

NOTES

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

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INTRODUCTION

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

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

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

² In 1989, Senator Jesse Helms used Mapplethorpe's highly publicized artwork—which often features graphic portraits of nude men in homoerotic and sadomasochistic poses—as an example of the failings of the NEA's grantmaking policies. See, e.g., Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 *Yale L.J.* 1359, 1370 (1990) (describing Mapplethorpe controversy). The controversy surrounding Mapplethorpe's photography also led a prominent museum to cancel a planned exhibit by the artist. See *id.* In addition, state officials prosecuted a private museum in Cincinnati, Ohio, for displaying allegedly obscene photographs by Mapplethorpe. See *Cincinnati v. Contemporary Arts Ctr.*, 566 N.E.2d 214 (Ohio Mun. Ct. 1990).

³ In 1979, the General Services Administration (GSA) commissioned Serra to install a large sculpture ("an arc of steel 120 feet long, 12 feet tall, and several inches thick") in the Federal Plaza in lower Manhattan. See *Serra v. United States Gen. Servs. Admin.*, 847

lective morality, limited resources, and public self-definition. When the government supports art, concerned audiences wonder not only what a given work means or how it makes them feel, but also whether it is appropriate for public spaces⁴ or deserves taxpayer support.⁵ One commentator describes this phenomenon as the "paradox" of public art,⁶ which pits the individual, self-expressive nature of artistic speech against the "government's duty to promote harmony and the public good."⁷

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

F.2d 1045, 1045-47 (2d Cir. 1988). Following "intense public criticism" concerning "the sculpture's appearance and its obstruction of Federal Plaza's previously open space," the GSA decided to remove the site-specific work. See *id.* at 1047. Serra subsequently sued the GSA (unsuccessfully) to enjoin the sculpture's removal. See *id.* at 1048. For further discussion of the *Serra* case, see *infra* note 114.

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

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

⁶ See Barbara Hoffman, *Law for Art's Sake in the Public Realm*, 16 *Colum.-VLA J.L. & Arts* 39, 39 (1991).

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

⁸ In addition to the recent case law concerning NEA funding, see *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1475-76 (C.D. Cal. 1992) (striking down NEA's "decency" clause), *aff'd*, 100 F.3d 671 (9th Cir. 1996), and *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774, 785 (C.D. Cal. 1991) (finding NEA's certification requirement unconstitutional). For related coverage in the popular press, see, for example, Grace Glueck, *Border Skirmish: Art and Politics*, *N.Y. Times*, Nov. 19, 1989, § 2, at 1 (reporting on tensions between artists and lawmakers); Kim Masters, *Arts Panel Urges End to Grant Pledge*, *Wash. Post*, Aug. 4, 1990, at G1 (describing meeting of NEA Council on proposed pledge of compliance for grant recipients); Allan Parachini, *Endowment, Congressmen Feud over Provocative Art*, *L.A. Times*, June 14, 1989, § 6, at 1 (detailing escalating political controversy involving NEA). Numerous scholars have addressed legal issues surrounding the NEA. See generally Elizabeth E. DeGrazia, *In Search of Artistic Excellence: Structural Reform of the National Endowment for the Arts*, 12 *Cardozo Arts & Ent. L.J.* 133 (1994) (suggesting structural reform of NEA's grantmaking authority); Michael J. Elston, *Artists and Unconstitutional Conditions: The Big Bad Wolf Won't Subsidize Little Red Riding Hood's Indecent Art*, 56 *Law & Contemp. Probs.* 327, 329-33 (1993) (examining application of doctrine of unconstitutional conditions to government funding through NEA); Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 *Yale L.J.* 1209 (1993) (discussing

ramifications of government regulation of private artistic displays on public property.⁹ In the paradigmatic case of public art display, officials seeking to enhance the aesthetic appeal of a government building invite private artists to show their work on the premises for a limited time.¹⁰ Because, under such arrangements, daring art is often displayed prominently—for example, when a public university's faculty art show features sexually explicit stained-glass windows,¹¹ or an abortion-related painting hangs in the lobby of a federal courthouse¹²—disputes over art in public spaces abound.¹³ Yet despite the increasing frequency of such clashes, principled, consistent resolution of these tensions remains elusive.¹⁴

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

whether government may constitutionally consider content in awarding grants to artists); Courtney R. Nea, Note, Content Restrictions and National Endowment for the Arts Funding: An Analysis from the Artist's Perspective, 2 Wm. & Mary Bill Rts. J. 165 (1993) (exploring link between NEA and artistic freedom); Note, Standards for Federal Funding of the Arts: Free Expression and Political Control, 103 Harv. L. Rev. 1969 (1990) (discussing basic legal, moral, and political concerns implicated in government support of arts).

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

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

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

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

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

¹⁴ See *infra* Part II.B.

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

I

PUBLIC ART: CONSTITUTIONAL VALUES AND LEGAL DIFFICULTIES

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

Legal and political scholars have developed numerous theories¹⁵ to explain the First Amendment's protection of freedom of expression.¹⁶ Some view free speech as safeguarding a "market-place of ideas."¹⁷ Others consider the First Amendment necessary to democratic self-government because it encourages vital public debate and deliberation.¹⁸ Still others focus on the First

¹⁵ The following discussion presents First Amendment theory in rather simplistic fashion. Many nuanced positions about the nature of free speech do not fit neatly in any of the following categories. Indeed, many of the scholars cited for a given theory may have profound disagreements with others placed in the same school. For purposes of this Note, however, the generalized categories should suffice, since all are treated as incorporating artistic expression.

¹⁶ The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."

¹⁷ See, e.g., *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

¹⁸ See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (arguing that First Amendment has "*structural* role to play in securing and fostering our republican system of self-government"); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (suggesting that "the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government"); see also Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 8-9 (1960) (noting that free speech protects "the common needs of all the members of the body politic"); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 U. Fla. L. Rev. 443, 450 (1989) (emphasizing "dialogic" function of free speech); Cass R.

Amendment's promotion of individual autonomy and self-realization.¹⁹

Under all these theories, it seems well-settled that when artistic expression conveys a perceptible message, it enjoys full First Amendment protection.²⁰ Art functions as any other speech, assisting in the pursuit of truth, encouraging public debate, and fostering individual self-realization.²¹ Artistic ideas operate with the same force and under the same constitutional guarantees as classic written or spoken communication.

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

¹⁹ See, e.g., *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (emphasizing "right of self-determination in matters that touch individual opinion and personal attitude"); see also Thomas I. Emerson, *The System of Freedom of Expression* 6 (1970) (noting that "freedom of expression is essential as a means of assuring individual self-fulfillment"); Martin H. Redish, *Freedom of Expression: A Critical Analysis* 57-58 (1984) (noting First Amendment promotion of self-realization); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. Rev.* 964, 966 (1978) (asserting that speech is "protected not as a means to a collective good but because of the value of speech conduct to the individual").

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

²¹ See, e.g., William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 *Harv. L. Rev.* 1, 13 (1965) (explaining that "literature and the arts . . . fall within the subjects of 'governing importance' that the first amendment absolutely protects from abridgment"); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *Sup. Ct. Rev.* 245, 257 ("Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.").

Some commentators reject the ability of classic First Amendment theories to account for the protection of art speech. See, e.g., Marci A. Hamilton, *Art Speech*, 49 *Vand. L. Rev.* 73, 103-04 (1996) (arguing that while "proponents of [traditional First Amendment] theories have been inclined to include art under the category of protected speech, . . . they have not addressed, much less reconciled, the difficulty of explaining how a first amendment theory valuing speech for its rationally comprehensible ideas can comfortably accommodate the phenomenon of art"); Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime, and the First Amendment*, 1987 *Wis. L. Rev.* 221, 222 (noting "relegation of artistic expression to second class status" caused by "the centrality of political expression in theories of the first amendment").

Art need not, however, express identifiable ideas in order to receive First Amendment protection.²² If the Constitution required such clarity, courts would be forced to engage in the difficult (if not impossible) task of determining where "entertainment" stops and "ideas" begin.²³ Furthermore, the creative, imprecise nature of artistic expression affects audiences in ways mere words cannot.²⁴ If a picture is indeed "worth a thousand words," then art speech deserves the utmost First Amendment protection for its ability to inspire a host of intellectual, interpersonal, and spiritual responses.²⁵

²² See, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 115 S. Ct. 2338, 2345 (1995) (noting that if First Amendment reached only "expression conveying a 'particularized message,'" its protection "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll"); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) ("Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection."); *Piarowski v. Illinois Community College*, 759 F.2d 625, 628 (7th Cir. 1985) ("[T]he freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression (and entertainment that falls far short of anyone's idea of 'art,' . . .) unless the artistic expression is obscene in the legal sense." (citation omitted)); see also *infra* note 25.

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

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

²⁵ As one commentator has noted:

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

Heins, *supra* note 5, at 5; see also Hugh Honour & John Fleming, *The Visual Arts, A History* 15 (2d ed. 1986) ("Great works of art are more than aesthetically pleasing objects, more than feats of human skills and ingenuity: they deepen our insight into ourselves and others, they sharpen our awareness of our own and other religious beliefs, they enlarge our comprehension of alternative and often alien ways of life—in short, they help us to explore and understand our own human nature."); Nahmod, *supra* note 21, at 223 (noting that "from the perspective of the audience artistic expression functions to eliminate mankind's alienation from nature through communication by symbols" (citing H. Read, *Art and Alienation* 162-64 (1967))); *id.* at 224 ("Artistic expression, even nonrepresentational art, has a marked influence on society even where it does not present an overt political message.").

Numerous commentators have argued that art deserves an elevated position in First Amendment jurisprudence. For example, Professor David Cole has suggested that "artistic expression . . . is central to the cultural and political vitality of democratic society"²⁶ and therefore deserves maximum constitutional protection.²⁷ Professor Cole relies primarily on the public debate rationale for free speech protection,²⁸ finding historical support in all branches of government activity.²⁹

Professor Marci Hamilton has taken a different approach, calling for heightened protection on the basis of art's revolutionary spirit.³⁰ Professor Hamilton criticizes attempts to tie artistic expression to perceptible ideas, focusing instead on the "extrarational value" of art that contributes "to the First Amendment's task of shoring up counterweights to government."³¹ If, as the Supreme Court has explained, "a principal function of free speech under our system of gov-

²⁶ David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. Rev. 675, 739 (1992).

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

²⁸ See *supra* note 18 and accompanying text.

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

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

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

³¹ *Id.* Professor Hamilton explains:

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

Id. at 96.

ernment is to invite dispute,'"³² then art speech, which historically has challenged (and been attacked by) the status quo, stands at the forefront of the First Amendment ideal.³³

Strains of Professor Hamilton's argument can be seen in the Supreme Court's obscenity decisions, which recognize a First Amendment value in art speech that is entirely distinct from political ideas.³⁴ But one need not focus so heavily on the "nonrational" aspects of artistic expression in order to accord it full First Amendment protection.³⁵ Rather, the rational and nondiscursive elements of art stand

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

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

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

³⁵ At times, Professor Hamilton describes her position as incorporating, to some extent, traditional speech theories:

While art can address and work through rational faculties, it is neither limited to nor dependent upon them, and even empowers such faculties to subvert their own assumptions. Art stands on much firmer ground if its capacity to communicate nondiscursively is recognized *alongside* its capacity to carry a more explicit and readily comprehensible message.

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

Governmental funding of either [art or religion] . . . threatens the private sphere of freedom safeguarded by the First Amendment. In a diverse society, the establishment of an official art is an evil that should be avoided as assiduously as the establishment of an official religion. Such establishment directly threatens the scope of power individuals can exercise over their respective pri-

together, combining to promote free speech values found both in Professor Cole's public debate and Professor Hamilton's antityranny theories.³⁶

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

In addition, as wealth in the United States becomes concentrated in fewer hands, there is a danger that public debate will be dictated by

vate spheres and therefore against the public sphere. NEA funding has not served the end to which it is directed—free inquiry—and cannot do so.

Id. at 118. By valuing art speech only to the extent that it can challenge the government, Professor Hamilton ignores the importance of artistic expression to self-development, cultural enrichment, and democratic deliberation unrelated to attacks on the establishment.

The neutral display approach proposed by this Note seeks to harness public resources in pursuit of art's myriad goals, without sacrificing the revolutionary potential of that expression. See *infra* Part III.

³⁶ To be sure, not all commentators believe that art speech should enjoy an elevated status under the First Amendment. See, e.g., Posner, *supra* note 33, at 520 ("[A] rule that gave privileged status to the *flaunting* of offensive art . . . might engender public hostility to art that would be out of all proportion to the benefits in artistic freedom gained."). As explained below, see *infra* Part III.B, legal theories that recognize the unique nature of artistic speech do not necessarily imply that art is more important than other forms of expression. Rather, they might simply reflect the recognition that traditional doctrine fails to account for art's special features. See *infra* Part II.B; see also Hoffman, *supra* note 6, at 69 ("This is not to argue that the First Amendment creates an impenetrable shield protecting all creative works and processes merely because they may be labeled 'Art.' It is to state the proposition that artistic expression is at the core of a democratic society's cultural and political vitality and as such is entitled to the same careful analysis and protection that courts have traditionally reserved for other forms of speech.").

³⁷ Free speech jurisprudence consistently has placed great emphasis on expression in the public realm. See, e.g., *Cohen v. California*, 403 U.S. 15, 18-19 (1971) ("The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); Hoffman, *supra* note 6, at 58 ("There traditionally has been a close link between First Amendment theory and the concept of the public realm. The Supreme Court has emphasized that the First Amendment 'embraces at least the liberty to discuss publicly . . . all matters of public concern.'" (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 (1980))).

Because of its visibility, public art also has an increased capacity to offend. See *infra* Part I.B.

³⁸ In *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), for example, the Second Circuit invalidated a city ordinance barring artists from the public sale and exhibition of their work without first obtaining a vendor's license. In finding that publicly displayed art is "entitled to full First Amendment protection," *id.* at 695 (citation omitted), the Court explained that "the street marketing is in fact a part of the message of appellants' art," *id.* at 696.

a small, wealthy group of speakers.³⁹ The dominance of museums in the art world exacerbates this problem in two ways: First, limited museum space means that fewer artists can participate in public artistic discussion; second, because only a small segment of the population attends museums on a regular basis, even the most renowned artists have difficulty reaching mass audiences.⁴⁰ As a result, when the government devotes its abundant property⁴¹ to the display of private artistic speech, it promotes public debate.⁴² As Congress continues to reduce the budget of the NEA,⁴³ public display has become vital to art's First Amendment mission.

B. Difficulties in Public Art Adjudication

The same visibility that makes publicly displayed art so important to First Amendment values also incites the controversies prevalent in this area.⁴⁴ Public art often shows audiences images they would rather

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

The recent expansion of on-line communication has mitigated this problem to some degree, but Internet speech is still unable to replace live, face-to-face public debate.

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

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

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

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

⁴⁴ See, e.g., *People for the American Way*, *supra* note 1, at 10 (discussing art in public spaces as a "[m]ajor [f]ocus of [c]ontroversy"); Hoffman, *supra* note 6, at 42-52 (describing in detail numerous instances of public art controversy since World War II); Senie & Webster, *supra* note 7, at 171 (noting that "public art and controversy seem to have been joined at birth").

not see, in places audiences would rather not see them. Moreover, because such art appears on government property, it angers those who feel public resources should not be devoted to the promotion of "morally bankrupt" activities.

On occasion, viewers object to a public work simply on aesthetic grounds. In the case of Richard Serra's "Tilted Arc," for example, the General Services Administration (GSA) sought removal of the artist's site-specific sculpture after receiving a flood of complaints from community residents and local employees.⁴⁵ The GSA had commissioned the abstract work—a 120-foot-long arc of steel designed to oxidize over time⁴⁶—in an attempt to beautify a federal office complex. Local residents and workers, however, found the sculpture ugly and a hideous obstruction of the once-open plaza; the GSA eventually felt compelled to remove it. Serra later sued unsuccessfully in federal court to enjoin the removal.⁴⁷

The *Serra* case notwithstanding, most public art disputes revolve around a work's allegedly offensive content.⁴⁸ Sometimes tensions mount over religious⁴⁹ or racially-charged⁵⁰ imagery, but the overwhelming number of conflicts concern sexually explicit art. Controversial public art in recent years includes a drawing of "nude man lifting a nude woman up towards a tree-image made up of explicit renderings of male genitalia" in a university art show;⁵¹ graphic stained-glass windows depicting, among other things, a woman "naked

⁴⁵ See *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1047 (2d Cir. 1988) (noting "intense public criticism" concerning "the sculpture's appearance and its obstruction of Federal Plaza's previously open space").

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

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

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

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

⁵⁰ See *infra* note 197.

⁵¹ See Anne Salzman, Note, On the Offensive: Protecting Visual Art with Sexual Content Under the First Amendment and the "Less Valuable Speech" Label, 55 U. Pitt. L. Rev. 1215, 1215 (1994). University of Pittsburgh officials initially planned to omit the work from a student art show, but they later reached a compromise with the artist (who had filed suit in federal district court). The officials included the work in the show and posted warning signs outside the exhibit. See *id.* at 1216.

except for stockings, and apparently masturbating" in a college faculty art exhibit;⁵² a classic male nude statue in a public art show;⁵³ a painting of "semi-nude females" in a public library;⁵⁴ and a painting featuring "larger-than-life depictions of a nude woman, a coathanger, and a fetus."⁵⁵

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

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

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

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

⁵³ City officials in Austin, Texas, tried to bar the exhibition of artist David Swim's statue, but a federal magistrate judge ordered them to permit its display. See *Swim v. City of Austin*, No. A-93-CA-648-JRN (W.D. Tex. July 17, 1995) (Interim Report and Recommendation of the United States Magistrate Judge, on file with the *New York University Law Review*). The district court sustained the analysis of the magistrate judge, but in an unpublished opinion the Fifth Circuit reversed on appeal. See *Swim v. City of Austin*, No. 96-50160, 1996 U.S. App. LEXIS 36200 (5th Cir. Dec. 18, 1996); see also Heins, *supra* note 9, at 141 n.220 (discussing *Swim* case).

⁵⁴ See *Bellospirito v. Manhasset Pub. Library*, No. 93-CV-4484, slip op. at 19 (E.D.N.Y. July 31, 1994). The judge in *Bellospirito*, discussed *infra* notes 109-13 and accompanying text, found the removal of the painting unconstitutional. See *Bellospirito*, No. 93-CV-4484, slip op. at 19.

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

⁵⁶ See *infra* Part II.B.2.b.

ally, expression that is considered to be "political speech" will enjoy greater constitutional protection than so-called nonpolitical speech.⁵⁷

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

⁵⁷ See, e.g., *Schenck v. Pro-Choice Network*, No. 95-1065, 1997 U.S. LEXIS 1270, at *34 (Feb. 19, 1997) (noting that "commenting on matters of public concern" is "classic form[] of speech that lie[s] at the heart of the First Amendment"); *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1518 (1995) (noting that political speech "occupies the core of the protection afforded by the First Amendment"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) (suggesting that discussion of public issues lies "at the heart of the First Amendment's protection"); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to . . . political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (second alteration in original) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))); see also Antonin Scalia, *A House With Many Mansions: Categories of Speech Under the First Amendment*, in *The Constitution, The Law, and Freedom of Expression 1787-1987*, at 9, 12 (James Brewer Stewart ed., 1987) (noting that political speech is "utterly central to the purposes of the First Amendment").

While most courts generally accept the primacy of political speech, not all First Amendment theorists agree with this hierarchical approach to free speech. See, e.g., Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* 48 (1990) (arguing that "something is seriously amiss" with a First Amendment theory that "provide[s] absolute protection for political speech . . . [while] excluding protection for Shakespeare, Aristotle, and Einstein").

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

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

⁶⁰ In the context of vulgar or sexually explicit speech, the Supreme Court has delivered conflicting messages. For example, in *Cohen v. California*, 403 U.S. 15 (1971), the Court declared, "[I]t is . . . often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25. But in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the plurality opinion declared, "[T]hough we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate." *Id.* at 70. See also *Nahmod*, supra note 21, at 235-49 (demonstrating courts' difficulty in tying art to political speech under classic First Amendment theories).

In the context of artistic expression, the categorical line between content and viewpoint becomes hopelessly blurred.⁶¹ Effective art can depict ideas, thoughts, and subjects in an entirely novel and unconventional fashion.⁶² How, then, is a court to sift through the meaning or message of a work, let alone determine whether government officials targeted the art's so-called content or viewpoint? In the end, judges inevitably construct artificial distinctions that fail to accommodate the special nature of art speech.⁶³

Take, for example, the judicial treatment of sexually explicit art. While most courts consider this material devoid of any perceptible, rational idea or message,⁶⁴ several judges and commentators have recognized that sexual communication is itself a point of view.⁶⁵ Disa-

⁶¹ For all forms of expression, the line between content and viewpoint is often blurred. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995) (acknowledging that distinction between viewpoint discrimination and content discrimination "is not a precise one"); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (noting how content regulations can be used as pretexts for suppressing viewpoint); *Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1216 (9th Cir. 1996) (remarking that "the line between content and viewpoint discrimination is a difficult one to draw"); *Heins*, supra note 9, at 110 ("[T]he Supreme Court has sometimes been imprecise in distinguishing between viewpoint and the more generic concept of content."); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 *Stan. L. Rev.* 113, 140 (1981) (noting possibility of superficially content-neutral government regulations aimed at particular viewpoint); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 *Wm. & Mary L. Rev.* 189, 200 (1983) (noting courts have applied stringent standards for content-based analysis to viewpoint-based restrictions).

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

⁶² See supra note 25.

⁶³ Professor Hamilton notes:

Indeed, the Court's general speech doctrine, which examines laws according to whether they are *content*-based, *content*-neutral, or *viewpoint*-based, similarly begs the question of why one would protect art in the first place by presuming that the phenomenon should be separated from an internal message. Although these categories serve a legitimate function, their domination of the Court's doctrine serves to obscure art's capacities beyond the delivery of a rationally apprehendable [sic] message.

Hamilton, supra note 21, at 107; see also Hoffman, supra note 6, at 74 ("If the concept of viewpoint discrimination is limited only to 'ideas,' artistic expression is not afforded sufficient protection.").

⁶⁴ As discussed below, courts in public art disputes tend to deny the existence of a definable viewpoint in sexually explicit art. See infra notes 134-43 and accompanying text.

⁶⁵ See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 56 n.1 (1986) (Brennan, J., dissenting) ("[T]he speech suppressed by restrictions [on adult-oriented businesses] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions . . . have a potent viewpoint-differential impact." (quoting Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 *U. Chi. L. Rev.* 81, 111-12 (1978))); *Cohen v. California*, 403 U.S. 15, 26 (1971) ("We cannot sanction the view that the Constitution . . . has

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

II

STATE OF THE LAW: ART AND THE PUBLIC FORUM DOCTRINE

Most disputes over art in public spaces never reach the courts.⁶⁶ When informal resolution fails, though, artists can sue government officials to enjoin regulation of their work or to obtain monetary relief. These cases usually involve judicial application of the public forum doctrine, which governs the extent to which private speech may be regulated on public property.

This Part will first explain the history of the public forum doctrine and then examine its application to art speech. Although the public forum doctrine was initially conceived as a way to promote free expression, this Part will show that it has proved incapable of safeguarding artistic freedom. This is due both to the general shortcomings of the doctrine,⁶⁷ which has been criticized persistently by numerous Supreme Court Justices,⁶⁸ other federal

little or no regard for [the] emotive function [of vulgar speech] which, practically speaking, may often be the more important element of the overall message sought to be communicated.”); *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 329 (7th Cir.) (holding as unconstitutional viewpoint-based ordinance that targeted only sexual expression that was “subordinating” to women), *aff’d mem.*, 475 U.S. 1001 (1985); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 814 (D.D.C. 1986) (invalidating as viewpoint discrimination Librarian of Congress’s decision to stop funding braille translation of *Playboy* magazine because of “sexual orientation of the magazine”); Catherine A. MacKinnon, *Feminism Unmodified* 212 (1987) (“Why aren’t obscenity and child pornography laws viewpoint laws? Obscenity, as Justice Brennan pointed out[,] . . . expresses a viewpoint: sexual mores should be relaxed . . .”); Heins, *supra* note 9, at 128 (“[T]he notion that sexual speech—even hardcore pornography—lacks any ‘exposition of ideas’ reflects a curiously narrow and cerebral approach to the concept of expression.”).

⁶⁶ Often, controversies dissipate when artists respond to pressure by “voluntarily” removing their work. See, e.g., *People for the American Way*, *supra* note 1, at 60 (describing voluntary removal from university art exhibit of student painting deemed offensive to rape victims). When artists do pursue formal legal action, most cases (like most civil actions generally) reach settlement before judicial resolution is necessary. See, e.g., *Salzman*, *supra* note 51, at 1216 (describing settlement agreement which permitted display of disputed painting in university art exhibit, but required warning posted at entrance of show).

⁶⁷ This Note does not address the issue of whether the public forum doctrine should be abandoned in all circumstances. Although the arguments presented here may support such a conclusion, that is beyond the scope of this Note. For persistent criticism of the public forum doctrine, see *infra* notes 68-70.

⁶⁸ Three sitting Justices—Kennedy, Souter, and Stevens—have criticized openly the Court’s current public forum doctrine in recent years. See *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694 (1992) [hereinafter *ISKCON*] (Kennedy, J., joined by Blackmun, Stevens, Souter, JJ., concurring in part in the judgment) (“I believe

judges,⁶⁹ and commentators,⁷⁰ and to the difficulties involved in cate-

that the Court's public forum analysis in [recent] cases is inconsistent with the values underlying the Speech and Press Clauses of the First Amendment."); *United States v. Kokinda*, 497 U.S. 720, 741 (1990) (Brennan, J., joined by Marshall, Stevens, and Blackmun, JJ., dissenting) ("I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand."). In addition, a number of former Justices rejected the current doctrine as inflexible, incoherent, and overly restrictive of First Amendment rights. Justice Blackmun, for example, questioned the Court's undue reliance on simple doctrinal categories, opining:

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

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 820 (1985) (Blackmun, J., dissenting); see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 57 (1983) (Brennan, J., dissenting) ("In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or non-public.").

⁶⁹ See, e.g., *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 377 & n.7 (5th Cir. 1989) (criticizing "formulaic application of the public forum doctrine" and citing commentators' warnings that "rigid application of public forum analysis threatens to obscure important first amendment issues").

⁷⁰ The vast majority of legal commentators who have considered modern public forum analysis both reject its theoretical foundations and bemoan its practical impact. For example, Rosemary Salomone argues:

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

Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons From Lamb's Chapel*, 24 N.M. L. Rev. 1, 23 (1994); see also, e.g., Laurence H. Tribe, *American Constitutional Law* 987 (2d ed. 1988) ("[M]any recent cases illustrate the blurriness, the occasional artificiality, and the frequent irrelevance, of the categories within the public forum classification."); G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. Ill. L. Rev. 949, 980 ("[I]n this area, the Court's analytical machinery has broken down . . ."); David S. Day, *The End of the Public Forum Doctrine*, 78 Iowa L. Rev. 143, 145, 202 (1992) ("Although the Supreme Court's 'public forum doctrine' was once a speech-protective methodology, the [Court has] converted it into a speech-restrictive methodology . . . [T]he problem is that the Court's application of the modern forum doctrine blindly trusts the intentions of governmental officials. This is a fatal flaw."); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1715 (1987) ("The doctrine has in fact become a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property."); Stephen K. Schutte, *International Society for Krishna Consciousness, Inc. v. Lee: The Public Forum Doctrine Falls to a Government Intent Standard*, 23 Golden Gate U. L. Rev. 563, 568 (1993) ("[T]he arbitrary nature of the standards used to decide a property's forum classification, compounded by the Court's strict limitation of traditional public fora, poses a direct threat to First Amendment values.").

gorizing not only the government property but also the expression at issue.⁷¹

A. Public Forum Doctrine Generally

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

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

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

⁷² 307 U.S. 496, 515 (1939) (noting in dicta that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). While Justice Roberts's opinion in *Hague* laid the groundwork for what would become the public forum doctrine, see, e.g., Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1221 (1984) (tracing public forum doctrine to *Hague*), the term "public forum" did not appear until 1965, in Harry Kalven's groundbreaking article, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1:

[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

Id. at 11-12.

⁷³ The phrase "public forum" first appeared in a Supreme Court majority opinion in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972):

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

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

⁷⁴ *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984); see also Post, *supra* note 70, at 1750.

⁷⁵ See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2516 (1995) ("[T]here is no question that the [government], like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." (quoting *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2146 (1993))).

Ass'n v. Perry Local Educators' Ass'n,⁷⁶ where the Supreme Court upheld a school board's policy of granting the duly-elected teachers' union exclusive access to a school's mail system.

In expounding its new categorical approach, the Court identified three distinct types of fora: First, "traditional" public fora—"places which by long tradition or by government fiat have been devoted to assembly and debate,"⁷⁷ second, "limited"⁷⁸ public fora—"public property which the State has opened for use by the public as a place for expressive activity,"⁷⁹ and third, "nonpublic" fora—property not dedicated in any significant way to free or open communication.⁸⁰

Under this categorical system, the state's ability to regulate speech depends on the nature of the forum. The government's power to restrict expression in traditional public fora, the *Perry* Court explained, is extremely limited: "Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."⁸¹ The Court imposes similar restraints on speech in limited public fora: "Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."⁸² In nonpublic fora, however, the government may restrict expression "as long as the regu-

⁷⁶ 460 U.S. 37 (1983).

⁷⁷ *Id.* at 45.

⁷⁸ This category is alternatively referred to as "designated public fora." For clarity and consistency, this Note will use the term "limited" exclusively.

⁷⁹ *Perry*, 460 U.S. at 45.

⁸⁰ See *id.* at 45-46.

⁸¹ *Id.* at 46. Content-based restrictions on speech in traditional and limited public fora must satisfy a "compelling state interest" test. See *ISKCON*, 505 U.S. 672, 678 (1992); *Perry*, 460 U.S. at 45. Content-neutral restrictions, on the other hand, are permitted only in the form of valid time, place, and manner restrictions. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding regulation limiting loudness of band performing in Central Park); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding ban on demonstrators sleeping in park); *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (holding that ordinance prohibiting posting of signs on public property was constitutional); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (finding that law prohibiting distribution of religious material on fair grounds did not violate First Amendment). However, despite the seemingly broad protection afforded to private expression in a public forum, the Supreme Court has been reluctant to consider the discriminatory effects of facially neutral regulations. See, e.g., William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 *Geo. Wash. L. Rev.* 757, 767-71 (1986) (discussing discriminatory effect of regulations in above-mentioned cases).

⁸² *Perry*, 460 U.S. at 46. Speech in limited public fora can be limited to certain classes of speakers, see *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (assuming that availability of state university facilities may be limited to registered student groups), and certain topics, see *Madison Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976) (noting that speech at school board meetings may be limited to school matters).

lation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."⁸³

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

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

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

⁸⁴ See *supra* notes 81-82 and accompanying text.

⁸⁵ *Perry*, 460 U.S. at 50-51 (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 (1981) (alteration in original) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966))). Even in fora which appear to have a number of different uses, the Supreme Court generally identifies government property as single-purpose facilities. See *ISKCON*, 505 U.S. at 688 (O'Connor, J., concurring) ("[W]e have almost always been confronted with cases where the fora at issue were discrete, single-purpose facilities."). It remains a question whether restrictions on speech must directly advance the government's purpose in maintaining a nonpublic forum, or whether they need only be rationally related to that purpose. While some lower courts have stressed that the government is not "free to ban all speech not directly advancing the forum's intended purpose," *Multimedia Publ'g Co. v. Greenville-Spartanburg Airport*, 991 F.2d 154, 162 (4th Cir. 1993) (holding total ban on news racks in airport unreasonable burden on expressive activity), the Supreme Court has found that "a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated," *Cornelius*, 473 U.S. at 808. This broad notion of reasonableness was explained by the Supreme Court in *United States v. Kokinda*, 497 U.S. 720 (1990), which upheld solicitation restrictions on postal property. "Even if more narrowly tailored regulations could be promulgated, however, the Postal Service is only required to adopt *reasonable* regulations, not 'the most reasonable or the only reasonable' regulation possible." *Id.* at 735-36 (quoting *Cornelius*, 473 U.S. at 808).

This should not imply that courts will deem every government regulation in a nonpublic forum to be reasonable. On rare occasions courts have found speech restrictions in such fora unduly overbroad. See, e.g., *Board of Airport Comm'rs of L.A. v. Jews For Jesus, Inc.*, 482 U.S. 569, 576 (1987) (holding airport ban on all expressive activity unreasonable

based.⁸⁶ Thus, in a nonpublic forum, the government may institute a content-based ban on all artwork, for example, that deals with the subject of abortion. They may not, however, permit paintings that espouse a pro-life message without also allowing the display of pro-choice art.⁸⁷ As discussed below,⁸⁸ this distinction becomes crucial in the resolution of public art disputes, which typically will take place in nonpublic fora.

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

The case law governing restrictions on private art in public spaces is relatively limited, given the breadth and intensity of the controversy in this area.⁸⁹ To date, only seven federal cases deal directly with limits on noncommercial, secular art displayed on government property.⁹⁰ Of those, four apply categorical public forum analysis to the

and overbroad); *Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1204 (9th Cir. 1996) (finding ban on display of religious materials outside employees' cubicles unreasonable and overbroad); *Springfield v. San Diego Unified Port Dist.*, 950 F. Supp. 1482, 1490-91 (S.D. Cal. 1996) (enjoining enforcement of airport ban on leafletting, "proselytizing," "speech making," distributing printed material, and displaying signs). Nonetheless, these are isolated incidents, and courts seem to reject the government's reasonableness claims only in the face of egregiously overbroad restrictions.

⁸⁶ See *supra* note 83 and accompanying text.

⁸⁷ See *Finley v. National Endowment for the Arts*, 100 F.3d 671, 683 (9th Cir. 1996) (invalidating grant scheme under which government could favor "decent" depictions of American flag over those that "demonstrated disrespect for 'the diverse beliefs and values of the American public'").

⁸⁸ See *infra* Part II.B.2.b.

⁸⁹ See discussion *supra* Part I.

⁹⁰ See *Swim v. City of Austin*, No. 96-50160, 1996 U.S. App. LEXIS 36200 (5th Cir. Dec. 18, 1996); *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988); *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir. 1985); *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970); *Bellospirito v. Manhasset Pub. Library*, No. 93-CV-4484 (E.D.N.Y. July 31, 1994); *Claudio II*, 836 F. Supp. 1230 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994); *Claudio I*, 836 F. Supp. 1219 (E.D.N.C. 1993) (order granting partial summary judgment); *Sefick v. Chicago*, 485 F. Supp. 644 (N.D. Ill. 1979).

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

Similarly, adjudications involving religious art are complicated by the Establishment Clause of the First Amendment. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2444 (1995) (discussing Establishment Clause in determining propriety of religious displays on public property); *Washegesic v. Bloomingdale Pub. Schs.*, 33

paradigmatic case of private art displayed in a public building.⁹¹ Two occurred before *Perry*, and therefore employ markedly divergent methods of analysis,⁹² and one involves a government-commissioned (rather than privately-owned) work and speaks to the central issues of this Note only in dicta.⁹³

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

1. *Forum Determination*

As noted above, the first question judges must consider in evaluating the propriety of restrictions on art in public spaces is the nature of the forum in dispute. This threshold issue often controls the final resolution of a case, since a finding of a nonpublic forum allows the government great discretion in limiting speech.⁹⁴ In theory, the forum determination should be made without regard to the contested expression; it should depend only on the government's purpose and historical use of the property.⁹⁵ In practice, though, courts frequently have tailored the forum determination to meet their subjective judgments about the value or offensiveness of the art at issue.

In the vast majority of cases, artists, like litigants in public speech disputes generally,⁹⁶ have found it exceedingly difficult to obtain a

F.3d 679, 683 (6th Cir. 1994), cert. denied, 115 S. Ct. 1822 (1995) (using Establishment Clause doctrines to resolve dispute over religious painting in school hallway).

Finally, this Note does not address cases involving art speech on private property, as those disputes are governed by significantly stricter standards than the public art cases. See, e.g., *Nelson v. Streeter*, 16 F.3d 145, 148 (7th Cir. 1994) (noting distinction between seizure of painting from private gallery and art regulation on public property).

⁹¹ See *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir. 1985); *Bellospirito v. Manhasset Pub. Library*, No. 93-CV-4484 (E.D.N.Y. July 31, 1994); *Claudio II*, 836 F. Supp. 1230 (E.D.N.C. 1993), aff'd, 28 F.3d 1208 (4th Cir. 1994); *Claudio I*, 836 F. Supp. 1219 (E.D.N.C. 1993), aff'd, 28 F.3d 1208 (4th Cir. 1994).

⁹² See *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970); *Sefick v. Chicago*, 485 F. Supp. 644 (N.D. Ill. 1979).

⁹³ See *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988).

⁹⁴ See *supra* notes 83-87 and accompanying text.

⁹⁵ See *supra* note 85 (describing appropriate analysis for forum determination).

⁹⁶ See, e.g., *Schutte*, *supra* note 70, at 581 n.132 (noting that "[s]ince 1983, signifying the ascent of modern forum doctrine methodology, the Court has concluded in every case involving the public forum doctrine that the publicly-owned property was a nonpublic forum, warranting only rational basis review").

For the most part, traditional public fora are now limited to streets and parks. See *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988); *Hague v. CIO*, 307 U.S. 496, 515 (1939). Even certain sidewalks are no longer accepted as public fora without question. See *United*

traditional or limited public forum determination.⁹⁷ In *Piarowski v. Illinois Community College*,⁹⁸ for example, the Seventh Circuit, after

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

⁹⁷ This Note focuses primarily on instances in which the government has opened public property specifically for the display of art. As such, it does not concentrate on wholly voluntary artistic expression in traditional public fora, such as parks and streets. Of course, the forum determination in those cases is seldom an issue, and the disputes there usually revolve around the propriety of the government's time, place, and manner restrictions. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (amplified music concert in park); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (round-the-clock vigil in public park); *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515 (11th Cir. 1992) (nude sculpture in park); *Comite Pro-Celebracion v. Claypool*, 863 F. Supp. 682 (N.D. Ill. 1994) (statue in park); *Committee for a Sane Nuclear Policy v. City of Indianapolis*, 668 F. Supp. 1211 (S.D. Ind. 1987) (painting human silhouette shadows on sidewalk); *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200 (D. Utah 1986) (shanties on college campus). Even in parks, however, a court may find the property to be a nonpublic forum if it is narrowed significantly by a government program or policy. See, e.g., *Community for Creative Non-Violence v. Hodel*, 623 F. Supp. 528, 533 (D.D.C. 1985) (finding annual "Christmas Pageant of Peace" in park to be nonpublic forum, even though park itself is public forum).

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

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

⁹⁸ 759 F.2d 625 (7th Cir. 1985).

finding a college art gallery to be a nonpublic forum,⁹⁹ permitted the removal of several sexually charged stained-glass windows.¹⁰⁰ Likewise, a district court in *Claudio v. United States*¹⁰¹ determined the lobby of a federal courthouse to be a nonpublic forum, upholding the government's removal of a painting entitled "Sex, Laws & Coathangers."¹⁰² The *Claudio* court disregarded compelling evidence of the government's intent to create a limited public forum in the lobby,¹⁰³ and instead molded its forum analysis to reflect the judge's

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

¹⁰⁰ The court described the controversial windows as follows:

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

Id. at 627.

¹⁰¹ *Claudio II*, 836 F. Supp. 1230 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994); *Claudio I*, 836 F. Supp. 1219 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994).

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

¹⁰³ After a cursory inquiry into the government's policy, practice, and intent, the court concluded that "the individual defendants were acting in a discretionary capacity with regard to a non-public forum." *Id.* at 1225. In so doing, the court disregarded the purposes of the Public Buildings Cooperative Use Act of 1976 (PBCUA), Pub. L. No. 94-541, 90 Stat. 2505 (codified as amended at 40 U.S.C. §§ 490, 601, 606, 611, 612a and 42 U.S.C. §§ 3331, 4231 (1994)), which evidenced clear legislative intent to open certain federal buildings to artistic expression, and the Federal Property Management Regulations (FPMR), 41 C.F.R. §§ 101-20.400 to .409 (1996). See, e.g., 40 U.S.C. § 490(a)(17) (1994) ("mak[ing] available, on occasion, . . . auditoriums, meeting rooms, courtyards, rooftops, and lobbies of public buildings to persons, firms, or organizations engaged in cultural, educational, or recreational activities [including "fine art exhibits," see 40 U.S.C. § 612a(6) (1994)] . . . that will not disrupt the operation of the building"). The *Claudio* court interpreted FPMR language providing access "for the occasional use of public areas for cultural, educational and recreational activities," 41 C.F.R. § 101-20.400 (1996), to mean that the government had no intention of opening a limited public forum, since "occasional use" meant something significantly less than unrestricted access. *Claudio I*, 836 F. Supp. at 1224. This ignored, however, the fact that the FPMR specifically enumerate six narrow bases on which a permit may be disapproved or canceled. See 41 C.F.R. § 101-20.403(a) (1996). The limited nature of these exceptions implies that, under usual circumstances, the government is prohibited from restricting access to the fora covered. See *National Treasury Employees Union v. King*, 798 F. Supp. 780, 787 (D.D.C. 1992) (examining PBCUA and FPMR and holding that "[b]y promulgating regulations that govern speech and by recognizing that the [government property to which access was sought] constitute[s] public areas for purposes of those regulations, defendants have clearly exhibited an intent to create a public forum under the First Amendment").

distaste for the "vulgar and inappropriate"¹⁰⁴ painting under consideration.

Conversely, innocuous works of art have benefited from favorable forum decisions. In *Sefick v. City of Chicago*,¹⁰⁵ for example, a district court treated the lobby of a civic center as a limited public forum¹⁰⁶ in order to protect the temporary display of a satirical sculpture.¹⁰⁷ Central to the *Sefick* decision was the court's conclusion that the sculpture—a political indictment of then-mayor Michael Bilandic—was relatively harmless to viewers.¹⁰⁸ In the unpublished opinion, *Bellospirito v. Manhasset Public Library*,¹⁰⁹ another district court made a similar forum determination¹¹⁰ to prohibit the removal of paintings of "semi-nude females" from the community room of a public library.¹¹¹ In safeguarding art that it described as "fairly innoc-

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

¹⁰⁵ 485 F. Supp. 644 (N.D. Ill. 1979).

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

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

¹⁰⁸ The *Sefick* court stated:

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

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

Id. at 647.

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

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

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

¹¹¹ See *id.* at 3, 19.

uous,"¹¹² the *Bellospirito* court stumbled through a confused, undisciplined forum analysis to reach its desired outcome.¹¹³

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

¹¹² *Id.* at 3.

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

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

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

For unsolicited artistic expression in traditional public fora (which is beyond the scope of this Note, see *supra* note 97), the Supreme Court has held that content-based restrictions must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). In addition, "[t]he State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* Displays of art in limited public fora enjoy the same protections as in traditional public fora, but the government need not open this property to expressive speech at all. When it does, it may limit expression to particular categories of speech or particular subjects. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (stating that public forum may be created by government designation of places for discussion of certain subjects (citing *Perry*, 460 U.S. at 45, 46 n.7)); see also *supra* note 82.

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

true for controversial art, given the willingness of some members of the judiciary to allow art's content to shape their forum determinations. For purposes of this Note, then, the standards associated with government regulation of nonpublic fora are most relevant.

2. *Restrictions in Nonpublic Fora*

When government-owned property is characterized as a nonpublic forum, a court's inquiry focuses on whether government restrictions on public art are reasonable and viewpoint neutral. Difficulties here result from the unique, complex nature of artistic expression and interpretation, which blurs the line between content and viewpoint.¹¹⁵ This blurring of content and viewpoint permits some courts to tailor their analyses to comport with their subjective impressions of the art in dispute, as judges frequently take the following steps within the two-pronged reasonableness/viewpoint neutrality scheme. First, courts sanction as "reasonable" government restrictions that are motivated explicitly by the "controversial," "offensive," or "inappropriate" nature of the work, by looking to various First Amendment doctrines that permit the regulation of intrusive, unwanted speech. Second, having identified the content at issue to be amenable to regulation, courts then determine that the work in question expresses no discernible viewpoint and that the restrictions at issue are therefore free of viewpoint discrimination.

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

a. Reasonableness. Speech restrictions in a nonpublic forum will be considered reasonable if they are consistent with the function and purpose of the forum involved.¹¹⁶ Official action enjoys considerable latitude under this analysis, and courts are likely to make a reasonableness finding in the face of any regulation that plausibly advances government interests.¹¹⁷ With art speech, judges tend to view all restrictions that curb the "offensive" content of paintings and

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

¹¹⁵ See *supra* Part I.B.

¹¹⁶ See *supra* notes 75-83 and accompanying text.

¹¹⁷ See *supra* note 85.

sculpture as reasonable, ignoring the government interest in the appearance of public property.

Courts in public art cases justify the regulation of confrontational art on a number of grounds. First, some rely on the theory of the "captive audience." This seeks to balance the expressive rights of speakers with the rights of unwilling listeners by shielding the latter from "offensive" speech that invades substantial privacy interests.¹¹⁸ In *Close v. Lederle*,¹¹⁹ the court found such an "assault upon individual privacy"¹²⁰ in the display of sexually explicit¹²¹ paintings in the corridor of a university's student union. Similarly, *Piarowski* relied on the prominent display of "sexually explicit and racially offensive"¹²² art to justify the relocation of those works.¹²³ In *Claudio*, the court justified the government's removal of a "vulgar, shocking and tasteless painting"¹²⁴ on the grounds that the painting "was displayed in the direct line of vision of everyone who entered the Federal Courthouse."¹²⁵

While captive audience theory may appear a valid means of protecting unwilling viewers, the extent to which courts may regulate speech on this basis is far from settled. Although the Supreme Court has on numerous occasions sanctioned speech restrictions intended to protect the rights of listeners,¹²⁶ it has consistently limited the application of captive audience theory to instances in which "substantial pri-

¹¹⁸ See *Tribe*, supra note 70, at 948-49.

¹¹⁹ 424 F.2d 988 (1st Cir. 1970).

¹²⁰ *Id.* at 990 (quoting *Redrup v. New York*, 386 U.S. 767, 769 (1967)).

¹²¹ As described by the court, several of the paintings, "which fell short of unlawful obscenity," *id.* at 989, depicted "nudes, male or female, displaying the genitalia in what was described as 'clinical detail.' A skeleton was fleshed out only in this particular. One painting bore the title, 'I'm only 12 and already my mother's lover wants me.' Another, 'I am the only virgin in my school.'" *Id.* at 990.

¹²² *Piarowski v. Illinois Community College*, 759 F.2d 625, 632 (7th Cir. 1985). For the court's description of the stained-glass windows, see supra note 100.

¹²³ See *Piarowski*, 759 F.2d at 631-32.

¹²⁴ *Claudio II*, 836 F. Supp. 1230, 1235 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1203 (4th Cir. 1994). In *Claudio I*, the court had described the painting as follows:

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

Claudio I, 836 F. Supp. 1219, 1222 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1203 (4th Cir. 1994).

¹²⁵ *Claudio II*, 836 F. Supp. at 1235.

¹²⁶ See *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (upholding prohibition of indecent radio broadcast because of intrusive nature of medium); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion) (relying, in part, on "captive audience" concerns to uphold ban on political advertising on municipal buses); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737-38 (1970) (sustaining addressee's right to prevent mailing of erotic material to home).

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

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

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

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

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

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

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

theory would effectively silence any extreme, daring private speech on government property.

In the context of specific constitutional prohibitions on government endorsement—for example, the Establishment Clause of the First Amendment¹³¹—the Supreme Court has been increasingly unreceptive to sponsorship claims.¹³² If sponsorship theory is unpersuasive in the religion setting, then it is much less compelling for allegedly offensive speech. But even if the theory retains some validity for non-religious public art, the government may avert any danger by explicitly disclaiming sponsorship of the works.¹³³ In any event, neither *Piarowski* nor *Claudio* provides any indication of how similar claims should be adjudicated in the future.

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

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

¹³¹ That clause states, “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I.

¹³² For instance, in *Capitol Square Review & Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995), the Court refused to allow state officials to bar the Ku Klux Klan’s private religious display (a cross) in a public plaza. The Court explained that the possibility that some viewers might falsely assume official endorsement of the display was insufficient to permit restrictions on private speech. See *id.* at 2448 (plurality opinion). Justice Scalia explained that, although the cross was erected very “close to the symbols of government,” free speech guarantees cannot be abrogated “whenever private speech can be mistaken for government speech.” *Id.*

¹³³ The regulations in *Claudio* provide that the government may disclaim sponsorship. See 41 C.F.R. § 101-20.409 (1996); see also *Pinette*, 115 S. Ct. at 2450 (“If [the state] is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such.”); *Amato v. Wilentz*, 753 F. Supp. 543, 558 (D.N.J. 1990) (holding that disclaimer satisfies government interest in not being mistakenly associated with speech activities on public property), vacated on other grounds, 952 F.2d 742 (3d Cir. 1991).

¹³⁴ See *supra* note 57.

¹³⁵ *Close v. Lederle*, 424 F.2d 988, 990 (1st Cir. 1970). For a description of the works and titles at issue in *Close*, see *supra* note 121.

conclusion that the "plaintiff's constitutional interest" was "minimal."¹³⁶ The *Piarowski* court relied on similar findings to justify the government's removal of the artwork at issue. Distinguishing the obvious political message protected in *Sefick*,¹³⁷ Judge Posner explained, "Piarowski intended no political statement by the content and coloring used in his windows, no disparagement of women or blacks, no commentary on relations between the sexes or between the races. The windows were art for art's sake."¹³⁸ The *Claudio* court was similarly strict in its requirement of an easily-identifiable political message, noting, "Indeed, Claudio's course of conduct suggests, not that he desired to express a viewpoint, but that he sought to vex the Government and to generate such self-serving notoriety as might be attendant to this dispute."¹³⁹ The court concluded, "It is impossible to perceive the artist's viewpoint regarding abortion by looking at the painting; the painting is ambiguous in its position on abortion and likely was designed that way."¹⁴⁰

These opinions thus recognize a broad category of artistic content that is vague enough to avoid the prohibitions on viewpoint discrimination but sufficiently "shocking" to regulate in a constitutionally permissible way. In both *Close* and *Claudio*, for example, the courts factored into their analyses the "controversial" nature of the art in question.¹⁴¹ Similarly, *Piarowski*'s approval of the university's conduct rested, in part, on a finding that the works at issue were "sexually explicit and racially insulting."¹⁴² As noted above, these concerns were deemed reasonable enough to justify substantial art speech regulation.¹⁴³ But this begs the question: From what did the government wish to protect its captive audience? What message did it wish not to endorse?

Of course, courts reasonably may find a content-based speech regulation to be viewpoint neutral under current public forum analysis; in fact, content-based restrictions are generally upheld in nonpublic fora.¹⁴⁴ Perhaps the disputed content indeed contained no idea or

¹³⁶ See *Close*, 424 F.2d at 990.

¹³⁷ See *Piarowski v. Illinois Community College*, 759 F.2d 625, 632 (7th Cir. 1985) (distinguishing *Sefick v. City of Chicago*, 485 F. Supp. 644 (N.D. Ill. 1979)).

¹³⁸ *Id.* at 628.

¹³⁹ *Claudio II*, 836 F. Supp. 1230, 1236 n.2 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994).

¹⁴⁰ *Id.* at 1236.

¹⁴¹ See *Close*, 424 F.2d at 989; *Claudio II*, 836 F. Supp. at 1235.

¹⁴² *Piarowski*, 759 F.2d at 632.

¹⁴³ See *supra* notes 98-104 and accompanying text.

¹⁴⁴ Expression seldom is saved from facially viewpoint neutral restrictions when courts employ the deferential, rational basis standard of review articulated in *Perry*. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49-53, 54 (1983) (finding no

thought whatsoever. Nonetheless, courts have an obligation to determine whether assertions of viewpoint neutrality are merely pretextual justifications for impermissible state conduct.¹⁴⁵ With artistic expression, certain content-based regulations (e.g., "aesthetic" concerns¹⁴⁶) will indeed pass constitutional muster. The inherent subjectivity of artistic speech, however, helps shield the government from searching judicial inspection. Too often, courts use any uncertainty about a work's message or its audience's ability to "understand" the art¹⁴⁷ to dismiss the suggestion of viewpoint discrimination.

Even worse, sympathetic judges may ignore the government's blatantly viewpoint-based judgments by recharacterizing the state's reasons for regulating works of art. Such was the case in *Claudio*, where federal officials had stated publicly their reasons for revoking the artist's permit, writing, "Although your display may be in the form of art it is more properly described as a political expression concerning the highly controversial issue of abortion. Since your work is considered to be political in nature it is not permitted on federal property and your license is hereby revoked."¹⁴⁸ As "political" speech generally enjoys heightened protection under the First Amendment, this of-

indication that school board intended to discourage one viewpoint to advance another); see also *Greer v. Spock*, 424 U.S. 828, 838-39 (1976) (holding that military regulation prohibiting partisan political speeches did not discriminate based on candidates' views); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974) (finding ban on political advertising in city buses not "arbitrary, capricious, or invidious"); *Lee*, supra note 81, at 774 ("[T]he minimal scrutiny generally applied to nonforum subject-matter cases ensures that the Court will not detect viewpoint discrimination.").

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

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

¹⁴⁶ See discussion *infra* Part III.

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

¹⁴⁸ *Claudio II*, 836 F. Supp. 1230, 1233 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1203 (4th Cir. 1994).

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

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

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

¹⁴⁹ Id. at 1235.

¹⁵⁰ See id. at 1235-36.

¹⁵¹ Id. (emphasis added).

¹⁵² Such a policy would advance the interests of the GSA officials in the *Claudio* dispute. See supra notes 101-04 and accompanying text. In the face of a nonpublic forum determination (as in *Claudio*), that policy might survive judicial scrutiny even under the stricter standards proposed in Part II.

¹⁵³ This example is not so far-fetched. For example, the Fairfax County Art Guidelines, discussed supra note 49, initially declared that "[n]udes, weaponry, drug paraphernalia, and works which reflect violence, religious scenes, political expression or unpatriotic sub-

couching these regulations in terms of content (e.g., "no depictions of hunting") rather than viewpoint (e.g., "no depictions that oppose gun control"), government officials could insulate their viewpoint-based actions from constitutional scrutiny.

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

III

NEUTRAL DISPLAY: AN ALTERNATIVE TO PUBLIC FORUM ANALYSIS

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

jects" were not "acceptable subject matters" for display in the county government building. See Heins, *supra* note 9, at 138; see also *id.* (concluding that Fairfax Guidelines "exacerbated the First Amendment problems of content and viewpoint discrimination"). In the face of informal challenges from, among other groups, the American Civil Liberties Union and the American Jewish Congress, the county eventually abandoned the guidelines. *Id.* at 139-40.

¹⁵⁴ See *supra* note 63. As Barbara Hoffman explains,

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

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

regulation of public art display would be limited to judgments based on artistic merit.¹⁵⁵

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

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

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

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

¹⁵⁵ This Note uses interchangeably terms such as "artistic merit," "aesthetic worth," and "artistic value." When endorsing judgments based on "aesthetic criteria," this Note envisions decisionmaking processes similar to those conducted by the NEA. See *infra* notes 158-59 and accompanying text. For a discussion of the theoretical difficulties in separating "aesthetic" criteria from "moral" or "political" ones, see *supra* Part I.A.

¹⁵⁶ This theory has been argued most eloquently and forcefully by Professor David Cole. See *infra* note 191 and accompanying text.

¹⁵⁷ See *supra* Part II.

¹⁵⁸ See, e.g., DeGrazia, *supra* note 8, at 133.

¹⁵⁹ Although the final decisionmaker, the Chairperson must first consult and receive a recommendation from the Council before making the final determination. See *Finley v. National Endowment for the Arts*, 100 F.3d 671, 674 (9th Cir. 1996) (citing 20 U.S.C. §§ 954(c), 955(f) (1994)).

¹⁶⁰ See, e.g., Cole, *supra* note 26, at 740 ("In creating the NEA . . . Congress sought to insulate concerns about isolating the funding process from political intrusion."); Nea, *supra* note 8, at 166-69 (discussing how NEA agency structure and legislative intent reveal effort to limit government control over artistic freedom).

versy, and litigation.¹⁶¹ As a result, several lower courts recently have had occasion to examine the constitutional limitations on government control over public art subsidies.

In October 1989, Congress amended the National Arts Funding Law to require that grants not be used for the promotion, dissemination, or production of materials "considered obscene," which may include works depicting "sodomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts which, when taken as a whole, do not have serious literary, artistic, political, or scientific value."¹⁶² In addition, the NEA added a certification condition to its application, requiring recipients to certify that no NEA funds would be used "to promote, disseminate, or produce materials which in the judgment of the NEA . . . may be considered obscene."¹⁶³ The amendments arose in the wake of two controversial (and highly publicized) NEA grants: one, to Andres Serrano, who received federal support for his "Piss Christ" photograph, which featured a crucifix submerged in a jar of the artist's urine; and the other, to Robert Mapplethorpe, who frequently photographed homosexual and sado-masochistic practices.¹⁶⁴

Shortly after the 1989 amendments, several artist groups mounted a legal challenge to the obscenity oath. In *Bella Lewitzky Dance Foundation v. Frohnmayer*,¹⁶⁵ a federal district court struck down the oath as unconstitutionally vague, reasoning that, among other things, obscenity determinations must be left to the courts, not to administra-

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

NEA funding was the subject of some litigation in the mid-1970s. In *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir. 1976), the First Circuit upheld a state arts commission's decision to deny funding to a local poet where the commission received funds from the NEA. See *id.* at 793, 798. The court addressed the narrow question of whether *any* content-based decisions, including those based on artistic merit, were permissible. See *id.* at 796-97. Since few now dispute that merit-based decisions for arts funding are constitutional, see *infra* note 227, this decision has had little influence on subsequent litigation.

¹⁶² Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989) (partially codified at 20 U.S.C. § 954 (1994)).

¹⁶³ *Id.*

¹⁶⁴ See, e.g., Georges Nahitchkevansky, Note, *Free Speech and Government Funding: Does the Government Have to Fund What It Doesn't Like*, 56 Brook. L. Rev. 213, 213 & n.5 (1990) (summarizing Serrano and Mapplethorpe controversies).

¹⁶⁵ 754 F. Supp. 774 (C.D. Cal. 1991).

tive agencies.¹⁶⁶ The court deemed the certification requirement to be an unconstitutional condition and intimated that while NEA funding was not constitutionally mandated, once the NEA engaged in support of private expression, it could not condition that support on impermissible criteria.¹⁶⁷

One year later, another judge in the same district expanded on the *Bella Lewitzky* principles by holding the NEA to a standard of strict neutrality. In *Finley v. National Endowment for the Arts*,¹⁶⁸ four performance artists sued the NEA when, despite unanimous approval from the Performance Artists Program Peer Review Panel, the agency denied them funding.¹⁶⁹ The artists also challenged the newly enacted "decency clause" in the NEA's enabling legislation, which required that grant applications be judged "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."¹⁷⁰

The NEA moved for summary judgment, relying on the Supreme Court's decision in *Rust v. Sullivan*,¹⁷¹ a case decided shortly after *Bella Lewitzky*. In *Rust*, the Court upheld the so-called gag rule, which prohibited federally funded family planning clinics from discussing abortion with their clients.¹⁷² The NEA argued that *Rust* had cabined the "unconstitutional conditions" doctrine to such an extent¹⁷³ that federal arts grants were now immune from the plaintiffs'

¹⁶⁶ See *id.* at 781-82 (finding that requirement of jury of citizens applying community standards was lacking in administrative adjudications).

¹⁶⁷ The court explained that "the government may well be able to put restrictions on who it subsidizes, and how it subsidizes, but once the government moves to subsidize, it cannot do so in a manner that carries with it a level of vagueness that violates the First and Fifth Amendments." *Id.* at 784-85 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)).

¹⁶⁸ 795 F. Supp. 1457 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996).

¹⁶⁹ See *id.* at 1462.

¹⁷⁰ See 20 U.S.C. § 954(d)(1) (1994).

¹⁷¹ 500 U.S. 173 (1991).

¹⁷² See *id.* at 203.

¹⁷³ In upholding the restriction at issue, the Court in *Rust* explained that the regulation still permitted grant recipients to speak freely on their own time and with their own resources. See *id.* at 198-99. The Court noted, "The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights." *Id.* at 198. On the other hand, the Court reasoned that a condition is unconstitutional when "the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197. One commentator has read this analysis to "limit[] unconstitutional conditions to situations where the condition on a benefit extends beyond the scope of the benefit itself." Cole, *supra* note 26, at 685.

Although *Rust* appears to allow the government greater power to attach restrictive conditions to government benefits, the opinion suggests three important limitations. First, the government conditions may not effectively serve to "suppress[] a dangerous idea," *Rust*, 500 U.S. at 194. Second, the state may not enact "a general law singling out a disfa-

challenges.¹⁷⁴ Nonetheless, the court denied the NEA's motion, citing *Rust*'s call for heightened protection of "traditional sphere[s] of free expression . . . fundamental to the functioning of our society."¹⁷⁵ Then-District Judge Tashima found the arts to be one such "traditional sphere of free expression"¹⁷⁶ and held that the plaintiffs had a cognizable claim relating to the allegedly content-based denial of their grant applications.¹⁷⁷

More importantly the *Finley* court ultimately struck down the "decency clause" as facially overbroad.¹⁷⁸ Analogizing to the Supreme Court's press and academic freedoms jurisprudence, the court declared that "[a]rtistic expression, no less than academic speech or journalism, is at the core of a democratic society's cultural and political vitality."¹⁷⁹ The court acknowledged that "some content-based decisions are unavoidable,"¹⁸⁰ but limited those choices to neutral aesthetic criteria: "[P]rofessional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of 'decency' are not."¹⁸¹

On appeal, the Ninth Circuit affirmed in a 2-1 decision, reiterating that art is a "traditional sphere of free expression" deserving of exacting neutral treatment.¹⁸² The *Finley* majority adopted the district court's analysis of art's central place in democratic society¹⁸³ with fresh support from the Supreme Court's recent decision in

vored group on the basis of speech content." *Id.* (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987)). Finally, as discussed *infra* text accompanying note 175, government funding cannot serve to control the content of speech in a "traditional sphere of free expression . . . fundamental to the functioning of our society." *Rust*, 500 U.S. at 200 (citing *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)).

Furthermore, *Rust* has been narrowed by the Supreme Court's recent decision in *Rosenberger v. Rector & Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995), which distinguished between government programs that "encourage private speech" and those that "use[] private speakers to transmit specific information pertaining to [the government's] own program." *Id.* at 2519.

¹⁷⁴ See *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1463 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996).

¹⁷⁵ *Id.* at 1473 (quoting *Rust*, 500 U.S. at 200).

¹⁷⁶ *Id.* (quoting *Rust*, 500 U.S. at 200).

¹⁷⁷ See *id.* at 1464.

¹⁷⁸ See *id.* at 1476.

¹⁷⁹ *Id.* at 1473; see also *id.* at 1473 n.19 (citing *Leathers v. Medlock*, 499 U.S. 439 (1991)) (neutrality in journalism); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (neutrality in academics).

¹⁸⁰ *Id.* at 1473.

¹⁸¹ *Id.* at 1475.

¹⁸² See *Finley v. National Endowment for the Arts*, 100 F.3d 671, 681 (9th Cir. 1996). The court invalidated the NEA's "decency and respect" provision on both vagueness and viewpoint discrimination grounds. See *id.* at 683-84.

¹⁸³ See *id.* at 682.

Rosenberger v. Rector & Visitors of the University of Virginia.¹⁸⁴ In *Rosenberger*, the Court invalidated a university regulation that withheld authorization for payments from a student activities fund on behalf of a religious student newspaper.¹⁸⁵ Relying on *Rosenberger*'s expansive reading of viewpoint discrimination¹⁸⁶ and the First Amendment's application to subsidized speech,¹⁸⁷ the *Finley* majority concluded that the NEA's "decency and respect" provision violated the viewpoint neutrality required of arts funding.¹⁸⁸ In fashioning speech-protective rules specifically tailored to government support of the arts, then, the NEA cases offer formal judicial recognition of the unique importance of free artistic expression.¹⁸⁹ These decisions, like the free press and education cases on which they rely,¹⁹⁰ argue for heightened neutrality when the government funds certain forms of valued expression—what Professor David Cole refers to as "spheres of neutrality."¹⁹¹ From the NEA cases and the spheres of neutrality

¹⁸⁴ 115 S. Ct. 2510 (1995).

¹⁸⁵ See *id.* at 2520.

¹⁸⁶ In *Finley*, the majority applied *Rosenberger*'s "recent teaching on viewpoint discrimination" to the NEA's "decency and respect" clause, which, like the disfavored treatment of the religious student newspapers in *Rosenberger*, would favor certain artistic viewpoints (e.g., "respectful" depictions of the American flag) over others (e.g., "indecent" flag art). See *Finley*, 100 F.3d at 682-83 & n.21.

¹⁸⁷ See *id.* at 682 n.20 (noting that *Rosenberger* "took a much broader view of the First Amendment's applicability to subsidized speech" (citing *Rosenberger*, 115 S. Ct. at 2517)).

¹⁸⁸ See *id.* at 683. The court also reiterated *Rosenberger*'s finding that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Id.* (alteration in original) (quoting *Rosenberger*, 115 S. Ct. at 2519).

¹⁸⁹ Both cases accord artistic expression heightened protection. See *id.* at 681-82 (finding that art "is a 'traditional sphere of free expression . . . at the core of a democratic society's cultural and political vitality'" (citations omitted); *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 783 (C.D. Cal. 1991) (protecting "creative expression of the plaintiff Dance Foundation" and discussing special "practical realities of funding in the artistic community").

This comports well with the legislative history of the NEA, see, e.g., S. Rep. No. 89-300, at 3-4 (1965) ("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."); statements by past Presidents of the United States, see, e.g., Moshe Carmilly-Weinberger, *Fear of Art: Censorship and Freedom of Expression in Art 159* (1986) ("For our Republic to stay free those among us with the rare gift of artistry must be able freely to use their talent" (quoting President Eisenhower)); and commentators throughout history, see, e.g., Honour & Fleming, *supra* note 25, at 15 (discussing value of art); see also *supra* Part I.B (discussing importance of artistic expression).

¹⁹⁰ See *supra* note 179 and accompanying text.

¹⁹¹ While recognizing that neutrality mandates should not apply across the board to all government subsidies, Professor Cole urges a neutrality approach to those institutions that "play[] a central role in shaping and contributing to public debate." Cole, *supra* note 26, at 682. Government funding of the arts, Professor Cole argues, is one such institution "central to a system of free expression" that must "operate with a degree of independence from government control." *Id.*

theory, one basic governing principle has emerged: Once the government chooses to subsidize artistic expression, it must insulate its decisions from the political process by evaluating works solely on artistic merit. As explained below, this notion is similarly compelling in the art display cases, where the neutrality concept should inform the adjudication of public art disputes.

B. The Neutral Display Approach

When deciding the extent to which the government may regulate private artistic displays on public property, courts should abandon the public forum doctrine and adopt an analysis of neutral display. Once a government agent decides to solicit submissions for general display¹⁹² on public property, she may select, reject, or remove a work of art from display only on the basis of its artistic merit.¹⁹³ Any regulation or restriction she imposes for a reason other than aesthetic quality violates the First Amendment.

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

¹⁹² This Note does not suggest that strict neutral display analysis be applied either to special purpose displays, such as the "Enola Gay" exhibit at the Smithsonian Institute in 1995, or to government-commissioned works, such as Richard Serra's "Tilted Arc" sculpture. See *infra* notes 196-98 and accompanying text.

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

Certainly, "artistic merit" is an elusive concept. Indeed, some think it impossible to separate artistic merit from considerations of propriety, politics, and morality. See *infra* note 223. However difficult it is to define "aesthetic value," though, official regulation couched in language commonly associated with artistic judgments seems considerably less threatening to First Amendment ideals than decisions made in explicitly political and moral terms. See *infra* notes 226-29 and accompanying text.

as artistically deficient.¹⁹⁴ Third, the neutral display analysis does not apply to government speech, where strict neutrality is not and cannot be required.¹⁹⁵ Accordingly, commissioned works—such as Richard Serra’s “Tilted Arc”¹⁹⁶ or the controversial “Malcolm X Mural”¹⁹⁷ at San Francisco State University—lie outside the rules of neutral display. Likewise, government-sponsored museum exhibits designed for a specific purpose—for example, the Smithsonian Air and Space Museum’s hotly contested “Enola Gay” exhibit¹⁹⁸—are beyond the purview of the neutral display scheme. Finally, the neutral display doctrine is limited by First Amendment jurisprudence, which permits government restrictions on speech that is legally obscene,¹⁹⁹ is “harm-

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

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

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

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

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

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

(a) whether the “average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

ful to minors,"²⁰⁰ constitutes child pornography,²⁰¹ or may fall into any other category of speech from which the Supreme Court removes constitutional protection in the future.²⁰²

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

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

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

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

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

²⁰³ See *supra* Part II.B.1.

²⁰⁴ See *supra* Part II.B.2.a-b.

²⁰⁵ See *supra* Part I.B.

²⁰⁶ See *supra* Part II.B.2.b.

²⁰⁷ See *id.*

manner.”²⁰⁸ In much the same way, government officials should be permitted to make content-based decisions about art that speaks to aesthetic enhancement, the core purpose of public display. However, when art regulation goes beyond beautification concerns to incorporate notions of “propriety” and “community values,” it threatens to “cast a pall of orthodoxy”²⁰⁹ over the public display space. Accordingly, courts should insulate decisions over public art from political pressures.²¹⁰ While neutrality is not required every time the government offers its property for some public use, the unique importance of artistic speech—recognized by, among other things, the NEA funding cases²¹¹—demands such protection.

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

C. Criticisms of Neutral Display

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

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

²⁰⁸ Board of Educ. v. Pico, 457 U.S. 853, 870 (1982).

²⁰⁹ Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

²¹⁰ See supra note 191.

²¹¹ See supra Part III.A.

²¹² See supra Part I.A.

²¹³ See supra note 35 (discussing Professor Hamilton’s views on art’s position within free speech theory); see also Hamilton, supra note 21, at 118 (calling for First Amendment adjudication that would recognize, in effect, “arts Establishment Clause,” so that art would occupy essentially same position as religion).

²¹⁴ Some public artists have incorporated this sentiment into their creative mission. See Siah Armajani, *Shaping the New Sculpture of the Street*, N.Y. Times, Sept. 22, 1985, at E22 (“[P]ublic art should not intimidate or assault or control the public. . . . The public artist is a

Ideally, public art would simultaneously beautify, inspire, and enlighten, without offending unwilling audiences. If it were possible to construct a legal test that could protect viewers' sensibilities while adequately safeguarding artistic expression, this Note would endorse such a proposal. However, complete reconciliation of these interests is impossible,²¹⁵ and thus the neutral display approach is the most appropriate because, at the very least, it addresses the government's goal of aesthetic enhancement.

Of course, offended audiences will claim a particularly strong right to avoid shocking art when it is displayed prominently on government property, such as a federal courthouse.²¹⁶ As explained above, however, sponsorship²¹⁷ and captive audience²¹⁸ theories are

citizen first. There is no room for self-expression."), quoted in Hoffman, *supra* note 6, at 42.

²¹⁵ As argued above, see *supra* Part II.B.2.b, restricting the content of artistic expression inevitably discriminates against the viewpoint of that speech as well.

Standards that seek to characterize the offensive nature of contested speech are equally unavailing. For example, federal courts consistently have struck down regulations or decisions based on standards as vague as "offensiveness," "indecent," or even "lack of educational value." See, e.g., *Finley v. National Endowment for the Arts*, 100 F.3d 671, 680-81 (9th Cir. 1996) (invalidating as unconstitutionally vague NEA's "decency and respect" standard); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512-14 (9th Cir. 1988) (holding as void for vagueness regulatory provision exempting from import duties only those written materials that are "educational, scientific[, or] cultural" and do not "attack or discredit economic, religious, or political views or practices"); *Big Mama Rag v. United States*, 631 F.2d 1030, 1034 (D.C. Cir. 1980) (holding as void for vagueness tax exemption for "educational" organizations); *ACLU v. Reno*, 929 F. Supp. 824, 856 (E.D. Pa.) (invalidating as inherently vague provisions of Communications Decency Act of 1996 prohibiting modem transmission of "obscene" or "indecent" communications), cert. granted, 117 S. Ct. 554 (1996); *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278, 293-96 (S.D.N.Y. 1992) (invalidating Center for Disease Control's requirement that federally funded AIDS education be "[in]offensive to a majority of adults").

While the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), upheld a broadcast regulation banning "any obscene, indecent, or profane language by means of radio communications," that decision can be distinguished on a number of grounds, including: the fact that bright lines can be drawn in the banning of spoken words in a way that they cannot for visual art; the Court's reliance on the unique qualities of the broadcast media; and the intrusion of that speech into the home. See *id.* at 731, 748-50. The Court recently revisited this area in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996), which, somewhat inconsistently, upheld restrictions on "patently offensive" or "indecent" programming on leased access cable channels while invalidating similar regulations on public access channels. See *id.* at 2382-90, 2394-97. However, as Professor Laurence Tribe has explained, "no Court has yet squarely held that offensive or sexually explicit but non-obscene speech enjoys less than full first amendment protection." Tribe, *supra* note 70, at 938.

²¹⁶ See, e.g., *Claudio II*, 836 F. Supp. 1230, 1232 (E.D.N.C. 1993) (action challenging removal of allegedly offensive painting from federal courthouse), *aff'd*, 28 F.3d 1203 (4th Cir. 1994).

²¹⁷ See *supra* notes 129-33 and accompanying text.

²¹⁸ See *supra* notes 127-28 and accompanying text.

generally unavailing in most settings. The Supreme Court's decision in *Cohen v. California*²¹⁹ is particularly instructive here. Addressing the issue of listeners' privacy rights in a courthouse, the Court suggested that, rather than censor unwanted, "distasteful" speech,²²⁰ "[t]hose in the . . . courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."²²¹ With public art, the government need not open its property for the display of potentially offensive, privately-owned speech. But when it does, and when that expression meets minimum aesthetic criteria, unwilling audiences must heed *Cohen's* rule and avert their eyes.²²²

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

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

²¹⁹ 403 U.S. 15 (1971).

²²⁰ The expression at issue was a jacket bearing the words, "Fuck the Draft." See *id.* at 16.

²²¹ *Id.* at 21.

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

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

Id. at 1044 (footnote omitted).

²²³ See, e.g., *Finley v. National Endowment for the Arts*, 100 F.3d 671, 688 (9th Cir. 1996) (Kleinfeld, J., dissenting) ("Philosophers have no way to distinguish art from non-art, or good art from bad art. There is not even a useful vocabulary for most of the distinctions we need to identify 'artistic excellence' . . ."); Hamilton, *supra* note 21, at 110 (questioning theory behind exception to obscenity law for works that have "serious" artistic value (quoting *Miller v. California*, 413 U.S. 15, 24 (1973))); Hoffman, *supra* note 6, at 65 ("It is . . . erroneous to distinguish between artistic categories such as 'aesthetic,' 'political' or 'erotic.'"); Adler, *supra* note 2, at 1363-64 (noting that Post-Modern art theory rejects "distinctions between good art and bad, between high art and popular culture"); Salzman, *supra* note 51, at 1220 ("Particularly in an artistic context, where the artist through his work may be challenging the very values and aesthetics held by judge and jury, are these parties the appropriate authorities to be determining social worth?"); Weinstock, *supra* note 40, at 820 (noting Post-Modern art theory's rejection of traditional concept of "value" in art).

tablishing local art panels, modeled after the NEA's peer review system, to select works for public display. All official attempts to override the panels' decisions would then be presumptively invalid.²²⁴ Absent this prophylactic measure, there is little to prevent censors from explaining their viewpoint-based decisions in terms of aesthetics. While this loophole appears dangerously vast in practice, public officials generally reveal their censorious intent with pride.²²⁵ In any case, the censorship allowed under neutral display will be considerably less pervasive than under prevailing First Amendment doctrine.

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

²²⁴ In *Finley*, the majority noted how an arts advisory panel might ameliorate some of the inherent problems in allocating government resources on the basis of artistic merit. "Such decision makers possess an expertise in determining 'artistic excellence and artistic merit' that will guide their application of these criteria" *Finley*, 100 F.3d at 680 n.18.

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

²²⁶ See *supra* Part II.B.2.b.

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

²²⁸ See Lionel S. Sobel, *First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist*, 41 *Vand. L. Rev.* 517, 526 (1988) ("Awarding subsidies on a first come, first served basis would reward administrative efficiency rather than artistic talent. Thus, 'first come, first served' would not

merit seems constitutionally preferable (albeit theoretically challenging) to that based on moral judgments.²²⁹

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

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

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

even be a rational basis for awarding artistic and cultural subsidies, let alone a basis required by the first amendment.").

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

Ann Powers, *Deal With It! In Defense of the Nasty*, Village Voice (N.Y.), Aug. 22, 1995, at 21.

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

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

²³² See *id.*

²³³ *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

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

CONCLUSION

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

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