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Unringing the Bell: Publicly Funded Art and the Government Speech Doctrine

John Barlow
J.D. Candidate, Emory Law School, 2014

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John Barlow[*]

The framers of the United States Constitution drafted the First Amendment with the intent to codify one of the United States' foundational and immutable individual rights: the freedom of speech. While this freedom has remained a bedrock of constitutional law and a core value protected by the Court, it is not without its nuances and exceptions. The Government Speech Doctrine, a recently minted judicial concept, is one such nuance. The Doctrine states that when the government is the speaker the First Amendment does not restrict its speech, and it may disseminate particular ideas or discriminate against particular viewpoints. At its core, the Government Speech Doctrine is an attempt by the Court to balance the need of a functional government with First Amendment rights. The Doctrine, while attempting to navigate the tension between free speech and government activities, creates an interesting question: when does government involvement in speech make that speech an extension of the government and thus subject to the Government Speech Doctrine?

The realm of publicly funded art is an arena where this question is particularly nettlesome. When the government or a governmental unit funds the creation of public artwork, who is the speaker? Is the government the speaker when it provides funding and space for the art? Does the government speech cease once the government has exercised its control in allocating funding to a particular artist for a particular work? Where does an intended government message stop and the expressive nature of art to provoke dialogue and convey multiple messages begin?

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How do you separate the vision of the artist from the views of the government and ascertain what in the artwork is government speech and what is private artistic speech? Where do the rights of the government end and the rights of the artist begin?

This Article advances the novel argument that within the domain of removing publicly funded art from public display, the application of the Government Speech Doctrine is improper because of the current scope and policy considerations of the Doctrine, the mutable nature of art speech, and artist moral rights. As an alternative, this Article proposes a model statute legislatures should adopt that outlines an appropriate analytical framework for removing public art from public display that takes into consideration individual free speech rights, the government's right to control its own messages, the nature of art speech, and artist moral rights.

I. INTRODUCTION

"An Artist is not paid for his labor but for his vision."
— James Abbott McNeill Whistler[*1]

Art is speech;[2] it resonates from our past in pottery shards, illuminated manuscripts, and frescos. Because art is speech, it is protected by the First Amendment of the United States Constitution, which states that "Congress shall make no law . . . abridging the freedom of speech."[3] While limited carve-outs to free speech exist, the protections offered by the First Amendment have been widely protected by the Supreme Court.[4] These protections range from preventing the government from invidiously discriminating or suppressing speech based on content or viewpoint to

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1. James Abbott McNeill Whistler *quoted in* ANU GARG, ANOTHER WORD A DAY 163 (2005).

2. Art is protected speech under the First Amendment, with the general narrow exceptions to First Amendment protection still applying. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) (finding that artworks such as Jackson Pollock paintings are "unquestionably shielded" by the First Amendment).

3. U.S. CONST. amend. I.

4. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech."); Cohen v. California, 403 U.S. 15, 18 (1971) (finding anti-draft speech was protected because it did not "incite disobedience"); Roth v. United States, 354 U.S. 476, 484 (1957) (denying free speech protection to obscene speech because it is "utterly without redeeming social importance"); *see also* N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

ensuring that public forums remain open to vigorous public debate.[5] However, when the government is the speaker, it does not need to maintain viewpoint neutrality, a judicial concept implied by the Supreme Court in the late 1970s.[6] This theory, known as the Government Speech Doctrine, has since expanded to classify a broad spectrum of actions as government speech, from the choice to fund specific government programs, to the decision to approve or deny public space for private speakers.[7] The Government Speech Doctrine is an attempt by the Court to balance private, individual speech rights with government's need to control its own functions.[8] Although courts have used the Government Speech Doctrine to justify the removal of publicly funded artworks from public spaces, the application of the Doctrine to such removals is improper because of the scope and underlying policy considerations of the Doctrine, the mutable nature of art speech, and artist moral rights.[9]

Part I of this Article introduces the Free Speech Doctrine and the more recently minted Government Speech Doctrine, and briefly traces the latter's history through case and policy analysis. Part II discusses the mutable nature of art as identified by both the Court and the intellectual community, focusing on the ability of art speech to change based on individual perspective and through spatial and temporal context. It focuses on broad changes in art theory and psychological analyses of individual reactions to art to explore the mutable nature of art on a personal level, and discusses the changing nature of art speech as it relates to the passage of time and the context in which an artwork is displayed. Part III discusses the moral rights of artists, first by laying out a brief history of moral rights as they exist in Europe, then as they currently exist in the United States under the 1990 Visual Artists Rights Act. Part III then discusses the tension that exists between moral rights and the Government Speech Doctrine and concludes that moral rights make the application of the Doctrine improper with regards to the removal of public artwork from public spaces. Finally, Part IV proposes a model statute that establishes an analytical framework for the removal of publicly funded art from public

5. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 117 (1972) (noting "access to the streets, parks, and other similar public places . . . for the purposes of exercising [First Amendment rights] cannot constitutionally be denied broadly") (internal quotations omitted).

6. *See generally* Wooley v. Maynard, 430 U.S. 705, 717 (1977).

7. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

8. *See infra* Part I.A.

9. *See infra* Part III.A.

display. The proposed statute sidesteps the issue of government speech versus private speech and takes into consideration the classic free speech protection, the government's right to speak, the mutable nature of art speech, and moral rights. After proposing the statute, Part IV discusses its provisions and outlines its potential application in a case and possible ramifications.

II. THE LANDSCAPE OF FREE SPEECH AND THE GOVERNMENT-SPEECH DOCTRINE

This Part explores the landscape of the First Amendment, from the protection offered to private individuals to government speech regulation. Private individuals have robust free speech rights that cannot be limited by the government outside of a narrow band of exceptions.[10] Alternatively, when the government is viewed as the speaker, its speech is not regulated by the Free Speech Clause and thus is not required to remain viewpoint neutral.[11] Not surprisingly, considerable tension exists between these two broad concepts. This Article's focus is on the specific tension that exists between government funding or encouragement of speech and the retention of control over the speech in question. The following sections will address the inception and context of the Government Speech Doctrine.

A. The First Amendment: A Brief Overview

At the core of the First Amendment is the concept that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[12] Although this concept seems axiomatic, the Supreme Court never actually ruled on the constitutionality of any federal law involving free speech until the early part of the twentieth century.[13] Since then, unabridged free speech has been widely protected, with the Court finding only very narrow and limited exceptions to speech regulation in realms such as speech inciting violence,[14] obscenity,[15] and

10. *See infra* Part I.A.

11. *See* Bd. of Regents of Univ. Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (finding a government entity has the right to "speak for itself"); *see also infra* Part I.B.1.

12. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

13. *See* Schenck v. U.S., 249 U.S. 47, 52 (1919) (upholding the constitutionality of the Espionage Act).

14. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (curbing speech against the government only where such speech is "directed to incit[e] or produc[e] imminent lawless action").

defamation.[16] Free speech rights have also been expanded into previously regulated areas such as political speech,[17] anonymous speech,[18] and flag desecration.[19]

While the Court has found that individuals have the right to widely unrestricted private speech,[20] this right is not unequivocal and depends on the setting in which the speech takes place. This theory, known as the Forum Doctrine, divides these settings into three categories: traditional public forums,[21] limited or designated public forums,[22] and nonpublic forums.[23] Speech in public forums, whether traditional or limited, can only be narrowly limited,[24] whereas speech in nonpublic forums may be more widely regulated.[25] Special considerations regarding free speech regulation are given to particularly sensitive forums such as public schools.[26] With

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15. *See* Roth v. United States, 354 U.S. 476, 489 (creating a "community standards" analysis for what is considered obscene speech).

16. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (making "actual malice" the standard for defamation suits).

17. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 313 (2010) (finding political spending is a form of protected speech under the First Amendment).

18. *See* Talley v. California, 362 U.S. 60, 65 (1960) (striking down a Los Angeles ban against the distribution of anonymous pamphlets).

19. *See* Texas v. Johnson, 491 U.S. 397, 397 (1989) (finding a Texas ban against flag burning to be unconstitutional).

20. *See, e.g.*, *Sullivan*, 376 U.S. at 270 (noting that there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

21. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (defining traditional public forums as "streets and parks which have immemorially been held in trust for the use of the public") (internal quotations omitted). *See also* United States v. Kokinda, 497 U.S. 720, 727 (1990) (finding a certain type of sidewalk not to be a traditional public forum and thus narrowly construing the definition of public forum promoted in *Perry*).

22. Perry, 460 U.S. at 45 (defining limited public forums as those which "the State has opened for use by the public as a place for expressive activity").

23. *Id.* at 46 (defining a nonpublic forum as one where "[p]ublic property which is not by tradition or designation a forum for public communication").

24. *Id.* at 45 (permitting time, place, or manner restrictions on speech).

25. *Id.* at 46 (stating that within nonpublic forums, "communication is governed by different standards").

26. Bethel Sch. Dist. No. 403. v. Fraser, 478 U.S. 675, 681 (1986) (balancing student free speech rights on school campuses against countervailing societal interests).

the very basic structure of individual free speech rights in mind, this Article now turns to the Government Speech Doctrine.

B. The Common Law Development of the Government Speech Doctrine

The Government Speech Doctrine asserts that when the government is the speaker, it does not have to maintain viewpoint neutrality.[27] This doctrine is crystalized in *Rust v. Sullivan*[28] and its progeny, but has its roots in *Wooley v. Maynard*,[29] where the Court opined that a state could have an interest sufficiently compelling to curb free speech protection.[30] In *Wooley*, the state of New Hampshire required noncommercial motor vehicles to display the state motto "Live Free or Die" on their license plates.[31] Two residents of New Hampshire, the Maynards, refused to display the motto on their automobile and Mr. Maynard was cited, fined, and jailed for 15 days after refusing to pay his fines.[32] Mr. Maynard sued to enjoin further enforcement of the statute, claiming a violation of his free speech rights.[33]

The Supreme Court began its free speech inquiry by acknowledging that "the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all."[34] The Court identified the Maynards' interest in "hold[ing] a point of view different from [New Hampshire]" and acknowledged that a state could have an interest sufficient to compel an individual to display a state motto on his or her car.[35] Ultimately, however, the Court found that New Hampshire could not "stifle fundamental personal liberties when the end

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27. *See infra* Part I.C.; *see, e.g.*, Rust v. Sullivan, 500 U.S. 173, 194 (1991) (noting that the government may promote certain points of view when funding programs).

28. *See Rust*, 500 U.S. at 193 (holding that the Government can, without violating the Constitution, fund certain programs it believes to be in the public's interest without funding an alternative program that would deal with the same issue in a different way).

29. *See generally* Wooley v. Maynard, 430 U.S. 705 (1977).

30. *Id.* at 716.

31. *Id.* at 707.

32. *Id.* at 708.

33. *Id.* at 709.

34. *Id.* at 714.

35. *Wooley*, 430 U.S. at 715-16 (deciding whether "[New Hampshire's] countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates").

can be more narrowly achieved."[36]

Wooley demonstrates the limit of the government's power to compel speech by private individuals.[37] The opinion also analyzes the underlying government right to speak phrases like "Live Free or Die."[38] Although the government did not satisfy its burden in *Wooley*, the Supreme Court opined that a state could have a "countervailing interest" sufficiently compelling to curb Free Speech protection.[39] Through this aspect of *Wooley*, the Court laid the foundation for the Government Speech Doctrine, though it lay fallow for fourteen years.

1. Cultivating the Landscape Created by *Wooley v. Maynard*

Rust v. Sullivan[40] marked the first time that the Supreme Court explicitly created the Government Speech Doctrine and laid out its analytical framework. In *Rust*, recipients of Title X funding ("Petitioners") brought suit against the Secretary of the Department of Health and Human Services ("Secretary") for preventing the use of such funds for abortions or abortion-related activities.[41] Section 300 of Title X, passed in 1970, authorized the Secretary to "make grants and to enter into contracts with public or nonprofit private entities to assist in the establishment and operation of . . . family planning projects . . . and effective family planning methods."[42] In 1988, the Secretary interpreted section 300 to mean "*preventive* family planning" that did not include abortion or abortion-related counseling.[43] Petitioners' suit alleged a violation of their First Amendment rights.[44]

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36. *Id.* at 716. One of the reasons put forth by New Hampshire in support of the requirement that individuals display the state motto on their cars was to "promot[e] appreciation of history, individualism, and state pride." *Id.* The Court rejected that argument, stating "where the State's interest is to disseminate an ideology . . . such interest cannot outweigh an individual's First Amendment right to avoid becoming a courier for such message." *Id.* at 717.

37. *See, e.g.*, *id.* at 712.

38. *See generally id.*

39. *See Wooley*, 430 U.S. at 716-17.

40. *See generally Rust*, 500 U.S. at 173.

41. *Id.* at 181.

42. *Id.* at 178 (quoting 42 U.S.C. § 300(a)(1970)).

43. *Id.* at 179 (quoting H.R. REP. NO. 91-1667, at 8 (1970) (Conf. Rep.)).

44. *Id.* at 192. Petitioners alleged that the Government violated their First Amendment rights by "impermissibly imposing viewpoint-discriminatory conditions on government subsidies . . . [b]ecause Title X continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to

The Supreme Court began its analysis of the alleged First Amendment rights violation by bluntly stating that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[45] In distinguishing government funding of a program from otherwise prohibited viewpoint discrimination, the Court rationalized that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternate activity consonant with legislative policy."[46] The Court also identified policy reasons underpinning the ability of the Government to condition funding on certain prerequisites.[47] In holding that conditioning the receipt of government funds on certain speech restrictions is constitutional, the Court emphasized that the Title X recipients were only "limited during the time that they actually work[ed] for the project."[48]

Four years later in *Rosenberger v. Rector & Visitors of University of Virginia*,[49] the Supreme Court considered whether a university could withhold payments to third-party contractors for the printing of a student publication on the basis of a specific ideology supported by that publication.[50] In *Rosenberger*, Wide Awake Productions ("WAP"), an

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views and information about abortion, [and thus] invidiously discriminates on the basis of viewpoint" (internal quotations omitted).

45. *Id.* at 193.

46. *Rust*, 500 U.S. at 175, 193 (1991) (citing Maher v. Roe, 432 U.S. 464, 475 (1977)). Programs receiving Title X funding were also not completely barred from engaging in pro-abortion or abortion-related speech. The Court distinguished *Rust* as not completely barring an otherwise constitutionally protected right to engage in such speech because "[t]he regulations do not force the Title X *grantee*, or its employees, to give up abortion-related speech; they merely require that such activities be kept separate and distinct from . . . the Title X *project*."

47. *Id.* at 194. In the context of funding programs to promote what the Court identified as "permissible goals," the Government would necessarily discourage alternative goals, but to hold that the Government unconstitutionally discriminated on the basis of viewpoint "would render numerous government programs constitutionally suspect."

48. *Id.* at 199. The Court expanded this concept that a funding recipient's speech was restricted only within the scope of the governmentally supported project by more broadly stating that "[t]he general rule that the Government may choose not to subsidize speech applies with full force." *Id.* at 200.

49. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

50. *Id.* at 822–23.

independent student organization[51] at the University of Virginia, was denied funding from the Student Activities Fund ("SAF") to print and publish a student newspaper because of the paper's Christian viewpoint.[52] WAP brought suit against the University, alleging that the denial of SAF support based on the publication's Christian perspective violated constitutionally protected free speech.[53]

The Court began its analysis of the alleged free speech violation by laying out the general groundwork of free speech protection[54] and the importance of the location of the speech.[55] Following this analysis, the Court then reaffirmed the Government Speech Doctrine it established in *Rust*.[56] However, the Court then distinguished the speech at hand from the speech in *Rust*, finding that when the government "expends funds to encourage a diversity of views from private speakers[,]" it may not regulate that speech based on viewpoint.[57] The Court articulated that "[t]he danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them."[58] In ultimately concluding that the University violated the free speech rights of WAP, the Court found that the University, by providing funds that subsidized student activities, created a limited public forum that was required to include all viewpoints.[59] More

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51. *Id.* at 823–25. Also known as "Contracted Independent Organizations" (CIOs), groups that achieve this status may, among other things, have access to school facilities and apply for funding from the SAF as long as they sign a contract acknowledging that they are separate and distinct from the University of Virginia.

52. *Id.* at 825, 827 (alteration in original). The University guidelines for SAF payments specifically excluded the use of funds for religious activities which were described as "any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity.'"

53. *Id.* at 827.

54. *Id.* at 828–29.

55. *Rosenberger*, 515 U.S. at 830 (finding that the classic setting of the University as a forum for the exchange of ideas and the limited public forum created by the SAF were relevant to the analysis).

56. *Id.* at 833 (acknowledging that "when the State is the speaker, it may make content-based choices").

57. *Id.* at 833-34. The Court further distinguished this case from *Rust* because in *Rust*, "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program."

58. *Id.* at 835. Another corollary danger to speech identified was the potential "chilling of individual thought and expression."

59. *Id.* at 837.

broadly, this limited public forum indicated that the government in *Rosenberger* was not speaking but rather subsidizing private, individual speech.[60]

Three years later a related but distinct issue relating to the Government Speech Doctrine and art arose in *National Endowment for the Arts v. Finley*.[61] In *Finley*, the National Endowment for the Arts ("NEA"), based on the direction of a 1990 Congressional Amendment to the National Foundation on the Arts and the Humanities Act of 1965 ("Act"), denied funding to four individual artists who had previously been recommended for funding prior to the 1990 amendment.[62] The unamended Act identified funding considerations broadly, including "artistic and cultural significance, giving emphasis to . . . creative and cultural diversity."[63] The amendment directed the chairperson of the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[64] The artists brought suit seeking restoration of the recommendation that their grants be approved, asserting that the "decency and respect" standard promulgated by the 1990 amendment violated the Free Speech Clause by imposing invidious viewpoint discrimination.[65]

The Court first acknowledged the general purpose of the NEA to support the arts[66] but qualified this support, stating that "although the First Amendment applies in the subsidy context, Congress has wide latitude to

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60. Here, the University, due to its funding structure for student groups, subsidized private speech as it would classic forum speech, just as streets and parks were subsidized by the government. *See, e.g.*, Citizens United, 558 U.S. at 312 (finding political spending is a form of protected speech under the First Amendment).

61. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572-73 (1998).

62. *Id.* at 569.

63. National Foundation on the Arts and the Humanities Act of 1965, 20 U.S.C. § 954(c)(1) (2006).

64. *Id.* § 954(d)(1); *see Finley*, 524 U.S. at 591. This amendment to the Act was implemented in response to a number of public criticisms on the use of NEA grants to fund two shows: one, a retrospective of works by Robert Mapplethorpe containing homoerotic images; and the other, a work by Andres Serrano called "Piss Christ." *See id.* at 574.

65. *Finley*, 524 U.S. at 572.

66. 20 U.S.C. §§ 953(b), 951(7) (The Act created a "broadly conceived national policy of support for the . . . arts in the United States" and pledged federal funds to "help create and sustain . . . a climate encouraging . . . the release of creative talent."); *see also id.* § 952 (2006).

set spending priorities."[67] Rejecting the argument that the "decency and respect" standard would inevitably "be utilized as a tool for invidious viewpoint discrimination," the Court found it was permissible for the NEA to consider "respect for the diverse beliefs and values of the American public" when approving or rejecting grant applications.[68] The Court was also careful to distinguish the funding here from the funding in *Rosenberger*, articulating that "[i]n the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately 'encourage a diversity of views from private speakers.'"[69] So long as the NEA was not "leverag[ing] its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints" or "impos[ing] . . . a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace,'" then it was merely choosing "to fund one activity to the exclusion of another."[70]

In the most recent Supreme Court case to deal with the overlap between government speech and art, *Pleasant Grove City, Utah v. Summum*,[71] the Court addressed the issue of whether a city violated free speech rights when it refused to display a privately-funded monument in a

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67. *Finley*, 524 U.S. at 571; *see also* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983) (granting Congress the authority to set certain spending priorities).

68. *Finley*, 524 U.S. at 582-84.

69. *Id.* at 586. The Court also found the competitive process to receive the grants to be a distinguishing feature from *Rosenberger* where the funds were indiscriminately allocated to any group classified as a CIO. *Id.* In a dissenting opinion, Justice Souter challenged this distinction, finding that "*Rosenberger* controls here." *Id.* at 613 (Souter, J., dissenting). Justice Souter pointed out that scarcity in funding that makes the process competitive does not allow for otherwise impermissible viewpoint discrimination. *Id.* at 614-15. Furthermore, Souter felt that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" and feared the "chilling effect" the NEA's "decency and respect" standard would have on the artistic community. *Id.* at 621. Souter's dissent is interesting as it is an attempt to create an alternative rationale for judging competitive funding offered by a governmental body.

70. *Finley*, 524 U.S. at 587–88 (majority opinion). Conditioning the receipt of funds on certain speech limitations has been upheld in a variety of contexts by the Supreme Court. *See, e.g.*, United States v. Am. Library. Ass'n, Inc., 539 U.S. 194, 196 (2003) (holding that "[w]hen the Government appropriates public funds to establish a program, it is entitled to broadly define that program's limits"). *See also* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871–72 (1982) (finding that while libraries have the ability to choose what books to add to their collection, "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books").

71. Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

public park.[72] In *Summum*, a religious organization requested to erect a stone monument containing the "Seven Aphorisms of SUMMUM" in a public park in Pleasant Grove City, Utah.[73] Pleasant Grove City denied the request several times and Summum filed suit, alleging a violation of its free speech rights.[74]

The Court identified the novelty of the issue[75] and structured its analysis of the issue by first analyzing its precedent dealing with government speech.[76] First, the Court recognized the right of a government entity to speak, either on its own behalf or through a private entity, but couched that right with the acknowledgment that "the government does not have a free hand to regulate private speech on government property."[77] While the Court admitted that "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech,"[78] it had no trouble quickly identifying that "[p]ermanent monuments displayed on public property . . . represent government speech."[79] The Court supported its advancement of this idea on several principles.[80] Historically, governments have used monuments to speak.[81] Second, the Court identified that cities, like Pleasant Grove, often exercised control over the selection process.[82] The

72. *Id.* at 464.

73. *Id.* at 465.

74. *Id.* at 465-66.

75. *Id.* at 467 ("No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park.").

76. *Id.* at 467.

77. *Summum*, 555 U.S. at 467-69.

78. *Id.* at 470 (The Court also acknowledged that in certain instances a government entity may create a limited forum, and in such a forum may impose restrictions on speech that are reasonable and viewpoint neutral.); *see* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (describing how a limited public forum is created); *see* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 -08 (2001) (finding a limited public forum where a school allowed groups to use its facilities after hours).

79. *Summum*, 555 U.S. at 470.

80. *Id.* at 470-71.

81. *Id.* at 470; *see also id.* at 471 (concluding that both publicly and privately financed and donated monuments constituted government speech because it is "not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.").

82. *Id.* at 471-72.

fact that the land in question was a public park influenced the Court in determining that this speech was government speech because public parks are "often closely identified in the public mind with the government unit that owns the land."[83]

The Court then tackled the more complicated issue of what sort of message an art piece, such as a monument, actually conveys. The Court first admitted that the meaning conveyed by a monument is not generally simple or one-dimensional.[84] Articulating the dynamic nature of art speech, the Court found that

> [b]y accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. Indeed, when a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretations of the monument's significance. By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.[85]

The Court also noted "the message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity" and can "change over time."[86] It is notable that the Court so readily classified the monument in question as government speech yet articulated the difficulty in identifying any particular message that it could convey.[87] The difficulty of pinning down a particular message conveyed by art speech is highlighted by the four concurring opinions filed in *Summum*, which express varying viewpoints regarding the reach and merits of the Government Speech

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83. *Id.* at 472.

84. *Id.* at 474 (offering examples of the difficulty in attaching a meaning to a monument such as, "[s]ome observers may 'imagine' the musical contributions of John Lennon . . . [o]thers may think of the lyrics of the Lennon song."); *id.* at 475 (describing another example of attaching a meaning to a monument with a bronze statue in Arkansas displaying the word "Peace" in many languages); *id.* (admitting that when the monuments are not text-based their message is likely to "be even more variable.").

85. *Summum*, 555 U.S. at 476–77.

86. *Id.* at 477.

87. *Id.* at 476-77.

Doctrine.[88]

2. Interpreting the Landscape: *Newton v. LePage*

The government has the ability to speak, be it through funding[89] or denying public space for private speech.[90] However, as the concurring opinions in *Summum* highlighted, the scope of the Government Speech Doctrine and its appropriate application are ill-defined. This ill-defined scope of the Government Speech Doctrine is further highlighted in *Newton v. LePage*.[91]

In *Newton*, the First Circuit addressed the issue of whether a mural paid for with public funds hanging in the Maine Department of Labor ("MDOL") constituted government speech.[92] In 2007, Judith Taylor was commissioned to create a mural for the MDOL antechamber.[93] The finished mural[94] was installed and presented to the public in August of 2008.[95] In early 2011 Paul LePage, the recently elected governor of Maine, received an anonymous complaint about the mural, and in March 2011, the mural was taken down and placed in storage.[96] After the removal of the mural, Taylor and other Maine residents brought suit alleging free speech

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88. *Id.* at 481 (Stevens, J., concurring) (expressing doubt about the merit of the entire government speech doctrine when stating,"[t]o date, our decisions relying on the recently minted government speech doctrine to uphold government actions have been few and, in my view, of doubtful merit."); *id.* at 487 (Souter, J., concurring) (offering an alternative approach to developing a *per se* rule as to what speech is governmental, stating "the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech").

89. *See, e.g.*, *Sullivan*, 500 U.S. at 192-93.

90. *See, e.g.*, *Summum*, 555 U.S. at 472.

91. Newton v. LePage, 700 F.3d 595, 602 (1st Cir. 2012).

92. *Id.* at 597.

93. *Id.*

94. *See infra* App., illus. 1.

95. *Newton*, 700 F.3d at 598.

96. *Id.* at 598-600. On a radio program, LePage claimed the mural was too "one-sided," implying that the mural was too pro-labor, as the anonymous complaint alleged the mural was "overwhelming, pro-labor, and anti-business." *Id.* at 598-599. In an interview, LePage alternatively claimed that his objection with the mural was "simply where the money [to fund the mural] came from." *Id.* at 600. In a press release after the interview, members of the LePage administration acknowledged they "originally removed the mural because of its messaging [as being too pro-labor]" and "that it was then discovered how the mural was funded" which further supported the decision to remove the mural. *Id.* at 600.

violations.[97]

In analyzing the nature of the mural speech, the First Circuit identified that the First Amendment protects artistic expression.[98] The court dismissed the idea that the MDOL anteroom was a public forum[99] and then outlined the authority granted by the Government Speech Doctrine to the government or a governmental unit: the right of association with the message of the mural,[100] the right to remove offensive artwork,[101] the right to consider the use of the space in which the artwork is displayed,[102] and the right of an administration to display its own message.[103] Ultimately, the First Circuit concluded that the mural was government speech and that while the removal of the mural may be controversial, dissatisfaction with the decision could be voiced through the voting process, not by prohibiting LePage from taking the mural down.[104]

Newton exemplifies an inherent difficulty underlying the Government Speech Doctrine: when does government involvement with speech make that speech *government speech*?[105] Although the Court never explicitly outlines the boundaries and policy considerations underlying the Government Speech Doctrine,[106] the boundaries of the Doctrine *implied* by the Supreme Court make its application to justify the removal of public art from public space improper.

C. Analyzing the Government Speech Doctrine: Control and Association

At its core, the Government Speech Doctrine is the Court's attempt to navigate the tension between the competing policies of the government's need to control its own messages and private, individual free speech rights.[107] Where the government acts in a more functional capacity such as

97. *Id.* at 600.

98. *Id.* at 601.

99. *Id.* at 602.

100. *Id.*

101. *Newton*, 700 F.3d at 603.

102. *See id.*

103. *Id.*

104. *See Id.* at 604.

105. *See id.* at 602.

106. *Id.* at 603

107. *Newton*, 700 F.3d at 602

a service provider, the Court has permitted the government to disseminate a particular message.[108] Contrarily, where the government moves beyond the realm of functionality and encroaches into the realm of idea suppression, the Court has scrutinized the government activity under a classic free speech analysis.[109]

Determining where the government ceases to be functional and becomes suppressive is difficult, with the Court acknowledging that situations exist where "it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech."[110] Because of this difficulty, the Court has had reservations in creating a rigid analytical framework with regards to the Government Speech Doctrine, stating instead that the government may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints" or "impose . . . a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'"[111] The subsections below address the issue of the proper scope of the Government Speech Doctrine when the government performs a functional role as a provider, be it through the provision of funds for speech or through space for speaking.

1. The Boundaries of the Government Speech Doctrine

The first guidepost established in *Rust v. Sullivan* shows that the government may condition the receipt of funds on certain speech restrictions when performing a functional role as a service provider.[112] The ability of the government to allocate resources based on certain speech restrictions was further articulated in later Government Speech Doctrine cases such as *Finley* and *Pleasant Grove*, although the Court resisted

108. *See, e.g.*, *Rust*, 500 U.S. at 179 (providing funds for family planning services).

109. *See, e.g.*, *Rosenberger*, 515 U.S. at 835 (prohibiting the University of Virginia from prohibiting the publication of a magazine based on the content of the magazine).

110. *See Summum*, 555 U.S. at 470.

111. *See Finley*, 524 U.S. at 587.

112. *See Rust*, 500 U.S. at 193 (citing Maher v. Roe, 432 U.S. 464, 475 (1977)). Programs receiving Title X funding were also not completely barred from engaging in pro-abortion or abortion-related speech. The Court distinguished *Rust* from completely barring an otherwise constitutionally protected right to engage in such speech because "[t]he regulations do not force the Title X *grantee*, or its employees, to give up abortion-related speech; they merely require that such activities be kept separate and distinct from . . . the Title X *project*." *Id.* at 175 (emphasis in original).

granting the Government complete control over a message just because the government provided funds or space for that message.[113] For instance, in *Finley*, the Court upheld the NEA's decency standard to receive funding so long as the NEA did not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints."[114] In a logically parallel decision in *Pleasant Grove*, the Court permitted Pleasant Grove City to reject displaying a privately created sculpture in one of its parks, but, like *Finley*, couched its assertion by also stating that "the government does not have a free hand to regulate private speech on government property."[115]

The second guidepost, on the opposite end of the spectrum, shows the government can lose the ability to control speech it funds when the funds allocated indiscriminately support individual, private speech, rather than a direct government message.[116] In *Rosenberger*, the Court found that by subsidizing student activities, the University of Virginia had created a limited public forum from which it could not impermissibly exclude certain viewpoints.[117] In *Pico*, the Court gave weight to a school board's preliminary decision to embrace or reject certain ideas contained in books, but drew the line at allowing the school to later remove said books from the library because it decided after the books' placement, that it disagreed with the books' points of view.[118] This resistance to allowing the government to "unring the bell" when it funds private speech is also implied in *Rosenberger*.[119] There, the Court did not allow the University of Virginia to deny funding to a student group when the very reason the group had access to the funds was because the University allowed the group to

113. *See Finley*, 524 U.S. at 587; *Summum*, 555 U.S. at 468–69.

114. *See Finley*, 524 U.S. at 587.

115. *See Summum*, 555 U.S. at 468–69.

116. *See Rosenberger*, 515 U.S. at 864.

117. *Id.* at 837; *see Finley*, 524 U.S. at 587–88 (stating that conditioning the receipt of funds on certain speech limitations has been upheld in a variety of contexts by the Supreme Court); *see, e.g.*, *Am. Libr. Ass'n, Inc.*, 539 U.S. at 196 (holding that "[w]hen the Government appropriates public funds to establish a program, it is entitled to broadly define that program's limits"); *cf. Pico*, 457 U.S. at 871–72 (finding that while libraries have the ability to choose what books to add to their collection, "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books").

118. *See Pico*, 457 U.S. at 873. *Pico*, however, does not stand for the assertion that a governmental body cannot change its mind, stating that "criteria that appear on their face to be permissible" may be an appropriate basis for action such as reversing a previous decision.

119. *See Rosenberger*, 515 U.S. at 823-24, 834, 837.

register as a student group.[120] Between these two very broad guideposts is a wide swath of gray.

2. The Implicit Policy Considerations of the Government Speech Doctrine

While the Court never states it explicitly, the proximity of the government allocation of funding or space to the functional role of the government as a provider of resources influences the amount of control the Court allots the government over the speech in question. Whether the government is acting within this functional role as a provider of resources as opposed to encroaching on private, individual free speech rights turns on two implicit considerations: namely, the association between the government and the speech in question, and the amount of control the government exercised over said speech.

First, one of the Court's primary concerns with regard to the ability of the government to regulate governmentally funded or supported speech is the association between the government and the speech in question.[121] *Rust* marks the most straightforward application of this theory that the more the government will be associated with the speech in question, the more the government can control that speech, with the Court stating that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program."[122] This idea makes perfect sense, as when the government acts within its functional role as a provider of services, the public will inherently associate that service with the government.

This sort of "association with the government equals control by the government" mentality is reinforced in *Pleasant Grove*, where the Court found that when the speech in question was in a form classically associated with the government[123] and would be displayed on land "closely identified in the public mind with the government unit that owns the land," the government had the ability to regulate the speech in question.[124] In the

120. *See id.*

121. Oddly, although the Court never embraced the Souter concurrence in *Pleasant Grove* where he suggested that "the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech," the Court seems to be doing just that in a less direct way. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 487 (2009).

122. *See Rust*, 500 U.S. 173, 194 (1991).

123. *See Summum*, 555 U.S. at 470.

124. *Id.* at 472. This logic is consistent with concerns articulated in *Rosenberger* where the Court found that "when the state is the speaker, it may

alternative, where the government is perceived as merely "encourag[ing] a diversity of views from private speakers," the risk of association is diminished, and as such, the Court has shown trepidation in allowing the government to exercise control over said speech via the Government Speech Doctrine.[125]

The second concern that the Court indirectly focuses on when determining the amount of latitude the government may have when regulating speech is control. *Rosenberger* highlights an instance where a governmental unit gave up control of the speech it aimed to regulate and, as a result, forfeited the ability to regulate that speech.[126] Whereas in *Rust*, the government had a clear objective and aim for the allocation of Title X funding,[127] in *Rosenberger*, that clarity of objective was not present. While the initial decision to label a group as an independent student organization (and thus make the group eligible to request University funds) rested with a governmental unit, once that threshold was passed, funding was allocated indiscriminately.[128] In *Finley*, the NEA's goal was to fund art that encouraged "artistic and cultural significance, giving emphasis to . . . creative and cultural diversity."[129] Unlike *Rosenberger* where the Court did not grant the government the ability to regulate private speech, the Court granted the NEA a narrow authority to approve grant requests under the

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make content-based choices." *Rosenberger*, 515 U.S. at 833. The Court, though not expressly stating it, has expanded that concern articulated in *Rosenberger* to a broader assumption that when "the state is the speaker" or the state is *perceived as the speaker*, then it should be able to regulate the speech in question.

125. *See, e.g.*, *Rosenberger*, 515 U.S. at 834.

126. *See id.* at 837.

127. *See Rust*, 500 U.S. at 193 (citing Maher v. Roe, 432 U.S. 464, 475 (1977)). Programs receiving Title X funding were also not completely barred from engaging in pro-abortion or abortion-related speech. The Court distinguished *Rust* from completely barring an otherwise constitutionally protected right to engage in such speech because "[t]he regulations do not force the Title X *grantee*, or its employees, to give up abortion-related speech; they merely require that such activities be kept separate and distinct from . . . the Title X *project*" (emphasis in original). *Id*. at 175.

128. *See Rosenberger*, 515 U.S. at 823–24. It was the indiscriminate access to funding that led the court to find that the University had created a limited public forum. *Id.* at 829. This unrestricted access for funding should not be thought of as the only reason that the Court was willing to find that a limited public forum was created by the University. For instance, college campuses are thought of as classic public forums, so the location of the funding source on a university campus and through a university agent are relevant. *See supra* Part I.A.

129. *Finley*, 524 U.S. 569, 572 (1998) (citing National Foundation on the Arts and the Humanities Act of 1965, 20 U.S.C. § 954 (2006)).

"decency and respect" standard promulgated by the 1990 amendment to the National Foundation on the Arts and the Humanities Act.[130]

The distinction between *Rosenberger* and *Finley* and the ultimate divergence in the outcomes of the two cases is subtle but important. First, in *Finley*, access to funding was competitive, so a limited public forum was not created by the allocation of resources because the resources were not made available indiscriminately.[131] Second, the competitive nature of the funding[132] allowed the NEA to retain some amount of control over the allocation of funds by asserting the authority to take standards of "decency and respect" into account when determining how to allocate funding.[133]

The amount of control the government seems to retain over the content of speech it funds seems to be inversely proportional to the breadth of the speech in question. For example, in *Rust*, the government retained a high level of control over a narrow type of speech aimed at promoting preventative family planning.[134] Alternatively, in *Finley*, the government retained only a thin ability to regulate a broad type of speech.[135] When the government or a governmental unit exercises its control and allows a certain type of speech, the Court has shown hesitation in allowing that unit to then "unring the bell" and re-exercise control over said speech without having guidelines in place.[136] With these considerations in mind, this Article now turns to the mutable nature of art speech.

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130. *See id.*

131. While it is tempting to argue that obtaining status as a CIO in *Rosenberger* is a form of competition to get access to funds, the comparison would be improper. Based on university policy, "CIO status is available to any group the majority of whose members are students, whose managing officers are fulltime students, and that complies with certain procedural requirements." *See Rosenberger*, 515 U.S. at 823. This process is much less rigorous than receiving an NEA grant.

132. *See* 20 U.S.C. § 954. This amendment to the Act was implemented in response to a number of public criticisms on the use of NEA grants to fund two shows: one, a retrospective of works by Robert Mapplethorpe containing homoerotic images; and the other, a work by Andres Serrano called "Piss Christ." *See Finley*, 524 U.S. at 574.

133. *See Finley*, 524 U.S. at 569.

134. *See Rust*, 500 U.S. at 189.

135. *See Finley*, 524 U.S. at 582 (explaining how the NEA only identifies the broadest funding priorities). The Act created a "broadly conceived national policy of support for the . . . arts in the United States." 20 U.S.C § 953(b). The Act also pledged federal funds to "help create and sustain . . . a climate encouraging . . . the release of creative talent." *Id.* § 951(7).

136. *See Pico*, 457 U.S. at 871–72.

III. THE MUTABLE NATURE OF ART SPEECH

There is an inherent tension between the Government Speech Doctrine and the nature of art speech. The courts in the cases discussed above showed no hesitation in classifying art as government speech. However, defining the nature of the art speech never expanded beyond that very basic classification. This Article proposes that defining art speech as government speech is not that simple. Art has been a central and contentious area of discourse since the start of written history. What is the function of art? What is the form of art? What meaning does art convey? Great thinkers since the time of the ancient Greeks have attempted to answer these questions,[137] and while there is little consensus as to the answers, an underlying consistency rests with the idea that the meaning and purpose of art is mutable.

A. The Meaning of Art Speech Changes Based on Individual Perspective

This Section begins with the Supreme Court's recognition that individual perspective shapes the way in which art is perceived.[138] Although this theory known as Perspectivism did not arise until the nineteenth century, its foundation arose much earlier in human history.[139] Because the theories surrounding modern art theory go so far back in time, it is appropriate to give a brief history of the progression of philosophical thought as it relates to art. This discussion's purpose is to give context to art theory in its present state and to show that cultural influences shape individual perspectives on art.

Art theory originates in the time of the ancient Greeks.[140] Plato and Aristotle suggested the original foundation of art theory, believing in mimesis, the idea that art imitated life.[141] The idea of mimesis percolated through time and influenced the philosophers of the Middle Ages who, while accepting mimesis, attributed the functions, forms, and meaning of

137. *See infra* Part II.A.

138. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 475 (2009) (admitting "text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers and the effect of monuments that do not contain text is likely to be even more variable").

139. *See infra* Part II.A.

140. *See, e.g.*, ARISTOTLE, POETICS 2 (Albert K. Whitaker ed., Joe Sachs trans., Focus Publ'g/R Pullinas Co., 2006).

141. *Id.*

art to God, rather than an underlying ideal or truth, such as beauty.[142] The Enlightenment embraced the idea of beauty, formalizing it in the new concept known as aesthetics, which divided the basis for making a judgment about art into seeing the object and regarding one's contemplations on the object in question.[143] However, not all Enlightenment thinkers embraced the concept of aesthetics, leading to the dawn of the psychoanalytical movement, which gave way to a more individualized inquiry into why art is created and what purpose it serves.[144]

The onset of the twentieth century brought with it a rapid acceleration in the changing perspective of the artistic landscape.[145] This happened through several poignant artistic movements.[146] This rapid fluctuation in art movements highlights how cultural influences shape individual perspectives on art. The pre-Christian Greeks attributed the meaning of art to an ideal of beauty, while the Christian thinkers of the Middle Ages associated the meaning of art with God.[147] As twentieth century society began to change more rapidly following the Industrial Revolution, artistic movements came and went more quickly.[148]

From Plato to Freud, to the rapidly shifting art landscape of the twentieth century, the mutable nature of art is implied rather than directly addressed. Starting in the 1930s, writers and philosophers more directly addressed the mutable nature of art.[149] Developing off the dual nature of

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142. *See e.g.*, ST. AUGUSTINE, CONFESSIONS (Henry Chadwick trans., 1992). According to St. Augustine of Hippo, God was the ideal of beauty, and thus the closer art was to God, the more perfect its function, form, and content. This closeness to God was in turn defined, in some degree, by the object's closeness to its proper place in the world.

143. *See, e.g.*, IMMANUEL KANT, *Critique of Judgment*, *in* 42 GREAT BOOKS OF THE WESTERN WORLD 87, 88 (Robert Maynard Hutchins ed., 1952).

144. *See, e.g.*, SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 20 (Adam Phillips ed., David McLintock trans., 2002); *compare* KANT, *supra* note 143, at 87, *with* JEAN- JACQUES ROUSSEAU, *The First Discourse: Discourse on the Sciences and Arts*, THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES 43, 50-51 (Susan Dunn ed., 2002).

145. *See, e.g.*, FRED S. KLEINER & HELEN GARDNER, GARDNER'S ART THROUGH THE AGES: THE WESTERN PERSPECTIVE 700, 703, 710, 749, 759 (Sharon Adams Poore, ed., 13th ed. 2010) (analyzing the different stylistic and conceptual elements of artistic movements throughout the twentieth century).

146. *See, e.g., id.*

147. *See, e.g., id.*

148. *See, e.g., id.*

149. There are books that predate the 1930s with regards to the principles of art theory, but relationships between the individual and the interpretation of art did not blossom or become widely accepted in the United States until the 1930s. For

aesthetics proposed during the Enlightenment,[150] writers such as John Dewey greatly expanded on the idea that art is interpreted as an experience to an object—an experience that is informed by a myriad of external influences.[151] Dewey suggested that the interaction of man and the environment is the "[only] foundation upon which [a]esthetic theory and criticism can build"[152] and stressed that the focus on art should not be on the "expressive object," meaning the physical art object, but rather on the "experience" that "expressive object" generates.[153] According to Dewey, a number of considerations exist when analyzing an individual's reaction to a piece of artwork, including the nature of the "expressive object"[154] and the common substance of an artwork that influences our interpretation.[155] This idea that an individual's reaction to a piece of artwork is defined by a multitude of experiences, including the nature of the object and the various substances of the artwork, has been accepted and further expanded to include the idea that the viewer must actively seek and inject meaning into the work he or she views:

> You cannot look at a picture and find it beautiful by a merely passive act of seeing. The internal relations that make it beautiful to you have to be discovered and in some way have to be put in by you. The artist provides a skeleton; he provides guiding lines; he provides enough to engage your interests and

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early examples of the development of art theory, *see* HEINRICH WOLFFLIN, THE PRINCIPLES OF ART HISTORY: THE PROBLEM OF THE DEVELOPMENT OF THE STYLE IN LATER ART (M.D. Hottinger trans., Dover Publ'ns 6th ed. 1952) (1932) (devising a method of analyzing artistic styles through the use of line, plane, form and unity).

150. *See* KANT, *supra* note 143, at 42.

151. *See* JOHN DEWEY, ART AS EXPERIENCE 82-83 (1980).

152. *Id.* at 220.

153. *Id.* at 86. While Dewey builds off of the structure proposed by Kant that art is experienced via a reaction to an object, his theories stand in opposition to Kant in important ways. *Compare* KANT, *supra* note 143, at 87, *with* DEWEY, *supra* note 151, at 82.

154. *See* DEWEY, *supra* note 151, at 23. Dewey suggests that nature of the "expressive object" is so important because our minds want to be challenged, stating "like the soil, the mind is fertilized while it lies fallow, until a new burst of bloom ensues."

155. *Id.* These substances include the means and end of an artwork (defining the means of artwork as an aesthetic journey undertaken for "the delight of moving about and seeing what we see") and the spatial/temporal qualities of an artwork (describing these conditions as "general conditions without which an experience is not possible").

> touch you emotionally. But there is no picture and no poem unless you yourself enter it and fill it out.[156]

Our individual perspective is shaped by personal experience and cultural influences.[157] Modern psychology also supports the idea that the nature of the "expressive object" changes our experience and interpretation with the object in question.[158] Various factors which influence our interpretation of an artwork include the level of abstraction[159] of the object,[160] complexity of the work,[161] personality type,[162] lighting direction,[163] symmetry,[164] and compositional balance.[165]

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156. Lloyd E. Sandelands & Georgette C. Buckner, *Of Art and Work: Aesthetic Experience and the Psychology of Work Feelings*, 11 RES. ORGANIZATIONAL BEHAVIOR 105, 115 (1989).

157. *See* JOHN BERGER ET AL., WAYS OF SEEING 8 (1972) (giving the example that individuals interpreted fire to be representative of hell in medieval paintings, while such an association is not made in modern times).

158. *See id.* (giving the example that individuals interpreted fire to be representative of hell in medieval paintings, while such an association is not made in modern times); *accord* Tomas Chamorro-Premuzic et al., *Personality Predictors of Artistic Preferences as a Function of the Emotional Valence and Perceived Complexity of Paintings*, 4 PSYCHOL. OF AESTHETICS, CREATIVITY, AND THE ARTS 196, 198 (suggesting that reactions and interpretations of art are influenced by a myriad of factors including age, gender and personality).

159. *See* Mark J. Landau et al., *Windows into Nothingness: Terror Management, Meaninglessness, and Negative Reactions to Modern Art*, 90 J. PERSONALITY AND SOC. PSYCHOL. 879, 880 (2006) (explaining how modern abstract art is unique in its explicit abandonment of any representational intentions).

160. *See id.* at 881 (arguing that humans, being aware of their own mortality, seek to derive meaning from reality and thus dislike abstract art because it lacks an easily recognizable meaning).

161. *See* R.M. Nicki & Virginia Moss, *Preference for Non-Representational Art as a Function of Various Measures of Complexity*, 29 CAN. J. PSYCHOL. 237, 240-241 (1975) (finding that with regards to abstract artwork, people, to an extent, prefer more visually complicated works).

162. *See* Adrian Furnham & John Walker, *Personality and Judgments of Abstract, Pop Art, and Representational Paintings*, 15 EUR. J. PERSONALITY 57, 58 (2001) (finding one's personality type can be predictive of what kind of art one will like).

163. *See* David. A. McDine et al., *Lateral Biases in Lighting of Abstract Work*, 16 LATERALITY: ASYMMETRIES OF BODY, BRAIN AND COGNITION 268, 270 (2012) (finding left-side top-down lighting to be most visually appealing to viewers).

164. *See* Ingo Rentschler et al., *Innate and Learned Components of Human Visual Preference*, 9 CURRENT BIOLOGY 665, 670 (1999) (finding people naturally find symmetrical images more beautiful and appealing).

The mutable nature of art at an individual level is supported by history,[166] art theorists, and modern psychology.[167] Some of the most prominent thinkers in western civilization, dating back to ancient Greeks, disagreed over the seemingly simple questions of the purpose and meaning of art.[168] Does art reflect beauty? God? Vanity? The desire to escape reality? How much of our reaction to art is predicated on personal experience and our inherent psychological reactions to the qualities of the artwork in question? The answers to these questions, as discussed above, do not have a singular answer and change based on cultural context and individual perspective. As suggested at the beginning of Part II, this mutable nature of art speech puts it at tension with analysis under the Government Speech Doctrine. How can a court label the message conveyed by an artwork as government speech when the message being conveyed changes based on individual perspective shaped by societal context and personal experience?

B. The Meaning of Art Speech Changes Based on Spatial and Temporal Context

Analysis of art speech under the Government Speech Doctrine is further complicated by the fact that the message art speech conveys mutates based on spatial and temporal contexts.[169] The art discussed in this Section focus on public art and divides public art into three categories: (1) classic public art, which references themes such as national identity, civic pride, and historical figures; (2) blended public art, which reinterprets or utilizes classic public art themes in new ways; and (3) non-blended public art,

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165. *See* Annukka K. Lindell & Julia Mueller, *Can Science Account for Taste? Psychological Insights into Art Appreciation*, 23 J. COGNITIVE PSYCHOL. 453, 460 (2011) (finding balanced compositions are more visually appealing to viewers).

166. *See Summum*, 555 U.S. at 475 (admitting "text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers and the effect of monuments that do not contain text is likely to be even more variable").

167. *See* Nicki & Moss, *supra* note 161, at 237-238 (finding that with regards to abstract artwork, people, to an extent, prefer more visually complicated works).

168. *See* Furnham & Walker, *supra* note 162, at 58 (explaining psychological studies over the years with respect to the different ideas about purpose and meaning of art).

169. *See* DEWEY, *supra* note 151, at 82.

which generally abandons the iconography utilized by classic public art.[170] The focus on public art in this Section reflects this Article's broader focus on the inapplicability of the Government Speech Doctrine to the removal of public art from public display.

With regard to classic public art, governments have historically used monuments to speak:

> Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression.[171]

Examples of this kind of classic public art include the Marine Corps War Memorial,[172] the Vietnam War Memorial,[173] and the Washington Monument.[174]

Despite the use of such classic monuments, the Supreme Court has acknowledged that the meaning of such art can change based on context and/or over time.[175] Considering context, the Court noted that "[t]he message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity."[176] With regard to time, the Court

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170. These categories are unique to this Article and will be discussed below. *See infra* Part IV.B.

171. *Summum*, 555 U.S. at 470.

172. *George Washington*, NAT'L PARKS SERV., http://www.nps.gov/gwmp/planyourvisit/usmc_memorial.htm (last updated Apr. 26, 2014) (Created to commemorate "the Marine dead of all wars and their comrades of other services who fell fighting beside them.").

173. *Vietnam Veterans*, NAT'L PARKS SERV., http://www.nps.gov/vive/index.htm (last updated Mar. 31, 2014) ("Honoring the men and women who served in the controversial Vietnam War, the Vietnam Veterans Memorial chronologically lists the names of more than 58,000 Americans who gave their lives in service to their country.")..

174. *Washington Monument*, NAT'L PARKS SERV., http://www.nps.gov/wamo/index.htm (last updated Apr. 24, 2014) (explaining that the monument honors the nation's founding father, George Washington). It should be noted that some privately raised funds were used in the completion of the Washington Monument. *Washington Monument*, NAT'L PARKS SERV., http://www.nps.gov/nr/travel/wash/dc72.htm (last visited Apr. 25, 2014).

175. *See Summum*, 555 U.S. at 477.

176. *See id.*

further noted that "[the Statue of Liberty] was given to the [United States of America] by the Third French Republic to express Republican solidarity and friendship between the two countries. . . . Only later did the statue come to be viewed as a beacon of welcoming immigrants to the land of freedom."[177] However, publicly funded art speech is not limited to these kinds of classic public art.

Blended public art, unlike classic public art, combines contemporary ideas of context and time with classic public art subject matter.[178] A good example of this blending is Tatzu Nishi's publicly funded[179] "Discovering Columbus." With "Discovering Columbus," Nishi "built a convincingly appointed penthouse-worthy space around [a] 13-foot-high marble sculpture of Columbus."[180] To access the work, visitors climbed six flights of stairs where, upon ascending, they were greeted by both the statue and a well-lit apartment complete with "hardwood floors, area rugs, cushy couches and armchairs, art reproductions, lots of reading material and a remote-free, 55-inch Samsung television screen."[181] The purpose of the installation was to change the public's perception of the historic statue, which normally sat upon a column seventy-five feet tall, by changing our contextual relationship to the piece and "invit[ing] us to discover where the imagination may lead."[182]

Non-blended public art, by contrast, generally deviates from the classic purposes of public art because it does not utilize the predominate themes of classic public art. A prominent early example of non-blended public art is The Chicago Picasso, a fifty-foot abstract sculpture that combines imagery of an afghan dog and a woman.[183] The abstracted nature

177. *See id.*

178. The term "blended public art" is unique to this Article and will be discussed below. *See infra* Part IV.A.

179. Though the project is funded through the Public Arts Fund, it is not one hundred percent publicly funded. For a list of all the private sponsors, *see Tatzu Nishi: Discovering Columbus*, PUBLIC ARTS FUND, http://www.publicartfund.org/view/exhibitions/5495_discovering_columbus (Apr. 25, 2014). For images of "Discovering Columbus," *see infra* App., illus. 2 & 3.

180. Roberta Smith, *At His Penthouse, a Tête-à-Tête With Columbus*, N.Y. TIMES, Sept. 22, 2012, http://www.nytimes.com/2012/09/22/arts/design/tatzu-nishis-discovering-columbus-installation.html.

181. *Id.*

182. PUBLIC ARTS FUND, *supra* note 179.

183. Alan G. Artner, *Chicago's Picasso Sculpture*, CHI. TRIB. (Aug. 15, 1967) http://www.chicagotribune.com/news/politics/chi-chicagodays-picasso-story,0,1344585.story. For an image of the Chicago Picasso, *see infra* App., illus. 4.

of the sculpture made it stand in stark contrast to the majority of public art in Chicago, which primarily portrayed historical figures.[184] According to Chicago Mayor Richard Daley, the precise purpose of erecting the sculpture, which contrasted so greatly from the context of the surrounding public art,[185] was to celebrate "the belief that what is strange to us today will be familiar tomorrow."[186] While the purpose of the statue may have been to promote an awareness of new art forms in a city known for its classic public art, reactions were not positive.[187] Over time, the city of Chicago embraced modern public art and commissioned works by artists such as Alexander Calder[188] and Jean DuBuffet.[189] Again, context and time changed the meaning of the Chicago Picasso. Originally the message the sculpture conveyed was controversial because it was so contextually different,[190] but as time passed its message became less contentious and morphed into one that encouraged the city of Chicago to embrace modern art.[191]

Other examples of public artworks that have a contextual meaning are Cloud Gate (more famously known as the "Chicago Bean"), an abstract sculpture by the artist Anish Kapoor that sits in Millennium Park in Chicago,[192] and the Work Project Administration's Federal Art Project ("FAP") murals. Cloud Gate's highly polished surface reflects the Chicago skyline, conveying a subtle civic message by incorporating the city itself into the piece. This contextual proximity to the Chicago skyline helps

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Jyoti, *Alexander Calder*, CHICAGO OUTDOOR SCULPTURES, (Oct. 11, 2010, 7:19 AM), http://chicago-outdoor-sculptures.blogspot.com/2011/01/alexander-calder.html.

189. *Public Art in the Loop*, CHOOSE CHICAGO, http://www.choosechicago.com/articles/view/Public-Art-in-the-Loop/314/ (last visited Apr. 25, 2014).

190. Artner, *supra* note 183 (Various civic leaders reacted poorly to the statue's metamorphic message; the Mayor's Deputy of Special Events recommended that the city remove the statue and replace it with a statue of "Mr. Cub . . . Ernie Banks.").

191. *Id.* (discussing how the sculpture inspired other commissions and eventually became as much a symbol of Chicago as the Water Tower).

192. *See Millennium Park*, CITY OF CHI., http://www.cityofchicago.org/city/en/depts/dca/supp_info/millennium_park.html (last visited Apr. 25, 2014). For an image of Cloud Gate, *see infra* App., illus. 5.

define the message the sculpture conveys. What sort of message would Cloud Gate convey if it were positioned on the city's waterfront instead?

The FAP murals, commissioned in the 1930s to employ artists during the Great Depression, raise a similar question.[193] Under FAP, artists across the country created murals for public buildings, with the New York area project director focusing specifically on funding abstract paintings.[194] Artists such as Paul Kelpe received funding to create abstract murals for the Williamsburg Housing Project's social rooms because "these areas were intended to provide a place of relaxation and entertainment for the tenants" and "the more arbitrary color . . . enables the artist to place an emphasis on [the] psychological potential to stimulate relaxation."[195] Just like Cloud Gate, the spatial context of the murals defined, to some degree, the messages they conveyed because they were located in government housing projects. What messages would the murals have conveyed if they were painted on the exterior of a building or on a canvas hanging in a museum?

C. The Mutable Nature of Art Speech Makes Analysis of Art Under the Government Speech Doctrine Improper

When determining if government involvement in speech allows that speech to fall into the scope of the Government Speech Doctrine, the Court has considered the broad purpose of the Doctrine, the government's function as a service provider,[196] and the two implicit policy considerations of control and association.[197] Thus, the discussion regarding the improper application of the Government Speech Doctrine to art speech needs to revolve around the tensions between the mutable nature of art speech and the three considerations listed above.

First, although the Doctrine allows the government to retain control over the message of the services it provides, this control is related to the

193. *See, e.g.*, Francis V. O'Connor, *New Deal Art Projects*, *in* THE NEW DEAL ART PROJECTS: AN ANTHOLOGY OF MEMOIRS 220, 227 (Francis V. O'Connor ed. 1934).

194. *See, e.g.*, *id.*

195. Francis V. O'Connor, *Federal Art Projects*, *in* ART FOR THE MILLIONS: ESSAYS FROM THE 1930S AND ADMINISTRATORS OF THE WPA FEDERAL ARTS PROJECT 46, 69 (Francis V. O'Connor ed. 1974). For an image of the murals, *see infra* App., illus. 6.

196. *See supra* Part I.C.

197. *See supra* Part I.C.2.

narrowness of the speech the government encourages.[198] Encouraging art is not a narrow service with a narrow message[199] and therefore should not trigger a broad amount of governmental control under the present scope of the Government Speech Doctrine. Furthermore, once art is funded and displayed, the implicit considerations of control and association become more of an issue than the broader purpose and goal of the Doctrine, as the purpose of the government to fund art has been achieved.

The amount of control the government retains over the speech in question is an implicit but important consideration of the Government Speech Doctrine.[200] This issue, when considering publicly funded art, is relevant in the preliminary parts of funding an art piece: choosing the appropriate artist and art proposal, deciding where to display the artwork, and displaying the artwork after observing the finished piece. The government has ultimate control over these decisions which reflect the government's intent to convey some message through art, be it a focused decision to convey the history of the Maine labor movement as seen in *Newton*, or the broad decision by the NEA to fund art to create a "broadly conceived national policy of support for the . . . arts in the United States."[201] Once the government distributes funds to an artist and displays artwork, it has exercised and exhausted its control over the speech in question, and thus control consideration implied by the Court is not an appropriate consideration with regards to the Government Speech Doctrine and public art. While it is colorable that the government is still exercising control over a piece of artwork in so far that it continues to provide space for its display, that argument more logically fits within the second policy consideration permeating the Government Speech Doctrine: association.[202]

Association, unlike control, is never exercised or exhausted, and arises from implicit or explicit direct government involvement in the speech.[203] With publicly funded art, the mutable nature of art speech

198. *See supra* Part I.C.2.

199. For instance, the goal of the NEA is to create a "broadly conceived national policy of support for the . . . arts in the United States" and pledge federal funds to "help create and sustain . . . a climate encouraging . . . the release of creative talent." *See* National Foundation on the Arts and the Humanities Act of 1965, 20 U.S.C. §§ 953(b), 951(7) (2006).

200. *See supra* Part I.C.2.

201. 20 U.S.C. § 953(b).

202. *See supra* Part I.C.2.

203. *See, e.g.*, *Rust*, 500 U.S. at 193; *Summum*, 555 U.S. at 470 (finding the nature of speech in conjunction with the location of the speech to be sufficient to create government speech).

diminishes the risk of government association with the speech because once art is displayed to the public, any message it conveys, be it the intentional message of the artist or the government, begins to change. On the individual level, this is because people react to the artwork differently based on a multitude of factors that include personal experiences,[204] cultural influences,[205] and individual psychology.[206] The mutable nature of art speech, both individually and contextually, makes the ease with which the courts label art speech as government speech seem unwarranted.[207] How can the government purport to be speaking when any message it intended to convey through the art it funds is constantly fluctuating outside of its control? The fear that this question could be answered in favor of the Government—that an artwork will be seen as an extension of government policy rather than an individual expression of creative vision—has already had chilling effects on the public art world.[208]

IV. ARTIST RIGHTS: MORAL RIGHTS & THE VISUAL RIGHTS ACT

Tension exists not only between the Government Speech Doctrine and the nature of art speech, but also between the Doctrine and the latent legal rights that exist with the creator of a piece of artwork.[209] Art represents the expressive work of an individual and carries with it residual rights, called moral rights, which exist with the creator of the work even when ownership has been transferred.[210] These rights developed to protect the personal rather than economic interests of a copyright holder, and evolved under the theory that the creators of any work have a personal connection to the property they created.[211] Moral rights exist within certain

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204. *See* Sandelands & Bunker, *supra* note 156, at 115.

205. *See supra* Part II.A.

206. *See supra* Part II.A.

207. *See, e.g.*, *Summum*, 555 U.S. at 470 (claiming "[p]ermanent monuments displayed on public property . . . represent government speech").

208. Christo, one of the most well-known and prolific public artists of our time, refuses to accept any public funding for his piece for fear that his vision and artistic integrity will be compromised. *See* CHRISTO & JEANNE-CLAUDE, http://www.christojeanneclaude.net/faq (search under "Who Pays for the Installations?" and "Why Don't they Accept Licensing Deals and Use that Money on the Installations?" subheadings) (last visited Apr. 25, 2014).

209. *See, e.g.*, 17 U.S.C. § 106(A) (2013) (describing moral rights).

210. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L. J. 353, 369 (2006).

211. Moral rights have a strong basis in the "natural rights" philosophy of property expounded by John Locke, who suggested that the ownership of property

types of copyrightable work[212] and include both rights of attribution[213] and rights of integrity.[214] Common law moral rights have their roots in France and Germany[215] and were codified in the moral rights provision of the Berne Convention in 1928.[216] Classically, the United States has differed from Continental Europe in so far that it did not recognize moral rights in artworks.[217] However, in recent years there has been a shift towards recognizing moral rights in the United States.

Historically, the United States has not recognized the moral rights of artists.[218] At the local level, however, states began addressing the issue of

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is derived from the effort exerted to create it. *See generally,* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

212. To be eligible for copyright protection, a work must be fixed in a tangible medium, be original and contain some minimum amount of creativity. *See, e.g.*, Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345, 355, 358 (1991).

213. Rights of attribution ensure that "artists are correctly associated with the works of art they create, and that they are not identified with works created by others." Pavia v. Ave. of the Am's. Assoc's., 901 F. Supp. 620, 628 (S.D.N.Y. 1995) (internal citation omitted). While rights of association are an important aspect of moral rights, they are not of primary importance to this Article and will not be discussed further.

214. Rights of integrity allow an artist "to prevent any intentional distortion, mutilation, or other modification of [his or her] work which would be prejudicial to his or her honor or reputation, and [that] any intentional distortion, mutilation, or modification of that work is a violation of that right." Mass. Museum of Contemporary Art Found., Inc. v. Buchel, 593 F.3d 38, 52-53 (1st Cir. 2010) (*citing* 17 U.S.C. § 106A(a)(3)(A)).

215. *See Rigamonti*, *supra* note 210, at 355-67 (discussing and comparing Continental moral rights).

216. *See Universal Copyright Convention*, July 24, 1971, 25 U.S.T. 1341.

217. *Compare* Rigamonti, *supra* note 210, *with* Philip B. Hallen, *Local Dispatch / Airport art is not always a pretty picture: The story of Calder's 'Pittsburgh,'* PITTSBURGH POST-GAZETTE, (Jan. 4, 2008, 12:00 AM), http://www.post-gazette.com/stories/local/morning-file/local-dispatch-airport-art-is-not-always-a-pretty-picture-the-story-of-calders-pittsburgh-374554/ (looking at Continental Europe's treatment of artworks versus the Allegheny County's modification of the Alexander Calder sculpture "Pittsburgh").

218. For instance, the 1958 Calder mobile "Pittsburgh" (which won the 1958 Carnegie Award for Sculpture at the 1958 Carnegie Art Exhibition) was donated to the Allegheny County Airport and subsequently repainted, immobilized with weights, and attached to a motor to force rotation of the piece without Calder's permission. *See* Hallen, *supra* note 217; *see also* Serra v. U.S. Gen. Servs. Admin., 847 F.2d 1045, 1046 (2d Cir. 1988) (upholding the removal of Richard Serra's "Tilted Arc" from a Federal Plaza in New York City).

moral rights as early as the 1970s.[219] Moral rights were not codified on the federal level until 1990 when Congress passed the Visual Artist Rights Act (VARA).[220] VARA grants authors of a work of visual art[221] both rights of attribution[222] and rights of integrity,[223] and these rights are conferred regardless of whether the author of the work of visual art owns the copyright to the work.[224] However, these rights have their limitations. For instance, protection under VARA extends only to a narrowly defined group of works of visual art, lasts only for the life of the author, cannot be transferred, and can be waived.[225]

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219. Passed in 1979, the California Preservation of Works of Art Act was the first piece of legislation to recognize artists' moral rights. *See* CAL. CIV. CODE § 987 (West 2012). Other states followed in suit, such as New York in 1984. *See, e.g.*, N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2012) (providing moral rights to artists).

220. *See* Visual Artist Rights Act, 17 U.S.C. § 106A(a) (2013). It should be noted that while VARA is part of the Copyright Act, a registered copyright is not required to receive protection under VARA. *See* Mass. Museum of Contemporary Art Found., Inc. v. Buchel, 593 F.3d 38, 48 (1st Cir. 2010) (finding that "[b]eyond the Copyright Act's protection of certain economic rights, VARA provides additional and independent protections to authors of works of visual art").

221. A "work of visual art" is defined as "a painting, drawing, print, or sculpture" or "a still photographic image for exhibition purposes only." *See* 17 U.S.C. § 101.

222. *See id.* §§ 106A(a)(1)–(2) (granting the author of a work of visual art the right "to claim authorship of [a] work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create" and to "prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification [to] the work").

223. *Id.* §§ 106A(a)(3)(A)–(B) (granting the author of a work of visual art the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his honor or reputation . . . and to prevent any destruction of a work of recognized stature"). It should be noted that "(t)he modification of a work of visual art which is the result of . . . public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence." *Id.* § 106A(c)(2).

224. *Id.* § 106A(b).

225. *Id.* §§ 106A(d)–(e). Continental European moral rights, by comparison, cannot be waived. *See, e.g.*, Irma Sirvinskaite, *Toward Copyright "Europeanification": European Union Moral Rights*, 3 J. INT'L MEDIA & ENT. L. 263, 286 (2010-2011).

A. The Slow and Unpredictable Expansion of Artist Rights Under VARA

One of the earliest and most cited cases to date on moral rights granted under VARA is *Carter v. Helmsley-Spear, Inc.*, in which the Second Circuit helped expand, to some degree, the scope of protection offered to artists under VARA.[226] In *Carter*, the manager of a commercial building in Queens, New York contracted three artists to create a walkthrough artwork containing multiple sculptural elements for the lobby of the building.[227] During the course of the contract, building ownership changed hands and the new owners of the building wanted to remove the artwork created by the three contracted artists.[228] On appeal, the Second Circuit upheld several findings of the lower court that expanded the rights of artists under VARA.[229] First, the Second Circuit affirmed the District Court's finding that multiple elements of an artwork that would not be individually protectable could still constitute a "single, interrelated, indivisible work of art."[230] Secondly, the Second Circuit rejected the argument that because portions of the work of art were attached to the floor and ceiling of the lobby, those elements were "applied art" and thus were not considered "works of visual art" under VARA.[231] These rulings, though not groundbreaking, prevented the court from limiting VARA from offering protection to single, free-standing sculptural forms.

While *Carter* may have constituted a limited victory for the advancement of artist moral rights and a more expansive interpretation of VARA, a full-fledged victory under the statute occurred in 1999 in the case of *Martin v. City of Indianapolis*.[232] The facts in *Martin* were fairly unremarkable: a sculptor received permission from the Indianapolis Metropolitan Development Commission to construct a large metal sculpture on a piece of privately owned land.[233] That land was later

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226. Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995).

227. *Id.* at 80.

228. *Id.* at 81.

229. *Id.* at 77.

230. *Id.* at 84.

231. *Id.* at 85 (where the court found that "[i]nterpreting applied art to include [works attached to utilitarian objects such as floors or ceilings] would render meaningless VARA's protection for works of visual art installed in buildings").

232. Martin v. City of Indianapolis, 192 F.3d 608, 610 (7th Cir. 1999).

233. *See id.*

acquired by the city of Indianapolis and the sculpture was destroyed.[234] The artist filed suit for a violation of VARA and ultimately prevailed.[235] The primary hurdle faced in *Martin* was proving that the sculpture in question was a work of "recognized stature,"[236] which the Seventh Circuit allowed to be proven via newspaper and magazine articles.[237] The fact that the Seventh Circuit did not require expert testimony to prove "recognized stature" was extremely important because requiring expert testimony would have made litigation under VARA prohibitively expensive for most artists.[238]

Flack v. Friends of Queen Catherine, Inc. marked another instance where the courts expanded artist protection offered under VARA.[239] In *Flack*, a non-profit organization commissioned an artist to create a bronze sculpture of Queen Catherine of Braganza.[240] Clay sculptures and molds were created in preparation for casting the piece in bronze, but a series of controversies surrounding the statue and contract renegotiations delayed the completion of the project.[241] Because of the delay in the project, the molds created for the bronze casting became damaged and were improperly repaired by an assistant.[242] The non-profit organization sought to go ahead with casting the ill-repaired head and, after a temporary restraining order was filed which prevented the organization from casting the head, sought to destroy the original clay sculpture from which the molds were created.[243]

Rejecting the non-profit's claim that the clay sculpture was a model and thus did not warrant VARA protection, the Court found that, "'[c]ommon sense' and the 'generally accepted standards of the artistic community'" dictated that sculptures created in preparation of completion

234. *Id.* at 611.

235. *Id.* at 610-11.

236. See 17 U.S.C. § 106A(a) (2013). VARA provides that "the author of a work of visual art . . . shall have the right . . . to prevent any destruction of a work of recognized stature."

237. *Martin*, 192 F.3d at 613.

238. *Id.* at 613 (The Seventh Circuit agreed that exclusion of expert testimony was correct and held that the testimony was not necessary to satisfy the "recognized stature" requirement of VARA.).

239. *See* Flack v. Friends of Queen Catherine, Inc., 139 F. Supp. 2d 526, 528 (S.D.N.Y. 2001).

240. *Id.*

241. *Id.* at 530.

242. *Id.*

243. *Id.* at 531.

of a larger project were "preliminary works," rather than models and were "unquestionably covered by VARA."[244] While other portions of the artist's claim failed (discussed below), the language of VARA was expanded to offer greater protection to works of visual art not explicitly listed in the statute.[245]

Perhaps the two most successful suits brought under VARA were actually settled during the course of litigation, showing the Act's potential strength as a lever to enforce moral rights. The first such case, *Cort v. St. Paul Fire & Marine Ins. Co.*, came out of San Francisco in 1998.[246] In *Cort*, the city of San Francisco commissioned an artist to create a mural on the side of a building in the Mission District.[247] Twelve years later, the building was sold, the mural was covered, and the children of the artist sued under both VARA and the California Artist Protection Act ("CAPA"), alleging that the mural was modified or destroyed without the artist's consent.[248] Rather than litigate the case, the owners of the building decided to purchase the mural from the city for $200,000.[249] The second such case to show the leveraging power of VARA involves another muralist, Kent Twitchell, and his massive mural of Ed Ruscha.[250] The mural, which was completed in 1978 and located on the side of a federally owned building, was completely painted over in 2006.[251] The artist brought suit under both VARA and CAPA against the United States government and eleven other defendants, and the case was eventually settled out of court for $1.1

244. *Id.* at 534.

245. *See also* Mass. Museum of Contemporary Art Found., Inc. v. Buchel, 593 F.3d 38, 51 (1st Cir. 2010) (finding that "[VARA] . . . must be read to protect unfinished, but 'fixed,' works of art that, if completed, would qualify for protection under the statute").

246. *See* Cort v. St. Paul Fire & Marine Ins. Co., 311 F.3d 979 (9th Cir. 2002).

247. *Id.* at 982.

248. *Id.*

249. *Id.* It is questionable if the suit under VARA would have been sustained had the case not settled, as VARA rights only last for the life of the artist and by the time of the lawsuit the original artist had died; *see also* 17 U.S.C. § 106A(d)(1) (2013).

250. Diane Haithman, *Artist Kent Twitchell Settles Suit over Disappearing Mural*, L.A. TIMES (May 1, 2008), http://www.latimes.com/la-et-twitchell1-2008may01,0,2393553.story [hereinafter *Artist Kent Twitchell Settles Suit*].

251. *See id.*; Diane Haithman, *Kent Twitchell: Once, There Were Murals*, L.A. TIMES (Apr. 2, 2009), http://www.latimes.com/entertainment/la-et-twitchell2-2009apr02,0,6227244.story [hereinafter *Once, There Were Murals*].

million, the largest settlement ever obtained under VARA.[252]

While these cases highlight some of the expansive readings by the courts in expanding protection to artists under VARA, litigation under the act has been a mixed bag. For instance, some courts have narrowly construed the subject matter that is considered a work of visual art under VARA.[253] VARA also includes an exception to protection for works made for hire,[254] a classification some courts have been generous in applying.[255] Although courts have shown some willingness to expansively interpret works considered works of visual art under VARA, they have shown strong resistance to reading other kinds of moral rights in VARA.[256]

For instance, the suggestion that VARA encompasses the right of divulgation[257] was expressly rejected by the First Circuit,[258] as was the argument that VARA protects site-specific works of visual art from site relocation in the Fifth Circuit.[259] Lastly, in some jurisdictions VARA has

252. *See Artist Kent Twitchell Settles Suit*, *supra* note 250.

253. *See, e.g.*, Gegenhuber v. Hystopolis Prods., Inc., No. 92 C 1055, 1992 WL 168836, at *4 (N.D. Ill. July 13, 1992) (finding that "VARA does not include puppets, costumes, or sets, which arguably may be considered 'visual art'" or provide "the *performance* of puppet shows" protection for those works). This narrow interpretation of protected works of visual art speaks more of a judicial trepidation to read VARA broadly rather than an inherent weakness in the statute. For instance, puppets could very easily be considered "sculpture," which is protected by VARA, and stage sets could, without much stretching, be considered paintings, which are also protected by VARA. *Accord* Patricia Alexander, Comment, *Moral Rights in the VARA Era*, 36 ARIZ. ST. L.J. 1471, 1479 (2004).

254. *See* 17 U.S.C. § 106A(c)(3).

255. *See, e.g.*, Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 308 (S.D.N.Y. 1994), *rev'd in part*, 71 F.3d 77, 86-88 (2d Cir. 1995) (finding that factors such as the performance of additional labor tasks and the tax treatment of the artists weighed in favor of finding the artists' works of visual art to be works made for hire and thus not eligible for VARA protection).

256. *See, e.g.*, Mass. Museum of Contemporary Art Found., Inc. v. Buchel, 593 F.3d. 38, 51 (1st Cir. 2010) (finding VARA to protect unfinished but "fixed" sculptures); *but see* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 (1st Cir. 2006) (noting that VARA does not apply to site-specific works).

257. The right of divulgation gives "the artist the right to decide when (and whether) the work [of visual art] is complete and can be shown." Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 268 (2009). For a thorough discussion and comparison of Continental moral rights, *see* Rigamonti, *supra* note 210.

258. *See Buchel*, 593 F.3d at 62 (stating "we decline to interpret VARA to include such a claim [of] a separate moral right of disclosure [when] . . . Congress explicitly limited the statute's coverage to the rights of attribution and integrity").

259. *See Pembroke Real Estate, Inc*., 459 F.3d 128 at143 (holding that "[t]here is no basis for [the] claim that VARA [protects] . . . site-specific art").

been detrimental, preempting state laws that might otherwise offer broader protection to artists.[260]

B. Artist Moral Rights Make the Application of the Government Speech Doctrine to Publicly Displayed Art Improper

The concept that publicly funded, publicly displayed art can be regulated via the Government Speech Doctrine is improper not only because of the nature of art speech but also because of the moral rights of an artist.[261] This concept arises from the idea that public art should remain on public display because of an artist's right of integrity and the ill-defined scopes of both moral rights and the Government Speech Doctrine encourages wasteful litigation when public art is removed from public display.[262]

First, public art should remain on public display because failing to do so is very possibly a violation of an artist's right of integrity. Removing public art likely violates an artist's right of integrity because, although the work has not been physically mutilated or altered, it has been constructively destroyed by being made inaccessible to the viewing public. While no case has ever held explicitly that a publicly inaccessible piece of art has been constructively destroyed, functionally equivalent cases involving reversibly damaged murals that *could* be made available to the public again have settled out-of-court for large sums of money.[263] While VARA does not protect site-specific art from being relocated,[264] the removal of art from public display is distinguishable from relocated art because relocated art is still available for public viewing. People also have a constitutional right to have access to "receive information and ideas," including ideas conveyed by art.[265]

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260. *See e.g.*, Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226 DAB, 2003 WL 21403333, at *12-14 (S.D.N.Y. June 17, 2003) (finding that VARA preempted New York law).

261. *Compare supra* Part I.C. (discussing the government speech doctrine), *with* 17. U.S.C. § 106(A) (defining artist moral rights).

262. *See, e.g.*, Newton v. LePage, 700 F.3d 595, 600 (1st Cir. 2012) (describing a lawsuit against the governor of Maine for removing a mural from the Maine Department of Labor); *see also Artist Kent Twitchell Settles Suit*, *supra* note 250.

263. *See, e.g.*, *St. Paul Fire & Marine Ins. Co.*, 311 F.3d at 982; *see also Once, There Were Murals*, *supra* note 251.

264. *See Phillips*, 459 F.3d at 143.

265. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

Second, by ignoring moral rights when discussing the Government Speech Doctrine as it relates to art, the courts merely encourage litigation by artists and the waste of resources.[266] Although slow and unpredictable, moral rights have been expanded under VARA to include preparatory work for art projects[267] and unfinished works that exist in fixed form.[268] The government, as a speaker, patron, and subsidizer, has the right to disseminate particular viewpoints.[269] The artist, as a creator, also has rights that permeate the works of visual art he or she creates.[270] Because of the inherent tensions between these rights and the nature of art speech, the Government Speech Doctrine should not govern the removal of publicly funded, publicly displayed art. Rather, as discussed below, the regulation of publicly funded, publicly displayed art speech should be analyzed through an equitable balancing test that considers the various elements discussed in the analysis so far.

V. A MODEL STATUTE FOR THE REMOVAL OF PUBLICLY FUNDED ART

A. The Proposed Statute

State and federal governments should adopt legislation that outlines an appropriate process for removing publicly funded art from public display and takes into consideration the rights of the government to control its own speech, individual free speech rights, and artist moral rights. Rather than rely on courts to determine the appropriate scope of the Government Speech Doctrine with regards to these interests, a model statute that deals specifically with this issue could add much needed clarity to this area of the law and dissuade litigation. The statute reads:

PROPOSED STATUTE SECTION ___; REMOVAL OF PUBLICLY FUNDED, PUBLICLY DISPLAYED WORKS OF VISUAL ART

(a) DEFINITIONS

"Public(ly) Display(ed)" shall mean a work of visual art which is viewable to the general public in either a general or limited

266. *See, e.g.*, *Artist Kent Twitchell Settles Suit*, *supra* note 250; *see also Once, There Were Murals*, *supra* note 251.

267. *See Friends of Queen Catherine, Inc.*, 139 F. Supp. 2d at 527.

268. *See Buchel*, 593 F.3d at 51.

269. *See infra* Part I.B.

270. *See infra* Part III.A.

capacity. A work of visual art need not be accessible to the general population to be considered publicly displayed.

"Publicly Funded" shall mean a work of visual art which received the majority of its financial funding from public sources. Examples of sources which constitute public funding shall include, but are not limited to, National Endowment for the Arts grants and state Percentage for the Arts programs. A work of visual art which has been privately funded and donated to the government or a governmental unit shall be considered "Publicly Funded."

"Recognized Stature" shall mean that the artist or group of artists responsible for the creation of the work of visual art are generally known within their respective artistic community. General knowledge of the artist or artists within the community can be shown through, but is not limited to, newspaper or magazine articles, public exposure, or word-of-mouth reputation.

"Removal" shall mean making any publicly displayed work of visual art unavailable for public viewing, whether it be to the general public or a more limited subset, for a period of time of more than two (2) years.

"Work of Visual Art" shall mean any permanent painting, photographic or pictorial representation, sculpture, or three-dimensional object of recognized stature. This list shall be construed broadly. An artwork shall not be considered a work of visual art if:

(1) it constitutes part of a series of more than two hundred (200) reproductions; or

(2) was created for the purposes of business promotion; or

(3) is primarily decorative in nature.

(b) REMOVAL OF A PUBLICLY FUNDED, PUBLICLY DISPLAYED CLASSIC WORK OF VISUAL ART

(1) A Classic Work of Visual Art shall be any work of visual art that is directly associated with the government or a governmental unit. Direct association with the Government or a governmental unit shall be determined if:

(A) the title of the Work of Visual art is directly associated with the government or a governmental unit or a figure, event or other occurrence of local or national importance; and

(B) the location of the Work of Visual Art is directly associated with or could reasonably be seen as being directly associated with the government or a governmental unit; and

(C) the subject matter of the Work of Visual Art is directly associated with or could be reasonably seen as being directly associated with a figure, event, or other occurrence of local or national importance; and

(D) the Work of Visual Art as a whole is strongly associated with the government or a governmental unit in the mind of the public.

(2) Except as provided in paragraph (e)(1), a Classic Work of Visual Art of Recognized Stature shall not be removed from Public Display unless: (A) the government or governmental unit can articulate some legitimate government interest reasonably related to the removal of the Classic Work of Visual Art.

(c) REMOVAL OF A PUBLICLY FUNDED, PUBLICLY DISPLAYED BLENDED WORK OF VISUAL ART

(1) A Blended Work of Visual Art shall be any Work of Visual Art that, while not directly associated with the government or a governmental unit, is or could be indirectly associated with the government or a governmental unit. Indirect association shall be determined if two or more of the following are found:

(A) the title of the Work of Visual Art is strongly associated with the government or a governmental unit or a figure, event or other occurrence of local or national importance; or

(B) the location of the Work of Visual Art is strongly associated with or could reasonably be seen as being strongly associated with the government or a governmental unit; or

(C) the subject matter of the Work of Visual Art is strongly associated with or could be reasonably seen as being strongly associated with a figure, event, or other occurrence of local or national importance; or

(D) the Work of Visual Art as a whole is strongly associated with the government or a governmental unit in the mind of the public.

(2) Except as provided in paragraph (e)(1), a Blended Work of Visual Art of Recognized Stature shall not be removed from

Public Display unless: the government or governmental unit can articulate some important government interest substantially related to the removal of the BlendedWork of Visual Art.

(d) REMOVAL OF A PUBLICLY FUNDED, PUBLICLY DISPLAYED NON-BLENDED WORK OF VISUAL ART

(1) A Non-Blended Work of Visual Art is any work of visual art not classified as a classic Work of Visual Art or a Blended Work of Visual Art under paragraphs (b)(1) or (c)(1).

(2) Except as provided in paragraph (e)(1), a Non-Blended Work of Visual Art of Recognized Stature shall not be removed from Public Display unless the government or governmental unit can articulate some compelling government interest that is narrowly tailored to the removal of the Non-Blended Work of Visual Art.

(e) EXCEPTIONS

(1) Despite the classification of the Work of Visual Art under paragraphs (b)(1), (c)(1) or (d)(1), the government or a governmental unit may justify the Removal of a Work of Visual Art if:

(A) the Work of Visual Art is vulgar, offensive, or offends current standards of morality; or

(B) maintaining, preserving, or continued display of the Work of Visual Art imposes a significant financial burden on the Government or governmental unit; or

(C) the Work of Visual Art substantially impairs the general public's use or enjoyment of the space in which the Work of Visual Art is located.

(f) NO CIVIL CAUSE OF ACTION OR OTHER PENALTIES

(1) No good faith removal or attempt at removal by the government or a governmental unit of a work of visual art shall:

(A) result in a civil claim or cause of action for damages; unless

(B) the good faith removal or attempted Removal of the Work of Visual Art results in the irreparable physical destruction or mutilation of the Work of Visual Art, in which case the artist or artists shall have a civil claim for damages.

B. Discussion of the Statutory Provisions

The statutory provisions listed above satisfy the scope of the Government Speech Doctrine, take into account the mutable nature of art speech, and are consistent with artist moral rights. The scope of the Doctrine is satisfied by three main components: (1) the statute's focus on the association between the instant art speech and the government; (2) the correlation between the likelihood of association with the amount of control the government has over the art speech; and (3) the creation of exceptions for the government to regulate art speech regardless of association, taking into account that art is speech and thus subject to narrow regulations. The mutable nature of art speech is taken into account by the statute because the "blended work of visual art" section has the broadest potential reach and does not overly favor individuals or the government, thus keeping in mind that the message conveyed by art is difficult to determine. Lastly, the definition section of the statute incorporates various moral rights identified by the courts. These benefits of the statute are discussed more thoroughly below.

First, the proposed statute circumvents the ill-defined boundaries of the Government Speech Doctrine and puts in place guidelines when regulating art speech.[271] The statute simplifies the bifurcated considerations of control and association the Court takes into consideration when discussing whether speech is government speech.[272] Rather than focus on control *and* association, in instances where initial control has been exhausted, the statute focuses only on association,[273] which will never be exhausted, depleted, or exercised and is therefore an appropriate analytical starting place.

Second, the definition section of the proposed statute will help expand and simplify the analysis of what would be considered a publicly funded, publicly displayed work of visual art[274] and codify certain artist moral

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271. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 873 (1982) (noting that "criteria that appear[s] on [its] face to be permissible" may be an appropriate basis for reversing a prior governmental action so long as that criteria stems from established policies).

272. *See, e.g.*, Proposed Statute *Removal of Publicly Funded, Publicly Displayed Works of Visual Art* § (b)(1) [hereinafter "Proposed Statute"]; *see also infra* Part I.C.

273. *See id.* §§ (b)(1), (c)(1), (d)(1) (considering the likeliness of the art speech to be associated with the government when determining appropriate removal framework analysis).

274. *See id.* § (a). The "Publicly Funded" language would allow works of visual art such as the Washington Monument or the Chicago Picasso to be analyzed under the statute although neither was completely government-funded.

rights[275] without being overly broad.[276] By creating a broader analytical framework for what would be considered "publicly funded" and "publicly displayed" while narrowly defining "work of visual art," the proposed statute will not narrowly reach only completely government-funded works of visual art, but also reach more classic forms of public art such as sculptures and murals.[277] By codifying certain moral rights recognized by the courts, the proposed statute would dissuade litigation by artists without unduly trampling the right of integrity.[278] The Constitution also "protects the right to receive information and ideas," so prohibiting the permanent removal of an artwork from public display[279] also ensures that the public has continued access to the message and ideas conveyed by the art in question.[280]

See e.g., *Washington Monument*, NAT'L PARKS SERV., http://www.nps.gov/nr/travel/wash/dc72.htm (last visited Apr. 25, 2014) (noting that some privately raised funds were used in the completion of the Washington Monument). The "publicly displayed" language would allow works of visual art displayed in places such as government buildings to be considered "publicly displayed," despite the fact that some members of the public may not actually have access to the work of visual art or the work may not available to view all the time.

275. *See* Proposed Statute § (a). The "Recognized Stature" language would codify the ruling in *Martin* which allowed "recognized stature" to be proved without calling an expert witness, which would be prohibitively expensive for many artists wishing to enforce their moral rights. *See* Martin v. City of Indianapolis, 192 F.3d 608, 612 (7th Cir. 1999). The "Removal" language would allow a work of visual art to be temporarily taken down without fear that an artist would leverage his or her right of integrity via a lawsuit, while simultaneously ensuring that the work of visual art was not put in permanent storage (the equivalent of being reversibly destroyed) and that the public was not deprived access to the information or idea conveyed by the work of visual art.

276. *See* Proposed Statute § (a). The "Work of Visual Art" language draws from text of the Copyright Act that was specifically drafted to make VARA's reach narrow. *Compare* 17 U.S.C. §101 (2013) (defining a "Work of Visual Art" only as a "painting, drawing, print, or sculpture . . . or a still photographic image."), *with* 17 U.S.C. §§ 102(a)(1)–(8) (granting copyright protection to literary works, musical works, dramatic works, pantomime, pictorial, graphic, or sculptural works, motion pictures, sound recordings, and architectural works).

277. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 472-73 (2009).

278. *See* Proposed Statute § (a). The "Recognized Stature" language would codify the ruling in *Martin* which allowed "recognized stature" to be proved without calling an expert witness, which would be prohibitively expensive for many artists wishing to enforce their moral rights. *See Martin*, 192 F.3d at 612.

279. *See* Proposed Statute § (a). The "Removal" language prohibits an artwork from being out of public display for more than 2 years.

280. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

Third, the statute takes into consideration the tension between the rights of a private artist and government speech rights.[281] In instances where the government would be directly associated with a work of visual art,[282] the analytical framework for the removal of that work gives the government quite a bit of latitude.[283] Conversely, where the government would only be weakly associated with the work of visual art,[284] the analytical framework for the removal of that work of visual art triggers classic private, individual free speech protections.[285] In the middle ground where the nature of the speech is less clear,[286] neither the government nor the individual is given too much latitude as to control of the speech.[287] By using the language "associated," the proposed statute keeps in mind the underlying association considerations implied by the Supreme Court in the various Government Speech Doctrine Cases previously discussed.[288] The use of constitutional scrutiny framework dependent on the definition of the work of visual art keeps in mind that art speech is constitutionally protected.[289] However, the use of varying frameworks within the proposed statute still grants the government latitude consistent with the Government Speech Doctrine cases in controlling messages with which it is associated.[290] To classify a work of visual art as classic, blended, or non-blended meshes smoothly with the Forum Doctrine.[291] In instances where

281. *See* Proposed Statute §§ (b)–(d).

282. *See id.* §§ (b)(1)(A)–(D).

283. *See id.* §§ (a)–(b)(2)(A).

284. *See id.* § (d)(1).

285. *See id.* § (d)(2)(A).

286. *See id.* §§ (c)(1)(A)–(D). The language of this section, by using "or" instead of "and," makes it easier for speech to be considered blended. *See also supra* Parts II.A–B (taking into consideration the difficulty of pinning down the exact nature of art speech).

287. *See* Proposed Statute § (c)(2)(A).

288. *See id.* §§ (b)(2)(A), (c)(2)(A), (d)(2)(A).

289. Art is protected speech under the First Amendment speech, with the general narrow exceptions to First Amendment protection still applying. *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) (finding that artworks such as Jackson Pollock paintings are "unquestionably shielded" by the First Amendment); *see also* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 641-42 (1994) (providing that there are narrow exceptions to the First Amendment, thus private individual speech is generally analyzed under strict scrutiny framework).

290. *See* Proposed Statute § (b)(2)(A) (giving the government broad discretion when the art is likely to be associated with the government).

the government or a governmental unit exercises more control over the art speech in question,[292] the likelihood that a limited public forum was created is much lower.[293]

Lastly, the proposed statute, via its exceptions and no civil damages sections, avoids making the removal of publicly funded, publicly displayed artwork overly burdensome for the government or a governmental unit.[294] The government or a governmental unit would not be required to display obscene works of visual art,[295] taking into account that art can change meaning over time and potentially become offensive to standard social values.[296] The proposed statute would also not impose unduly burdensome costs to maintain artwork[297] or deprive the public the right to enjoy its space.[298] The proposed statute would not, except under narrow

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291. *See id.* §§ (b)(1), (c)(1), (d)(1); *see also supra* Part I.A.

292. *See* Proposed Statute §§ (b)(1)–(2), (c)(1)–(2). In instances where there is a Classic Work of Visual Art, the work of art *must* be on government property; while in instances where there is a Blended Work of Visual Art, there is a strong likelihood that the work of art will be on government property.

293. This is because the government or a governmental unit has not indiscriminately opened up its facilities to multiple forums of artistic expression, but rather only for the limited purpose of displaying specific messages. *See, e.g.*, Newton v. LePage, 700 F.3d 595, 602 (1st Cir. 2012) (noting the MDOL waiting room could not be considered a public forum); *see also Summum*, 555 U.S. at 469 (where the court also acknowledged that in certain instances a government entity may create a limited forum imposing reasonable and viewpoint neutral restrictions on speech). *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (describing how a limited public forum is created); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 143 (2001).

294. *See* Serra v. U.S. Gen. Servs. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988) (finding that "removal of the [artwork] is a permissible time, place, and manner restriction," and "such restrictions are valid 'provided that they are justified without reference to the content of the regulated speech'") (internal citations omitted); *see also* Proposed Statute § (f).

295. *See* Proposed Statute § (e)(1)(A) (keeping the Proposed Statute consistent with the idea that art is speech and thus subject to normal, albeit narrow, free speech regulations). *See* Miller v. Cal., 413 U.S. 15, 37 (1973) (finding obscenity to be outside the realm of free speech protection); New York v. Ferber, 458 U.S. 747, 764 (1982) (allowing government to restrict the distribution of child pornography).

296. *See supra* Part II.B.

297. *See* Proposed Statute § (e)(1)(B) (allowing the Government to destroy or relocate, say, WPA projects that are incorporated into dilapidated housing projects); O'Connor, *supra* note 193, at 227.

298. *See generally* Proposed Statute § (e)(1)(C) (permitting the public and the government the right to remove public art if it substantially impairs the public's use of the space in which its located); *see also Serra*, 847 F.2d at 1050 (permitting

circumstances, impose civil penalties on governments or governmental units, thus avoiding potential chilling effects to public art funding.[299]

Ultimately, this proposed statute balances the rights of the government to speak with private individual speech rights and artist moral rights. By adopting a proposed statute like this one, a government could dissuade litigation and make the removal of publicly funded, publicly displayed works of visual art less contentious and more predictable.

C. Application and Potential Ramifications of the Statutory Provisions

How would *Newton v. LePage* have turned under the proposed statute? Ironically, the case probably would have come out differently, but only because of LePage's rationale for the removal of the mural.[300] Rather than focus on the rights of the government to speak through art from various Circuit opinions,[301] the First Circuit could have simply analyzed the mural as government speech because its title, location, subject matter, and public association were all associated with the Maine government. After that, all LePage would have had to do was articulate a reasonable justification for the removal of the mural, which he failed to do.[302] Had this statute been in place in Maine prior to *LePage*, it may well have prevented

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the government to remove public art for non-content based reasons such as functional purposes).

299. The government or governmental units should not be financially liable for attempting to remove artwork for which they have already funded. It would be unfair to penalize an entity for a work of visual art it helped bring into existence. *See* Proposed Statute § (f)(1)(A). The Proposed Statute keeps in place the artist's right of integrity for the physical mutilation or destruction of a work of visual art, but the language "irreparable" makes that right more limited considering the definition of "removal" is already favorable to artists and incorporates considerations regarding their moral rights.

300. *See* Newton v. LePage, 700 F.3d 595, 597 (1st Cir. 2012); *see also* CHRISTO & JEANNE-CLAUDE, http://www.christojeanneclaude.net/faq (accessed under "Who Pays for the Installations?" subheading) (last visited Apr. 25, 2014) (emphasizing that one of the most well-known and prolific public artists of our time refused to accept public funding for fear of compromising his artistic integrity).

301. The First Circuit referenced dicta from numerous non-binding sources. *See, e.g.*, *Serra*, 847 F.2d at 1049 (finding no First Amendment violation for relocation of a federally commissioned sculpture); Ill. Dunesland Pres. Soc'y v. Ill. Dept. of Natural Res., 584 F.3d 719, 725-26 (7th Cir. 2009) (finding no First Amendment violation when a state park declined to display certain items on sale racks).

302. Funding streams are not a legitimate reason. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 586 (1998).

the litigation, as LePage could have pointed to it for clear, reliable authority justifying the removal of the mural.

The statute is also not without its potential ramifications. Considering moral rights can be waived, it seems unfortunate that an attempt to more effectively codify those rights may cause a movement towards their contractual forfeiture. While the proposed statute attempts to address this by codifying certain moral rights in its language,[303] the moral rights it attempts to codify are narrower than those granted by VARA, so the proposed statute has the potential to weaken certain artist moral rights. Again, though, the potential chilling effect such a movement may have on the arts community[304] may be sufficient impetus to prevent a strong push towards requiring artists to forfeit their moral rights in their art works.

VI. CONCLUSION

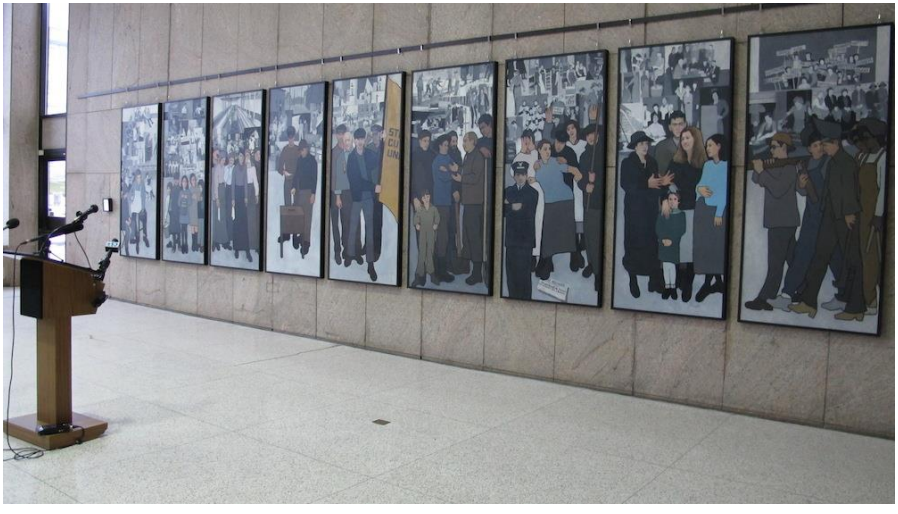
Art reflects our culture. From the Lincoln Memorial to a Rothko color field, art tells us where we have been, where we are, and where we are going. We have been to and experienced some places collectively—wars, depressions, recessions, elections—and these events are often commemorated by our government. When the government speaks about these events, which helps forge our collective identity, it should have the ability to control that speech, as in many ways it is only through the existence and action of our government that these events came to be. However, when the government merely encourages individuals to create, it assumes some risk that the speech it encourages will be challenging or challenged. However, this is the purpose of art. It pushes us, causes us to self-reflect, and ultimately speaks of things greater than ourselves. In those capacities, the government should not be able to fund art and then regulate it, for it does us all a disservice. This concern is especially pertinent in an era where the appropriate size of the government is a contentious issue. Ultimately, however, once you have funded and displayed a piece of art that speech has been spoken. In that most proverbial sense, you cannot unring that bell.

303. *See* Proposed Statute § (f)(1)(B).

304. *See* CHRISTO & JEANNE-CLAUDE, *supra* note 300.

APPENDIX

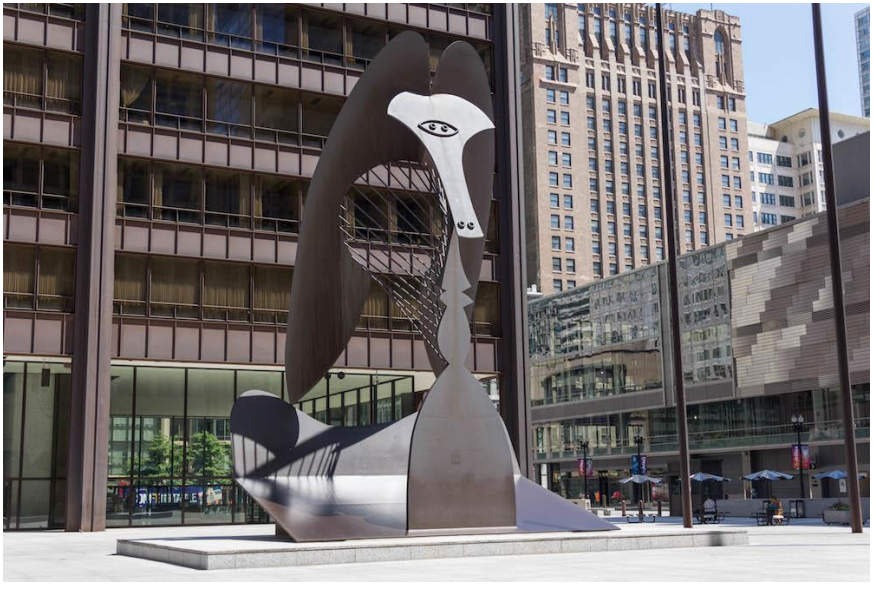
1. Susan Sharon, *Labor Mural Panel Wide Shot*, Maine Public Broadcasting (2012) (*available at* https://flic.kr/p/dLw76t).



2. Jesse Hamerman, *Discovering Columbus* (2012) (*available at* http://www.publicartfund.org/view/exhibitions/5495_discovering_columbus).

3. Go Sugimoto, *Discovering Columbus* (2012) (*available at* http://www.publicartfund.org/view/exhibitions/5495_discovering_columbus).

4. Brian Woychuk, *The Picasso* (2012) (*available at* https://flic.kr/p/co5DoA).



5. Chris Smith, *Just Me and the Bean* (2012) (*available at* https://flic.kr/p/bnk4oC).

6. *Williamsburg Murals move to a new location*, Brooklyn Museum (2009) (*available at* https://flic.kr/p/6eVnqS).