# NOTES

# The Fallacy of *Finley*: Public Fora, Viewpoint Discrimination, and the NEA

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## INTRODUCTION

In September of 1999, Rudolph Guiliani, mayor of New York City, saw the catalog of an exhibition entitled "Sensation," which was soon to open at the Brooklyn Art Museum.[1] The Mayor denounced several pieces in the exhibition as sick and stated that if the museum exhibited the show without removing the offending pieces, New York City would withhold the municipal funding that the city provided to the museum.[2] The museum held its ground and opened the exhibit as planned.[3] The confrontation generated two strands of public opinion, both now very familiar. One camp opposed public funding of art that contained potentially offensive material.[4] The other camp decried as censorship any attempt to defund art due to controversial content.[5] The entire episode demonstrated that public funding for the arts remains a highly charged issue with politicians and the public at large. Ten years earlier, Congress and then the courts had addressed the same core issue on a federal level.

In 1989, artist Andre Serrano displayed a photograph of a crucifix submerged in the artist's urine.[6] In the same year, photographer Robert Mapplethorpe exhibited a set of photographs with

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[1] *See* Dan Barry & Carol Vogel, *Guiliani Vows to Cut Subsidy over "Sick" Art*, N.Y. TIMES, Sept. 23, 1999, at A1.

[2] *See id.*

[3] *See* Max Frankel, *The Way We Live Now: 11-07-99: Word & Image; Too Much Art*, N.Y. TIMES, Nov. 7, 1999 at S6, p. 46 (stating that author's cohorts visited exhibit after opening to support museum's right to display "assorted works of schlock and shock").

[4] *See* Dave Goldiner, *Apple Turns Sour on Rudy: Poll Shows Most N.Y.ers Back Museum*, DAILY NEWS, Oct. 1, 1999, at 7. The Daily News polled New Yorkers and found 60% of those polled supported the museum's right to exhibit "Sensation" and 30% supported the Mayor's attempt to defund the museum. *See id.*

[5] *See id.*

[6] *See* ROBERT HUGHES, AMERICAN VISIONS 618 (1997) (featuring reproduction of Serrano's *Piss Christ*); Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 199 (1994) (containing description of *Piss Christ*); Alan G. Artner, *The Eye of the Storm: Mapplethorpe's Unblinking Vision Sparked a Continuing Battle over Art*, CHI. TRIB., Dec. 31, 1989, at S13 (describing *Piss Christ* as photograph of crucifix in liquid identified as urine); *Bush Signs Obscene Art Bill*, TULSA TRIB., Oct. 10, 1989, at 12C (describing work by Serrano).

explicit homoerotic and sadomasochistic references.[7] One of Mapplethorpe's pieces pictured a bullwhip inserted into the artist's rectum.[8] The American public flooded Congress with complaints about both exhibits.[9] The content alone, however, did not ignite the ensuing public controversy. Instead, the fact that federal funding supported both displays sparked the national debate.[10]

In 1965, Congress created the National Endowment for the Arts ("NEA").[11] This agency subsidizes a wide spectrum of activities relating to the fine arts,[12] providing grants to state art agencies, museums, and individual artists.[13] In 1989, NEA grants partially

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[7] *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2172 (1998) (observing that Mapplethorpe exhibit, entitled *The Perfect Moment*, contained photographs many people found pornographic); Chemerinsky, *supra* note 6, at 199 (noting photographs included violent images); Artner, *supra* note 6, at S13 (stating that photographs displayed subjects engaged in sadomasochism); Alex Heard, *Mapplethorpe of My Eye*, NEW REPUBLIC, Aug. 21, 1989, at 11 (noting photos depicting homosexual activity).

[8] *See* Heard, *supra* note 7, at 11 (describing content of particular photograph); Robert Hughes, *Whose Art Is It Anyway?*, TIME, June 4, 1990, at 46 (noting Mapplethorpe dressed as Devil in photo with whip as tail); *see also* Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1370 n.79 (1990) (detailing features of controversial photograph).

[9] *See* Cathleen McGuigan et al., *When Taxes Pay for Art*, NEWSWEEK, July 3, 1989, at 68 (stating that Congress received thousands of letters following media reports regarding use of government subsidies for Mapplethorpe and Serrano exhibits); *see also* Artner, *supra* note 6, at 4 (discussing write-in campaign urged by American Family Association); *Bush Signs Obscene Art Bill*, supra note 6, at 12C (noting congressional dispute over NEA arose because of public protests).

[10] *See Finley*, 118 S. Ct. at 2172 (noting federal funding for controversial works created public controversy); Chemerinsky, *supra* note 6, at 199 (noting funding for exhibits by Serrano and Mapplethorpe created national controversy); McGuigan et al., *supra* note 9, at 68 (discussing how use of tax dollars to support Serrano and Mapplethorpe exhibits spurred protests); MaryEllen Kreese, Comment, *Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe Controversy"?*, 39 BUFF. L. REV. 231, 234 (1991) (noting that conservative groups angered by federal funding for controversial art urged congressional action).

[11] *See Finley*, 118 S. Ct. at 2172; Raleigh Douglas Herbert, Legislative Survey, *National Endowment for the Arts — The Federal Government's Funding of the Arts and the Decency Clause — 20 U.S.C. § 954(d)(1)(1990)*, 18 SETON HALL LEGIS. J. 413, 413 (1993); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 578 (1996).

[12] *See* 20 U.S.C. § 951(7) (1994) (declaring that by creating NEA, Congress intended to create "material conditions facilitating the release of . . . creative talent"); *see also Finley*, 118 S. Ct. at 2172 (stating that NEA has substantial discretion in awarding grants); Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1460 (C.D. Cal. 1992) (noting congressional intent that NEA not give undue preference to particular styles of expression), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *rev'd*, 118 S. Ct. 2168 (1998).

[13] *See Finley*, 118 S. Ct. at 2172 (stating that, since its inception, NEA has distributed three billion dollars in grants to individuals and organizations including state art agencies, museums, and individual artists); *see also* 20 U.S.C. § 954(c) (1994) (stating that NEA is authorized to carry out program of grants to subsidize exceptional artistic talent); Herbert,

funded the shows by Mapplethorpe and Serrano.[14] The subject matter and unsettling imagery of the shows offended large segments of the American public.[15] In response to demands by religious groups and disgruntled taxpayers that the NEA be dismantled,[16] Congress enacted a statute requiring that the NEA consider decency and respect for American values when awarding grants.[17]

Four artists sued the agency, alleging that the decency requirement violated the U.S. Constitution.[18] The artists claimed the requirement favored the expression of some viewpoints over the expression of others.[19] The Supreme Court has repeatedly found such favoritism, referred to as viewpoint discrimination, unconstitutional when the expression takes place in a public arena.[20] The Court, however, ruled that the decency criteria did not create a viewpoint discriminatory standard.[21]

This opinion reaches a desirable result; if the NEA's decency requirement unconstitutionally discriminates on the basis of viewpoint, the NEA would be precluded from disfavoring proposals

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*supra* note 11, at 413 (stating that federal government became major art patron through NEA).

[14] *See* Chemerinsky, *supra* note 6, at 199; Ruth Berenson, *Artistic Freedom, Public Anger*, NAT'L REV., Oct. 13, 1989, at 46 (noting use of NEA funds for Mapplethorpe exhibition and support through subgrant for Serrano exhibition); *see also Finley*, 118 S. Ct. at 2172 (noting that Mapplethorpe exhibitor used $30,000 of NEA money for show and Serrano received $15,000 from an organization that received NEA support).

[15] *See Finley*, 118 S. Ct. at 2172 (stating that Mapplethorpe and Serrano works created public controversy and led Congress to review NEA's funding priorities); Berenson, *supra* note 14, at 46 (noting that works of Mapplethorpe and Serrano have angered many people); McGuigan et al., *supra* note 9, at 68 (stating that Congress received thousands of letters regarding federal funding for NEA programs).

[16] *See* Kreese, *supra* note 10, at 234 (noting that activist groups pressured Congress to take immediate action against NEA); McGuigan et al., *supra* note 9, at 68 (stating that letter-writing campaign prompted some Congress members to call for tighter controls on NEA); Jeff McLaughlin, *Endowment for Arts Finds Itself Under Siege from All Sides*, SEATTLE TIMES, Oct. 9, 1989, at E1 (noting calls by segments of public to cut funding of NEA).

[17] *See* 20 U.S.C. § 954(d)(1). The statute states that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for diverse beliefs and values of the American public." *Id.*

[18] *See Finley*, 795 F. Supp. at 1463-64 (discussing constitutional basis for plaintiffs' claim).

[19] *See id.* at 1460 (stating plaintiffs seek declaration that decency criteria facially violate First Amendment).

[20] *See, e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983); Carey v. Brown, 447 U.S. 455, 462-63 (1980); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980); Young v. American Mini Theatres, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).

[21] *See Finley*, 118 S. Ct. at 2176 (upholding constitutionality of decency criteria).

with indecent content, [22] and Congress might cut funding to the agency. [23] But the Court's analysis is both confused and inconsistent with its prior holdings.[24] Preserving NEA funding and upholding prior constitutional rulings on speech in public arenas requires a novel solution.[25]

Part I of this Note describes the events that led to the legislation at issue and examines the traditional categories of public fora delineated by the Court. The Note shows that the Court has struck down viewpoint discrimination in each category of fora. Part II explains the facts, rationale, and holding in *National Endowment for the Arts v. Finley.* Part III maintains that under existing precedent, the NEA is properly considered a public forum. Under the First Amendment principles applicable to public fora, however, the Court could not have upheld the decency criteria. In order to avoid this result and maintain the coherence of the principles governing nonpublic fora, the Court should have recognized a new, fourth type of public forum permitting viewpoint discrimination.

## I. BACKGROUND

The NEA is a funding program implemented by Congress and supported by federal funds.[26] Although only a tiny percentage of NEA-funded projects have generated any controversy,[27] the controversy generated by those projects nearly lost the NEA its funding.[28]

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[22] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring) (reasoning that courts cannot separate indecency from ideas conveyed thereby); *see also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397 (1993) (Kennedy, J., concurring) (prohibiting defendant from discriminating against plaintiff's speech on viewpoint basis); May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1114 (7th Cir. 1986) (stating that courts disallow stances discriminating against particular viewpoints); *Finley*, 795 F. Supp. at 1475 (holding that NEA funding is subject to First Amendment constraints and cannot discriminate on viewpoint basis).

[23] *See* 136 CONG. REC. 28,657-64 (1990) (discussing Rohrabacher Amendment, which would have nearly eliminated funding for NEA in response to NEA's funding choices).

[24] *See infra* notes 214-72 and accompanying text (arguing that decency criteria is unconstitutional).

[25] *See infra* notes 273-300 and accompanying text (detailing possible fourth type of forum to preserve both NEA and decency criteria).

[26] *See* 20 U.S.C. § 954(c) (1994) (authorizing NEA to provide grants to artists and artistic programs).

[27] *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2172 (1998) (stating that "only a handful" of approximately 100,000 grants awarded have generated controversy); HUGHES, *supra* note 6, at 618-19 (stating that of tens of thousands of NEA grants distributed, twenty or less generated controversy).

[28] *See* 136 CONG. REC. 28,657-64 (1990) (debating amendment that would have essentially eliminated NEA).

For example, the NEA-sponsored exhibits by Serrano and Mapplethorpe resulted in Congress receiving thousands of letters from outraged constituents.[29] Congress responded by requiring the NEA to consider the content of proposals when funding projects.[30]

### *A. The Origins of the National Endowment for the Arts, the Controversy, and the Congressional Response*

Congress created the NEA to promote diversity and excellence in the fine arts.[31] To fulfill that mission, the NEA employs a three-tiered review process in awarding grants.[32] Parties seeking funding submit grant proposals to the NEA.[33] A panel of private experts reviews each of the proposals and reports to the governing body of the NEA, the National Council of the Arts.[34] The Council, in turn, makes a recommendation to the NEA chairperson regarding funding.[35] The chairperson then decides whether to fund a particular proposal.[36]

In the wake of the public outcry over the Serrano and Mapplethorpe exhibits, Congress re-evaluated the NEA's funding priorities.[37] After initially threatening to revoke funding for the NEA entirely, Congress imposed various grant requirements.[38] However, the courts struck them down, finding the requirements unconstitu-

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[29] *See* McGuigan et al., *supra* note 9, at 68; *see also Finley*, 118 S. Ct. at 2172 (noting that Serrano and Mapplethorpe exhibits caused public outcry); Berenson, *supra* note 14, at 46 (reporting that Serrano and Mapplethorpe exhibits outraged many people).

[30] *See* 20 U.S.C. § 954(d)(1) (1994) (imposing on NEA responsibility of taking decency and respect for American values into consideration when making funding decisions).

[31] *See id.* § 954(c)(1)-(10) (identifying NEA's mission as funding projects with "artistic and cultural significance, giving emphasis to American creativity and cultural diversity").

[32] *See id.* § 959(c)(1)-(2) (1994) (impaneling diverse groups of individuals to render initial judgment on grant proposals); *id.* § 955(b), (f) (1994) (creating 20-member National Council on Arts that accepts panelists' recommendations and, in turn, reports to NEA chairperson, who then makes final funding decisions).

[33] *See id.* § 955(f) (authorizing panelists, Council, and chairperson with powers to review proposals).

[34] *See id.* § 959(c) (impaneling experts to render initial judgment on grant proposals).

[35] *See id.* § 955(f) (creating National Council on Arts to advise NEA chairperson).

[36] *See id.* (stating that chairperson makes final decisions on all grants).

[37] *See* 135 CONG. REC. H3637, H3640 (daily ed. July 12, 1989) (statements of Reps. Rohrabacher and Dannemeyer) (citing Mapplethorpe and Serrano exhibits in debate over how to further congressional control over NEA funding).

[38] *See* Department of the Interior and Related Agencies Appropriation Act of 1990, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989) (prohibiting NEA from using funds to facilitate depictions of sadomasochism, homoeroticism, sexual exploitation of children, or individuals engaged in sex acts that lack serious literary, artistic, political, or scientific value).

tionally vague.[39] Congress then created an independent commission composed of constitutional law scholars to advise Congress as to permissible restrictions on NEA funding.[40] On the basis of the Commission's report, Congress adopted the Williams/Coleman Amendment ("decency criteria" or "criteria") in 1990.[41] The decency criteria called for the NEA to consider general standards of decency as well as respect for the diverse beliefs and values of the American citizenry.[42]

### *B. The Decency Criteria, Its Legislative History, and Its Implementation by the National Endowment for the Arts*

The language of the decency criteria directs the NEA to consider such imprecise terms as "decency."[43] The vagueness results from congressional disagreement over the intended effect of the decency criteria.[44] In enacting the decency criteria, Congress attempted to salvage the NEA's funding while restraining the agency's funding of potentially offensive, fringe projects.[45] However, discerning more exactly the intended scope of the decency criteria from the legislative history proves difficult.[46] Members of

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[39] *See* Bella Lewitzsky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 782 (C.D. Cal. 1991) (holding requirements unconstitutionally vague because Congress left determination of obscenity up to NEA). A requirement is unconstitutionally vague when a party cannot reasonably determine how to comply with that requirement. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[40] *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2173 (1998) (observing that Congress created independent commission to study standards by which NEA awarded grants).

[41] *See id.* The independent commission's report suggested Congress make changes in funding procedure while reaffirming the importance of the arts in a democratic and pluralistic society. *See id.* at 2173 (citing Independent Commission, Report to Congress on the National Endowment for the Arts 83-91 (Sept. 1990), 3 Record, Doc. No. 151, Exh. K).

[42] *See* 20 U.S.C. § 954(d)(1) (1994).

[43] *See id.*

[44] *See, e.g.*, 136 CONG. REC. 28,674 (1990) (statement of Rep. Williams) (stating that decency criteria maintains integrity of First Amendment); *id.* at 28,644 (statement of Rep. Chandler) (supporting decency criteria because it will promote responsible arts funding); *id.* at 28,637 (statement of Rep. Coleman) (asserting that decency criteria will eliminate funding for indecent art); *id.* at 28,634 (statement of Rep. Marlenee) (arguing that decency criteria does not prohibit funding of any work); *id.* at 28,632 (statement of Rep. Kennedy) (indicating support of decency criteria because it does not "muzzle" free expression); *id.* at 28,627 (statement of Rep. Gaydos) (stating belief that decency criteria will preclude funding exhibits similar to those by Serrano and Mapplethorpe).

[45] *See, e.g., id.* at 28,644 (statement of Rep. Chandler); *id.* at 28,637 (statement of Rep. Coleman); *id.* at 28,627 (statement of Rep. Pashayan).

[46] *See, e.g., id.* at 28,674 (statement of Rep. Williams); *id.* at 28,634 (statement of Rep. Marlenee); *id.* at 28,632 (statement of Rep. Kennedy).

Congress favoring passage of the decency criteria offered widely divergent reasons for its implementation.[47] One legislator believed that the bill would bar the NEA from spending federal money on sexually explicit or sacrilegious art.[48] Another legislator stated that the statute's importance derived from its leaving intact the protections of the First Amendment.[49] Some members of Congress felt the criteria would eliminate funding for controversial projects.[50] Other members believed the statute would serve a purely advisory function.[51]

Regardless of the disagreements over the decency criteria's scope, the legislative history clearly shows Congress intended to alter the NEA's grant process.[52] However, the passage of the decency criteria did not alter the system the NEA used to judge grant proposals.[53] In a sense, the NEA did not implement the decency criteria at all. Instead, the NEA simply retained its prior system of reviewing proposals, believing that the system inherently conformed to the requirements of the decency criteria.[54] Under this system, a panel of peers and experts in the field reviewed each

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[47] *See id.* at 28,620-74 (containing statements by some members of Congress indicating belief that decency criteria will absolutely prohibit funding of indecent art, and statements of other members that decency criteria retains integrity of First Amendment).

[48] *See id.* at 28,642 (statement of Rep. Alexander) (requesting that Congress pass decency criteria to ensure that sexually explicit or sacrilegious exhibits do not receive funding).

[49] *See id.* at 28,674 (statement of Rep. Williams) (explaining that sponsor of decency criteria believed that it maintained integrity of freedom of expression).

[50] *See, e.g., id.* at 28,644 (statement of Rep. Chandler); *id.* at 28,624 (statement of Rep. Coleman); *id.* at 28,622 (statement of Rep. Pashayan); *see also id.* at 28,620-74 (quoting members of Congress urging passage of decency criteria to prevent funding obscene works).

[51] *See id.* at 28,631 (statement of Rep. Henry) (quoting decency criteria's author as saying that it simply adds viewpoint which NEA must take into account); *see also id.* at 28,620-76 (quoting members of Congress urging passage of decency criteria because it does not violate First Amendment guarantees).

[52] *See, e.g., id.* at 28,636 (statement of Rep. Weiss) (stating that decency criteria reforms NEA's grant-making proposals); *id.* at 28,632 (statement of Rep. Henry) (stating that decency criteria involves procedural reforms of NEA grant process); *id.* at 28,623 (statement of Rep. Coleman) (asserting that decency criteria would protect taxpayers' money by reforming NEA).

[53] *See* Finley v. National Endowment for the Arts, 100 F.3d 671, 676 (9th Cir. 1996) (stating that NEA chairperson decided no changes in reviewing procedures were necessary following passage of decency criteria), *rev'd*, 118 S. Ct. 2168, 2175 (1998).

[54] *See Finley*, 118 S. Ct. at 2173 (citing Minutes of the Dec. 1990 Retreat of the National Council of the Arts; Transcript of the Dec. 1990 Retreat of the National Council on the Arts (quoting chairperson of NEA as believing that diverse reviewing panelists satisfied decency criteria's requirements)).

proposal.[55] A statute predating passage of the decency requirement already mandated that reviewing panelists represent diverse geographic areas, ethnic backgrounds, and aesthetic tastes.[56]

Because of those regulations, the NEA believed that panelists holding a broad spectrum of value systems would review the proposals.[57] A diverse panel would filter out indecent or disrespectful art, because one or more of the panelists would not like a potentially offensive proposal.[58] With a variety of views reviewing each grant, the NEA believed that it could satisfy the decency criteria without changing the entrenched system of review.[59]

### *C. Public Fora and Viewpoint Discrimination*

Congress intended the decency criteria to disfavor NEA funding for indecent expression.[60] When the federal or state government ("government") facilitates free speech, such disfavor might not pass constitutional muster.[61] Judging the constitutionality of rules that disfavor certain forms of expression in public arenas requires two determinations.[62] First, the courts must determine how open

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[55] *See* 20 U.S.C. § 959(c)(1)-(2) (1994) (impaneling panelists to review proposals and make recommendations to National Council on Arts).

[56] *See id.*

[57] *See Finley*, 118 S. Ct. at 2173 (citing Minutes of the Dec. 1990 Retreat of the National Council of the Arts; Transcript of the Dec. 1990 Retreat of the National Council of the Arts (stating that NEA unanimously adopted resolution to implement decency criteria through diversity of reviewing panelists)).

[58] *See id.* at 2173-74 (citing Transcript of the Dec. 1990 Retreat of the National Council on the Arts (quoting chairperson of NEA for proposition that diverse reviewing panelists satisfied decency criteria's requirements)).

[59] *See id.*

[60] *See* 136 CONG. REC. 28,620-74 (1990) (indicating widespread congressional belief that decency criteria would reduce funding of indecent works). While the statements of various members of Congress demonstrate disagreement regarding the exact scope of the decency criteria, all the supporters of the amendment believed the decency criteria would at least reduce the number of controversial works receiving NEA funding. *See, e.g., id.* at 28,670 (statement of Rep. Coleman) (noting restrictive quality of decency criteria); *id.* at 28,636 (statement of Rep. Weiss) (asserting that structural changes to NEA precipitated by decency criteria will limit funding of controversial works).

[61] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995) (observing that viewpoint discrimination is impermissible when directed against speech in public forum); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (prohibiting government from restraining speech based on speaker's ideological stance or motivation); Police Dep't v. Moseley, 408 U.S. 92, 96 (1972) (finding that government cannot regulate speech based on its content).

[62] *See generally* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1641-42 (1998) (describing three kinds of public fora); *Rosenberger*, 515 U.S. at 829-30 (distinguishing content discrimination from viewpoint discrimination).

the government has made the forum to expression.[63] For example, the courts must discern whether the forum invites all speakers, or certain classes of speakers, or limits invitations to a few select speakers.[64] Second, the courts must determine whether the rules disfavor certain expressive activities on the basis of viewpoint or content.[65]

### 1. Public and Nonpublic Fora

Determining the scope of the forum at issue allows the courts to classify the forum.[66] The Supreme Court has developed three categories of fora entitled the traditional public forum, the designated public forum, and the nonpublic forum.[67] Each class of forum has different rules controlling what expressive activity the government can or cannot disfavor.[68] Traditionally, courts consider public fora as government-owned physical spaces where people can congregate and express themselves.[69] Streets and parks are examples of classic public fora.[70] Courts term any public land where the government

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[63] *See Forbes*, 118 S. Ct. at 1641 (describing three kinds of public fora and stating that courts classify particular fora based on historical access and government policy); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (observing that courts differentiate between traditional public fora, designated public fora, and nonpublic fora based on accessibility); Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581, 586 (7th Cir. 1995) (noting three-tiered forum structure and that courts differentiate between fora based on ease of access).

[64] *See Forbes*, 118 S. Ct. at 1641 (noting that traditional public fora accept all speakers, designated public fora accept all speakers falling into general class, and nonpublic fora invite speakers based on specified criteria).

[65] *See Rosenberger*, 515 U.S. at 829-30 (noting that courts tolerate content discrimination in nonpublic fora only, and never tolerate viewpoint discrimination in fora); *Perry*, 460 U.S. at 49 (holding that government cannot restrict access to fora based on viewpoint); *Moseley*, 408 U.S. at 96 (noting that government cannot restrict use of fora on the basis of viewpoint).

[66] *See Forbes*, 118 S. Ct. at 1640-41 (noting that courts classify government actions facilitating speech as fora based upon scope of action).

[67] *See id.* at 1641; *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45; May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1113 (7th Cir. 1986).

[68] *See Forbes*, 118 S. Ct. at 1640-41 (noting differences between traditional public fora, designated public fora, and nonpublic fora); *Cornelius*, 473 U.S. at 802 (differentiating three types of fora on basis of access and ability to control general subject matter); *Perry*, 460 U.S. at 45-46 (noting three types of fora and that different rules apply to each type); *May*, 787 F.2d at 1113 (observing that different access principles define three types of fora).

[69] *See Forbes*, 118 S. Ct. at 1641 (defining traditional public fora as property opened to assembly and debate due to tradition or by government fiat); *Cornelius*, 473 U.S. at 802 (identifying salient characteristics of public fora); *Perry*, 460 U.S. at 45-46 (identifying three types of public fora, including traditional public fora).

[70] *See* Hague v. CIO, 307 U.S. 496, 515 (1939) (finding public streets and parks to be traditional public fora).

historically has allowed open public discourse a traditional public forum.[71] The Constitution constrains the government's authority to restrict parties from indulging in their First Amendment rights in a traditional public forum.[72] Courts will only uphold restrictions that serve important governmental interests.[73] For instance, the restriction might protect against a serious public safety hazard.[74] Moreover, the scope of the restriction must not exceed the scope of the governmental interest.[75] In addition to the traditional public fora there are two types of fora characterized by more restrictive access.[76] First Amendment protection attaches to these fora once people are granted access.[77]

One such type of forum is the designated public forum.[78] Designated public fora exist where government action creates a public forum for a particular class of speaker.[79] For example, a public

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[71] *See Forbes*, 118 S. Ct. at 1641 (defining traditional public fora as property historically opened to assembly and debate); *Cornelius*, 473 U.S. at 802 (identifying traditional public fora as places where people historically have freely expressed their views); *Perry*, 460 U.S. at 45 (defining traditional public fora as places where government has allowed open debate).

[72] *See Forbes*, 118 S. Ct. at 1641 (stating that excluding speakers from traditional public fora requires compelling state interest); *Cornelius*, 473 U.S. at 800 (requiring compelling state interest for exclusion of speaker); Police Dep't v. Moseley, 408 U.S. 92, 98-99 (1972) (holding that courts must carefully scrutinize selective restrictions in public fora).

[73] *See Forbes*, 118 S. Ct. at 1641 (stating that excluding speakers from traditional public fora requires compelling state interest); *Cornelius*, 473 U.S. at 800 (requiring compelling state interest for exclusion of speaker); *Moseley*, 408 U.S. at 98-99 (holding that courts must carefully scrutinize selective restrictions in public fora).

[74] *Cf.* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (finding city ordinance banning signs on utility poles justified by city's interest in avoiding visual blight).

[75] *See Forbes*, 118 S. Ct. at 1641 (holding that government must narrowly tailor exclusions from traditional public fora); *Cornelius*, 473 U.S. at 802 (finding that U.S. Constitution requires government to limit restrictions in traditional public fora so that restrictions do not represent over-inclusive rules); Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581, 587 (7th Cir. 1995) (holding that Constitution permits only narrowly tailored restrictions in traditional public fora).

[76] *See Forbes*, 118 S. Ct. at 1641 (delineating three types of fora); *Cornelius*, 473 U.S. at 802 (stating that Supreme Court has identified three types of fora); Widmar v. Vincent, 454 U.S. 263, 267 (1981) (finding state university that had opened meeting facilities had created designated public forum); *Grossbaum*, 63 F.3d at 586 (holding that lobby of public building qualified as nonpublic forum).

[77] *See Forbes*, 118 S. Ct. at 1643 (noting government cannot restrict access to nonpublic fora based on viewpoint or in manner unrelated to fora's purpose); *Rosenberger*, 515 U.S. at 829-30 (holding that government cannot promulgate restrictions on speech that are inconsistent with purpose of designated public fora, nor may it restrict access based on viewpoint).

[78] *See Cornelius*, 473 U.S. at 802 (identifying designated public forum as one of three fora delineated by Court).

[79] *See Forbes*, 118 S. Ct. at 1641 (stating that "purposeful governmental action" creates designated public forum); *Rosenberger*, 515 U.S. at 829 (observing that government creates designated public fora); *see also* United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (hold-

university might designate a bulletin board at which enrolled students could post flyers.[80] Courts scrutinize designated public fora under the same standards as the traditional public fora.[81] Thus, courts require both a compelling governmental interest and that any restrictions not exceed the scope of that interest.[82] Courts limit such scrutiny, however, to members of the class of speaker for whom the forum's creators designed it.[83] Returning to the example of the bulletin board, courts would only strictly scrutinize restrictions on enrolled students.[84] Restrictions barring others would not present a constitutional issue.[85] Because of such scrutiny, designated public fora employ what the Supreme Court labeled a "general access policy."[86]

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ing that government creates designated public fora for particular class of speaker); *Cornelius*, 473 U.S. at 802 (stating that Court generally examines "policy and practice" of government to determine whether it intended to create designated public forum, and whether such fora are open to particular class of speaker).

[80] *See generally Cornelius*, 473 U.S. at 802 (stating that government creates designated public fora by designating locale or "channel of communication" for use by class of speakers).

[81] *See, e.g., Forbes*, 118 S. Ct. at 1641 (stating that courts view exclusion from designated public fora with strict scrutiny); Widmar v. Vincent, 454 U.S. 263, 267 (1981) (holding that courts hold designated public fora to standards identical to those of traditional public fora regarding exclusion of speakers).

[82] *See Forbes*, 118 S. Ct. at 1641 (noting that courts view restrictions on designated public fora with strict scrutiny). The Supreme Court uses the term "strict scrutiny" as shorthand for a two-prong review standard. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992). The first prong requires a compelling state interest. *See id.* The second requires that the restrictions be narrowly drawn the advance the compelling state interest satisfies the second prong. *See id.*

[83] *See Forbes*, 118 S. Ct. at 1641 (noting that where government excludes member of class of speakers for whom designated public forum exists, courts will scrutinize restriction strictly); *Lee*, 505 U.S. at 678 (noting courts only apply strict scrutiny to speakers falling within class designated to use fora); *Kokinda*, 497 U.S. at 726-27 (noting governmental exclusion of member of intended class of speaker from designated public fora invokes strict scrutiny).

[84] *Cf. Forbes*, 118 S. Ct. at 1641 (holding that governmental exclusion from designated public fora triggers strict scrutiny where excluded speaker belongs to designated class of speakers for whom government created forum). The students in the example represent the class intended to use the forum. Courts would subject their exclusion to strict scrutiny. *See id.* The courts would view exclusion of nonstudents, people not intended to have access to the forum, using a far more lenient standard of review. *See id.*

[85] *See id.* (failing to include government exclusion of nonclass members raises strict scrutiny standard); *see also Rosenberger*, 515 U.S. at 829-30 (noting legitimacy of government exclusion of nonclass members); *Lee*, 505 U.S. at 678 (noting that only exclusion of class members triggers strict scrutiny).

[86] *See Forbes*, 118 S. Ct. at 1642 (noting that general access characterizes designated public fora); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 803 (1985) (contrasting general access policy in designated public fora with more restrictive selective access policy).

The third type of forum is the nonpublic forum.[87] Sometimes, designated public fora by their nature cannot accommodate all the speakers who wish to engage in public expression.[88] An example might be a lecture series at a public university.[89] If the First Amendment required the university to allow anyone who wished to lecture access to the series, the program would become unwieldy.[90] Because of its general access policy, a designated public forum could not bar any otherwise permissible speaker.[91] Courts classify a forum as nonpublic anytime a designated public forum must, in order to maintain the purpose of the forum, further restrict who can use the forum.[92] Courts have thus allowed administrators of nonpublic fora to practice a selective access policy, selecting and designating those who may speak at the forum.[93]

### 2. Content and Viewpoint Discrimination

Analyzing the constitutionality of restrictions on speech in fora requires distinguishing between viewpoint and content discrimina-

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[87] *See Forbes*, 118 S. Ct. at 1641 (stating that where property is neither traditional nor designated public forum, it represents either nonpublic forum or no forum at all); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993) (identifying defendant's property as nonpublic forum); *Cornelius*, 473 U.S. at 802 (identifying nonpublic forum as one of three types Court has identified).

[88] *See generally Forbes*, 118 S. Ct. at 1643 (holding that political debate had to limit participants to those with political viability); *Cornelius*, 473 U.S. at 810-11 (noting that admitting any charity to fund-raising drive targeting federal employees would disrupt workplace).

[89] *Cf. Forbes*, 118 S. Ct at 1641 (finding that political debate constituted nonpublic forum); *Lamb's Chapel*, 508 U.S. at 392-93 (finding school property opened after school hours to certain public uses constituted nonpublic forum).

[90] *Cf. Forbes*, 118 S. Ct. at 1643 (finding that opening political debate to every candidate would create severe burden on organizers); *Cornelius*, 473 U.S. at 810-11 (noting that admitting any charity to fund-raising drive targeting federal employees would disrupt workplace).

[91] *See Forbes*, 118 S. Ct. at 1641 (observing that exclusion of otherwise permissible speaker triggers strict scrutiny); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829-30 (1995) (noting that once government creates designated public fora, government binds itself to allowing unrestricted access to designated class of speakers).

[92] *See Forbes*, 118 S. Ct. at 1642 (stating that nonpublic fora restrict access to maintain purpose of fora in light of fora's limitations); *see, e.g., Cornelius*, 473 U.S. at 806; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983); Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581, 587 (7th Cir. 1995); May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1113 (7th Cir. 1986).

[93] *See Forbes*, 118 S. Ct. at 1642 (stating that selective access characterizes nonpublic fora); *Cornelius*, 473 U.S. at 803-04 (stating that nonpublic fora require permission of fora's administrators to use).

tion.[94] Content discrimination disfavors certain expressive conduct based upon subject matter.[95] Viewpoint discrimination disfavors expression based on the speaker's perspective on subject matter.[96]

Nonpublic fora, which generally must limit the number of speakers, can engage in content discrimination to maintain a particular forum's focus.[97] Thus, a forum dedicated to gender issues could justify excluding a speaker wishing to express views solely on racial issues.[98]

That same forum, however, could not engage in viewpoint discrimination by excluding a speaker whose subject matter clearly fits within the forum's purpose.[99] Thus, a forum dedicated to gender issues could not exclude a speaker who sought to express that women are invariably better parents than men.[100] Such an exclusion would be based on the speaker's stance regarding gender issues.[101] Any time a forum excludes a speaker based on ideology or opinion, the forum engages in viewpoint discrimination.[102]

The Supreme Court most recently analyzed the difference between viewpoint discrimination and content discrimination in *Ar-*

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[94] *See Rosenberger*, 515 U.S. at 829-30 (observing that constitutionality of restrictions in nonpublic fora depend upon whether restriction implicates content or viewpoint); *Perry*, 460 U.S. at 46-47.

[95] *See Rosenberger*, 515 U.S. at 831 (noting that content discrimination restricts general subject matter which forum permits); *Perry*, 460 U.S. at 49 (reasoning that subject matter provides basis of content discrimination).

[96] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-42 (1994) (holding that restrictions against speech based on message violate Constitution); R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) (finding viewpoint discrimination blatantly violates First Amendment); Police Dep't v. Moseley, 408 U.S. 92, 96 (1972) (finding fundamental that government cannot regulate speech on basis of message conveyed).

[97] *See Rosenberger*, 515 U.S. at 829 (noting permissibility of content discrimination to maintain forum's purpose); *Cornelius*, 473 U.S. at 804-06 (noting that content discrimination tolerated if "reasonable in light of the purpose served by the forum").

[98] *See generally Rosenberger*, 515 U.S. at 829-30 (holding that courts permit content discrimination to further purpose of forum).

[99] *See generally id.* at 831 (stating that where government excludes based upon perspective, not subject matter, it discriminates on basis of viewpoint).

[100] *See generally* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (finding that exclusion from forum based on perspective violates Constitution).

[101] *See generally id.* (finding that Christian-based film series on parenting represented one perspective on general subject of child rearing).

[102] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 630 (1994) (holding that restrictions against speech based on message violate Constitution); R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) (concluding that viewpoint discrimination blatantly violates First Amendment); Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (characterizing as fundamental principle that government cannot regulate speech on basis of message conveyed).

*kansas Educational Television Commission v. Forbes.*[103] *Forbes* involved a televised debate between congressional candidates.[104] The Arkansas Educational Television Commission ("AETC") did not invite Forbes, an independent candidate, to participate.[105] The AETC alleged that the need to limit the debate to a small number of candidates and Forbes's lack of political viability constituted the only reasons for excluding him.[106] Forbes sued, alleging that the AETC's decision to exclude him amounted to viewpoint discrimination.[107]

The Supreme Court disagreed.[108] Had the debate been a designated public forum, the Court would have found *Forbes*'s exclusion unconstitutional.[109] However, when structuring the debate, the state did not intend to make the forum generally available.[110] In fact, the Court determined that requiring the AETC to make the forum generally available would most likely result in the destruction of such fora.[111] Sponsors of such debates would have to allow any candidate on the ballot to participate. Six to eleven candidates typically qualify for a space on the ballot in congressional elections.[112] Rather than sponsor a cacophonous debate amongst a multitude of contenders, the Court believed the AETC and like parties would discontinue holding debates.[113] The result would diminish the amount of speech, not increase it.[114] Given that nonpublic fora exist to facilitate speech, the Court viewed such an out-

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[103] *See* 118 S. Ct. 1633, 1643-44 (1998) (noting exclusion from nonpublic forum on basis of political viability implicated content, not viewpoint).

[104] *See Forbes*, 118 S. Ct. at 1637-38 (stating exclusion from televised political debate provided basis for plaintiff's First Amendment claim).

[105] *See id.* at 1638 (noting letter written by AETC's Executive Director denying Forbes's request to participate in debate).

[106] *See id.* at 1643-44 (reciting AETC's claim that it based Forbes's exclusion solely on lack of voter support and general disregard by press).

[107] *See id.* at 1637-38 (observing that Forbes alleged that AETC excluded him based upon his views in violation of First Amendment).

[108] *See id.* at 1638 (reversing appellate court decision holding Forbes had right of access to debate).

[109] *See id.* at 1641 (noting that in designated public fora, courts subject exclusion of speakers in designated class to strict scrutiny).

[110] *See id.* at 1644 (observing that AETC intended debate to be limited to most viable candidates).

[111] *See id.* at 1643 (stating that Nebraska Educational Television Network canceled debate due to appellate ruling in *Forbes*).

[112] *See id.* (stating that, in addition to number of congressional candidates on average ballot, 22 candidates appeared in one state's Presidential ballot and 19 appeared on New Jersey's gubernatorial ballot).

[113] *See id.* (observing that open format might result in fewer debates).

[114] *See id.* (stating that forcing debate sponsors to open forum represses speech).

come unfavorably.[115] Accordingly, the Court allowed the AETC to employ a selective access policy.[116]

In *Forbes*, the Court found that the necessity of selective access made the debate a nonpublic forum.[117] As such, the AETC's decision to exclude Forbes because of his limited political viability was a reasonable exercise of the AETC's journalistic judgment.[118] In its opinion, however, the Court carefully delineated the difference between viewpoint-neutral content discrimination and viewpoint discrimination.[119] Had the AETC excluded *Forbes* because his views were unpopular or outside the political mainstream, the Court would not have upheld the exclusion.[120] However, lack of political viability does not implicate any viewpoint;[121] instead, viewpoint discrimination only occurs when government action favors or disfavors the expression of certain viewpoints.[122]

Thus, the Court found that the AETC employed a viewpoint-neutral, content discriminatory standard in excluding Forbes.[123] Relying on precedent, the *Forbes* Court held that the mere fact that a forum is nonpublic does not allow the government to restrict speech arbitrarily.[124] Specifically, any exclusion must have a reasonable basis given the purpose of the forum, and must not dis-

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[115] *See id.* (expressing concern over possibility of easier access reducing amount of speech).

[116] *See id.* at 1643-44 (noting that opening forum would place severe burden upon broadcasting public debate)

[117] *See id.* at 1642-43 (declaring that debate had status of nonpublic forum).

[118] *See id.* at 1643-44 (concluding Forbes's claims that AETC based exclusion on viewpoint had no validity).

[119] *See id.* at 1639-40 (noting that while providing access to all candidates is infeasible, viewpoint discrimination would distort elections).

[120] *See id.* at 1644 (reversing appellate decision because *Forbes* presented no evidence of viewpoint discrimination).

[121] *See id.* at 1643-44 (quoting testimony from AETC Executive Director stating that Forbes's viewpoints played no role in his exclusion).

[122] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 814, 828 (1995) (stating that any regulation burdening speech based on speaker's viewpoint triggers presumption of unconstitutionality); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-43 (1994) (holding that restrictions against speech based on message are unconstitutional); R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) (concluding that viewpoint discrimination blatantly violates First Amendment); Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (holding that fundamental that government cannot regulate speech on basis of message conveyed).

[123] *See Forbes*, 118 S. Ct. at 1644 (holding decision to exclude Forbes to be both reasonable and viewpoint neutral).

[124] *See id.* at 1643 (citing International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687 (1992) (noting that restrictions on nonpublic fora cannot implicate viewpoint of potential speakers).

criminate based on viewpoint.[125] Thus, although the AETC could not have excluded Forbes for the substance of his political views,[126] it reasonably could have excluded Forbes for his lack of political viability.[127]

An earlier Supreme Court decision offers another example of the distinction between content and viewpoint discrimination.[128] Pursuant to state law, a school district allowed social, civic, or recreational organizations to use school property after school hours.[129] However, the school district explicitly disallowed use of school property for religious purposes.[130] Under this rule, the district denied permission to a church wishing to show a Christian-based film series on parenting.[131]

When the church sued, the Supreme Court found that the prohibition on religious purposes constituted viewpoint, not content, discrimination and violated the Constitution.[132] The prohibition denied the church an opportunity to express views on child-rearing from a Christian perspective, while allowing numerous other parties to express their views on the subject.[133] The Supreme Court has consistently found viewpoint discrimination unconstitutional in all three types of public fora.[134]

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[125] *See id.* at 1643 (observing prohibition on viewpoint-based exclusions or exclusions that fail to further purpose of forum).

[126] *See id.* at 1644 (holding that AETC based exclusion of Forbes on viewpoint-neutral standards).

[127] *See id.* (noting that AETC excluded Forbes due to voter apathy towards his candidacy).

[128] *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-94 (1993) (finding that school district's refusal to allow plaintiff to show film series on school grounds constituted viewpoint, not content, discrimination).

[129] *See id.* at 387 (stating that school district elected to open school grounds for after-hours use by social, civic, or recreational groups).

[130] *See id.* (noting that Rule Seven of school district prohibited use of school grounds for religious purposes).

[131] *See id.* at 388-89 (noting school district's refusal to show plaintiffs' film series).

[132] *See id.* at 394 (holding that film series dealt with subject "otherwise permissible" and that prohibition on its showing was "plainly invalid").

[133] *See id.* at 391 n.5 (listing 17 parties recently allowed to use facilities).

[134] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1643 (1998); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828-30 (1995); *Lamb's Chapel*, 508 U.S. at 2147-48; Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985); City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581, 587 (7th Cir. 1995); May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1114 (7th Cir. 1986). *See generally* Texas v. Johnson, 491 U.S. 397, 414 (1989) (stating principle that government may not prohibit expression of idea simply because society finds idea itself offensive or disagreeable).

### *D. The Government-as-Speaker Exception*

The Court has noted one exception to the blanket prohibition on viewpoint discrimination.[135] The courts have created the government-as-speaker exception when the government promotes a particular message.[136] Under this exception, the government may practice viewpoint discrimination in funding speakers in all three types of fora.[137]

The Supreme Court defined the government-as-speaker exception in *Rust v. Sullivan.*[138] *Rust* involved a federal funding program for family planning services.[139] Grantees of the fund challenged regulations prohibiting the use of program funds to promote or encourage abortion.[140] Responding to the assertion that the regulations constituted viewpoint discrimination, the Supreme Court found that the government interest in promoting life motivated the program.[141] Consequently, the Court allowed the regulations as part of a program to advance that interest.[142]

The *Rust* Court gave a further example of the exception's application. The Court found that the federal government has an interest in promoting democracy.[143] When it funds a foundation to promote democracy, the government does not engage in discrimination by barring pro-Communist or pro-Fascist speakers.[144]

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[135] *See* Rust v. Sullivan, 500 U.S. 173, 192-93 (1991) (upholding constitutional prohibition on recipients of federal family planning funds advocating abortion as method of family planning).

[136] *See id.* at 193 (holding that government does not violate Constitution when it chooses to fund programs it believes serve public interests while not funding alternative programs).

[137] *See id.* (finding that government may choose to subsidize one activity to exclusion of others).

[138] *See id.* at 194.

[139] *See id.* at 178 (stating that disputed regulation concerned statute funding family planning services).

[140] *See id.* at 181 (stating that *Rust* involved facial challenge to prohibition on abortion counseling).

[141] *See id.* at 193 (noting that government created program to spread pro-childbirth message); *see also* Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding governmental interest in favoring childbirth over abortion).

[142] *See Rust*, 500 U.S. at 194 (noting that Court has rejected position that if government subsidizes one protected right, it must subsidize analogous counterpart rights).

[143] *See id.* (discussing National Endowment for Democracy, which Congress intended to encourage other nations' steps towards democratic governments).

[144] *See id.* (holding that Congress's funding of National Endowment for Democracy does not require it to promote "competing lines of political philosophy").

The government-as-speaker exception does not, however, allow for unlimited discretion.[145] Unless the government clearly defines its role as speaker, the prohibition on viewpoint discrimination continues to apply.[146] Thus, the government cannot compel publicly funded universities, traditionally spheres of free expression, to limit speech to messages favored by the government.[147] The government-as-speaker exception seems to apply only if two conditions are met.[148] First, the state must have an interest in promoting a certain message.[149] Second, the forum must not be one traditionally open to free expression.[150]

### *E. Funding Programs as Fora*

Traditionally, fora are physical spaces where people can congregate and express themselves.[151] However, the Supreme Court has recognized that public fora sometimes take other forms.[152] For example, in *Rosenberger v. Rector & Visitors of University of Virginia*, the

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[145] *See id.* at 199-200 (observing that government subsidy not adequate to justify government control over speech).

[146] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (stating that Court has allowed government to regulate the content expression when it speaks or when it enlists private entities to speak for it).

[147] *See id.* at 834 (observing that where university is not speaking directly or subsidizing transmission of message it favors viewpoint-based restrictions remain prohibited); *Rust*, 500 U.S. at 200 (noting that universities represent zone of free expression whose existence is vital to functioning of American society).

[148] *See Rosenberger*, 515 U.S. at 833-34 (stating that viewpoint-based restrictions remain prohibited if government has no clear message or where it attempts to impose restrictions on fora traditionally open to expression).

[149] *See id.* at 833 (holding that government can restrict speech when promoting its own message); *Rust*, 500 U.S. at 193, (holding that government can selectively subsidize programs to further public interest goals).

[150] *See Rosenberger*, 515 U.S. at 836 (observing that viewpoint-based restrictions present particular dangers when imposed on forum with historical dedication to discussion of important ideas); *Rust*, 500 U.S. at 199-200 (noting that government subsidy was not adequate to overcome prohibition on speech regulation in fora traditionally open to free expression); *see also* Hague v. CIO, 307 U.S. 496, 515-16 (1939) (holding that government must not abridge right of free expression in public fora).

[151] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1641 (1998) (defining public fora as property opened to assembly and debate due to tradition or by government fiat); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc. 473 U.S. 788, 802 (1985) (identifying public fora as places long open to assembly and debate); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (identifying three types of public fora and defining traditional public fora as those long held open for debate).

[152] *See Rosenberger*, 515 U.S. at 830 (holding that university funding program constituted designated public fora); *see also Cornelius*, 473 U.S. at 801 (finding that charitable contribution program represented forum); *Perry*, 460 U.S. 37, 46-47 (finding that school mailing program constituted forum).

Court found that a funding program administered by a public university for student groups represented a designated public forum.[153]

In *Rosenberger*, the University of Virginia created a program that reimbursed student groups for expenses related to student publications.[154] To qualify for reimbursement, the groups had to meet certain criteria.[155] A student group at the University that met the criteria, Wide Awake Productions ("WAP"), sought reimbursement for monies spent producing a newspaper.[156] WAP intended the newspaper to provide a Christian perspective on issues relevant to University students.[157] However, University guidelines prohibited funding any religious activity.[158] Therefore, the University Appropriations Committee denied funding to WAP, labeling the publication a religious activity.[159]

WAP sued the University, claiming that the denial of funding amounted to viewpoint discrimination.[160] The United States Supreme Court agreed.[161] The *Rosenberger* Court noted that the student funding program was not a physical space, but constituted a designated public forum nevertheless.[162] The Court construed the funding program as a forum because the University intended the program to foster free expression.[163] The University's decision to

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[153] *See* 515 U.S. at 830 (finding that student funding program represents forum).

[154] *See id.* at 822 (stating that university program authorizes paying printer's expenses for student publications).

[155] *See id.* at 823. Under these criteria, the majority of the group's members had to be students and all managing officers had to be students, and the group had to agree not to discriminate in its membership. *See id.* The group also had to sign an agreement stating that the student group functions independently of the university, and that the university does not control, or necessarily approve of, the group's activities. *See id.* at 824.

[156] *See id.* at 827 (stating that WAP sought $5862 to defray printing cost of *Wide Awake: A Christian Perspective at the University of Virginia*).

[157] *See id.* at 826 (quoting *Wide Awake* editorial as stating that journal presented Christian perspective to issues important to University of Virginia students).

[158] *See id.* at 825 (citing Appellant's Petition for Certiorari at 66a) (quoting relevant university guidelines rendering religious activities ineligible for subsidy).

[159] *See id.* at 827 (stating that after examining WAP's first issue, university denied WAP's request for printing subsidy on grounds that publication represented religious activity).

[160] *See id.* at 827. The district court granted the university's motion for summary judgment. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 795 F. Supp. 175, 181-82 (W.D. Va. 1992), *aff'd*, 18 F. 3d 269 (4th Cir. 1994), *rev'd*, 515 U.S. 819 (1995). The Fourth Circuit agreed. *See Rosenberger*, 18 F.3d at 279-81.

[161] *See Rosenberger*, 515 U.S. at 831 (holding that prohibition on funding religious activity created viewpoint-discriminatory standard).

[162] *See id.* at 830 (holding that university funding program constituted designated public forum).

[163] *See id.* at 835 (stating that university created funding program to facilitate speakers with their own message which made viewpoint discrimination unacceptable).

prohibit funding for religious activities denied WAP the opportunity to express its viewpoint.[164] Therefore, the *Rosenberger* Court ruled that the University's prohibition on funding for religious expression amounted to viewpoint discrimination.[165]

Further, the *Rosenberger* Court stated that viewpoint discrimination is unconstitutional when practiced in either funding decisions or regulatory decisions.[166] The Court ruled that the government cannot dictate, beyond the limitations of the forum, regulatory decisions such as which speakers may appear.[167] In an analogous fashion, once the government creates a funding program to allow for free expression, it cannot make funding decisions subsidizing certain viewpoints but not others.[168]

The *Rosenberger* Court specifically distinguished the University program from the program at issue in *Rust*.[169] The Court observed that the government did not create the funding program in *Rust* to foster free expression, but instead to promote choosing childbirth over abortion.[170] The *Rosenberger* Court found the government-as-speaker exception inapplicable where the government designs a funding program to foster free expression.[171] The Court noted the long held principle that the government cannot use subsidies to

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[164] *See id.* at 831 (finding that religious thought constituted viewpoint).

[165] *See id.* at 837 (holding that university policies regarding funding program violated First Amendment by creating viewpoint discriminatory standard).

[166] *See id.* at 834 (stating that viewpoint-based restrictions on subsidies are just as violative of First Amendment principles as regulatory restrictions); *see also* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983) (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)) (stating that Congress cannot restrict distribution of subsidies to suppress dangerous ideas).

[167] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1641 (1998) (citing Cornelius v. NAACP Legal Defense Educ. Fund, 105 S. Ct. 3439 (1985)) (stating that whenever government excludes speakers who fall within class normally allowed access to forum, courts employ strict scrutiny in reviewing government action); City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (noting that government cannot regulate speech on basis of viewpoint).

[168] *See Rosenberger*, 515 U.S. at 834 (stating that viewpoint-based restrictions on subsidies are just as violative of First Amendment principles as regulatory restrictions); *Regan*, 461 U.S. at 548 (1983) (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)) (stating that Congress may not restrict distribution of subsidies to suppress dangerous ideas).

[169] *See Rosenberger*, 515 U.S. at 834 (clarifying that courts will not tolerate restrictions with viewpoint basis where government acts to encourage diversity of speakers and not to transmit message).

[170] *See id.* at 833 (observing that Congress created program at issue in *Rust* to convey specific message).

[171] *See id.* at 834 (holding that, having set up funding program, university could not muffle particular viewpoints).

suppress dangerous ideas.[172] The *Rosenberger* ruling, however, did not discuss whether the government might have an obligation to subsidize dangerous, or potentially offensive, speech.[173] Three years after *Rosenberger*, the Court seemed to answer that question in resolving a dispute between the NEA and a group of unconventional artists.[174]

## II. *NATIONAL ENDOWMENT FOR THE ARTS V. FINLEY*

In *National Endowment for the Arts v. Finley* four artists denied NEA funding sued the agency, claiming that the decency criteria amounted to viewpoint discrimination.[175] The petitioning artists frequently addressed controversial and potentially disturbing subject matter, including homosexuality, rape, and AIDS.[176] For example, one of the artists became well known for describing the effects of being sexually assaulted.[177] As she did so, the artist disrobed and covered herself in various substances, most notably melted chocolate.[178]

The artists sued the NEA on the grounds that the decency criteria for NEA funding imposed a viewpoint discriminatory standard on the disbursement of state funds.[179] Both the district court and

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[172] *See id.* (holding that using funds to suppress ideas constitutes viewpoint discrimination) (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)); *Regan*, 461 U.S. at 548 (observing government cannot use funding decisions as proxies for legislative regulation of speech).

[173] *See Rosenberger*, 515 U.S. at 822-46 (containing no discussion of positive duty to fund controversial expression).

[174] *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2172 (1998) (holding that Congress has no constitutional duty to fund indecent or disrespectful art).

[175] *See id.* at 2174 (1998) (noting that plaintiffs filed suit following denial of their individual grant proposals).

[176] *See id.* The petitioning artists included Karen Finley, Tim Miller, Holly Hughes, and John Fleck. *See id.* Finley's piece revolved around her recounting a sexual assault. *See* Julie A. Alagna, Note, *1991 Legislation, Reports and Debates Over Federally Funded Art: Arts Community Left with an "Indecent" Compromise*, 48 WASH. & LEE L. REV. 1545, 1545 n.2 (1991). Miller's piece narrated his life as a homosexual in the shadow of AIDS. *See id.* Holly Hughes performed a monologue on lesbianism. *See id.* In the course of discussing Catholicism and alcoholism, Fleck urinated on stage. *See id.*

[177] *See Performance Art: What Is It and Where Is It Going?*, ARTNEWS, Apr. 8, 1992, at 84, 86 (discussing artist's description of being sexually assaulted and artist's smearing of her person with chocolate).

[178] *See id.* (describing various substances Finley rubbed on her skin, including candied yams, chocolate, and peanut butter).

[179] *See Finley*, 118 S. Ct. at 2174 (noting amended complaint included facial challenge to decency clause as violative of First Amendment).

the Ninth Circuit Court of Appeals found for the artists.[180] The district court held that the arts, like universities, represent traditional spheres of free expression.[181] Therefore, funding decisions demanded viewpoint neutrality.[182] The Ninth Circuit agreed with the district court's rationale.[183]

The Supreme Court disagreed.[184] The *Finley* Court concluded that the decency criteria did not impose a viewpoint discriminatory standard.[185] The Court found the decency criteria served a purely advisory function.[186] Because the decency criteria required only that the panelists consider its standards, the criteria did not necessarily preclude the funding of any proposal.[187] Therefore, the *Finley* Court held that the decency criteria did not propound viewpoint

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[180] *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1470-71 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *rev'd*, 118 S. Ct. 2168 (1998) (holding that decency clause violates Constitution); *see also Finley*, 100 F.3d at 674 (upholding ruling of district court).

[181] *See Finley*, 795 F. Supp. at 1475.

[182] *See id.* at 1475 (holding that government funding of arts is subject to First Amendment constraints). The federal district court rejected the NEA's implementation of the criteria. *See id.* at 1470-71. The NEA's charter already called for diversity in panelists. *See* 20 U.S.C. § 959(c) (1994). The NEA, therefore, believed it need not alter its reviewing standards to adhere to the decency criteria. *See Finley*, 795 F. Supp. at 1470. However, the court found the criteria would be surplusage if it did not impose a further requirement. *See id.* at 1471. Moreover, the explicit language of the statute required the NEA Council as a whole, not as individual members, to consider decency when making grant applications. *See* 20 U.S.C. § 954(d)(1) (1994). Therefore, the criteria required the NEA to change its procedure for judging grant proposals. *See Finley*, 795 F. Supp. at 1471. Finding that proper implementation would result in a significant abridgment of free expression, the court struck down the criteria as unconstitutional. *See id.* at 1476.

[183] *See Finley*, 100 F.3d at 674. As in the ruling below, the Ninth Circuit found that the Amendment required the NEA to change the procedures by which the agency judged grant proposals. *See id.* at 676. Such a change, the Ninth Circuit found, would impose an unconstitutional, viewpoint-discriminatory standard. *See id.* at 683-84.

[184] *See Finley*, 118 S. Ct. at 2175 (reversing appellate court and upholding decency criteria).

[185] *See id.* at 2180 (finding that decency criteria does not facially violate First Amendment).

[186] *See id.* at 2176. In finding the decency criteria to be advisory only, the Court interpreted the plain language of the statute as imposing no categorical requirements. *See id.* The criteria does not require the NEA to deny funding to any proposal solely because of indecent content. *See id.* Rather, the decency criteria is one of several standards the NEA review boards must consider when judging grant proposals. *See id.* at 2178. The Court found that mere consideration of decency did not create a substantial or evident danger of viewpoint discrimination. *See id.* at 2176. Nor would the criteria necessarily exclude any particular viewpoint from receiving funds. *See id.*

[187] *See id.* at 2175 (noting that decency criteria allows possible funding of proposals for indecent work).

discrimination.[188] Instead, the Court found the criteria to be subject to varied interpretations,[189] and to create a standard no more selective than the requirement that proposals demonstrate artistic excellence.[190]

Moreover, the *Finley* Court held that under *Rust*, the government has more latitude in restricting speech when disbursing funds than when directly regulating speech.[191] The Court found that funding one program while excluding another did not amount to viewpoint discrimination.[192] Provided that Congress does not interfere with other constitutional rights, it can distribute subsidies as it chooses.[193]

The *Finley* Court further noted that NEA funding is a limited resource.[194] Because the funds are limited, the NEA must deny funding to many constitutionally protected works.[195] The Court specifically distinguished *Finley* from *Rosenberger* on the basis of the NEA's additional selectivity.[196]

Observing that the funding program in *Rosenberger* constituted a designated public forum, the *Finley* Court noted the different standards by which the NEA and the University dispersed funds.[197] Had the NEA made funds generally available to any party meeting minimum objective standards, as the University did in *Rosenberger*, the Court would have found the decency criteria unconstitutional.[198] However, in order to qualify for NEA funding, proposals

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[188] *See id.* at 2176-77 (finding that because decency criteria strictly prohibits no views from receiving funds, it does not violate constitutional prohibition on viewpoint discrimination).

[189] *See id.* at 2177 (finding that diverse American beliefs regarding decency preclude decency criteria from creating uniform standard).

[190] *See id.* (finding that advisory nature of decency criteria imposes no more selectivity than artistic excellence requirement).

[191] *See id.* at 2179 (finding that Congress has great discretion when it disperses funds).

[192] *See id.* (holding that funding one program and not another does not entail viewpoint discrimination).

[193] *See id.* (citing Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983)) (noting that direct interference with constitutional rights through spending is definitely invalid but that otherwise government has discretion). The Court did note that it might find specific applications violate constitutional rights. *See id.* at 2178-79.

[194] *See id.* at 2177-78 (noting that funding shortages require NEA to refuse funding to majority of submitted proposals).

[195] *See id.* (observing that NEA denies funding to many proposals).

[196] *See id.* at 2178 (holding that artistic excellence standard differentiates NEA from *Rosenberger* subsidy program).

[197] *See id.* (noting that Congress, via NEA, discriminates on artistic excellence standard, whereas university in *Rosenberger* made funds generally available to student groups).

[198] *See id.* (noting that selective access distinguished *Finley* from *Rosenberger*).

must demonstrate artistic excellence.[199] The Court ruled that the competitive difference distinguished NEA grants from the University subsidies in *Rosenberger*.[200]

In its opinion, the Court did not attempt to position the NEA as one of the three types of developed fora.[201] The concurring opinion only noted that, because of its competitive approach to disbursing funds, the NEA could not constitute a designated public forum.[202] The Court does not attempt to distinguish the NEA from the political debate in the *Forbes* case, despite deciding the two cases within five weeks of one another.[203]

## III. WHY THE COURT DECIDED *FINLEY* INCORRECTLY AND A POSSIBLE SOLUTION TO THE PROBLEM

Like the *Rosenberger* program, the NEA is a funding program designed to foster expression.[204] Like the AETC in *Forbes*, the NEA cannot accept all applicants.[205] In light of *Rosenberger* and *Forbes*, the NEA constitutes a nonpublic forum, a fact overlooked by the Court.[206] Additionally, the *Finley* decision promotes a much more expansive view of *Rust* than that to which the Court had previously subscribed.[207] The *Finley* Court expands the government-as-speaker exception outlined in *Rust* and *Rosenberger* to include any situation in which the government subsidizes expression.[208]

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[199] *See* 20 U.S.C. § 954(d)(1) (1994) (stating that artistic excellence represents primary criterion when judging proposals).

[200] *See Finley*, 118 S. Ct. at 2178 (noting that need for artistic excellence and scarcity of funds differentiated *Finley* from *Rosenberger*).

[201] *See id.* at 2172-80 (containing no analysis of NEA as type of forum); *see also supra* notes 71-99 and accompanying text (describing three-tiered forum analysis developed by Court).

[202] *See Finley*, 118 S. Ct. at 2184 (Scalia, J., dissenting) (noting that selective access means NEA bears no resemblance to *Rosenberger* program).

[203] *See id.* at 2172-80 (containing no discussion of nonpublic fora standards defined in *Forbes*).

[204] *See* 20 U.S.C. § 954(c)(1) (identifying NEA's mission as funding worthy artistic endeavors).

[205] *See Finley*, 118 S. Ct. at 2177-78 (noting that NEA must deny funding to many proposals).

[206] *See infra* notes 222-44 and accompanying text (arguing that, in wake of *Rosenberger* and *Forbes*, Court should analyze NEA as nonpublic forum).

[207] *See infra* notes 261-68 and accompanying text (asserting that reading of *Rust* in *Finley* creates much broader exception than do either *Rosenberger* or *Rust* itself).

[208] *See Finley*, 118 S. Ct. at 2179 (holding that government has much greater latitude to restrict expression when dispersing funds as opposed to regulating).

Under the existing three-tiered public forum analysis the decency criteria are likely unconstitutional.[209] However, the possibility of a novel solution exists.[210] Perhaps the NEA represents a type of forum falling outside the traditional three-tiered structure.[211] If that type of forum allowed standards that discriminated on the basis of viewpoint, Congress could impose the decency criteria without violating the Constitution.[212] Congress could also limit viewpoints subsidized by similar programs.[213]

### *A. Why the Holding in* Finley *Is Wrong*

The Court's holding in *Finley* suffers from three major deficiencies. First, the Court failed to explain why the NEA does not constitute a nonpublic forum.[214] Second, the Court held that a standard that does not impose a categorical requirement cannot amount to viewpoint discrimination.[215] Third, the *Finley* Court's broad view of the *Rust* case contrasts sharply with the limited government-as-speaker exception that *Rust* purported to create.[216] *Finley*'s use of *Rust* also differs sharply from *Rosenberger*'s narrow view of *Rust*.[217] The Court must have decided *Finley* incorrectly if

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[209] *See infra* notes 236-44 and accompanying text (arguing that, applying principles outlined in *Rosenberger* and *Forbes*, Court's decision in *Finley* does not withstand scrutiny).

[210] *See infra* notes 273-300 and accompanying text (proposing model solution allowing consistency with *Forbes* and *Rosenberger*, while allowing NEA to employ decency criteria).

[211] *See infra* notes 273-324 and accompanying text (suggesting that NEA represents fourth type of forum).

[212] *See infra* notes 245-58 and accompanying text (arguing that decency criteria represents viewpoint discriminatory standard); *see also infra* notes 299-308 and accompanying text (arguing that fourth forum should allow viewpoint discrimination to facilitate programs like NEA).

[213] *See infra* notes 273-300 and accompanying text (arguing in favor of new forum classification).

[214] *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2172-80 (1998) (lacking rationale on why NEA escapes forum analysis).

[215] *See id.* at 2176 (finding that decency criteria presents no evident or substantial danger of viewpoint discrimination because it does not preclude funding of particular proposals).

[216] *Compare Finley*, 118 S. Ct. at 2179 (holding that when government subsidizes expression, it has wide discretion in setting parameters of program), *with* Rust v. Sullivan, 500 U.S. 173, 199-200 (1991) (holding that government has no more latitude when funding than when regulating, unless conveying particular message).

[217] *Compare Finley*, 118 S. Ct. at 2179 (granting government great discretion when subsidizing expressive activity), *with* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833-35 (1995) (holding that where government transmits no particular message, it has no greater discretion when funding rather than regulating).

propositions are correct.[218] First, the NEA represents a nonpublic forum.[219] Second, the decency criteria discriminates on the basis of viewpoint.[220] Third, the government-as-speaker exception does not apply to the NEA.[221]

### 1. Why the National Endowment for the Arts Is a Nonpublic Forum

Although the NEA does not directly provide tangible property where people can meet and exchange ideas, the agency represents a type of forum.[222] The NEA is a funding program,[223] and when the government chooses to subsidize free expression, such funding programs qualify as fora.[224] The fact that the NEA cannot fund all proposals does not negate the agency's status as a forum.[225] The selectivity inherent in awarding NEA grants simply classifies the NEA as a nonpublic forum.[226]

The NEA's grant procedure closely resembles one that the Supreme Court found to constitute a designated public forum,[227] the

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[218] *See infra* notes 222-72 and accompanying text (arguing that because NEA represents nonpublic forum, because decency criteria creates viewpoint discriminatory standard, and because government-as-speaker exception does not apply to NEA, *Finley* decision is wrong).

[219] *See infra* notes 223-44 and accompanying text (finding NEA to constitute nonpublic forum); *see also supra* notes 123-27 and accompanying text (demonstrating that courts do not permit viewpoint discrimination in nonpublic fora).

[220] *See infra* notes 245-58 and accompanying text (arguing that decency criteria creates viewpoint-discriminatory standard).

[221] *See infra* notes 259-72 and accompanying text (arguing that *Finley* expands previously narrow holding of *Rust* in manner inconsistent with *Rosenberger*).

[222] *See Rosenberger*, 515 U.S. at 830 (finding that similarly intangible subsidy program represented type of forum).

[223] *See* 20 U.S.C. § 954(c)(1) (1994) (identifying NEA's mission as funding worthy artistic endeavors).

[224] *See Rosenberger*, 515 U.S. at 829-30 (holding university funding program designed to facilitate expression constituted designated public fora); *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 801 (1985) (reasoning that charitable contribution program constituted forum); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1983) (finding that school mailing program represented forum).

[225] *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2178 (1998) (noting that necessary selectivity in funding proposals does not distinguish NEA from funding program in *Rosenberger*); *Rosenberger*, 515 U.S. at 835 (declaring that scarcity of funds does not excuse otherwise prohibited viewpoint discrimination).

[226] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1642 (1997) (holding that selective access policies differentiate designated public fora from nonpublic fora).

[227] *See Rosenberger*, 515 U.S. at 828-30 (observing school had designated funds for student groups and thereby created forum).

University funding program at issue in *Rosenberger*.[228] Both programs involve funding decisions, as opposed to regulatory measures.[229] Also, both programs facilitate expressive activity by independent third parties.[230] Finally, no obligation exists for the government to underwrite the expressive activities in either case.[231]

However, one key difference exists between the fora at issue in *Finley* and *Rosenberger*. Whereas the University in *Rosenberger* made the funds generally available to groups meeting certain specified criteria, the NEA disburses its funds using the additional standard of artistic excellence.[232] Because NEA grants represent a limited resource, the NEA must limit itself to funding the worthiest projects submitted for grants.[233] Viewed from the subjective eyes of the reviewing panelists, the projects must deserve funding compared to the proposals of other grant seekers.[234] That standard removes the NEA from the designated public forum category in which the Court placed the funding program in *Rosenberger*.[235]

Instead, according to the Court's decision in *Forbes*, the selectivity of the artistic excellence standard makes the NEA a nonpublic forum.[236] Whereas the AETC required political viability for admission to its debate, the NEA requires a demonstration of artistic excel-

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[228] *See Finley*, 118 S. Ct. at 2191 (Souter, J., dissenting) (comparing many similarities between NEA and *Rosenberger* program).

[229] *See id.* at 2172 (stating that NEA enabling statute authorizes NEA to award grants); *Rosenberger*, 515 U.S. at 834 (noting that program involves funds, not facilities).

[230] *See Rosenberger*, 515 U.S. at 835 (stating that university designed program to subsidize speakers' own messages); 111 CONG. REC. 13,108 (1965) (stating that Congress intended NEA to promote "free inquiry and expression").

[231] *See Finley*, 118 S. Ct. at 2186 n.2 (Souter, J., dissenting) (noting that Congress had no obligation to create NEA); *Rosenberger*, 515 U.S. at 829 (stating that government need not open property to public use).

[232] *See* 20 U.S.C. § 954(d)(1) (1994) (stating that primary consideration when awarding NEA grants is artistic excellence); *Finley*, 118 S. Ct. at 2178 (noting both that *Rosenberger* funds were generally available to students and that NEA requires proposals display artistic excellence); *Rosenberger*, 515 U.S. at 824-25 (noting that student groups meeting objective requirements received funds).

[233] *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *rev'd*, 118 S. Ct. 2168 (1998) (stating that NEA funds represent limited resource).

[234] *See Finley*, 118 S. Ct. at 2178 (noting that NEA makes funding decisions through use of competitive process).

[235] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1642 (1998) (holding that selective access policies differentiate designated public fora from nonpublic fora); *Rosenberger*, 515 U.S. at 830 (finding funding program constitutes designated public forum).

[236] *See Forbes*, 118 S. Ct. at 1642 (holding that selective access designates forum as nonpublic).

lence as a threshold for funding.[237] The standard of artistic excellence does not disfavor any viewpoint.[238] It serves only to limit the NEA's scope to a manageable level.[239]

Together, *Rosenberger* and *Forbes* support the argument that the NEA constitutes a nonpublic forum.[240] *Rosenberger* dictates that fora need not have physical characteristics,[241] and specifically designates government funding of expressive activities as fora.[242] *Forbes* defines the nonpublic forum as characterized by selective access.[243] The NEA's requirement that projects must demonstrate artistic excellence to receive funding is such a selective access clause.[244]

### 2. Why the Decency Criteria Amount to Viewpoint Discrimination

If the NEA is a nonpublic forum, then the *Finley* Court's reasoning fails. According to the analysis in *Forbes*, the Constitution does not permit viewpoint discrimination in nonpublic fora.[245] By creating the NEA as a nonpublic forum, the government also assumed the burden of ensuring that the attendant standards did not discriminate on the basis of viewpoint against any form of constitutionally protected speech.[246]

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[237] *See* 20 U.S.C. § 954(d)(1) (making artistic excellence primary criterion when evaluating proposals).

[238] *See* Metromedia, Inc. v. San Diego, 453 U.S. 490, 507-08 (1981) (plurality opinion) (holding that standards based on merit do not implicate viewpoint). *But see Finley*, 118 S. Ct. at 2183 (Scalia, J., concurring). Justice Scalia observed that John Adams believed that fine arts possessed inherently corrupting qualities which endangered "healthy constitutions." *See id.*

[239] *See Finley*, 100 F.3d at 685 (Kleinfeld, J., dissenting) (stating that NEA grants represent limited resource for "fortunate few").

[240] *See Forbes*, 118 S. Ct. at 1642 (holding that selective access characterizes nonpublic fora); *Rosenberger*, 115 U.S. at 830 (holding intangible funding program constituted designated public fora).

[241] *See Rosenberger*, 115 U.S. at 830 (finding funding program without tangible qualities constituted designated public forum).

[242] *See id.* at 834-35 (holding that because university created funding program to foster expression, program represented designated public forum).

[243] *See Forbes*, 118 S. Ct. at 1642 (stating that selective access policy distinguishes nonpublic fora from designated public fora).

[244] *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2178 (1998) (noting that artistic excellence requirement creates competitive process for funding decisions).

[245] *See Forbes*, 118 S. Ct. at 1642 (noting that permissible selective access clauses do not include clauses barring particular viewpoints); *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (noting courts will not tolerate viewpoint discriminatory standards in nonpublic fora).

[246] *See Finley*, 118 S. Ct. at 2186 n.2 (Souter, J., dissenting) (observing that nothing obligated Congress to create NEA but, having chosen to do so, it must obey prohibition against

The *Finley* Court incorrectly found that the implementation of the decency criteria did not create a viewpoint discriminatory standard.[247] The Court based its theory on two key points. First, the NEA did not change its review procedures following passage of the decency criteria.[248] Second, the criteria requires only that the NEA consider decency and respect for American values and does not prohibit the funding of indecent expression.[249]

Each of the *Finley* Court's justifications is unpersuasive. The language of the decency criteria indicates that Congress intended the NEA to apply the criteria consciously to every proposal.[250] But the NEA's method of implementing the criteria does nothing to ensure its universal application.[251] Because the NEA must take decency and respect for American values into consideration, it must apply the criteria to every proposal the NEA judges.[252] The NEA's failure to change its review procedures in implementing the decency criteria contradicts accepted principles of statutory construction because the implementation does not conform to congressional intent.[253]

Implementing the decency criteria in a manner that conforms with congressional intent would create a viewpoint discriminatory

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viewpoint discrimination); *Forbes*, 118 S. Ct. at 1643 (observing that creation of nonpublic forum entails corresponding obligation to avoid viewpoint discrimination).

[247] *See Finley*, 118 S. Ct. at 2176 (finding that decency clause does not violate First Amendment).

[248] *See id.* at 2173 (citing Minutes of the Dec. 1990 Retreat of the National Council on the Arts).

[249] *See* 20 U.S.C. § 954(d)(1) (1994) (stating that NEA must consider decency and respect for American values when judging proposals); *Finley*, 118 S. Ct. at 2176 (finding decency criteria "imposes no categorical requirement").

[250] *See* 136 CONG. REC. 28,672 (1990) (quoting author of decency criteria's statement as saying that NEA panelists must consider decency); *see also Finley*, 118 S. Ct. at 2189 (Souter, J., dissenting) (arguing that consideration requires conscious application).

[251] *See Finley*, 118 S. Ct. at 2180-81 (Scalia, J., concurring) (observing that NEA's implementation of decency criteria clearly fails to accord with congressional intent).

[252] *See id.* (noting that NEA panelists must apply decency criteria when judging proposals); *id.* at 2188-89 (Souter, J., dissenting) (stating that NEA must apply decency criteria consciously); Finley v. National Endowment for the Arts, 795 F. Supp 1457, 1470 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *rev'd*, 118 S. Ct. 2168 (1998) (finding that NEA decisions must apply decency criteria); 136 CONG. REC. 28,672 (quoting author of decency criteria's statement as saying that NEA panelists must consider decency).

[253] *See Finley*, 795 F. Supp. at 1470-71 (holding that NEA's interpretation renders passage of decency criteria superfluous or without legal content); Freytag v. Commissioner, 501 U.S. 868, 874 (1991) (observing Court's deep reluctance to interpret statute in manner that renders it superfluous); *see also* Chevron U.S.A., Inc., v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (holding that agency cannot construe statute in manner contrary to congressional intent).

standard.[254] That standard would favor decent expression over indecent expression.[255] Indecent expression constitutes a class of expression, and the Court has found indecency to represent a viewpoint.[256] According to *Rosenberger*, courts will not tolerate discrimination against such a class.[257] Irrespective of whether Congress intended the decency criteria to create a prohibition against indecent art or merely to disfavor its funding, Congress has hindered the expression of a class of viewpoints in violation of the First Amendment.[258]

### 3. Why the Court's Distinction Between Funding and Regulation Makes No Difference

*Finley* also errs because it differentiates between funding and regulatory decisions restricting speech in fora.[259] The *Finley* Court emphasized that the NEA only makes funding decisions.[260] *Finley* relied on *Rust* for the proposition that Congress may act more re-

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[254] *See* 20 U.S.C. § 954(d)(1) (requiring that NEA factor viewpoint-based criteria into selection process); *see also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring) (finding indecency inextricable from viewpoint); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995) (finding viewpoint discrimination equally violative of First Amendment when government discriminates against classes of viewpoints rather than targeting particular viewpoints for exclusion); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (holding that school district's decision to bar religious perspectives violated viewpoint discriminatory standard).

[255] *See Finley*, 118 S. Ct. at 2182 (Scalia, J., concurring) (stating that decency criteria unquestionably disfavors indecent expression); *id.* at 2186 (Souter, J., dissenting) (finding clear purpose of decency criteria entails disfavoring funding for indecent art); Finley v. National Endowment for the Arts, 100 F.3d 671, 677 (9th Cir. 1996) (concluding that Congress intended NEA factor in decency criteria when judging grant proposals), *rev'd*, 118 S. Ct. 2168 (1998).

[256] *See* Denver Area Educ. Telecomms. Consortium, Inc., 518 U.S. at 805 (Kennedy, J., concurring) (finding indecency inextricable from viewpoint)

[257] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (stating that any regulation burdening speech based on speaker's viewpoint invokes presumption of unconstitutionality).

[258] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (holding that restrictions against speech based on message are unconstitutional); R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) (finding viewpoint discrimination blatantly violates First Amendment); Police Dep't v. Moseley, 408 U.S. 92, 96 (1972) (finding it fundamental that government cannot regulate speech on basis of message conveyed).

[259] *See Rosenberger*, 515 U.S. at 834 (holding that where government subsidizes free expression, it cannot engage in viewpoint discrimination).

[260] *See Finley*, 118 S. Ct. at 2172 (noting that Congress vested NEA with sole power to award grants).

strictively when funding then when regulating.[261] *Rust*, however, is easily distinguishable from *Finley*. In the *Rust* case, the government spoke through an agency to promote a particular viewpoint.[262] The Court upheld the government-as-speaker exception in that narrow instance.[263] However, the *Rust* Court noted that where the state merely funds an activity, as opposed to actively pursuing an agenda, viewpoint discrimination remains prohibited.[264]

Congress created the NEA to foster free expression in the arts.[265] As even the NEA acknowledges, the government does not speak through the NEA.[266] The charter of the NEA calls for the agency to nurture diversity and artistic excellence.[267] The legislative history of the 1965 enabling statute for the NEA states that Congress intended that the NEA not bind itself to any particular message.[268] Conceiving a clear role for the government-as-speaker in the case of the NEA seems impossible.

Because the government-as-speaker exception does not apply to the NEA, the principles outlined in *Rosenberger* and *Forbes* should guide the *Finley* Court. *Rosenberger* held that funding programs designed to foster expression are fora.[269] *Forbes* held that nonpublic fora cannot exclude speakers or expression because of the viewpoint expressed.[270] Neither the decency criteria's advisory status nor the fiscal nature of the forum renders the criteria constitu-

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[261] *See id.* at 2178 (finding that *Rust* held that government has latitude to fund programs as it sees fit); *see also* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (creating exception to prohibition on viewpoint discrimination where government acts as speaker).

[262] *See Rust*, 500 U.S. at 193 (finding that government created *Rust* program to "encourage certain activities").

[263] *See id.* at 178 (upholding ruling that government can prohibit use of funds to facilitate abortion).

[264] *See id.* at 199 (noting that where government funds programs fostering speech, government-as-speaker exception does not justify viewpoint-based restrictions); *see also Rosenberger*, 515 U.S. at 834 (noting government-as-speaker exception does not apply to programs created to foster free expression).

[265] *See* 20 U.S.C. § 951(7) (1994) (stating that NEA funds should create "climate encouraging freedom of thought, imagination, and . . . creative talent.").

[266] *See Finley*, 118 S. Ct. at 2190 (Souter, J., dissenting) (observing that government freely admits it does not speak through NEA).

[267] *See* 20 U.S.C. § 954(c)(3) (1994) (describing NEA's purpose as facilitating wider distribution and excellence in arts).

[268] *See* 111 CONG. REC. 13,108 (1965) (calling for NEA not to bind itself to particular modes of expression or specific viewpoints).

[269] *See supra* notes 152-63 and accompanying text (discussing Court's finding that funding program constitutes designated public forum).

[270] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1643 (1998) (finding that selective access clause does not permit viewpoint-discriminatory standards).

tional.[271] The statute discriminates on the basis of viewpoint and, thus, does not pass constitutional muster.[272]

### *B. The Fourth Forum: An Alternative Solution*

Although the NEA as a nonpublic forum could not engage in viewpoint discrimination, the *Finley* Court could have supported its decision by categorizing the NEA as a new fourth forum.[273] The NEA funding program involves highly subjective judgments.[274] Moreover, the public might view the federal government as implicitly endorsing the message of funded projects.[275] These two features distinguish the NEA from similar programs falling within the three-tiered forum analysis.[276]

#### 1. Highly Subjective Standards as a Feature of the Fourth Forum

The most distinctive feature of the NEA-as-forum is the highly subjective standard of its artistic excellence selection criterion.[277] The *Rosenberger* Court determined that the funding program qualified as a designated public forum because any student group that met certain minimal requirements became eligible to receive funds.[278] The *Forbes* Court found that the AETC could objectively measure lack of support for *Forbes* and use it as a basis for his exclu-

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[271] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995) (noting that courts enforce prohibition against viewpoint discrimination equally vigorously in funding and regulatory decisions); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (finding viewpoint discrimination occurs when government merely disfavors viewpoints).

[272] *See supra* notes 245-58 and accompanying text (arguing that decency criteria creates viewpoint-based, unconstitutional standard).

[273] *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2178 (1998); *see also id.* at 2183-84, 2190-91 (Souter, J. dissenting) (implying that NEA possesses unique traits which remove it from standard forum analysis).

[274] *See* 20 U.S.C. § 954(d) (1994) (requiring that NEA employ artistic excellence and merit as standards for disbursing funds).

[275] *See infra* notes 296-300 and accompanying text (arguing that federal government represents NEA's patron, and people equate patronage with approval).

[276] *Cf.* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1643-44 (1998) (finding that standards excluding candidate from political debate had objective basis); *Rosenberger*, 515 U.S. at 824 (observing that university made funds available based upon objective criteria).

[277] *See Finley*, 118 S. Ct. at 2178 (distinguishing NEA from other funding programs on basis of artistic excellence requirement).

[278] *See Rosenberger*, 515 U.S. at 829 (finding that university made funds available to student groups meeting objective standards).

sion.[279] The standards in these cases involved no subjective judgments.[280]

Artistic excellence represents a criterion that courts cannot measure objectively.[281] For some, indecent language or content will always negate a work's claim to artistic excellence.[282] Others find that such indecency enhances the aesthetic value of art.[283]

Artistic excellence demonstrates the fragility of the line separating content discrimination from viewpoint discrimination.[284] Elements of both forms of discrimination are inherent when any individual decides the worth of a particular piece of art.[285] A person's appreciation, or lack thereof, for the greatness of a particular work of art results from the viewer's values.[286] Therefore, in the context of the arts, the already blurry line between content and viewpoint

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[279] *See Forbes*, 118 S. Ct. at 1644 (finding that AETC could objectively measure political viability).

[280] *See generally id.* (holding that standards of exclusion had objective, not subjective basis); *Rosenberger*, 515 U.S. at 829 (noting that university dispersed funds on objective basis).

[281] *See* Smith v. Goguen, 415 U.S. 566, 573 (1974) (noting that work some people find contemptuous, other people find to represent art); Cohen v. California, 403 U.S. 15, 25 (1971) (observing that work some people find tasteless and without merit represents beauty to others); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 184 (1996) (stating that artistic excellence could only possess viewpoint neutrality if NEA adopted particular perspective, and that NEA's perspective would discriminate on viewpoint basis to those who disagreed with it); Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1210 (1993) (stating that judging quality of art involves "subjective, visceral pronouncements from on high").

[282] *See* Hilton Kramer, *Tyranny of the Avant-Garde in Art: Not All Works Must Receive Public Funds*, ARIZONA REPUBLIC, Sept. 24, 1989, at C1 (finding Mapplethorpe's absolute focus on male sexuality negates artistic worth of his photos); Phil Lawler, *Public Money Should Not Support Obscene Works*, BOSTON HERALD, Nov. 10, 1991, at A41 (deriding NEA for funding work that promotes hatred and lacks artistic merit).

[283] *See* Julie Ann Alagna, Note, *Legislation, Reports and Debates over Federally Funded Art: Arts Community Left with an "Indecent" Compromise*, 48 WASH & LEE L. REV. 1545, 1545 n.2 (1991) (noting viewers need not find work beautiful to find it art); David Foil, *En Garde!*, BATON ROUGE MORNING ADVOCATE, June 21, 1989, at 2D (stating that great art is often as troubling and shocking as it is reassuring or pretty).

[284] *See* Sabrin, *supra* note 281, at 1210 (stating that courts have provided little guidance in distinguishing content discrimination from viewpoint discrimination when decision involves artistic merit).

[285] *See Smith*, 415 U.S. at 573 (stating that personal values will strongly affect judgments of artistic worth); *Cohen*, 403 U.S. at 25 (noting that people make artistic judgments in part based on subjective standards); Post, *supra* note 281, at 184 (arguing that NEA judgments would be objective only if NEA adopted particular viewpoint as doctrinal matter); Sabrin, *supra* note 281, at 1210 (asserting that judging art always implicates subjective standards).

[286] *See* Kreese, *supra* note 10, at 256 (stating that people make judgments about artistic merit based on personal values).

discrimination disappears.[287] Consequently, any funding decision requiring excellence will involve viewpoint discrimination.

### 2. The Government's Patronage as a Feature of the Fourth Forum

The NEA's subjective judgment that a particular work of art demonstrates artistic excellence has another effect. Such a judgment implies approval of the work.[288] Traditionally, wealthy citizens supported the artists whose work they liked.[289] The artists, in turn, lent respectability to their patrons.[290]

The NEA represents a more democratic view of patronage. Congress, representing the will of the citizenry, appoints an agency to distribute public funds to worthy artists.[291] But patronage remains patronage, and segments of the public were offended when their representatives used their money to fund art they found offensive.[292]

The University in *Rosenberger* dispersed funds using objective standards that carried no implicit approval.[293] If a student group

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[287] *See Smith*, 415 U.S. at 573 (holding that people base artistic judgment on personal viewpoint toward subject matter and mode of expression); *Cohen*, 403 U.S. at 25 (observing that personal values may negate beauty of particular work to particular viewer); Post, *supra* note 281, at 184 (arguing that NEA judgments unavoidably involve viewpoint); Sabrin, *supra* note 281, at 1210 (describing how viewpoint is inextricably part of artistic judgment).

[288] *See* HOWARD S. BECKER, ART WORLDS 103 (1982) (finding that patrons choose artists whose work those patrons admire); Lawler, *supra* note 282, at A41 (noting that aristocracy patronized artists whom those aristocrats preferred).

[289] *See Practice and Profession of the Arts: The Artist's Livelihood*, BRITANNICA CD, VERSION 97, (Encyclopaedia Britannica, Inc. 1997) (stating that, historically, artists depended on wealthy patrons for their livelihood).

[290] *See* BECKER, *supra* note 288, at 100 (noting that act of patronage supports claim to aristocratic privilege).

[291] *See* 20 U.S.C. § 1954(c)(1) (1994) (describing NEA's role as funding worthy artistic endeavors); *see also* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2190 (1998) (Souter, J., dissenting) (noting that, through NEA, government acts as patron to artists); Herbert, *supra* note 11, at 413 (noting that NEA made federal government one of art world's most important patrons).

[292] *See Finley*, 118 S. Ct. at 2172 (1998) (noting that Serrano and Mapplethorpe exhibits caused public outcry); Berenson, *supra* note 14, at 46 (reporting that Serrano and Mapplethorpe exhibits outraged large numbers of people); Lawler, *supra* note 282, at A41 (noting NEA represented patronage system and, as such, public should control content of funded proposals); McGuigan et al., *supra* note 9, at 68 (stating that Serrano and Mapplethorpe exhibits resulted in Congress receiving thousands of letters from angry constituents).

[293] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 823 (1995) (listing objective requirements for funding); *see also Finley*, 118 S. Ct. at 2178 (noting objective criteria and general access to funding distinguish *Rosenberger* program from NEA).

met the standards, it received funds.[294] The University made no claim that any subsidy promoted excellence, merely expression.[295]

The NEA, by contrast, chooses only to fund works displaying artistic excellence.[296] Such a finding of excellence carries with it an implicit approval.[297] The government as patron thinks highly enough of an artist's work to subsidize it.[298] Because the government can discriminate against viewpoints when conveying a message, the courts should also allow such discrimination when the government subsidizes work it finds excellent.[299] Otherwise, the public may view the government as endorsing works that, while excellent, nevertheless have the potential to offend.[300]

### 3. Why the Fourth Forum Would Allow Viewpoint Discrimination

If promoting excellence conveys an implicit message of governmental approval, and if subjective standards always implicate viewpoint, then a fourth forum seems necessary for programs like the NEA.[301] Where the courts employ the traditional three-tiered forum analysis, viewpoint discrimination remains unconstitutional.[302] Tied to such an analysis, courts would view any subjective standards

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[294] *See Rosenberger*, 515 U.S. at 825 (noting that university disperses subsidies to qualifying student groups if expenses seem appropriate).

[295] *See id.* at 824 (noting that university made qualifying organizations sign agreement distancing university from substance of expression).

[296] *See* 20 U.S.C. § 954(d)(1) (1994) (noting that artistic excellence represents primary standard for judging grant proposals).

[297] *See* BECKER, *supra* note 288, at 103 (finding that patrons choose artists whose work those patrons admire); Lawler, *supra* note 282, at A41 (noting that aristocracy patronized artists whom those aristocrats preferred).

[298] *See* 20 U.S.C. § 954(d)(1) (noting that NEA should use artistic excellence as primary guide when dispersing funds).

[299] *See, e.g.*, National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2178 (1998) (holding that subjective criteria by which NEA disperses funds does not necessarily constitute viewpoint discrimination); Rust v. Sullivan, 500 U.S. 173, 194 (1991) (holding that government may fund program to advance goals and define limits of program).

[300] *See* BECKER, *supra* note 288, at 103 (1982) (finding that patrons choose artists whose work those patrons admire); Lawler, *supra* note 282, at A41 (noting that aristocracy patronized artists whom those aristocrats preferred).

[301] *See supra* notes 288-98 and accompanying text (arguing that federal government's role as patron creates imprimatur of government approval of funded works); *supra* notes 281-87 and accompanying text (arguing that judgments regarding artistic merit always involve subjective values of viewer).

[302] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1643 (1998) (holding that viewpoint discrimination is presumptively unconstitutional in nonpublic fora).

as suspect because such standards always involve viewpoint.[303] Moreover, the government would not willingly fund fora if the public saw the government as approving of views it was powerless not to subsidize.[304]

The survival of programs such as the NEA hinges on creating a fourth forum in which the government can narrow the scope of permitted expression.[305] Achieving this result does not require overturning *Rosenberger* or expanding *Rust*.[306] Instead, the fourth forum would free the government from the absolute prohibition against viewpoint discrimination.[307] Like the reasonable limitation in *Forbes*, allowing some viewpoint discrimination would increase, not diminish, the amount of speech because the government would be more willing to promote programs like the NEA.[308]

Of course, a fourth forum tolerating viewpoint discrimination has some disadvantages. The government could create fora of this type to promote political ideas held by its legislators.[309] For instance, Congress could create a subsidy program for the most visionary conservative thinkers.[310] However, Congress responded to citizens upset over public funds for indecent art, and Congress

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[303] *See supra* notes 288-98 and accompanying text (arguing that federal government's role as patron creates imprimatur of government approval for funded works); *supra* notes 289-95 and accompanying text (arguing that judgments regarding artistic merit always involve subjective values of viewer).

[304] *Cf. Finley*, 118 S. Ct. at 2172 (noting that Congress placed additional restrictions on NEA in response to controversial exhibits and attendant public outcry); Elizabeth E. DeGrazia, *In Search of Artistic Excellence: Structural Reform of the National Endowment for the Arts*, 12 CARDOZO ARTS & ENT. L.J. 133, 133 (1993) (noting that Mapplethorpe and Serrano shows stimulated calls for elimination or increased congressional control of NEA).

[305] *See supra* notes 222-58 and accompanying text (arguing that within current three-tiered forum structure, decency criteria violates Constitution).

[306] *See supra* notes 227-31, 259-72 and accompanying text (arguing that *Finley* rule contradicts *Rosenberger* and expands *Rust* holding).

[307] *See Forbes*, 118 S. Ct. at 1643; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828-30 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); Texas v. Johnson, 491 U.S. 397, 414 (1989); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581, 587 (7th Cir. 1995); May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1114 (7th Cir. 1986).

[308] *Cf. Forbes*, 118 S. Ct. at 1643 (finding that easier access to fora sometimes results in less speech).

[309] *Cf. Lamb's Chapel*, 508 U.S. at 394 (noting that prohibition on viewpoint discrimination prohibits government from favoring certain perspectives).

[310] *Cf. id.* (observing that government cannot favor one viewpoint over others because of First Amendment prohibition against viewpoint discrimination). Visionary conservatism simply represents one of many possible perspectives that courts currently prohibit the government from espousing through the doctrine of viewpoint discrimination. *See id.*

would respond likewise to voters indignant over using public money to fund positions the voters opposed.[311] The democratic process ensures against Congress using government funds to promote viewpoints unpopular with any sizable bloc of voters.[312]

Critics might also worry that, due to its vast financial resources, the government could also use public speech to marginalize competing ideological positions.[313] However, when defining the government-as-speaker exception, the Supreme Court made clear that programs conveying government messages could not be used to suppress competing messages.[314] Certainly the courts should impose the same limitation on the government-as-patron exception.[315]

The Supreme Court, however, has not yet recognized any fourth forum, and traditional forum analysis would define the NEA as a nonpublic forum.[316] As such, courts find criteria imposing viewpoint discriminatory standards impermissible.[317] Thus, Congress's standard in judging NEA grant proposals should amount to an impermissible exercise.[318] The *Finley* Court found otherwise, however, and the NEA's subjective standards and role as government patron set it apart from the fora discussed in prior cases.[319] Such differences are sufficient to justify placing the NEA in a previously unknown category of forum.[320] Provided that courts tolerated viewpoint discrimination within the forum, such a finding would har-

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[311] *Cf.* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2172 (1998) (noting that Congress enacted decency criteria in response to public anger over Serrano and Mapplethorpe exhibits).

[312] *See generally* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 33-34 (1985) (noting that legislators respond to pressure from segments of voting public).

[313] *Cf. Finley*, 118 S. Ct. at 2178 (noting danger of government employing subsidies for coercive effect).

[314] *See* Rust v. Sullivan, 500 U.S. 173, 192 (1991) (noting that government-as-speaker exception does not permit government to marginalize dangerous ideas)

[315] *Cf. Finley*, 118 S. Ct. at 2178-79 (observing that Court would evaluate artists' claims differently if government suppressed dangerous viewpoints through NEA subsidies).

[316] *See supra* notes 222-44 and accompanying text (arguing that current standards designate NEA as nonpublic forum).

[317] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1643 (1998); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1980); Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581, 587 (7th Cir. 1995).

[318] *See supra* notes 245-56 and accompanying text (arguing that decency criteria represents viewpoint discriminatory standard).

[319] *See supra* notes 274-87 and accompanying text (discussing unique aspects of NEA as public arena for speech).

[320] *See supra* notes 273-319 and accompanying text (arguing for creation of new, fourth forum classification).

monize the Court's decision in *Finley* and its previous rulings.[321] Certainly, the very characteristics that distinguish the NEA from other fora also justify the application of viewpoint discrimination.[322] The NEA's standards already involve viewpoint,[323] and the inherent potential for viewpoint discrimination, and the role of patron places the government, by ostensibly endorsing the excellence of a given work, in a similar position to that of speaker.[324]

## CONCLUSION

A novel solution could salvage the *Finley* opinion while retaining the Court's previous decisions on expression in public fora. A fourth forum seems possible, with unique traits making viewpoint discrimination permissible. For programs such as the NEA, where some viewpoint restrictions seem inevitable, the fourth forum presents itself as a distinct and intriguing possibility.

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[321] *See supra* notes 273-75 and accompanying text (arguing fourth forum permitting viewpoint discrimination would provide consistency with previous holdings).

[322] *See supra* notes 273-300 and accompanying text (arguing that subjective nature of selection and government patronage provide appropriate justifications for viewpoint discriminatory standards).

[323] *See supra* notes 277-87 and accompanying text (arguing that standards of artistic excellence unavoidably involve subjective standards held by viewer).

[324] *See supra* notes 288-300 and accompanying text (arguing that government's role as patron should permit discrimination on viewpoint basis).

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