter plies the narrow channel of conventional First Amendment doctrine, built as it is on a speech model resting on a cognitive message. Souter agrees with Scalia about the purpose and meaning of the amendment. He agrees also that the decency and respect criteria, applied to a work of art, are point-of-view-based. Therefore, he concludes, the law is unconstitutional, unless the NEA program is government speech, which it isn't because it affects only private speech by private artists who speak for themselves. Tight logic wrapped up in a pretty bow, but it is unsatisfying because it seems to have so little to do with Karen Finley and the issue of judging art as a distinct form of expression.

With this, Karen Finley's legal fate came to an ignominious end.

There are many things to think about in the *Finley* case. We will focus on just a few. The main points are the nature and quality of Karen Finley's art, the criteria by which art and aesthetics can be judged, and the Supreme Court's treatment of aesthetic speech claims under the First Amendment. We will take them in reverse order.

One can't help but come away from the Supreme Court oral argument and opinions with a sense of cold, intellectual abstraction. Nowhere was Finley's performance art, or that of the other plaintiffs, mentioned. It's not that the Court assumed that her performances were art. The Justices and the lawyers simply didn't want to get into the subject at all. Instead, the Court sought procedural and structural ways around the issue. And in doing so, they made two potential errors. First, they assumed that an artist's free speech claim could be treated under the same rules as the soapbox orator—that is, by the

48. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 600-15 (1998) (*citations omitted*). The last paragraph was a footnote that the author inserted into the text for purposes of clarification.

content or message of the speech and the government's possible interest in restricting that message in a given place or at a given time or when delivered in a given manner. But the message of the artist isn't necessarily cognitive, or exclusively so. It is aesthetic, going to the perfection of technique and the emotional power of performance, quite apart from any cognitive message. Such matters can't be reduced to questions of process alone: was the NEA's panel process suitable for questions of decency and respect; could the comfort of a group decision be trusted to confine and contain the discretion implied in such a standard; and are decency and respect valid limitations to be placed on art selection? The answers might be that they are not valid criteria, because they have nothing to do with *artistic* quality.

Second, the Court wrongly assumed that decency can be judged by the message of the art, when the message can't be reduced to reason or logic. Therefore, it might be concluded, while decency and respect might be (and are in some settings) perfectly valid legislative concerns, they cannot effectively be lodged in a judgment of artistic merit, and therefore they are constitutionally inapt for the NEA. There is a way to reach such a First Amendment conclusion, but the Court did not take it. Instead, the Court and the lawyers devoted all of their energies to the ineffable question of whether "decency and respect" were point-of-view limitations, in which case they would be unconstitutional; or whether they were subject or manner limitations, in which case they might not be; or whether instead of that the government should be best conceived as acting not as a regulator of speech, but as a patron of the arts, and therefore freed of all First Amendment limits.

This borders on sophistry. No one can know for certain whether decency and respect are point-of-view criteria or not. The distinction, coherent in the abstract, is far too slippery to apply consistently in *Finley* and like cases. To define the government's role, as the majority opinion did, as patron of the arts is to allow the government to exceed the more benign role of patron—judging only the artist's technique, emotion, power, and beauty—and to consider instead the reasons a regulator, not a patron, would use, reasons of morals or majoritarian preference having nothing to do with aesthetics. Before the NEA amendment, perhaps the government (NEA) could be accurately seen as a relatively benign patron (a category that rarely if ever existed in the history of art). The amendment stopped all of that by injecting criteria unrelated to artistic merit; negative criteria rather than positive reasons.

Justice O'Connor's opinion, by this reasoning, was fatally flawed. Even if the NEA was right in thinking it could lodge decency and respect in the composition of the panels, decency and respect didn't belong there, where artistic quality was the standard and where the members, no matter how selected, had to have experience in judging art as art. And the conclusion that

prohibiting indecent and disrespectful art from support doesn't "threaten censorship of ideas [or aesthetic feelings],"⁴⁹ or compromise First Amendment values is simply declared, not explained. The only real explanation, unsatisfactory as it is for reasons given above, is that the government is not acting as a regulator, but as a patron of the arts, and thus is entitled to make judgments on the basis of *its* own tastes. But who is the "it"? Any old government employee, the NEA, the panels, the Council, the Congress, the President, the Secretary of Art? Here the indisputable maker of judgments was the Congress, led by Jesse Helms and a host of others whose actions and explanations defy the definition of acting as a patron rather than a regulator.

Finley's work is boisterous, profane, sexual, funny, tragic, and political, among other things. Apart from its message, it evokes humor, revulsion, disgust, sensuality, irony, and deep emotional feelings of hopelessness, sadness, and anger. It addresses such issues as self-loathing, incest, sexualization of women, and AIDS, to name a few. Her work is forceful and powerful, drawing directly on emotions and feelings to inscribe her messages in the audience's minds. And if technique and skill are a function, at least in part, of effectiveness in communicating or evoking feelings of passion or beauty or ugliness through sensuous perception, Karen Finley is indeed skilled. She has a large and admiring following in venues in which she performs, and she is respected widely in the arts community.

Her problem, if it qualifies as that, is that she is "in your face," including in the face of her detractors. She is fond of saying that "When I finally realized that Jesse Helms was actually having a public sexually abusive relationship with me. . . I changed the relationship and I think that I've been healthier ever since."⁵⁰ Her work is different and shocking and controversial and, perhaps most importantly, it violates many taboos: it challenges established conventions; it is lewd and crass; it breaks rules. One would not use the word beauty to describe it. But "art" and "aesthetics" are not so restricted.

Alison Young, the author of *JUDGING THE IMAGE: ART, VALUE, LAW*,⁵¹ describes the effect on the viewer of Serrano's *Piss Christ*, a photograph of the crucified Christ immersed in a vat of the artist's urine.

49. *Finley*, 524 U.S. at 583.

50. Beth Potier, *Karen Finley Provokes, Reveals in Lecture*, HARVARD UNIVERSITY GAZETTE, Feb. 14, 2002.

51. ALISON YOUNG, *JUDGING THE IMAGE: ART, VALUE, LAW* 42, 42-44 (2005).

The picture on the gallery wall does not literally touch the spectator; however, the visceral response to artworks such as *Piss Christ* . . . can be interpreted as the shudder arising from an image which transcends the cushioning effect of the fact of representation and threatens metaphorically to touch the spectator.

. . . .

This is the dynamic of ‘aesthetic vertigo’. Rather than provoking a simple ‘disgusted’ response, artworks such as . . . *Piss Christ* . . . make the spectator dizzy, teetering on the verge of a representational abyss. The desire to judge these artworks not only as disgusting but also as indecent, or obscene or blasphemous, is a desire for the reinstatement of the law (of community, of religion, of representation) and for a continued segregation of images into the sanctioned and the unwarranted.

Piss Christ was one of the works that spawned the NEA controversy and the resulting decency and respect amendment, and that subsequently caught Karen Finley in its conflagration. Like Finley’s performance art, it was confrontational and subverting, representationally transforming the meaning of the image from objective and dispassionate disgust to a subjective and personal “shudder arising from an image which transcends the cushioning effect of the fact of representation and threatens . . . to touch the spectator.”⁵²

If we recognize the aesthetic power and the skill with which Karen Finley’s performance is created as art, or at least that it is not different in kind from the transformative emotions evoked by Bach, or by the objectively ugly and frightening Nazi paintings by Maurice Lasansky, or by the surrealists, and if we acknowledge the many descriptions of Karen Finley’s work as evoking similar emotion and perception, we are left with three essential questions. First, how, if at all, can the law define art? Second, if something is art, can the law determine its quality? Third, where do “decency and respect” (or similar criteria) fit in?

In 1903, Justice Oliver Wendell Homes, Jr., wrote:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.⁵³

Justice Scalia voiced similar views in 1987:

[W]e would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum*. Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide ‘What is Beauty’ is a novelty even by today’s standards.⁵⁴

The gist of these statements is that the law should not undertake to define what is art. But is it really that easy? With Karen Finley it may be: just take

52. *Id.*

53. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

54. *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring).

her at her word, based on what she does and claims, and proceed to the next question (decency and respect). In many cases this will work, for the matter at issue can make a colorable claim to looking like art, at least in form and technique.

But what do we do with other examples? How about the nude dancer in a bar? She certainly evokes emotion. Is it simply not the right kind? How about the cigarette advertisement with the Marlboro Man? At first it was just an effective ad, appealing to emotions but directed to selling a product. Today, the Marlboro Man picture is an artistic icon, much like the Campbell's soup can in the hands of Andy Warhol. To be sure, Warhol himself transformed the can. In the case of the Marlboro Man, time did the work. But why should the agent of transformation matter if it is now considered art? What about a burning cross, an image of great emotional power and transformative meaning, transformed by the hand of the Ku Klux Klan? Is it art? Is it disqualified as art because of its hateful and frightening power over the viewer; its disgusting and violent nature? Can the Court just assume that these are all art, accepting the word of the dancer, the tobacco company, the KKK?

Perhaps we can't escape the definitional question of "art." If not, courts will at least have to set some wide boundaries—broad but still useful. And in doing so, courts will have to keep questions of illegality or harm or decency and respect separate from questions of art.

Even if the government and the courts can in some measure judge something as "art," can they take the next step and judge the quality of the art?

This, of course, is precisely what the NEA is charged with doing in making grants to artists, exhibitions, and programs. Many think the government ought not to do this at all—indeed that it should be unconstitutional for the government to judge and support art. Their reasoning, at base, is that the government ought not to be in the business of regulating or selectively supporting art by making qualitative judgments, for in doing so the government will tend to protect its own interests (including avoiding controversy) and, in the long run, will effectively domesticate art. Art is a medium that by its own definition cannot be domesticated, for the point is to challenge, change, evoke responses, even morally revolutionary ones. Art is therefore a private matter for the private sector.

This is a respectable, even very strong, argument. In First Amendment language, a judgment by government of the quality of a work of art is, inherently, based on point of view, and thus essentially prohibited. Could the

government prohibit a political speaker because of his or her diction or grammar? Because his or her ideas are simply bizarre? The very purposes of the First Amendment would be defeated by such a measure.

Setting aside the “decency and respect” question for the moment, the NEA sought to avoid the problem of government judging art and its quality by delegating the definitional and qualitative judgments to panels of private citizens who are artists or experts in judging the arts. These people, of course, are still acting for, *and as*, the government, but they are also independent of the formal bureaucratic mechanisms of government, and have no formal allegiances to particular parties or government policies. This delegation to private individuals acting as a group is not, of course, an answer to those who worry that any system, even a delegated one, will have the effect of domesticating art and instilling incentives to perpetuate current ideas about art and discourage radical change, like surrealism.

But practicality also plays an important role. Public university faculties make tenure decisions in much the same fashion as the NEA panels, and those decisions are explicitly focused on the quality of published scholarship (including art or music or dance) and the quality of (the art of?) teaching. The justification is that leaving the qualitative judgments to deans or administrators would be worse, as it could directly discourage and threaten the freedom to explore ideas in the academy; and that failing to make any judgment whatever would be even worse. So a delegated process of choice by experts is perhaps the only process, imperfect and often self-interested as it is, by which the academic purposes of tenure can be achieved. With slight modification, this is the process used in the acquisition process of public libraries—trained acquisition professionals make the judgments about which books to buy, along with the qualitative judgments often accompanying that decision. Teachers give grades, orchestra directors select musicians.

Should necessity and professional delegation be enough to justify the NEA’s choices based on artistic merit: Is it art? Is it very good art? Is it consistent with the artistic and programmatic objectives for a specific grant program, such as Native American art; modern dance; or performance art? The argument favoring the constitutionality of the NEA selections may well rest on an affirmative answer to this question, for without the artistic screen provided by the panels, the Chair of the NEA and the Council might possess too much discretion to pass First Amendment scrutiny. They could favor “art” that they personally liked; and they could reject “art” that they disliked. Panel judgments partially constrain such choices.

Or is the NEA differently situated than librarians or faculties in the sense that governmental arts funding—government patronage in the Court’s language—is not a practical necessity as is selecting books for a library or deciding upon job security for teachers and scholars? As Justice Scalia says,

without the NEA there would still be a large market in private patronage to which artists might appeal.⁵⁵ And without the NEA grant, an artist could still produce her or his art. The existence of the arts is thus not dependent on government subsidy in the way that the existence of a library or a university is dependent on choices based upon artistic or aesthetic or scholarly merit.

And even if the NEA's merit-based grant programs are constitutional, does the addition of "decency and respect" change the equation? Decency and respect are not criteria that go to artistic merit. They are different, too, from NEA decisions to sponsor Native American art, or children's art. Decency and respect are broad social and political goals having little if anything to do with the intrinsic status and merits of art; and they do not lie within the field, or genres, of good art like the programmatic subcategories of Native American art. Decent and respectful Native American art is not a subcategory of good art, but rather a standard for exclusion of good art within the subcategory of Native American art.

If the NEA's mission is principally to judge art and good art, injecting decency and respect reshapes that mission into two parts: judging art as art; and judging social and moral and religious preferences about what good art should be excluded for social policy and political reasons. These are two fundamentally different undertakings. The NEA seems unsuited to the latter judgment *because* it is suited to the former. This fact, it might be argued, is a better and clearer reason for the unconstitutionality of the decency and respect amendment than the conclusion that decency and respect are point-of-view criteria, as Souter, Scalia, and Thomas all claim, and as the majority disclaims, at least in part. Would we expect the faculty tenure decision to turn on scholarly and teaching merit, and also on whether a candidate was suitably religious or spiritual, or had the right values of decency and respect in his or her private life?

But if decency and respect are misfits for the NEA, do they have no valid place in the government's selection decisions? Here the argument is between Justice Souter, who has little sympathy for such open and political standards, and Justice Scalia, who says that when the government is not regulating private activity but just choosing how to spend its money, it can make virtually any choices it wants, for the government needs such discretion and the disappointed applicant is not placed in a worse situation than if they hadn't applied at all—that is, they are on their own in the private market. This is a

55. *Finley*, 524 U.S. at 590-600 (Scalia, J., dissenting).

valid point, because today, unlike at the time of the great patrons like the Medicis, art is an autonomous enterprise and the market, not the patron, is its standard. But should it make any difference to the First Amendment question? Should the government be able to give me a bonus or award for my own writing because it is more consistent with the official government view than another writer's? What if I write for a newspaper, or a magazine?

Ultimately, the Court majority simply avoids Justice Scalia's point, not even deigning to reply, saying instead that decency and respect *might* be a valid criteria for government in the arts setting—i.e. it isn't necessarily bad all the time, whatever that means—but it might also be quite invalid. We'll have to wait for another case to think about the problem.

This, of course, is hardly an answer. There may be some wisdom in saving the issue for a later day and a better case. Yet it seems pretty likely that Karen Finley's grant, first recommended by the panel, then reviewed by the Chair and returned to the panel to reconsider in light of decency and respect, and then once again recommended by the panel, only to be finally rejected by the Council, presents the issue clearly enough if only the Court wanted to delve further into the First Amendment issue based on real facts rather than legal abstractions. That is, it's not that the Court couldn't look further. It's that they chose not to. Why?