

# Chicago-Kent College of Law

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February, 1999

## State Supported Speech

Steven J. Heyman, *Chicago-Kent College of Law*



## ARTICLES

### STATE-SUPPORTED SPEECH

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I.	Introduction .....	1120
II.	The Intractable Problem .....	1122
A.	The Controversy over State-Supported Speech .....	1122
B.	Exploring the Two Approaches .....	1131
1.	The Governmental Power Approach .....	1131
a.	The Impact of Funding Decisions on Free Speech as Individual Liberty .....	1132
b.	The Impact of Funding Decisions on Free Speech as Social Liberty .....	1135
2.	The Individual Rights Approach .....	1138
3.	Conclusion .....	1141
III.	A New Approach .....	1142
A.	The Transformation of the American Constitutional Order .....	1142
B.	The Concept of Distributive Justice .....	1145
1.	The Classical Theory .....	1145
2.	Liberalism and Distributive Justice .....	1147
3.	Conclusion .....	1152
C.	A Distributive Justice Approach to State-Supported Speech .....	1154
1.	Basic Analysis .....	1154
2.	An Illustration .....	1158
3.	The Domain of Distributive Justice .....	1160
4.	Conclusion .....	1163
IV.	Applications .....	1163
A.	Abortion Counseling and Referral .....	1163
B.	State Support for the Arts .....	1174
1.	The Controversy over the NEA .....	1174
2.	<i>NEA v. Finley</i> .....	1177
3.	A Distributive Justice Perspective .....	1180
4.	The Storm over the Brooklyn Museum of Art .....	1194
V.	Conclusion .....	1197

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## I. INTRODUCTION

In *West Virginia State Board of Education v. Barnette*,<sup>1</sup> Justice Jackson described the task of modern constitutional jurisprudence as that of “translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century . . .”<sup>2</sup> This task was a daunting one, Jackson conceded, for it required the courts to take rights that had grown up in the soil of *lassiez-faire* individualism and to transplant them into a modern society that increasingly sought the common good through active government.<sup>3</sup>

Nowhere has this challenge proven more difficult than in the area of state-supported speech. The First Amendment, like the rest of the Bill of Rights, applies most clearly to restrictions on liberty.<sup>4</sup> In many cases, however, the modern state seeks not to regulate expression but to actively support it, while at the same time imposing limits on the speech it supports. How should the First Amendment apply in this context? In recent years the Supreme Court has addressed this issue in a series of controversial decisions. The Court has ruled that Congress may prohibit lobbying by tax-exempt charitable organizations;<sup>5</sup> that Congress may not ban editorializing by public broadcasting stations;<sup>6</sup> that federally funded family-planning clinics may be forbidden to engage in abortion counseling, referral, and advocacy;<sup>7</sup> that a state university violates the First Amendment when it funds secular but not religious expression by student organizations;<sup>8</sup> and that Congress may constitutionally require the National Endowment for the Arts (NEA) to consider not only artistic merit but also “general standards of decency” in awarding grants.<sup>9</sup> No coherent pattern or doctrine emerges from these decisions. After struggling with the issue for nearly two decades, the Court appears no closer to resolving it. As Justice Blackmun once remarked, state-supported speech appears to present an “intractable problem.”<sup>10</sup>

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1. 319 U.S. 624 (1943).

2. *Id.* at 639.

3. *See id.* at 639-40.

4. *See* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

5. *See* *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

6. *See* *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

7. *See* *Rust v. Sullivan*, 500 U.S. 173 (1991).

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

9. *NEA v. Finley*, 524 U.S. 569 (1998).

10. *Rust*, 500 U.S. at 205 (Blackmun, J., dissenting). For some thoughtful efforts to address this problem, see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981); William T. Mayton, “Buying-up Speech”: *Active Government and the Terms of the First and Fourteenth Amendments*, 3 WM. & MARY BILL RTS. J. 373 (1994); Robert C. Post,

This Article offers a new approach. Part II provides an overview of the Court's jurisprudence, which has been marked by a clash between two opposing positions. The first, advocated by Chief Justice Rehnquist and Justice Scalia, holds that when the government funds expression, it has broad authority to decide what to support. The opposing view, which has been championed by Justices Blackmun and Souter, contends that the First Amendment should apply to funding decisions in much the same way it applies to traditional regulations of speech. This Article will argue that both positions are unsatisfactory: The former disregards the impact that subsidy decisions have on First Amendment rights, while the latter fails to recognize that public programs are created for public purposes, and that those purposes play a crucial role in determining which activities should receive support. These difficulties stem from the way the two views conceptualize subsidized speech. Both seek to understand the problem within the framework of traditional First Amendment jurisprudence, which focuses on governmental regulation or censorship. Rehnquist and Scalia contend there is a fundamental difference between regulating speech and merely refusing to support it, while Blackmun and Souter respond that funding denials may amount to penalties on disfavored expression. Neither side recognizes that state-supported speech poses a distinctive problem—a problem that is generated by the modern affirmative state, and that must be understood in its own terms.

The remainder of the Article seeks to meet this challenge. The starting point is to observe that subsidized speech involves a classic issue of distributive justice—the principles that should apply when the community provides benefits to its members. Part III elaborates the concept of distributive justice, and argues that it offers the best way of understanding disputes over benefits within the modern liberal state. The Article then uses this concept to develop an analysis of state-supported speech—an approach that seeks to reconcile individual and collective values, the right to free expression and the purposes served by public programs. Finally, Part IV

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*Subsidized Speech*, 106 YALE L.J. 151 (1996) [hereinafter Post, *Subsidized Speech*]; Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996). See also *infra* notes 298, 370 (citing literature on *Rust* and *Finley*).

On the related problem of government speech, see generally MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980) [hereinafter Shiffrin, *Government Speech*]. On the doctrine of unconstitutional conditions and other constraints on governmental power to allocate benefits, see generally CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 114-18 (1993) [hereinafter SUNSTEIN, *THE PROBLEM OF FREE SPEECH*]; Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

applies this analysis to two of the most controversial problems in this area: the constitutionality of a ban on abortion counseling and referral, and the standards that should govern public funding of the arts.<sup>11</sup>

## II. THE INTRACTABLE PROBLEM

### A. The Controversy over State-Supported Speech

The debate over subsidized speech began to take shape in the 1983 case of *Regan v. Taxation With Representation*.<sup>12</sup> Section 501(c)(3) of the Internal Revenue Code grants a federal income-tax exemption to a broad class of nonprofit organizations, but limits that exemption to organizations that do not engage in substantial lobbying or support candidates in election campaigns.<sup>13</sup> In *Taxation With Representation*, the Supreme Court upheld the constitutionality of this limitation. Writing for the Court, Justice Rehnquist began with the premise that a tax exemption is "a form of subsidy" which "has much the same effect as a cash grant to the organization" that receives it.<sup>14</sup> While the Constitution guarantees the right to freedom of speech, it does not compel the government to subsidize the exercise of that right.<sup>15</sup> In section 501(c)(3), Rehnquist concluded, "Congress ha[d] not infringed any First Amendment rights or regulated any First Amendment activity," but had "simply chosen not to pay for . . . lobbying" by nonprofit organizations.<sup>16</sup> In a nod to some earlier decisions, however, he cautioned that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'"<sup>17</sup>

An equal protection challenge fared no better. In a separate section, the Code granted a tax exemption to veterans' groups regardless of whether they engaged in lobbying, thereby treating them more favorably than section 501(c)(3) organizations.<sup>18</sup> *Taxation With Representation* argued that, under the Court's equal protection jurisprudence, this differential treatment should be subject to strict scrutiny because it discriminated with respect to the

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11. Of course, one important way the government supports speech is by providing forums for expressive activity. The Supreme Court's public forum doctrine is, however, a complex and technical one that merits separate treatment. It will not be discussed in depth here. For a valuable discussion, see ROBERT C. POST, *Between Governance and Management: The History and Theory of the Public Forum*, in CONSTITUTIONAL DOMAINS 199 (1995).

12. 461 U.S. 540 (1983).

13. 26 U.S.C. § 501(c)(3) (1994).

14. 461 U.S. at 544.

15. *See id.* at 545-46.

16. *Id.* at 546.

17. *Id.* at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958))).

18. *See* § 501(c)(19).

fundamental right of free speech.<sup>19</sup> Rehnquist rejected this argument on the same ground as the First Amendment claim: The government does not interfere with free speech rights when it declines to subsidize their exercise.<sup>20</sup> Reviewing the statute under a deferential standard, Rehnquist concluded that it was “not irrational” for Congress to refuse to subsidize lobbying by nonprofit groups while making an exception for veterans as form of compensation for their service to the nation.<sup>21</sup>

Although the Court was ostensibly unanimous in *Taxation With Representation*, the opinions hinted at a basic divergence in approach—a disagreement that would fully emerge in later cases. The central theme of Rehnquist’s opinion was that when the government chooses to subsidize speech, it has “broad power” to determine what it will support, and that the First Amendment imposes few limits on this power.<sup>22</sup> As Rehnquist made clear, this position drew crucial support from two earlier decisions, *Maher v. Roe*<sup>23</sup> and *Harris v. McRae*.<sup>24</sup> In those cases, a narrowly divided Court rejected constitutional challenges to laws that provided Medicaid funding for childbirth but not for abortion. The rationale of *Maher* and *McRae* was that while the Constitution prohibits unwarranted governmental interference with reproductive freedom, “it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”<sup>25</sup> By refusing to subsidize abortion, the government had placed no “obstacles in the path of a woman’s exercise” of her rights, but rather had merely declined to “remove those not of its own creation.”<sup>26</sup> Because the laws did not infringe the fundamental right protected by *Roe v. Wade*,<sup>27</sup> they were not subject to strict scrutiny for purposes of either substantive due process or equal protection review.<sup>28</sup> Instead, the majority asserted, the laws fell within the government’s broad power to subsidize, and thereby encourage, “actions deemed to be in the public interest.”<sup>29</sup> In *Taxation With Representation*, Rehnquist derived from these cases the general principle that “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”<sup>30</sup>

While joining the Court’s opinion, Justice Blackmun, together with Justices Brennan and Marshall, took a fundamentally different tack.<sup>31</sup> For the

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19. See 461 U.S. at 546-47.

20. See *id.* at 548-51.

21. *Id.* at 550-51.

22. *Id.* at 550.

23. 432 U.S. 464 (1977).

24. 448 U.S. 297 (1980).

25. *Id.* at 318.

26. *Id.* at 316.

27. 410 U.S. 113 (1973).

28. See *Maher*, 432 U.S. at 469-74; *McRae*, 448 U.S. at 311-18, 321-26.

29. *Maher*, 432 U.S. at 475-76.

30. 461 U.S. at 549.

31. See *id.* at 551-54 (Blackmun, J., concurring).

concurring Justices, the touchstone of analysis was not the abortion-funding cases (from which they had dissented),<sup>32</sup> but rather the doctrine of unconstitutional conditions articulated in such cases as *Speiser v. Randall*.<sup>33</sup> *Speiser* struck down state constitutional provisions that had granted a property tax exemption to veterans, but had denied that benefit to veterans who refused to swear they did not advocate violent overthrow of the federal or state governments. Writing for the Court, Justice Brennan asserted that “[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech,” with a coercive effect no different than a fine.<sup>34</sup> In this case, he found, the denial was clearly (in the words later quoted by Justice Rehnquist) “aimed at the suppression of dangerous ideas.”<sup>35</sup> *Speiser* and its progeny stand for the proposition that “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”<sup>36</sup>

Concurring in *Taxation With Representation*, Justice Blackmun observed that the lobbying ban in section 501(c)(3), viewed in isolation, appeared to be a classic unconstitutional condition because it denied a significant government benefit to “otherwise eligible organization[s]” that chose to engage in lobbying, thereby imposing a “penalty” on them for exercising their First Amendment rights.<sup>37</sup> The statute avoided this constitutional pitfall, Blackmun found, only because it contained a separate section<sup>38</sup> that allowed a section 501(c)(3) organization to establish an affiliate to lobby on its behalf without the tax subsidy conferred by section

32. See *Maier*, 432 U.S. at 482 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting); *McRae*, 448 U.S. at 329 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting).

33. 357 U.S. 513 (1958).

34. *Id.* at 518.

35. *Id.* at 519 (citation and internal quotation marks omitted).

36. Sullivan, *supra* note 10, at 1415. As the Court explained the doctrine of unconstitutional conditions in *Perry v. Sindermann*, 408 U.S. 593 (1972):

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.”

*Id.* at 597 (quoting *Speiser*, 357 U.S. at 526). For recent discussions of the doctrine, see the works by Epstein, Kreimer, Sullivan, and Sunstein, *supra* note 10.

37. *Regan v. Taxation With Representation*, 461 U.S. 540, 552-53 (1983) (Blackmun, J., concurring).

38. 26 U.S.C. § 501(c)(4) (1994).

501(c)(3).<sup>39</sup> In its overall effect, then, the statute merely declined to subsidize speech, a result that did not violate the First Amendment.<sup>40</sup> Blackmun also agreed with the Court's disposition of the equal protection claim, but emphasized that the question would be "very different" if the law had drawn distinctions based on the content or viewpoint of speech.<sup>41</sup> In sum, while the concurring Justices agreed with the outcome, their analysis focused not on the government's power to subsidize activities in the public interest, but rather on the impact of that power on individuals' rights to freedom of speech.

The dispute foreshadowed in *Taxation With Representation* emerged with full force in 1991 in *Rust v. Sullivan*.<sup>42</sup> At issue were regulations adopted by the Secretary of Health and Human Services (HHS) that barred federally funded family planning clinics from counseling patients about abortion, referring them to abortion providers, or engaging in other activities that "encourage, promote or advocate abortion as a method of family planning."<sup>43</sup> Instead, clinics were required to refer pregnant clients "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child."<sup>44</sup> The Supreme Court upheld the regulations by a vote of five to four. Echoing *Maher* and *McRae* as well as *Taxation With Representation*, Chief Justice Rehnquist held that nothing in the First Amendment disabled the government from "subsidiz[ing] family planning services which will lead to conception and childbirth, [while] declining to promote or encourage abortion."<sup>45</sup> "The Government," he declared,

can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>46</sup>

In an impassioned dissent, Justice Blackmun, joined by Justices Marshall and Stevens, objected that the majority went well beyond *Taxation With Representation*, which had upheld a limitation that was both content- and viewpoint-neutral.<sup>47</sup> Invoking *Speiser v. Randall*, Blackmun argued that

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39. See 461 U.S. at 552-54 (Blackmun, J., concurring).

40. See *id.* at 551-52.

41. *Id.* at 551.

42. 500 U.S. 173 (1991).

43. 42 C.F.R. § 59.10(a) (1989); see also *id.* § 59.8.

44. *Id.* § 59.8(a)(2).

45. 500 U.S. at 193 (internal quotation marks omitted).

46. *Id.*

47. See *id.* at 208-09, 211 (Blackmun, J., dissenting).



the HHS regulations were an attempt to suppress speech by imposing a penalty on clinics that advocated abortion.<sup>48</sup> This was an unconstitutional condition, he asserted, for it violated the fundamental First Amendment principle that government may not impose restrictions “based solely upon the content or viewpoint of . . . speech.”<sup>49</sup>

The majority understood the notion of unconstitutional conditions in narrower terms. According to Chief Justice Rehnquist, the doctrine was properly limited to “situations in which 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 [Government-]funded program.”<sup>50</sup> In *Rust*, by contrast, the government was “simply insisting that public funds be spent for the purposes for which they were authorized.”<sup>51</sup> Rehnquist responded in similar terms to the dissent’s contention that the regulations “clearly . . . aimed at the suppression of ‘dangerous ideas.’”<sup>52</sup> Rather than suppressing ideas, he insisted, the government was merely requiring grantees to observe the limits of the public program, and not to engage in activities beyond its scope.<sup>53</sup>

In this way *Rust* narrowed *Taxation With Representation*’s caveat with respect to the suppression of ideas.<sup>54</sup> At the same time, *Rust* added a qualification of its own: There were some contexts in which governmental funding was insufficient to justify control over content.<sup>55</sup> This was true not only of traditional and designated public forums, but also of universities, which Rehnquist described as a “traditional sphere of free expression . . . fundamental to the functioning of our society.”<sup>56</sup> Although he recognized that these exceptions were required by precedent, the Chief Justice made no effort to rationalize them; or to reconcile them with his general approach, other than the suggestion that they were “traditional.”<sup>57</sup>

Although Rehnquist’s views prevailed in *Taxation With Representation* and *Rust*, they failed to gain a majority in several other cases. In *FCC v. League of Women Voters*,<sup>58</sup> the Court invalidated section 399 of the Public Broadcasting Act of 1967,<sup>59</sup> which barred editorializing by noncommercial

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48. See *id.* at 207-08 (citing *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958)) (additional citations omitted).

49. *Id.* at 207.

50. *Id.* at 197 (opinion of the Court).

51. *Id.* at 196.

52. *Id.* at 210 (Blackmun, J., dissenting).

53. See *id.* at 194 (opinion of the Court).

54. See *supra* text accompanying note 17.

55. See 500 U.S. at 199-200.

56. *Id.* at 200.

57. *Id.*

58. 468 U.S. 364 (1984).

59. 47 U.S.C. § 399 (1982).

educational television or radio stations that received funding from the Corporation for Public Broadcasting. Writing for a five-member majority, Justice Brennan distinguished *Taxation With Representation*, finding that the effect of section 399 was not merely to deny a subsidy to editorializing, but to prohibit stations from editorializing with their own funds.<sup>60</sup> As Justice Rehnquist complained in dissent, however, the majority addressed the subsidized-speech issue only briefly, and instead treated the case essentially as one of broadcast regulation.<sup>61</sup> Similarly, in striking down a state law that provided tax exemptions to religious, professional, trade, and sports journals but not general interest magazines, *Arkansas Writers' Project, Inc. v. Ragland*<sup>62</sup> relied on precedents regarding discriminatory taxation, but failed even to discuss the subsidized-speech issue.<sup>63</sup>

The individual rights approach achieved its greatest success in the 1995 case of *Rosenberger v. Rector of the University of Virginia*.<sup>64</sup> The university had established a Student Activities Fund, derived from student fees, to support extracurricular activities deemed to be "related to the educational purpose of the University."<sup>65</sup> University guidelines specified several categories of organizations that were eligible to seek disbursements from the fund, including those that presented "student news, information, opinion, [or] entertainment."<sup>66</sup> At the same time, the guidelines denied funding for certain activities, including "religious activity," defined as that which "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."<sup>67</sup> Applying this rule, university authorities denied funding to a student organization for the publication of a Christian magazine, on the ground that it constituted a "religious activity."<sup>68</sup>

Once again divided five to four, the Supreme Court held that the funding denial, and the regulation on which it was based, abridged freedom of speech and were not excused by the need to comply with the Establishment Clause of the First Amendment.<sup>69</sup> Justice Kennedy's majority opinion found that by establishing the Student Activities Fund, the university had created a limited-purpose public forum.<sup>70</sup> Although the university could consider the content

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60. See 468 U.S. at 399-401.

61. See *id.* at 402-03 (Rehnquist, J., joined by Burger, C.J., and White, J., dissenting).

62. 481 U.S. 221 (1987).

63. *Id.* at 227-33. Justice Scalia and Chief Justice Rehnquist dissented, arguing that the law provided a tax subsidy that was constitutional under *Taxation With Representation*. See *id.* at 235-36 (Scalia, J., dissenting).

64. 515 U.S. 819 (1995).

65. *Id.* at 824 (citation omitted).

66. *Id.* (citation omitted).

67. *Id.* at 825 (citation omitted).

68. *Id.* at 826-27.

69. See *id.* at 837; U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

70. See 515 U.S. at 829-30.

of expression in delineating the contours of the forum, viewpoint discrimination was “presumed impermissible when directed against speech otherwise within the forum’s limitations.”<sup>71</sup> Kennedy found that rather than merely excluding the general subject matter of religion, as the university contended, the regulation discriminated against student publications with a religious perspective.<sup>72</sup>

Kennedy then turned to the university’s contention that this discrimination was permissible under decisions like *Rust v. Sullivan*.<sup>73</sup> *Rust*, Kennedy maintained, was a case in which the government had enlisted private speakers to convey a message of its own.<sup>74</sup> In such cases, the government legitimately could insist that its message not be distorted.<sup>75</sup> By contrast, viewpoint-based restrictions were improper “when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”<sup>76</sup>

The four dissenting Justices did not question this distinction between government and private expression.<sup>77</sup> Instead, in an opinion by Justice Souter, they argued that the University of Virginia regulation was constitutional because it was intended “not to deny funding for those who discuss issues in general from a religious *viewpoint*,” but rather to exclude a particular *subject matter* of expression—that of “religious apologetics” directed to “promoting or opposing religious conversion and religious observances as such.”<sup>78</sup> Such distinctions were constitutional in a funding context, Souter argued, because they did not “skew[] public debate” by funding only one side of a particular controversy,<sup>79</sup> and were inherent in the university’s broad discretion to make content-based judgments in fulfilling its educational responsibilities.<sup>80</sup>

71. *Id.* at 830.

72. *See id.* at 830-32.

73. *See id.* at 832-33.

74. *See id.* at 833.

75. *See id.*

76. *Id.* at 834. Justice Kennedy noted that, in *Rosenberger*, the Court did not have before it the related question of whether the university could require objecting students to pay a student activity fee for the support of speech with which they disagreed. *See id.* at 840; *see also id.* at 851 (O’Connor, J., concurring). This question is currently before the Court in *Board of Regents v. Southworth*, No. 98-1189. *See* 119 S. Ct. 1332 (1999) (granting certiorari limited to the question, “Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech”).

77. *See id.* at 892 n.11 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting). The dissent did suggest, however, that the distinction was more difficult to draw than the majority believed. *See id.*

78. *Id.* at 896, 898 (emphasis added).

79. *Id.* at 894.

80. *See id.* at 892.

*Rosenberger* offered a possible way of reconciling the governmental power and individual rights approaches to state-supported speech. According to that decision, the government has broad authority over content when the government itself is the speaker, either directly or indirectly. On the other hand, when it provides support for diverse private expression, the rights of individual speakers are paramount, and viewpoint discrimination is presumptively unconstitutional.

Yet there was good reason to doubt that *Rosenberger* represented the Court's settled views on the subject. The vote suggested that the Justices approached *Rosenberger* more as a religion case than as a free speech case. The majority was composed of members of the Court who generally uphold governmental support for religion, while the dissent consisted of those who often take the opposite position.<sup>81</sup> As a result, Justice Kennedy's relatively libertarian opinion on the subsidized-speech issue was joined by Chief Justice Rehnquist and Justice Scalia, while Justice Souter—soon to become the leading advocate of the individual rights approach—dissented in an opinion that emphasized governmental discretion.<sup>82</sup>

It was hardly surprising, therefore, that the Court retreated from *Rosenberger* in its most recent funding decision, *NEA v. Finley*.<sup>83</sup> The case involved a challenge to a 1990 law that required the NEA, in awarding grants, to consider not only "artistic excellence and artistic merit" but also "general standards of decency and respect for the diverse beliefs and values of the American public."<sup>84</sup> Applying *Rosenberger*, a divided Ninth Circuit ruled that the NEA was intended to support diverse private expression, and that the decency-and-respect clause constituted impermissible viewpoint discrimination.<sup>85</sup> On appeal, the Supreme Court reversed, holding that *Rosenberger* should apply only to programs that "indiscriminately" support all private speakers who satisfy certain "objective" criteria, and not to programs like the NEA, which award funds on a competitive basis according to "inherently content-based" standards such as excellence.<sup>86</sup>

While *Finley* found the *Rosenberger* approach inadequate, the decision did little to clarify the standards that should apply to state-supported speech. Justice O'Connor's majority opinion initially appears to follow the individual rights approach, but applies it in a wholly unpersuasive way, concluding that

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81. In the majority were Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, as well as Justice O'Connor, who is often a swing vote in Establishment Clause cases. Justices Souter, Stevens, Ginsburg, and Breyer dissented.

82. See 515 U.S. at 892 (Souter, J., dissenting) (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983)).

83. 524 U.S. 569 (1998).

84. Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, § 103(b), 104 Stat. 1960, 1963 (codified at 20 U.S.C. § 954(d)(1) (1994)).

85. See *Finley v. NEA*, 100 F.3d 671, 682 (9th Cir. 1996), *reh'g denied and reh'g en banc rejected*, 112 F.3d 1015 (9th Cir. 1997) (with three judges dissenting).

86. 524 U.S. at 586.

the decency clause poses no “realistic danger” of viewpoint discrimination.<sup>87</sup> Changing course, the opinion then cites *Taxation With Representation* and *Rust* for the proposition that when the government subsidizes speech, it may use “criteria that would be impermissible were direct regulation . . . or a criminal penalty at stake.”<sup>88</sup> Only five Justices joined the majority opinion in its entirety.<sup>89</sup> Justice Souter dissented, arguing that the First Amendment ban on viewpoint discrimination applied with full force to subsidized speech, and that the decency clause clearly violated that principle.<sup>90</sup> Concurring in the judgment, Justice Scalia, joined by Justice Thomas, agreed that the clause constituted viewpoint discrimination, but contended that such discrimination was “perfectly constitutional” in a subsidy context.<sup>91</sup>

*Finley* clearly reveals the incoherence and disarray of the Court’s subsidized-speech jurisprudence. To be sure, some elements of doctrine appear relatively settled. When the government itself seeks to convey a message, either directly or through private surrogates, it will be allowed to control what is said.<sup>92</sup> There is also general agreement that when the government funds expression, it has wide authority over aspects of content (such as subject matter) that the Justices regard as relatively neutral.<sup>93</sup> On the other hand, viewpoint discrimination is impermissible in programs that indiscriminately support a diversity of private expression (at least if the Court concludes that a public forum has been created).<sup>94</sup> Finally, the “unconstitutional conditions” doctrine applies when government seeks to impose limits on speech beyond the scope of a public program.<sup>95</sup> Yet, however clear the issue may be at the periphery, it remains deeply obscure at the core.

This Article will return to the NEA controversy in Part IV.<sup>96</sup> For present

87. *Id.* at 583. For a fuller critique of the majority opinion, see *infra* Part IV.B.2.

88. 524 U.S. at 587-88.

89. Justice Ginsburg declined to join the portion of Justice O’Connor’s opinion that relied on *Taxation With Representation* and *Rust*. See *id.* at 572 (reporter’s syllabus).

90. See *id.* at 600-01 (Souter, J., dissenting).

91. *Id.* at 590 (Scalia, J., concurring in judgment).

92. See *id.* at 613 (Souter, J., dissenting); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 833-34 (1995).

93. See *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 237-38 (1987) (Scalia, J., dissenting) (contending that, in awarding subsidies and tax preferences, government may “draw distinctions based upon subject matter”); *Rosenberger*, 515 U.S. at 829-30 (observing that government may use subject matter in defining the bounds of a limited public forum); *id.* at 892-93 (Souter, J., dissenting) (stating that university may make funding decisions based on content and subject matter); *Finley*, 524 U.S. at 585 (maintaining that content-based judgments with regard to excellence and other factors are inherent in “the nature of arts funding”); *id.* at 614 & n.9 (Souter, J., dissenting) (agreeing that criterion of “artistic excellence and artistic merit” is acceptably neutral).

94. See *Finley*, 524 U.S. at 586.

95. See *Rust v. Sullivan*, 500 U.S. 173, 197 (1991).

96. See *infra* Part IV.B.

purposes, two aspects of Justice O'Connor's opinion are worthy of note. First, the case suggests that a majority of the Justices are inclined to steer a middle course between the individual rights and governmental power positions. Secondly, however, the Court has not yet found an intellectually defensible way to do so.

Although *Finley* failed to produce a coherent centrist position, it did elicit the clearest and most powerful statements of the governmental power and individual rights positions. The following Section explores whether either view offers a satisfactory way of approaching state-supported speech.

### *B. Exploring the Two Approaches*

#### 1. THE GOVERNMENTAL POWER APPROACH

No member of the contemporary Court has articulated the governmental power approach more forcefully than Justice Scalia.<sup>97</sup> Concurring in *Finley*, Scalia began with the language of the First Amendment, which bars Congress from “abridging the freedom of speech.”<sup>98</sup> His argument is straightforward: A legislative decision to deny funding for a particular kind of expression simply “does not ‘abridge’ anyone’s freedom of speech,” for the speakers remain “as unconstrained now as they were before the enactment of this statute.”<sup>99</sup> This analysis led Scalia not only to endorse the reasoning of *Taxation With Representation* and *Rust*,<sup>100</sup> but also to take this rationale to its logical conclusion by closing the doors those decisions left open. While *Taxation With Representation* had intimated that funding denials could not constitutionally be based on mere ideological hostility to particular speech,<sup>101</sup> Scalia asserted that “[i]t is preposterous to equate the denial of taxpayer

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97. For classic statements of this approach, see the opinions of Justice Holmes in *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895) (“For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”), and *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (“The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”). But cf. *Milwaukee Soc. Democratic Publ’g Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting) (“The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues”; hence the statute should not be construed to grant Postmaster General arbitrary discretion to control the mails absent the clearest indication of congressional intent to do so).

98. 524 U.S. at 595 (Scalia, J., concurring in judgment) (quoting U.S. CONST. amend. I) (emphasis added by Scalia, J.).

99. *Id.* at 596, 598.

100. See *id.* at 597 (citing *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983), and *Rust*, 500 U.S. at 193).

101. See *supra* text accompanying note 17.

subsidy with measures 'aimed at the *suppression* of dangerous ideas.'"<sup>102</sup> Such denials lack "any significant coercive effect";<sup>103</sup> moreover, "[i]t is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects."<sup>104</sup> Similarly, Scalia did not even mention *Rust*'s caveat that government funding might not be sufficient to justify control over content within "a traditional sphere of free expression."<sup>105</sup> Instead, he took the uncompromising position that the First Amendment simply does not apply to funding denials, and that, as far as that Amendment is concerned, the government "may allocate . . . funding *ad libitum*."<sup>106</sup>

*a. The Impact of Funding Decisions on Free Speech as Individual Liberty*

At first glance, the Rehnquist-Scalia position that funding denials do not "abridge" free speech may seem to have considerable logical force. This view may also appear consonant with the original understanding of the Constitution, which is often said to embody a negative conception of liberty as an absence of external constraints on action.<sup>107</sup>

This assertion is mistaken, however.<sup>108</sup> At the time of the founding, liberty was commonly understood in a more positive sense—a view that received seminal exposition in the works of John Locke.<sup>109</sup> For Locke, liberty

102. 524 U.S. at 596 (quoting *Taxation With Representation*, 461 U.S. at 550 (citation omitted)) (emphasis added by Scalia, J.).

103. *Id.* (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)). In *Ragland*, Scalia was careful to qualify his view, observing that denial of a subsidy or tax exemption does not "necessarily infringe" fundamental rights because "such a denial does not, as a general rule, have any significant coercive effect." 481 U.S. at 237 (emphases added) (internal quotation marks omitted). During the past decade, Scalia's position appears to have hardened, for nothing in his *Finley* concurrence recognizes any exception to the "general rule" he asserts.

104. 524 U.S. at 598.

105. *Rust*, 500 U.S. at 200.

106. 524 U.S. at 599. *But cf. infra* text accompanying note 137.

107. See, e.g., *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987) (Posner, J.) (asserting that the Constitution was intended to be "a charter of negative rather than positive liberties"), *aff'd*, 489 U.S. 189 (1989). On the distinction between negative and positive liberty, see ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969). For some critiques of Berlin's account, see Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 *PHIL. REV.* 312 (1967), *reprinted in LIBERTY* 100 (David Miller ed., 1991); Charles Taylor, *What's Wrong with Negative Liberty*, in *THE IDEA OF FREEDOM* 175 (Alan Ryan ed., 1979), *reprinted in LIBERTY*, *supra*, at 141.

108. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 *DUKE L.J.* 507, 526-30 (1992) [hereinafter Heyman, *The First Duty of Government*].

109. Locke analyzes the nature of liberty most fully in JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* bk. II, ch. XXI (Peter H. Nidditch ed., Clarendon Press 1975) (1700) [hereinafter LOCKE, *HUMAN UNDERSTANDING*]. For further discussion of Locke's view, see Steven J. Heyman, *The Liberty of Rational Creatures: Lockean Natural*

was rooted in the human capacity for self-determination.<sup>110</sup> More specifically, Locke defined liberty as the power to act in accord with one's own will.<sup>111</sup> This positive conception of liberty as power was widely held in eighteenth-century England and America.<sup>112</sup>

On this classical understanding, while liberty can be diminished by external constraints on the power to act, it can also be increased by measures that enhance that power.<sup>113</sup> In particular, the classical view implies that one's liberty is increased if one acquires or is provided with resources necessary for action, for this expands the power to act according to one's own choice.<sup>114</sup>

According to this view, government promotes the freedom of speech when it provides individuals with the means to exercise it. Indeed, one might reach the same conclusion even on a negative understanding of liberty. In this view, the government increases liberty whenever it removes an external constraint on action, whether the obstacle is one that was previously imposed by the government itself (as by repealing a restriction on liberty) or one that arises from the acts of others (as by enforcing laws against violence).<sup>115</sup> A lack of resources may be regarded as one of the constraints on an individual's actions. Government action providing those resources would remove that limitation.<sup>116</sup>

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Rights and the Freedom of Speech and Thought (Nov. 1999) (unpublished manuscript, on file with author).

110. See LOCKE, HUMAN UNDERSTANDING, *supra* note 109, bk. II, ch. XXI.

111. See *id.* § 8, at 237 (defining liberty as "a Power in any Agent to do or forbear any particular Action, according to the determination or thought of the mind, whereby either of them is prefer'd to the other").

112. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*125 (defining natural liberty as "a power of acting as one thinks fit, without any restraint or control, unless by the law of nature"); 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS NO. 62, at 427 (Ronald Hamowy ed., Liberty Fund 1995) (1755) [hereinafter CATO'S LETTERS] ("By liberty, I understand the power which every man has over his own actions, and his right to enjoy the fruit of his labour, art, and industry, as far as by it he hurts not the society, or any members of it . . ."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 21-23 (1969) (describing eighteenth-century Whig conception of liberty as power).

113. According to Locke, for example, the function of law was to "*preserve and enlarge Freedom*" by protecting it from wrongful interference. JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, § 57 (Peter Laslett ed., student ed. 1988) (1690) [hereinafter LOCKE, TWO TREATISES]; see also 1 BLACKSTONE, *supra* note 112, at \*125-26 (observing that law increases civil liberty by protecting individuals from violence).

114. In Locke's view, for example, an individual who suffers from a paralytic illness lacks liberty of movement, since his limbs do not obey "the determination of his Mind" to move from one place to another. LOCKE, HUMAN UNDERSTANDING, *supra* note 109, § 11, at 239. That would no longer be true, however, if he were provided with a motorized wheelchair, or with assistance in moving, or with medication that cured the illness.

115. See, e.g., IMMANUEL KANT, THE METAPHYSICS OF MORALS \*231 (Mary Gregor trans., Cambridge Univ. Press 1991) (observing that law promotes freedom when it negates hindrances to freedom).

116. Berlin appears to take a similar position. See BERLIN, *Introduction* to FOUR



In short, under both the positive and negative conceptions of liberty, one can reasonably argue that government funding expands recipients' freedom of speech. Of course, it does not necessarily follow that a denial of funding would *abridge* that freedom. Is not Justice Scalia correct to assert that such denials simply leave the speakers' liberty unaffected?

The answer to this question depends on an understanding of the terms "abridging" and "the freedom of speech." Abridging is a relative term. As Scalia observes, it means "'to contract [or] diminish,'"<sup>117</sup> but to do so relative to some baseline. This baseline can be understood in two different ways. The first is *descriptive*: In this view, the government abridges the freedom of speech whenever it restricts expression that an individual desires to engage in, or would be free to engage in absent the restriction. Scalia appears to take this view in *Finley* when he maintains that the decency clause did not "*abridge* indecent speech," since it left those who desired to create indecent art "as unconstrained now as they were before the enactment of [the] statute."<sup>118</sup>

It should be observed that, from this point of view, all governmental restrictions on speech would constitute abridgments. As Scalia has noted elsewhere, however, the Supreme Court has never taken such a position.<sup>119</sup> Instead, the Court has recognized several forms of expression (such as obscenity and defamation) the regulation of which is not regarded as abridging free speech.<sup>120</sup> This suggests that the baseline is not descriptive but *normative*: Freedom of speech is abridged whenever the government contracts or diminishes the scope of expressive liberty to which individuals are entitled.<sup>121</sup> If this is so, however, then it is not necessarily true that government can abridge free speech only by actively restricting it. If there are any circumstances in which government has a duty to support or protect expression, then failure to do so would result in an abridgment.

It seems clear that there are indeed situations in which government can abridge free speech through inaction. Under the public forum doctrine, for example, individuals have a constitutional right to use traditional forums such

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ESSAYS ON LIBERTY, *supra* note 107, at xlvi (arguing that the state should undertake "to provide the minimum conditions in which alone any degree of significant 'negative' liberty can be exercised by individuals or groups, and without which it is of little or no value to those who may theoretically possess it. For what are rights without the power to implement them?"); *see also id.* at xl (observing that absence of social or political freedom can be due to the "failure to open [doors]" to individuals' actual or potential choices).

117. *NEA v. Finley*, 524 U.S. 569, 595 (1998) (Scalia, J., concurring in judgment) (citation omitted).

118. *Id.*

119. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

120. *See id.*

121. On descriptive versus normative readings of the First Amendment's language, see Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1281 (1998) [hereinafter Heyman, *Righting the Balance*].

as streets and parks for expressive purposes, and may also have a right to participate in designated public forums, such as the Student Activities Fund in *Rosenberger*.<sup>122</sup> An unjustified exclusion from such a forum is unconstitutional even if it involves mere inaction.<sup>123</sup> Again, suppose an applicant who satisfies the statutory criteria for an arts grant is denied funding solely because the official who administers the program disapproves of her political views. Although this is a mere subsidy denial, it would clearly violate the First Amendment.<sup>124</sup> So would a police refusal to protect a demonstration from violence, at least if that refusal were based on the demonstrators' views.<sup>125</sup> In all of these cases, governmental inaction abridges First Amendment rights because it contracts the liberty to which individuals are entitled.

*b. The Impact of Funding Decisions on Free Speech as Social Liberty*

Thus far, this Section has considered liberty in purely individual terms. The classical conception was broader than this, however. According to the social contract tradition, when individuals entered into society, they gave up

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122. See *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983). *Perry* identifies two categories of property subject to the public forum doctrine: (1) traditional public forums, such as streets and parks, which "by long tradition . . . have been devoted to assembly and debate"; and (2) designated public forums, which have been opened to such activities "by government fiat." *Id.* Forums of the latter kind may be (a) general or (b) limited to certain subjects or groups, see *id.* at 46 n.7. Subsequent cases have expanded the category of designated public forums to include some that exist "more in a metaphysical than in a spatial or geographic sense." *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 830 (1995) (categorizing Student Activities Fund as a designated public forum); see also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (characterizing Combined Federal Campaign for charities in same way). Under *Perry*, designated public forums need not be maintained indefinitely, but as long as they exist, they are bound by the same rules that govern traditional public forums: The government must allow the forum to be used for communicative activity, but may impose reasonable time, place, and manner regulations; content-based regulations are permissible only if they meet the requirements of strict scrutiny. See 460 U.S. at 45. All other forms of government property are treated as nonpublic forums, and are subject to much broader regulation. See *id.*

123. For example, *Rosenberger* held that university officials violated the First Amendment by excluding a student organization from participation in a limited public forum, even though that exclusion consisted merely of a denial of funding. See *supra* text accompanying notes 64-80. Likewise, in *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998), the Court invoked the forum doctrine to review the exclusion of a congressional candidate from a televised debate, even though the exclusion consisted merely of a failure to invite him. Justices Scalia and Thomas joined the majority in both of these cases.

124. The plaintiffs in *Finley* included such a claim in their suit against the NEA. See *NEA v. Finley*, 524 U.S. 569, 577 (1998). After discovery, the NEA agreed to settle this claim by paying damages. See *infra* note 371.

125. Cf. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (holding that city may not charge fee for police protection that varies depending on content of speech).

some of their natural liberty to be regulated for the common good.<sup>126</sup> In return, they obtained protection for their rights, as well as many other advantages from association with others.<sup>127</sup> These positive advantages, which were often referred to as the “privileges” of society, were as fundamental to the classical view of liberty as were the natural rights of individuals.<sup>128</sup> Taken as a whole, these privileges—which may be called social liberty—comprised the right to participate in the life of the community and to enjoy the benefits and opportunities that it afforded its members.<sup>129</sup>

This notion of liberty plays an essential part in our understanding of free speech. As Justice Brennan observed in *New York Times Co. v. Sullivan*,<sup>130</sup> “the central meaning of the First Amendment” includes the right of citizens to engage in discourse on public issues.<sup>131</sup> The social aspect of free expression also embraces, in the words of Thomas I. Emerson, “the right to participate in the building of the whole culture, and [extends to] religion, literature, art, science and all areas of human learning and knowledge.”<sup>132</sup>

Because social liberty involves interaction with other individuals and the community, it clearly has a positive dimension. It follows that the community can abridge this liberty through inaction—by denying individuals an opportunity to fully participate in social or political life, or by withholding benefits that are afforded to other citizens.<sup>133</sup> Suppose a city decides to create a new, technologically advanced version of Alexander Meiklejohn’s traditional town meeting.<sup>134</sup> The city establishes a website on which officials and others can post information relevant to local issues, and on which citizens

126. See LOCKE, TWO TREATISES, *supra* note 113, bk. II, § 129; 1 BLACKSTONE, *supra* note 112, at \*125.

127. See LOCKE, TWO TREATISES, *supra* note 113, bk. II, § 130.

128. See, e.g., 1 BLACKSTONE, *supra* note 112, at \*129 (describing civil liberty as consisting not only of “that *residuum* of natural liberty” which is retained by members of society, but also of “those civil privileges, which society hath engaged to provide, in lieu of the natural liberties . . . given up by individuals”). In his speech introducing the Bill of Rights in the First Congress, James Madison characterized these “positive rights” as those which resulted from the “social compact,” and remarked that they were “as essential to secure the liberty of the people as any one of the pre-existent rights of nature.” James Madison, Speech to House of Representatives (June 8, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 81 (Helen E. Veit et al. eds., 1991).

129. See Heyman, *Righting the Balance*, *supra* note 121, at 1345-46.

130. 376 U.S. 254 (1964).

131. *Id.* at 270-71, 273.

132. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 883 (1963).

133. Of course, this was one of the deepest injuries inflicted by racial segregation. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960) (“[T]he life of a southern community [is not one] of mutual separation of whites and Negroes, but of one in-group enjoying full normal communal life and one out-group that is barred from this life and forced into an inferior life of its own.”).

134. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 24-28 (1960).

can debate those issues. These debates play an important role in shaping public opinion and guiding governmental decision-making. To use the website, a citizen requires a personal identification code and special software provided by the city. There can be no doubt that under the public forum doctrine, the city would violate the First Amendment if it unjustifiably refused to provide this software and code to one or more citizens.<sup>135</sup> Yet this abridgment of free speech would result from mere inaction, and the refusal to provide a subsidy.

This reasoning also applies where a community distributes a good among a smaller group of citizens. For example, if a city holds a forum for candidates for public office, the city would violate the First Amendment if it unjustifiably excluded a particular candidate.<sup>136</sup> Again, suppose that the city establishes a program to award grants to the most talented local musicians. This program also falls within the notion of social liberty, for it provides benefits to individuals as members of the community, and is intended to enable them to contribute to shaping the culture. Once more, an unjustified decision to deny a grant to a particular musician would abridge her freedom of expression, even though it would be an instance of mere inaction. Of course, the difficulty in these cases is to determine what constitutes an *unjustified* decision—a question that was easily overlooked in the electronic town meeting example, where the benefit was to be distributed to all citizens. There can be no question, however, that some criteria of distribution would *not* be justified—for example, how each of the applicants voted in the last mayoral election.<sup>137</sup>

The issue of the appropriate standard of distribution lies at the heart of the problem of state-supported speech.<sup>138</sup> This issue is only obscured by the

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135. Under the Court's doctrine, *see supra* note 122, the electronic town meeting would be classified as a limited-purpose, designated public forum that the city had chosen to open for debate among its citizens. The government may not exclude a citizen from such a forum except when necessary to achieve a compelling interest. *See* *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (citations omitted).

136. *See Forbes*, 523 U.S. at 675. In this case, decided the same Term as *Finley*, a majority of the Court upheld the decision of a state-owned public broadcasting station to exclude an independent congressional candidate from a televised debate on the ground that he lacked significant popular support. *See id.* All of the Justices, however, agreed that the First Amendment limited the station's discretion to determine which candidates should participate. *See id.* at 675-76; *id.* at 689 (Stevens, J., joined by Souter and Ginsburg, JJ., dissenting).

137. In *Finley*, Justice Scalia conceded that the government could not constitutionally limit its subsidies to a single political party, but added, rather cryptically, "I do not think that that unconstitutionality has anything to do with the First Amendment." *NEA v. Finley*, 524 U.S. 569, 598 n.3 (1998). Perhaps Scalia meant that this discrimination would serve no legitimate government interest, and therefore would violate equal protection. Yet as Scalia himself observed in another context, "the only *reason* that government interest is not a 'legitimate' one is that it violates the First Amendment." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992).

138. *See infra* Part III.C.1.

governmental power approach, which insists that funding decisions do not even implicate the First Amendment. This Section has argued, on the contrary, that such decisions do affect freedom of speech, and that they *abridge* that freedom when the government refuses to support expression in a situation in which it has an affirmative obligation to do so. For these reasons, the governmental power approach is unacceptable.

## 2. THE INDIVIDUAL RIGHTS APPROACH

A strong statement of the opposing view may be found in Justice Souter's dissent in *Finley*.<sup>139</sup> Following the approach previously taken by Justice Blackmun,<sup>140</sup> Souter contends that when the government disqualifies a particular kind of expression from receiving support it would otherwise be entitled to, the government "penalizes" that speech in a way that is comparable to "traditional regulation" or "affirmative suppression of speech."<sup>141</sup> It follows that such decisions should be subject to "traditional First Amendment limits."<sup>142</sup>

In recent decades, those limits have been understood largely in terms of content and viewpoint neutrality. As Justice Marshall put it in *Police Department v. Mosley*,<sup>143</sup> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>144</sup> A little reflection, however, shows that this doctrine cannot be sensibly applied to subsidy programs, at least in the broad form stated by Marshall. To begin with, such programs typically make distinctions based on subject matter.<sup>145</sup> In establishing an arts program, for example, the government might choose to support classical but not country music,<sup>146</sup> or the performing arts but not others. If *Mosley* applied, such distinctions would be unconstitutional unless they were necessary to achieve a compelling interest.<sup>147</sup> Instead, the government would be required

139. See 524 U.S. at 601 (Souter, J., dissenting).

140. See *supra* text accompanying notes 31-41, 47-49.

141. *Finley*, 524 U.S. at 601, 606, 616 (Souter, J., dissenting).

142. *Id.* at 616.

143. 408 U.S. 92 (1972).

144. *Id.* at 95 (citations omitted).

145. Even the broadest tax exemptions fall far short of applying to all types of expression protected by the First Amendment. See, e.g., 26 U.S.C. § 501(c)(3) (1994) (granting exemption to organizations "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes"); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding section 501(c)(3)'s exclusion of organizations that engage in substantial lobbying activities).

146. See Amy Sabrin, *Thinking About Content: Can It Play An Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1224 (1993) (noting that the NEA does not have "a category for country and western music . . . probably because that art form is economically viable without public support").

147. See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims*

to support all artistic expression or none at all. Even a program supporting all art would be presumptively unconstitutional, however, for it would favor art over science and philosophy. To avoid content discrimination, the program would have to expand to include all forms of expressive activity.

Nor is this the only difficulty that would arise from applying *Mosley* to subsidy programs. Such programs commonly award grants based on criteria such as “artistic excellence and artistic merit.”<sup>148</sup> Those criteria are, of course, based on content. Under the standards applicable to “traditional regulation of speech,” the government clearly would violate the First Amendment if it imposed fines on artists who produced mediocre work. If the same principles applied to subsidy programs, merit-based grants would be presumptively unconstitutional. Instead, it would be necessary to resort to a lottery, or to distribute funding on a first-come, first-served basis. In this way, a strict rule of content neutrality would undermine the purpose—as well as the political viability—of most subsidy programs, effectively precluding communities from supporting the arts and other forms of expression.

In light of these difficulties, Justice Souter would not in fact require that state support for expression comply with the *Mosley* doctrine in the broad form that applies to “traditional regulation of speech.”<sup>149</sup> In particular, he would not bar such programs from making distinctions based on subject matter or excellence.<sup>150</sup> Souter does insist, however, that there is no basis for exempting subsidy programs from “the fundamental rule of the First Amendment that viewpoint discrimination . . . is unconstitutional.”<sup>151</sup>

Undoubtedly, there are many cases in which such discrimination should be held to violate the First Amendment. The standard illustration is a law that grants subsidies to Democrats and not Republicans.<sup>152</sup> Ultimately, however, a bar against viewpoint discrimination proves untenable as a “fundamental rule” to govern state-supported speech.

In explaining why it is permissible to distribute funds on the basis of content-based judgments of “artistic excellence,” Souter observes that this criterion promotes a “government goal [that] is perfectly legitimate”—in this case, an “esthetic” goal.<sup>153</sup> The same rationale, however, would allow viewpoint discrimination where appropriate to promote other goals. Suppose

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Bd., 502 U.S. 105, 115-16 (1991).

148. 20 U.S.C. § 954(d)(1) (1994).

149. Tellingly, when Souter invokes the *Mosley* principle in *Finley*, he modifies Justice Marshall’s formulation so it condemns restriction of speech only on the basis of “its message [or] its ideas,” not its subject matter or its content. *NEA v. Finley*, 524 U.S. 569, 601 (1998) (Souter, J., dissenting) (quoting *Mosley*, 408 U.S. at 95).

150. See *id.* at 614 n.9 (indicating that criteria of artistic merit are legitimate, at least on their face); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 892-93 (1995) (Souter, J., dissenting) (observing that subject-matter distinctions in funding are permissible).

151. *Finley*, 524 U.S. at 600-01 (Souter, J., dissenting).

152. See, e.g., Kreimer, *supra* note 10, at 1374-75.

153. *Finley*, 524 U.S. at 614 n.9 (Souter, J., dissenting).

that in the wake of such recent tragedies as the school shootings in Littleton, Colorado,<sup>154</sup> a state legislature becomes concerned about violence in popular culture and the impact it may have on young people.<sup>155</sup> Instead of attempting to regulate violent entertainment, the legislature decides to create a program to support art and culture, with the proviso that no funds should be awarded to works that glorify violence. There can be little doubt that this would constitute viewpoint discrimination. Yet it seems highly implausible to suggest that if the government chooses to support nonviolent art, it must support violent art as well. Instead, the proviso should be upheld on the same ground that Souter offers in defending criteria of artistic merit—that it serves a “perfectly legitimate” governmental goal.<sup>156</sup>

Souter acknowledges that this is true where the government’s own speech is involved.<sup>157</sup> Thus, “if the Food and Drug Administration launches an advertising campaign on the subject of smoking, it may condemn the habit without also having to show a cowboy taking a puff on the opposite page”;<sup>158</sup> if the government speaks out against violence—directly or through private surrogates—it need not afford equal time to expression on the other side. Following *Rosenberger*, however, Souter denies that government may consider viewpoint when it expends funds not to transmit its own message, but rather “to encourage expression of a diversity of views from private speakers.”<sup>159</sup> Once the government has decided to subsidize free expression, Souter contends, it has no right to deny support to those who would use that freedom “to defy[] our tastes, our beliefs, or our values.”<sup>160</sup> It is extremely difficult, however, to see why this should be regarded as a constitutional command. Why should the state be permitted to campaign against violence, but be compelled to support violent art if it wishes to support any art at all? In either case, a rule of viewpoint neutrality would undermine a “perfectly legitimate” state purpose, that of promoting nonviolent forms of culture.

This is not to suggest, of course, that whenever the government funds speech, it has carte blanche to make distinctions based on viewpoint. As already noted, there are many cases in which such discrimination should be held unconstitutional. The government may not support only conservative artists, or stock a school library with books by Democrats.<sup>161</sup> On the other

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154. See James Brooke, *2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. TIMES, Apr. 21, 1999, at A1.

155. For some recent discussions of violence in popular culture, see SISSELA BOK, *MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT* (1998); *WHY WE WATCH: THE ATTRACTIONS OF VIOLENT ENTERTAINMENT* (Jeffrey Goldstein ed., 1998).

156. *Supra* text accompanying note 153.

157. See *Finley*, 524 U.S. at 610-11 (Souter, J., dissenting).

158. *Id.* at 611.

159. *Id.* at 613 (quoting *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 834 (1995)).

160. *Id.*

161. See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982) (plurality

hand, a policy of cultural nonviolence should be upheld. The challenge is to determine when such criteria are appropriate and when they are not—a challenge that the rule against viewpoint discrimination cannot meet.

### 3. CONCLUSION

Neither the governmental power nor the individual rights approach succeeds in capturing our intuitions on state-supported speech, or in formulating principles to govern the disputes that arise in this area. The governmental power approach emphasizes that government programs are designed to promote public purposes, and that those purposes are important in determining what kinds of expression should receive support. Yet this approach overlooks the impact public programs may have on the First Amendment rights of potential recipients. The individual rights approach is a mirror image of the governmental power view: It recognizes the importance of private rights of expression, but fails to acknowledge the public dimension—that the program was created for public ends.

Each of these views is one-sided, grasping only half of the phenomenon. This helps to explain why each position seems so plausible: In any given case, one view or the other may appear to produce the correct result. It also explains the intractability of the controversy between the two views, for in difficult cases each offers a justification for a result that some judges intuitively want to reach. Above all, it explains why each view is inadequate. Neither position grasps the central point: that such programs involve *a positive interaction between the public and private spheres*, between the purposes of the public program and the free activity of individuals. This insight provides the starting point for any adequate approach to the problem.

Despite their differences, the two views have important features in common. In the first place, both are formalistic. The governmental power approach would allow the state to exert control over all subsidized speech, regardless of its nature or content, while the individual rights approach would forbid all decisions based on content, or at least on viewpoint. Neither approach considers it necessary to explore the substantive relationship between the purposes of the program and the expression that it supports—an inquiry that this Article will contend should be at the heart of the analysis.

Moreover, both views seek to understand state-supported speech in relation to the same model: that of traditional censorship or regulation. The individual rights approach would equate denials of funding with restrictions or “penalties” on speech. For the governmental power approach, by contrast, what is crucial is the way in which such denials differ from regulation. Neither view recognizes subsidized speech as a distinctive problem that has arisen during the modern era, and that calls for an analysis of its own. In

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opinion).



short, neither approach succeeds in meeting the challenge articulated by Justice Jackson—that of understanding how traditional constitutional principles are transformed within the modern state.<sup>162</sup> This challenge is taken up in the following Part, which first explores that transformation, and then outlines a new approach to state-supported speech.

### III. A NEW APPROACH

#### *A. The Transformation of the American Constitutional Order*

To understand the transformation brought about by the rise of modern affirmative government, one must begin with the classical theory that prevailed during the nation's first century. At the heart of this view was a conception of the natural rights of mankind, including life, liberty, and property, freedom of expression and conscience, and many other liberties set forth in the Bill of Rights. Citizens were also entitled to certain positive benefits or "privileges" in return for the portion of natural liberty they gave up when they entered society. Chief among these was the right to protection by government.<sup>163</sup> Implicit in this notion was a right to be protected under the law equally with other citizens.<sup>164</sup>

The original Constitution and the Bill of Rights sought to safeguard these rights against invasion by the federal government, but afforded little protection against the states.<sup>165</sup> A major aim of the Reconstruction Amendments was to remedy this omission. The Fourteenth Amendment was intended to secure not only the negative right to be free from unjustified deprivations of life, liberty, and property, but also the positive right to protection.<sup>166</sup> The Amendment also expressly secures the right to "equal protection of the laws."<sup>167</sup>

In the period since the Civil War, the functions of government have expanded far beyond those performed by the classical state.<sup>168</sup> In addition to undertaking extensive social and economic regulation, the modern state

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162. See *supra* text accompanying notes 1-3.

163. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."); *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (enumerating "[p]rotection by the government" among privileges and immunities of American citizens).

164. See Heyman, *The First Duty of Government*, *supra* note 108, at 563-65 (describing concept of equal protection in classical liberal tradition).

165. See, e.g., *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding Bill of Rights inapplicable to states).

166. See Heyman, *The First Duty of Government*, *supra* note 108, at 545-70.

167. U.S. CONST. amend. XIV, § 1.

168. See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 18-24 (1990).

provides a wide range of benefits, including public education, welfare payments, job training, retirement benefits, medical care for the indigent and elderly, subsidies for business and agriculture, support for the arts, sciences, and humanities, and many others.<sup>169</sup>

Initially, these governmental functions were understood largely in utilitarian or social welfare terms.<sup>170</sup> This was true not only of social and economic regulation, but also of the benefits that were provided to individuals. Those benefits were regarded not as rights, but rather as “privileges” (used here in a different sense than that of the “privileges of citizenship”)—advantages which were bestowed on individuals merely as a means to promote the common good, and which therefore were not subject to constitutional constraints for the protection of individual rights.<sup>171</sup>

In recent decades, this “right-privilege” distinction has been at least partially repudiated.<sup>172</sup> To be sure, the Supreme Court has consistently refused to hold that the Constitution confers substantive rights to government benefits.<sup>173</sup> Indeed, the Court is unwilling even to find a constitutional right to protection against violence<sup>174</sup>—a right that was recognized by the classical view itself. The Court does, however, regard the provision of benefits as subject to the constraints of equal protection. In this way, among others, the scope of constitutional protection has been extended to include affirmative benefits.<sup>175</sup>

A paradigm example of this development is provided by *Brown v. Board of Education*.<sup>176</sup> Congressional debates over the Fourteenth Amendment, and the closely related Civil Rights Act,<sup>177</sup> indicate that those measures were

169. See, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 734-39 (1964).

170. See *id.* at 768-70, 774-77 (describing and criticizing the philosophy of “the public interest state”).

171. See, e.g., William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

172. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-9, at 686 (2d ed. 1988); Van Alstyne, *supra* note 171. On the Supreme Court’s partial retreat from this development since the mid-1970s, see TRIBE, *supra*, § 10-10.

173. See, e.g., *Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding that government has no constitutional duty to provide abortions); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (same); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (rejecting constitutional right to adequate housing).

174. See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 202 (1989).

175. The Court has also held that the requirements of procedural due process may apply to such benefits. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970). See generally TRIBE, *supra* note 172, §§ 10-9 to 10-10.

176. 347 U.S. 483 (1954). Of course, *Brown* and its progeny established a general right to be free from racial discrimination. The case also sheds light, however, on the problem of rights in the affirmative state.

177. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. §§ 1981-82 (1994)).

intended to apply only to “civil rights”—that is, to life, liberty, property, protection of the law, and other fundamental rights that the Reconstruction-era Republicans believed were inherent in American citizenship.<sup>178</sup> It may be that the framers generally did not believe that this category included the right to be free from racial segregation in public education.<sup>179</sup> As the Court observed in *Brown*, however, while public education was hardly a central function of government in 1868, by 1954 it had become perhaps the most important benefit states provided to their citizens.<sup>180</sup> “Such an opportunity,” Chief Justice Warren wrote, “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>181</sup> In this way the Court effectively recognized that the rights of citizenship protected by the Fourteenth Amendment are not limited to those that existed under the classical view, but also extend to the benefits that the modern state confers on its citizens.

It is in this context that one should understand the problem of state-supported speech. When the government subsidizes expression, it actively provides a benefit to some or all of its citizens—a benefit that affects their freedom of speech.<sup>182</sup> Although the government has no general, affirmative obligation to support speech under existing doctrine, when the state chooses to do so it should be bound by constitutional principles of equality.<sup>183</sup> This is required not merely by the Equal Protection Clause, but also by the First Amendment itself: As *Police Department v. Mosley* recognized, equality is a central principle of the First Amendment.<sup>184</sup> Indeed, much of the Court’s

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178. See e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson).

179. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). But see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (challenging this view).

180. See 347 U.S. at 493.

181. *Id.*

182. See *supra* Part II.B.1.

183. For the view that government should have an affirmative obligation to support speech, see OWEN M. FISS, *Why the State?*, in LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 31 (1996); STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 20 (1999) [hereinafter SHIFFRIN, *DISSENT*]. Although I have some sympathy with this view, it would mark a dramatic departure from current doctrine, an innovation that the Court is unlikely to embrace in the foreseeable future. See *supra* text accompanying notes 15-16, 40 (describing *Taxation With Representation*’s unanimous rejection of the notion that government has a constitutional duty to subsidize First Amendment rights); *supra* text accompanying notes 173-74 (discussing Court’s general refusal to recognize affirmative constitutional rights). For purposes of this Article, I shall not challenge this doctrine, but instead shall argue that the First Amendment imposes important constraints on subsidy decisions even if it does not require the state to support speech in the first place.

184. See *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972) (declaring that “under the Equal Protection Clause, not to mention the First Amendment itself, . . . [t]here is an ‘equality

contemporary free speech jurisprudence takes place in the intersection between the First Amendment and the Equal Protection Clause.<sup>185</sup> Where restrictions on speech are at issue, the concept of equality is relatively straightforward: As a general rule, the Constitution forbids government to discriminate among speakers based on the content of expression, so long as the expression is constitutionally protected.<sup>186</sup> As discussed earlier, however, this simple concept of equality cannot appropriately be applied to government-supported speech, for the concept would invalidate many programs (such as National Science Foundation grants based on merit) whose constitutionality is hardly in doubt.<sup>187</sup> The crucial question, then, is what equality should mean in this context.

### B. The Concept of Distributive Justice

To answer this question, one should begin by recognizing that state-supported speech poses a problem of distributive justice: The state is providing a benefit to its citizens, and the question is how that benefit ought to be distributed. This Section outlines the classical theory of distributive justice and then explores how that concept is transformed within the liberal state.

#### 1. THE CLASSICAL THEORY

The idea of distributive justice received its first and most influential formulation in the works of Aristotle.<sup>188</sup> That form of justice applies to

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of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard") (quoting MEIKLEJOHN, *supra* note 134, at 27); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

185. As *Mosley* indicates, the rule against content discrimination has its roots both in the First Amendment and in the Equal Protection Clause. See *supra* note 184. For some applications of the doctrine, see *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Carey v. Brown*, 447 U.S. 455 (1980).

186. See *supra* text accompanying notes 143-44.

187. See *supra* Part II.B.2.

188. On Aristotle's account of justice, see ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 56-83 (1995) [hereinafter WEINRIB, *PRIVATE LAW*]; Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 688-702 (1992).

In recent years, Aristotle's thought has been used to illuminate a wide range of legal problems, including the theory of torts, see, e.g., Symposium, *Corrective Justice and Formalism*, 77 IOWA L. REV. 403 (1992); the treatment of emotions in criminal law, see Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); contract theory, see, e.g., Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); welfare policy, see Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983 (1990); the legal profession, see, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993); Lorie M. Graham, *Aristotle's Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5 (1995-96); the qualities required in appellate judging,

"distributions of honour or money or the other things that fall to be divided" among the members of a political community.<sup>189</sup> Aristotle identifies justice with equality.<sup>190</sup> He stresses, however, that equality has different meanings in different contexts. In some spheres, it means treating all persons as exactly the same, without regard to their particular qualities. This form of equality applies in the realm of corrective justice or private law.<sup>191</sup> In adjudicating private disputes, the law takes no account of the individual characteristics of the parties, such as their wealth, social status, or personal qualities.<sup>192</sup> Instead, it treats all persons alike, and simply inquires whether one has wrongfully injured the other.<sup>193</sup>

According to Aristotle, distributive justice is not governed by this simple or "arithmetical" form of equality, but rather by "proportional" equality.<sup>194</sup> Distributive justice requires that benefits be allocated to persons in proportion to their "merit."<sup>195</sup> The criterion of merit differs from one setting to another. In athletic competitions, prizes are awarded to those who demonstrate outstanding athletic ability, while in musical performances, the best instruments should be given to those who are best able to play them.<sup>196</sup> In business ventures, profits are distributed in proportion to the funds that each individual has invested in the enterprise.<sup>197</sup> In each case, the criterion of merit is determined by the nature of the activity and the good it aims to achieve.

Of course, Aristotle's account of justice is part of a comprehensive theory of political and ethical life. The theory holds that "man is by nature a political animal," in the sense that he can fully realize his nature only within

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see Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988); the nature of American constitutionalism, see, e.g., Symposium, *Classical Philosophy and the American Constitutional Order*, 66 CHI.-KENT L. REV. 1 (1990); the ideal of deliberative democracy, see Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329 (1994); and the relationship between law and morality, see HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY 27-28 (1996).

189. ARISTOTLE, NICOMACHEAN ETHICS bk. V, ch. 2, at ll. 1130b30-32 (W.D. Ross trans. & J.O. Urmsen rev.), in 2 THE COMPLETE WORKS OF ARISTOTLE 1729 (Jonathan Barnes ed., rev. Oxford trans., Princeton Univ. Press 1984) [hereinafter ARISTOTLE, NICOMACHEAN ETHICS].

190. See *id.* ch. 3, at ll. 1131a10-14.

191. See *id.* ch. 4, at ll. 1131b32-1132a2.

192. See *id.* at ll. 1132a2-6.

193. See *id.*; WEINRIB, PRIVATE LAW, *supra* note 188, at 77-78.

194. ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 189, bk. V, ch. 4, at ll. 1131b27-1132a2.

195. *Id.* ch. 3, at ll. 1131a23-28.

196. See ARISTOTLE, THE POLITICS bk. III, ch. 12, at ll. 1283a11-14, 1282b30-1283a2 (Carnes Lord trans., Univ. of Chicago Press 1984) [hereinafter ARISTOTLE, POLITICS].

197. See ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 189, bk. V, ch. 4, at ll. 1131b29-31.

a political community.<sup>198</sup> For Aristotle, it follows that the community is prior to individuals: It constitutes the whole of which they are parts.<sup>199</sup> Likewise, the good of the community is the most comprehensive end, and includes within it the good of individuals.<sup>200</sup> In this view, one of the community's central functions is to distribute goods to its members. Hence the sphere of distributive justice is a broad one. Indeed, for Aristotle, the constitution of the community is itself a matter of distributive justice.<sup>201</sup> Political authority should be distributed to citizens in proportion to their "political virtue," or how much each is able and willing to contribute to the end of the community, which is to promote the good life for human beings.<sup>202</sup>

## 2. LIBERALISM AND DISTRIBUTIVE JUSTICE

The liberal state was founded on quite different principles. Lockean liberalism rejected the Aristotelian conception of the relationship between the individual and the community. Instead, it began with a view of autonomous individuals in a natural state of liberty and equality.<sup>203</sup> Rather than being parts of a social whole, individuals establish civil society for their own purposes.<sup>204</sup>

Despite its core of individualism, classical liberalism did not simply dispense with the idea of community. According to Locke, it was because mankind constituted a natural community that individuals had a duty not to injure others (and indeed to assist others in need).<sup>205</sup> Classical liberalism also recognized that individuals were naturally inclined to live in society, and held that, as a practical matter, they could not secure their freedom and well-being in any other way.<sup>206</sup> But while classical liberalism did not reject the notion of community, it radically narrowed its scope. The primary function of civil society was to protect individual rights against violation by others.<sup>207</sup> The scope of distributive justice was narrowed in the same way: The principal

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198. ARISTOTLE, *POLITICS*, *supra* note 196, bk. I, ch. 2, at ll. 1252b27-1253a28.

199. *See id.* at ll. 1253a19-27.

200. *See* ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 189, bk. I, ch. 2, at ll. 1094a26-b11.

201. *See id.* bk. V, ch. 3, at ll. 1131a23-28; ARISTOTLE, *POLITICS*, *supra* note 196, bk. III, chs. 9-13.

202. ARISTOTLE, *POLITICS*, *supra* note 196, bk. I, ch. 2, at ll. 1252b27-1253a18; *id.* bk. III, ch. 9, at ll. 1280b39-1281a8.

203. *See, e.g.*, LOCKE, *TWO TREATISES*, *supra* note 113, bk. II, § 4.

204. *See, e.g., id.* §§ 123-31.

205. *See id.* §§ 6, 128.

206. *See id.* § 123; LOCKE, *HUMAN UNDERSTANDING*, *supra* note 109, bk. III, ch. I, § 1, at 402.

207. *See, e.g.*, 1 BLACKSTONE, *supra* note 112, at \*124; 1 CATO'S LETTERS, *supra* note 112, No. 62, at 427.

good that the state distributed to its citizens was protection for their private rights.<sup>208</sup>

This is not to say, of course, that classical liberal thinkers were indifferent to individual welfare. In accord with Aristotle,<sup>209</sup> they held that human beings always acted with a view to some good,<sup>210</sup> or (in the language of Locke and Jefferson) in pursuit of their own happiness.<sup>211</sup> In particular, individuals entered into society and established government only to make themselves better off.<sup>212</sup> It followed that the function of the state was to promote the public good or the happiness of the people.<sup>213</sup> Classical liberalism assumed, however, that so long as the rights of individuals were secure, they generally were capable of pursuing the good on their own.<sup>214</sup> It was for this reason that the role of the state was largely limited to protecting private rights.

Since the late nineteenth century, however, it has become increasingly clear that, under the conditions of modern society, collective action is often required not only to promote individual and social welfare, but also to secure the conditions necessary for individual autonomy itself.<sup>215</sup> The result has been a vast expansion in the role of government and the provision of public goods.<sup>216</sup> Although this expansion has been and remains deeply controversial, it is fundamentally consistent with modern liberalism's thrust to promote the human good.

What kinds of goods does the modern liberal state promote? For liberalism, the good may be understood as the realization of human freedom,

208. See, e.g., KANT, *supra* note 115, at \*305-08 (identifying "distributive justice" with the condition of civil society, in which private rights are secured through public law and justice).

209. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 189, bk. I, ch. 1, at ll. 1094a1-3 ("Every art and every inquiry, and similarly every action and choice, is thought to aim at some good . . .").

210. See, e.g., LOCKE, *HUMAN UNDERSTANDING*, *supra* note 109, §§ 41-55, at 258-70 (arguing that an individual's will is always determined by his view of his own happiness); LOCKE, *TWO TREATISES*, *supra* note 113, bk. II, § 131 (asserting that "no rational Creature can be supposed to change his condition with an intention to be worse").

211. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For Locke's use of this phrase, see, for example, LOCKE, *HUMAN UNDERSTANDING*, *supra* note 109, bk. II, ch. XXI, § 51, at 266; see also *id.* § 59, at 273.

212. See LOCKE, *TWO TREATISES*, *supra* note 113, bk. II, § 131.

213. See, e.g., *id.* §§ 131, 135; MASS. CONST. of 1780, pt. 1, art. VII ("Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people . . ."), in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 341 (1971).

214. See, e.g., JOHN STUART MILL, *ON LIBERTY* ch. 3 (David Spitz ed., W.W. Norton & Co. 1975) (1859).

215. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

216. See *supra* text accompanying notes 168-69. For a philosophical account of the rise of the modern welfare state, see G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* §§ 229-49 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821).

together with the attainment of the goals that people pursue through the exercise of their freedom.<sup>217</sup> In turn, freedom may be regarded as having four facets: (1) freedom in relation to the external world, which takes legal form in the rights to life, liberty, and property; (2) liberty to shape one's inner self and to realize it in the world, including the freedom to determine and pursue one's own well-being; (3) political and social liberty; and (4) freedom in the intellectual and spiritual realm.<sup>218</sup> The good, then, consists of the realization of these four elements of liberty as well as the objects at which they aim.

The state seeks to secure the first of these goods through its traditional function of protecting life, liberty, and property. Indeed, for classical liberalism the public good was largely identified with such protection.<sup>219</sup> The protection of rights is also the most important way in which the state promotes the other three goods: Like its classical counterpart, modern liberalism holds that, for the most part, the individual and social good are best achieved through free private activity.

Yet the modern state also seeks to advance these goods in other ways. It promotes individual welfare—an aspect of the second good—by providing for the needs of those who, because of individual circumstances or social conditions, are unable adequately to support themselves,<sup>220</sup> as well as by supplying other benefits that can best be provided through the public sector. Following Aristotle, one may view these goods as falling in three categories: (i) external goods, such as welfare payments, tax benefits, and subsidies for business and other activities; (ii) goods of the body, including medical care for the elderly and indigent; and (iii) goods of the mind, such as education.<sup>221</sup>

The first two major goods, those of external freedom and private welfare, are essentially individual in character.<sup>222</sup> But there are others that are distinctively social, in the sense that they involve interaction or relationships between people, and are best understood as goods shared by individuals or communities. Love and friendship are classic examples.<sup>223</sup> Another

217. On the good being the realization of freedom, see HEGEL, *supra* note 216, § 129.

218. This account of freedom is developed in Heyman, *Righting the Balance*, *supra* note 121, at 1313-55.

219. See LOCKE, TWO TREATISES, *supra* note 113, bk. II, § 131 (equating the common good with the protection of life, liberty, and property); 1 BLACKSTONE, *supra* note 112, at \*139 (observing that “the public good is in nothing more essentially interested, than in the protection of every individual’s private rights” under the law).

220. For the roots of welfare rights in the classical liberal tradition, see Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 699-706 (1994).

221. For this tripartite classification of goods, see ARISTOTLE, NICOMACHEAN ETHICS *supra* note 189, bk. I, ch. 8, at ll. 1098b11-19.

222. This paragraph draws on the discussion of political and social liberty in Heyman, *Righting the Balance*, *supra* note 121, at 1344-49.

223. See, e.g., ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 189, bks. VIII-IX (discussing the good of friendship); HEGEL, *supra* note 216, § 158 (discussing love as a paradigm example of social relationships).



illustration is provided by the First Amendment itself, which sets a high value not only on individual self-expression, but also on the intrinsically social good of communication. Political speech may be understood in this way: As Justice Brandeis and Alexander Meiklejohn stress, political speech involves deliberation by citizens on the common good, as part of the activity by which we govern ourselves.<sup>224</sup> Similarly, the social and cultural life of the community is a product of shared activity. Under the First Amendment, political, social, and cultural expression must generally be free from governmental control. The government is free to support these goods, however—for example, by establishing forums for expression,<sup>225</sup> providing public funding for election campaigns,<sup>226</sup> and subsidizing the arts, humanities, and sciences.<sup>227</sup> In these cases, government actively promotes First Amendment values.<sup>228</sup>

For the liberal tradition, “the sphere of intellect and spirit” is one that transcends the state.<sup>229</sup> Accordingly, as Justice Jackson remarked in *West Virginia Board of Education v. Barnette*, the basic “purpose of the First Amendment . . . [is] to reserve [that sphere] from all official control.”<sup>230</sup> Once again, however, while the state is forbidden to impose any authoritative vision of the truth, it is free to promote intellectual activity and the search for knowledge to the extent that they are relevant to, or form part of, the individual or social good. Thus, the state supports higher education and funds scientific and medical research. As to spiritual freedom, the Religion Clauses of the First Amendment recognize this as a fundamental human good, while at the same time imposing limits on government involvement.<sup>231</sup> Of course, government provides general support for religious activities by means of tax exemptions and public services such as police and fire protection.<sup>232</sup> The issue of whether, and to what extent, the government may provide more active support for religion is one on which the Supreme Court and the nation as a whole are deeply divided.<sup>233</sup>

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224. See *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring); MEIKLEJOHN, *supra* note 134, at 24-28.

225. See, e.g., *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 675 (1998).

226. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

227. See *infra* Part IV.B.

228. See, e.g., *Buckley*, 424 U.S. at 92-93 (observing that public campaign financing seeks “to facilitate and enlarge public discussion and participation in the electoral process,” and thus “furthers [rather than] abridges . . . First Amendment values”).

229. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

230. *Id.*

231. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

232. See, e.g., *Walz v. Tax Comm’n*, 397 U.S. 664, 671 (1970); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947).

233. In addition to *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995), see, for example, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and *Mueller v. Allen*, 463

The modern state seeks to promote the good in all these ways. Indeed, many programs are concerned with more than one facet of the good. For example, in addition to its importance for individual welfare, education serves an important social function by educating individuals for citizenship,<sup>234</sup> and enhances their capacity to attain knowledge and participate in the search for truth.

In contrast to the classical liberal state, then, its modern counterpart generates a broad sphere of distribution. In this way modern liberalism resembles the Aristotelian theory. At the same time, however, there are essential differences between the two views. For Aristotle, the collective sphere is virtually all-encompassing: The notion of distributive justice applies not only to particular goods, but also to the distribution of political authority.<sup>235</sup> By contrast, in modern democracies, the distributive sphere exists within the broader framework of a state dedicated to the protection of individual rights. Individuals are entitled to equality not only in their private rights, but also in their political capacity as members of a self-governing community. As will be discussed, constitutional norms of autonomy and equality impose significant constraints on distributive justice within the liberal state.<sup>236</sup>

The two views are also characterized by different conceptions of the human good. To be sure, both understand the good in terms of "happiness," including all the internal and external goods that contribute to a fulfilled life.<sup>237</sup> For Aristotle, however, the good is ultimately to be understood as activity in conformity with virtue or excellence.<sup>238</sup> The function of distributive justice, and of law in general, is to make the polity and its members as good as possible, thereby promoting the highest development of

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U.S. 388 (1983). The Supreme Court will confront the issue again this term in *Mitchell v. Helms*, No. 98-1648, *cert. granted*, 119 S. Ct. 2336 (1999), which poses the question whether public schools may provide computers and other equipment for use in religious school classrooms. See Linda Greenhouse, *Justices Agree to Consider Case on Public Aid to Religious Schools*, N.Y. TIMES, June 15, 1999, at A22.

234. See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (recognizing "that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system'" (citation omitted)); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (asserting that in "our democratic society," education "is the very foundation of good citizenship").

235. See *supra* text accompanying notes 201-02.

236. See *infra* text accompanying notes 254-55.

237. ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 189, bk. I, chs. 7-8, at ll. 1097a15-1099b8; *supra* text accompanying notes 217-34 (discussing liberal conception of the good).

238. See ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 189, bk. I, ch. 7, at ll. 1098a16-17 (concluding that the "human good turns out to be activity of soul in conformity with excellence [*aretē*]"). The Greek word *aretē* means both "virtue" and "excellence."

human nature.<sup>239</sup> Self-development is also an important theme in liberal political thought.<sup>240</sup> In the liberal view, however, self-development must be a product of autonomous activity, and ultimately consists in the realization of our nature as free, self-determining beings. In short, the liberal conception of the good emphasizes freedom rather than virtue. This is not to say, of course, that when individuals or communities engage in freely chosen activity, they may not strive for excellence and the full development of human talents and abilities. These are among the most important goods people pursue through the use of their freedom. Liberal society can make an important place for the pursuit of excellence, but only within the context of a legal and constitutional order that places a paramount value on individual freedom and equality.

The notion of equality suggests a final difference between the liberal and Aristotelian views. As discussed above, Aristotle holds that while all individuals are equal in the realm of private law, distributive justice is governed not by "arithmetical" but by "proportional" equality.<sup>241</sup> Goods should be allocated in proportion to merit, which in turn is understood in terms of virtue, or the capacity to contribute to the ends of the community.<sup>242</sup> Of course, this view is consistent with a great deal of social and political hierarchy. By contrast, liberalism is founded on a recognition of the equal dignity and worth of all individuals, who are regarded as ends in themselves as well as members of a community.<sup>243</sup> For this reason, liberal justice requires (arithmetical) equality in many areas, including rights of political participation as well as protection of private rights. Moreover, because liberalism affirms the equal value of every individual, it focuses more on the *needs* of its members. While the modern welfare state promotes a broad range of goods, its most characteristic programs are those that distribute benefits according to need. Remarkably, this notion does not appear in Aristotle's account of distributive justice, which instead focuses on promoting excellence in activity. In all these ways, the concept of distributive justice is transformed within the context of modern liberalism.

### 3. CONCLUSION

This discussion of liberal distributive justice sheds important light on the problem of state-supported speech. In particular, it allows us to break the impasse between the governmental power and individual rights approaches. In this view, subsidy programs should be understood in terms of *both* public purposes and individual rights. Such programs involve a positive relationship

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239. See *id.* bk. II, ch. 1, at ll. 1103b2-6; *id.* bk. V, ch. 1, at ll. 1129b12-26.

240. See, e.g., MILL, *supra* note 214.

241. *Supra* text accompanying notes 194-95.

242. See *supra* text accompanying notes 194-202.

243. See, e.g., KANT, *supra* note 115, at \*434-35.

between the community and the individual. While the programs seek to promote the public good, they do so by providing benefits to individuals. Conversely, the benefits individuals receive are intended not only for their own advantage but also for that of the community as a whole. In this way, such programs seek to integrate the public and private good.

A similar point can be made in terms of liberty. Insofar as the decision to create a public program is made through the democratic process, it may be regarded as an exercise of our freedom as a community.<sup>244</sup> Moreover, the program itself may be understood as a collective activity—say, the activity by which the community supports, produces, and enjoys art. At the same time, that art reflects the activity of the artists who create it, and is an exercise of their own liberty. In this way, distributive justice seeks to reconcile individual and collective freedom, the rights of individuals and those of the community.<sup>245</sup>

Thus the concept of liberal distributive justice offers a promising way to approach the problem of state-supported speech. The following Section develops this approach in more depth.<sup>246</sup>

244. See, e.g., MEIKLEJOHN, *supra* note 134, at 8-28.

245. It is also illuminating to explore how the idea of distributive justice relates to Robert Post's sociological theory of the First Amendment. See generally CONSTITUTIONAL DOMAINS, *supra* note 11; Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995); Post, *Subsidized Speech*, *supra* note 10. Post argues that problems of subsidized speech, like other First Amendment issues, require courts to determine the boundaries between different social domains. See *id.* at 152. In particular, he distinguishes between "public discourse" and "managerial" domains. *Id.* at 164. The constitutional principles that govern public discourse assume "the existence of a domain of democratic self-determination, in which persons are independent and autonomous. Within the democratic domain of public discourse, persons must be given the freedom to determine their own collective identity and ends." *Id.* at 154. Yet a democratic state must also be able to implement policies that have been democratically adopted. This requires the existence of "managerial domains" in which the government seeks to achieve specified ends. *Id.* at 164. In contrast to public discourse, the constitutional value that marks managerial domains "is that of instrumental rationality, a value that conceptualizes persons as means to an end rather than as autonomous agents. Within managerial domains, therefore, ends may be imposed upon persons." *Id.* Post then develops a rich and complex approach to determining how government subsidies for speech should be characterized in particular cases.

The account developed in this Article suggests that state-supported speech is better understood as falling in a third domain: that of distribution. Like the sphere of management, the distributive sphere involves the pursuit of collective ends. In contrast to managerial domains, however, individuals are not treated as mere "means to an end" that is not their own. Instead, as in the domain of public discourse, individuals should be able to participate in a collective activity in a way that is consistent with their own autonomy. In this way, the distributive sphere involves a positive relationship between individuals and the community.

For Post, the domain of public discourse aims "to reconcile individual autonomy with collective self-determination." POST, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, in CONSTITUTIONAL DOMAINS, *supra* note 11, at 268, 273. My contention is that the distribution of public benefits should be understood in a similar way, rather than as an instance of management.

246. Theories of distributive justice in the modern liberal state include WILLIAM A.

*C. A Distributive Justice Approach to State-Supported Speech*

1. BASIC ANALYSIS

Distributive justice holds that when the state distributes a benefit to its citizens, the benefit should be allocated according to their respective “merit,” as determined under an appropriate criterion.<sup>247</sup> This criterion plays a central role in the constitutional analysis, for it supplies the normative baseline or standard of entitlement that governs the benefit.<sup>248</sup> A statute that conforms to this standard should be held constitutional even though it benefits some citizens more than others. By contrast, a statute that violates this standard deprives those whom it disadvantages of a benefit to which they are justly entitled. In this way, the statute may not only deny them equal protection, but may also abridge their substantive rights to freedom of speech, if the benefit denied is an opportunity to engage in expression.

As a straightforward example, suppose that Congress establishes a program at the National Institutes for Health (NIH) to support research on a particular form of cancer, and provides that funds shall be awarded to applicants on the basis of their scientific qualifications and the merits of their proposed research. This statutory standard will favor some applicants (those with the strongest credentials and research agendas) over others, thereby affording them a greater opportunity to pursue their scientific inquiries, a form of First Amendment activity. Yet no one would question the statute’s validity. In a program of this sort, it is natural to award funds on the basis of scientific merit.

On the other hand, suppose that when it drafts the statute, Congress adds the proviso that funds should be awarded only to applicants who belong to the Democratic party. This limitation is clearly unconstitutional because it deviates from the appropriate criterion, that of scientific merit. By denying non-Democratic scientists funds to which they are entitled as a matter of

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GALSTON, *JUSTICE AND THE HUMAN GOOD* (1980); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); JOHN RAWLS, *POLITICAL LIBERALISM* (1993); and MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983). In this Article, I shall not argue for any of these theories in particular, but instead shall offer a more general account that is intended to be compatible with a variety of positions. Cf. ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 189, ch. 3, at ll. 1131a24-28 (indicating that the concept of distributive justice is compatible with different substantive views of what is just); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 411-12 (1992) [hereinafter Weinrib, *Corrective Justice*] (same).

247. As I have noted, liberal distributive justice holds that goods should often be distributed in accord with *need* rather than with merit or virtue in the Aristotelian sense. See *supra* text following note 243. For simplicity, I shall use the term “merit” broadly to include need as well.

248. For a seminal discussion of baselines and their role in determining how benefits should be distributed in the affirmative state, see Kreimer, *supra* note 10.

distributive justice, it effectively penalizes them for the exercise of their rights of political association, and improperly denies them an opportunity for research. This proviso should be treated in the same way as a restriction or penalty on expression, and struck down under strict scrutiny, or indeed held invalid *per se* as an instance of viewpoint discrimination.

The NIH case provides a useful illustration because the demands of distributive justice are intuitively clear. But of course that will not always be true. The question of how government benefits should be distributed will often raise complex issues of fairness and public policy. In establishing the NIH program, for example, the government must decide how funds should be divided between cancer and other illnesses, such as heart disease and AIDS; what forms of cancer should receive the greatest attention; whether to focus on prevention or cure; whether to explore the effectiveness of alternative forms of medicine; and so on. These issues may well be controversial. In addition, public programs represent collective efforts on the part of the community. For these reasons, decisions regarding appropriate criteria of distribution are largely the province of the legislature. Nevertheless, such decisions are not merely a matter of politics, but a matter of justice that is properly subject to judicial review.<sup>249</sup> How should courts analyze such issues under the liberal distributive justice approach?

(1) *Purpose*: First, a court should ask what the purpose of the program is, and whether that purpose is constitutionally legitimate. Of course, the notion that programs are intended to advance public purposes is central to the governmental power approach. However, judges who apply this approach rarely explore the purposes of specific programs in any depth. Instead, they simply argue that because programs exist for public purposes, the government must have broad authority to determine what activities to support.<sup>250</sup> Opinions that follow the individual rights view also occasionally discuss a program's purpose. But they generally do so in order to argue that the purpose does not justify a particular limitation on funding.<sup>251</sup> From a distributive justice perspective, however, purpose is crucial, for it is among the most important factors in determining the appropriate criteria of distribution. Of course, the purpose must also be a constitutionally permissible one. This would exclude such goals as advancing the interests of a particular political party, as in the NIH example.<sup>252</sup>

(2) *Criterion*: After determining whether the program has a legitimate goal, the court should ask whether the distributive criterion the legislature has

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249. See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 990-92 (1988) [hereinafter Weinrib, *Legal Formalism*]; Steven J. Heyman, *Aristotle on Political Justice*, 77 IOWA L. REV. 851, 855 (1992).

250. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

251. See, e.g., *NEA v. Finley*, 524 U.S. 569, 612 (1998) (Souter, J., dissenting).

252. Cf. Post, *Subsidized Speech*, *supra* note 10, at 186-87 (arguing that such a statute would be illegitimate because it promotes partisan interests rather than shared values).

adopted is substantially related to that goal.<sup>253</sup> In the NIH case, for example, the government might assert that the program's purpose was to promote advances in science and medicine. Although this end is undeniably a legitimate one, the funding limitation is still unconstitutional because the criterion of political affiliation is not substantially related to this end.

(3) *Persons*: Distributive justice involves a relationship between the community and its members. It follows that the function of the criterion is not merely to promote a public end, but also to mediate between that end and the persons among whom the benefit is to be distributed.<sup>254</sup> Hence, in addition to determining whether the criterion is directed toward a legitimate purpose, the court should ask whether that criterion, and the program in general, treat individuals in a way that is consistent with constitutional norms of respect for persons. Suppose, for example, that in the NIH statute Congress had made women and nonwhites ineligible for research funding. This exclusion would be unconstitutional for the reasons already discussed: It would not be related to a legitimate purpose. But it would be invalid for another reason as well—it would violate the constitutional principle that individuals should be treated as equal members of the community, without invidious discrimination based on race or gender.<sup>255</sup>

(4) *Constitutional structure*: These three factors—public purpose, criterion, and persons—are all internal to the sphere of distributive justice. In a modern liberal society, however, that sphere is not all-encompassing, but exists within a larger constitutional framework based on individual liberty, democratic self-government, and intellectual and cultural freedom. If the distributive sphere were to expand too far, it might undermine this structure. For example, if most art came to be dependent on government funding, this would threaten the existence of a private realm of artistic expression and pose a danger of governmental control over culture. Similar dangers would arise from public financing of elections if the government were thereby enabled to exercise control over the content of political expression.

To avoid such problems, courts should engage in a fourth inquiry, asking whether the criterion or the program has the purpose or effect of eroding other aspects of the constitutional order, such as by undermining the sphere of private autonomy or the integrity of public discourse.<sup>256</sup> If so, the

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253. Cf. Redish & Kessler, *supra* note 10, at 572-73 (advocating a similar standard).

254. See Weinrib, *Corrective Justice*, *supra* note 246, at 417.

255. For an excellent discussion of the constraints that concepts of personhood and equality impose on distributions of benefits, see Weinrib, *Legal Formalism*, *supra* note 249, at 990-92.

256. For an approach that focuses on the impact that government funding may have on constitutional structure, see Sullivan, *supra* note 10, at 1489-1505. Many scholars have expressed concern about the potential for government speech or government funding to distort or dominate public discourse. See, e.g., Cole, *supra* note 10, at 680-81; Emerson, *supra* note 10, at 797; Redish & Kessler, *supra* note 10, at 562-63; Shiffrin, *Government Speech*, *supra* note 10, at 607.

criterion or program should be held unconstitutional. It is important to emphasize, however, that public programs should not be deemed to pose this danger merely because they have some effect on private decisions or public discourse. The very purpose of such programs is to have an effect of this sort, in order to promote the public and private good.<sup>257</sup> In this regard, it would be a mistake to suppose that the First Amendment was meant to ensure a marketplace of ideas completely free from government involvement.<sup>258</sup> For example, state support for public broadcasting rests on the notion that it serves important individual and social values that are insufficiently reflected by the market. Such programs should be regarded as raising structural concerns only when they pose a substantial danger of undermining other spheres.

What is the relationship between this four-part analysis and existing forms of constitutional review in substantive rights and equal protection cases? The governmental power approach holds that funding decisions do not affect the right to free speech at all, and therefore are subject to little if any review under the First Amendment, and to only rational basis scrutiny under the Equal Protection Clause.<sup>259</sup> The individual rights approach, on the other hand, regards at least some funding denials as equivalent to restrictions or penalties on speech, and therefore would subject them to strict scrutiny, or perhaps even hold them invalid per se as viewpoint discrimination.<sup>260</sup>

The distributive justice approach takes a position between these two extremes. It holds that funding decisions do affect the constitutional right to free expression, but that they differ from traditional regulations. Hence they should be regarded as neither presumptively valid nor presumptively unconstitutional. Instead, courts should undertake a serious, substantive inquiry into the reasonableness of the legislative decision.

In this way, the analysis resembles the intermediate scrutiny the Court has employed in other contexts.<sup>261</sup> The analysis should not simply be equated with intermediate review, however. Instead, it is intended to serve a different function than the existing standards of review (strict, intermediate, or rational-basis). Those standards apply once a court has found that a government action infringes a constitutionally protected interest. The question then arises as to whether the infringement is justified. Where a fundamental right or a suspect or quasi-suspect classification is involved, the

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257. See Post, *Subsidized Speech*, *supra* note 10, at 185-86 (observing that all such programs have "the purpose and effect of influencing the shape of public discourse").

258. See Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. CIN. L. REV. 1103, 1116 (1995) (criticizing this notion).

259. See *supra* Part II.B.1.

260. See *supra* Part II.B.2.

261. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (establishing intermediate standard of review in sex-discrimination cases).



government is required to show a substantial or compelling reason for its action; in other cases, only the most minimal justification is required.<sup>262</sup>

By contrast, the analysis outlined here is addressed to the threshold question of whether a particular funding decision *does* infringe the right to free expression. The analysis does this by employing the concept of distributive justice to identify a baseline of entitlement for the relevant program. In the NIH case, for example, scientific merit was found to be an appropriate baseline. If the statute accords with that criterion, then it does not deprive unsuccessful applicants of anything to which they are justly entitled. Accordingly, the statute neither infringes their First Amendment rights nor denies them equal protection of the law, and no further justification for the distribution is required (so long as it does not threaten the larger constitutional structure). If, on the other hand, the statute fails to conform to that criterion, by excluding some applicants because of their political affiliation, then it does infringe the free speech and equal protection rights of those who might have been entitled to funding under the proper criterion. In that case, the statute should be subjected to the same standard of review that would apply if it imposed a restriction or penalty on speech. Because the statute discriminates based on viewpoint, it should be held unconstitutional.

## 2. AN ILLUSTRATION

To further illustrate this approach, this Section will explore how it would apply to a more complex case, *Regan v. Taxation With Representation*.<sup>263</sup> As noted earlier, section 501(c)(3) of the Internal Revenue Code granted a tax exemption to many nonprofit organizations but barred them from lobbying.<sup>264</sup> Under section 501(c)(4), however, such groups could lobby by establishing an affiliate organization that received less favorable tax status.<sup>265</sup> According to the Court, the effect of the statutory scheme was to subsidize the general activities of nonprofit organizations but not their lobbying activities.<sup>266</sup> A separate provision, section 501(c)(19), granted favorable tax status to veterans' organizations without imposing a lobbying ban.<sup>267</sup> Given the existence of section 501(c)(4), the Justices agreed that the statutory scheme did not have the effect of preventing nonprofit organizations from lobbying at all.<sup>268</sup> Instead, the case was regarded as raising two issues: whether Congress constitutionally could decline to subsidize lobbying by

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262. See, e.g., *Regan v. Taxation With Representation*, 461 U.S. 540, 547 (1983).

263. *Id.*; see *supra* text accompanying notes 12-41.

264. See 26 U.S.C. § 501(c)(3) (1994).

265. See *id.* § 501(c)(4). More specifically, section 501(c)(3) organizations were not merely tax-exempt but were also permitted to receive tax-deductible contributions, while section 501(c)(4) were tax-exempt but ineligible to receive such contributions.

266. See 461 U.S. at 544.

267. § 501(c)(19).

268. See 461 U.S. at 544; *id.* at 552-53 (Blackmun, J., concurring).

nonprofit organizations, and whether it could make an exception for veterans' groups. The Court answered both questions in the affirmative.

A distributive justice analysis indicates that the Court was probably right on the first point but wrong on the second. The purpose of sections 501(c)(3) and 501(c)(4)—to promote activities undertaken for the public interest—is clearly legitimate. At first glance, the limitation on lobbying may not appear substantially related to this end, because lobbying can be directed toward the public good in the same way as other forms of political expression permitted by the Code. The distinction may be reasonable, however—for example, on the ground that lobbying is more likely to be self-interested than more open forms of expression.<sup>269</sup> Moreover, the legislature's pursuit of one purpose may be qualified by other objectives or values.<sup>270</sup> Thus, another justification for the restriction might be the view that taxpayers should not be required to subsidize lobbying in favor of views they do not share. Finally, a refusal to subsidize lobbying does not violate constitutional norms of respect for persons, at least so long as the organizations remain free to lobby with their own funds.

The statutory exception for veterans' groups is another matter, however. In *Taxation With Representation*, the government understandably did not assert that the purpose of this exception was to enhance the political voice of veterans, for that purpose would clearly be illegitimate: Under the First Amendment, government may not favor the expression of some citizens over others, at least in the absence of strong justification.<sup>271</sup> Instead, the provision was said to compensate veterans for the burdens and sacrifices they had undertaken for the nation.<sup>272</sup> This purpose is undoubtedly legitimate, and it may be substantially advanced by a criterion that limits subsidized lobbying to veterans' organizations. The difficulty, however, lies in the way the statutory scheme treats persons. While it may promote the welfare of veterans, it does so by enhancing their capacity for political expression. In a liberal democracy, however, all citizens must be treated as equals in the political sphere, without regard to such characteristics as veteran status.<sup>273</sup> By taking account of this status in the distribution of opportunities for political expression, the statutory scheme violates constitutional norms of equal citizenship. Moreover, by increasing the voice of some citizens rather than others, the scheme violates the integrity of public discourse. For these reasons, it should be struck down.

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269. See *id.* at 550 (opinion of the Court).

270. See *infra* text accompanying note 416.

271. See, e.g., *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 828 (1995); Post, *Subsidized Speech*, *supra* note 10, at 189 ("Because we believe in an equality of status among speakers, we do not permit the state to regulate public discourse so as to favor the contributions of some persons more than others . . .").

272. See 461 U.S. at 550-51.

273. See *supra* text following note 243.

In the NIH case, the unconstitutional provision denied the plaintiffs benefits to which they were entitled under the proper baseline. In *Taxation With Representation* this was not the case, for the baseline was no-subsidy-for-lobbying. The problem with the statute was not that it gave nonprofit organizations less than they were entitled to, but that it gave veterans' groups more. Nevertheless, it can reasonably be argued that the statute violated the First Amendment by denying non-profits the right to participate in public discourse on the same terms as other groups. In any event, by unjustifiably discriminating between citizens in the political realm, the statute clearly violated equal protection. To correct these violations, the Court should have struck down the statute's preferential treatment for veterans' organizations.<sup>274</sup>

### 3. THE DOMAIN OF DISTRIBUTIVE JUSTICE

Having outlined the distributive justice approach to state-supported speech, we must now define the category of cases to which it applies. These cases should be distinguished from government speech, on one hand, and from regulations of speech, on the other.

The First Amendment generally forbids the government to silence private speakers, but does not preclude it from adding its own perspective to public discourse.<sup>275</sup> Although it is possible for government speech to invade negative rights,<sup>276</sup> individuals rarely have an affirmative right that the government speak in one way rather than another. To be sure, government speech may indirectly advance the interests of some individuals or groups; but this is not a benefit to which they have a right. For these reasons, government speech should not be subject to the constraints of distributive justice. As *Rosenberger* recognizes, this principle applies not only to speech by the government and its officials, but also to cases in which private speakers have been enlisted to convey a governmental message.<sup>277</sup>

Distributive justice is also inapplicable to cases at the other end of the spectrum—those in which the state seeks to limit private expression. In

274. This conclusion assumes that Congress would regard that preference as less fundamental than the general ban on lobbying. If, on the other hand, Congress would consider the subsidy for lobbying by veterans' groups more important, the Court should strike down the lobbying ban in section 501(c)(3)—at least to the extent that it results in less favorable tax treatment than that accorded veterans' groups under section 501(c)(19). See 461 U.S. at 546 n.8.

275. See *TRIBE*, *supra* note 172, § 12-4, at 807. On government speech, see generally *YUDOF*, *supra* note 10; Shiffrin, *Government Speech*, *supra* note 10.

276. For example, speech by government officials may give rise to an action for defamation. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). In many cases, however, officials will enjoy immunity from liability. See, e.g., *Barr v. Matteo*, 360 U.S. 564 (1959).

277. See *supra* text accompanying notes 74-75. As I shall argue below, however, the *Rosenberger* Court was mistaken in its view that this principle justifies the result in *Rust v. Sullivan*, 500 U.S. 173 (1991). See *infra* text accompanying notes 303-06.

addition to traditional regulations of speech, this category should be held to include those situations covered by the doctrine of unconstitutional conditions—cases in which the government denies a benefit to individuals because they have engaged in speech that has no substantial relationship to the benefit in question,<sup>278</sup> as well as “situations in which 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 [Government-]funded program.”<sup>279</sup> Such cases should be subject to the same traditional First Amendment analysis as laws imposing civil or criminal penalties on expression.<sup>280</sup>

Instead, distributive justice applies to situations in which the government distributes a benefit to citizens—a benefit that at some point becomes a right. This category includes, to begin with, situations in which individuals have a statutory entitlement to the benefit, under the approach the Court has developed for purposes of procedural due process.<sup>281</sup> The category is not limited to such cases, however. For example, individuals may have no statutory entitlement to government grants that are awarded through a competitive process on the basis of criteria such as scientific merit.<sup>282</sup> Once

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278. See *supra* text accompanying notes 32-36 (discussing *Speiser v. Randall*, 357 U.S. 513 (1958)).

279. *Rust v. Sullivan*, 500 U.S. 173, 197 (1991); see *supra* text accompanying note 50.

280. What of situations in which the government does not fund “a particular program or service,” 500 U.S. at 197, such as the Title X projects in *Rust*, but instead subsidizes an organization’s activities in general, as with the tax benefits provided to section 501(c)(3) organizations in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), or the grants to public broadcasting stations in *FCC v. League of Women Voters*, 468 U.S. 364 (1984)? See *supra* text accompanying notes 11-41, 58-61, 263-74 (discussing these cases). When the government seeks to impose limitations on the activities of such organizations, such as the ban on lobbying in *Taxation With Representation* or the prohibition on editorializing in *League of Women Voters*, how should the constitutionality of those restrictions be assessed? In such cases, the government should bear the burden of demonstrating that there is no effective way to segregate the organization’s general operations from other activities that the government does not wish to support. Cf. *Taxation With Representation*, 461 U.S. at 552-54 (Blackmun, J., concurring) (observing that the Internal Revenue Code permitted a section 501(c)(3) organization to engage in lobbying without a tax subsidy by establishing an affiliate organization); *League of Women Voters*, 468 U.S. at 400 (observing that the Public Broadcasting Act made no comparable provision for non-subsidized editorializing). If the government is able to make this showing, the case should be analyzed within the framework of distributive justice. Otherwise, the limitation should come within the doctrine of unconstitutional conditions, and should be reviewed under the same standards that apply to regulations of private speech.

281. For an overview, see *TRIBE*, *supra* note 172, §§ 10-9 to 10-10. Of course, this is not necessarily to endorse the specific analysis that the Court has used in recent years to define entitlements—an approach that, as many scholars have argued, is unduly narrow and positivist. See, e.g., *id.* § 10-10.

282. Cf. *NEA v. Finley*, 524 U.S. 569, 585-86 (1998) (holding that *Rosenberger* rule

the grant money has been received, however, it becomes the grantee's property in a traditional sense. Programs of this sort should also be subject to the constraints of distributive justice.

Moreover, the scope of distributive justice is not limited to new and old property, but should also extend to certain benefits that are made available to the public as a whole. Thus, cities sponsor public concerts, fireworks, and the like, while the federal government provides funds for public broadcasting. These activities are intended for the benefit of citizens, and may substitute for goods and services that are (or otherwise would be) available through the market. It would be anomalous to hold that such activities do not constitute benefits simply because the government has chosen not to charge for them, but to make them freely available to the public. These benefits may be regarded as a matter of common right, in the same way as the freedom to travel on a public highway.<sup>283</sup> It follows that such activities should be subject to First Amendment constraints. For example, if the government establishes an independent public-broadcasting system, it may not restrict funding to programs that espouse a Republican perspective.

As the last example suggests, however, not everything that is made available to the public is subject to these constraints. Instead, the focus should be on the nature and purpose of the activity. Suppose that in creating public television, the federal government had reserved a half-hour per day to broadcast its own messages. Clearly, this should be regarded as a matter of government speech, not of distributive justice. At first blush, one might seek to explain this result by saying that the broadcasts were made for the government's benefit rather than that of individuals. The government might well believe, however, that its messages would benefit people who watched them. Thus, the critical question is not merely whether the activity would benefit individuals, but whether average recipients would regard the activity as being for their benefit, and would assert a right to the benefit. On this analysis, while the programs broadcast by an independent public-broadcasting system should be subject to distributive justice constraints, broadcasts of the government's own views should not be. Instead, they should be subject only to the modest limitations that apply to government speech.

Thus far the discussion has focused on benefits that promote the personal welfare of individuals. But distributive justice should also apply to benefits that are provided to individuals in their capacity as democratic citizens. For example, under the First Amendment, individuals have a right of access to public forums "for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>284</sup> Many of the publicly available benefits discussed above can be understood in this way, for

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against viewpoint discrimination does not apply in such situations).

283. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 37-40 (1883) (Harlan, J., dissenting).

284. *Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality opinion).

they allow individuals to participate in the political, social, and cultural life of the community. Benefits of this sort should fall within the sphere of distributive justice, in addition to benefits that constitute either “new” or “old” property.

#### 4. CONCLUSION

This Section has developed an approach to state-supported speech that is rooted in a modern liberal conception of distributive justice. Of course, in deciding cases, courts need not invoke the theoretical language of distributive justice. The essential inquiry is whether the criteria adopted by the legislature are substantially related to a legitimate public purpose, accord with constitutional principles of personhood, and are consonant with the larger constitutional and political order. If so, the criteria represent a constitutionally legitimate way to distribute public benefits, and should be upheld under both First Amendment and equal protection analysis. Criteria that fail this test, on the other hand, improperly deny some individuals the opportunity to engage in expressive activity, and should be held unconstitutional.

It must be conceded that this approach will often call for difficult judgments. In this respect, the approach may seem less attractive than the more categorical positions taken by the governmental power and individual rights views. As demonstrated earlier, however, the simplicity of these positions is delusive. No simple principle is capable of capturing our intuitions about the appropriate way to distribute government benefits, especially in cases involving subsidized speech. Indeed, it would be surprising if such cases proved to be less difficult or controversial than other First Amendment problems. The virtue of the distributive justice view is not that it provides easy answers to such questions, but that it focuses attention on the crucial issues at stake.

#### IV. APPLICATIONS

Finally, this Part will consider how the distributive justice approach should apply to two of the most controversial problems in the area of state-supported speech: the ban on abortion counseling in *Rust v. Sullivan*<sup>285</sup> and the standards for arts funding in *NEA v. Finley*.<sup>286</sup>

##### *A. Abortion Counseling and Referral*

In 1970, Congress enacted Title X of the Public Health Services Act to

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285. 500 U.S. 173 (1991).

286. 524 U.S. 569 (1998).

provide funding for family-planning services.<sup>287</sup> Title X authorizes the Department of Health and Human Services (HHS) to make grants to organizations to establish and operate such services.<sup>288</sup> Section 1008 of the Act, however, provides that no Title X funds may "be used in programs where abortion is a method of family planning."<sup>289</sup>

For nearly two decades, HHS interpreted this provision to apply only to the actual performance of abortions.<sup>290</sup> In 1987, however, President Reagan announced a change of policy.<sup>291</sup> The following year, HHS issued regulations imposing a variety of restrictions on federally funded family-planning clinics.<sup>292</sup> In particular, the regulations prohibited clinics from engaging in even nondirective counseling about abortion or from referring pregnant clients for abortions.<sup>293</sup> Instead, "once a client . . . is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child."<sup>294</sup> The regulations added that the clinic must not indirectly encourage or promote abortion, "such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list . . . providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by 'steering' clients to providers who offer abortion[s] . . . ."<sup>295</sup> The regulations suggested that if a pregnant woman asked for information regarding abortion, she should be told that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion," and then provided with assistance in obtaining prenatal care.<sup>296</sup> Finally, the regulations barred clinics from engaging in lobbying or other forms of advocacy of "abortion as a method of family planning."<sup>297</sup>

287. See Population Research and Voluntary Family Planning Programs Act, Pub. L. No. 91-572, 84 Stat. 1506 (1970) (codified as amended at 42 U.S.C. §§ 300 to 300a-6 (1994)).

288. See 42 U.S.C. § 300(a) (1994).

289. *Id.* § 300a-6.

290. For an overview of the pre-1988 policy, see Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects, 53 Fed. Reg. 2922, 2923 (1988) (codified at 42 C.F.R. pt. 59) [hereinafter Statutory Prohibition].

291. See Steven V. Roberts, *U.S. Proposes Curb on Clinics Giving Abortion Advice*, N.Y. TIMES, July 31, 1987, at A1.

292. See Statutory Prohibition, *supra* note 290.

293. See 42 C.F.R. § 59.8 (1989). The regulations may be found in Statutory Prohibition, *supra* note 290, 53 Fed. Reg. at 2944-46. One of President Clinton's first acts upon taking office was to announce that his administration intended to revoke the regulations. See Memorandum of the President of the United States, Jan. 22, 1993, 58 Fed. Reg. 7455 (1993), reprinted in 42 U.S.C. § 300 note (1994).

294. 42 C.F.R. § 59.8(a)(2).

295. *Id.* § 59.8(a)(3).

296. *Id.* § 59.8(b)(5).

297. *Id.* § 59.10(a).

In *Rust*, a sharply divided Supreme Court rejected statutory and constitutional challenges to the regulations.<sup>298</sup> As discussed earlier, the case constitutes a classic debate between the governmental power and individual rights approaches to subsidized speech.<sup>299</sup> Siding with the plaintiffs, Justice Blackmun's dissent argued that the regulations penalized constitutionally protected speech by denying benefits to clinics that exercised their First Amendment rights to engage in abortion counseling, referral, or advocacy.<sup>300</sup> Chief Justice Rehnquist's majority opinion responded that a mere refusal to subsidize expression does not violate the First Amendment, and that the government is entitled to promote its own policies by funding some activities to the exclusion of others.<sup>301</sup>

Remarkably, both the majority opinion and the dissent focused almost exclusively on the First Amendment rights of the clinics and their employees, rather than on those of their clients.<sup>302</sup> By contrast, the distributive justice approach focuses on the rights of the women—the principal beneficiaries of the Title X program, and surely the group most affected by the regulations.

The threshold question is whether the case falls within the domain of distributive justice.<sup>303</sup> The answer is clearly yes. Access to Title X family-planning services may well be a matter of statutory entitlement for those women who meet the eligibility criteria. In any event, the Title X program provides its clients with valuable services that are ordinarily supplied through the market. The way in which such benefits are provided is a matter of

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298. 500 U.S. 173 (1991). For discussions of *Rust*, see SUNSTEIN, *THE PROBLEM OF FREE SPEECH*, *supra* note 10, at 116-17; Cole, *supra* note 10; Post, *Subsidized Speech*, *supra* note 10, at 168-76; Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993); Peter M. Shane, *The Rust That Corrodes: State Action, Free Speech, and Responsibility*, 52 LA. L. REV. 1585 (1992); William W. Van Alstyne, *Second Thoughts on Rust v. Sullivan and the First Amendment*, 9 CONST. COMMENTARY 5 (1992); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey*, 95 COLUM. L. REV. 1724 (1995); Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 STAN. L. REV. 185 (1992).

299. See *supra* text accompanying notes 42-57.

300. See 500 U.S. at 207-11 (Blackmun, J., joined by Marshall and Stevens, JJ., dissenting).

301. See *id.* at 193.

302. For example, Justice Blackmun's discussion of the First Amendment issue devoted only one paragraph to the interests of the clients. See *id.* at 215.

This common focus reflects the tendency of both the governmental power and individual rights views to assimilate the problem of state-supported speech to that of traditional censorship. See *supra* text accompanying note 162. In particular, a major thrust of the First Amendment challenge to the regulations was that they imposed an unconstitutional condition by threatening to deny benefits to those who engaged in certain expression. See 500 U.S. at 192, 196 (framing the issue in this way); *id.* at 208-09 (Blackmun, J., dissenting) (same). This challenge dictated an emphasis on the conditions imposed on the clinics, rather than on the consequent harm to their clients. See Cole, *supra* note 10, at 697-98 (criticizing this focus).

303. See *supra* Part III.C.3.



distributive justice. For this reason, the result in *Rust* cannot be justified on the ground later advanced in *Rosenberger v. Rector of University of Virginia*: that *Rust* was merely a case of government speech, a situation in which the government had provided funds to private organizations "to convey a governmental message" and was therefore "entitled to say what it wishe[d]."<sup>304</sup> This conclusion might be correct if, for example, the government required Title X projects to make available to clients an HHS-prepared pamphlet or film promoting childbirth over abortion. In that case, the government would merely be conveying its own views.<sup>305</sup> By contrast, counseling and referral are both offered and understood as services for the benefit of the client,<sup>306</sup> rather than as mere opportunities for the government or the clinic to present their views. As benefits, counseling and referral services come within the scope of distributive justice. The requirements of equal protection unquestionably apply to such benefits: No one would contend that the government may deny such services on the basis of race. The First Amendment should apply as well.

The central inquiry is whether the regulations distribute benefits in an appropriate way in light of the purposes of Title X, on one hand, and the persons among whom the benefits are distributed, on the other. More specifically, a court should ask (1) what the purposes of the program are, and whether they are constitutionally legitimate; (2) whether the regulations are substantially related to those purposes; (3) whether the regulations treat the program's beneficiaries in a way that accords with constitutional norms of personhood; and (4) whether the regulations have the purpose or effect of undermining other aspects of the constitutional order.<sup>307</sup> The following discussion will begin with the restrictions on counseling and referral, and then turn to those on advocacy.

Title X was enacted "to assist in making comprehensive voluntary family planning services," including "information . . . on family planning," "readily available . . . to all persons desiring such information."<sup>308</sup> At the

304. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 833 (1995) (citing *Rust*, 500 U.S. at 194, 196-200).

305. Of course, First Amendment issues would arise if the project were required to expressly or implicitly endorse the government's views as its own, *see, e.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), or if clients were treated as a captive audience and not permitted to decline the material, *see, e.g.*, *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting).

306. HHS itself emphasized this point in its argument that counseling and referral were subject to section 1008 of the Act. *See* Statutory Prohibition, *supra* note 290, 53 Fed. Reg. at 2923 (observing that "[c]ounseling and other informational services [including referral] are some of the principal family planning services provided by Title X programs," and "integral parts of the provision of any method of family planning").

307. *See supra* Part III.C.1.

308. Population Research and Voluntary Family Planning Programs Act, Pub. L. No. 91-572, § 2, 84 Stat. 1506 (1970), *quoted in* 42 U.S.C. § 300 note (1994) (Congressional Declaration of Purpose).

same time, the legislation prohibited the use of federal funds “in programs where abortion is a method of family planning.”<sup>309</sup> Neither the language nor the legislative history of the statute made clear how far this prohibition was meant to extend. Under these circumstances, the *Rust* majority held that the regulations represented a reasonable interpretation of the statute and were entitled to deference.<sup>310</sup>

Suppose that one (tentatively) grants this assumption. In this view, the purpose of Title X is to support voluntary family-planning services, while also promoting childbirth over abortion. As the majority emphasized,<sup>311</sup> the latter purpose was held to be constitutionally legitimate in *Maher v. Roe*<sup>312</sup> and *Harris v. McRae*.<sup>313</sup> Of course, those decisions are intensely controversial.<sup>314</sup> Yet the Court has shown no inclination to reconsider them. For purposes of argument, then, suppose that this is a legitimate purpose. Moreover, it is difficult to deny that a ban on abortion counseling and referral is substantially related to that purpose. Thus, the regulations appear to satisfy the first two elements of the distributive justice analysis.

The difficulty arises with the third element. As the agency itself made clear, the premise of the regulations is that even nondirective counseling should be regarded as promoting abortion if the result is that more women choose to have abortions.<sup>315</sup> For this reason, the regulations forbid clinics to provide relevant information, and instead require them to steer clients toward prenatal care and childbirth. In so doing, the regulations treat women as mere means to the government’s own ends—an approach that is fundamentally

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309. 42 U.S.C. § 300a-6 (1994).

310. See *Rust v. Sullivan*, 500 U.S. 173, 184-88 (1991).

311. See *id.* at 192-93.

312. 432 U.S. 464, 477-80 (1977).

313. 448 U.S. 297, 326-27 (1980).

314. For commentary critical of the decisions, see Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113 (1980); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985). For a qualified defense, see Epstein, *supra* note 10, at 89-94.

315. As the agency explained, it rejected the contention that the requirement [of the existing guidelines] that the counseling must be “nondirective” is sufficient to render [them] consistent with the statute. Counseling in a Title X program, whether directive or nondirective, which results in abortion as a method of family planning simply cannot be squared with the language of section 1008, regardless of whether the actual abortion occurs in another program operated by the grantee or in an unrelated program.

Statutory Prohibition, *supra* note 290, 53 Fed. Reg. at 2923. The agency added that, even if the existing guidelines did not contravene the language of section 1008, they were unsound as a matter of statutory policy—the policy “that abortion is not to be encouraged or promoted in any way.” *Id.*; see also *id.* at 2933 (“[T]he Department is simply unable to conclude that the . . . [nondirective] counseling and referral that has been required by the program guidelines has not had the effect of promoting or encouraging abortion in violation of . . . section 1008.”).

inconsistent with our constitutional recognition of the autonomy of persons. This conception lies at the heart of the First Amendment.<sup>316</sup> In particular, it is central to those decisions which hold that, as a general rule, the state may not restrict expression because it does not trust listeners to respond in an appropriate way.<sup>317</sup> This principle of self-determination also underlies the right to reproductive freedom recognized in such cases as *Griswold v. Connecticut*,<sup>318</sup> *Roe v. Wade*,<sup>319</sup> and *Planned Parenthood v. Casey*.<sup>320</sup>

The HHS regulations violate this principle by requiring Title X clinics to selectively withhold information from women in order to induce them to pursue a course of action they might otherwise reject. By distorting individual deliberation on an intensely personal matter, the regulations also constitute a classic example of how government power over benefits can

316. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 574 (1995) (observing that “autonomy to control one’s own speech” is a fundamental principle of the First Amendment); *Cohen v. California*, 403 U.S. 15, 24 (1971) (stating that the First Amendment puts “the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests”); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (holding that First Amendment protects the individual’s “right to read or observe what he pleases . . . in the privacy of his own home”).

317. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council*, 425 U.S. 748, 773 (1976) (holding that “a State may [not] completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon . . . its recipients”); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that the First Amendment does “not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”). For defenses of this principle, see RONALD DWORKIN, *Why Must Speech Be Free?*, in *FREEDOM’S LAW* 195, 200 (1996); C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 989-92 (1997); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

318. 381 U.S. 479 (1965) (plurality opinion) (recognizing a constitutional right to privacy that protects contraceptive use by married couples). In *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), that right was extended to unmarried individuals on the ground that, “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

319. 410 U.S. 113, 153 (1973) (holding that right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”).

320. 505 U.S. 833, 851 (1992) (plurality opinion) (reaffirming that the Constitution protects individual liberty to make “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” on ground that these matters “involv[e] the most intimate and personal choices a person may make in a lifetime” and are “central to personal dignity and autonomy”); see *id.* at 916 (Stevens, J., concurring in part and dissenting in part) (asserting that autonomy to make such personal decisions is “an element of basic human dignity”).

threaten the sphere of private liberty.<sup>321</sup> For these reasons, the regulations do not represent an appropriate way to distribute Title X benefits. Instead, distributive justice dictates that, to the extent the government funds post-conceptional counseling or referral, it do so in a way that affords equal treatment to women who desire to give birth and those who wish to consider abortion. By denying benefits to women in the latter group, the regulations deprive them of something to which they are justly entitled. In this way the regulations deny equal protection. They also violate the First Amendment by interfering with the women's access to information they are entitled to receive,<sup>322</sup> thereby reducing their ability to engage in informed deliberation about what course to take.<sup>323</sup>

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321. Cf. Sullivan, *supra* note 10, at 1497 n.358 (criticizing *Maier* and *McRae* on this ground).

322. That freedom of expression is grounded in the interests of listeners as well as speakers is, of course, an important theme in modern free speech theory. See, e.g., MEIKLEJOHN, *supra* note 134, at 26-27 (arguing that the First Amendment is intended to prevent suppression of information and opinion necessary for citizens to make informed political judgments); MILL, *supra* note 214, ch. 2, at 18 (observing that "the peculiar evil" of censorship is that it deprives mankind of the potential for greater apprehension of truth); MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 22 (1984) (contending that the First Amendment should protect the "free flow of information and opinion [that individuals need] to guide them in making . . . life-affecting decisions"); Heyman, *Righting the Balance*, *supra* note 121, at 1328 (contending that freedom to receive images and ideas is an essential aspect of individual self-realization); see also commentary cited *supra* note 317.

For decisions holding that the First Amendment encompasses a "right to receive information and ideas," see *Board of Education v. Pico*, 457 U.S. 853, 866-68 (1982) (plurality opinion), and cases cited therein. In general, this right presupposes a willing speaker, and does not necessarily require the government to affirmatively provide information. See *id.* at 887-89 (Burger, C.J., dissenting). The First Amendment may be violated, however, when the government refuses to allow access to information when it has a constitutional obligation to do so. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (recognizing a First Amendment right of public to attend criminal trials). In the present context, the HHS regulations should be regarded as a First Amendment violation insofar as they deny Title X clients information that they are entitled to receive under the distributive justice analysis.

323. For an argument that promoting this ability is a central value of the First Amendment, see REDISH, *supra* note 322, at 22.

At some points, HHS suggests a rather different account of the regulations' purpose. According to this view, Congress intended to limit Title X to preventive family planning, rather than prenatal care or other post-conceptional services. See Statutory Prohibition, *supra* note 290, 53 Fed. Reg. at 2922. Thus, the regulations merely sought to refocus the program "on its traditional mission," *id.* at 2925, not to affect the ability of women to make their own decisions after conception.

This argument clearly is unpersuasive with regard to the regulations on referral. Those provisions not only permit but require clinics to refer pregnant clients "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child." 42 C.F.R. § 59.8(a)(2) (1989). By mandating referrals for prenatal care while forbidding those for abortion, the regulations seek to affect the ability of women to make their own decisions, both at that time and in the future.

Thus far the discussion has focused on the rights of Title X clients. It is now apparent, however, that the regulations also violate the rights of the clinics and their employees. Title X confers benefits on them as well by enabling them to conduct their operations, including those that involve speech. Those benefits must be distributed in accord with distributive justice. In this context, justice requires that grants be made to the clinics that are best able to provide the services covered by the Title X program. Those services, however, cannot constitutionally be limited to information promoting childbirth, while excluding information on abortion. It follows that this restriction cannot be used as a criterion for making grants under Title X. By denying funding to otherwise qualified clinics solely because they provide information on abortion, the regulations violate their rights to equal protection, as well as their freedom of speech—both by denying them resources to engage in speech, and by withholding benefits on account of speech. Finally, because the clinics can speak only through their employees, the regulations also violate the latter's First Amendment rights.

One can reach the same result in another way as well. When the government distributes benefits, it must do so in a way that respects individual autonomy. Similarly, when it distributes benefits through a particular social relationship or institution, the government should be required to respect their own autonomy and integrity, insofar as these are entitled to

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The case is less clear with regard to counseling. Although the regulations expressly forbid only "counseling concerning . . . abortion as a method of family planning," *id.* § 59.8(a)(1), they can reasonably be read to place post-conceptual counseling of any sort beyond the bounds of the program. *See id.* § 59.8(a)(2) ("Because Title X funds are intended only for family planning, once a client . . . is diagnosed as pregnant, she must be referred" for services outside the Title X program.). On this interpretation, the counseling regulations are not meant to take a position on abortion versus childbirth, but merely hold that the Title X program was not intended to provide post-conceptual services.

If the counseling regulations were to be interpreted this way, rather than as expressing "a value judgment favoring childbirth over abortion," *Rust v. Sullivan*, 500 U.S. 173, 192 (1991), they would present a more difficult First Amendment problem. *Rust*, however, was not the appropriate occasion to address this issue, for it was by no means clear that the two types of restrictions were severable from one another. Under the guidelines in force prior to the 1988 regulations, a major purpose of counseling was to enable the clinic to make an appropriate referral. *See UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, PROGRAM GUIDELINES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES* § 8.6 (1981) (providing that pregnant women "requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request: Prenatal care and delivery[;] Infant care, foster care, or adoption[;] Pregnancy termination"). In adopting the new regulations, HHS was able to dispense with post-conceptual counseling at least in part because the regulations made referral for prenatal care mandatory, to the exclusion of all other options. If the restrictions on referral were struck down, the agency might well wish to reconsider the ban on nondirective counseling. For this reason, it would not have been appropriate for the Court to have confronted the question whether the ban on counseling would be constitutional standing on its own.

constitutional recognition and protection.<sup>324</sup> For example, the Constitution protects the rights of people to raise and educate their children and to be free from unwarranted intrusion into their family life.<sup>325</sup> Government should not be allowed to distribute benefits in a way that unduly interferes with those rights—say, by requiring families that receive welfare benefits to read their children officially prescribed lectures on the virtues of hard work and sexual abstinence. Similarly, because “the university is a traditional sphere of free expression . . . fundamental to the functioning of our society,” government should not be permitted to condition benefits in a way that improperly interferes with university autonomy or academic freedom.<sup>326</sup> As Chief Justice Rehnquist acknowledged in *Rust*, it is plausible to argue that “traditional relationships such as that between doctor and patient should [also] enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government.”<sup>327</sup> The majority declined to address this argument on the ground that the HHS regulations “do not significantly impinge upon the doctor-patient relationship.”<sup>328</sup> As the dissenters showed, this response is wholly unconvincing: It is difficult to imagine a more severe intrusion than a rule that “manipulat[es] the very words spoken by physicians and counselors to their patients” in order to steer them toward a choice they might not otherwise make.<sup>329</sup>

This interference with the doctor-patient relationship provides an additional ground for invalidating the regulations under the First Amendment.<sup>330</sup> The distributive justice analysis of *Rust* goes beyond this rationale, however. The analysis would reach the same conclusion if abortion information and referral were provided by clinic employees who were not physicians or counselors. Nor does the result depend on the fact that the regulations limit the speech of private parties. The outcome would be the same if the government chose to provide family-planning services through its own clinics and personnel, for the impact on clients would be the same. Nor, finally, does the conclusion depend on the fact that many Title X clients are

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324. For general arguments to this effect, see Cole, *supra* note 10, at 748; Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 120 (1998).

325. See, e.g., *Planned Parenthood*, 505 U.S. at 887-98 (striking down spousal-notification requirement for abortion); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (holding that the Constitution limits government power to intrude on family living arrangements); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (plurality opinion) (recognizing constitutional right to marital privacy); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that Constitution protects “the liberty of parents and guardians to direct the upbringing and education of children under their control”).

326. *Rust*, 500 U.S. at 200.

327. *Id.*

328. *Id.*

329. *Id.* at 218 (Blackmun, J., dissenting).

330. For a persuasive argument to this effect, see Post, *Subsidized Speech*, *supra* note 10, at 168-76.

indigent and have little alternative but to rely on the program. This fact greatly increases the regulations' impact on personal autonomy, and thus strengthens the argument that they are unconstitutional. The result would be no different, however, if the Title X program were intended to serve all American women and men. Under the distributive justice approach, the crucial question is whether the program distributes benefits in a way that is appropriate in view of the program's purposes and our constitutional conception of persons. Because the Title X restrictions violate this requirement in a way that diminishes the ability of individuals to convey and receive information, they infringe the First Amendment. The Court could appropriately invalidate the regulations on this ground. A better resolution of the case is possible, however.

At this point, we should recall that the restrictions on abortion counseling and referral were imposed not by Title X itself but by administrative regulations. Insofar as Title X authorizes or requires HHS to impose such restrictions, the statute itself is unconstitutional. A court should not strike down a statute, however, if a reasonable alternative interpretation is available.<sup>331</sup> This suggests that we should reconsider the purposes of Title X. When we do, we may well conclude that the statute's objective was not merely instrumental (to promote population control, but not by means of abortion), but also, more fundamentally, to enable individuals to make their own decisions about family planning. This interpretation is consistent with the statute's language,<sup>332</sup> and finds considerable support in the legislative history.<sup>333</sup> If Title X is understood in this way, there is much less tension

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331. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *Hooper v. California*, 155 U.S. 648, 657 (1895)).

332. See, e.g., *Population Research and Voluntary Family Planning Programs Act*, Pub. L. No. 91-572, § 2(1), (4), 84 Stat. 1506 (1970), *quoted in* 42 U.S.C. § 300 note (1994) (Congressional Declaration of Purpose) (stating that a major purpose of the Act was "to assist in making comprehensive *voluntary* family planning services readily available to all persons *desiring* such services") (emphasis added).

333. For example, according to Representative Nelsen, the manager of the legislation on the House floor, "[T]he primary purpose of [the bill] is to make family planning services available to all [low-income] women *so that they can determine the size of their families.*" 116 CONG. REC. 37,367 (1970) (statement of Rep. Nelsen) (emphasis added). The legislation's supporters described access to family planning services as "a basic human right that should not be conditioned by economic status." *Id.* at 37,369 (statement of Rep. Scheuer); see also *id.* at 37,370 (statement of Rep. George H.W. Bush) ("[W]e . . . need public awareness that birth control is basic health care for the benefit of both parent and child."); *id.* at 37,386 (statement of Rep. Ottinger) (asserting that the lack of subsidized family planning services "is shortchanging Americans of a very basic right: the opportunity to make something of their lives, to live in dignity, to control their destiny"). In response to concerns about the danger of coercive population control, they emphasized that the program was purely voluntary and would enable individuals to make decisions in accord with their own values and beliefs. See, e.g., *id.* at 37,371 (statement of Rep. Pickle) (asserting that involuntary population control should be a last resort because it would "go against our traditional

between its purposes and constitutional principles of autonomy. In that event, however, it is even more clear that the HHS regulations do not constitute a proper criterion for distributing the program's benefits. Instead, as a matter of distributive justice, those benefits should be distributed in such a way as to promote the ability of individuals to make their own decisions. This suggests that the *Rust* Court should have interpreted Title X to require that any post-conceptional counseling, referral, or other information provided through the program be nondirective as between childbirth and abortion. Because the regulations were inconsistent with this interpretation, the Court should have held them unauthorized by statute, thereby avoiding the need to definitively decide the constitutional questions presented.<sup>334</sup> In this way, *Rust* provides a good example of how courts can use statutory interpretation to reach results consistent with distributive justice.

Finally, let us consider the regulations' restrictions on lobbying and other political expression advocating or promoting abortion.<sup>335</sup> Under the distributive justice approach, these limitations are defective for the same reasons as the tax code provisions in *Regan v. Taxation With Representation*.<sup>336</sup> In their capacity as citizens, all persons must be regarded as equal. The government generally has no constitutional obligation to subsidize political expression.<sup>337</sup> In particular, Congress may bar the use of Title X funds for any form of political advocacy or lobbying.<sup>338</sup> Congress

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commitment to maximize individual freedom"); *id.* at 37,375 (statement of Rep. Broyhill) (emphasizing that "it is not the intent of Congress that any such program should interfere with the religious or moral beliefs of individual Americans," but that "any individual wanting information about family planning should be able to obtain it"); *id.* at 37,388 (statement of Rep. Matsunaga) (stressing that the program was "strictly voluntary" and that "[w]e must be very careful to safeguard the religious and moral convictions of all of our citizens"). As Representative Burke observed, this meant that any information provided by the program must be designed simply to educate and inform individuals, and not to "motivat[e] the person to adopt a particular ideology" or to impose the government's own "moral judgment[s]" on them. *Id.* (statement of Rep. Burke). Instead, the program should be presented "as a public health service to enable people to do what their conscience dictates is proper or advisable in their own situation." *Id.* Representative Burke's remarks, which were meant to caution against using the Title X program to inculcate a pro-contraceptive ideology, seem equally applicable to an anti-abortion one.

334. The dissenting Justices urged a course much like this. See 500 U.S. at 204-07 (Blackmun, J., dissenting); *id.* at 220-23 (Stevens, J., dissenting); *id.* at 223-25 (O'Connor, J., dissenting).

335. See 42 C.F.R. § 59.10 (1989).

336. 461 U.S. 540 (1983). See *supra* text accompanying notes 271-73.

337. See *Regan*, 461 U.S. at 545-46.

338. As *Rust* recognizes, however, such restrictions may violate the unconstitutional conditions doctrine when they go beyond regulating the use of government funds within a particular program and instead impose "a condition on the *recipient* of the subsidy, . . . thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." 500 U.S. at 197. Thus, while Congress may prohibit Title X projects from engaging in political advocacy, it may not require the project's parent organization (such as Planned Parenthood) to refrain from doing so with its own resources



may not, however, deny funds only to those clinics that wish to speak on a particular side of a controversial political issue. The violation here is far more egregious than that in *Taxation With Representation* because the restriction is based on viewpoint, not merely on speaker identity. Once again, there is nothing in Title X that requires HHS to impose these restrictions, and they should therefore have been held beyond the agency's statutory authority.

### *B. State Support for the Arts*

#### 1. THE CONTROVERSY OVER THE NEA

In 1965, Congress created the National Endowments for the Arts and the Humanities "to develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States."<sup>339</sup> The enabling legislation authorized the NEA to make grants to organizations and individuals in order to support projects of "substantial artistic and cultural significance, . . . encourage and assist artists and enable them to achieve standards of professional excellence," and promote public appreciation and enjoyment of art.<sup>340</sup> Since 1965, the NEA has made approximately 100,000 awards totaling over three billion dollars.<sup>341</sup> In turn, this funding has greatly stimulated state, local, and private support for the arts.<sup>342</sup>

During its first quarter-century, the NEA stirred only sporadic controversy.<sup>343</sup> Major disputes erupted in 1989, however, over two exhibitions that had received funding directly or indirectly from the NEA.<sup>344</sup> The first was a show at the Southeastern Center for Contemporary Art in Winston-Salem, North Carolina, of photographs by Andres Serrano. The exhibit included a work entitled "Piss Christ," which portrayed a crucifix submerged in the artist's urine.<sup>345</sup> Further contention arose over a planned

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as a condition of eligibility for receiving federal funds. As *Rust* stresses, the HHS regulations did not purport to do so. See *id.* at 196.

339. National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, § 4(b), 79 Stat. 845, 846 (1965) (codified as amended at 20 U.S.C. § 953(b) (1994)).

340. *Id.* § 5(c), 79 Stat. at 846-47 (codified as amended at 20 U.S.C. § 954(c)).

341. See *NEA v. Finley*, 524 U.S. 569, 574 (1998).

342. See THE INDEPENDENT COMMISSION, A REPORT TO CONGRESS ON THE NATIONAL ENDOWMENT FOR THE ARTS 34-36 (1990) (noting that the NEA's reliance on matching grants had stimulated a vast increase in private support for the arts, from approximately \$250 million per year in 1965 to \$6 billion in 1990, with an additional \$534 million in spending by state and local arts agencies).

343. For an overview of controversies arising from NEA grants prior to 1989, see *id.* at 37-39.

344. For a collection of materials on the controversy, see *CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS* (Richard Bolton ed., 1992) [hereinafter *CULTURE WARS*].

345. See Joshua P. Smith, *Why the Corcoran Made a Big Mistake*, WASH. POST, June 18, 1989, reprinted in *CULTURE WARS*, *supra* note 344, at 37, 39.

retrospective at the Corcoran Gallery of Art in Washington, D.C., of work by Robert Mapplethorpe, which included a series of explicit photographs portraying homosexual and sadomasochistic activities, and two others involving child nudity.<sup>346</sup> Responding to the political storm over these exhibits,<sup>347</sup> Congress in late 1989 attached a rider to an appropriations bill which temporarily barred the NEA from using federal funds

to promote, disseminate, or produce materials which in the judgment of the [NEA] . . . may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.<sup>348</sup>

At the same time, Congress created a bipartisan Independent Commission to review the NEA's grantmaking procedures and to consider the appropriate standards for publicly funded art.<sup>349</sup>

The Independent Commission submitted its report in September 1990, on the eve of a major congressional debate over the future of the NEA.<sup>350</sup> The report reaffirmed the importance of public support for the arts<sup>351</sup> and praised the NEA's strong record in "contributing to unprecedented growth in virtually every field of the arts," thereby helping to "transform the cultural landscape of the United States."<sup>352</sup> The report also emphasized that freedom of expression was essential to the arts.<sup>353</sup> At the same time, however, the Commission found that in recent years the NEA had failed to show sufficient sensitivity to "the nature of public sponsorship" and the need "to maintain public confidence in its stewardship of public funds."<sup>354</sup>

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346. See *id.* For a detailed account of the Mapplethorpe exhibition and the controversy surrounding it, see FISS, *State Activism and State Censorship*, in *LIBERALISM DIVIDED*, *supra* note 183, at 89, 92-97.

347. Although the controversy was sparked by the Mapplethorpe and Serrano exhibitions, conservatives alleged that they were not isolated incidents, but were representative of a substantial number of works funded by the agency. See, e.g., Robert H. Knight, *The National Endowment for the Arts: Misusing Taxpayers' Money*, HERITAGE FOUND. REP., Jan. 18, 1991, available in LEXIS, News Library, HFRPTS File.

348. Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, § 304(a), 103 Stat. 741 (1989). An NEA policy requiring grantees to certify that their projects would not violate this provision was declared unconstitutionally vague in *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 782 (C.D. Cal. 1991).

349. See Department of the Interior and Related Agencies Appropriations Act § 304(c), 103 Stat. at 742.

350. See THE INDEPENDENT COMMISSION, *supra* note 342.

351. See *id.* at 58-59.

352. *Id.* at 34-36.

353. See *id.* at 83.

354. *Id.* at 3, 91.

Despite this criticism, the Commission urged Congress not “to impose specific restrictions on the content of works of art supported by the Endowment.”<sup>355</sup> Instead, the report recommended that Congress adopt a wide range of reforms to improve the NEA’s structure and procedures in order to promote greater public accountability.<sup>356</sup> The report further urged Congress to amend the Act’s declaration of purposes to provide greater guidance to the agency.<sup>357</sup> The Commission emphasized, however, that the success of the Endowment ultimately depended on its sensitivity and good judgment in administering the program.<sup>358</sup>

In late 1990, Congress enacted legislation reauthorizing the NEA.<sup>359</sup> During the debate, Congress rejected several amendments that would have virtually eliminated the agency’s budget<sup>360</sup> or imposed a range of content-based restrictions on the works it could fund.<sup>361</sup> Instead, Congress adopted a bipartisan compromise that largely followed the recommendations of the Independent Commission.<sup>362</sup> The legislation focused on structural and procedural reforms.<sup>363</sup> It also amended the 1965 Act’s Declaration of Purpose to stress that “[t]he arts and the humanities belong to all the people of the United States.”<sup>364</sup> For this reason, the Act declared:

[T]he Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money.

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355. *Id.* at 89.

356. *See id.* at 63-81.

357. *See id.* at 91 (recommending that Congress make clear that “the Endowment serves all of the people rather than artists and arts institutions alone, that it must be aware of the nature of public sponsorship and that it reflects the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us”).

358. *See id.* at 3, 61.

359. *See Arts, Humanities, and Museums Amendments of 1990*, Pub. L. No. 101-512, 104 Stat. 1960.

360. *See, e.g.*, 136 CONG. REC. 28,656-57 (1990) (rejecting Crane Amendment).

361. For example, the House rejected the Rohrabacher Amendment, which would have prohibited the NEA from funding any work which was obscene, or which “depicts or describes, in a patently offensive way, human sexual or excretory activities or organs,” or which has “the purpose or effect of denigrating the beliefs, tenets, or objects of a particular religion,” *id.* at 28,657-64, as well as the Regula Amendment, which would have provided that no NEA funds could be expended to support any project “that is obscene under the standards of *Miller v. California*, 413 U.S. 15, 24 (1973) or indecent as the term is used in *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 732 (1978),” *id.* at 29,233-44.

362. *See id.* at 29,239-45 (adopting Williams-Coleman Amendment).

363. For example, the law instructed the Chairperson “to ensure that all [NEA advisory] panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view,” and also “include representation of lay individuals who are knowledgeable about the arts.” 20 U.S.C. § 959(c)(1)-(2) (1994).

364. *Id.* § 951(1).

Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.<sup>365</sup>

In one crucial respect, the compromise legislation went beyond the Independent Commission's report. Section 5(d) of the 1965 Act authorized the Chairperson of the NEA to establish regulations and procedures to govern the grant program.<sup>366</sup> The provision specified no substantive standards for grant awards, although other sections of the statute and the legislative history suggested that the principal criterion was to be artistic merit or excellence.<sup>367</sup> The 1990 legislation amended section 5(d) by adding the following:

In establishing such regulations and procedures, the Chairperson shall ensure that—

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

(2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded.<sup>368</sup>

Even in this respect, however, Congress followed the advice of the Independent Commission, which had recommended that if any content-based criteria were adopted, they should be treated “as aspects of the ultimate aesthetic judgment” rather than as separate and absolute prohibitions.<sup>369</sup>

## 2. *NEA V. FINLEY*

A constitutional challenge to the decency-and-respect clause reached the Supreme Court in *NEA v. Finley*.<sup>370</sup> The plaintiffs were four performance

365. *Id.* § 951(5).

366. *See* 20 U.S.C. § 954(d) (1988).

367. *See, e.g.,* National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, § 5(c)(1)-(3), 79 Stat. 845, 846-47 (codified as amended at 20 U.S.C. § 954(c)(1)-(3)) (instructing NEA to support projects of substantial artistic significance and to encourage professional excellence); S. REP. NO. 89-300, at 4 (1965) [hereinafter 1965 SENATE REPORT] (stating that grants should be awarded on the basis of “artistic and humanistic excellence”).

368. Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, § 103(b), 104 Stat. 1960, 1963 (codified at 20 U.S.C. § 954(d) (1994)).

369. THE INDEPENDENT COMMISSION, *supra* note 342, at 89-90.

370. 524 U.S. 569 (1998). The *Finley* litigation, and the problem of arts funding in

artists, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, whose grant applications were denied at the height of the controversy over Mapplethorpe, Serrano, and the future of the NEA.<sup>371</sup> By a vote of eight to one, the Supreme Court ruled that the clause was not unconstitutional on its face.<sup>372</sup> Justice O'Connor's majority opinion attempted to decide the case on the narrowest possible grounds. Unfortunately, the result was an opinion of almost Sibylline obscurity.

Most of the opinion responded to the plaintiffs' contention that the clause was "a paradigmatic example of viewpoint discrimination because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency."<sup>373</sup> At some points, O'Connor appeared to endorse the NEA's view that the provision was concerned with procedure rather than substance,<sup>374</sup> and could be adequately implemented merely by ensuring that grant-review panels reflected a broad range of perspectives and backgrounds.<sup>375</sup> This was hardly a tenable interpretation of the statute, however,<sup>376</sup> and O'Connor stopped short of adopting it.<sup>377</sup> No more convincing was the majority's suggestion that the clause was merely "advisory".<sup>378</sup> As amended, the statute provided that the Chairperson "shall ensure" that decency and respect were considered in the funding process.

O'Connor emphasized that the clause "imposes no categorical requirement," but merely "adds 'considerations' to the grant-making process; it does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those

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general, have sparked vigorous debate. See, e.g., SHIFFRIN, *DISSENT*, *supra* note 183, at 18-24; SUNSTEIN, *THE PROBLEM OF FREE SPEECH*, *supra* note 10, at 226-34; Bollinger, *supra* note 258; Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199 (1994); FISS, *State Activism and State Censorship*, *supra* note 346; Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 112-19 (1996); Jeffrie G. Murphy, *Freedom of Expression and the Arts*, 29 ARIZ. ST. L.J. 549 (1997); Post, *Subsidized Speech*, *supra* note 10, at 176-94; Sabrin, *supra* note 146; Schauer, *supra* note 324.

371. During the course of the litigation, the agency agreed to settle the plaintiffs' individual claims for damages, and the case proceeded as a facial challenge to the decency-and-respect clause. See 524 U.S. at 577-78.

372. See *id.* at 590. For a thoughtful analysis of the case, see Lackland H. Bloom, Jr., *NEA v. Finley: A Decision in Search of a Rationale*, 77 WASH. U.L.Q. 1 (1999).

373. 524 U.S. at 580.

374. See, e.g., *id.* at 576 (stating that the clause "directs the Chairperson, in establishing procedures to judge the artistic merit of grant applications," to consider decency and respect) (emphasis added); *id.* at 575-76, 582 (suggesting that Congress simply followed the Independent Commission's procedural approach to reform); *id.* at 582 (stating that "the legislation was aimed at reforming procedures rather than precluding speech").

375. See *id.* at 580-81.

376. See *supra* text accompanying notes 366-69 (discussing Congress' decision to depart from the Commission's approach and adopt substantive criteria).

377. See 524 U.S. at 581.

378. *Id.*

factors must be given any particular weight in reviewing an application.”<sup>379</sup> As Justice Scalia noted, however, “factors need not be conclusive to be discriminatory.”<sup>380</sup> The Court, Justice Souter added, would hardly fail to perceive viewpoint discrimination “if the statute required a panel to apply criteria ‘taking into consideration the centrality of Christianity to the American cultural experience,’ or ‘taking into consideration whether the artist is a communist,’ or ‘taking into consideration the political message conveyed by the art.’”<sup>381</sup> Examples of this sort also undermine the majority’s contention that the decency and respect criteria are so subjective that they are unlikely to lead to discrimination against any particular set of views.<sup>382</sup> Although those views may not be clearly defined, there can be little doubt that Congress intended the agency to disfavor certain kinds of art.<sup>383</sup>

Finally, the majority argued that “[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.”<sup>384</sup> In deciding whether to fund a particular project, the NEA must consider a wide variety of factors, including the skill and creativity displayed by the work, its contemporary relevance and educational value, and its appeal to particular audiences and to the public in general.<sup>385</sup> Indeed, the very criterion of artistic merit required the agency to make content-based judgments.<sup>386</sup> It does not necessarily follow, however, that the agency must also consider such factors as “decency” and “respect,” or that those factors are equally legitimate. These are separate questions that the majority failed to address.

Up to this point, Justice O’Connor’s opinion appeared to proceed on the premise that the decency-and-respect clause would be unconstitutional if it constituted “invidious viewpoint discrimination.”<sup>387</sup> And in fact this portion of the opinion concluded by observing that the Court would be confronted with “a different case” if “the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints.”<sup>388</sup> Remarkably, however, the majority never explicitly stated that viewpoint discrimination in funding was unconstitutional. Indeed, the opinion is profoundly unclear on virtually every point: not only on the constitutionality of viewpoint discrimination, but also on whether such discrimination must be “invidious,” what makes discrimination “invidious,”

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379. *Id.* at 580-81.

380. *Id.* at 592 (Scalia, J., concurring in judgment).

381. *Id.* at 610 (Souter, J., dissenting).

382. *See id.* at 583.

383. *See id.* at 592-95 (Scalia, J., concurring in judgment).

384. *Id.* at 585.

385. *See id.*

386. *See id.* at 585-86.

387. *Id.* at 587.

388. *Id.*

and how these principles would apply to the decency-and-respect clause if it were construed to have any meaningful content.

Even more remarkably, the majority then radically shifted direction, moving from an individual rights to a governmental power position. Having just characterized a viewpoint-based funding denial as a “penalty,”<sup>389</sup> O’Connor went on to “note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake,” supporting this view with citations from *Taxation With Representation*, *Rust*, and *Maher*.<sup>390</sup> Once again, the opinion sheds no light on the nature of these “criteria.” It is difficult to avoid the conclusion, however, that they include standards that take viewpoint into account—although the Court is unwilling to refer to such standards, insofar as they are legitimate, as “viewpoint discrimination.”<sup>391</sup>

*Finley* clearly reveals the failure of the Court’s jurisprudence in this area. In *Finley*, six Justices adopted the centrist position that the NEA could take decency into account, but that it should not have untrammelled discretion to deny funding to controversial art. There is a great deal to be said for this position. Yet neither the individual rights nor the governmental power approach provided an adequate language with which to articulate this view, and the attempt to combine the two was simply incoherent. The next Section explores whether a more persuasive account is possible.

### 3. A DISTRIBUTIVE JUSTICE PERSPECTIVE

How should one think about *Finley* from a distributive justice perspective? More generally, how should the First Amendment apply to public funding of the arts? As a threshold matter, it seems clear that the problem is one of distributive justice. As the government conceded, NEA grants are not intended to enlist private speakers to convey a governmental message.<sup>392</sup> Hence the case is not one of government speech.<sup>393</sup> Instead, the program provides benefits to artists as well as to citizens in general.<sup>394</sup> On the other hand, the decency-and-respect clause does not pose a classic unconstitutional-conditions problem, because it does not attempt to restrict or penalize activities beyond the scope of the program.<sup>395</sup> Instead, the issue falls squarely within the realm of distributive justice.

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389. *Id.*

390. *Id.* at 587-88.

391. *Id.* at 588 (quoting Chief Justice Rehnquist’s assertion in *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), that in such cases “the Government has not discriminated on the basis of viewpoint,” but “has merely chosen to fund one activity to the exclusion of the other”).

392. *See id.* at 611 (Souter, J., dissenting).

393. *See supra* text accompanying notes 275-77.

394. *See supra* text accompanying note 283 (contending that goods provided to public as a whole should be regarded as benefits).

395. *See supra* text accompanying notes 278-80.

At first glance, it clearly seems legitimate to award arts grants on the basis of artistic excellence and merit. The use of decency as a further criterion is much more problematic. To determine whether it is legitimate, one must explore the purposes of the program—an inquiry that none of the Justices undertook in *Finley*.

A reading of the 1965 Act and its legislative history indicates that Congress created the NEA for several purposes. Most obviously, the program was designed to assist artists in order to promote individual creativity and self-expression.<sup>396</sup> The program was also intended to “encourage and develop the appreciation and enjoyment of the arts by our citizens,”<sup>397</sup> and thereby afford them “new opportunities for self-improvement and fulfillment.”<sup>398</sup>

In addition to these individual goods, supporters of the NEA stressed the social value of art and its importance to the nation as a whole. The arts, President Lyndon B. Johnson remarked, were valuable as “a unifying moral force” in a highly diverse society.<sup>399</sup> They expressed the nation’s identity and sought to articulate the meaning of its common life.<sup>400</sup> In addition to building a common culture, the NEA was intended to enhance and enrich that culture,

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396. See National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, § 2(5), 79 Stat. 845, 845 (codified as amended at 20 U.S.C. § 951(7) (1994)) (committing federal government “to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent”); *id.* § 5(c)(3) (codified as amended at 20 U.S.C. § 954(c)(3) (1994)) (authorizing NEA to support “projects that will encourage and assist artists and enable them to achieve standards of professional excellence”).

397. *Id.* § 5(c)(4) (codified as amended at 20 U.S.C. § 954(c)(5)).

398. H.R. REP. NO. 618, reprinted in 1965 U.S.C.C.A.N. 3186, 3190 [hereinafter 1965 HOUSE REPORT]; see also 111 CONG. REC. 23,938 (1965) (statement of Rep. Thompson) (“[I]t seems to me the ultimate end is to develop the capacity of all our citizens for the full development of their lives intellectually, esthetically, and to the moral opportunities . . .”) (quoting testimony of President Kingman Brewster of Yale University); *id.* at 23,952 (statement of Rep. Halpern) (maintaining that “the key goal would be the promotion of public understanding and appreciation” of the arts and humanities, in order to provide individuals with an opportunity for “enriching their lives” in this way).

399. Remarks to Members of the Bakersfield College Choir on the Creative and Performing Arts in America, 2 PUB. PAPERS 405 (Aug. 4, 1965) [hereinafter Remarks]. For this reason, the Act emphasized the need to ensure that the program’s benefits extended to all communities and regions in the country, including those that had previously had little exposure to the arts. See National Foundation on the Arts and the Humanities Act of 1965 § 5(c)(2) (codified as amended at 20 U.S.C. § 954(c)(2)) (authorizing NEA to support projects “which are of significant merit and which . . . would otherwise be unavailable to our citizens in many areas of the country”); *id.* § 5(h) (codified at 20 U.S.C. § 954(g)(1)) (authorizing the NEA to establish a program of grants to enable states to “furnish adequate programs, facilities, and services in the arts to all the people and communities in each of the several States”); 1965 HOUSE REPORT, *supra* note 398, at 3190 (“The Foundation would serve to decentralize the arts in the United States, so that artistic excellence could be enjoyed and appreciated by far greater numbers of our citizens, in each State of the Union.”).

400. See Remarks, *supra* note 399, at 405.



and thereby promote the quality of life in America.<sup>401</sup> The United States, the bill's advocates asserted, lagged far behind other nations in recognizing the importance of art and culture for national life.<sup>402</sup> The legislation would counterbalance the country's tendency to pursue material welfare and technological progress while neglecting the values represented by the arts and humanities.<sup>403</sup> Those values were particularly important in a democratic society. Echoing Alexander Meiklejohn, the Act asserted that art and culture were indispensable for their role in promoting the "wisdom and vision" required for self-government.<sup>404</sup> Finally, the Act's supporters stressed the intrinsic importance of the arts and humanities in "preserv[ing] and develop[ing] our human values" and "enrich[ing] . . . the core of human life."<sup>405</sup> The importance of these social and humanistic values was reaffirmed by the 1990 legislation.<sup>406</sup>

In sum, the NEA was established to further individual creativity and self-fulfillment, to build and enrich the common culture, and to promote more ultimate values in the realm of intellect and spirit. Under the distributive justice approach, these goals play a central role in determining what sorts of art the program should support.

To begin with, these goals help to explain the basic criterion of "artistic excellence and artistic merit." This standard would of course be unconstitutional in the context of traditional regulation. Under the First

401. See, e.g., 111 CONG. REC. 23,946 (1965) (statement of Rep. Saylor); *id.* at 23,948 (statement of Rep. Moeller); *id.* at 23,957 (statement of Rep. Pepper); 23,958 (statement of Rep. Schmidhauser).

402. See, e.g., *id.* at 23,938 (statement of Rep. Powell); *id.* at 23,955 (statement of Rep. Giaimo).

403. See, e.g., National Foundation on the Arts and the Humanities Act of 1965 § 2(2) (codified as amended at 20 U.S.C. § 951(3)); 111 CONG. REC. 23,945 (1965) (statement of Rep. Moorheard); *id.* at 23,955 (statement of Rep. Giaimo); *id.* at 23,956-57 (statement of Rep. Pickle).

404. National Foundation on the Arts and the Humanities Act of 1965 § 2(3) (codified as amended at 20 U.S.C. § 951(4)); see also 111 CONG. REC. 23,943 (1965) (statement of Rep. Rivers) (asserting that "freedom and democracy" require "a humane and enlightened society"); *id.* at 23,944 (statement of Rep. McVicker) ("The wisdom democracy demands of the average man is obscured by intolerance, bigotry, and ignorance."). For Meiklejohn's views, see MEIKLEJOHN, *supra* note 134, at 86 (arguing that the value of free speech in a democratic society is enhanced by affirmative efforts aimed at "educating and informing its people [so] that, in mind and will, they are able to think and act as self-governing citizens"); Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 256-57 (arguing that art and literature should receive First Amendment protection because of their contribution to "the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment" required by citizens of a democracy).

405. 111 CONG. REC. 23,943, 23,948 (1965) (statements of Rep. Rivers and Rep. Moeller); see also *id.* at 23,943 (statement of Rep. Meeds) (observing the arts and humanities are concerned with "concepts that provide the foundation and justification of man's very existence"); *id.* at 23,944 (statement of Rep. McVicker) ("In fostering and encouraging individual creativity, we can contribute to the elevation of all human values.").

406. See *supra* text accompanying notes 364-69.

Amendment, government may not ban works that fall short of artistic excellence. A merit standard would also be improper in a program that was designed simply to promote individual expression—for example, subsidized postal rates for magazines, or tax deductions for contributions to nonprofit organizations devoted to expressive activities. Yet few people would deny that the state may employ a merit standard when it distributes funding for art. The reasons lie in the purposes of the program. Although all artists are engaged in self-expression, some have the capacity to express their visions with greater clarity, insight, and depth than others. In this way, awarding grants on the basis of artistic merit not only promotes the values of individual creativity and self-expression, but also contributes more to the common culture and to art itself.

However difficult judgments of “artistic excellence” may be in practice, the standard itself has generated little controversy, perhaps because in this case all of the NEA’s purposes point in the same direction. Unfortunately, this will not always be true. In such cases, it may be appropriate for decisions on public funding to take account of factors other than individual self-expression and artistic excellence in general.

To start with the most dramatic example, suppose that a performance artist seeks NEA funding for a work entitled “The Dead Hand of the Past,” in which she has emotionally charged confrontations with several figures from her past life—figures represented on stage by actual human corpses.<sup>407</sup> No doubt such a work might express a powerful artistic vision. Moreover, so long as the performance used bodies that were voluntarily donated, and posed no threat to public health, it might not violate any civil or criminal laws.

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407. For a recent instance of art using human corpses, see Edmund L. Andrews, *Mannheim Journal: Anatomy on Display, and It's All Too Human*, N.Y. TIMES, Jan. 7, 1998, at A1, describing “Human Body World,” an exhibition on anatomy at the Museum of Technology and Work in Mannheim, Germany. The exhibit featured corpses that had been preserved through a process known as plastination and transformed in a variety of ways, in what its creator called “anatomical artwork.” *Id.* The article describes some of the figures as follows:

The Runner is frozen in the loping gait of a marathoner, stripped of almost everything except bones and muscles. Its outer muscles fly backward off its bones, as if the muscles were being blown by the wind rushing past.

The Muscleman is a bare skeleton that holds up its entire system of muscles, which looks like an astronaut's bulky spacesuit dangling on a hanger. The Figure with Skin retains all its muscles and organs, but its skin is draped like a coat over one arm. The Expanded Body resembles a human telescope, its skeleton pulled apart so people can see what lies beneath the skull and the rib cage.

. . . .

By any measure, some of the exhibits are shocking. On one female corpse, the stomach and womb have been slashed open to reveal a five-month old fetus. In a glass case at the center of the room, visitors encounter a row of plasticized infant corpses, including a pair of conjoined twins.

*Id.*

Surely, however, the NEA could properly decline to fund such a work, on the ground that it was inconsistent with widely held notions of human dignity. No doubt this proposition is contestable; the artist might argue that rather than demeaning death, her work was meant to affirm the value of life.<sup>408</sup> When an organization supports artistic projects, however, it cannot avoid the responsibility of making such judgments itself. And this is no less true of public than private institutions. In this case, the NEA could reasonably conclude that the work's aesthetic merit was outweighed by its adverse impact on human dignity—a value at the core of a good society, as well as one of the ultimate values the NEA was created to promote. For these reasons, it would be appropriate to deny funding for the work.

The same is true of works that degrade humanity as embodied in particular people. Suppose that a white-supremacist artist proposes to create a sculpture portraying certain racial groups as “Mud People,” an inferior species that should be destroyed to bring about an all-white world.<sup>409</sup> This work might also express its message in an aesthetically powerful way.<sup>410</sup> There is little question that, under current doctrine, the sculpture would be entitled to First Amendment protection, so long as it was not displayed in such a way as to constitute “fighting words” or incitement to imminent violence.<sup>411</sup> Once again, however, the community should not be compelled to fund art of this sort. This is true not only because the work assaults the dignity of humanity in general and of the target group in particular, but also because it is inconsistent with the fundamental bond that holds the society together—the fact that its members recognize one another as human beings and fellow citizens.<sup>412</sup> In this way, the work contravenes one of the NEA's

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408. In response to the criticism that “Human Body World” was inconsistent with human dignity, the exhibit's creator, Dr. Gunther von Hagens, argued that it was intended to “give[] people a new respect for the body”: “When you look at the models, you can recognize yourself as a member of the human species. Your humanity becomes clear.” *Id.*

409. See, e.g., Todd Lighty, *Church's Followers Have Violent History*, CHI. TRIB., July 9, 1999, at 1 (describing ideology of the white-supremacist World Church of the Creator); Evan Osnos & Diane Struzzi, *Suspect Known as Outspoken Racist*, CHI. TRIB., July 5, 1999, at 1 (same).

410. See Sabrin, *supra* note 146, at 1221 (observing that “there are many works of art that express repulsive views, but nonetheless are executed with outstanding technical merit and in a coherent and effective form and style”).

411. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978). Of course, the question whether the First Amendment should protect hate speech is the subject of an important and ongoing debate. For collections of writings, see HENRY LOUIS GATES, JR. ET AL., *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* (1994); *HATE SPEECH AND THE CONSTITUTION* (Steven J. Heyman ed., 1996); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

412. See Steven J. Heyman, *Hate Speech and the Theory of Free Expression*, in *HATE SPEECH AND THE CONSTITUTION*, *supra* note 411, at ix, xli-lxiii [hereinafter Heyman, *Hate Speech*].

central purposes—to build a common culture in a heterogeneous society.<sup>413</sup> Whether or not the First Amendment should be interpreted to protect hate speech, it certainly should not compel the state to support such speech. The government represents all of its citizens; it need not, and should not, provide direct support for activities whose very purpose is to deny the humanity of any of them.<sup>414</sup>

These examples suggest two additional points. The first concerns the relationship between aesthetics and other values. On one view, these are quite separate things: A work of art can be judged purely on aesthetic grounds, without regard to any other values. Any limitations on art for the sake of social or ethical values do not reflect the values of art itself, but come from the outside. Another view holds, on the contrary, that aesthetics cannot be completely isolated from other values. If, for example, one were aware that the gold in a sculpture had been taken from the dental fillings of people who had perished in a concentration camp, that knowledge would undermine the aesthetic pleasure one would otherwise take in the sculpture. In this view, social and moral values are not simply external to art, but may be relevant to its aesthetic value.

For present purposes, this debate need not be resolved. On the second view, of course, there is nothing improper about considering social and moral values in funding decisions, at least insofar as those values affect a work's aesthetic merit. Considering such values might appear to be more problematic on the first view, for the concept of distributive justice might seem to require that arts grants be awarded solely on the basis of artistic merit, without regard to extrinsic factors.<sup>415</sup> Nothing in the idea of distributive justice, however, precludes a program from pursuing more than one objective at the same time, or from moderating the pursuit of one end because of its impact on other aspects of the public good. Consider government support for scientific research. Undoubtedly, there are many situations in which researchers could learn more about human biology or psychology if they were allowed to use human subjects without their full knowledge and consent, or in ways that would inflict serious harm. Clearly, however, the government may insist that the research it supports observe strict ethical guidelines, whether or not those rules are otherwise mandated by law.<sup>416</sup> In this way, the society limits its pursuit of scientific knowledge

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413. See *supra* text accompanying notes 399-401. Nor does the work contribute to the "wisdom and vision" required by citizens in a democratic society. 20 U.S.C. § 951(4) (1994); *supra* note 404 and accompanying text. As Meiklejohn emphasized, democratic self-government depends upon the existence of mutual respect among citizens. See MEIKLEJOHN, *supra* note 133, at 69-70. By undermining that respect, hate speech makes democratic deliberation more difficult. See Heyman, *Hate Speech*, *supra* note 412, at l, lii.

414. But cf. SUNSTEIN, *THE PROBLEM OF FREE SPEECH*, *supra* note 10, at 232 (questioning the constitutionality of such a limitation).

415. See *supra* note 196 and accompanying text.

416. See, e.g., Federal Policy for the Protection of Human Subjects, 56 Fed. Reg.

out of respect for other values that at some point are regarded as more important. By the same token, there is no reason why support for art may not be limited by social and ethical values, even if they are regarded as extrinsic to art itself.

A second point concerns the notion of merit. Distributive justice dictates that benefits be allocated in proportion to merit. It may seem to follow that the “Dead Hand of the Past” and “Mud People” projects should receive some degree of funding, even if they are entitled to less than other projects with the same purely aesthetic value. For two reasons, however, this is not the case. The first is obvious: When a program with limited funds receives a large number of applications, it is simply incapable of funding all projects. In such a case, the program’s purposes may be better served by fully funding the projects with the greatest merit rather than providing strictly proportionate, but inadequate, funding to all projects.<sup>417</sup> A second reason is more interesting. Aristotle’s account of distributive justice seems to assume that all claimants have some merit. As the above examples suggest, however, it is possible for a project to have *negative* merit, in the sense that any good it does is more than offset by harm to the program’s purposes. Such a project should not merely receive less funding than others, but none at all. There is no good reason for the community to affirmatively support activities that, on balance, undermine its purposes in creating a program.

In short, while it is natural to make artistic merit the principal basis for awarding arts grants, distributive justice does not require that it be the sole criterion. When a program such as the NEA is designed to support art not only for the sake of individual self-expression but also for other purposes, those ends may properly be taken into account in determining what forms of art should receive public support.

How do these considerations bear on the problem in *Finley*—whether Congress may instruct the NEA to take account of “general standards of decency” in awarding arts grants? This problem implicates the relationship between art, morality, and community. This is a profound and difficult topic which often gives rise to passionate debate. I shall not attempt to fully explore this issue here. Instead, what follows are some tentative reflections on the notion of decency, its application to art, and the implications for public funding.

Let us begin with “decency.” In the 1990 amendments, Congress expressly declined to adopt the technical definition set forth in such cases as *FCC v. Pacifica Foundation*,<sup>418</sup> and instead used the term in a more general

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28,003 (1991) (adopting regulations to govern research conducted or funded by federal agencies).

417. See GALSTON, *supra* note 246, at 150.

418. 438 U.S. 726 (1978). *Pacifica* upheld an FCC decision that defined indecency, for purposes of broadcast regulation, as that which “describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or

sense. At root, decency refers to what is fitting.<sup>419</sup> As applied to conduct, it means that which is moral or proper. With regard to works of art or other objects of perception, decency refers to what is appropriate to be seen or heard,<sup>420</sup> in the sense of conforming to relevant standards of taste, propriety, or morality. Presumably, this is the primary sense in which the statute uses the term.

To understand the decency clause in this way, however, is to underscore its controversial nature. Can the government legitimately make judgments about whether particular works are fit to be seen or heard? Indeed, is the concept of decency applicable to works of art at all? To answer these questions, one must first explore what it would mean to say that an artwork is decent or indecent.

Following the philosopher Joel Feinberg, one can distinguish three ways in which something can be unfitting or indecent: It can be offensive to the senses, to “lower order sensibilities,” or to “higher level sensibilities” or standards of morality or propriety.<sup>421</sup> Food provides a useful illustration. Food is unfit to eat in the first sense when it has a disgusting taste or smell. It is unfit in the second sense when we recognize what it is—say, a live, wriggling cockroach—“and given the character of our gastronomic sensibility, that recognition is . . . sufficient to induce disgust” in a “pre-rational, nondiscursive way.”<sup>422</sup> Finally, dead human bodies are unfit to eat not only for these reasons, but also because to do so would violate our higher-order sensibilities and respect for human dignity.<sup>423</sup>

Similar judgments can be made about works of art. A musical work may be so dissonant as to offend the senses. An artistic composition that displays used tampons or condoms may clash with lower-order sensibilities.<sup>424</sup> And art that features human corpses may conflict with higher-order sensibilities and values.<sup>425</sup>

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excretory activities and organs.” *Id.* at 732 (plurality opinion). For Congress’ refusal to adopt this definition, see *supra* note 361.

419. See OXFORD ENGLISH DICTIONARY 326 (2d ed. 1989).

420. As Joel Feinberg observes, the English term “decent” can ultimately be traced to “the Latin *decere*, to be fitting or becoming, which is related to the Greek *dokein* to seem good (with emphasis on the seeming) . . . . It is closely related to such other English words as ‘decor’ and ‘decorate,’ ‘decorous,’ ‘indecorous,’ and ‘dignity’ and ‘indignation.’” JOEL FEINBERG, 2 THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 110 (1985).

421. *Id.* at 14-16 (distinguishing between senses and sensibilities, and between lower- and higher-order sensibilities); *id.* at 109-12 (analyzing the notions of decency and indecency).

422. *Id.* at 16.

423. Of course, this conclusion might not apply in cases of extreme necessity, when no other food was available. Cf. *id.* at 72-77 (arguing that symbolic interests in human dignity should not be protected at expense of the real interests that they signify, such as human life itself).

424. See, e.g., Victoria Finlay, *Shock Exhibit Offers Artistic Challenge*, SOUTH CHINA MORNING POST, June 1, 1995 (describing exhibit at Vancouver Art Gallery, which

The last category, one should note, includes some norms that are distinctively social in character. Some of these norms are concerned with the appropriate ways of treating other people. These standards would be violated, for example, by works like the "Mud People" sculpture that portray particular groups as subhuman. Another subcategory of social norms relates to the distinction between public and private. According to these norms, some aspects of life should be regarded as intimate, personal, and private.<sup>426</sup> These norms underlie the legal and constitutional right to privacy, which protects individuals from unauthorized intrusion into or exposure of their private lives,<sup>427</sup> as well as from unwarranted government interference with important personal decisions.<sup>428</sup> Conversely, these norms also hold that it is improper to perform certain intimate acts in public places.<sup>429</sup> These norms would be transgressed, for example, by a performance artist who urinated or defecated on stage.<sup>430</sup> Indeed, that transgression might be the very point of the performance, which might not work at all if it were not recognized as violating generally accepted standards of decency.

Several caveats are called for at this point. First, decency and indecency are matters of degree. Works that exhibit human corpses are clearly more indecent than, say, those that display used tampons or condoms. Second, norms of decency are to some extent socially relative, not only in the sense that they differ from one society to another, but also in the sense that they depend on particular social settings. Those standards vary greatly depending

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included "a work consisting of dozens of used tampons from women throughout the world").

425. See *supra* text accompanying notes 407-08. Although the controversy over the NEA has often focused on sex and nudity, it would be a mistake to define indecency in these terms. On the one hand, sex and nudity obviously can be appropriate subjects for artistic representation; they are indecent only when presented in certain ways. See *Roth v. United States*, 354 U.S. 476, 487 (1957); HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY* 230 (1969). On the other hand, representations of death, violence, and other subjects also can violate norms of decency. See CLOR, *supra*, at 225, 245; 2 FEINBERG, *supra* note 420, at 115-20.

426. See, e.g., CLOR, *supra* note 425, at 225-26. For a historical account, see ROCHELLE GURSTEIN, *THE REPEAL OF RETICENCE* (1996).

427. See RESTATEMENT (SECOND) OF TORTS §§ 652B, 652E (1965) (outlining torts of invasion of privacy through intrusion upon seclusion or unreasonable publicity); POST, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, in CONSTITUTIONAL DOMAINS, *supra* note 11, at 51; Heyman, *Righting the Balance*, *supra* note 121, at 1332-36.

428. See *supra* text accompanying notes 318-20.

429. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) (giving example of "a man and woman locked in a sexual embrace at high noon in Times Square"). On the relationship between privacy and dignity, see Harry M. Clor, *Obscenity and Freedom of Expression*, in CENSORSHIP AND FREEDOM OF EXPRESSION 97, 102-05 (Harry M. Clor ed., 1971).

430. See, e.g., Note, *1991 Legislation, Reports and Debates over Federally Funded Art: Arts Community Left with an "Indecent" Compromise*, 48 WASH. & LEE L. REV. 1545, 1546 n.2 (1991) (describing the performance of *Finley* plaintiff John Fleck, which included urinating on stage and creating an altar out of a toilet bowl).

on whether one is in a doctor's examining room, a private home, a public street, a classroom, or the symphony. Works of art inhabit a cultural space where standards of decency are less strict than in many other settings. Finally, even when an artwork is to some extent indecent, this obviously is not all that can be said about it. A work can have aesthetic value in spite of being indecent, or even because it is indecent. Judgments about both aesthetics and decency are highly contextual and require sensitivity to all of the values at stake.

We are now in a better position to address the general question of the relationship between art and decency. The debate on this issue has often been dominated by two antithetical views. On one side, some moral conservatives, including the NEA's strongest critics, speak as though judgments of decency involved nothing more than applying our pre-existing standards of morality and propriety to art. This view is clearly inadequate, for an important purpose of art is to challenge our existing perspectives and to enable us to see the world in a new light.<sup>431</sup> Yet this should not lead to the conclusion, as the NEA's defenders sometimes imply, that norms of decency do not apply to art at all. When viewing a work of art, we do not simply put aside all of the attitudes, beliefs, and values that make us what we are. If we did, we would be incapable of responding to art at all.<sup>432</sup> Art seeks to have an impact not merely on aesthetic sensibilities, but on our minds and feelings as a whole. This is what makes it so powerful. At the same time, however, this means that art is capable of violating our sensibilities, as the above examples show.

A more adequate view lies between these two extremes. When viewing a work of art, we do not simply impose our own standards on it, nor do we simply suspend those standards. Instead, the situation is best understood in terms of an interaction between the viewer and the work of art. This interaction is often a positive one, which gives new insights and expands our awareness of the world and of human experience. Art can also challenge our values in a way that is powerful and even shocking. At the same time, however, we are not mere passive viewers who are affected by art, but active subjects capable of responding to it and evaluating it. A work of art can have an impact that, on reflection, violates our sensibilities or deeply held values. Insofar as it does so, the work may be termed indecent. This must be true if we are to have an adequate basis for saying that there is something improper about (say) art that makes use of human corpses or the gold fillings of concentration-camp victims.

But are not judgments of this sort subjective? Again, one may start by identifying two polar positions: that such judgments are based on objective standards, and that they are no more than subjective reactions. Once again,

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431. See, e.g., Hamilton, *supra* note 370, at 86-96.

432. See HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1996).



both views seem one-sided and unsatisfactory. Instead, in the account given here, art involves a relationship between subject and object, between the viewer and the work of art. Decency has to do with the fitness or unfitness of this relationship: A viewer will regard a work as indecent insofar as it transgresses her sensibilities or her standards of taste, propriety, or morality. The question then becomes where these standards or sensibilities come from. To the extent that they either have or lack an objective or reasonable basis, the same will be true of the judgments to which they give rise.

In some cases, our reactions are merely subjective, arbitrary, or idiosyncratic. In others, they clearly have an objective or reasonable basis. The fact that most people find extremely loud, dissonant, or high-pitched sounds unpleasant may be explained by facts about the human auditory faculty. To take a very different example, all human beings have, or should have, a sense of their own inherent dignity and worth, and therefore find it deeply offensive when others treat them as subhuman.<sup>433</sup> Moreover, because people possess dignity by virtue of their status as human beings, it is also appropriate for them to have respect for human dignity in general.

Most of our sensibilities and norms fall between these two extremes. In such cases, judgments about decency may be more or less controversial, but it would be a mistake to dismiss them as merely subjective. Indeed, the same is true of aesthetic judgments, which are hardly more objective than those about decency. The subjective aspect of both sorts of judgments should make us cautious about making them and respectful of different opinions, but should not preclude us from making them at all.

Let us now consider the role of government. Even if an artwork is regarded as indecent, it by no means follows that the work should be subjected to government censorship. Social conceptions of decency are in tension with individual self-expression, and may also be in tension with artistic ends. In general, the balancing of these different values should be done not by government officials but by the individuals who create and view art, as well as by social opinion. Accordingly, the power of government to regulate artistic expression on grounds of indecency should be strictly limited. The case is different, however, when government is not regulating expression, but is actively supporting it with a view to the public good. In this context, government must necessarily balance the competing values to determine what art should receive public support.

The constitutionality of the NEA decency clause can now be addressed. Under the distributive justice approach, benefits should be distributed according to criteria that are consonant with the purposes of the program. If the NEA's sole purpose were to promote artistic self-expression, the decency clause would constitute an unprincipled limitation, for indecent art can be no

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433. For writings on dignity and self-respect, see *DIGNITY, CHARACTER, AND SELF-RESPECT* (Robin S. Dillon ed., 1995).

less expressive than decent art. But the NEA was created for several other purposes as well.<sup>434</sup> First, it was intended to promote self-fulfillment for those who view the art. Decency does have some relevance to this end: If large numbers of people find particular works unfit to view, those works will benefit fewer people than would others with broader appeal. In itself, however, this consideration is not sufficient to justify the decency clause. A more reasonable solution might be to fund a wide variety of art, in order to satisfy all tastes to the extent possible.

Instead, the clause finds its strongest justification in the NEA's goal of building and enriching a common culture. Indecent art can undermine this goal in several ways. The first is by offending sensibilities in a way that aggravates social division and conflict. Works of art like the "Mud People" sculpture that demean particular racial or ethnic groups are a paradigm example. Second, works of art often seek to affirm individual subjectivity in opposition to social constraint in general. In many cases, such art not only promotes individuality but also improves the culture, for a good social order requires a balance between community and individuality. In its more extreme forms, however, such art can unduly derogate from the social dimension of our common life.<sup>435</sup> Finally, a common culture is characterized by at least some shared substantive values. Those values should not be regarded as sacrosanct. An essential function of art is to interrogate our attitudes and beliefs. Yet it is also true that particular works of art can depreciate shared values in ways that on reflection we find unjustified, as with a display of corpses, or a film whose making involves gross mistreatment of animals.<sup>436</sup>

In these ways, particular works of art can detract from the goal of advancing a common culture. This is not a good reason for censoring such works, but it may be a good reason for denying them public support. Presumably, this is part of what Congress meant when it declared that the NEA's funding decisions "must be sensitive to the nature of public sponsorship."<sup>437</sup>

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434. See *supra* text accompanying notes 396-406.

435. Performance artists who urinate or defecate on stage, or who invite the audience to come on stage to examine the performer's genitals, are good examples. See, e.g., Hunter Drohojowska, *Annie Sprinkle Brings 'Porn Modernist' to California*, L.A. TIMES, Apr. 30, 1992, at F8 (describing show by performance artist Annie Sprinkle, which included "public cervix announcements" in which she invited members of the audience to view her cervix through a speculum).

436. For example, in the late 1970s, the NEA chairperson disapproved an application to make a film recording the shooting and death of a dog. See THE INDEPENDENT COMMISSION, *supra* note 342, at 37-38. For a more recent example, see Michael Platt, *Decaying Rabbit Art Seen as Rotten Idea*, CALGARY SUN, Sept. 16, 1999, at 4 (describing Diana Thorneycroft's exhibit "Monstrance," a display of "a dozen decomposing rabbits hanging in a Winnipeg forest," intended to "celebrat[e] the gloriousness of putrefaction").

437. 20 U.S.C. § 951(5) (1994).

Once again, several caveats are in order. First, as noted earlier, judgments about public funding require close attention to the particular work and sensitivity to all the values involved, not a narrow preoccupation with decency. In some situations, an artist may be justified in transgressing ordinary standards of decency in order to achieve artistic ends. In such a case, one may conclude that taken as a whole the work should not be considered indecent, or alternatively that the work's indecency is justified by its artistic value.<sup>438</sup> This suggests that Congress acted wisely in following the advice of the Independent Commission and treating decency not as a categorical requirement, but rather as one factor to be considered in an overall assessment of a work.<sup>439</sup>

Second, as Congress recognized, works should not be regarded as indecent merely because they offend some individuals or groups, but only when they contravene "general standards of decency." Decisions about public funding must be made by reference to public standards. It is one thing to use public programs to promote widely shared values, quite another to use them to advance the values of particular groups.

Finally, it should be emphasized that the main question about a work of art is not whether it is indecent, but rather its overall value in terms of the purposes of the NEA: to promote artistic self-expression and audience self-fulfillment, to enrich the common culture, and to contribute to the development of art, culture, and other humanistic values. Decency is relevant only because of its bearing on a work's overall value. When the decency clause is understood in this way, it is reasonable to conclude that the clause does not "aim at the suppression of dangerous ideas,"<sup>440</sup> but rather at promoting the public good.

The same may be said of the statutory language requiring the NEA to take into consideration "respect for the diverse beliefs and values of the American public."<sup>441</sup> Clearly, this provision should not be construed to

438. For example, Karen Finley's performance art included stripping to the waist and smearing chocolate on her body to symbolize excrement. See Note, *supra* note 430, at 1546 n.2. This undeniably transgressed, and was intended to transgress, prevailing standards of decency—it would hardly have been comprehensible otherwise. Nevertheless, it should be open to Finley to argue that this indecency was artistically justified as the most powerful way of dramatizing the social degradation of women. For an interview in which Finley discusses her work, see Interview by Jeanne Carstensen with Karen Finley, in 2000 Chronicle Publ'g Co., *The Gate* (visited Jan. 19, 2000) <<http://www.sfgate.com/eguide/profile/arc97/1297/finley-interview.shtml>>. Critics are divided over whether Finley's performances make an important artistic statement, see, e.g., Anthony Kubiak, *Splitting the Difference: Performance and Its Double in American Culture*, TDR, Dec. 22, 1998, at 91 (available in LEXIS, News Library, All File), or are "simply a waste of a perfectly good condiment," Allison Stewart, *Even Honey-Coated, Finley is a Bitter Pill*, CHI. TRIB., Dec. 13, 1999, § Tempo, at 3.

439. See *supra* text accompanying note 369.

440. NEA v. Finley, 524 U.S. 569, 587 (1998) (quoting Regan v. Taxation With Representation, 461 U.S. 540, 550 (1983)).

441. 20 U.S.C. § 954(d)(1).

require the agency to disfavor all art that challenges our values and beliefs. That would undermine one of the most important purposes of art, and would promote the very conformity and mediocrity the NEA's founders were determined to avoid.<sup>442</sup> There are certain kinds of beliefs, however, which traditionally have been regarded as beyond the bounds of the liberal state. This is true of religious beliefs in particular. The Establishment Clause forbids government to intrude into the religious sphere either to support or to oppose such beliefs.<sup>443</sup> In accord with this principle, it is at least reasonable for the state to disfavor or decline to subsidize art whose main purpose is to attack or demean the religious beliefs of others.<sup>444</sup> For the government to support such art is profoundly divisive and undermines one of the main objects of the NEA, to promote a common culture.<sup>445</sup> Serrano's "Piss Christ" was widely perceived to be such a work.<sup>446</sup> The "respect" clause can best be

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442. As the Senate Report accompanying the 1965 Act put it:

It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression. One of the artist's and humanist's great values to society is the mirror of self-examination which they raise so that society can become aware of its shortcomings as well as its strengths.

....

[C]onformity for its own sake is not to be encouraged, and . . . no undue preference should be given to any particular style or school of thought or expression. Nor is innovation for its own sake to be favored.

1965 SENATE REPORT, *supra* note 367, at 3-4.

443. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

444. For a similar view, see Murphy, *supra* note 370, at 561 (arguing that "in a society organized around a principle of equal concern and respect for all citizens," it is not "fair and reasonable to force people to pay the bill for art whose very purpose is to ridicule their most basic values").

445. See *supra* text accompanying notes 399-401; cf. *supra* text accompanying notes 412-13 (discussing divisiveness produced by racial and ethnic hate speech).

446. Whether Serrano intended the work to be understood this way is unclear. Describing himself as an artist who seeks to "explore my own Catholic obsessions," he has asserted that his purpose in "Piss Christ" "was neither critical nor blasphemous." Interview by Adriana Rosenberg with Andres Serrano, in *Fundacion Proa* (visited Aug. 10, 1999) <<http://www.proa.org.ar/exhibicion/serrano/exhibi-fr.html>>. Referring to a related artwork, he stated:

I would say it is a spiritual image, that comforts. It is in no way different to the icons that can be seen in church. I think the treatment of the image is full of reverence. At the same time, the fact of knowing that there is a body fluid involved in it . . . the point is to question the whole notion of what is acceptable and what is not. There is a duality in it, of goodness and evil, of life and death.

*Id.*

The subjective dimension in creating and viewing works of art is one important reason for strictly limiting the government's power to censor them. See Sabrin, *supra* note 146, at 1221. When government supports art, however, the question is not merely how the artist intended a work or how different individuals may perceive it, but how the public in general is likely to interpret it. It is hardly surprising that "Piss Christ" was widely viewed as an attack on Christian religious belief. In any event, even if "Piss Christ" is taken, as Serrano

understood as a response to cases of this kind. If the statute is interpreted in this way, it would also be reasonable to construe it to disfavor or preclude funding for art whose main purpose is to promote a religious belief. Government support for such expression is also divisive, and may equally be regarded as beyond the bounds of a liberal state.<sup>447</sup>

If this analysis is accepted, then the funding criteria adopted by the 1990 amendments—artistic merit, general standards of decency, and respect for diverse beliefs—appear to be reasonable in light of the program's purposes. Nor does the decency-and-respect clause violate constitutional notions of personhood. When the government subsidizes art, it is not required to treat all artists equally in the way it must when it supports political expression. If the government were required to do so, it could not use artistic merit as a criterion. Moreover, in contrast to the regulations in *Rust*, the decency clause does not disrespect individual autonomy. It does not prevent individuals from making their own decisions about what art to create or view. Instead, it simply reflects a legislative judgment about what sorts of art should receive public support. Finally, because the NEA is responsible for a relatively small proportion of the funding for art in the United States, there does not appear to be a substantial danger that the NEA will dominate American culture or undermine the existence of a private sphere of artistic expression.<sup>448</sup> For these reasons, the Supreme Court was correct to hold the decency-and-respect clause constitutional on its face.

#### 4. THE STORM OVER THE BROOKLYN MUSEUM OF ART

It by no means follows, however, that the government should have carte

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suggests, as a religious image, there are good reasons why it should not receive public funding. As I suggest below, *infra* text accompanying note 447, it is reasonable for a liberal state to decline to fund art that is primarily religious in nature, whether it seeks to attack or promote religious belief.

447. See, e.g., James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), reprinted in 5 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds., 1987). This conclusion, it should be noted, does not conflict with *Rosenberger*. In that case, the Court did not hold that freedom of speech required the state to fund this expression, or that such funding would not violate the Establishment Clause. Instead, the majority found that, rather than excluding "religion as a subject matter," the university's guidelines discriminated against journalism that brought a religious perspective to bear on subjects that "were otherwise within the approved category of publications." *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 831 (1995). The four dissenting Justices interpreted the guidelines to bar funding for activities whose primary purpose was to promote religious belief as such. See *id.* at 895-96 (Souter, J. dissenting). They argued that this was permissible under the Free Speech Clause, see *id.* at 892-99, and indeed mandated by the Establishment Clause, see *id.* at 864-92.

448. For a balanced assessment, see Post, *Subsidized Speech*, *supra* note 10, at 193 & n.208. It is important to recognize that, if such a danger were found to exist, the basic standard of "artistic excellence and artistic merit" might itself be unconstitutional, not merely the decency-and-respect clause. See *id.* at 194.

blanche over arts funding. Consider the recent uproar over “Sensation: Young British Artists from the Saatchi Collection,” an exhibition that was scheduled to open at the Brooklyn Museum of Art on October 2, 1999.<sup>449</sup> The show included a number of controversial works, including Chris Ofili’s “The Holy Virgin Mary,” a painting of a Madonna “with a clump of elephant dung on one breast and cutouts of genitalia from pornographic magazines in the background.”<sup>450</sup> Denouncing such works as “sick,” offensive, and sacrilegious, New York Mayor Rudolph W. Giuliani threatened to terminate all city funding for the Museum—approximately \$7 million per year, plus \$20 million for capital improvements—and to evict the Museum from its city-leased premises unless it canceled the exhibition.<sup>451</sup> When the Museum refused, the Mayor sought to carry out his threat, provoking ongoing litigation and an intense political and cultural debate.<sup>452</sup> On November 1, a federal district court in Brooklyn ruled that the City’s actions violated the First Amendment, and granted the Museum’s request for a preliminary injunction.<sup>453</sup> The City has vowed to appeal.<sup>454</sup>

Many of the works in “Sensation” transgressed common standards of decency (and were obviously intended to do so).<sup>455</sup> As this Article has

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449. See, e.g., Dan Barry & Carol Vogel, *Giuliani Vows to Cut Subsidy over “Sick” Art*, N.Y. TIMES, Sept. 23, 1999, at A1.

450. Carol Vogel, *Holding Fast to His Inspiration: An Artist Tries to Keep His Cool in the Face of Angry Criticism*, N.Y. TIMES, Sept. 28, 1999, at E1. Other works in the show included Damien Hirst’s vivisections of dead animals suspended in formaldehyde; his “A Thousand Years,” which consisted of “a glass vitrine containing a rotting cow’s head, live maggots that hatch into flies, and an Insect-o-Cutor device to zap the flies”; “Marcus Harvey’s notorious portrait of Myra Hindley, the convicted [English] child murderer, painted with what look like the tiny imprints of children’s hands”; “Marc Quinn’s self-portrait head cast in eight pints of his own frozen blood”; and “Jake and Dinos Chapman’s adolescent female mannequins, which sprout erect penises and gaping anuses where one normally finds noses or mouths.” Calvin Tomkins, *After Shock: What Has Damien Hirst Done to British Art?*, NEW YORKER, Sept. 20, 1999, at 84, 84. The Museum’s publicity for the show highlighted its sensational nature, with a mock warning that read: “The contents of this exhibition may cause shock, vomiting, confusion, panic, euphoria and anxiety. If you suffer from high blood pressure, a nervous disorder or palpitations, you should consult your doctor.” Barry & Vogel, *supra* note 449.

451. See Abby Goodnough, *Mayor Threatens to Evict Museum over Exhibit He Dislikes*, N.Y. TIMES, Sept. 24, 1999, at B6; Barry & Vogel, *supra* note 449.

452. See David Barstow, *Brooklyn Museum Sues to Keep Mayor from Freezing Its Funds*, N.Y. TIMES, Sept. 29, 1999, at A1.

453. *Brooklyn Inst. of Arts and Sciences v. City of New York*, 64 F. Supp. 2d 184, 205 (E.D.N.Y. 1999) (Gershon, J.).

454. David Barstow, *Giuliani Ordered to Restore Funds for Art Museum*, N.Y. TIMES, Nov. 2, 1999, at A1.

455. For a description of these works, see *supra* note 450. As it did when it opened in London, the exhibition received mixed reviews. See, e.g., Roberta Smith, *Bringing America Up to Speed*, N.Y. TIMES, Oct. 24, 1999, § 2, at 40 (praising the exhibition for “bring[ing] together the real and the esthetic with a crash that is audible to many different kinds of people”); Michael Kimmelman, *Critic’s Notebook: Cutting Through Cynicism in Art*

argued, this may legitimately be considered—together with the works' artistic merit—in deciding whether they should receive public funding. Moreover, Ofili's Madonna raises the same sorts of concerns as Serrano's "Piss Christ," and may be denied funding for the same reasons.<sup>456</sup> Thus, if the City had simply rejected a proposal to fund "Sensation," the decision might well have been constitutionally permissible.<sup>457</sup> That is not what the City did, however.<sup>458</sup> Instead, Mayor Giuliani threatened to eliminate *all* of the Museum's funding—money that had already been appropriated for its benefit<sup>459</sup>—if it proceeded with a particular show. As the district court found, this was clearly an effort to coerce the Museum into canceling the exhibition,

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*Furor*, N.Y. TIMES, Sept. 24, 1999, at B1 (observing that, while some of the works were "strangely beautiful," "[m]uch of what is in the show would not shock anyone, least of all a teen-ager," and that "[a] lot of it is absolutely forgettable").

456. See *supra* text accompanying notes 443-47. As in Serrano's case, it is unclear whether Ofili intended the work to be sacrilegious. The artist's supporters argued that "the Virgin Mary painting is by an artist who was raised a Catholic and inspired by African traditions that venerate elephant dung as a symbol of regeneration." David Barstow, *Seeking Buzz, Museum Chief Hears a Roar Instead*, N.Y. TIMES, Sept. 25, 1999, at B1 (describing views of Museum Director Arnold L. Lehman). Ofili himself has said, rather more enigmatically, that his use of the dung "attracts a multiple of meanings and interpretations." Vogel, *supra* note 450 (quoting Chris Ofili). Once again, however, when public funding is at issue, the question is not only how the artist intended the work, but also how it is likely to be perceived. "Holy Virgin Mary" was widely, and understandably, perceived to be an attack on particular religious beliefs. As argued above, the government may reasonably decline to fund such work. See *supra* text accompanying notes 444-45.

457. At least, this would be true if the City were to adopt general standards regarding the kinds of art that it would support, and a regular procedure for applying that policy, like those established by the NEA's governing legislation. A process of this sort would help assure that funding decisions were made on a principled basis, and were not unduly affected by political considerations. Cf. *Board of Educ. v. Pico*, 457 U.S. 853, 874 (1982) (plurality opinion) (observing that school district's decision to remove certain books from its libraries would merit greater deference if it had been made pursuant to "established, regular, and facially unbiased procedures for the review of controversial materials"); Bollinger, *supra* note 258, at 1117 (suggesting that constitutional review of subsidy decisions should focus on "the integrity of the processes" used to reach them). In the litigation over "Sensation," City officials acknowledged that there were "no rules, regulations or procedures or even an *ad hoc* method for determining whether the City would view a particular work as inappropriate." *Brooklyn Inst.*, 64 F. Supp. 2d at 204. Instead, the decision regarding the exhibition was apparently made by the Mayor himself, based on his own personal reaction to it. See *id.* at 186, 191.

458. As the district court explained, the City generally does not provide funding for particular exhibitions, nor was it asked to fund "Sensation." Instead, "the City's Procedures Manual specifies that public funds are provided to designated cultural institutions to help meet costs for general maintenance, security and energy, and in some instances to support education programs." *Brooklyn Inst.*, 64 F. Supp. 2d at 189. Thus, as Judge Gershon was careful to note, the litigation did not raise the question "whether the City could be required to provide funding to support the Sensation Exhibit or any other particular exhibit, if the Museum had sought funding on an exhibit-by-exhibit basis." *Id.* at 202.

459. See *id.* at 186, 189.

or to penalize it for refusing to do so.<sup>460</sup> Under the approach developed here, the City's action should be reviewed under the doctrine of unconstitutional conditions, and struck down as an unjustified content-based restriction on expression, in the same way that a direct attempt to censor or regulate the exhibition would be.<sup>461</sup>

#### IV. CONCLUSION

With the rise of the modern affirmative state, American government has come to support expression in a variety of ways. The Supreme Court's efforts to respond to this phenomenon have been torn between two contradictory positions. According to one view, the First Amendment imposes few if any constraints on the government's power over speech it supports. The other view holds that funding decisions should be subject to the same strict standards that apply to regulation of speech. As with many First Amendment issues, the conflict between these two positions appears to be irresolvable, making it impossible for the Court to develop a coherent body of doctrine.

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460. *See id.* at 196-98.

461. The same conclusion should probably hold if the City were to adopt a new policy that provided that cultural institutions should be eligible to receive public funds only on condition that they refrain from displaying art that is indecent, or that denigrates particular religious beliefs. Rather than merely establishing the terms under which the City would support particular expressive activities, such a policy would impose a restriction on *the organizations themselves*. In such cases the government should be required to show that there is no effective way to segregate its support for the organization's general operations from support for the particular activity at issue. *See supra* note 280. In the absence of such a showing, restrictions on an organization should be treated as penalties on expression, and analyzed under the unconstitutional conditions doctrine. *See id.*

In the present context, it seems doubtful that the City could make such a showing. As noted above, under its long-standing practice, the City of New York does not provide funding for particular exhibitions, but only for general operations. *See supra* note 458. Thus, one could reasonably hold that a separation already exists between general operations and particular exhibits, with the City supporting only the former. On the other hand, one could argue that the City's support for general operations provides benefits (such as security and maintenance) that help to make particular exhibitions possible. Even on this view, however, it would appear that reasonable measures could be devised to enable the City to avoid supporting a particular exhibition—for example, by reducing the organization's subsidy by a certain percentage. Indeed, a serious effort was made to resolve the "Sensation" controversy in just this way. *See* David Barstow & David M. Herszenhorn, *Museum Chairman Broached Removal of Virgin Painting*, N.Y. TIMES, Sept. 28, 1999, at A1 (describing negotiations with city officials in which the Museum's chairman indicated that it might be willing to accept a 20 percent reduction in its subsidy for the duration of the show, a sum corresponding to the amount of floor space devoted to the exhibit).

Given the existence of such alternatives, the City would not be justified in imposing a broad restriction on the organizations themselves. By contrast, when a government provides funding on an exhibit-by-exhibit basis, it should have greater leeway to determine what projects should receive public support.



This Article has argued that both views ask the wrong question: whether denials of support are the equivalent of censorship. Instead, the problem is best understood as one of distributive justice in the modern liberal state. According to this view, funding should be distributed in a way that is consonant both with the community's purposes in establishing a program and with constitutional principles of respect for persons. In this way, state support for speech can promote rather than undermine the values of the First Amendment, expanding the liberty of individuals as well as our collective freedom as a community.