NOTES
THE BOLD AND THE BEAUTIFUL: ART, PUBLIC SPACES, AND THE FIRST AMENDMENT

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INTRODUCTION

Art has become a battleground on which American society fights its most intensely political and deeply personal wars. Because art by its very nature stimulates both intellectual and emotional responses, it is uniquely suited to generate powerful, often conflicting reactions in both artist and viewer. Increasingly, our most profound cultural tensions surface when people contest the meaning and value of artistic expression.1

When the government engages in the process of creating, supporting, or displaying art, the stakes are even higher. From the National Endowment for the Arts' (NEA) controversial funding of Robert Mapplethorpe's homoerotic photography2 to the public display and subsequent removal of Richard Serra's abstract "Tilted Arc" sculpture,3 government involvement in the arts highlights issues of col-

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1 See generally Stephen C. Dubin, Arresting Images: Impolitic Art and Uncivil Actions 1 (1992) ("Art might be balm or irritant, bringing people together or wrenching them apart. Whether it inspires reverence and admiration or provokes disdain, the reaction to art in the late twentieth century is often a strong one."); 2 People for the American Way, Artistic Freedom Under Attack 11 (1994) (noting that "attempts to suppress [artistic] expression serve as a byproduct of much more profound cultural divisions along lines of race, religion, gender, sexual orientation and ethnicity").


3 In 1979, the General Services Administration (GSA) commissioned Serra to install a large sculpture ("an arc of steel 120 feet long, 12 feet tall, and several inches thick") in the Federal Plaza in lower Manhattan. See Serra v. United States Gen. Servs. Admin., 847
lective morality, limited resources, and public self-definition. When the government supports art, concerned audiences wonder not only what a given work means or how it makes them feel, but also whether it is appropriate for public spaces\(^4\) or deserves taxpayer support.\(^5\) One commentator describes this phenomenon as the "paradox" of public art,\(^6\) which pits the individual, self-expressive nature of artistic speech against the "government's duty to promote harmony and the public good."\(^7\)

While the public art paradox has been examined at length in the context of NEA funding,\(^8\) few have explored the legal and political

\(^4\) See, e.g., Claudio v. United States, 836 F. Supp. 1230, 1235 (E.D.N.C. 1993) [hereinafter Claudio III] (permitting removal of controversial painting from Federal Building because of "the inarticulable inappropriateness of the painting to the forum"), aff'd, 28 F.3d 1208 (4th Cir. 1994). The Claudio litigation is discussed at length infra notes 101-04 and accompanying text.

\(^5\) See, e.g., Marjorie Heins, Sex, Sin, and Blasphemy 125-27 (1993) (discussing, in context of NEA funding, recent arguments against using "the taxpayers' money" to support art).


\(^7\) Id. Hoffman notes the inherent difficulty in juxtaposing art, "the epitome of self-expression, which very often challenges conventional wisdom and value," and "[t]he term 'public,' [which] implies self-negation—encompassing references to the community and the social order." Id.; see also Harriet F. Senie & Sally Webster, Public Art and Public Response, in Critical Issues in Public Art: Content, Context, and Controversy 171, 173 (Harriet F. Senie & Sally Webster eds., 1992) (referring to "the fundamental contradictions embedded in the very idea of public art").

\(^8\) In addition to the recent case law concerning NEA funding, see Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1457-76 (C.D. Cal. 1992) (striking down NEA's "decency" clause), aff'd, 100 F.3d 671 (9th Cir. 1996), and Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F. Supp. 774, 785 (C.D. Cal. 1991) (finding NEA's certification requirement unconstitutional). For related coverage in the popular press, see, for example, Grace Glueck, Border Skirmish: Art and Politics, N.Y. Times, Nov. 19, 1989, § 2, at 1 (reporting on tensions between artists and lawmakers); Kim Masters, Arts Panel Urges End to Grant Pledge, Wash. Post, Aug. 4, 1990, at G1 (describing meeting of NEA Council on proposed pledge of compliance for grant recipients); Allan Parachini, Endowment, Congressmen Feud over Provocative Art, L.A. Times, June 14, 1989, § 6, at 1 (detailing escalating political controversy involving NEA). Numerous scholars have addressed legal issues surrounding the NEA. See generally Elizabeth E. DeGrazia, In Search of Artistic Excellence: Structural Reform of the National Endowment for the Arts, 12 Cardozo Arts & Ent. L.J. 133 (1994) (suggesting structural reform of NEA's grantmaking authority); Michael J. Elston, Artists and Unconstitutional Conditions: The Big Bad Wolf Won't Subsidize Little Red Riding Hood's Indecent Art, 56 Law & Contemp. Probs. 327, 329-33 (1993) (examining application of doctrine of unconstitutional conditions to government funding through NEA); Amy Sabrin, Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?, 102 Yale L.J. 1209 (1993) (discussing
ramifications of government regulation of private artistic displays on public property. In the paradigmatic case of public art display, officials seeking to enhance the aesthetic appeal of a government building invite private artists to show their work on the premises for a limited time. Because, under such arrangements, daring art is often displayed prominently—for example, when a public university's faculty art show features sexually explicit stained-glass windows, or an abortion-related painting hangs in the lobby of a federal courthouse—disputes over art in public spaces abound. Yet despite the increasing frequency of such clashes, principled, consistent resolution of these tensions remains elusive.

This Note focuses on the regulation of private artistic displays on government property and seeks to develop a legal framework for resolving conflicts in this area. Part I explores the First Amendment value of artistic expression, both as classic political speech and as a

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9 While no published commentary specifically addresses the issue of public art display, a number of scholars refer to the subject as part of a larger discussion of law and art. See, e.g., Hoffman, supra note 6, at 63-64 (discussing public display cases in context of broader discussion on public art); Robert M. O'Neil, Artistic Freedom and Academic Freedom, 53 Law & Contemp. Probs. 177, 184-87 (1990) (describing “display cases” involving exhibitions in university galleries in article on artistic freedom generally); Marjorie Heins, Viewpoint Discrimination, 24 Hastings Const. L.Q. 99, 136-50 (1996) (discussing viewpoint discrimination in restrictions on art in public spaces).

10 This Note does not focus on voluntary artistic displays in traditional public fora such as parks and streets. See infra note 97.

11 See Piarowski v. Illinois Community College, 759 F.2d 625, 627 (7th Cir. 1985), discussed at length infra notes 98-100 and accompanying text.

12 See Claudio II, 836 F. Supp. 1230 (E.D.N.C. 1993), aff'd, 28 F.3d 1203 (4th Cir. 1994); Claudio v. United States, 836 F. Supp. 1219 (E.D.N.C. 1993) [hereinafter Claudio I], aff'd, 28 F.3d 1208 (4th Cir. 1994). References to the Claudio decision in the text refer to both cases. The Claudio decision is discussed at length infra notes 101-04 and accompanying text.

13 See, e.g., People for the American Way, supra note 1, at 10 (discussing prevalence of disputes over art in public spaces, and explaining that “[a]s all Americans live more of their lives in shared space—office buildings, campuses, public parks and facilities, malls—tensions have escalated as individuals attempt to assert some measure of control over a rapidly changing social and cultural environment”); Harriet F. Senie & Sally Webster, Introduction to Critical Issues in Public Art: Content, Context, and Controversy xi (Harriet F. Senie & Sally Webster eds., 1992) ("[S]ince its inception, issues surrounding its appropriate form and placement, as well as its funding, have made public art an object of controversy more often than consensus or celebration."). For examples of such disputes, see infra Part II.B.1.

14 See infra Part II.B.
less perceptible, yet equally important mode of ambiguous, nonrational communication. Part I then discusses the difficulties inherent in the adjudication of public art disputes under conventional definitions and analyses. Part II examines how courts have treated these conflicts in the past, highlighting the inability of traditional legal doctrine to account for the unique nature of artistic expression. Specifically, Part II criticizes the courts' applications of the public forum doctrine and the concept of viewpoint discrimination to art speech. Finally, Part III suggests an alternative approach to controversies over public art display, drawing an analogy to several NEA funding cases. Under the proposed "neutral display" analysis, government regulation of art in public spaces would be limited to determinations about artistic merit; all other regulation presumptively would violate the First Amendment.

I

PUBLIC ART: CONSTITUTIONAL VALUES AND LEGAL DIFFICULTIES

A. Ideas and Beyond: Public Art and the First Amendment

Legal and political scholars have developed numerous theories to explain the First Amendment’s protection of freedom of expression. Some view free speech as safeguarding a "marketplace of ideas." Others consider the First Amendment necessary to democratic self-government because it encourages vital public debate and deliberation. Still others focus on the First Amendment to the U.S. Constitution provides that "Congress shall make no law ... abridging the freedom of speech."

The following discussion presents First Amendment theory in rather simplistic fashion. Many nuanced positions about the nature of free speech do not fit neatly in any of the following categories. Indeed, many of the scholars cited for a given theory may have profound disagreements with others placed in the same school. For purposes of this Note, however, the generalized categories should suffice, since all are treated as incorporating artistic expression. The First Amendment to the U.S. Constitution provides that "Congress shall make no law ... abridging the freedom of speech."

See, e.g., Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (arguing that First Amendment has "structural role to play in securing and fostering our republican system of self-government"); Whitney v. California, 274 U.S. 375 (1927) (Brandeis, J., concurring) (suggesting that "the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government"); see also Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 8-9 (1960) (noting that free speech protects "the common needs of all the members of the body politic"); Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: Voting Rights, 41 U. Fla. L. Rev. 443, 450 (1989) (emphasizing "dialogic" function of free speech); Cass R.
Amendment's promotion of individual autonomy and self-realization.\textsuperscript{19} Under all these theories, it seems well-settled that when artistic expression conveys a perceptible message, it enjoys full First Amendment protection.\textsuperscript{20} Art functions as any other speech, assisting in the pursuit of truth, encouraging public debate, and fostering individual self-realization.\textsuperscript{21} Artistic ideas operate with the same force and under the same constitutional guarantees as classic written or spoken communication.

Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1549 (1988) (arguing that many republican conceptions of government include "political institutions that promote discussion and debate among the citizenry").


\textsuperscript{20} The Supreme Court has recognized as much, applying constitutional guarantees to various forms of art speech. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (music); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (theater); Miller v. California, 413 U.S. 15, 34-35 (1973) (all artistic expression, unless obscene in legal sense); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (film); see also O'Neill, supra note 9, at 181 ("There seems to be a fairly firm consensus that art that conveys a political message is fully protected."). But see Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion) (upholding ban on nude dancing, stating that "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so").

\textsuperscript{21} See, e.g., William J. Brennan, Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1, 13 (1965) (explaining that "literature and the arts . . . fall within the subjects of 'governing importance' that the first amendment absolutely protects from abridgment"); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 257 ("Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created."). Some commentators reject the ability of classic First Amendment theories to account for the protection of art speech. See, e.g., Marci A. Hamilton, Art Speech, 49 Vand. L. Rev. 73, 103-04 (1996) (arguing that while "proponents of [traditional First Amendment] theories have been inclined to include art under the category of protected speech, . . . they have not addressed, much less reconciled, the difficulty of explaining how a first amendment theory valuing speech for its rationally comprehensible ideas can comfortably accommodate the phenomenon of art"); Sheldon H. Nahmod, Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime, and the First Amendment, 1987 Wisc. L. Rev. 221, 222 (noting "relegation of artistic expression to second class status" caused by "the centrality of political expression in theories of the first amendment").
Art need not, however, express identifiable ideas in order to receive First Amendment protection. If the Constitution required such clarity, courts would be forced to engage in the difficult (if not impossible) task of determining where “entertainment” stops and “ideas” begin. Furthermore, the creative, imprecise nature of artistic expression affects audiences in ways mere words cannot. If a picture is indeed “worth a thousand words,” then art speech deserves the utmost First Amendment protection for its ability to inspire a host of intellectual, interpersonal, and spiritual responses.

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22 See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338, 2345 (1995) (noting that if First Amendment reached only “expression conveying a ‘particularized message,’” its protection “would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll”); Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996) (“Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.”); Piarowski v. Illinois Community College, 759 F.2d 625, 628 (7th Cir. 1985) (“The freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression (and entertainment that falls far short of anyone’s idea of ‘art,’ . . . ) unless the artistic expression is obscene in the legal sense.” (citation omitted)); see also infra note 25.

23 See, e.g., Winters v. New York, 333 U.S. 507, 510 (1948) (rejecting suggestion that constitutional protection for free speech applies only to exposition of ideas and noting that “line between the informing and the entertaining is too elusive”).

24 See, e.g., Joseph Burstyn, 343 U.S. at 501 (explaining that nonpolitical speech that entertains may “affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression”); Bery, 97 F.3d at 695 (“The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. . . . [V]isual images are ‘a primitive but effective way of communicating ideas . . . a short cut from mind to mind.’” (quoting Barnette, 319 U.S. at 632 (alteration in original))); see also infra note 25.

25 As one commentator has noted:

Creative works are constitutionally protected in large part because of the critical role they play in a society that values individual autonomy, dignity, and growth. Artistic expression not only provides information and communicates ideas; it also expresses, defines, and nourishes the human personality. Art speaks to our emotions, our intellects, our spiritual lives, and also our physical and sexual lives. Artists celebrate joy and abandon, but they also confront death, depression, and despair.

Heins, supra note 5, at 5; see also Hugh Honour & John Fleming, The Visual Arts, A History 15 (2d ed. 1986) (“Great works of art are more than aesthetically pleasing objects, more than feats of human skills and ingenuity: they deepen our insight into ourselves and others, they sharpen our awareness of our own and other religious beliefs, they enlarge our comprehension of alternative and often alien ways of life—in short, they help us to explore and understand our own human nature.”); Nahmod, supra note 21, at 223 (noting that “from the perspective of the audience artistic expression functions to eliminate mankind’s alienation from nature through communication by symbols” (citing H. Read, Art and Alienation 162-64 (1967))); id. at 224 (“Artistic expression, even nonrepresentational art, has a marked influence on society even where it does not present an overt political message.”).
Numerous commentators have argued that art deserves an elevated position in First Amendment jurisprudence. For example, Professor David Cole has suggested that "artistic expression . . . is central to the cultural and political vitality of democratic society" and therefore deserves maximum constitutional protection. Professor Cole relies primarily on the public debate rationale for free speech protection, finding historical support in all branches of government activity.

Professor Marci Hamilton has taken a different approach, calling for heightened protection on the basis of art's revolutionary spirit. Professor Hamilton criticizes attempts to tie artistic expression to perceptible ideas, focusing instead on the "extrarational value" of art that contributes "to the First Amendment's task of shoring up counterweights to government." If, as the Supreme Court has explained, "a principal function of free speech under our system of government,"

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27 In a departure from the unconstitutional conditions doctrine, Professor Cole argues that, for certain areas of expression that are vital to free public debate—what he terms protected "spheres of neutrality"—government funding should be held to a higher neutrality standard than usual. See id. at 681. Professor Cole identifies artistic expression as one such sphere. See id. at 739. This Note's proposals in Part III build on Professor Cole's work, applying many of his theories for funding doctrine to the context of display.

28 See supra note 18 and accompanying text.

29 In addition to his reliance on relevant case law, Professor Cole cites to the legislative history of the NEA, in which the Senate Report declared that arts "are at the center of our lives and are of prime importance to the Nation and to ourselves . . . Very simply stated, it is in the national interest that the humanities and arts develop exceedingly well." Cole, supra note 26, at 739 (alteration in original) (quoting S. Rep. No. 89-300, at 7 (1965) (quoting Hearing Before the Special Subcomm. on Arts and Humanities, 89th Cong. (1965) (statement of Dr. Barnaby C. Keeney, Chairman of the Commission on the Humanities)).

Professor Cole also refers to numerous presidential declarations, including statements from, among others, Presidents Eisenhower ("[f]or our Republic to stay free those among us with the rare gift of artistry must be able freely to use their talent . . . ."), id. (quoting Moshe Carmilly-Weinberger, Fear of Art: Censorship and Freedom of Expression in Art 159 (1986)), and Kennedy ("I see little of more importance to the future of our country and our civilization than full recognition of the place of the artist. If art is to nourish the roots of our culture, society must set the artist free to follow his vision wherever it takes him."), id. at 739 n.249 (quoting John Frohnmayer, Talking Points for First Amendment Congress, Kansas City, Mo. (Apr. 19, 1991) (filed as exhibit F to Cole Declaration submitted in Finley v. NEA, No. CV90-5236 AWT (C.D. Cal.))).

30 See Hamilton, supra note 21, at 110 ("[A]rt is a lifespring of liberty in the face of representative democracy.").

31 Id. Professor Hamilton explains:

The value of art lies not merely in its contemporaneous experience, but also in its capacity to be a future, potent, immanent tool of critique. A store of such experiences is invaluable against the bewitchment of one's common sense by the potent and prevailing powers in society, including those of the government.

Id. at 96.
ernment is to invite dispute,’” then art speech, which historically has challenged (and been attacked by) the status quo, stands at the forefront of the First Amendment ideal. Strains of Professor Hamilton’s argument can be seen in the Supreme Court’s obscenity decisions, which recognize a First Amendment value in art speech that is entirely distinct from political ideas. But one need not focus so heavily on the “nonrational” aspects of artistic expression in order to accord it full First Amendment protection. Rather, the rational and nondiscursive elements of art stand

32 Texas v. Johnson, 491 U.S. 397, 408 (1989) (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)); see also Miller v. California, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting) (“The First Amendment was designed ‘to invite dispute,’ to induce ‘a condition of unrest,’ to ‘create dissatisfaction with conditions as they are,’ and even to stir ‘people to anger.’”) (quoting Terminiello, 337 U.S. at 4).

33 See Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (“From Plato’s discourse in the Republic to the totalitarian state in our own times, rulers have known [music’s] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state.”); Hamilton, supra note 21, at 96 (“History is replete with examples where art threatened entrenched power structures and in so doing secured a measure of freedom.”); see also Cole, supra note 26, at 739-40 (noting how art historically has been a “frequent target of political repression by totalitarian governments, reflecting those governments’ judgments that it is a forum for dissent and opposition”); Richard A. Posner, Art for Law’s Sake, 58 Am. Scholar 513, 518 (1989) (remarking that “the censorship of art has a dreadful historical record”).

34 In Miller, 413 U.S. at 24, the Supreme Court declared that, as a matter of law, a work can be considered obscene only if it lacks “serious literary, artistic, political, or scientific value.” By naming “artistic” and “political” as separate categorical exceptions, the Court implied that artistic expression had First Amendment worth separate and apart from classic political speech. Professor Hamilton acknowledges, however, the limited application of the Miller exceptions: “Although it has been willing to employ aesthetic value in this defensive mechanism, the Court has never pursued the implications of this line of reasoning to protect art on grounds distinguishable from the grounds normally offered to protect ideas.” Hamilton, supra note 21, at 108.

35 At times, Professor Hamilton describes her position as incorporating, to some extent, traditional speech theories: While art can address and work through rational faculties, it is neither limited to nor dependent upon them, and even empowers such faculties to subvert their own assumptions. Art stands on much firmer ground if its capacity to communicate nondiscursively is recognized alongside its capacity to carry a more explicit and readily comprehensible message.

Hamilton, supra note 21, at 109 (emphasis added). She later elaborates, “The Court should consciously elevate art to the top of the First Amendment’s pyramid of protection, alongside political speech. There will be times when it is political speech, but even when it is not, it furthers the constitutional goal of placing parameters around government.” Id. at 111. However, in Professor Hamilton’s discussion of public support for the arts, she intimates that the antiestablishment strain of art speech makes government funding per se unconstitutional:

Governmental funding of either [art or religion] . . . threatens the private sphere of freedom safeguarded by the First Amendment. In a diverse society, the establishment of an official art is an evil that should be avoided as assiduously as the establishment of an official religion. Such establishment directly threatens the scope of power individuals can exercise over their respective pri-
together, combining to promote free speech values found both in Professor Cole's public debate and Professor Hamilton's antityranny theories.\textsuperscript{36}

The First Amendment status of art is even more relevant when art is publicly displayed. Public art reaches wider audiences with greater frequency, and therefore is more likely to inspire self-reflection, public discussion, and the search for truth.\textsuperscript{37} The public nature of the art itself, moreover, may be intertwined with the work's expressive message.\textsuperscript{38}

In addition, as wealth in the United States becomes concentrated in fewer hands, there is a danger that public debate will be dictated by
a small, wealthy group of speakers. The dominance of museums in the art world exacerbates this problem in two ways: First, limited museum space means that fewer artists can participate in public artistic discussion; second, because only a small segment of the population attends museums on a regular basis, even the most renowned artists have difficulty reaching mass audiences. As a result, when the government devotes its abundant property to the display of private artistic speech, it promotes public debate. As Congress continues to reduce the budget of the NEA, public display has become vital to art's First Amendment mission.

B. Difficulties in Public Art Adjudication

The same visibility that makes publicly displayed art so important to First Amendment values also incites the controversies prevalent in this area. Public art often shows audiences images they would rather not see. The recent expansion of on-line communication has mitigated this problem to some degree, but Internet speech is still unable to replace live, face-to-face public debate.

39 See Mark Yudof, When Government Speaks: Politics, Law, and Government Expression in America 43 (1983) (suggesting that public debate is increasingly dominated by “mass institutions—the press, corporations, state government, organized single-issue or multiple-issue interest groups, and so on”); Cole, supra note 26, at 703 (“Pervasive economic inequality in the private marketplace, which is permitted, encouraged, protected, and reinforced by law, creates a risk that private concentrations of wealth will dominate the marketplace of ideas.”); id. at 703-05 nn.103-15 (noting increased concentration of wealth and resulting threat to First Amendment values).

40 See, e.g., Bery, 97 F.3d at 696 (invalidating license requirement for public art sales and echoing sentiments of public artists who feel that “[a]nyone, not just the wealthy, should be able to view it and to buy it”); Nahmod, supra note 21, at 257 (arguing that “challenging art has been increasingly removed from everyday life and sent to the museums, so that its visibility and effect in the real world have been reduced”); Pamela Weinstock, Note, The National Endowment for the Arts Funding Controversy and the Miller Test: A Plea for the Reunification of Art and Society, 72 B.U. L. Rev. 803, 823 (1992) (“The 'high culture' of art should not be sequestered in museums attended by a small percentage of the population.”).

41 Professor Cole explains that “[s]peech, by necessity, has to take place on someone's property, and the government owns a great deal of it.” Cole, supra note 26, at 718.

42 See id. at 703 (“Government support of speech is an important mechanism for counteracting the effects of economic inequality on public debate.”).

43 In 1996 congressional conservatives slashed the NEA's budget by 40%, down to $99.5 million from $162 million the previous year. See Jane Fritsch, As Slashed Arts Grants Are Unveiled, the Backlash Begins to Take Shape, N.Y. Times, Dec. 16, 1996, at C11. In addition, the endowment discontinued nearly all of its individual grants and now funds only specific projects, rather than providing general support for organizations. See id.

44 See, e.g., People for the American Way, supra note 1, at 10 (discussing art in public spaces as a “[m]ajor [f]ocus of [c]ontroversy”); Hoffman, supra note 6, at 42-52 (describing in detail numerous instances of public art controversy since World War II); Senie & Webster, supra note 7, at 171 (noting that “public art and controversy seem to have been joined at birth”).
not see, in places audiences would rather not see them. Moreover, because such art appears on government property, it angers those who feel public resources should not be devoted to the promotion of "morally bankrupt" activities.

On occasion, viewers object to a public work simply on aesthetic grounds. In the case of Richard Serra's "Tilted Arc," for example, the General Services Administration (GSA) sought removal of the artist's site-specific sculpture after receiving a flood of complaints from community residents and local employees. The GSA had commissioned the abstract work—a 120-foot-long arc of steel designed to oxidize over time—in an attempt to beautify a federal office complex. Local residents and workers, however, found the sculpture ugly and a hideous obstruction of the once-open plaza; the GSA eventually felt compelled to remove it. Serra later sued unsuccessfully in federal court to enjoin the removal.

The Serra case notwithstanding, most public art disputes revolve around a work's allegedly offensive content. Sometimes tensions mount over religious or racially-charged imagery, but the overwhelming number of conflicts concern sexually explicit art. Controversial public art in recent years includes a drawing of "nude man lifting a nude woman up towards a tree"—image made up of explicit renderings of male genitalia in a university art show; graphic stained-glass windows depicting, among other things, a woman "naked

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46 According to the Serra court, the work soon became "coated with what the artist refers to as 'a golden amber patina' and what the sculpture's critics refer to as 'rust.'" Id.

47 See id. at 1051. The Serra opinion is analyzed in Part II. See infra notes 97, 114 and accompanying text.

48 See, e.g., Hoffman, supra note 6, at 45 ("Whereas modernist public art aroused controversy over its abstract, non-referential nature, more recent public art has tended to arouse negative sentiments because of its specific political references and direct effrontery to traditional standards of decency and taste.").

49 In April 1994, public officials in Fairfax County, Virginia, removed from a county government building artworks depicting "an adobe church" and "a man wearing a yarmulke and reading from a prayer book," pursuant to art guidelines that banned, among other things, "religious scenes." Heins, supra note 9, at 138. After much debate and negotiation, the county abandoned the use of the guidelines in the spring of 1995. See id. at 138-39.

50 See infra note 197.

51 See Anne Salzman, Note, On the Offensive: Protecting Visual Art with Sexual Content Under the First Amendment and the "Less Valuable Speech" Label, 55 U. Pitt. L. Rev. 1215, 1215 (1994). University of Pittsburgh officials initially planned to omit the work from a student art show, but they later reached a compromise with the artist (who had filed suit in federal district court). The officials included the work in the show and posted warning signs outside the exhibit. See id. at 1216.
except for stockings, and apparently masturbating” in a college faculty art exhibit;52 a classic male nude statue in a public art show;53 a painting of “semi-nude females” in a public library;54 and a painting featuring “larger-than-life depictions of a nude woman, a coathanger, and a fetus.”55

Of course, most public art is considerably less dramatic than the examples above. But when the government displays provocative paintings or sculpture, the possibility of conflict always exists. Even more than private artistic speech, public art has an uncommon ability to offend. Adjudication in this area is thus complicated because courts must balance audience outrage against core First Amendment freedoms.

The rigidity of the First Amendment case law traditionally applied to public art disputes also makes resolution of these matters difficult. This case law posits that expression can be divided into separate and distinct categories and assigns constitutional protections accordingly.

As described in greater detail in Part II, courts adjudicate public art controversies within the confines of the public forum doctrine, which often requires judges to distinguish between permissible “content-based” regulation—for example, a ban on all depictions of trees and flowers—and impermissible “viewpoint-based” regulation—for example, a prohibition on the unpatriotic display of trees and flowers.56 Under this analysis, as under First Amendment case law gener-

52 See Piarowski v. Illinois Community College, 759 F.2d 625, 627 (7th Cir. 1985). The court upheld the college’s removal of the windows. See id. at 632. For further discussion of the case, see infra notes 98-100 and accompanying text.


55 Claudio II, 836 F. Supp. 1230, 1232 (E.D.N.C. 1993), aff’d, 28 F.3d 1208 (4th Cir. 1994). The district court in Claudio II, discussed infra notes 101-04 and accompanying text, upheld the GSA’s removal of the work. See id. at 1237.

56 See infra Part II.B.2.b.
ally, expression that is considered to be “political speech” will enjoy greater constitutional protection than so-called nonpolitical speech.57

Art speech suffers under these categorical approaches because it eludes conventional identification.58 While some art is overtly political, most creative expression communicates in myriad subtle, complex ways.59 What one person finds meaningless abstraction, another may read as poignantly direct in its message. Unable to separate these competing messages, courts often will struggle in vain to determine the political nature of a work of art.60


58 See, e.g., Hoffman, supra note 6, at 53 (“The Supreme Court, unable to articulate any principled line between content regulation and censorship, has provided little guidance in the form of a coherent theory or pragmatic analytical tools to resolve First Amendment claims over art in public spaces.”).

59 See id. at 65 (“It is difficult to draw a bright line between art that communicates political ideas and art that does not.”); see also supra note 25 (discussing nonpolitical nature of artistic speech).

60 In the context of vulgar or sexually explicit speech, the Supreme Court has delivered conflicting messages. For example, in Cohen v. California, 403 U.S. 15 (1971), the Court declared, “[I]t is . . . often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.” Id. at 25. But in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the plurality opinion declared, “[T]hough we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.” Id. at 70. See also Nahmod, supra note 21, at 235-49 (demonstrating courts’ difficulty in tying art to political speech under classic First Amendment theories).
In the context of artistic expression, the categorical line between content and viewpoint becomes hopelessly blurred. Effective art can depict ideas, thoughts, and subjects in an entirely novel and unconventional fashion. How, then, is a court to sift through the meaning or message of a work, let alone determine whether government officials targeted the art's so-called content or viewpoint? In the end, judges inevitably construct artificial distinctions that fail to accommodate the special nature of art speech.

Take, for example, the judicial treatment of sexually explicit art. While most courts consider this material devoid of any perceptible, rational idea or message, several judges and commentators have recognized that sexual communication is itself a point of view.

For all forms of expression, the line between content and viewpoint is often blurred. See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2517 (1995) (acknowledging that distinction between viewpoint discrimination and content discrimination “is not a precise one”); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (noting how content regulations can be used as pretexts for suppressing viewpoint); Tucker v. California Dep’t of Educ., 97 F.3d 1204, 1216 (9th Cir. 1996) (remarking that “the line between content and viewpoint discrimination is a difficult one to draw”); Heins, supra note 9, at 110 (“[T]he Supreme Court has sometimes been imprecise in distinguishing between viewpoint and the more generic concept of content.”); Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113, 140 (1981) (noting possibility of superficially content-neutral government regulations aimed at particular viewpoint); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 200 (1983) (noting courts have applied stringent standards for content-based analysis to viewpoint-based restrictions).

Artistic speech exacerbates this doctrinal morass. See Scalia, supra note 57, at 9 (discussing difficulty in applying First Amendment analysis to liberal arts); Salzman, supra note 51, at 1221 (noting that perceived offensive content of certain artwork may reflect artist's attempt “to express an extremely personal, deeply held emotion” or viewpoint).

See supra note 25.

Professor Hamilton notes:

Indeed, the Court's general speech doctrine, which examines laws according to whether they are content-based, content-neutral, or viewpoint-based, similarly begs the question of why one would protect art in the first place by presuming that the phenomenon should be separated from an internal message. Although these categories serve a legitimate function, their domination of the Court's doctrine serves to obscure art's capacities beyond the delivery of a rationally apprehensible [sic] message. Hamilton, supra note 21, at 107; see also Hoffman, supra note 6, at 74 (“If the concept of viewpoint discrimination is limited only to 'ideas,' artistic expression is not afforded sufficient protection.”).

As discussed below, courts in public art disputes tend to deny the existence of a definable viewpoint in sexually explicit art. See infra notes 134-43 and accompanying text.


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agreement on this point persists, and as long as artistic expression is judged on the basis of traditional categorical speech distinctions, courts will continue to wrestle with such arguably unresolvable issues.

II
STATE OF THE LAW: ART AND THE PUBLIC
Forum Doctrine

Most disputes over art in public spaces never reach the courts. When informal resolution fails, though, artists can sue government officials to enjoin regulation of their work or to obtain monetary relief. These cases usually involve judicial application of the public forum doctrine, which governs the extent to which private speech may be regulated on public property.

This Part will first explain the history of the public forum doctrine and then examine its application to art speech. Although the public forum doctrine was initially conceived as a way to promote free expression, this Part will show that it has proved incapable of safeguarding artistic freedom. This is due both to the general shortcomings of the doctrine, which has been criticized persistently by numerous Supreme Court Justices, other federal
that the Court's public forum analysis in [recent] cases is inconsistent with the values underly-
ing the Speech and Press Clauses of the First Amendment.""); United States v. Kokinda, 497 U.S. 720, 741 (1990) (Brennan, J., joined by Marshall, Stevens, and Blackmun, J., dissenting) ("I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand."). In addition, a number of former Justices rejected the current doctrine as inflexible, inco-
herent, and overly restrictive of First Amendment rights. Justice Blackmun, for example,
questioned the Court's undue reliance on simple doctrinal categories, opining:

"[T]he public forum, limited-public-forum, and non-public forum categories are
but analytical shorthand for the principles that have guided the Court's deci-
sions regarding claims to access to public property for expressive activity. The
interests served by the expressive activity must be balanced against the inter-
ests served by the uses for which the property was intended and the interests of
all citizens to enjoy the property.

(Blackmun, J., dissenting); see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460
U.S. 37, 57 (1983) (Brennan, J., dissenting) ("In focusing on the public forum issue, the
Court disregards the First Amendment's central proscription against censorship, in
the form of viewpoint discrimination, in any forum, public or non-public.")."

Given the internal inconsistency in public forum doctrine, its inherent dangers
in capturing too broad a range of speech in its restrictive grasp, the confusion
evidenced in lower court attempts to apply the doctrine, and the concern
expressed in recent years by a solid core of sitting Justices, the time may be ripe
for the Court to abandon the public forum concept in favor of a standard that
overcomes the rigidity of public forum analysis yet provides the maximum pos-
sible guidance for lower courts, individual speakers, and government officials.

Rosemary C. Salomone, Public Forum Doctrine and the Perils of Categorical Thinking:
Lessons From Lamb's Chapel, 24 N.M. L. Rev. 1, 23 (1994); see also, e.g., Laurence H.
Tribe, American Constitutional Law 987 (2d ed. 1988) ("Many recent cases illustrate the
blurriness, the occasional artificiality, and the frequent irrelevance, of the categories within
the public forum classification."); G. Sidney Buchanan, The Case of the Vanishing Public
Forum, 1991 U. Ill. L. Rev. 949, 980 ("In this area, the Court's analytical machinery has
broken down . . ."); David S. Day, The End of the Public Forum Doctrine, 78 Iowa L.
Rev. 143, 145, 202 (1992) ("Although the Supreme Court's 'public forum doctrine'
was once a speech-protective methodology, the [Court has] converted it into a speech-restric-
tive methodology . . .

The problem is that the Court's application of the modern forum
doctrine blindly trusts the intentions of governmental officials. This is a fatal flaw.");
Robert C. Post, Between Governance and Management: The History and Theory of the
Public Forum, 34 UCLA L. Rev. 1713, 1715 (1987) ("The doctrine has in fact become a
serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreci-
ation of the government's requirements in controlling its own property."); Stephen K.
Doctrine Falls to a Government Intent Standard, 23 Golden Gate U. L. Rev. 563, 568
(1993) ("The arbitrary nature of the standards used to decide a property's forum classifi-
cation, compounded by the Court's strict limitation of traditional public fora, poses a direct
threat to First Amendment values.").
gorizing not only the government property but also the expression at issue.\textsuperscript{71}

\textbf{A. Public Forum Doctrine Generally}

The contours and boundaries of the right to engage in expressive activity on government property have been shaped by the evolving public forum doctrine. The concept of a public forum first emerged as dicta in the Supreme Court's 1939 decision in \textit{Hague v. CIO}.\textsuperscript{72} It enjoyed widespread acceptance through the 1970s,\textsuperscript{73} and by 1984 the idea had become "a fundamental principle of First Amendment doctrine."\textsuperscript{74} In its development over the years, the doctrine has stood for the basic principle that the government is limited in its ability to restrict expression on certain types of public property.

In order to balance individual speech rights with the government's interest in preserving its property,\textsuperscript{75} the Supreme Court eventually developed a categorical approach in which the government's restrictive power depends on the nature of the forum and its intended uses. This modern public forum analysis began with \textit{Perry Education}

\textsuperscript{71} See supra Part I.B (discussing difficulty in applying categorical free speech doctrine to artistic expression).

\textsuperscript{72} 307 U.S. 496, 515 (1939) (noting in dicta that "streets and parks ... have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). While Justice Roberts's opinion in \textit{Hague} laid the groundwork for what would become the public forum doctrine, see, e.g., Daniel A. Farber & John E. Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1221 (1984) (tracing public forum doctrine to \textit{Hague}), the term "public forum" did not appear until 1965, in Harry Kalven's groundbreaking article, The Concept of the Public Forum: \textit{Cox v. Louisiana}, 1965 Sup. Ct. Rev. 1: [I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

\textsuperscript{73} Id. at 11-12.

\textsuperscript{74} The phrase "public forum" first appeared in a Supreme Court majority opinion in \textit{Police Department of Chicago v. Mosley}, 408 U.S. 92 (1972):

Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

\textsuperscript{75} Id. at 96. For a discussion of the development of the public forum doctrine through the 1970s, see generally Post, supra note 70, at 1732-48.

\textsuperscript{76} Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 280 (1984); see also Post, supra note 70, at 1750.

\textsuperscript{77} See Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2516 (1995) ("[T]here is no question that the [government], like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated.") (quoting \textit{Lamb's Chapel v. Center Moriches Union Free Sch. Dist.}, 113 S. Ct. 2141, 2146 (1993)).
ASS'N v. PERRY LOCAL EDUCATORS' ASS'N, where the Supreme Court upheld a school board's policy of granting the duly-elected teachers' union exclusive access to a school's mail system.

In expounding its new categorical approach, the Court identified three distinct types of fora: First, "traditional" public fora—"places which by long tradition or by government fiat have been devoted to assembly and debate;" second, "limited" public fora—"public property which the State has opened for use by the public as a place for expressive activity;" and third, "nonpublic" fora—property not dedicated in any significant way to free or open communication.

Under this categorical system, the state's ability to regulate speech depends on the nature of the forum. The government's power to restrict expression in traditional public fora, the Perry Court explained, is extremely limited: "Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." The Court imposes similar restraints on speech in limited public fora: "Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." In nonpublic fora, however, the government may restrict expression "as long as the regul-
lation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.\textsuperscript{83}

In its present form, then, the public forum doctrine consists of a two-step approach to the adjudication of attempts to regulate expressive activity on government property. First, the court must determine the nature of the forum in question, i.e., whether it is a traditional public forum, limited public forum, or nonpublic forum. Second, the court must examine the government's restriction on speech in light of the forum determination.

The court's forum decision in turn determines the appropriate level of scrutiny applied. If the court finds the government property to be a traditional or limited public forum, it will subject all content-based decisions to strict scrutiny.\textsuperscript{84} In nonpublic fora, though, content-based regulations must be reasonable—"consistent with the [government's] legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated'"\textsuperscript{85}—and not viewpoint-

\textsuperscript{83} Perry, 460 U.S. at 46. The Court reiterated this analytical scheme in Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788 (1985), which upheld the exclusion of legal defense and public advocacy groups from participation in a charity drive in federal offices. See id. at 802-03. The Supreme Court continues to apply the Perry doctrine. See Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2516-17 (1995) (describing Court's prior treatment of viewpoint discrimination); ISKCON, 505 U.S. at 679-80 (detailing cases which provide guidance on defining public forum).

\textsuperscript{84} See supra notes 81-82 and accompanying text.


\textsuperscript{86} See supra notes 81-82 and accompanying text.
based. Thus, in a nonpublic forum, the government may institute a content-based ban on all artwork, for example, that deals with the subject of abortion. They may not, however, permit paintings that espouse a pro-life message without also allowing the display of pro-choice art. As discussed below, this distinction becomes crucial in the resolution of public art disputes, which typically will take place in nonpublic fora.

B. The (Mis?)Application of the Public Forum Doctrine to Art in Public Spaces

The case law governing restrictions on private art in public spaces is relatively limited, given the breadth and intensity of the controversy in this area. To date, only seven federal cases deal directly with limits on noncommercial, secular art displayed on government property. Of those, four apply categorical public forum analysis to the

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86 See supra note 83 and accompanying text.
87 See Finley v. National Endowment for the Arts, 100 F.3d 671, 683 (9th Cir. 1996) (invalidating grant scheme under which government could favor “decent” depictions of American flag over those that “demonstrated disrespect for ‘the diverse beliefs and values of the American public’”).
88 See infra Part II.B.2.b.
89 See discussion supra Part I.

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Certain categories of related cases are not considered in depth in this Note for various reasons. Commercial art, for example, enjoys reduced First Amendment protection (as does commercial speech generally). See, e.g., Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2390, 2397 (1996) (upholding part of law permitting cable systems operators to prohibit patently offensive or indecent programming on leased access channels, but invalidating same law as applied to noncommercial public access channels); Lebron v. National R.R. Passenger Corp. (Amtrak), 69 F.3d 650, 660 (2d Cir.) (upholding ban on “political” billboards in commercial advertising space), amended by 89 F.3d 39 (2d Cir. 1995), cert. denied, 116 S. Ct. 1675 (1996).

paradigmatic case of private art displayed in a public building. Two occurred before Perry, and therefore employ markedly divergent methods of analysis, and one involves a government-commissioned (rather than privately-owned) work and speaks to the central issues of this Note only in dicta.

On the whole, these cases represent a consistent misapplication of the public forum doctrine, usually at the expense of artistic expression. The courts engaged in result-oriented jurisprudence, capitalizing on the inherently ambiguous nature of art speech to permit government officials, and the judges themselves, to substitute their personal moral judgments for more neutral, objective criteria.

1. Forum Determination

As noted above, the first question judges must consider in evaluating the propriety of restrictions on art in public spaces is the nature of the forum in dispute. This threshold issue often controls the final resolution of a case, since a finding of a nonpublic forum allows the government great discretion in limiting speech. In theory, the forum determination should be made without regard to the contested expression; it should depend only on the government's purpose and historical use of the property. In practice, though, courts frequently have tailored the forum determination to meet their subjective judgments about the value or offensiveness of the art at issue.

In the vast majority of cases, artists, like litigants in public speech disputes generally, have found it exceedingly difficult to obtain a

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94 See supra notes 83-87 and accompanying text.
95 See supra note 85 (describing appropriate analysis for forum determination).
96 See, e.g., Schutte, supra note 70, at 581 n.132 (noting that "since 1983, signifying the ascent of modern forum doctrine methodology, the Court has concluded in every case involving the public forum doctrine that the publicly-owned property was a nonpublic forum, warranting only rational basis review").
97 For the most part, traditional public fora are now limited to streets and parks. See Frisby v. Schultz, 487 U.S. 474, 480-81 (1988); Hague v. CIO, 307 U.S. 496, 515 (1939). Even certain sidewalks are no longer accepted as public fora without question. See United
traditional or limited public forum determination. In *Piarowski v. Illinois Community College*, for example, the Seventh Circuit, after

States v. Kokinda, 497 U.S. 720, 730, 737 (1990) (noting that post office's sidewalks are not open to First Amendment activity). The limited public forum category is also shrinking at an alarming rate, as the objective "compatibility" test employed for a brief period during the 1970s, see Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972) (noting that "crucial question" for free speech analysis is compatibility of speech with "the normal activity of particular place at particular time"), has fallen to a subjective "government intent" standard. See Schutte, supra note 70, at 578 (explaining that after *ISKCON*, "the test for determining a 'new' property's forum status is government intent"). Under the latter standard, the government can avoid a limited public forum designation simply by showing that a forum's "primary purpose" is something other than providing an arena for open discourse. See *ISKCON*, 505 U.S. 672, 682 (1992); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). Thus, under the current scheme, courts might not characterize a property as a traditional or limited public forum even if "members of the public are permitted freely to visit a place owned or operated by the Government." Green v. Spock, 424 U.S. 828, 836 (1976); see also *ISKCON*, 505 U.S. at 680 (holding airport terminal not public forum for speech activity). Nor may the courts find a public forum when the government allows certain outsiders occasional expressive use of the forum. See id. at 680-81 (finding purpose of terminal is "facilitation of passenger air travel, not the promotion of expression"); Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974) (holding that transit advertising space can be utilized without creating public forum).

This Note focuses primarily on instances in which the government has opened public property specifically for the display of art. As such, it does not concentrate on wholly voluntary artistic expression in traditional public fora, such as parks and streets. Of course, the forum determination in those cases is seldom an issue, and the disputes there usually revolve around the propriety of the government's time, place, and manner restrictions. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781 (1989) (amplified music concert in park); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (round-the-clock vigil in public park); Naturist Soc'y, Inc. v. Fillyaw, 958 F.2d 1515 (11th Cir. 1992) (nude sculpture in park); Comite Pro-Celebracion v. Claypool, 863 F. Supp. 682 (N.D. Ill. 1994) (statue in park); Committee for a Sane Nuclear Policy v. City of Indianapolis, 668 F. Supp. 1211 (S.D. Ind. 1987) (painting human silhouette shadows on sidewalk); University of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200 (D. Utah 1986) (shanties on college campus). Even in parks, however, a court may find the property to be a nonpublic forum if it is narrowed significantly by a government program or policy. See, e.g., Community for Creative Non-Violence v. Hodel, 623 F. Supp. 528, 533 (D.D.C. 1985) (finding annual "Christmas Pageant of Peace" in park to be nonpublic forum, even though park opening is public forum).

Some related art cases have also produced limited public forum findings. See, e.g., Amato v. Wilentz, 753 F. Supp. 543, 555 (D.N.J. 1990) (holding access to New Jersey Supreme Court building for filming movie, rather than for display, to be limited public forum), vacated on other grounds, 952 F.2d 742 (3d Cir. 1991).

In one leading art in public spaces case, Serra v. United States General Services Administration, 847 F.2d 1045 (2d Cir. 1988), the Second Circuit Court of Appeals did not reach a forum determination. In that case, the court upheld the government's removal of commissioned abstract sculpture from the Federal Plaza in downtown Manhattan. The court found the government's ownership of the work (as the result of its commission to the artist) to be dispositive of the case, but stated in dicta that, even if the artist retained some First Amendment rights, the removal was permissible. See id. at 1049. On the issue of forum determination, the court noted, "We need not decide whether Federal Plaza is a public forum because, even in a public forum, expression is subject to reasonable time, place, and manner restrictions." Id. at 1049 n.1.

759 F.2d 625 (7th Cir. 1985).
finding a college art gallery to be a nonpublic forum,99 permitted the removal of several sexually charged stained-glass windows.100 Likewise, a district court in Claudio v. United States101 determined the lobby of a federal courthouse to be a nonpublic forum, upholding the government's removal of a painting entitled "Sex, Laws & Coathangers."102 The Claudio court disregarded compelling evidence of the government's intent to create a limited public forum in the lobby,103 and instead molded its forum analysis to reflect the judge's

99 The court explained that, although the college had sometimes invited outside artists to display their work, the gallery was not "generally available" for such purposes. See id. at 629. "Occasional use by outsiders," the court concluded, "is not enough to make a college art gallery a public forum." Id. (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).

100 The court described the controversial windows as follows:
One depicts the naked rump of a brown woman, and sticking out from (or into) it a white cylinder that resembles a finger but on careful inspection is seen to be a jet of gas. Another window shows a brown woman from the back, standing, naked except for stockings, and apparently masturbating. In the third window another brown woman, also naked except for stockings and also seen from the rear, is crouching in a posture of veneration before a robed white male whose most prominent feature is a grotesquely outsized phallus (erect penis) that the woman is embracing.

Id. at 627.


102 Claudio I, 836 F. Supp. at 1222, 1225.

103 After a cursory inquiry into the government's policy, practice, and intent, the court concluded that "the individual defendants were acting in a discretionary capacity with regard to a non-public forum." Id. at 1225. In so doing, the court disregarded the purposes of the Public Buildings Cooperative Use Act of 1976 (PBCUA), Pub. L. No. 94-541, 90 Stat. 2505 (codified as amended at 40 U.S.C. §§ 490, 601, 605, 611, 612a and 42 U.S.C. §§ 3331, 4231 (1994)), which evidenced clear legislative intent to open certain federal buildings to artistic expression, and the Federal Property Management Regulations (FPMR), 41 C.F.R. §§ 101-20.400 to .409 (1996). See, e.g., 40 U.S.C. § 490(a)(17) (1994) ("mak[ing] available, on occasion, . . . auditoriums, meeting rooms, courtyards, rooftops, and lobbies of public buildings to persons, firms, or organizations engaged in cultural, educational, or recreational activities [including "fine art exhibits," see 40 U.S.C. § 612a(6) (1994)] . . . that will not disrupt the operation of the building"). The Claudio court interpreted FPMR language providing access "for the occasional use of public areas for cultural, educational and recreational activities," 41 C.F.R. § 101-20.400 (1996), to mean that the government had no intention of opening a limited public forum, since "occasional use" meant something significantly less than unrestricted access. Claudio I, 836 F. Supp. at 1224. This ignored, however, the fact that the FPMR specifically enumerate six narrow bases on which a permit may be disapproved or canceled. See 41 C.F.R § 101-20.403(a) (1996). The limited nature of these exceptions implies that, under usual circumstances, the government is prohibited from restricting access to the fora covered. See National Treasury Employees Union v. King, 798 F. Supp. 780, 787 (D.D.C. 1992) (examining PBCUA and FPMR and holding that "[b]y promulgating regulations that govern speech and by recognizing that the [government property to which access was sought] constitute[s] public areas for purposes of those regulations, defendants have clearly exhibited an intent to create a public forum under the First Amendment").
distaste for the "vulgar and inappropriate" painting under consideration.

Conversely, innocuous works of art have benefited from favorable forum decisions. In Sefick v. City of Chicago, for example, a district court treated the lobby of a civic center as a limited public forum in order to protect the temporary display of a satirical sculpture. Central to the Sefick decision was the court's conclusion that the sculpture—a political indictment of then-mayor Michael Bilandic—was relatively harmless to viewers. In the unpublished opinion, Bellospirito v. Manhasset Public Library, another district court made a similar forum determination to prohibit the removal of paintings of "semi-nude females" from the community room of a public library. In safeguarding art that it described as "fairly innoc-

104 Claudio II, 836 F. Supp. at 1236. In making its forum determination, the court reasoned that the "larger-than-life depictions of a nude woman, a coathanger, and a fetus," id. at 1232, would be incompatible with the government's interest in "preserving a certain elevated level of decorum within (and upon) the walls of a building which houses federal judicial, executive, and administrative offices," Claudio I, 836 F. Supp. at 1225.


106 Although it was decided four years before the Supreme Court formalized the categorical public forum doctrine in Perry, see supra notes 75-87 and accompanying text, Sefick rested on reasoning very similar to the modern notion of a limited public forum, see Sefick, 485 F. Supp. at 648-50 (remarking that while city was "under no constitutional compulsion to provide" public display area, once it did so, city created a "constitutionally protected interest . . . which must be accorded full first amendment protection").

107 The court found that, in removing the sculpture, the city official impermissibly restricted access to a government forum based on her objection to the social-political content of the work. See Sefick, 485 F. Supp. at 651.

108 The Sefick court stated:

The sculptures, along with [a] tape recording, satirized the handling by then-mayor Michael Bilandic of the snow removal operation necessitated by the record snowfall that victimized the city of Chicago during the winter of 1979. The tableau depicted Bilandic seated in an easy chair with his wife, Heather, sitting on the arm of the chair. The tape recording continuously played the following statement:

Heather, Heather, I think it is still snowing out there, Heather. I think it is still snowing. God, it must be around eight feet now, isn't it, Heather? At least eight feet. . . . I don't know what to do. What do you think we should do, Heather?

Id. at 647.

Certainly, not everyone viewed the sculpture as "harmless"—least of all the city official who decided to remove it. In protecting the work, however, the court pointedly distinguished its "social-political content" from more sexually explicit material. See id. at 651. The court also noted that the tape recording—"the most objectionable part of the exhibit"—would likely be heard only "by those who sought to listen to it." Id. at 652.

109 No. 93-CV-4484 (E.D.N.Y. July 31, 1994).

110 See id. at 13-14 (finding library Community Room to be "public forum that has been opened to the general public for at least certain categories of speech" and therefore subject to "same standards as apply in a traditional public forum").

111 See id. at 3, 19.
uous,”112 the Bellospirito court stumbled through a confused, undis-
ciplined forum analysis to reach its desired outcome.113

As these cases show, it has been extremely difficult for artists to
obtain a traditional or limited public forum determination. As a re-
result, artists typically will be unable to avail themselves of the increased
 protections these determinations allow.114 This will be particularly

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112 Id. at 3.
113 The opinion makes a series of inconsistent references to the Supreme Court’s de-
cision in Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 394
(1993) (holding school board’s refusal to allow religious groups access to school facilities to
be unconstitutional viewpoint discrimination), never determining conclusively whether
Lamb’s Chapel involved a nonpublic or limited public forum.

In fact, the Supreme Court in Lamb’s Chapel never reached a definitive forum deter-
mination; instead, the Court applied nonpublic forum standards to declare the speech re-
striction at issue to be an unconstitutional exercise of viewpoint discrimination. See id. at
391-93 (“We need not rule on [the forum determination] . . . for even if the courts below
were correct [that the property was a nonpublic forum]—and we shall assume for present
purposes that they were—the judgement below must be reversed.”) If anything, Lamb’s
Chapel should be cited for its discussion of viewpoint neutrality and the permissibility of
speech regulations in nonpublic fora, and not to establish a property as a limited public
forum.

114 It is nonetheless worth noting the limitations imposed on government actors in trad-
tional or limited public fora.

For unsolicited artistic expression in traditional public fora (which is beyond the scope
of this Note, see supra note 97), the Supreme Court has held that content-based restric-
tions must be “necessary to serve a compelling state interest and . . . narrowly drawn to
achieve that end.” Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45
enforce regulations of the time, place, and manner of expression which are content-neutral,
are narrowly tailored to serve a significant government interest, and leave open ample
alternative channels of communication.” Id. Displays of art in limited public fora enjoy
the same protections as in traditional public fora, but the government need not open this
property to expressive speech at all. When it does, it may limit expression to particular
categories of speech or particular subjects. See Cornelius v. NAACP Legal Defense &
Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (stating that public forum may be created by
government designation of places for discussion of certain subjects (citing Perry, 460 U.S.
at 45, 46 n.7)); see also supra note 82.

Few courts have examined the extent of the government’s regulatory power in this
area, but several principles have emerged. First, according to Bellospirito, courts may not
prohibit the entire category of nude art in a limited public forum. See Bellospirito, 93-CV-
4484, slip op. at 16. This has yet to be tested by higher courts and may not withstand the
increasingly hostile attitude toward sexually explicit expression. See infra notes 118-25 and
accompanying text. Second, several courts have indicated the permissibility of government
regulation of artistic speech in a limited public forum on “aesthetic grounds.” The Serra
court made such a determination, see Serra v. United States Gen. Servs. Admin., 847 F.2d
1045, 1051 (2d Cir. 1988) (noting that “[t]o the extent that GSA's decision may have been
motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permis-
sible”), but only after finding the government-ownership issue to be dispositive, see id. at
1049, and concluding that “the primary reason” for the sculpture's removal was “to regain
the openness” of the Federal Plaza, see id. at 1050. Similarly, Piarowski noted in dicta that,
if the art in question were displayed in a public forum (rather than in a nonpublic forum),
relocation of “sexually explicit” material still would not violate the First Amendment.
true for controversial art, given the willingness of some members of the judiciary to allow art's content to shape their forum determinations. For purposes of this Note, then, the standards associated with government regulation of nonpublic fora are most relevant.

2. Restrictions in Nonpublic Fora

When government-owned property is characterized as a nonpublic forum, a court's inquiry focuses on whether government restrictions on public art are reasonable and viewpoint neutral. Difficulties here result from the unique, complex nature of artistic expression and interpretation, which blurs the line between content and viewpoint. This blurring of content and viewpoint permits some courts to tailor their analyses to comport with their subjective impressions of the art in dispute, as judges frequently take the following steps within the two-pronged reasonableness/viewpoint neutrality scheme. First, courts sanction as "reasonable" government restrictions that are motivated explicitly by the "controversial," "offensive," or "inappropriate" nature of the work, by looking to various First Amendment doctrines that permit the regulation of intrusive, unwanted speech. Second, having identified the content at issue to be amenable to regulation, courts then determine that the work in question expresses no discernible viewpoint and that the restrictions at issue are therefore free of viewpoint discrimination.

This section examines the validity of these judicial steps. The reasonableness inquiry and rationales for government regulation based on the "captive audience" and "sponsorship" theories of the First Amendment are explored first. This section then considers the second half of the analysis—whether a given restriction is viewpoint neutral.

a. Reasonableness. Speech restrictions in a nonpublic forum will be considered reasonable if they are consistent with the function and purpose of the forum involved. Official action enjoys considerable latitude under this analysis, and courts are likely to make a reasonableness finding in the face of any regulation that plausibly advances government interests. With art speech, judges tend to view all restrictions that curb the "offensive" content of paintings and

Piarowski v. Illinois Community College, 759 F.2d 625, 630 (7th Cir. 1985). Presumably, the court had in mind some notion of a time, place, and manner restriction, but it is unclear whether the admittedly content-based relocation would pass muster under this theory (which requires content neutrality).

115 See supra Part I.B.
116 See supra notes 75-83 and accompanying text.
117 See supra note 85.
sculpture as reasonable, ignoring the government interest in the appearance of public property.

Courts in public art cases justify the regulation of confrontational art on a number of grounds. First, some rely on the theory of the "captive audience." This seeks to balance the expressive rights of speakers with the rights of unwilling listeners by shielding the latter from "offensive" speech that invades substantial privacy interests. In Close v. Lederle, the court found such an "assault upon individual privacy" in the display of sexually explicit paintings in the corridor of a university's student union. Similarly, Piarowski relied on the prominent display of "sexually explicit and racially offensive art to justify the relocation of those works. In Claudio, the court justified the government's removal of a "vulgar, shocking and tasteless painting" on the grounds that the painting "was displayed in the direct line of vision of everyone who entered the Federal Courthouse."

While captive audience theory may appear a valid means of protecting unwilling viewers, the extent to which courts may regulate speech on this basis is far from settled. Although the Supreme Court has on numerous occasions sanctioned speech restrictions intended to protect the rights of listeners, it has consistently limited the application of captive audience theory to instances in which "substantial pri-

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118 See Tribe, supra note 70, at 948-49.
119 424 F.2d 988 (1st Cir. 1970).
120 Id. at 990 (quoting Redrup v. New York, 386 U.S. 767, 769 (1967)).
121 As described by the court, several of the paintings, "which fell short of unlawful obscenity," id. at 989, depicted "nudes, male or female, displaying the genitalia in what was described as 'clinical detail.' A skeleton was fleshed out only in this particular. One painting bore the title, 'I'm only 12 and already my mother's lover wants me.' Another, 'I am the only virgin in my school.'" Id. at 990.
122 Piarowski v. Illinois Community College, 759 F.2d 625, 632 (7th Cir. 1985). For the court's description of the stained-glass windows, see supra note 100.
123 See Piarowski, 759 F.2d at 631-32.
124 Claudio II, 836 F. Supp. 1230, 1235 (E.D.N.C. 1993), aff'd, 28 F.3d 1203 (4th Cir. 1994). In Claudio I, the court had described the painting as follows:

[T]he work bears a painting of a nude female and, attached to the canvas, a three-dimensional representation of a human fetus and a metal wire coathanger. The curved end of the coathanger is partially straightened, and the coathanger appears to be dripping blood. The work measures approximately ten feet long by seven feet high.

125 Claudio II, 836 F. Supp. at 1235.
vacy interests are being invaded in an essentially intolerable manner.”127 Given the limited and unpredictable scope of captive audience doctrine which, for the most part, is targeted at unwanted speech that invades the home,128 the rationale becomes a dangerous tool in the hands of a court in search of a justification for speech restrictions.

A similar problem arises when courts justify public art restrictions as necessary to avoid the perception that the government endorses the message conveyed by the work. Both Piarowski and Claudio employ a version of the “sponsorship” theory to establish the reasonableness of the government restriction at issue.129

The Piarowski/Claudio approach is both theoretically unsound and doctrinally deficient. While the government has some interest in distancing itself from unpopular views, fear of endorsement sets the state on a dangerous course.130 A broad acceptance of sponsorship

127 Cohen v. California, 403 U.S. 15, 21 (1971); see also Consolidated Edison Co. v. Public Serv. Comm' n, 447 U.S. 530, 541 (1980) (holding that commission could not bar utility from enclosing controversial political messages in its billing and stating that "less stringent analysis [than Cohen] would permit a government to slight the First Amendment's role in affording the public access to discussion, debate, and the dissemination of information and ideas") (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978))). Even in Pacifica, a case relying on captive audience theory to limit indecent radio broadcasts, the plurality remarked that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." Pacifica, 438 U.S. at 745.

128 See, e.g., Tribe, supra note 70, at 948 (“Outside the home, the burden is generally on the observer or listener to avert his eyes or plug his ears against the verbal assaults, lurid advertisements, tawdry books and magazines, and other 'offensive' intrusions which increasingly attend urban life.” (citing Cohen, 403 U.S. at 21)); William Cohen, A Look Back at Cohen v. California, 34 UCLA L. Rev. 1595, 1614 (1987) (noting that under captive audience case law “the relevance of a captive-offended-audience argument becomes dependent on an infinite variety of circumstances in different contexts”); see also Erznoznik v. Jacksonville, 422 U.S. 205, 209-12 (1975) (concluding that “the limited privacy interest of persons on the public streets cannot justify . . . censorship of otherwise protected speech on the basis of its content”).

129 See Piarowski v. Illinois Community College, 759 F.2d 625, 631 (7th Cir. 1985) (reasoning that “[i]f the college had done nothing it might have been thought to be endorsing the windows by allowing them to be displayed so prominently right off the main thoroughfare, and near the main entrance, of the college”); Claudio II, 836 F. Supp. at 1235 (distinquishing Cohen, and finding that, because “the offensive expression literally was physically attached to the courthouse itself, and it was so large and situated in such a location that anyone entering the Federal Building had to look at it,” a viewer could have attributed its message to government).

130 See, e.g., Comite Pro-Celebracion v. Claypool, 863 F. Supp. 682, 688-89 (N.D. Ill. 1994) (noting that “[i]f [First Amendment rights] could be exercised only when government is willing to offer its co-sponsorship to the speaker, a system of free expression would be indistinguishable from a system of prior restraint.’ . . . The First Amendment was designed to protect the voice of the people, not of the government.” (quoting Women Strike for Peace v. Morton, 472 F.2d 1273, 1280 (D.C. Cir. 1972) (Wright, J., concurring))).
theory would effectively silence any extreme, daring private speech on government property.

In the context of specific constitutional prohibitions on government endorsement—for example, the Establishment Clause of the First Amendment\(^{131}\)—the Supreme Court has been increasingly unreceptive to sponsorship claims.\(^ {132}\) If sponsorship theory is unpersuasive in the religion setting, then it is much less compelling for allegedly offensive speech. But even if the theory retains some validity for non-religious public art, the government may avert any danger by explicitly disclaiming sponsorship of the works.\(^ {133}\) In any event, neither \textit{Piarowski} nor \textit{Claudio} provides any indication of how similar claims should be adjudicated in the future.

\textbf{b. Viewpoint Discrimination.} After the Court decides that the restrictions are reasonable, it then subjects art speech regulation to the final hurdle of viewpoint neutrality. In considering this prong of public forum analysis, courts tend to downplay the malleable content-based justifications used in the reasonableness inquiry. The public art decisions ultimately take an overly-detached stance, finding the “viewpoint” of controversial works hopelessly indeterminate.

Since “political” speech frequently is considered vital to the First Amendment’s mission,\(^ {134}\) judges often deny the existence of a work of art’s “viewpoint” by noting the absence of such a message. In \textit{Close}, for example, the court declared, “There is no suggestion, unless in its cheap titles, that plaintiff’s art was seeking to express political or social thought.”\(^ {135}\) This finding, the court assumed, logically led to the

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  \item \textsuperscript{131} That clause states, “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I.
  \item \textsuperscript{132} For instance, in Capitol Square Review & Advisory Board \textit{v. Pinette}, 115 S. Ct. 2440 (1995), the Court refused to allow state officials to bar the Ku Klux Klan’s private religious display (a cross) in a public plaza. The Court explained that the possibility that some viewers might falsely assume official endorsement of the display was insufficient to permit restrictions on private speech. See id. at 2448 (plurality opinion). Justice Scalia explained that, although the cross was erected very “close to the symbols of government,” free speech guarantees cannot be abrogated “whenever private speech can be mistaken for government speech.” Id.
  \item \textsuperscript{133} The regulations in \textit{Claudio} provide that the government may disclaim sponsorship. See 41 C.F.R. § 101-20.409 (1996); see also \textit{Pinette}, 115 S. Ct. at 2450 (“If [the state] is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such.”); Amato \textit{v. Wilentz}, 753 F. Supp. 543, 558 (D.N.J. 1990) (holding that disclaimer satisfies government interest in not being mistakenly associated with speech activities on public property), vacated on other grounds, 952 F.2d 742 (3d Cir. 1991).
  \item \textsuperscript{134} See supra note 57.
  \item \textsuperscript{135} \textit{Close v. Lederle}, 424 F.2d 988, 990 (1st Cir. 1970). For a description of the works and titles at issue in \textit{Close}, see supra note 121.
\end{itemize}
conclusion that the "plaintiff's constitutional interest" was "minimal." The Piarowski court relied on similar findings to justify the government's removal of the artwork at issue. Distinguishing the obvious political message protected in Sefick, Judge Posner explained, "Piarowski intended no political statement by the content and coloring used in his windows, no disparagement of women or blacks, no commentary on relations between the sexes or between the races. The windows were art for art's sake." The Claudio court was similarly strict in its requirement of an easily-identifiable political message, noting, "Indeed, Claudio's course of conduct suggests, not that he desired to express a viewpoint, but that he sought to vex the Government and to generate such self-serving notoriety as might be attendant to this dispute." The court concluded, "It is impossible to perceive the artist's viewpoint regarding abortion by looking at the painting; the painting is ambiguous in its position on abortion and likely was designed that way."

These opinions thus recognize a broad category of artistic content that is vague enough to avoid the prohibitions on viewpoint discrimination but sufficiently "shocking" to regulate in a constitutionally permissible way. In both Close and Claudio, for example, the courts factored into their analyses the "controversial" nature of the art in question. Similarly, Piarowski's approval of the university's conduct rested, in part, on a finding that the works at issue were "sexually explicit and racially insulting." As noted above, these concerns were deemed reasonable enough to justify substantial art speech regulation. But this begs the question: From what did the government wish to protect its captive audience? What message did it wish not to endorse?

Of course, courts reasonably may find a content-based speech regulation to be viewpoint neutral under current public forum analysis; in fact, content-based restrictions are generally upheld in nonpublic fora. Perhaps the disputed content indeed contained no idea or

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136 See Close, 424 F.2d at 990.
137 See Piarowski v. Illinois Community College, 759 F.2d 625, 632 (7th Cir. 1985) (distinguishing Sefick v. City of Chicago, 485 F. Supp. 644 (N.D. Ill. 1979)).
138 Id. at 628.
139 Claudio II, 836 F. Supp. 1230, 1236 n.2 (E.D.N.C. 1993), aff'd 28 F.3d 1208 (4th Cir. 1994).
140 Id. at 1236.
141 See Close, 424 F.2d at 989; Claudio II, 836 F. Supp. at 1235.
142 Piarowski, 759 F.2d at 632.
143 See supra notes 98-104 and accompanying text.
144 Expression seldom is saved from facially viewpoint neutral restrictions when courts employ the deferential, rational basis standard of review articulated in Perry. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49-53, 54 (1983) (finding no
thought whatsoever. Nonetheless, courts have an obligation to determine whether assertions of viewpoint neutrality are merely pretextual justifications for impermissible state conduct. With artistic expression, certain content-based regulations (e.g., "aesthetic" concerns) will indeed pass constitutional muster. The inherent subjectivity of artistic speech, however, helps shield the government from searching judicial inspection. Too often, courts use any uncertainty about a work's message or its audience's ability to "understand" the art to dismiss the suggestion of viewpoint discrimination.

Even worse, sympathetic judges may ignore the government's blatantly viewpoint-based judgments by recharacterizing the state's reasons for regulating works of art. Such was the case in Claudio, where federal officials had stated publicly their reasons for revoking the artist's permit, writing, "Although your display may be in the form of art it is more properly described as a political expression concerning the highly controversial issue of abortion. Since your work is considered to be political in nature it is not permitted on federal property and your license is hereby revoked." As "political" speech generally enjoys heightened protection under the First Amendment, this indication that school board intended to discourage one viewpoint to advance another); see also Greer v. Spock, 424 U.S. 828, 838-39 (1976) (holding that military regulation prohibiting partisan political speeches did not discriminate based on candidates' views); Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974) (finding ban on political advertising in city buses not "arbitrary, capricious, or invidious"); Lee, supra note 81, at 774 ("[T]he minimal scrutiny generally applied to nonforum subject-matter cases ensures that the Court will not detect viewpoint discrimination.")

However, judicial vigilance in this area has been surprisingly active in recent years, and it is uncertain how far the Supreme Court will expand its definition of "viewpoint" in the near future. See Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2517 (1995) (invalidating as viewpoint discrimination university regulation that "selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints"); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392 (1993) (holding that government conduct denying all religious speakers access to school property while granting nonreligious groups such access constitutes viewpoint discrimination).

145 As the Supreme Court warned in Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788 (1985), "the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers." Id. at 812.

146 See discussion infra Part III.

147 In Piarowski, the disputed artwork mirrored the style of Aubrey Beardsley, a distinguished fin de siècle illustrator. See Piarowski v. Illinois Community College, 759 F.2d 625, 627 (7th Cir. 1985). In his description of the windows, Judge Posner offers an elitist account of the potential audience for the works: "Prairie State College serves a community in which Aubrey Beardsley is not a household word; almost half the students are night students, three-fourths are part-time rather than full-time students, and the college has no admission requirements." Id. at 628. Posner thus implies that insufficient audience comprehension reduces the constitutional protections to which artistic expression is entitled.

ficial declaration of motive would seem to demand a favorable verdict for the artist. Instead, Chief Judge Fox ignored the statement, explaining, “The court is not convinced that the defendants are limited or are constrained by their stated ‘reasons’ for revoking the license or their attempts to defend those reasons in this lawsuit.”\textsuperscript{149} The court accepted the government’s subsequent explanation that the removal of the work was necessary to protect the security of the building,\textsuperscript{150} despite the lack of any factual support for this contention. In his deferential summary of the government’s motives, Chief Judge Fox finally betrayed his personal distaste for the work, opining that the defendant’s use of the “words ‘political expression,’ ‘controversial,’ and ‘obscene’ demonstrate his fumbling attempts, \textit{shared more recently by this court}, to articulate the inarticulable inappropriateness of the painting to the forum.”\textsuperscript{151}

Courts can avoid (or at least mitigate) the problems raised above by reevaluating viewpoint discrimination concerns in light of the unique nature of artistic expression. Under the present public forum doctrine, judges and government officials may indeed find a lack of perceptible viewpoint in the art in dispute. When this conclusion, however, is coupled with claims that the work is sufficiently “controversial,” “offensive,” or “inappropriate” to merit regulation, courts should cast a suspicious eye. In such circumstances, the government should bear the burden of proving that these assertions are not simply pretextual justifications for viewpoint suppression. If nothing else, this will require courts to take seriously any factual, concrete evidence of impermissible motives.

Even subjected to this heightened standard, the government can still exercise undue control over the messages conveyed through public art. For example, government officials opposed to abortion arguably could institute an art policy banning abortion-related subject matter while permitting images of adoption centers or traditional nuclear families.\textsuperscript{152} Similarly, administrators favoring strict gun control could formulate art guidelines prohibiting hunting scenes while sanctioning the depiction of firearms used against other people.\textsuperscript{153} By

\textsuperscript{149} Id. at 1235.
\textsuperscript{150} See id. at 1235-36.
\textsuperscript{151} Id. (emphasis added).
\textsuperscript{152} Such a policy would advance the interests of the GSA officials in the \textit{Claudio} dispute. See supra notes 101-04 and accompanying text. In the face of a nonpublic forum determination (as in \textit{Claudio}), that policy might survive judicial scrutiny even under the stricter standards proposed in Part II.
\textsuperscript{153} This example is not so far-fetched. For example, the Fairfax County Art Guidelines, discussed supra note 49, initially declared that “[n]udes, weaponry, drug paraphernalia, and works which reflect violence, religious scenes, political expression or unpatriotic sub-
couching these regulations in terms of content (e.g., "no depictions of hunting") rather than viewpoint (e.g., "no depictions that oppose gun control"), government officials could insulate their viewpoint-based actions from constitutional scrutiny.

As long as the public forum doctrine relies on distinctions between political and nonpolitical, between content and viewpoint, it poses profound problems for art speech. If courts continue to apply conventional categorical labels to artistic expression, the nuanced, nonrational aspects of that communication will be underprotected.\(^{154}\) The next Part seeks to fashion a new approach to regulation of public art, one that is sufficiently attentive to First Amendment concerns without slighting genuine government interests.

III

**NEUTRAL DISPLAY: AN ALTERNATIVE TO PUBLIC FORUM ANALYSIS**

As Part II demonstrated, the public forum doctrine fails to safeguard artistic freedom. It must be replaced by a simpler analytic scheme that, while acknowledging the government's interest in maintaining and beautifying its property, prohibits the discriminatory subsidization of a vital form of public speech. One possible solution is the neutral display approach presented here, under which government

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\(^{154}\) See supra note 63. As Barbara Hoffman explains,

> The result of [recent] decisions is that artistic expression is afforded full protection only when the Court perceives that the artist has an evident political message or has dealt with a matter of public concern. In considering the government's asserted justifications for limiting free speech against complete freedom of expression, the courts have afforded more weight to political speech than symbolic speech. The danger in these trends is that artistic expression, particularly in less traditional formats or media, may be seen as somewhat more marginal in value and deserving of less protection.

Hoffman, supra note 6, at 62; see also Hamilton, supra note 21, at 106 ("The Court's treatment of the Speech Clause tends to devalue the extrarational, nondiscursive elements of art because its doctrine places so much freight upon ideas. . . . The marketplace of ideas paradigm, which permeates the speech cases, tends to undervalue art by only recognizing its political, rational, discursive potential."); Nahmod, supra note 21, at 235 ("[A]ny first amendment theory that does not explicitly account for the nature and functions of artistic expression is to that extent inadequate.").
regulation of public art display would be limited to judgments based on artistic merit.155

Neutral display draws inspiration from two recent NEA cases and the theoretical foundations underlying those decisions. The theory suggests that art, like other unique spheres of expression (including academic speech and journalism), is so central to First Amendment values that it should enjoy heightened protection from nonneutral influences.156 Coupled with the inability of traditional categorical doctrines to accord art speech its due constitutional importance,157 this theory proffers neutral display as a viable alternative to public forum analysis.

A. Neutrality in Arts Funding: Lessons from the NEA Cases

Providing government property for the display of private art is, in effect, a powerful form of government subsidy. Accordingly, this Note turns to other areas of public art subsidy for doctrinal guidance in the display context.

Since 1965, government support for the arts has been most visibly and powerfully embodied in the National Endowment for the Arts, a federal agency dedicated to funding private art in the United States.158 The NEA strives for independent artistic excellence with a three-tiered grantmaking process in which applications for funding go first to a peer review panel, then to the National Council on the Arts (a group of private citizens with artistic expertise appointed by the President and confirmed by the Senate), and ultimately to the Chairperson of the NEA for final approval.159 Despite Congress's attempts to insulate the grantmaking process from political pressures,160 in recent years the NEA has been the subject of intense public debate, contro-
versy, and litigation. As a result, several lower courts recently have had occasion to examine the constitutional limitations on government control over public art subsidies.

In October 1989, Congress amended the National Arts Funding Law to require that grants not be used for the promotion, dissemination, or production of materials "considered obscene," which may include works depicting "sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." In addition, the NEA added a certification condition to its application, requiring recipients to certify that no NEA funds would be used "to promote, disseminate, or produce materials which in the judgment of the NEA . . . may be considered obscene." The amendments arose in the wake of two controversial (and highly publicized) NEA grants: one, to Andres Serrano, who received federal support for his "Piss Christ" photograph, which featured a crucifix submerged in a jar of the artist's urine; and the other, to Robert Mapplethorpe, who frequently photographed homosexual and sadomasochistic practices.

Shortly after the 1989 amendments, several artist groups mounted a legal challenge to the obscenity oath. In Bella Lewitzky Dance Foundation v. Frohnmayer, a federal district court struck down the oath as unconstitutionally vague, reasoning that, among other things, obscenity determinations must be left to the courts, not to administra-

161 See Finley, 100 F.3d at 683-84 (holding that NEA's "decency and respect" standard for grant applications was unconstitutional); Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 785 (C.D. Cal. 1991) (holding that NEA's requirement that grant recipient not use funds to produce obscene material was unconstitutional); see also supra note 8 (citing extensive legal commentary on NEA controversies).


163 Id.


tive agencies. The court deemed the certification requirement to be an unconstitutional condition and intimated that while NEA funding was not constitutionally mandated, once the NEA engaged in support of private expression, it could not condition that support on impermissible criteria.

One year later, another judge in the same district expanded on the Bella Lewitzky principles by holding the NEA to a standard of strict neutrality. In Finley v. National Endowment for the Arts, four performance artists sued the NEA when, despite unanimous approval from the Performance Artists Program Peer Review Panel, the agency denied them funding. The artists also challenged the newly enacted "decency clause" in the NEA's enabling legislation, which required that grant applications be judged "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

The NEA moved for summary judgment, relying on the Supreme Court's decision in Rust v. Sullivan, a case decided shortly after Bella Lewitzky. In Rust, the Court upheld the so-called gag rule, which prohibited federally funded family planning clinics from discussing abortion with their clients. The NEA argued that Rust had cabined the "unconstitutional conditions" doctrine to such an extent that federal arts grants were now immune from the plaintiffs' challenges.

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166 See id. at 781-82 (finding that requirement of jury of citizens applying community standards was lacking in administrative adjudications).
167 The court explained that "the government may well be able to put restrictions on who it subsidizes, and how it subsidizes, but once the government moves to subsidize, it cannot do so in a manner that carries with it a level of vagueness that violates the First and Fifth Amendments." Id. at 784-85 (citing Perry v. Sindermann, 408 U.S. 593 (1972)).
168 795 F. Supp. 1457 (C.D. Cal. 1992), aff'd, 100 F.3d 671 (9th Cir. 1996).
169 See id. at 1462.
172 See id. at 203.
173 In upholding the restriction at issue, the Court in Rust explained that the regulation still permitted grant recipients to speak freely on their own time and with their own resources. See id. at 198-99. The Court noted, "The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights." Id. at 198. On the other hand, the Court reasoned that a condition is unconstitutional when "the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." Id. at 197. One commentator has read this analysis to "limit[] unconstitutional conditions to situations where the condition on a benefit extends beyond the scope of the benefit itself." Cole, supra note 26, at 685.

Although Rust appears to allow the government greater power to attach restrictive conditions to government benefits, the opinion suggests three important limitations. First, the government conditions may not effectively serve to "suppress[ ] a dangerous idea." Rust, 500 U.S. at 194. Second, the state may not enact "a general law singling out a disfa-
challenges. Nonetheless, the court denied the NEA’s motion, citing Rust’s call for heightened protection of “traditional sphere[s] of free expression . . . fundamental to the functioning of our society.” Then-District Judge Tashima found the arts to be one such “traditional sphere of free expression” and held that the plaintiffs had a cognizable claim relating to the allegedly content-based denial of their grant applications.

More importantly the Finley court ultimately struck down the “decency clause” as facially overbroad. Analogizing to the Supreme Court’s press and academic freedoms jurisprudence, the court declared that “[a]rtistic expression, no less than academic speech or journalism, is at the core of a democratic society’s cultural and political vitality.” The court acknowledged that “some content-based decisions are unavoidable,” but limited those choices to neutral aesthetic criteria: “[P]rofessional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of ‘decency’ are not.”

On appeal, the Ninth Circuit affirmed in a 2-1 decision, reiterating that art is a “traditional sphere of free expression” deserving of exacting neutral treatment. The Finley majority adopted the district court’s analysis of art’s central place in democratic society with fresh support from the Supreme Court’s recent decision in

74 See Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1463 (C.D. Cal. 1992), aff’d, 100 F.3d 671 (9th Cir. 1996).

75 Id. at 1473 (quoting Rust, 500 U.S. at 200).

76 Id. (quoting Rust, 500 U.S. at 200).

77 See id. at 1464.

78 See id. at 1476.

79 Id. at 1473; see also id. at 1473 n.19 (citing Leathers v. Medlock, 499 U.S. 439 (1991)) (neutrality in journalism); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (neutrality in academics).

80 See Finley v. National Endowment for the Arts, 100 F.3d 671, 681 (9th Cir. 1996). The court invalidated the NEA’s “decency and respect” provision on both vagueness and viewpoint discrimination grounds. See id. at 683-84.

81 See id. at 682.
Rosenberger v. Rector & Visitors of the University of Virginia. In Rosenberger, the Court invalidated a university regulation that withheld authorization for payments from a student activities fund on behalf of a religious student newspaper. Relying on Rosenberger's expansive reading of viewpoint discrimination and the First Amendment's application to subsidized speech, the Finley majority concluded that the NEA's "decency and respect" provision violated the viewpoint neutrality required of arts funding. In fashioning speech-protective rules specifically tailored to government support of the arts, then, the NEA cases offer formal judicial recognition of the unique importance of free artistic expression. These decisions, like the free press and education cases on which they rely, argue for heightened neutrality when the government funds certain forms of valued expression—what Professor David Cole refers to as "spheres of neutrality." From the NEA cases and the spheres of neutrality

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185 See id. at 2520.
186 In Finley, the majority applied Rosenberger's "recent teaching on viewpoint discrimination" to the NEA's "decency and respect" clause, which, like the disfavored treatment of the religious student newspapers in Rosenberger, would favor certain artistic viewpoints (e.g., "respectful" depictions of the American flag) over others (e.g., "indecent" flag art). See Finley, 100 F.3d at 682-83 & n.21.
187 See id. at 682 n.20 (noting that Rosenberger "took a much broader view of the First Amendment's applicability to subsidized speech" (citing Rosenberger, 115 S. Ct. at 2517)).
188 See id. at 683. The court also reiterated Rosenberger's finding that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." Id. (alteration in original) (quoting Rosenberger, 115 S. Ct. at 2519).
189 Both cases accord artistic expression heightened protection. See id. at 681-82 (finding that art "is a 'traditional sphere of free expression . . . at the core of a democratic society's cultural and political vitality'" (citations omitted); Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 783 (C.D. Cal. 1991) (protecting "creative expression of the plaintiff Dance Foundation" and discussing special "practical realities of funding in the artistic community").
190 While recognizing that neutrality mandates should not apply across the board to all government subsidies, Professor Cole urges a neutrality approach to those institutions that "play[] a central role in shaping and contributing to public debate." Cole, supra note 26, at 682. Government funding of the arts, Professor Cole argues, is one such institution "central to a system of free expression" that must "operate with a degree of independence from government control."
theory, one basic governing principle has emerged: Once the govern-
ment chooses to subsidize artistic expression, it must insulate its deci-
sions from the political process by evaluating works solely on artistic
merit. As explained below, this notion is similarly compelling in the
art display cases, where the neutrality concept should inform the adju-
dication of public art disputes.

B. The Neutral Display Approach

When deciding the extent to which the government may regulate
private artistic displays on public property, courts should abandon the
public forum doctrine and adopt an analysis of neutral display. Once
a government agent decides to solicit submissions for general dis-
play\(^{192}\) on public property, she may select, reject, or remove a work of
art from display only on the basis of its artistic merit.\(^{193}\) Any regula-
tion or restriction she imposes for a reason other than aesthetic qual-
ity violates the First Amendment.

This seemingly radical departure from established doctrine is mit-
gigated by a number of subsidiary rules. First, it should be noted that
neutral display only applies when the government decides to open its
property to artistic display; absent such a decision, putative public art-
ists cannot claim any access to government fora. Moreover, the gov-
ernment retains the power to decide when, where, and in what form to
show the requested art. Second, since government administrators may
reject any art they consider aesthetically unappealing, much “gro-
tesque,” “shocking,” or even “offensive” art can lawfully be restricted

\(^{192}\) This Note does not suggest that strict neutral display analysis be applied either to
special purpose displays, such as the “Enola Gay” exhibit at the Smithsonian Institute in
1995, or to government-commissioned works, such as Richard Serra’s “Tilted Arc” sculp-
ture. See infra notes 196-98 and accompanying text.

\(^{193}\) This Note envisions that judgments about artistic merit be made in a manner similar
to the decisionmaking process of the NEA. Ideally, this would involve the establishment
of local peer review panels insulated from the political process. Once government adminis-
trators open a particular public space for display, panel members would select works based
on artistic merit. Absent these review panels, aesthetic decisions would be made by gov-
ernment officials using the same considerations and criteria employed by NEA judges. See
supra Part III.A; see also Finley v. National Endowment for the Arts, 795 F. Supp. 1457,
1475 (C.D. Cal. 1992) (holding that with NEA grants “professional evaluations of artistic
merit are permissible, but decisions based on the wholly subjective criterion of ‘decency’
are not”), aff’d, 100 F.3d 671 (9th Cir. 1996).

Certainly, “artistic merit” is an elusive concept. Indeed, some think it impossible to
separate artistic merit from considerations of propriety, politics, and morality. See infra
note 223. However difficult it is to define “aesthetic value,” though, official regulation
couched in language commonly associated with artistic judgments seems considerably less
threatening to First Amendment ideals than decisions made in explicitly political and
moral terms. See infra notes 226-29 and accompanying text.
as artistically deficient.\textsuperscript{194} Third, the neutral display analysis does not apply to government speech, where strict neutrality is not and cannot be required.\textsuperscript{195} Accordingly, commissioned works—such as Richard Serra’s “Tilted Arc”\textsuperscript{196} or the controversial “Malcolm X Mural”\textsuperscript{197} at San Francisco State University—lie outside the rules of neutral display. Likewise, government-sponsored museum exhibits designed for a specific purpose—for example, the Smithsonian Air and Space Museum’s hotly contested “Enola Gay” exhibit\textsuperscript{198}—are beyond the purview of the neutral display scheme. Finally, the neutral display doctrine is limited by First Amendment jurisprudence, which permits government restrictions on speech that is legally obscene.\textsuperscript{199} is “harm-

\textsuperscript{194} If a government official asserts some nonaesthetic reason for regulating a work of art, the neutral display rule is violated. Of course, many viewpoint-based decisions can be couched in terms of artistic merit, and, in many respects the very notion of "aesthetic worth" is inherently problematic. This Note offers no solution to this dilemma, but, as argued below, see infra Part III.C, the censorship allowed by neutral display will prove considerably less pervasive than under prevailing First Amendment doctrine.

\textsuperscript{195} See Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2518-19 (1995) (distinguishing between situations where government “is the speaker or when it enlists private entities to convey its own message” and those where government “encourage[s] private speech”); Finley v. National Endowment for the Arts, 100 F.3d 671, 679 n.17 (9th Cir. 1996) (same).

\textsuperscript{196} See Serra v. United States Gen. Servs. Admin., 847 F.2d 1045, 1048 (2d Cir. 1988) (“[T]he First Amendment has only limited application in a case like the present one where the artistic expression belongs to the Government rather than a private individual.”).

\textsuperscript{197} In 1994, San Francisco State University’s Student Union Governing Board commissioned a local artist to paint a giant mural of Malcolm X on school property. See Steve Rubenstein & Ben Wildavsky, Battle of Brushes at S.F. State, S.F. Chron., May 26, 1994, at A1. The mural contained images that many viewed as anti-Semitic, and the surrounding controversy eventually led the university to cover the mural. At the time, Dorothy Ehrlich, executive director of the ACLU of Northern California, explained her view that the government-owned work was beyond the reach of the First Amendment: “This is really not a classic First Amendment dispute. The university has commissioned art, and it can decide to send it back . . . .” Id.

\textsuperscript{198} The exhibit sought to commemorate the fiftieth anniversary of the atomic bombing of Japan during World War II. After much protest by veterans’ groups, who complained that the display unfairly questioned the necessity and morality of Truman’s decision to bomb Hiroshima and Nagasaki, the Smithsonian canceled most of the exhibit. See, e.g., Karen De Witt, Smithsonian Scales Back Exhibit of B-29 in Atomic Bomb Attack, N.Y. Times, Jan. 31, 1995, at A1.

\textsuperscript{199} In Miller v. California, 413 U.S. 15 (1973), the Supreme Court established the now-famous three-part test for determining whether speech may be considered “obscene,” and therefore beyond the scope of First Amendment protection. Under Miller, the trier of fact must ask:

(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.

Id. at 24 (citations omitted).
ful to minors,²⁰⁰ constitutes child pornography,²⁰¹ or may fall into any other category of speech from which the Supreme Court removes constitutional protection in the future.²⁰²

The shift to neutral display analysis would address many of the First Amendment theoretical concerns described in Part I and the doctrinal problems outlined in Part II. Neutral display would avoid the general pitfalls of the public forum doctrine as currently applied to all speech by obviating the need for an initial forum determination²⁰³ and by eliminating the highly deferential reasonableness and viewpoint inquiries.²⁰⁴ Neutral display also would speak to the special concerns of artistic expression, which, because of its complex, often ambiguous message, is too easily censored under prevailing categorical speech doctrine.²⁰⁵ Under neutral display doctrine, government officials no longer would be permitted to regulate allegedly offensive artistic speech while simultaneously asserting that the work in question had no perceptible viewpoint;²⁰⁶ all administrative decisions would be based solely on artistic merit, so the existence or nonexistence of a work’s “message” would be irrelevant. With this new bright line, neutral display would effectively protect certain disfavored forms of art speech—including sexual art—that often are suppressed on the belief that they express no viewpoint.²⁰⁷

In the related context of public school libraries, the Supreme Court has noted that while school boards “rightly possess significant discretion to determine the content of their school libraries[,] . . . that discretion may not be exercised in a narrowly partisan or political

²⁰⁰ In Ginsberg v. New York, 390 U.S. 629 (1968), the Court upheld an obscenity law with language similar to the test established in Miller but tailored to protect child audiences. See id. at 633.

²⁰¹ In New York v. Ferber, 458 U.S. 747 (1982), the Supreme Court loosened the Miller test slightly for cases where minors are depicted in sexually explicit material. See id. at 760-61.

²⁰² In recent years, courts have rebuffed attempts to limit the First Amendment’s protection of hate speech, see, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 381-96 (1992) (striking down local bias-motivated crime ordinance as facially invalid because it regulated on the basis of content), and “pornography” that allegedly subordinates women, see, e.g., American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 324-25, 332-34 (7th Cir.) (holding unconstitutional an ordinance that defined “pornography” without reference to the established constitutional standards for defining unprotected pornographic material), aff’d mem., 475 U.S. 1001 (1985). Were similar efforts to succeed in the future—an outcome in no way endorsed by this Note—neutral display analysis naturally would incorporate these changes.

²⁰³ See supra Part II.B.1.

²⁰⁴ See supra Part II.B.2.a-b.

²⁰⁵ See supra Part I.B.

²⁰⁶ See supra Part II.B.2.b.

²⁰⁷ See id.
In much the same way, government officials should be permitted to make content-based decisions about art that speaks to aesthetic enhancement, the core purpose of public display. However, when art regulation goes beyond beautification concerns to incorporate notions of "propriety" and "community values," it threatens to "cast a pall of orthodoxy"\(^\text{209}\) over the public display space. Accordingly, courts should insulate decisions over public art from political pressures.\(^\text{210}\) While neutrality is not required every time the government offers its property for some public use, the unique importance of artistic speech—recognized by, among other things, the NEA funding cases\(^\text{211}\)—demands such protection.

Because art speech is so essential to free and robust public debate, and because it is so difficult to categorize under traditional speech doctrines,\(^\text{212}\) it deserves heightened protection from nonneutral regulation. This is not to suggest, as some have argued,\(^\text{213}\) that art speech per se has some elevated status under the First Amendment. Rather, it merely posits that, in order to place artistic expression on equal footing with basic, more easily interpreted speech, a stricter neutrality mandate must be enforced.

C. Criticisms of Neutral Display

The neutral display analysis outlined above is susceptible to attack both from those who would prefer greater government regulation of public art and from those who would find neutral display insufficiently protective of artistic freedom. Each criticism is addressed briefly below.

First, some might view the departure from public forum doctrine as wholly inappropriate. These critics might contend that even if neutrality is appropriate in the funding context, it has no place in the display setting. Publicly displayed art, the argument goes, is meant to beautify, to please, and to soothe, not to shock and disturb audiences who need to use government spaces.\(^\text{214}\)

\(^{210}\) See supra note 191.
\(^{211}\) See supra Part III.A.
\(^{212}\) See supra Part I.A.
\(^{213}\) See supra note 35 (discussing Professor Hamilton's views on art's position within free speech theory); see also Hamilton, supra note 21, at 118 (calling for First Amendment adjudication that would recognize, in effect, "arts Establishment Clause," so that art would occupy essentially same position as religion).
\(^{214}\) Some public artists have incorporated this sentiment into their creative mission. See Siah Armajani, Shaping the New Sculpture of the Street, N.Y. Times, Sept. 22, 1985, at E22 ("[P]ublic art should not intimidate or assault or control the public. . . . The public artist is a
Ideally, public art would simultaneously beautify, inspire, and enlighten, without offending unwilling audiences. If it were possible to construct a legal test that could protect viewers' sensibilities while adequately safeguarding artistic expression, this Note would endorse such a proposal. However, complete reconciliation of these interests is impossible, and thus the neutral display approach is the most appropriate because, at the very least, it addresses the government's goal of aesthetic enhancement.

Of course, offended audiences will claim a particularly strong right to avoid shocking art when it is displayed prominently on government property, such as a federal courthouse. As explained above, however, sponsorship and captive audience theories are
generally unavailing in most settings. The Supreme Court’s decision in *Cohen v. California*\(^{219}\) is particularly instructive here. Addressing the issue of listeners’ privacy rights in a courthouse, the Court suggested that, rather than censor unwanted, “distasteful” speech,\(^{220}\) “those in the . . . courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.”\(^{221}\) With public art, the government need not open its property for the display of potentially offensive, privately-owned speech. But when it does, and when that expression meets minimum aesthetic criteria, unwilling audiences must heed *Cohen*’s rule and avert their eyes.\(^{222}\)

From the other side, art speech advocates might balk at neutral display’s “aesthetic merit” criterion. Practically speaking, neutral display enables shrewd government officials to subvert the First Amendment by couching their censorship in artistic terms. Since neutral display allows art restriction on the basis of artistic merit, censors could escape punishment simply by declaring, “I don’t find it offensive; I just think it’s ugly.” On a more theoretical level, critics might ask how, as a matter of objective legal doctrine, courts can take into account wholly subjective judgments about artistic worth.\(^{223}\)

As to the practical objection, federal, state, and local governments can guard against the censor who invokes artistic merit by es-

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\(^{219}\) 403 U.S. 15 (1971).

\(^{220}\) The expression at issue was a jacket bearing the words, “Fuck the Draft.” See id. at 16.

\(^{221}\) Id. at 21.

\(^{222}\) *Cohen*’s strictures pervade modern speech jurisprudence. For example, in *Loper v. New York City Police Department*, 802 F. Supp. 1029 (S.D.N.Y. 1992), affd, 999 F.2d 699 (2d Cir. 1993), the court explained:

> [T]he privacy interests of the most sensitive individuals who are in a government building, while being greater than the privacy interests those individuals would have in a public park or on a sidewalk, are still insufficient to justify restricting a speaker’s right to express himself even when that expression is obscene and offensive in nature.

Id. at 1044 (footnote omitted).

\(^{223}\) See, e.g., *Finley v. National Endowment for the Arts*, 100 F.3d 671, 688 (9th Cir. 1996) (Kleinfeld, J., dissenting) (“Philosophers have no way to distinguish art from non-art, or good art from bad art. There is not even a useful vocabulary for most of the distinctions we need to identify ‘artistic excellence’ . . . .”); *Hamilton*, supra note 21, at 110 (questioning theory behind exception to obscenity law for works that have “serious” artistic value (quoting Miller v. California, 413 U.S. 15, 24 (1973))); *Hoffman*, supra note 6, at 65 (“It is . . . erroneous to distinguish between artistic categories such as ‘aesthetic,’ ‘political’ or ‘erotic.’”); *Adler*, supra note 2, at 1363-64 (noting that Post-Modern art theory rejects “distinctions between good art and bad, between high art and popular culture”); *Salzman*, supra note 51, at 1220 (“Particularly in an artistic context, where the artist through his work may be challenging the very values and aesthetics held by judge and jury, are these parties the appropriate authorities to be determining social worth?”); *Weinstock*, supra note 40, at 820 (noting Post-Modern art theory's rejection of traditional concept of “value” in art).
establishing local art panels, modeled after the NEA's peer review system, to select works for public display. All official attempts to override the panels' decisions would then be presumptively invalid.\textsuperscript{224} Absent this prophylactic measure, there is little to prevent censors from explaining their viewpoint-based decisions in terms of aesthetics. While this loophole appears dangerously vast in practice, public officials generally reveal their censorious intent with pride.\textsuperscript{225} In any case, the censorship allowed under neutral display will be considerably less pervasive than under prevailing First Amendment doctrine.

The theoretical criticism has considerable force, since it mirrors the arguments against recognizing a distinction between artistic content and viewpoint.\textsuperscript{226} Nonetheless, public art doctrine must mediate between the concerns of the artist as speaker and those of the government as property owner. By allowing regulation on the basis of aesthetic merit, neutral display analysis respects the government's main interest in opening its property to art: the beautification of public spaces.\textsuperscript{227} Without the power to reject bad art, government necessarily would have to accept public art submissions on a first-come, first-served basis; limited resources make this option patently infeasible and conceptually irrational.\textsuperscript{228} Given that some amount of selectivity is needed, then, government speech regulation based on aesthetic

\textsuperscript{224} In \textit{Finley}, the majority noted how an arts advisory panel might ameliorate some of the inherent problems in allocating government resources on the basis of artistic merit. "Such decision makers possess an expertise in determining 'artistic excellence and artistic merit' that will guide their application of these criteria . . . ." \textit{Finley}. 100 F.3d at 650 n.18.

\textsuperscript{225} For example, the Eastern District of North Carolina found that the government's revocation of an artist's license was viewpoint neutral, see \textit{Claudio I}, 836 F. Supp. 1219, 1229-30 (E.D.N.C. 1993), aff'd, 28 F.3d 1208 (4th Cir. 1994), even though the official notice of revocation stated: "Since your work is considered to be political in nature it is not permitted on federal property and your license is hereby revoked." \textit{Claudio II}, 836 F. Supp. 1230, 1233 (E.D.N.C. 1993), aff'd, 28 F.3d 1208 (4th Cir. 1994); see supra text accompanying notes 148-51.

\textsuperscript{226} See supra Part II.B.2.b.

\textsuperscript{227} Federal case law has consistently recognized the government's ability to regulate creative expression on the basis of aesthetic criteria. See, e.g., Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984) (noting government may pass speech regulations intended to advance aesthetic values); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (noting that aesthetics is "substantial government goal[ ]"); Miller v. California, 413 U.S. 15, 24 (1973) (providing exception to obscenity law for works that have "serious" artistic value); Serra v. United States Gen. Servs. Admin., 847 F.2d 1045, 1051 (2d Cir. 1988) (observing that "[t]he state may regulate the display and location of art based on its aesthetic qualities"); see also Sabrin, supra note 8, at 1210 ("Courts have found the use of content in the exercise of professional judgment as to a work's artistic merit unremarkable and acceptable.").

\textsuperscript{228} See Lionel S. Sobel, First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist, 41 Vand. L. Rev. 517, 526 (1988) ("Awarding subsidies on a first come, first served basis would reward administrative efficiency rather than artistic talent. Thus, 'first come, first served' would not
merit seems constitutionally preferable (albeit theoretically challenging) to that based on moral judgments.\textsuperscript{229}

Finally, art speech advocates might criticize neutral display as strategically unsound. Greater protection leads to more shocking art, they might argue, which in turn creates controversy for elected officials. As a result, aggressive First Amendment enforcement might actually deter government agents from offering any public property for artistic display. Indeed, the recent attacks on the NEA would seem to validate these fears.\textsuperscript{230}

The strategic argument admits to sacrificing principle in the name of artistic survival. But while this position may be preferred in some art circles,\textsuperscript{231} it is seldom espoused by artists who have experienced censorship firsthand.\textsuperscript{232} Certainly, zealous art advocacy might produce a backlash. If this argument is taken to its logical extreme, though, courts should permit even the most blatantly viewpoint-based art regulation. In the name of that strategy, art advocates should sit idly by while government officials tailor public display to the perceived will of the majority.

As a practical matter, it may be true that freer public art means less public art. But strict government control over artistic expression, even in mass quantities, would violate the essence of art's First Amendment mission, ignoring Justice Jackson's famous proclamation that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."\textsuperscript{233}

\textsuperscript{229} Cultural critic Ann Powers explains the difficult task of judging radical art: Not all art that claims to be transgressive is worth caring about. But you can't tell the bullshit from the real by setting moral standards. You have to set artistic ones. And that means being honest about your responses. Plenty of times you won't know what to think—I sure don't, but what I'm trying to do now is keep thinking. Not turn away from what's inside, when it creeps out at the beckoning of something I ought to hate.


\textsuperscript{230} See supra note 43. This chilling effect is also evident in the public display setting. See, e.g., Letter from Douglas J. Sanderson, General Counsel, Fairfax County Arts Council, to ACLU and American Jewish Congress (June 10, 1994) (on file with the ACLU Arts Censorship Project) (stating that "Fairfax County prefers to avoid controversial art in its public buildings" and suggesting that any challenges to guidelines "might well jeopardize the entire program of exhibits at the Government Center"), quoted in Heins, supra note 9, at 139.

\textsuperscript{231} See Telephone Interview with Marjorie Heins, Legal Director, ACLU Arts Censorship Project (Sept. 17, 1995).

\textsuperscript{232} See id.

facing artistic freedom to preserve state-imposed public art ultimately would serve to dim that fixed star.

Conclusion

Much of the power of artistic expression lies in its ability to communicate thoughts and emotions that transcend the printed or spoken word. Precisely this quality, however, leaves art speech insufficiently protected under traditional First Amendment doctrines. The strict categorization that pervades public forum analysis is ill-suited to the complex and inherently ambiguous nature of art in public spaces. Consequently, courts have created an inconsistent, results-oriented jurisprudence of public art.

This Note offers neutral display as one possible alternative to the current approach. By limiting government discretion to aesthetic criteria, neutral display would balance the state's interest in beautifying its property with the First Amendment rights of artists and their public audiences. Under neutral display, artistic merit alone would govern the selection and exhibition of private art in public spaces, thereby insulating this vital expression from the prevailing political and moral climate.