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Cover Page Footnote
This Note is dedicated to my family for their unwavering support and encouragement.

This article is available in Fordham Law Review: https://ir.lawnet.fordham.edu/flr/vol68/iss3/12
NOTES

IN FINLEY'S WAKE: FORGING A VIABLE FIRST AMENDMENT APPROACH TO THE GOVERNMENT'S SUBSIDIZATION OF THE ARTS

Eric J. Cleary*

INTRODUCTION

[T]he so-called "art" that I have been opposing and continue to oppose and will oppose until we cut off funding for it, is so rotten, so crude, so disgusting, so filthy, that it turns the stomach of any normal person.¹

This statement represents the conservative battle cry in the cultural clash that erupted after a politically charged art scandal pitted political conservatives against progressive artists.² The controversy arose in April 1989, when the Executive Director of the American Family Association discovered that the National Endowment for the Arts ("NEA") had funded an exhibit of Andres Serrano's "Piss Christ," a photograph of a plastic crucifix submerged in a jar of the artist's urine.³ As the controversy grew, the Corcoran gallery in Washington cancelled an exhibition of Robert Mapplethorpe's photography, partly funded by the NEA, which included homoerotic and sadomasochistic images.⁴ This cancellation angered the arts

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community and failed to placate Congress.\(^5\)

In response to incensed constituents, members of Congress initiated a campaign to restrict the NEA's grant-making procedures as a safeguard against future controversial grants.\(^6\) Attendant to its "moral agenda," the religious right clamored for the complete abolition of the NEA.\(^7\) Proponents of the arts, meanwhile, labeled the fundamentalist attack on the NEA "censorship."\(^8\) After a series of unsuccessful legislative proposals and enactments, Congress ultimately altered the grant-making criteria of the NEA to include consideration of "general standards of decency" in awarding funding to potential grant recipients.\(^9\)

In *National Endowment for the Arts v. Finley*, the United States Supreme Court declared this decency standard constitutional.\(^10\) Because *Finley* involved a control on the governmental funding of speech through a selective subsidization process, rather than a sanction against private speech, the Court confronted a murky realm of First Amendment jurisprudence.\(^11\) Private speech, unless it falls into a specific "low-value" category, such as obscenity, is strongly protected by the First Amendment.\(^12\) Subsidized speech, which is speech promoted by the government through the allocation of monies or tax breaks, has often gone unprotected unless the government's funding standards are either viewpoint discriminatory or violate the doctrine of unconstitutional conditions.\(^13\)

Cognizant of the potential indoctrinating effect of subsidized speech, First Amendment scholars...
have argued for greater protection.\textsuperscript{14} The Supreme Court has failed to implement any of the newly proposed methods for the First Amendment analysis of subsidized speech.\textsuperscript{15}

Traditionally, however, the Supreme Court has applied strong First Amendment protection to the subsidized arena of schools.\textsuperscript{16} The Court has explained that protection is necessary to preserve the educational role of schools in a democratic society.\textsuperscript{17} The NEA's role has been analogized to that of schools, in that both are vital to fueling the ongoing public discourse that sustains a democracy.\textsuperscript{18} NEA funds liberate the arts "from strict dependence on the market or privately controlled wealth and thus make an important contribution to furthering the value that underlies the First Amendment: our right and duty to govern ourselves reflectively and deliberately."\textsuperscript{19} This Note argues that despite the Supreme Court's recent decision in \textit{Finley}, the concomitant purposes of schools and the NEA mandate that in order to preserve core First Amendment values, the First Amendment must be applied to the NEA as stringently as it is to schools. This Note concludes by offering a theoretical framework within which to analyze the free speech protection that the NEA's subsidized speech merits.

Part I begins by examining the establishment of the NEA in 1965. By analyzing the language employed by the NEA's founders, this part establishes the broad purpose of the Endowment to foster a "whole range of artistic activity."\textsuperscript{20} Part I then describes the organizational structure of the NEA and concludes by detailing the Mapplethorpe scandal and Congress's decision to alter the NEA's grant-making criteria in response to the controversy. Part II outlines the doctrines underlying First Amendment protection of free speech, focusing on the specific category of governmentally subsidized speech. This part explains how the Court's approach to such speech, employing analyses of viewpoint discrimination and unconstitutional conditions, has been

\begin{thebibliography}{99}
\bibitem{14} See Fiss, \textit{State Activism}, supra note 5, at 2097-98.
\bibitem{17} See \textit{Keyishian}, 385 U.S. at 603 (asserting that the First Amendment will not allow laws that "cast a pall of orthodoxy over the classroom").
\bibitem{19} Owen M. Fiss, \textit{The Irony of Free Speech} 48 (1996) [hereinafter Fiss, \textit{Irony}].
\end{thebibliography}
unclear and inconsistent. Part III analyzes the Finley case itself, both at the district court and the Supreme Court levels. This part points out the failures of the Supreme Court's three contradictory opinions by Justices O'Connor, Scalia, and Souter. Part IV proposes a novel First Amendment approach by arguing that the NEA be classified within a public-discourse category of subsidized speech and recognized as a unique institution necessary to an enlightened democracy. This part likens the function of the NEA to schools, a subsidized arena that the First Amendment stringently protects. This part then explains that the First Amendment should protect the NEA to the same degree that it protects schools to safeguard the NEA's role of engendering thought and enlightening our society, and to prevent the NEA from being fashioned into a tool of indoctrination.

I. HISTORY OF THE NEA

On June 8, 1965, a Report from the Committee on Labor and Public Welfare pronounced the establishment of the National Foundation on the Arts and Humanities ("Foundation") and extolled the creation of the NEA, a subpart of the Foundation. The Senate Report described the principles and goals driving the NEA's creation, and noted that its fundamental precept was that as an economically developed country, the United States should strive to cultivate the arts and humanities. This part describes the ideals underlying the NEA's creation in more detail, and analyzes how these ideals were put to the test by controversial grants that raised serious First Amendment concerns in funding for the arts.

A. NEA Goals and Ideals

Congress established the NEA to provide grants and loans to groups and individual artists. Using expansive language, the Senate Report accompanying the NEA's enabling legislation laid out the broad scope of the NEA's purpose and its vital role in American culture. Several statements in the Senate Report assert that the

22. See S. Rep. No. 89-300, at 2. The Foundation, placed within the Executive Branch, is comprised of the National Endowment for the Arts, the National Endowment for the Humanities ("NEH"), and the Federal Council on the Arts and the Humanities. The Federal Council on the Arts and the Humanities oversees the NEA and the NEH. See id.
23. See id. at 3-4.
24. See id. at 8-9.
25. See 20 U.S.C. § 954(c) (1994). The Chairperson is instructed to "give particular regard to artists and artistic groups that have traditionally been underrepresented." Id.
26. Quoting President Johnson, the Senate Report states that "[t]his Congress will
NEA was established to foster diversity and vigor of thought and expression.\textsuperscript{27} The Foundation, through a "broadly conceived national policy of support for the arts and humanities,"\textsuperscript{28} sought to encourage a "whole range of artistic activity."\textsuperscript{29}

The NEA's imperative to enrich American cultural life as expressed in the Senate Report emerges from a history of endeavors by Presidents and members of Congress to increase national support for the arts.\textsuperscript{30} In describing the background of the Bill, the Senate Report begins by recounting President Washington's recognition of "the arts as central to our national well-being."\textsuperscript{31} In 1891, Congress created the National Conservatory of Music, which brought Anton Dvorak to America.\textsuperscript{32} In 1909, Congress established the National Fine Arts Commission with the purpose of encouraging the arts.\textsuperscript{33} Although efforts to expand the national commitment to the arts repeatedly failed, arts-supporters such as President Eisenhower continued to assert the important role of the arts in American cultural life. He declared that "In the advancement of the various activities which would make our civilization endure and flourish, the Federal Government should do more to give official recognition to the importance of the arts and other cultural activities."\textsuperscript{34}

One year after President Kennedy had declared that "[i]f we are to be among the leaders of the world in every sense of the word, [the artistic] sector of our national life cannot be neglected or treated with indifference,"\textsuperscript{35} Congress created a National Council on the Arts, designed to advance federal support for the arts.\textsuperscript{36} This organization then became the NEA in the 1965 legislative enactment establishing

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\textsuperscript{27} For example, the Senate Report states that "the intent of this act should be the encouragement of free inquiry and expression." \textit{Id.} at 4.

\textsuperscript{28} \textit{Id.} at 2.

\textsuperscript{29} \textit{Id.}

\textsuperscript{30} The Report includes a section on the historical background of governmental support of the arts. \textit{See id.} at 10-13.

\textsuperscript{31} \textit{Id.} at 10.

\textsuperscript{32} \textit{See id.}

\textsuperscript{33} \textit{See id.}

\textsuperscript{34} \textit{Id.} at 11.

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} The Council was created on September 3, 1964. \textit{See id.} at 12.
Concurrent with the Foundation's establishment, President Johnson elaborated on President Kennedy's statement in support of federal funding for the arts. President Johnson stated:

\[ \text{[G]overnment can seek to create conditions under which the arts can flourish; through recognition of achievements, through helping those who seek to enlarge creative understanding, through increasing the access of our people to the works of our artists, and through recognizing the arts as part of the pursuit of American greatness.} \]

The Senate Report repeatedly asserts that as a grant-making vehicle for the arts, the NEA should promote a free forum for uninhibited and innovative expression. From its outset, the NEA was specifically intended not to impose restrictions on the manner of expression or to dictate the form of thought that it would fund. The Senate Report underscores that a primary function of the arts is to confront and to expose the failures of society in an effort to enlighten the citizenry and provoke thought. The imposition of majoritarian mores into grant-making standards can thus serve to deny the legitimacy of unorthodox thought, truncating the NEA's scope and fashioning it into a mechanism of conformity.

The Senate Report's language also reveals that the NEA was not intended to be a vehicle of indoctrination. In its comments on freedom of expression, the standards for judging an applicant's work are specifically set out as "artistic and humanistic excellence." It was noted that although this is a subjective standard, "the committee believes such a standard to be sufficiently identifiable to serve the broad purpose of the act." Underlining the importance of diversity of thought, the Senate Report states that "[t]he committee wishes to

37. See supra note 22 and accompanying text.
39. Id.
40. See id. at 3-4. The Senate Report states:
   \[ \text{It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression.} \]
   One of the artist's and the humanist's great values to society is the mirror of self-examination which they raise so that society can become aware of its shortcomings as well as its strengths.
   \[ \text{Id. at 3; see also Finley v. National Endowment for the Arts, 100 F.3d 671, 682 (9th Cir. 1996) (noting that even a brief look at the NEA's enabling statute reveals Congress's intent to promote diversity of artistic expression), rev'd, 524 U.S. 569 (1998).} \]
42. See id. at 3 (likening the artist to a societal "mirror of self-examination").
43. See Cole, supra note 15, at 680-81 (explaining that a monopolized marketplace of ideas may indoctrinate its audience).
44. See S. Rep. No. 89-300, at 4 (stating that conformity of thought is not Congress's intent).
45. Id.
46. Id.
make clear that conformity for its own sake is not to be encouraged, and that no undue preference should be given to any particular style or school of thought or expression.47

As part of the explanation of why freedom of thought is vital to the arts, the Senate Report draws a comparison between the role of arts and schools in society.48 Quoting President Kennedy, the Report notes that "[j]ust as the Federal Government has not, should not, and will not undertake to control the subject matter taught in local schools, so its efforts should be confined to broad encouragement of the arts."49 The use of the word "broad"50 coupled with the expansiveness of this statement indicates intent to urge the government not to limit the manner and content of artistic expression. Congress thus recognized that curbing the project of enlightenment undertaken by the arts and schools negatively impacts the intellectual vitality of American culture.51

B. Structure of the NEA

As one of the three parts of the National Foundation on the Arts and Humanities,52 the NEA administers a program of contracts, grants-in-aid, and loans to individuals and organizations for projects and productions.53 In 1992, for example, the NEA distributed a total of $123 million in grants.54 NEA proponents view these funds as seed money that encourages private donations.55 When the NEA was founded in 1965, annual private contributions to the arts totaled approximately $250 million, but by 1990, this figure had increased to $6 billion.56 As a result of continued controversy over its scope and purpose, the NEA’s budget was drastically reduced from $162 million in 1995 to $99 million in 1996.57

47. Id.
48. See id. at 11-12.
49. Id.
50. See id.
51. This correlation is explained infra Part IV.
52. The NEH promotes the humanities by, among other things, encouraging a national policy of scholarship, fostering international exchanges, supporting scholarly research, fostering understanding and appreciation of the humanities, and promoting the publication of scholarly works. See 20 U.S.C. § 956(e) (1994).
53. See id. § 954(e).
55. See Best, supra note 54, at 77.
The NEA consists of twenty members of the National Council on the Arts, all under the leadership of the Chairperson of the NEA.\textsuperscript{58} The Chairperson and the members of the Council are appointed by the President "by and with the advice and consent of the Senate."\textsuperscript{59} Although eligible for reappointment, the Chairperson's term in office is four years.\textsuperscript{60} The National Council on the Arts, which is a subpart of the NEA,\textsuperscript{61} is comprised of the Chairperson of the NEA, who is also the Chairperson of the National Council on the Arts,\textsuperscript{62} five members of Congress who serve in an ex-officio, non-voting capacity,\textsuperscript{63} and fourteen private citizens of the United States.\textsuperscript{64} In selecting members of the Council, the President shall seek out those "recognized for their broad knowledge of, or expertise in, or for their profound interest in the arts [and those who] have established records of distinguished service, or achieved eminence, in the arts."\textsuperscript{65} The term of office for the members appointed by the President is six years.\textsuperscript{66}

The Council's purpose is to advise and recommend to the Chairperson those applications for funding that demonstrate "artistic excellence and artistic merit."\textsuperscript{67} Although the Chairperson has final approval of applications for funding, the application must first receive the Council's recommendation for approval and its designation of a fiscal amount of aid for each project.\textsuperscript{68} In order to receive funding, artists fill out applications for financial assistance that describe the proposed project and the timetable for its completion, and assure that they will comply with certain conditions for receipt of financial assistance.\textsuperscript{69}

As of 1990, in giving final approval to an application, the Chairperson "shall ensure that... 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

\begin{itemize}
\item See \textit{id.} § 954(b)(1)(B) (Supp. III 1997).
\item See \textit{id.} § 954(b)(2) (1994).
\item See \textit{id.} § 955(b)(1)(C) (Supp. III 1997).
\item See \textit{id.} § 955(b)(1)(A) (Supp. III 1997).
\item See \textit{id.} § 955(a) (1994).
\item See \textit{id.} § 955(b)(1)(C)(i) (Supp. III 1997).
\item See \textit{id.} § 955(c) (Supp. III 1997). The term of office for the Chairperson, however, is four years. See \textit{id.} § 954(b)(2) (Supp. III 1997).
\item See \textit{id.} § 955(f)(1)(B) (1997).
\item See \textit{id.} § 955(f)(1) (Supp. III 1997).
\item See \textit{id.} § 955(f) (Supp. III 1997).
\item See \textit{id.} § 954(i) (Supp. III 1997).
\end{itemize}
beliefs and values of the American public.” This “decency provision” was inserted as a result of the NEA’s funding of two highly controversial artists. These funding choices caused a nationwide scandal and raised public concern over the use of federal funds for the arts. The next section explores this controversy.

C. Grants That Sparked a Controversy

1. The Mapplethorpe Imbroglio

Trouble began for the NEA in 1989 when it subsidized a traveling exhibition that included Andres Serrano’s photograph “Piss Christ.” The photograph depicts a plastic crucifix submerged in a jar of the artist’s urine. Serrano, along with nine other artists, had been selected from 500 applicants to receive grants of $15,000 made by the Southeastern Center for Contemporary Art (“SECCA”) in Winston-Salem, North Carolina, in order to appear in a show titled “Awards in the Visual Arts.” SECCA itself received $75,000 from the NEA for its annual visual arts competition.

The NEA’s role in funding the public display of “Piss Christ” was brought to Congress’s attention by the American Family Association, based in Tupelo, Mississippi. The Association encouraged readers of its newsletter to protest the funding to their representatives in Congress. In response to a flood of letters, Congress was soon debating the future of the NEA. Leading the effort to impose accountability on the NEA, Senators Jesse Helms and Alphonse D’Amato vociferously denounced Serrano’s work, expressing horror that the NEA had subsidized a “so-called piece of art [that] is a deplorable, despicable display of vulgarity.”

Advancing his crusade against the NEA, Senator Helms wrote that “these examples of so-

70. Id. § 954(d) (Supp. III 1997) (emphasis added).
71. See infra Part I.C.1. Perhaps the “decency clause” has set a political precedent to be emulated by local conservative politicians. Rudolph Giuliani, Mayor of New York City, has recently threatened to cut funding to the Brooklyn Museum for showing an exhibit entitled “Sensation” that includes works the Mayor perceives as sacrilegious. See Peter Schjeldahl, Those Nasty Brits, The New Yorker, Oct. 11, 1999, at 104; Michael Tomasky, Law & Ordure, New York, Oct. 11, 1999, at 26.
72. See Donald W. Hawthorne, Subversive Subsidization: How NEA Art Funding Abridges Private Speech, 40 U. Kan. L. Rev. 437, 438-41 (1992) (arguing that the decency clause is unconstitutional because NEA funding is widespread and thus limits private expression through the denial of funding).
73. See Vance, supra note 4, at 39.
74. See id.
75. See Herbert, supra note 54, at 415.
76. See Vance, supra note 4, at 39.
77. See Garvey, supra note 3, at 190-91.
78. See id. at 191.
79. See id.
called 'works of art' are offensive to the majority of Americans who are decent, moral people... Such gratuitous insults to the religious and moral sensibilities of fellow citizens contribute to the erosion of civil comity and democratic tolerance...

Meanwhile, another NEA grant of $30,000 was awarded to the Institute for Contemporary Art at the University of Pennsylvania, which used the funds to organize a retrospective exhibition of Robert Mapplethorpe's photographs. In July 1989, the exhibit was scheduled to appear at the Corcoran Gallery of Art in Washington, D.C. A gay New York photographer, Mapplethorpe had met with much success before his death from AIDS in 1989 at the age of forty-two. The exhibition included 175 photographs featuring a variety of images, including photographs of celebrities, portraits of Mapplethorpe himself, and pictures of flowers, children (including one of a young naked girl with her dress raised), and gay sex. In the face of a burgeoning controversy over NEA funding, the Corcoran Gallery cancelled the show, which was entitled "Robert Mapplethorpe: The Perfect Moment." When news of the cancellation became public, a full-fledged cultural war erupted.

Many taxpayers urged their state and local politicians to abolish the NEA, or to prevent the agency from funding offensive art. The debate polarized between NEA supporters who believed that restrictions on speech were a patent form of censorship, and NEA critics who argued that their tax dollars should not be used to fund offensive artwork. As one commentator noted, the attack on the NEA circumvented the obstacle of censorship through a "rhetorical disavowal of censorship per se and the cultivation of an artfully crafted distinction between absolute censorship and the denial of public funding."

2. Eradicating “Filth”: A Senator Takes the Helm

Congress reacted to the public clamor by endeavoring to reduce the NEA's budget and to amend the NEA's enabling statute. In 1989, an amendment was enacted that altered the appropriations bill for fiscal

82. See Garvey, supra note 3, at 190.
83. See id.
84. See Fiss, State Activism, supra note 5, at 2089.
85. See id.
86. See Kresse, supra note 4, at 234.
87. See Vance, supra note 4, at 39.
88. "This is an outrage, and our people's tax dollars should not support this trash, and we should not be giving it the dignity." 135 Cong. Rec. 9788 (1989) (statement of Sen. D'Amato).
89. See Vance, supra note 4, at 41.
90. Id.
Although Dana Rohrabacher’s proposal of a 100% budget cut was defeated, Charles Stenholm’s proposal to reduce the NEA budget by exactly $45,000 passed. This amendment symbolically disavowed the funding of the Mapplethorpe and Serrano exhibits by decreasing the NEA’s budget by the precise amount expended for their access to the public.

Senator Jesse Helms vociferously insisted that the funding, and ergo the prominence, of the NEA in our cultural scheme be drastically reduced. He led the movement in Congress to impose content restrictions upon the grant-making criteria of the NEA. Arguing that “the majority of American citizens surely did not approve of Mapplethorpe’s homoerotic photographs or of Serrano’s picture of a crucifix submerged in a bottle of his urine and, accordingly, that the citizens of this country did not have to support such ‘art,’” Senator Helms introduced another amendment two weeks after the initial budget cut.

Aiming to weed out homoerotic and anti-Christian art, the Amendment stated:

None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate, or produce—

(1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or

(2) material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion; or

(3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.

Passed quickly on a voice vote, this Amendment was then forwarded to an Independent Committee created to study the NEA’s grant-making criteria.

Many critics of the NEA asserted that the Endowment should be abolished in its entirety. An article in Policy Review claimed that

92. See id. at 14,432-38, 14,441.
93. This Amendment passed on a vote of 361 to 65. See id. at 14,440-49; see also Kresse, supra note 4, at 235 n.19.
94. See Garvey, supra note 3, at 192; Vance, supra note 4, at 41.
95. See Vance, supra note 4, at 41.
96. See Kresse, supra note 4, at 235-36.
99. Id.
100. See Garvey, supra note 3, at 193-94.
101. A few proponents of the arts have also argued that the NEA should be
the government should not patronize artists, for this can only be done by monarchs, and "republican values in America forbade such royal favors as a matter of principle." Although the claim is valid that art can develop within a society based purely on the contributions and tastes of private patrons and the forces of the market, it does not reflect the national cultural agenda embodied in the NEA. The premise of the Policy Review article is based partly on the difficulty of defining contemporary art and recognizing what constitutes great artistic achievement: "The brouhaha at the NEA obscures, by the very outlandishness of the works rewarded, that even in the most trustworthy and mature hands, ascertaining the value of contemporary art is fiendishly difficult." The difficulty of the NEA's task aside, the notion that contemporary art cannot be effectively judged for merit, is baseless. Inbred into this type of claim is an innate conservatism toward judging the quality of art. This conservatism clings to the values of art's "modern period" and is inimical to what the NEA does: distribute funds in part to the avant-garde to encourage creative expression.

Ultimately, Senator Helms's amendment was severely edited, leaving only a prohibition against obscenity, modeled after the test set forth in Miller v. California and a specific disallowance against "sadomasochism, homo-eroticism, the sexual exploitation of children, or [depictions of] sex acts." To effectively carry out this directive, the NEA required all prospective recipients of awards to certify, in advance, that they would not use their award money to promote works that fall into one of the proscribed categories. Congress's

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"abolished for the good of artistic excellence in America, especially post-modern, homoerotic, and other types of avant-garde art." Priya Sara Cherian, Promoting the Arts by Dissolving the National Endowment for the Arts, Comment, 4 U. Chi. L. Sch. Roundtable 129, 129 (1997) (arguing that perpetuation of the NEA may force art to remain in the modern period, in which the excellence of art can be judged more objectively than in the postmodern era).


103. Id. at 34.

104. See Cherian, supra note 101, at 133-34.


106. 135 Cong. Rec. 22,835 (1989). The edited amendment stated:

None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homo-eroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.

Id.

107. See Walker, supra note 7, at 937.
delineation of various categories of unsuitable expression soon came under attack.108

Asserting that the certification requirement would have a chilling effect on artistic expression, a California district court declared the requirement unconstitutional in *Bella Lewitzky Dance Foundation v. Frohnmayer*.109 The court held that the statutory requirement that an artist agree not to engage in certain forms of expression violated the First Amendment.110 Plaintiffs in this case were the Bella Lewitzky Dance Foundation and the Newport Harbor Art Museum.111 Both groups had received grants from the NEA in the past and were notified that they would again be receiving funds.112 When the plaintiffs objected to the certification of compliance with the statutory standards, the NEA informed them that their grants would be reversed without the required certification.113 Repeating an expansive theme of our First Amendment doctrine,114 the court found that the broad scope of the statute had a chilling effect on prospective grant recipients that would cause them to avoid creating works that might be deemed obscene by the NEA.115 Yet even before the obstacle created by *Frohnmayer*, Congress was again steeped in debate over NEA funding during the 1990 reauthorization.116

3. A Bipartisan "Solution"

In 1990, the Congressional debate resumed in the NEA reauthorization proceedings, only one year after it had erupted for the first time during the Endowment’s fiscal appropriation bill.117 The dispute in Congress now focused not only on the symbolic nature of Mapplethorpe and Serrano’s photographs, but more expansively on the purpose of the NEA and the role that it plays constitutionally and ideologically within our culture. Senator Helms advanced the most conservative anti-NEA sentiment. Describing the Seranno and Maplethorpe works that ignited the controversy, he insisted that his use of the term artist be put in quotations, because “in my judgment

110. See id.
111. See id. at 775.
112. See id. at 776-78.
113. See id. at 777.
115. See Bella Lewitzky, 754 F. Supp. at 783.
116. The NEA must be reauthorized every three to five years, and its 1985 reauthorization happened to expire in 1990. See Garvey, *supra* note 3, at 203.
117. See id.
they are anything but artists.” Senator Helms assessed the merit of the disputed artwork as “so rotten, so crude, so disgusting, so filthy, that it turns the stomach of any normal person.” He viewed Mapplethorpe and Seranno as attendant to a collective endeavor “by a group of people who are in a lifelong battle to destroy the Judeo-Christian foundations of this Republic,” which must, according to Senator Helms, be stopped. While in Senator Helms’s view the American public may “resent the use of their taxes to subsidize and promote filth,” his attempts to fund only “clean” art run afoul of the First Amendment, which declares that “Congress shall make no law . . . abridging the freedom of speech.”

In the Congressional debates, Senator Moynihan represented the opposing viewpoint and chastised his peers:

What is the matter with us? Are we afraid of painting, sculpture, book reviews? Or do we think the American people are so different than they were in the time of John F. Kennedy that they no longer support the arts and the humanities? Does art intimidate us? Do books frighten us? Does opinion seem inappropriate to us?

Senator Moynihan, who was present at the founding of the NEA, related that at that time some members of Congress had reservations about the NEA because they foresaw that there would be “conflicts over values” somewhere down the road. Their pessimistic prediction had finally been proven correct. Senator Moynihan added a global perspective to the 1990 debate: “All over the world governments are getting out of thought control, and by some perverse process, the U.S. Senate is beginning to cite that there is a correct form of Republican art and a correct form of Democratic literary criticism. I think it is nuts.” The sentiments of Senators Moynihan and Helms seemed to find a middle ground, which was legislated in the 1990 reauthorization.

Largely reliant upon an Independent Committee that was established during the 1989 allocation debate to evaluate the NEA’s

119. Id.
120. Id. at 23,465. Senator Helms also expressed alarm:
[A]bout the assault on America’s basic values by self-proclaimed, self-appointed, perverted artists who insist upon assaulting the moral sensibilities of the American people by using the taxpayers’ money to promote and subsidize rotten, disgusting material designed to promote homosexuality—with the aim of having it accepted as just another lifestyle. Well, it is not just another lifestyle.

121. Id. at 23,464.
122. Id.
123. U.S. Const. amend. I.
125. Id. at 23,459 (quoting Senator Patrick Moynihan, Address at the Juilliard School Commencement (May 17, 1991)).
126. Id. at 23,458.
grant-making criteria, the House adopted the Williams-Coleman substitute for the reauthorization bill. Allowing the NEA to survive while imposing some accountability on the Endowment, the Williams-Coleman substitute was hailed as a triumph of the bipartisan process at work as it marked a compromise between conservative and liberal agendas. However, it included the notorious "decency clause" that was eventually challenged and ultimately upheld by the Supreme Court in National Endowment for the Arts v. Finley. Although the enactment of the "decency clause" and Finley's constitutional seal of approval may have quieted the NEA debate temporarily, an entirely new controversy ensued over the government's latitude in dictating the terms and content of subsidized speech. To properly understand the impact of Finley's holding, Part II presents a background on First Amendment principles and describes the doctrines underlying the protection of subsidized speech.

II. THE DISORDERLY DOCTRINES OF SUBSIDIZED SPEECH

The Constitution broadly proclaims that "Congress shall make no law ... abridging the freedom of speech, or of the press." This expansive protection principle has been narrowed judicially, and now excludes various "low-value" categories of expression. Traditional First Amendment doctrine thus protects an individual's speech unless it falls into one of several "low-value" categories, including advocacy of illegal action, fighting words, obscenity, and defamation. In

126. See National Endowment for the Arts v. Finley, 524 U.S. 569, 575 (1998); supra note 70 and accompanying text.
128. See id. at 29,243.
130. U.S. Const. amend I.
131. See, e.g., New York v. Ferber, 458 U.S. 747, 764-66 (1982) (establishing child pornography as a category of speech outside First Amendment protection); Miller v. California, 413 U.S. 15, 24 (1973) (creating a three-part test to define obscenity that can be constitutionally prohibited); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973) (asserting that a state may prohibit the display of pornographic material if the prohibition is based on a morally neutral concern about public safety in the neighborhood); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that a state may only prohibit speech when the speaker advocates illegal action, intends to effectuate such action, and there exists a likelihood that the action will be incited); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (finding illegal statements that are likely to cause a violent reaction from the average addressee).
132. See Brandenburg, 395 U.S. at 444. In Brandenburg, the Supreme Court set forth a test by which the advocacy of illegal action should be judged in light of the First Amendment's expansive speech-protection principle. See id. at 447-48. The test states:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. at 447.
determining whether to create, narrow, or expand one of these unprotected speech arenas, the Supreme Court has generally weighed the value of the speech against its potential for harm. In the context of subsidized speech, the Court has articulated First Amendment protection much less clearly. This part will analyze subsidized speech and the doctrines employed by the Supreme Court in applying its protections, including viewpoint discrimination and unconstitutional conditions.

First Amendment doctrine within the realm of government-subsidized speech has evolved less forthrightly than approaches to non-funded private speech. Speech is subsidized when it is supported by government funds, as in the case of direct government employment, federal aid to hospitals, or national subsidization of schools. In the realm of private speech, the government acts primarily as a regulator, determining what boundaries it will impose upon an individual’s right to speak. But subsidized speech places

133. See Chaplinsky, 315 U.S. at 572. In Chaplinsky, the Supreme Court upheld a conviction under a state statute that prohibited face-to-face words likely to cause a fight. See id. at 573. The fighting words doctrine was later limited by Cohen v. California, 403 U.S. 15 (1971), in which the Supreme Court overturned a conviction under a disturbing-the-peace statute of a man who wore a jacket declaring “Fuck the Draft.” See id. at 16-17. Determining that the State has no right to sanitize public discourse, the Court asserted that the populace must endure some offensive language intermingled with protected First Amendment speech. See id. at 24-25.

134. See Miller, 413 U.S. at 16. In Miller, the Supreme Court determined when local legislators may proscribe sexual expression by creating an obscenity standard:
(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. See id. at 16-18. The advertising brochures primarily consisted of explicit drawings and pictures of sexual acts, with “genitals often prominently displayed.” Id. at 18. Noting the difficulty of defining obscenity, the Court attempted to forge a workable definition that would adequately protect the First Amendment interest in freedom of speech. See id. at 19-20. The Court hailed this definition as a successful measure to distinguish “hard core” pornography from constitutionally protected speech. See id. at 29.


136. See, e.g., Chaplinsky, 315 U.S. at 572 (implementing a balancing test that weighs the benefit of the speech against the interest in order and morality).


138. See Kreimer, supra note 137, at 1295-96.

139. See Fiss, Irony, supra note 19, at 80.
the government in the role of allocator.\textsuperscript{140} In that role, the
government does not criminalize a particular message, but rather
chooses which speech it will pay for and which speech will be denied
funding.\textsuperscript{141} As one commentator notes, jurisprudential confusion
thrives in the category of subsidized speech because "the Supreme
Court has acknowledged that the First Amendment applies to the
affirmative as well as the negative modes of exercising state power,
but it has encountered great difficulty in specifying exactly how it
applies."\textsuperscript{142}

Government-funded speech presents a myriad of categorizational
problems that have not been consistently delineated by the Supreme
Court.\textsuperscript{143} When the state is inhibiting the speech of an individual, such
as silencing a soapbox orator, it is regulating the individual speaker's
autonomy.\textsuperscript{144} The First Amendment tradition has largely developed
into a framework to prevent the state from inhibiting unpopular
speech.\textsuperscript{145} As a result, jurisprudence has fashioned the First
Amendment into a tool of classical liberalism.\textsuperscript{146} The ideas embedded
in the liberalist theory\textsuperscript{147} of the First Amendment prohibit the direct
regulation of minority voices and unorthodox views.\textsuperscript{148} First
Amendment theory, however, fails to provide adequate safeguards for
unpopular ideas voiced through government-funded speech when the

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\textsuperscript{140} Because the government's allocative role has increased with "its inheritance of
educational and welfare functions from the church and family, opportunities abound
for governmental intrusion through allocation of benefits." Kreimer, supra note 137,
at 1296.

\textsuperscript{141} See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819,
837 (1995) (invalidating a university guideline that proscribed the subsidization of
student groups that engaged in religious activities); Rust v. Sullivan, 500 U.S. 173, 203
(1991) (upholding a regulation that denied Title X funds to medical clinics that
discussed or promoted abortion).

\textsuperscript{142} Fiss, \textit{State Activism}, supra note 5, at 2088.

\textsuperscript{143} See Post, \textit{Speech}, supra note 13, at 152 (positing that the Supreme Court has
relied on the doctrines of unconstitutional conditions and viewpoint discrimination
rather than addressing issues of the social characterization of subsidized speech).

\textsuperscript{144} See, e.g., Cohen v. California, 403 U.S. 15, 26 (1971) (asserting that the First
Amendment protects both the manner and the content of an individual's speech). In
\textit{Cohen}, the Court determined that the defendant's right to speak could be curbed only
in the presence of "an intent to incite disobedience to or disruption of the draft." \textit{Id.}
at 18.

\textsuperscript{145} In \textit{Cohen}, the Court declared that "verbal tumult, discord, and even offensive
utterance" are the "necessary side effects of the broader enduring values which the
process of open debate permits us to achieve." \textit{Id.} at 24-25.

\textsuperscript{146} See Fiss, \textit{Irony}, supra note 19, at 28; Owen M. Fiss, \textit{Free Speech and Social
Structure}, 71 Iowa L. Rev. 1405, 1413 (1986) (stating that since "[c]lassical liberalism
presupposes a sharp dichotomy between state and citizen," it espouses freedom
through limited government).

\textsuperscript{147} One definition of liberalism is "an attitude or philosophy favoring individual
freedom for self-development and self-expression." Webster's Third New

\textsuperscript{148} See New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (asserting that the
First Amendment is committed to preserving the marketplace of ideas).
state is acting as allocator. The next two sections will explain the
doctrines of viewpoint discrimination and unconstitutional conditions
as applied to subsidized speech. Although these doctrines are
employed unpredictably by the Supreme Court, they comprise the two
primary analytical vehicles invoked to analyze the permissibility of the
regulation of subsidized speech.

A. Viewpoint Discrimination

The Supreme Court has stated that legislation may not be “aimed
at the suppression of dangerous ideas.” Eliminating dangerous ideas from public debate constitutes impermissible viewpoint
discrimination and stultifies the national discourse. Government
action that prohibits speech based on its viewpoint threatens to
undermine fundamental First Amendment values such as freedom of
thought, intellectual growth, a robust interchange of ideas, and the
ability to self-govern. Because of this threat against core First
Amendment values, viewpoint discrimination will be allowed “upon
only ‘the most exacting [judicial] scrutiny.’”

The doctrine of viewpoint discrimination is invoked to protect both
private speech and subsidized speech. First Amendment jurisprudence categorizes viewpoint discrimination, as well as subject

149. See Cole, supra note 15, at 680-81 (stating that the neutrality mandate for
direct prohibitions on speech ought to be incorporated into analyses of subsidized speech).
Randall, 357 U.S. 513, 519 (1958), quoting American Communications Ass'n v.
Douds, 339 U.S. 382, 402 (1950)); see, e.g., Lamb's Chapel v. Center Moriches Union
Free Sch. Dist., 508 U.S. 384, 393-97 (1993) (finding that a school's refusal to allow
religious organizations access to its facilities to engage in expression constitutes
impermissible viewpoint discrimination); West Virginia State Bd. of Educ. v.
Barnette, 319 U.S. 624, 641-42 (1943) (asserting that a school's compulsory flag salute
stamps out dissent and unconstitutionally prescribes orthodoxy), rev'g Minersville
151. See Laura V. Farthing, Note, Arkansas Writers' Project v. Ragland: The
Limits of Content Discrimination Analysis, 78 Geo. L.J. 1949, 1953 (1990) (asserting
that the threefold threatened interests of the First Amendment are “the preservation
of free debate in order to promote self-government; the safeguarding of the individual
and the communal search for truth; and the guarantee of the individual's right to free
expression”).
152. See Marjorie Heins, Viewpoint Discrimination, 24 Hastings Const. L.Q. 99, 100
(1996) (asserting that viewpoint discrimination unconstitutionally skews the public
debate).
153. Edward J. Eberle, Hate Speech, Offensive Speech, and Public Discourse in
312, 321 (1988)).
ordinance selectively proscribing the display of signs on residential property to be
impermissibly underinclusive); Speiser v. Randall, 357 U.S. 513, 519 (1958) (asserting
that California's oath requirement as a condition for obtaining a tax exemption
discriminates against dangerous ideas).
matter discrimination, as specific forms of content discrimination.\(^\text{155}\) The Court implements a functional test to determine whether a regulation is content-based.\(^\text{156}\) If regulators consider the content of the speech, such as political picketing as opposed to all picketing, in determining whether the expression falls into the proscribed category, then the legislation is content-based.\(^\text{157}\) In *Police Department of Chicago v. Mosley*,\(^\text{158}\) Justice Marshall broadly proclaimed the censorial dangers of content control.\(^\text{159}\) Stating that a "restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" the Court invalidated a city ordinance that prohibited all picketing other than peaceful labor picketing within 150 feet of a school.\(^\text{160}\)

In *R.A.V. v. City of St. Paul*,\(^\text{161}\) the Supreme Court explained that content discrimination consists of either subject matter discrimination or viewpoint discrimination.\(^\text{162}\) Subject matter discrimination prohibits discussion of an entire subject area.\(^\text{163}\) Although both forms of content discrimination are presumptively invalid and tested under a strict scrutiny standard, viewpoint discrimination is more pernicious and subject to heightened judicial scrutiny.\(^\text{164}\) While subject matter discrimination is tested under a traditional strict scrutiny analysis, which requires that the government regulation must be a "precisely drawn means of serving a compelling state interest,"\(^\text{165}\) viewpoint discrimination is subjected to an additional least-restrictive-alternatives analysis.\(^\text{166}\) Under this analysis, if there is an alternative content-neutral means of achieving the state's interest, then the regulation is determined to be unconstitutionally viewpoint based.\(^\text{167}\)

\(^{155}\) See Eberle, supra note 153, at 1171.

\(^{156}\) See Farthing, supra note 151, at 1960.

\(^{157}\) See id.

\(^{158}\) 408 U.S. 92 (1972).

\(^{159}\) See id. at 96.

\(^{160}\) See id. at 96, 102.


\(^{162}\) See id. at 391; see also Eberle, supra note 153, at 1171.

\(^{163}\) See Farthing, supra note 151, at 1964.

\(^{164}\) See id. at 1960-61 (stating that by intending to disadvantage or promote a specific opinion, viewpoint discrimination is the most dangerous type of content-based regulation); Robert L. Waring, *Wide Awake or Half-Asleep? Revelations from Jurisprudential Tailings Found in Rosenberger v. University of Virginia*, 17 N. Ill. U. L. Rev. 223, 232-33 (1997) (noting that viewpoint discrimination is a highly pernicious form of content discrimination).

\(^{165}\) Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980) (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978)). The strict scrutiny test has also been described as requiring that a regulation be "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

\(^{166}\) See Eberle, supra note 153, at 1171.

\(^{167}\) See R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992) (invalidating a hate-speech ordinance because a statute that did not single out disfavored topics could
Viewpoint neutrality must be maintained in the context of government subsidies because of "the dangers inherent in permitting the state to suppress critical and dissenting ideas through manipulation of its myriad benefit programs." One exception to this rule is when the government itself is speaking and has not created a realm for individual speech. Under these circumstances, "there is no pretense that a forum has been created for diverse ideas, or indeed for any speech by citizens." This exception does not apply when the government funds individual speech that lies within the public discourse, in which case prohibitions against content and viewpoint discrimination attach.

B. Unconstitutional Conditions

The unconstitutional conditions doctrine is the second doctrine the Supreme Court uses to analyze restrictions on subsidized speech. The doctrine reasons that there are certain conditions that the government may not place on the receipt of funds because imposing such conditions would violate a cherished right and thus render the condition unconstitutional. Cherished rights include fundamental freedoms such as the right to criticize the government. One explanation offered for the unconstitutional conditions doctrine states that "some constitutional rights are inalienable, and therefore may not be surrendered even through voluntary exchange." An early decision of the Tennessee Supreme Court in Townsend v. Townsend praised the special status of constitutional rights. The court declared that "Constitutional rights are vested, unexchangeable, and unalienable. They belong to posterity as well as to the present

serve the state's interest).

168. Heins, supra note 152, at 104.
169. See id. at 150.
170. Id.
171. See Post, Speech, supra note 13, at 155.
172. One scholar has explained:

The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.


175. See League of Women Voters, 468 U.S. at 402.
176. Sullivan, supra note 172, at 1476-77.
177. 7 Tenn. (Peck) 1 (1821); see also Kreimer, supra note 137, at 1302.
178. See Townsend, 7 Tenn. (Peck) at 10; see also Kreimer, supra note 137, at 1302.
generation. We may use and enjoy, but not transfer them; and every such condition is utterly void."

In contrast, an early analysis of the First Amendment protections afforded to subsidized speech found that a speaker relinquished his freedom of speech when he entered into the government's employ. In McAuliffe v. Mayor of New Bedford, Justice Holmes maintained that a police officer's constitutional right to voice his opinions is waived as part of his employment. Without entering into an analysis of the First Amendment, Holmes declared that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Holmes's tenet, however, has been undermined by the subsequent development of First Amendment doctrine and the Supreme Court's adoption of an intermediate position through the assertion of the unconstitutional conditions doctrine.

An earlier approach to the unconstitutional conditions analysis was the greater-includes-the-lesser theory, which was articulated and ultimately rejected in cases involving commercial speech. In Posadas de Puerto Rico Associates v. Tourism Co., the Supreme Court utilized the greater-includes-the-lesser argument to uphold a restriction on casino advertising. Employing a four-part test, the Court held that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."

179. Townsend, 7 Tenn. (Peck) at 10; see also Kreimer, supra note 137, at 1302.
180. See McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517-18 (Mass. 1892) (holding that by entering into employment with the government, a police officer suspends his First Amendment rights).
181. 29 N.E. 517 (Mass. 1892).
182. See id. at 517-18.
183. Id. at 517.
185. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996) (holding that the power to prohibit the sale of liquor does not include the power to ban accurate and nonmisleading alcohol advertisements); Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 345-46 (1986) (holding that because the government may prohibit gambling, it may also restrict gambling advertisement).
187. See id. at 348.
188. The four-part test for the prohibition of commercial speech emerged from Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980). The test states:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.
A speech restriction similar to that allowed in *Posadas* was deemed unconstitutional in *44 Liquormart, Inc. v. Rhode Island*. This case involved a Rhode Island prohibition against advertisements containing the retail prices of alcohol. The Court overturned *Posadas*’s greater-includes-the-less argument, stating that “a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes.”

Although the greater-includes-the-less doctrine, which stemmed from Justice Holmes’s premise in *McAuliffe*, has been defeated by the *44 Liquormart* opinion, “the ghost of Justice Holmes’s greater and lesser argument continues to brood over much constitutional analysis” in Justice Rehnquist’s penalty/subsidy distinction. In *Regan v. Taxation with Representation*, the Court determined that because the Constitution does not require the government to subsidize speech, it can do so selectively. *Taxation with Representation* involved the denial of nonprofit tax status to groups engaged in lobbying activities. In determining that the denial of nonprofit status was not a penalty, Justice Rehnquist’s opinion “assumed a baseline of no subsidy for lobbying activities (in which case there is tautologically no penalty), rather than subsidy for all nonprofit activities (in which case the exclusion of the lobbying strand of those activities resembles a penalty).”

The penalty/nonsubsidy distinction is arbitrary because “the characterization of a condition as a ‘penalty’ or as a ‘nonsubsidy’ depends on the baseline from which one measures.” An example of this occurs in *Taxation with Representation*, in which the Court began with a baseline assumption of nonsubsidy for tax exemption to

191. See id. at 489.
192. See id. at 513.
193. Id. at 510.
194. See id.
195. See Kreimer, *supra* note 137, at 1308.
197. See id. at 546.
198. See id. at 542 & n.1.
200. Id. at 1436.

Excessive focus on whether unconstitutional conditions are coercive, and thus “penalize” rights, has obscured the field. “Coercion” in this context is a conclusory label masquerading as analysis. Constitutional reasoning here lags behind the recognition, in both philosophy and private law, that coercion in the absence of physical compulsion or force is not an empirical concept but a normative one that necessarily refers to values lying beyond the value of autonomy itself.

Id. at 1505-06; see also Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan*, 45 Am. U. L. Rev. 353, 383 (1995) (arguing that the absence of uniformity in distinguishing between a penalty and nonsubsidy had yielded unpredictable case-by-case determinations).
political lobbying groups such that they could not receive the tax benefit without curbing their speech to eliminate lobbying. Other charitable organizations, however, enjoy the baseline assumption of a subsidy through tax exempt status, so that restrictions on their speech would be classified as a penalty. The logic underpinning this distinction is that the government's funds merely facilitate additional speech, and do not prohibit anyone from paying to project their own speech.

In *Rust v. Sullivan*, Justice Rehnquist again espoused a distinction between permissible nonsubsidies and impermissible penalties as part of the unconstitutional conditions analysis, and this distinction continues to this day. The penalty/nonsubsidy analysis echoes the greater-includes-the-lesser argument that the Court has since rejected in *44 Liquormart*. In *Rust*, the Court upheld a regulation that prohibited facilities that received Title X funds from discussing the possibility of abortion with their clients, primarily indigent women. The doctors in this case were even forbidden from referring their clients to independent clinics that could counsel patients on the prospects of abortion. The Court determined that the Constitution did not prevent the government from selectively erasing the content of subsidized speech, even if such content related to a matter of constitutional rights. Justice Rehnquist asserted that money granted to Title X clinics was much like a gift from the government.

Starting with a baseline understanding of no right to financial assistance, the Court upheld a condition that reduced discussion on the issue of a constitutionally protected right, namely a

201. See *Sullivan*, supra note 172, at 1441.
202. See *Rust v. Sullivan*, 500 U.S. 173, 182-83 (1991). The penalty/nonsubsidy distinction has yielded confused results and "seems no more helpful than its other attempts to use coercion as the ordering principle of unconstitutional conditions doctrine." Sullivan, supra note 172, at 1442. Although the unconstitutional conditions doctrine has attempted to identify conditions that limit human autonomy as coercive, "[c]oercion is a judgment, not a state of being." Id. at 1450.
204. "Justice Rehnquist is the legatee of the doctrine used by Justices Holmes and Brandeis in their efforts to immunize social legislation from judicial review, while Justice Brennan wields an analysis forged by Justices Sutherland and Day in their attempts to contain the growth of government regulation of corporate interests." Kreimer, supra note 137, at 1299 (footnote omitted).
207. See *Rust*, 500 U.S. at 203. Title X funds are federal funds distributed to medical facilities on the condition that they do not provide abortion services. See 42 U.S.C. §§ 300a, 300a-6 (1994).
208. See *Rust*, 500 U.S. at 180.
209. See id. at 192-93.
210. See id.
woman's right to have an abortion. The Court's inconsistent conclusions in the penalty/nonsubsidy analysis have led scholars to question the effectiveness of the unconstitutional conditions doctrine as a protection of subsidized speech. Additionally, the Court's use of viewpoint discrimination has been unpredictably selective and lacking in clarity. This lack of a sound analytical foundation forces the Court to analyze subsidized speech by haphazardly applying disjointed bits of doctrine and theory to important First Amendment issues.

The shortcomings of the Supreme Court's approach to analyzing subsidized speech is nowhere more evident than in National Endowment for the Arts v. Finley. Due to the lack of a viable doctrine with which to analyze the case, Justice O'Connor's majority opinion avoided a genuine First Amendment analysis and declared the "decency clause" constitutional while ignoring its intent to block grants to indecent art. Part III will discuss the disparate and contradictory Finley opinions.

III. FINLEY: CHOCOLATE-SMEARED FIRST AMENDMENT

After a presentation of the facts underlying Finley v. National Endowment for the Arts, this part explains the reasoning and outcome of the California district court's opinion that struck down the NEA's "decency clause" as an unconstitutional abridgement of free speech. It then analyzes the three separate United States Supreme Court opinions that ultimately reversed that holding: Justice O'Connor's majority opinion; Justice Scalia's concurrence; and Justice Sorter's dissent.

A. Facts of the Case

The four plaintiffs in Finley were performance artists who had applied for NEA grants before the enactment of 20 U.S.C. § 954(d)(1), the "decency clause." Karen Finley, a feminist ideologue, was notorious for a performance in which she smeared her naked body in chocolate to symbolize the oppression of women. The other

211. See id.
212. See Cole, supra note 15, at 680 (asserting that the unconstitutional conditions doctrine is an incomplete and misleading method with which to review subsidized speech).
213. See Heins, supra note 152, at 101-03 (maintaining that jurisprudential application of viewpoint discrimination has been confused and ill-defined).
216. Karen Finley, John Fleck, Holly Hughes, and Tim Miller ("NEA Four"). See id. at 1457.
217. See Finley, 524 U.S. at 577-79; supra note 70 and accompanying text.
plaintiffs' performances addressed religion, homosexuality, lesbianism, AIDS, and alcoholism. Although the Performance Artists Program Peer Review Panel, an advisory panel to the NEA, had recommended approval of their grants, the National Council on the Arts recommended disapproval of these controversial projects and the "NEA Four" were ultimately denied funding. The artists brought suit in 1990, initially alleging that the NEA had violated their First Amendment rights by rejecting their applications on political grounds. After the "decency clause" was enacted, the National Association of Artists' Organizations joined as a plaintiff and the complaint was amended to challenge the decency clause as void for vagueness and a facial violation of the First Amendment.

B. The District Court's Opinion: The "Decency Clause" Declared Unconstitutional

On the district court level, the NEA "decency clause" was invalidated as inconsistent with the First Amendment. The Ninth Circuit Court of Appeals affirmed and the Supreme Court reversed. After noting that by creating the NEA in 1965 Congress aspired to encourage freedom of artistic expression, the district court decreed that decency criteria conflicted with the proper functioning of the NEA by sweeping "within its ambit speech and artistic expression which is protected by the First Amendment." In determining that the NEA's subsidized speech was protected, Judge Tashima relied upon a correlation between academic freedom and artistic expression and the ways in which both play important roles in cultivating public


219. See Brian R. Collignon, Comment, Taking into Consideration the "Decency Clause," 38 Washburn L.J. 929, 931 (1999). The NEA denied funding even after Frohnmayer, Chairperson of the NEA, had returned three of the applications to the advisory panel for reconsideration and the panel had again recommended approval. See Finley, 524 U.S. at 577.

220. See Finley, 524 U.S. at 577. Plaintiffs also claimed that the NEA, by releasing information from their applications to the press, had violated the Privacy Act of 1974. See id.


224. See Finley, 524 U.S. at 590.

225. See Finley, 795 F. Supp. at 1473.

226. Id. at 1476.
In reaching its determination, the court weighed the probable effects of the NEA’s “decency clause” against the intent of the NEA’s enabling legislation. Relying upon statements made in the Congressional debates to amend the NEA’s enabling statute, the court indicated that the reason for the change in the grant-making criteria was clearly to prevent future works similar to “Piss Christ” from receiving funding. Referring to the “decency clause’s” language, the court writes that “[i]n addition to this plain language, the plethora of comments in the Congressional Record indicates that the ‘decency’ provision was intended to act as a bar to funding controversial projects or artists.”

In investigating the statutory framework, the court considered Congress’s original intent in establishing the NEA in 1965. The court asserted that Congress had intended to encourage the free expression of ideas and “to insure that ‘conformity for its own sake is not to be encouraged’ and that ‘no undue preference should be given to any particular style or school of thought or expression.” The “decency clause” thus directly conflicted with Congress’s original intent in forming the NEA.

After determining that the speech funded by NEA distributions is protected by the First Amendment because of its communicative impact, the court analyzed the denial of funding for controversial works under the unconstitutional conditions doctrine. Under an unconstitutional conditions analysis, a penalty is created when the law forces an individual to abandon a constitutionally protected right in order to receive a benefit from the government. The court relied

227. See id. at 1474 (citing a statement made by the American Association of University Professors, the American Council on Education, the Association of Governing Boards of Universities and Colleges, and the Wolf Trap Foundation). Part IV of this Note will develop this argument and place it within a viable framework of First Amendment analysis.
228. See id. at 1461, 1472-75.
229. See id. at 1461-62.
230. The statute states that “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.” 20 U.S.C. § 954(d)(1) (1994).
231. Finley, 795 F. Supp. at 1470 n.16 (citing 136 Cong. Rec. 28,620-80 (1990)).
232. See id. at 1460.
233. Id. at 1460 (quoting Establishing a National Foundation on the Arts and Humanities, S. Rep. No. 89-300, at 4 (1965)).
234. See id. at 1463. Judge Tashima explained that “it is well-established that ‘even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.’” Id. at 1463 (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)).
235. See supra notes 199-212 and accompanying text.
upon the conflicting holdings in *Rust v. Sullivan*\(^{236}\) and *Perry v. Sindermann*\(^{237}\) in finding that the "decency clause" operated as a penalty. In *Rust*, the Supreme Court held that the government could constitutionally withhold Title X funds from medical clinics that performed or even discussed abortion with their patients.\(^{238}\) The Court in *Perry*, however, held that a public university's conditioning of employment on refraining from criticizing the school's regents would constitute an unconstitutional condition.\(^{239}\) The district court's opinion in *Finley* does not explicitly describe why the "decency clause" falls into the category of "penalties," thus making it categorically similar to *Perry* and not *Rust*. The court did note:

Defendants correctly argue that denial of a benefit imposes an unconstitutional condition only when the benefit is conditioned on the recipient's surrender of (or is imposed as a penalty for) constitutionally protected activity *distinct* from that to be funded by the subsidy.... However, defendants' contention that the present case does not fall within this proscription is simply wrong.\(^{240}\)

The ambiguity inherent in determining whether a condition will be determined unconstitutional weakened the decision, as Judge Tashima was unable to articulate a rationale for finding a penalty.

### C. The Supreme Court Reverses

1. The Majority Opinion: Justice O'Connor

In his concurring opinion in *Finley*, Justice Scalia commented on Justice O'Connor's decision by remarking that "[t]he operation was a success, but the patient died."\(^{241}\) Justice O'Connor determined that the history of the legislative enactment of section 954(d)(1) enabled it to be treated as an innocuous attempt to modify procedure, not "as a tool for invidious viewpoint discrimination."\(^{242}\) The Court thus seems implicitly to have accepted the constitutionality of section 954(d)(1) simply because it was heavily debated and laboriously crafted in Congress.\(^{243}\)


\(^{237}\) 408 U.S. 593 (1972).

\(^{238}\) *See Rust*, 500 U.S. at 203; *supra* notes 203-11 and accompanying text.

\(^{239}\) *See Perry*, 408 U.S. at 597-98.


\(^{241}\) *Id.* at 582. Justice O'Connor's opinion was joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Breyer, and Ginsburg.

\(^{242}\) *Id.* at 582. Justice O'Connor's opinion was joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Breyer, and Ginsburg.

\(^{243}\) *See id.* at 581-83; *see also* Lackland H. Bloom, Jr., NEA v. Finley: A Decision
While drafting the statute, Congress enlisted the help of an Independent Commission of constitutional law scholars.²⁴⁴ The Commission had urged Congress away from prohibiting specific types of speech, as this could clearly be found to constitute impermissible viewpoint discrimination.²⁴⁵ In her opinion, O'Connor quoted from the Congressional debates:

As the sponsors of § 954(d)(1) noted in urging rejection of the Rohrabacher Amendment: "[i]f we start down that road of prohibiting categories of expression, categories which are indeed constitutionally protected speech, where do we end? Where one Member's aversions end, others with different sensibilities and with different values begin."²⁴⁶

The Commission recommended that Congress enact procedural changes that would increase the role of advisory panels and underscore the promotion of a diversity of values and beliefs.²⁴⁷

Justice O'Connor's majority opinion deferred to the NEA's argument that the decency requirement was merely hortatory.²⁴⁸ Generally, an agency may create its own interpretation of statutory language only when the real intent of the legislature is unclear.²⁴⁹ Here, Justice O'Connor warned that the Court was not trying to determine whether the NEA had accurately interpreted the meaning of the "decency clause."²⁵⁰ She did, however, assert that "the text of § 954(d)(1) imposes no categorical requirement."²⁵¹ Addressing the statute's vagueness, Justice O'Connor held that the court of appeals

²⁴⁴ See Finley, 524 U.S. at 575.
²⁴⁵ See id.
²⁴⁶ Id. at 582 (quoting 136 Cong. Rec. 28,624 (1990) (statement of Rep. Coleman)).
²⁴⁷ See id. at 575.
²⁴⁸ See id. at 580-83 (stating that the decency clause imposes no categorical requirement). The NEA suggested that 20 U.S.C. § 954(d)(1) was hortatory and that the decency clause was satisfied "merely by ensuring the representation of various backgrounds and points of view on the advisory panels that analyze grant applications." Id. at 581. The court of appeals rejected this argument as contrary to established statutory construction. See Finley v. National Endowment for the Arts, 100 F.3d 671, 676 (9th Cir. 1996), rev'd, 524 U.S. 569 (1998). As one commentator notes, "The problem with the Court's treatment of the statute is not that the Court read the decency and respect language as merely hortatory in nature, but rather that it simply avoided committing to any interpretation of the statute whatsoever." Bloom, supra note 243, at 8.
²⁴⁹ See Railway Labor Executives' Ass'n v. ICC, 958 F.2d 252, 256 (9th Cir. 1992). On the appellate level, the court in Finley dismissed the NEA's Chevron doctrine argument in which the NEA urged deference to its construction of section 954(d)(1). See Finley, 100 F.3d at 677 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-45 (1984)).
²⁵⁰ See Finley, 524 U.S. at 581.
²⁵¹ Id.; see also Bloom, supra note 243, at 7 (noting that the majority's opinion is extremely vague in determining what the language of section 954(d)(1) means).
was incorrect to invalidate the statute as vague.\textsuperscript{252} Although she conceded that the language was opaque, she asserted that this was no reason to invalidate a statute geared toward the distribution of government subsidies.\textsuperscript{253} Justice O’Connor dismissed the argument that a vague statute might over-deter speech\textsuperscript{254} by declaring that “when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.”\textsuperscript{255} Justice O’Connor’s assertion ignores well-established First Amendment concerns such as indoctrination, skewing the marketplace, and monopolization.\textsuperscript{256}

Justice O’Connor underscored the inherently imprecise and subjective nature of standards used in selective subsidy statutes.\textsuperscript{257} Invariably such statutes contain allocative standards such as merit and excellence. The majority relied on this fact in order to qualify the “decency clause” as an allocative standard similar to clauses about artistic merit: “Section 954(d)(1) merely adds some imprecise considerations to an already subjective selection process.”\textsuperscript{258} The majority consequently avoided the germane First Amendment issues through a highly imaginative reading of the “decency clause.” Although this may have paid obeisance to the bipartisan process, it did nothing to illuminate First Amendment doctrine with respect to subsidized speech.

\textsuperscript{252} See Finley, 524 U.S. at 588. Justice O’Connor determined that although the statute is clear enough for allocational purposes, its wording could raise significant vagueness issues for a criminal statute or regulatory scheme. See id. A vague or overly broad statute curbing speech can be struck down to prevent a potential “chilling effect.”

\textsuperscript{253} See id. at 588-89. The Court concluded that “[i]n the context of selective subsidies, it is not always feasible for Congress to legislate with clarity.” Id. at 589. The possibility that the government may skew the marketplace of ideas through subsidized speech prompted one scholar to query: “the precise question would be whether the NEA should be allowed powers denied the policeman or, to use my initial formulation, whether the allocative state should be held to the same First Amendment standards as the regulatory one.” Fiss, Irony, supra note 19, at 33.

\textsuperscript{254} See Finley, 524 U.S. at 589. Questioning Justice O’Connor’s assertion that a vague statute will not deter speech, one scholar wrote that the “notion of vagueness as an antidote to viewpoint discrimination would seem to stand the concept of vagueness on its head.” Bloom, supra note 243, at 9. Finley herself has stated that she will no longer apply for NEA grants, which indicates that the public will have reduced access to her speech. See C. Carr, Acting Out: Feminist Performances 156 (Lynda Hart & Peggy Phelan eds., 1993).


\textsuperscript{256} These traditional concerns address the issue that the government’s message may be too powerful, drowning out other voices and monopolizing public discourse.

\textsuperscript{257} See Finley, 524 U.S. at 589.

\textsuperscript{258} Id. at 590.
2. Concurring Opinion: Justice Scalia

Concurring in the result and joined by Justice Thomas, Justice Scalia invoked the plain meaning approach to statutory interpretation.\(^{259}\) He reasoned that the statute's language was not a suggestion or an option, but that it mandated that the NEA consider decency.\(^{260}\) Justice Scalia asserted, however, that the decency clause constituted constitutionally permissible viewpoint discrimination, the most strictly guarded-against First Amendment infraction.\(^{261}\) To defend this premise, Justice Scalia explained that the entire process of judging artistic excellence comprised viewpoint discrimination and that the NEA represented "institutionalized discrimination."\(^{262}\) The inadequacy of the Supreme Court's approach to subsidized speech is underscored by Justice Scalia's partly correct assertion.

Justice Scalia added that when a government agency distributes funds, it can dictate whatever terms of viewpoint discrimination it desires.\(^{263}\) This assertion flatly contradicts the substance of the First Amendment and the principles of freedom of thought.\(^{264}\) After concluding that the statute was constitutional, Justice Scalia alleged that Justice O'Connor skirted the salient First Amendment issue of viewpoint discrimination out of deference to the political forces that created the bipartisan compromise.\(^{265}\) He noted that "[t]he 'political context surrounding the adoption of the 'decency and respect' clause,' which the Court discusses at some length does not change its meaning or affect its constitutionality."\(^{266}\)

It is certainly true that the First Amendment does not call for a lessened standard of scrutiny when the statute being analyzed was created through arduous political compromise. A sound legal analysis must concur that "it is wholly irrelevant that the statute was a 'bipartisan proposal introduced as a counterweight' to an alternative proposal that would directly restrict funding on the basis of viewpoint."\(^{267}\) Unlike Justice O'Connor, Justice Scalia read the

\(^{259}\) "I think that § 954(d)(1) must be evaluated as written, rather than as distorted by the agency it was meant to control." Id. (Scalia, J., concurring).

\(^{260}\) See id.

\(^{261}\) See id. at 593. Commenting on Mapplethorpe and Serrano, Justice Scalia argues that "it is perfectly clear that the statute was meant to disfavor—that is, to discriminate against—such productions." Id. at 594.

\(^{262}\) See id. at 599.

\(^{263}\) See id. at 598-99. Justice Scalia reasons that because the government has no obligation to fund at all, selective funding is mere surplussage and cannot impose a penalty. Thus, the government can freely dictate the terms of its largesse. See id.

\(^{264}\) Justice Scalia's argument mirrors the "greater-includes-the-lesser" principle, which the Supreme Court had previously rejected. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513 (1996); see supra text accompanying note 190.

\(^{265}\) See Finley, 524 U.S. at 594 (Scalia, J., concurring).

\(^{266}\) Id. (citation omitted).

\(^{267}\) Id.
"decency clause" to be mandatory and determined that viewpoint discrimination is constitutional, so that when the government is allocating funds it can do whatever it chooses. Under this view, there would be no First Amendment protections to subsidized speech whatsoever. This reasoning has never been accepted by the Court.

3. Dissenting Opinion: Justice Souter

Reaching the opposite conclusion from Justice Scalia, yet utilizing a similar First Amendment analysis, Justice Souter dissented in _Finley_.

He determined that the statute was viewpoint discriminatory and was therefore unconstitutional. While Justice Souter arrived at the soundest conclusion regarding the statute, he failed to fully explain how to defend his stance. He did, however, invoke some vital principles of First Amendment jurisprudence, most notably that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 

Justice Souter asserted that the majority made several crucial mistakes: "The Court's conclusions that the [decency] proviso is not viewpoint based, that it is not a regulation, and that the NEA may permissibly engage in viewpoint-based discrimination, are all patently mistaken." Asserting the societal significance attributed to the arts, he warned that the "decency clause" was designed to chill speech. This warning is strengthened by the Congressional Record that clearly reveals the legislative purpose to "make sure that exhibits like [Mapplethorpe and Serrano] are not funded again." In light of the legislative intent and the "decency clause's" possible effect of silencing avant-garde art, Justice Souter asserted that it must be declared unconstitutional.

The disagreement reflected in the Supreme Court's three opinions in _Finley_ as to the proper interpretation of the "decency clause" and its relationship to First Amendment jurisprudence underscores the need for analytical reform. First Amendment analysis must be refashioned to protect the NEA from the vicissitudes of public mores and rabid political conservatism. The NEA was created to

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268. See id. at 600-23 (Souter, J., dissenting).
269. See id. at 600-01.
270. See id. at 600-23.
271. Id. at 601 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).
272. Id.
273. See id. at 603.
275. See id. at 602-03.
276. It has been noted that "[t]he fundamentalist attack on images and the art world must be recognized not as an improbable and silly outburst of Yahoo-ism, but as a systematic part of a right-wing political program to restore traditional social arrangements and reduce diversity." Vance, _supra_ note 4, at 43.
encourage the arts and to facilitate their innovation and advancement. Its enabling legislation asserted the important role that the arts should play in educating and enlightening all Americans. The “decency clause” undermines this ambition of enlightenment and thereby frustrates the purpose of the NEA. Part IV outlines a more viable doctrine in which to ground analysis of the First Amendment protections afforded to subsidized speech, and urges protection for the NEA by analogizing its function in society to that of schools.

IV. THE PROPHYLACTIC FIRST AMENDMENT: A NOVEL APPROACH TO THE NEA

In deciding Finley, the Supreme Court appears to have stepped through the looking glass. Its muddled and polarized opinions underscore the need to clarify the relationship between the First Amendment and subsidized speech. Drawing on traditional First Amendment principles and recent trends in scholarship, this part proposes an alternative mode of First Amendment analysis for subsidized speech. This analysis considers the importance of public debate in a democratic state, the educational institutions upon which the health of this debate rests, and the goal of the debate to protect well-informed political deliberation and individual self-expression. Analogizing the NEA's role in society to that of schools, this part argues that the Supreme Court must apply the same First Amendment protections to the NEA that it applies to schools.

A. The First Amendment and Government-Subsidized Speech

As the confusion surrounding the unconstitutional conditions doctrine makes clear, the Supreme Court has failed to adequately explain exactly what types of subsidized speech should be protected. In Rust v. Sullivan, the Court emasculated the unconstitutional conditions doctrine in order to allow the government to restrict the speech of Title X clinics, while at the same time conceding that there are subsidized realms in which such disallowance of speech would be problematic. The majority opinion in Rust contradicted itself by

277. See supra Part I.A.
278. See supra Part I.A.
280. See Cole, supra note 15, at 676-77 (asserting that the Supreme Court's current stance on the unconstitutional conditions doctrine is inadequate for subsidized speech).
281. See Rust v. Sullivan, 500 U.S. 173, 200 (1991) (asserting that the vagueness and overbreadth doctrines prevent the government from controlling speech in universities); see also Cole, supra note 15, at 682 (noting that the Supreme Court fails
claiming both that the unconstitutional conditions doctrine is the only safeguard against governmental tampering with subsidized speech and by then asserting that there exist unique areas in which otherwise constitutional government intervention would nevertheless be unconstitutional. This inconsistency reveals that the Court is sensitive to honored democratic traditions such as academic freedom, but has failed to reconcile the role of the First Amendment in safeguarding the freedom of vital cultural institutions.

In addition to the unconstitutional conditions analysis, the Supreme Court has also invoked the doctrine of viewpoint discrimination to approach First Amendment protections for subsidized speech. For example, the Court's *Finley* opinions said nothing about the unconstitutional conditions doctrine, but instead relied on viewpoint discrimination, "a principle that is becoming increasingly dominant in government enterprise cases." Concerns about viewpoint are intertwined with the First Amendment's goal of protecting robust public debate. Such debate would be markedly impeded if the government were to "aim[] at the suppression of dangerous ideas." Lively public discourse "provides an indispensable means by which all of us speak to or about one another, however civilly, rudely, or passionately, before deciding what to do, what values to adopt, and what ends are worth pursuing."

Considering the importance of public debate in light of the theoretical foundation of First Amendment doctrine reveals normative concerns that argue in favor of protection for the NEA. First Amendment jurisprudence developed around two distinct ideas: classical liberalism and the republican approach. A viable approach to the First Amendment protections of subsidized speech must fuse

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282. See Rust, 500 U.S. at 193-94 (intimating that the only protection to subsidized speech is the unconstitutional conditions doctrine); see also Cole, supra note 15, at 686 (interpreting Rust to suggest that the unconstitutional conditions doctrine is the only First Amendment protection of subsidized speech).

283. See Rust, 500 U.S. at 199-200.

284. See Post, Speech, supra note 13, at 152 (declaring that the Supreme Court has primarily relied upon the doctrines of unconstitutional conditions and viewpoint discrimination when addressing subsidized speech).


286. See New York Times v. Sullivan, 376 U.S. 254, 270 (1964); see also Eberle, supra note 153, at 1178-79 (stating that two of the goals of a robust dialogue are to create a capable citizenry and a more perfect polity).


289. See Cole, supra note 15, at 708-09 (explaining that Justice Holmes's liberal approach to the First Amendment is at odds with Justice Brandeis's republican conception of the First Amendment).
these two approaches. Classical liberalism was implicit in the views of Oliver Wendell Holmes, the father of First Amendment theory. In *Abrams v. United States*, Justice Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market... we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death." Adopting a laissez-faire approach, classical liberalism perceived the First Amendment as a vehicle to protect the private speaker and to preserve the individual's autonomy. A failure of this principle, however, is that by ignoring the potentially deleterious effects of subsidized speech, it fails to invoke principles for guarding against indoctrination, skewing of the marketplace, and chilling effect on subsidized speech.

The republican ideal aims at the facilitation of public debate and recognizes this process as vital to the project of democratic self-governance. This tradition's foundation lies in Justice Brandeis's concurrence in *Whitney v. California*. Asserting the importance of free speech, Justice Brandeis claimed that public discussion is vital to exposing falsehood and fallacies, and that as a democratic nation "the remedy to be applied is more speech, not enforced silence." Adequate protection of the NEA is dependent upon implementation of both classical liberalism and republican ideals. Classical liberalism protects the individuality of the artist's expression, both in terms of its content and its form. Republican principles protect the functioning of the NEA itself, guarding it against legislation that would curb the public discourse and expose the citizenry to the taint of indoctrination.

Together, these doctrines view the First Amendment as aimed at facilitating and protecting the robust marketplace of ideas, which is instrumental in cultivating enlightenment of the citizenry. In order for free discussion to flourish, unpopular opinions may not be

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290. See id. at 708.
291. See id.
292. 250 U.S. 616 (1919).
293. Id. at 630 (Holmes, J., dissenting).
295. See id.
296. See id. at 709.
298. Id. at 377. Recalling the founders of American government, Justice Brandeis stated:
[T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.
Id. at 375.
silenced, either by criminal prohibition or by being drowned out. Because the government is such a pervasive and vocal speaker, its message carries with it the danger of drowning out unpopular speech. In the context of the NEA, this danger presents itself through the funding of "decent" art, but not "indecent" art. One way of analyzing the protections that should be afforded to government-subsidized speech is to divide such speech into the realms of "public discourse" and "managerial domains.

Recognizing that public discourse is a place for the "forging of an independent public opinion to which democratic legitimacy demands that the state [refrain from] censorship," the Supreme Court has employed the unconstitutional conditions analysis to prevent the government from silencing subsidized speech such as funded editorials and broadcasts that fall squarely within the public discourse. One scholar warns that a restriction on freedom in the public discourse "contradicts the central premise of our democratic enterprise." Not all subsidized speech, however, is part of the public discourse, and sometimes it can be categorized as the state's own speech. This latter type of speech falls within the "managerial domain," where the government may legitimately impose restrictions to achieve specified goals. One example of speech in a managerial domain is a government public health campaign designed to encourage people not to smoke. In such a scenario, the government need not facilitate both sides of the debate.

When the government subsidizes speech, the granting of funds for a particular purpose may "convert a citizen into a public functionary and thereby alter the nature of the relevant First Amendment rights and analysis." The significance of this point is that the government may control its own message in a way that it cannot control the messages of individuals involved in the public discourse, regardless of whether these speakers are being subsidized by the government. The categorization of a function within our culture into the managerial

300. See Hawthorne, supra note 72, at 438; see also Susan M. Gilles, Images of the First Amendment and the Reality of Powerful Speakers, 24 Cap. U. L. Rev. 293, 303 (1995) (arguing that the government is the dominant speaker in the country).
301. See Bollinger, supra note 15, at 1111 (noting that the government can distort the marketplace of ideas by overwhelming speech that it dislikes).
302. See Post, Speech, supra note 13, at 164.
303. Id. at 153; see also FCC v. League of Women Voters, 468 U.S. 364, 381-82 (1984) (placing editorials within the public discourse because they have traditionally informed the public and criticized the government).
305. See Post, Speech, supra note 13, at 158; see also Rust v. Sullivan, 500 U.S. 173, 192-93 (1991) (asserting that the government may constitutionally voice an opinion by funding speech that "it believes to be in the public interest").
306. See Post, Speech, supra note 13, at 164.
307. Id. at 156.
domain must be carefully made, for once within, the government has
great latitude to determine the messages that will be tolerated. If the
NEA were so categorized, then its avowed purpose would be for the
government to fashion its own collective concept of our national
culture. Most Americans would rightly fear this sort of indoctrinating
force even more than a crucifix submerged in urine.

The division of subsidized speech into two domains is merely a
starting point. The Supreme Court has not adopted this doctrinal
approach, but it has acknowledged the existence of special arenas
within the public discourse that merit aggressive protection, even
though they are subsidized by the government. In forging a doctrinal
approach, the classification of speech into public discourse and
managerial domains must be followed by the identification of specific
institutions that play vital roles in a democratic

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Although

First Amendment doctrine has resisted the identification of
institutions, “it is increasingly clear that the refusal to draw doctrinal
distinctions among culturally distinct institutions is simply unworkable
in the context of the vast and increasing domain of free speech claims
about government land, government funds, and government
employees.”309 Institutions such as schools, public broadcasting, the
media, and the NEA indispensably contribute to the vitality of public
debate and should be protected from improper government
regulation.310 These institutions engender thought and preserve the
“constitutional balance between the governed and the governing” by
exposing the citizenry to new ideas and images that force them to
evaluate the status quo.311 They are an indispensable component of
public discourse, and governmental attempts to censor these
institutions threaten the health of a democracy.

B. Schools and the First Amendment

The Supreme Court has asserted that the First Amendment
protections afforded to private speakers are not suspended when
students and teachers enter the grounds of a public school.312 The
next two sections describe the various constitutional protections
afforded within the school framework and argue that the NEA and

308. A variant of this approach focuses on spheres of neutrality by “examining the
substance and the public purpose of a funded institution or individual in light of
the potential for government funding, with its attendant restrictions, to further or
reduce the recipient’s unfettered ability to contribute to public debate in the
marketplace of ideas.” Leff, supra note 200, at 389.
309. Schauer, supra note 285, at 86.
310. See id. at 118 (arguing that a cultural rather than legal understanding will
better serve the constitutional goal of affecting the behavior of officials).
that art plays an essential role in a representative democracy because it is subversive).
312. See Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506
schools serve the public in similar ways. Both institutions expose the populace to ideas and encourage its members to think and to engage in discussion. Based on this similarity of function, the First Amendment should protect the integrity of the NEA’s mission of enlightenment as it does that of schools.

The First Amendment protects the educational mission’s endeavor to cultivate individualism. The Supreme Court has contrasted this effort with Sparta’s deliberate repression of the individual aimed at forging “ideal citizens.” Pericles’s Funeral Oration muses on the disparity between the societies of Athens and Sparta. He states that “There is a difference, too, in our educational systems. The Spartans, from their earliest boyhood, are submitted to the most laborious training . . . .” Such training may have produced valiant citizens, but Athenian democracy produced thinking citizens. Noting that Athens submits political issues to public debate, Pericles describes Athens as “an education to Greece . . . each single one of our citizens, in all the manifold aspects of life, is able to show himself the rightful lord and owner of his own person . . . .”

Like Pericles’s description of Athenian democracy, the American educational system encourages a variety of viewpoints on a myriad of issues to create citizens fully capable of governing themselves. In Tinker v. Des Moines Independent Community School District, Justice Fortas set forth the principle that while the freedom to voice one’s opinion may cause a disturbance, “our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”

1. Student Speech

In Tinker, a group of public school students donned black armbands

313. Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (“Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest . . . .”).
315. Id. at 146.
316. Id. at 147.
317. Justice Stewart, concurring in the result in Tinker, writes that “[t]he classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’” Tinker 393 U.S. at 512 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).
319. Id. at 508-09.
to voice their objections to the conflict in Vietnam.\footnote{20} Three students were suspended from school for refusing to remove their armbands.\footnote{21} Although schools are a government-subsidized speech arena, the Supreme Court declared the prohibition against wearing black armbands in protest against the conflict in Vietnam unconstitutional.\footnote{22}

The Court reasoned that the students' non-verbal protest constituted speech and was therefore comprehensively protected by the First Amendment.\footnote{23} In order for school officials to justifiably restrict student speech, they would have to show that the expression would ""‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’""\footnote{24} Because the wearing of black armbands did not disrupt the educational agenda of the school, its officials could not proscribe the expression.\footnote{25} The school would thus have been able to curb speech in the classroom only if that speech had interfered with the ability of teachers to conduct class.\footnote{26} This standard indicates that schools do not merely serve the function of academic instruction, but are also fora in which students are free to express their views and to discuss social and political issues.

2. Removal of Books

In addition to protecting students' right to voice opinions in school, the First Amendment provides safeguards against the removal of books from a school's library.\footnote{27} In Board of Education v. Pico,\footnote{28} the Supreme Court extolled the virtues of academic freedom of inquiry and asserted that a "“school library is the principal locus of such freedom.”"\footnote{29} In Pico, the school removed nine books and made one available subject to parental approval.\footnote{30} The Court determined that the removal of books with the intention of suppressing ideas violated the First Amendment rights of the students.\footnote{31}

The outcome of Pico reveals a concern not for the speaker, but rather for the audience.\footnote{32} Pico indicates that students in the school

\footnote{20. See id. at 504.}
\footnote{21. See id.}
\footnote{22. See id. at 514. The Court's opinion stated "'[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" Id. at 506.}
\footnote{23. See id. at 505-06.}
\footnote{24. Id. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).}
\footnote{25. See id. at 508-09.}
\footnote{26. See id. at 509.}
\footnote{27. See Board of Educ. v. Pico, 457 U.S. 853, 869-72 (1982).}
\footnote{28. 457 U.S. 853 (1982).}
\footnote{29. Id. at 868-69.}
\footnote{30. See id. at 856-57.}
\footnote{31. See id. at 871-72.}
\footnote{32. Professor Cole states that "'[w]hen the government funds speech, however, first amendment concerns are not limited to potential coercion of the subsidized}
system have a constitutional right to receive information, not merely to express their views. The unique role of the school system in our society and the essential function of libraries within that system demand protection to carry out the objectives of the First Amendment. Thus, beyond the plain meaning of the First Amendment lie particular objectives that its words must actively endeavor to meet.

3. Student Organizations

The Fourth Circuit Court of Appeals has held that a state university may not deny funding to a school newspaper solely because the administration disapproved of the views expressed therein. In *Joyner v. Whiting*, a traditionally African American newspaper was denied funding at a school with a primarily black student body after the paper denounced the increased enrollment of white students at North Carolina Central University. The Fourth Circuit insisted that "[a] college, acting 'as the instrumentality of the State, may not restrict speech ... simply because it finds the views expressed by any group to be abhorrent." This statement reveals the Fourth Circuit's belief that within an educational framework the state may not fund selected viewpoints while excluding disfavored ones.

In 1995, the Supreme Court issued an important decision on the funding of university publications. *Rosenberger v. Rector and Visitors of the University of Virginia* involved the denial of funds to a school newspaper because it "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." The

speaker, but extend also, and perhaps more importantly, to the listener." Cole, *supra* note 15, at 680.

334. Advocating the fairness doctrine, the Supreme Court has declared that the function of the First Amendment is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).
335. "Once we get away from the bare words of the [First] Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*., 412 U.S. 94, 102 (1973) (quoting Chafee, Government and Mass Communications 640-41 (1947)).
337. 477 F.2d 456 (4th Cir. 1973).
339. *Id.* at 460 (quoting *Healy v. James*, 408 U.S. 169, 180, 187 (1972)).
340. Citing the unconstitutional conditions doctrine, the Fourth Circuit stated that "[t]his rule is but a simple extension of the precept that freedom of expression may not be infringed by denying a privilege." *Id.*
343. *Id.* at 823.
plaintiff’s magazine was created to encourage an awareness for and sensitivity to Christian viewpoints. The publication prescribed a “two-fold mission: ‘to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.” The Appropriations Committee of the Student Council denied Wide Awake Productions’ (“WAP”) request that their publisher be reimbursed $5862.

The Student Activities Fund guidelines prohibited the disbursement of funds to political activities, philanthropic contributions and activities, religious activities, social entertainment, and activities that would jeopardize the tax-exempt status of the university. A religious activity was expressly defined as promoting a belief or expressing one’s views about a deity, and thus funding was denied to WAP’s request. After appealing unsuccessfully within the structure of the Student Activities Committee, WAP filed suit, alleging, among other things, that the university’s denial of funding violated its rights of free speech and the press.

Although the university had not prohibited WAP from publishing through the use of its own funds, the Court held that the university’s denial of funding indeed violated WAP’s rights to free speech. It noted that “[o]nce it has opened a limited forum... [t]he state may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum.” In a publicly-funded university setting, when the state chooses to fund speech, it must allocate funds to all speech that is reasonably consistent with the purpose of the forum. Even when a school allocates the state’s resources, it may be capable of infringing upon free speech rights because “the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.” In analyzing the forum created through the university’s establishment of the SAF, the Court found that a speech forum had been created. The SAF constituted a “metaphysical

344. See id. at 825-26.
345. Id. at 826.
346. See id. at 827.
347. See id. at 825.
348. See id.
349. See id. at 827.
350. See id. at 831-46.
351. Id. at 829 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).
352. Id. at 828.
353. The traditional speech fora are streets and parks. See Police Dep’t v. Mosley, 408 U.S. 92, 98-99 (1972) (holding that a “time, place and manner” restriction must survive careful judicial scrutiny and further a significant government interest); Schneider v. New Jersey, 308 U.S. 147, 162 (1939) (invalidating municipal prohibitions against leafletting on public streets).
forum—a collection of funds aimed at facilitating speech.

In an attempt to defend its denial of funding to WAP, the university cited *Rust v. Sullivan*, asserting that the government "must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission." The Court in *Rosenberger* rejected this argument as "unremarkable" and distinguished the case from *Rust*. The distinction between *Rosenberger* and *Rust* hinges on the status of the subsidized speech involved in either case. In *Rust*, Title X clinics, funded by the government to encourage childbirth, were viewed as governmental instrumentalities. In contrast, the SAF was viewed as a government-subsidized speech forum. The Court in *Rosenberger* declared that "the University 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." The university would be able to select speech only if the speech were its own.

The special character of the university and its crucial role in our society mandate that the Supreme Court protect robust discussion in schools. The Court's opinion in *Rosenberger* notes that the denial of funding to the religious-oriented publication could have the effect of chilling expression. Citing the ancient tradition of universities as centers of learning and pillars of our civilization, the Court stated that "[v]ital First Amendment speech principles are at stake here." These principles arise as a result of the function of the university and its contribution to democracy, indicating that First Amendment protection is related to both practical and normative considerations.

Other cases have declared that universities cannot discriminatorily

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355. *Id.* at 830.
356. 500 U.S. 173 (1991); *supra* note 203 and accompanying text.
358. *See id.* at 832-33.
359. Subsidized speakers can be "characterized as independent participants in the formation of public opinion or instead as instrumentalities of the government." *Post, Speech, supra* note 13, at 152.
360. *See Rust*, 500 U.S. at 192-93. "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 which seeks to deal with the problem in another way." *Id.* at 193.
362. *Id.* at 834.
363. *See id.*
364. The selection of certain institutions as autonomous and protected by the First Amendment because of their traditional role in our society has been criticized. *See Bollinger, supra* note 15, at 1116-17 (arguing that the expression that emerges from these institutions should be judged independently).
366. *Id.*
deny funding to gay and lesbian student organizations. In one such case, *Gay and Lesbian Students Ass’n v. Gohn*, a student organization ("GLSA") that provided education and support regarding homosexuality was denied funds by the Student Senate. The Eighth Circuit held that the school had impermissibly discriminated based on its dislike for the views of the GLSA. The opinion states that "a public body that chooses to fund speech or expression must do so even-handedly, without discriminating among recipients on the basis of their ideology." The Eighth Circuit adds that "[t]his will mean, to use Holmes’ phrase, that the taxpayers will occasionally be obligated to support not only the thought of which they approve, but also the thought that they hate. That is one of the fundamental premises of American law."

4. Faculty Speech

A seminal United States Supreme Court case determined that the faculty members in the state university system of New York could not be forced to sign certificates assuring the university that they were not Communists. Aimed at eliminating any potentially subversive personnel from the state university system, the certificate declared that the faculty member "was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York." In *Keyishian v. Board of Regents* the Supreme Court determined that the First Amendment prohibits the state from forcing university faculty members to sign such certificates as a condition to employment.

In the context of the university, the nature of the forum dictates that the state cannot permissibly control the thoughts of its university employees. To do so would frustrate the purpose of higher education and "‘impose [a] strait jacket upon the intellectual leaders in our colleges and universities [and] [] imperil the future of our Nation.’" Discussing the special First Amendment protections afforded in the

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367. See, e.g., *Gay and Lesbian Students Ass’n v. Gohn*, 850 F.2d 361, 362 (8th Cir. 1988) (concluding that the state cannot constitutionally deny a benefit if it infringes upon one’s interest in freedom of speech); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1550 (11th Cir. 1997) (invalidating an Alabama statute that allowed a state university to refuse to fund a gay, lesbian, and bisexual student organization).
368. 850 F.2d 361 (8th Cir. 1988).
369. See *id.* at 362.
370. See *id.* at 367-68.
371. *Id.* at 362.
372. *Id.*
374. *Id.* at 592.
376. See *id.* at 604.
377. *Id.* at 603 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).
school context, the Supreme Court wrote that "[academic] freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"  

C. The NEA is Like a School

The First Amendment approaches adopted by the Supreme Court in the context of subsidized speech have been both confused and unsatisfying. Through haphazard reliance on the unconstitutional conditions analysis and concerns about viewpoint discrimination, the Court has created a morass of unpredictability and has failed to implement a protective First Amendment device that can be uniformly applied to subsidized speech. As the Court pointed out in Rust, there are areas of funded expression that merit protection beyond that provided by the unconstitutional conditions analysis. The Court, however, has been either unwilling or incapable of delineating what these areas are and how the First Amendment can be cogently and consistently applied to them.

One of these arenas of special concern to the First Amendment is schools. The reason for such great concern and strengthened First Amendment protection is that schools disseminate knowledge and act as breeding grounds for thought and the cultivation of an educated citizen who is capable of self-governance. Courts, policy makers, and theorists repeatedly assert the vital nature of a challenging and uninhibited educational mission. In Keyishian, the Court stated that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas." This truism has compelled the Court to stringently protect freedom of speech within

378. Id. (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
380. See J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 Yale L.J. 251, 255 (1989) (asserting that constitutional academic freedom was created to shield education from political interference).
381. Commenting on knowledge's primal role, Isaiah Berlin wrote:
   The advance of knowledge stops men from wasting their resources upon delusive projects. It has stopped us from burning witches or flogging lunatics or predicting the future by listening to oracles or looking at the entrails of animals or the flight of birds. It may yet render many institutions and decisions of the present—legal, political, moral, social—obsolete, by showing them to be as cruel and stupid and incompatible with the pursuit of justice or reason or happiness or truth ....
the subsidized context of schools. As such, the government may not restrict non-disruptive student speech, remove library books, disfavor published speech, deny funding for disfavored student organizations, or censor faculty speech.

Art serves a similarly important function by challenging people to question accepted tenets through viewing issues in a novel light.\textsuperscript{384} The Court, however, has failed to recognize that the similarity of schools and the NEA implicates equal First Amendment treatment. Because both schools and the NEA are funded by the state, courts must forge similar First Amendment treatments that cannot be loosened by the presence of government monies.\textsuperscript{385} Because the government funds speech in other areas that engender thought and enlighten our society, an analytical map must be provided with which to identify these unique institutions. Based on its founding precepts, the NEA is also an institution of thought and expression.\textsuperscript{386} Although the government funds the NEA, the principles behind its creation and its societal function mirror that of schools and dictates that the Supreme Court apply the First Amendment in a similar prophylactic fashion.\textsuperscript{387}

The fact that the NEA is far smaller in scale and impact does not detract from the mission behind its creation. The sentiments and objectives in the minds of the politicians who founded the NEA to encourage artistic diversity indicate the importance of its cultural mandate.\textsuperscript{388} These ideals are echoed on the NEA’s website, which states that the NEA “serves the public good by nurturing the expression of human creativity.”\textsuperscript{389} Viewpoint discrimination undermines the NEA’s original precepts because “the politicalization of art is a restrictive, discriminatory, and dangerous concept that inhibits the free exchange of ideas and, therefore, limits the visions and viewpoints society can access.”\textsuperscript{390}

\textsuperscript{384} See Anne L. Rody, Federal Arts Funding at What Cost? The Impact of Funding Guidelines on the First Amendment and the Future of Art in America, 1 Fordham Ent. Media & Intell. Prop. L.F. 175, 197 (1991) (discussing the fact that cubism, futurism, dadaism, expressionism, surrealism, and modernism have encouraged the deconstruction of accepted societal values).

\textsuperscript{385} See Leff, supra note 200, at 412 (noting that both subsidized artistic expression and academic speech occupy a special realm in constitutional jurisprudence).

\textsuperscript{386} See supra Part I.A.

\textsuperscript{387} See Bollinger, supra note 15, at 1116 (arguing that democracy dictates that the First Amendment should protect all endeavors aimed at understanding the human and natural world).

\textsuperscript{388} See Julie A. Shaya, Note, Can the Government Regulate Expression in the Public Forum?, 70 U. Det. Mercy L. Rev. 893, 894 (1993) (noting that although some expression offends, speech restrictions frustrate the NEA’s original intent); supra Part I.A.

\textsuperscript{389} The NEA Website (visited Oct. 5, 1999) <http://www.arts.endow.gov/learn>.

\textsuperscript{390} Brenda L. Tofte, “Baby, It’s Cold Outside:” The Chilling Effect of the Decency Clause on the Arts in the Aftermath of National Endowment for the Arts v. Finley, 22 Hamline L. Rev. 303, 304 (1998); see also Farthing, supra note 151, at 1980-81 (stating
The 1965 Senate Report accompanying the legislation that established the National Foundation on the Arts and Humanities reflects a clear symbiosis of the endowments for the humanities and for the arts. In conjunction with one another, they "are of central importance to our society and to ourselves as individuals. They at once express and shape our thoughts." Exposure to Mapplethorpe's photographs encourages people to question their values and "acts as a catalyst for change as people begin speaking to one another." This crucial role of the arts in the public discourse underscores the need to shield support for the arts from political interference that invariably seeks to remove unpopular ideas from the marketplace for fear that they will lead to societal upheaval.

People expect that the government will fund schools. The history of the NEA and the prominence it has gained and created in the world of the arts has also led artists to rely upon the government for financial assistance. By supporting the arts, the government's approbation "has become nearly a *sine qua non* of an arts institution's survival. Federal grants provide essential 'seed money' to fledging organizations, and serve as an imprimatur of the seriousness and responsibility that is crucial for attracting private support." The combination of a financial contribution expected by the people and the expressive nature of the activities of art and education make it only natural that the First Amendment must afford these arenas great protection. If the NEA remains unprotected, political forces may contort its role and fashion it into a mouthpiece for conservative ideologues, thereby allowing the government to float a cloud of indoctrination over our national discourse. This would violate the First Amendment's most strongly held tenets of free speech, open discourse, and a multitude of voices in the ideological marketplace.

Under traditional legal thinking, were the NEA to receive the heightened degree of protection that it should be afforded in light of its cultural mission, the "decency clause" would be rejected as an unconstitutional exercise of viewpoint discrimination, or as an invalid penalty on artists receiving funding. This conclusion is analytically sound in view of the importance of art to original thinking in a

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392. Tofte, *supra* note 390, at 352 ("Art motivates people to speak out against tyrannies and injustice, creates significant challenges to the status quo and encourages people to exercise their voices and make their viewpoints heard.").
393. *See* Leff, *supra* note 200, at 412 (noting that when Congress created the NEA, it wanted to avoid the imposition of a favored style and to protect the NEA from political tampering).
394. Hawthorne, *supra* note 72, at 444. *See* Leff, *supra* note 200, at 405 (stating that the receipt of an NEA grant allows an organization to attract collateral funding).
democracy. By creating the NEA, Congress established a forum to promote a diversity of speech; it did not create a vehicle to fund its own speech. In addition, under the proposed reconceptualization of subsidized speech the NEA should be classified within the public-discourse realm of subsidized speech, and in view of the goals of classical liberalism and republican values in shaping First Amendment jurisprudence, should receive the heightened protection provided to school speech.

CONCLUSION

The traditional methods of First Amendment analysis fail to effectively protect the NEA. The opinions in the Finley case underscore the unresolved nature of First Amendment jurisprudence in the context of subsidized speech. Both viewpoint discrimination analysis and the unconstitutional conditions doctrine do not account for the role of funded institutions in the process of self-government. This failure threatens to undermine the First Amendment’s core principle of preserving the integrity of the marketplace of ideas. In order to avoid this threat, the Supreme Court must adopt a more coherent and protective approach to analyzing subsidized speech.

This approach begins by classifying subsidized speech into realms of public discourse and managerial domains. Speech falling into the public discourse and belonging to a unique cultural institution should be afforded heightened First Amendment protection. Schools are an example of this type of speech, and speech within the school context is already afforded aggressive protection. Because the NEA’s purpose, mission, and effect on our culture are similar to that of schools, it should be afforded the same degree of protection.

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395. See Hamilton, supra note 311, at 87-88 (asserting that art causes the viewer to experience reorientation by challenging her preconceived world view).
396. See supra notes 350-52 and accompanying text.
397. See supra notes 289-306 and accompanying text.