University of Florida Journal of Law & Public Policy

Volume 10 | Issue 2 Article 8

1999

Constitutional Law: Decency Requirement in Art Funding NEA v. Finley, 118 S. Ct. 2168 (1998)

Amy Petrick

CASE COMMENT

CONSTITUTIONAL LAW: DECENCY REQUIREMENT IN ART FUNDING *NEA v. Finley*, 118 S. Ct. 2168 (1998)

Amy Petrick[*] [**]

Petitioner, the National Endowment for the Arts (NEA),[1] denied[2] grants to Respondents, four performance artists,[3] because the artists did not meet statutory[4] requirements to comport themselves with general standards of decency and respect for American values.[5] Respondents challenged the NEA's decision, alleging that the "general standards of decency"[6] criteria violated their First Amendment rights by discriminating on the basis of

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* *Editor's Note:* This case comment received the *Huber C. Hurst Award* for the outstanding case comment for Spring 1998.

** This comment is dedicated to Sage and Joe for their love, patience, and support.

1. Congress created the NEA in 1965 as part of the National Foundation on the Arts and Humanities to help create a climate "encouraging freedom of thought, imagination, [and] inquiry and the material conditions facilitating the release of . . . creative talent." 20 U.S.C. § 951(7) (1994).

2. An advisory panel initially reviewed grants for the four artists and recommended approval of all four grant applications. *See* NEA v. Finley, 118 S. Ct. 2168, 2174 (1998) [hereinafter *Finley III*]. John Frohnmayer, then Chairperson of the NEA, requested that three of the applications be reviewed again, and the advisory panel again recommended approval of all four applications. *See id.* at 2173-74. The National Council of the Arts, a 26-member council responsible for reviewing the advisory panel's recommendations and advising the Chairperson, subsequently recommended disapproval of the four grants. *See id.* at 2172, 2174. The Chairperson has the authority to award grants but may not approve an application that has been recommended for disapproval by the National Council for the Arts. *See id.* at 2172. Consequently, the Chairperson denied all four grants on recommendation of the National Council for the Arts. *See id.* at 2174.

3. The four performance artists, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, originally sought restoration of their grants or reconsideration of their applications. *See id.* at 2174. They were later joined by the National Association of Artists' Organizations (NAOO) and amended their complaint to include the constitutional challenge to the validity of § 954(d)(1). *See id.*

4. The statute, 20 U.S.C. § 954(d)(1), requires the NEA Chairperson to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in applying criteria by which applications are judged. *Id.*

5. *See Finley III*, 118 S. Ct. at 2174.

6. 20 U.S.C. § 954(d)(1).

viewpoint.[7] The District Court for the Central District of California found in favor of Respondents, granting summary judgment and enjoining enforcement of the provision.[8] The Ninth Circuit Court of Appeals affirmed the lower court's decision, holding that the provision discriminated on the basis of viewpoint and was void for vagueness.[9] The U.S. Supreme Court granted certiorari, reversed the circuit court's holding, and HELD that the statute was constitutional because it did not discriminate against a particular viewpoint and was not likely to burden the applicants' right to free speech.[10]

Under traditional First Amendment analysis, courts subject statutes that criminalize or otherwise prohibit expressive activity to a strict scrutiny test.[11] However, there are cases where a statute does not directly prohibit free speech, but merely limits funding for certain speech. In such cases, the Court has struggled to balance its traditional zealous protection of individual First Amendment rights with its longstanding judicial deference to congressional authority in setting spending priorities.[12]

When initially faced with First Amendment challenges in the funding context, the Court took the position that legislative spending power could not be used to suppress unpopular speech, favor one viewpoint over another, punish unpopular ideas, or condition a benefit on relinquishing the right to free speech.[13] The Court's broad prohibition against using legislative spending power to discriminate based on content was set forth as early as 1946 in *Hannegan v. Esquire*.[14] In *Hannegan*, the Court denounced the denial of a second class mail rate to a periodical based on its content as "censorship . . . abhorrent to our traditions."[15]

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7. *See* Finley v. NEA, 795 F. Supp. 1457, 1460 (C.D. Cal. 1992) [hereinafter *Finley I*], *aff'd*, 100 F.3d 671 (9th Cir. 1996) [hereinafter *Finley II*], *rev'd*, *Finley III*, 118 S. Ct. at 2168.

8. *See id.* at 1476.

9. *See Finley II*, 100 F.3d at 684.

10. *See Finley III*, 118 S. Ct. at 2180.

11. *See, e.g.*, Reno v. ACLU, 117 S. Ct. 2329, 2344-45 (1997) (applying a strict scrutiny standard to a statute criminalizing the transmission of indecent materials to minors via the Internet). The strict scrutiny standard requires at a minimum that a statute serve a compelling state interest and be narrowly tailored to serve that interest. *See id.*

12. *See Finley III*, 118 S. Ct. at 2171-73.

13. *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 830-31 (1995) (holding that a university may not deny funds to a student newspaper because of its Christian perspective and noting that viewpoint discrimination is an egregious form of content discrimination that cannot be tolerated); *see also* Rust v. Sullivan, 500 U.S. 173, 196 (1991) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that while an individual is not entitled to a government benefit, once the government offers a benefit, it cannot condition the benefit on the relinquishment of a constitutional right)); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983) (noting that Congress may not discriminate in awarding subsidies in order to suppress dangerous ideas).

14. 327 U.S. 146 (1946).

15. *Id.* at 151.

However, recent caselaw demonstrates the Court's increasing reluctance to invalidate spending schemes as violative of individual constitutional rights.[16] The Court's decision in *Regan v. Taxation with Representation of Washington* illustrates this trend.[17] In *Regan*, the Court held that Congress had the authority to withhold a tax exemption to a group that engaged in lobbying activities.[18] The *Regan* opinion underscored the Court's deference to legislative authority to set spending priorities, noting that the legislature is uniquely positioned to know local spending needs and the Court should be reluctant to question congressional spending decisions.[19] By rejecting the strict scrutiny test in favor of a rational relation test,[20] the *Regan* Court greatly relaxed the standards by which restrictions on expressive activity are judged in a funding context, thereby expanding congressional authority to condition and restrict funded speech.[21]

The *Regan* decision also departed from the traditional ban on content discrimination by announcing that content restrictions are permissible in the form of statutory classifications.[22] While the Court acknowledged that Congress could not use legislative spending power to censor individual messages,[23] the Court implied that content-related restrictions were permissible where they served a rational purpose unrelated to the suppression of speech.[24]

The Court continued its expansive reading of legislative authority to

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16. *See, e.g., Rust*, 500 U.S. at 193 (holding that Congress has the authority to require doctors working for Title X programs to refrain from abortion counseling in the course of providing services to patients, and upholding congressional authority to selectively fund certain expressive activities but not others).

17. 461 U.S. at 548.

18. *See id.*

19. *See id.* at 547 (citing Madden v. Kentucky, 309 U.S. 83, 87-88 (1940)).

20. The rational relation test is less rigorous than the traditional strict scrutiny test, requiring only that a statute bear a "rational relation" to a legitimate state interest. *Id.* While courts will inquire as to whether a statute is tailored to meet the specific objective served, the rational relation test does not contain a stringent requirement that the least restrictive means available be used. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989) (upholding a city ordinance that required users of a public park's band shell to use city-owned amplification equipment when holding concerts in the band shell).

21. *See Regan*, 461 U.S. at 548-49 (holding that Congress may deny a tax exemption to a group based on lobbying activities). The *Regan* Court acknowledged that the Court of Appeals required a strict scrutiny test because the statute affects First Amendment rights on a discriminatory basis, but held that a rational relation test was a more appropriate standard based on relevant caselaw. *See id.*

22. *See id.* at 548.

23. *See id.*

24. *See id.* at 550. "Where governmental provision of subsidies is not ' "aimed at the suppression of dangerous ideas" ' . . . its 'power to encourage actions deemed to be in the public interest is necessarily far broader.' " *Id.* (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959); Maher v. Roe, 432 U.S. 464, 476 (1977), respectively).

condition funded speech in *Rust v. Sullivan*.[25] In *Rust*, the Court decided that Congress may prohibit doctors who receive Title X funds from counseling patients about their option to obtain an abortion.[26] The *Rust* Court announced that, while Congress may not discriminate in order to suppress a particular viewpoint, Congress has the authority to selectively fund one speech act over another.[27] The Court further decided that the prohibition against abortion counseling did not condition the funding benefit on the waiver of a constitutional right because doctors could choose to speak about abortion outside of the funded program.[28]

The *Rust* decision expanded the focus on congressional intent implicit in the *Regan* decision and virtually overturned the general rule that Congress may not discriminate against particular viewpoints when setting spending priorities.[29] However, the narrow margin[30] and strong dissent[31] in *Rust* suggest the Court's unease with abandoning the strict judicial scrutiny typically required by the First Amendment out of deference for Congress' autonomy in setting spending priorities.[32]

While recent caselaw establishes a relaxation of strict judicial scrutiny as to content discrimination in a funding context, the requirement that a statute be narrowly tailored to meet its objective remains undisturbed.[33] Two doctrines that might have application in the funding context have evolved out of the Court's requirement that statutes be narrowly tailored to serve a legitimate state purpose: the overbreadth and the vagueness doctrines.[34] The overbreadth doctrine invalidates a statute that reaches more protected speech than is necessary in order to serve the legitimate purpose for which

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25. 500 U.S. 173, 196 (1991).

26. *See id.* at 198.

27. *See id.* at 193.

28. *See id.* at 199. It should be noted that the Court's refusal to strike down the funding condition on speech is particularly dramatic because of the fundamental nature of a doctor-patient relationship and the implicit restriction on a woman's ability to exercise her right to privacy as to procreative decisions. *See id.* at 214 (Blackmun, J., dissenting) (noting that the physician has an ethical obligation to help the patient make informed choices).

29. *See id.* at 194 (rationalizing the prohibition against abortion counseling as a provision that does not suppress dangerous ideas, but merely prohibits expressive activities outside the project's scope); *see also Regan*, 461 U.S. at 549 (asserting that congressional selection of particular entities for entitlements is a matter of policy and discretion not subject to judicial review unless under exceptional circumstances).

30. *See Rust*, 500 U.S. at 176 (5-4 margin).

31. *See id.* at 204 (Blackmun, J., dissenting). Justice Blackmun was joined in his dissent by Justice Marshall. *See id.* at 203 (Blackmun, J., dissenting). Justice Stevens joined Parts II and III, and Justice O'Connor joined Part I. *See id.* at 203-04 (Blackmun, J., dissenting).

32. *See id.* at 177-203.

33. *See id.* at 204 (Blackmun, J., dissenting); *see also Reno*, 117 S. Ct. at 2346 (requiring that a statute use the least restrictive means available to accomplish a legitimate state purpose).

34. *See Reno*, 117 S. Ct. at 2346.

it was enacted.[35] The vagueness doctrine strikes down statutory language as void where a person of ordinary intelligence must guess at the meaning of the statute, thus intending to avoid the possibility that potential speakers will refrain from protected speech for fear of sanction.[36] The vagueness doctrine also applies where administrators of the law, who are unable to discern an objective standard by which to apply the law, create unbridled administrative discretion and uneven application of the law.[37]

Both the overbreadth and the vagueness doctrines were applied recently in *Reno v. ACLU*.[38] The *Reno* Court invalidated a law that criminalized the transmission of indecent information to minors over the Internet.[39] The Court determined that, while the law served a legitimate state purpose by restricting a minor's access to indecent materials, the statutory language was overbroad, reaching many protected speech acts.[40] The Court also found the language of the law to be impermissibly vague because the word "indecent" is not easily defined and potentially chills speech as speakers might fear that a judge would later find that their speech fell within the sanctioned category.[41] While *Reno* shows that the overbreadth and the vagueness doctrines retain their vitality in the criminal context, the decision does not determine whether the doctrines are applicable in a funding context.[42]

In the instant case, the Court chose to leave unexplored possible applications of the overbreadth and the vagueness doctrines in the funding context.[43] Instead, by engaging in creative statutory interpretation, the Court continued its trend of upholding legislative conditions on funded speech, thereby validating the NEA's "decency and respect" criteria.[44] In affirming the validity of the statute, the majority reasoned that the statute may be read as merely advisory,[45] thus requiring only that the NEA

35. *See Finley III*, 118 S. Ct. at 2194 (Souter, J., dissenting) (citing New York v. Ferber, 458 U.S. 747, 771 (1982)) (noting that the Court has defined a law as substantially overbroad when it reaches a substantial number of impermissible applications).

36. *See Finley II*, 100 F.3d at 675 (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)) (holding that the void for vagueness doctrine requires that a person of ordinary intelligence have a reasonable opportunity to know what is being prohibited, and there must be explicit standards for those who are to apply it).

37. *See id.* (citing *Grayned*, 408 U.S. at 108-09).

38. 117 S. Ct. 2329 (1997).

39. *See id.* at 2351.

40. *See id.* at 2348.

41. *See id.* at 2344.

42. *See id.* at 2344-45 (noting the importance of the statute's criminal prohibition in applying the vagueness standard).

43. *See Finley III*, 118 S. Ct. at 2178-80 (deciding that while vagueness in a statute might cause artists to conform their speech in an effort to predict funding decisions, where the government acts as patron, this result is not "constitutionally severe").

44. *Id.* at 2176.

45. *See id.*

Chairperson consider "general standards of decency" and "respect for diverse beliefs and values of the American public" in evaluating grant applications.[46] Additionally, the majority maintained that, because the terms "decency," "respect," and "diverse values of the American public" can be read to include virtually all speech, the requirement to consider these standards does not discriminate against a particular viewpoint.[47] Further, the majority identified several contexts in which the "decency" and "respect" criteria could serve a purpose other than the suppression of a particular viewpoint.[48] Noting the widespread use of vague and subjective criteria in the funding context,[49] the Court maintained that an as-applied challenge[50] was required to establish the statute's abridgement of free speech.[51]

Both the concurrence[52] and the dissent[53] criticized the majority's interpretation of the statute as insensible, reading the statute as plainly requiring discrimination against those viewpoints that further "indecent" perspectives and those perspectives that show disrespect for American values.[54] Justice Scalia argued that viewpoint discrimination is "perfectly constitutional."[55] Conversely, Justice Souter argued in dissent that, while a

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46. *Id.* at 2171.

47. *Id.* at 2176-77.

48. *Id.*

49. *See id.* at 2179-80 (noting that scholarship programs, such as the Congressional Award Program and the National Endowment for the Humanities, use vague terms like "excellence" in their application criteria).

50. The term "as-applied challenge" refers to a cause of action where the petitioner asserts that the challenged statute is being applied in an unconstitutional manner. *Id.* at 2178. A "facial challenge" occurs where the claimant asserts that the statute is incapable of being applied in a manner consistent with the Constitution. *Id.* at 2194 (Souter, J., dissenting) (noting that First Amendment challenges constitute an exception to the stringent requirements for facial constitutional challenges under the overbreadth doctrine).

51. *See id.* at 2178-79.

52. *See id.* at 2180 (Scalia, J., concurring).

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

54. *See id.* at 2183-84 (Scalia, J., concurring), 2186-87 (Souter, J., dissenting).

55. *Id.* at 2180 (Scalia, J., concurring). Justice Scalia argued that an individual's right to free speech is always protected because the individual may refuse government benefits and engage in the restricted activity. *See id.* at 2182-83 (Scalia, J., concurring). This application of First Amendment principles would completely reverse the Court's earlier consensus that Congress may not condition the receipt of a benefit on the waiver of a constitutionally protected right. *See Rust*, 500 U.S. at 196 (quoting *Perry*, 408 U.S. at 597 (holding that while an individual is not entitled to a government benefit, once the government offers a benefit, it cannot condition the benefit on an infringement of a constitutional right)). Furthermore, this argument does not sufficiently recognize the prominence of NEA funding in the art world. *See Finley III*, 118 S. Ct. at 2195 (Souter, J., dissenting) (quoting Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 783 (C.D. Cal. 1991)). For many artists, NEA approval is essential to obtaining the resources needed to sustain their craft. *See id.* (Souter, J., dissenting) (stating that the NEA holds a dominant and influential role in the financial affairs of the U.S. art world, and that NEA approval often lends artists the legitimacy and prestige needed to obtain private funding).

speaker does not have a constitutional entitlement to government funding, where the government chooses to fund an expressive activity, it may not discriminate on the basis of viewpoint.[56]

While the instant case appears to extend congressional authority to restrict funded speech, its potential impact is unclear because the majority relies on weak reasoning and technical distinctions in upholding the statute.[57] For example, although the majority suggests that no burdens will be created by the statutory criteria,[58] the concurrence and dissent agree that not only will the criteria have the practical effect of restricting disfavored speech, but the criteria were enacted for exactly that purpose.[59] In fact, the majority acknowledges that the decency provision was motivated by public outcry over the funding of controversial artists, such as Robert Mapplethorpe and Andres Serrano.[60]

The public outcry and subsequent congressional debate confirm that the plain purpose of the amendment in question was to avoid future funding of similarly controversial art.[61] For this reason, the instant decision represents a virtual abandonment of the Court's general prohibition against viewpoint discrimination.[62] The Court's strained statutory interpretation shows that it will go to great lengths to construct a nondiscriminatory reading of a statute out of deference to the legislature, even when the legislative history clearly shows the purpose of the spending scheme is to favor certain speech activities and restrict others.[63]

Significant also is the Court's refusal to consider whether the provision serves a legitimate state interest or is in keeping with the general purpose of the funding scheme. By refusing to consider how a general decency standard furthers the NEA's avowed purpose to encourage expressive activity and create a climate that fosters creativity, the Court rejected application of even the relaxed rational relation standard set forth in *Regan* and implicitly applied in *Rust*.[64]

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56. *See id.* at 2191 (Souter, J. dissenting).

57. *See id.* at 2168-80.

58. *See id.* at 2177.

59. *See id.* at 2180-81 (Scalia, J., concurring), 2185 (Souter, J., dissenting).

60. *See id.* at 2172.

61. *See id.* at 2172-73.

62. *See, e.g., Rosenberger*, 515 U.S. at 835 (stating that granting the state the power to examine forms of expression and to classify them or deny them resources based on their content creates a danger to liberty).

63. *Compare Finley III*, 118 S. Ct. at 2176-77 (finding that general standards of decency do not discriminate on the basis of viewpoint), *with Reno*, 117 S. Ct. at 2343 (finding that a limitation on transmitting indecent material to minors was a content-based restriction).

64. *See Finley III*, 118 S. Ct. at 2196 (Souter, J., dissenting) (noting the irony of the Court's decision to uphold Congress' right to deny funding to any artistic work capable of giving offense in the context of a program designed to encourage freedom of thought); *see*

Furthermore, the instant decision suggests that the Court will not apply the doctrines of overbreadth and vagueness in the funding context.[65] The majority ignores the premise behind the vagueness doctrine by asserting that the subjective nature of the criteria alleviates the potential for viewpoint discrimination.[66] As the lower court pointed out, the vagueness doctrine was created to protect against subjectivity in the application of funding requirements.[67] In the instant case, the ambiguous nature of the criteria, far from alleviating the danger of viewpoint discrimination, creates an environment where NEA officials are able to exercise unbridled discretion without the possibility of judicial review.[68] Such unfettered discretion will necessarily chill funded speech, as grant recipients will have to guess as to the individual tastes of NEA officials and may refrain from more daring, truly creative work for fear of economic reprisal.[69]

However, as the concurrence points out, the impact of the majority's decision may be limited by its reliance on fine distinctions of statutory construction and its refusal to establish a unilateral congressional right to selectively fund speech.[70] Moreover, while the majority defends Congress' right to fund certain speech acts but not others, it concedes that the First Amendment restricts funding criteria that unduly burden speech.[71] However, due to the majority's weak reasoning in distinguishing between criteria that are merely advisory and criteria that require absolute denial, future claimants and courts will have difficulty establishing instances where freedom of speech is unduly burdened.[72]

For all these reasons, the majority decision eviscerates the Court's longstanding ban on viewpoint discrimination by narrowing the definition of viewpoint discrimination beyond practical application. The instant decision relegates First Amendment protection of funded art to the vagaries of the political process, ignoring the fundamental wisdom that the First Amendment

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also Rust, 500 U.S. at 193-94, 199 (noting that the restricted speech fell outside the scope of the funded program, which was designed to give limited medical services); *Regan*, 461 U.S. at 548-49 (requiring that the restriction be rationally related to the purpose of the statute).

65. *See Finley III*, 118 S. Ct. at 2179-80.

66. *See id.* at 2176 (citing the Respondent's argument that the American public disagrees about the meaning of general standards of decency as proof that realistically the criteria are not likely to compromise First Amendment rights).

67. *See Finley II*, 100 F.3d at 675 (quoting *Grayned*, 408 U.S. at 108) (noting that "a vague law impermissibly delegates basic policy matters to . . . [civil servants charged with executing the laws, thereby creating] the danger[] of arbitrary and discriminatory application").

68. *See id.*

69. *See id.*

70. *See Finley III*, 118 S. Ct. at 2180 (Scalia, J., concurring) (noting that the majority opinion "sustains the constitutionality of [the statute in question] by gutting it").

71. *See id.* at 2178.

72. *See id.* at 2177.

right to free speech is too important to be left at the mercy of political changes. Truly creative work is often initially viewed as distasteful, and indecency can serve a powerful communicative purpose. The instant decision endangers truly creative work by allowing Congress to fund only those artists who pander to political notions of decency and social acceptability.