

# **“THERE IS SOMETHING UNIQUE . . . ABOUT THE GOVERNMENT FUNDING OF THE ARTS FOR FIRST AMENDMENT PURPOSES”: AN INSTITUTIONAL APPROACH TO GRANTING GOVERNMENT ENTITIES FREE SPEECH RIGHTS**

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## ABSTRACT

*The common understanding of the First Amendment is that its purpose is primarily libertarian, serving to protect private citizens’ expression from government censorship. In the modern era, however, the government’s pervasive presence—especially in the role of funder of private activity—has blurred the lines between governmental and private speech. Further, the relatively new, increasingly influential government speech doctrine—which dictates that the government will not be subjected to First Amendment scrutiny when it is engaging in communication—has been the Supreme Court’s guidepost of late when the Court has been confronted with a case involving expression with both private and public elements.*

*The government speech doctrine as currently applied by the Court is a relatively blunt instrument, one which does not distinguish between different levels of government or the varied purposes of government activity. The overwhelming weight of First Amendment doctrine, however, suggests that the application of the Free Speech Clause should be case-specific, with each type of government regulation receiving a level of scrutiny appropriately tailored to the*

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*specific type of speech with which it deals and the context in which that speech operates. This Note argues that the Court should adopt a similarly contextual approach when choosing how and whether to apply the government speech doctrine. Specifically, it posits that when a government organization is charged with a task that heavily implicates the First Amendment rights of private parties—such as arts funding—and Congress has purposefully given it a measure of independence to allow it to fulfill that role in a neutral manner, the Court should afford that organization’s selection activities protection under the Free Speech Clause, rather than treating them as government speech. This approach would allow independent organizations responsible for promoting activities clearly protected by the First Amendment—like creative writing, journalism, and the visual arts—to defend their merit-based selection decisions against partisan political influence, instead of conflating the two levels of decisionmaking into one broad category of government speech. Though this approach ostensibly goes against the libertarian aims of the First Amendment, this Note seeks to demonstrate that giving independent-minded government organizations free speech rights on an institutional basis actually comports more closely with the theory, history, and doctrine of the First Amendment than does the current government speech doctrine.*

## INTRODUCTION

According to Judge Learned Hand, the rationale underlying the Free Speech Clause is “that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.”<sup>1</sup> Though this statement accurately explains one of the primary theoretical underpinnings of First Amendment doctrine, modern society has developed in such a way—particularly with the expansion of the federal government and the rise of the administrative state—that “authoritative selection” at the hands of government officials plays a large role in determining which concepts will feature prominently in the metaphorical marketplace of ideas.<sup>2</sup> The state’s right to select certain ideas over others is uncontroversial when political actors exercise the right openly in the pursuit of policy

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1. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945).

2. For an explanation of the marketplace of ideas theory of the First Amendment, see *infra* Part I.A.

goals, thereby furthering the project of governance.<sup>3</sup> The need for limitations on the government's ability to place speech-related restrictions on the vast universe of private persons and institutions entitled to government aid is also an unremarkable concept, given that the First Amendment's limitation on laws abridging speech would be rendered virtually meaningless if Congress were permitted to condition federal funding on a recipient's agreement to refrain from speech.<sup>4</sup> The government's promotion of certain ideas or messages over others becomes much more controversial, however, when the expression inextricably involves both governmental and private actors.<sup>5</sup> Thus, government-created advertisements subsidized by private funds,<sup>6</sup> state license plates featuring the logos of nongovernmental organizations,<sup>7</sup> and monuments donated by private groups to be placed in public parks<sup>8</sup> have all been the subject of

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3. See, e.g., *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1131 (2009) (“A government entity has the right to speak for itself.” (quoting *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000)) (internal quotation marks omitted)); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (“[T]he government's own speech . . . is exempt from First Amendment scrutiny.”); see also *Johanns*, 544 U.S. at 574 (Souter, J., dissenting) (“To govern, government has to say something . . .”). In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court provided an uncontroversial example of this concept in its seminal government speech decision. See *id.* at 194 (“When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.” (citation omitted)).

4. See RODNEY A. SMOLLA, 1 SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 7:5 (2010) (“Government is now so large, and governmental affiliation so ubiquitous, that freedom of speech would be rendered an empty guarantee if government retained carte blanche to attach any restrictions on speech that it pleased based on the receipt of governmental benefits.”).

5. For an argument that this type of hybrid speech should be treated as a category distinct from both purely public and purely private expression, see Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008).

6. See *Johanns*, 544 U.S. at 562–67 (holding that using funds from an assessment on beef producers to pay for generic, government-created advertising credited to “America's Beef Producers”—advertising that many of the beef producers did not approve of—did not compel speech in violation of the First Amendment).

7. See, e.g., *Roach v. Stouffer*, 560 F.3d 860, 867, 870 (8th Cir. 2009) (holding that Missouri's specialty license plate program communicated private speech and thus was required to issue plates promoting a “Choose Life” message to avoid pernicious viewpoint discrimination); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 857–67 (7th Cir. 2008) (holding that Illinois's decision to exclude all abortion-related content from its specialty license plate program was a permissible form of content discrimination and vacating the district court's requirement that the state issue “Choose Life” plates). For an explanation of the multi-circuit split resulting from the specialty license plate controversy, see *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1296–98 (2010).

8. See *Sumnum*, 129 S. Ct. at 1129, 1138 (holding that Pleasant Grove City, Utah had the right under the government speech doctrine to refuse to place a monument donated by the

recent First Amendment challenges. The question of the First Amendment status of mixed governmental-private speech has far-ranging implications, but few are so close to the core concerns of the Free Speech Clause as when the government funds activities that derive much of their worth from their independent status. These activities and institutions include public broadcasting, libraries, museums, and artistic creation—representing, respectively, the government’s roles as journalist, librarian, curator, and patron of the arts.<sup>9</sup> As then-Solicitor General Seth Waxman acknowledged during argument before the Supreme Court, “[T]here is something unique . . . about the Government funding of the arts for First Amendment purposes.”<sup>10</sup>

Despite the complicated attribution questions arising from the increasing scope of speech that combines governmental and private expression, the Supreme Court has become increasingly dogmatic in its insistence that “the Free Speech Clause has no application” when the government is “engaging in [its] own expressive conduct.”<sup>11</sup> Difficulty arises, however, due to the increasing blurriness of the line between the government’s own speech and a private entity’s speech in situations that involve both. In situations when a government agency chooses among the works of private actors to determine whom to fund, for example, can these funding choices fairly be characterized as a “message” the government is communicating? And who is “the government” in this context—the broader federal government or the individual agency? Though the scope of the speech that could potentially remain exempt from First Amendment scrutiny under the so-called government speech doctrine is vast, the Court’s jurisprudence points toward a tendency to treat “government” as a monolithic creature, rather than recognizing the nuances involved in intragovernmental interactions.<sup>12</sup>

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church of Summum in a public park, even though it had previously accepted both religious and secular monuments donated by a number of other groups).

9. See generally Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) (discussing the different roles the government plays depending upon the norms of the institution with which it is interacting).

10. Transcript of Oral Argument at 27, *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (No. 97-371).

11. *Summum*, 129 S. Ct. at 1131. The concept of “expressive conduct” is further explained in Part I, *infra*.

12. In *Ysursa v. Pocatello Education Association*, 129 S. Ct. 1093 (2009), for example, the Court refused to accept the theory that a state law prohibiting payroll deductions from funding political activities abridged the free speech rights of local government entities that wished to

This Note challenges the Court's expanding conception of what constitutes government speech by arguing that First Amendment theory, doctrine, and history support the idea that certain government entities can be treated like independent First Amendment rightsholders instead of being understood to communicate a government message. Because the theory behind the government speech doctrine centers upon the need to implement policy decisions,<sup>13</sup> which concededly could not happen were the government not able to express policy preferences, certain government-created organizations that were never intended to convey the messages of the party in power do not fit neatly within the doctrine's purview. Even in its previous First Amendment decisions, the Court has treated government organizations that interact with private actors in a way that particularly impacts free speech concerns—like public broadcasters and universities—differently.<sup>14</sup> This Note argues that, to support the goals underlying the Free Speech Clause, courts should recognize that government entities that are intended to exercise apolitical, independent judgment about subjects with which the First Amendment is particularly concerned—like education, literature, the arts, and journalism—have inherent free speech rights. In other words, these organizations should be treated as offering their own protected expression, rather than as presenting a government viewpoint, which would necessarily be that of the political branches.

This Note's argument squarely contradicts the majority view that the government, at any level, cannot assert free speech rights.<sup>15</sup>

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remit their employees' payroll deductions to union political action committees. *Id.* at 1100–01. These nuances implicate questions of federalism, as indicated in *Ysursa*, as well as separation-of-powers concerns, especially regarding executive and legislative control over independent agencies and corporations.

13. See *Sumnum*, 129 S. Ct. at 1131 (“If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.” (quoting *Keller v. State Bar*, 496 U.S. 1, 12–13 (1990))); *Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment) (“It is the very business of government to favor and disfavor points of view . . .”).

14. See *infra* Part IV.B.

15. See, e.g., SMOLLA, *supra* note 4, § 3:13 (stating that black-letter law recognizes that “[t]he Free Speech Clause does not instill in governmental units themselves any free speech rights”). But see generally David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006) (arguing that government speech should be protected by the First Amendment when “the expressive conduct at issue is constitutive of the public function of the entity speaking, so that restricting expression would rob the speaker of a core purpose for which it was created”); Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT’L L. 1 (1999)

Though arguing against conventional wisdom, it seeks to show that theory, doctrine, and history support the possibility of governmental First Amendment rights. Further, it aims to present an alternative to the Court's broad-sweeping conception of government speech, which is in danger of encompassing more speech than it must to support the goal of policy implementation.

This Note proceeds in four Parts. Part I offers an overview of First Amendment theory and doctrine, demonstrating the underlying goals achieved by protecting free speech. Part II discusses the government speech doctrine and explains the problems stemming from its broadening reach. Part III delves more deeply into the unique characteristics of the government organizations upon which this Note proposes conferring First Amendment rights. These characteristics include their independence from direct political oversight, their advancement of core First Amendment goals, and their purpose of engaging in speechlike activity—which necessarily involves expression of private parties that is unquestionably protected by the Free Speech Clause. Finally, Part IV closes with a proposal for how courts could implement this idea. The proposed analysis would mirror the Court's previous treatment of broadcast organizations, applying a level of intermediate scrutiny. If the agency were engaged in speech and the broader federal government were seeking to infringe upon its set procedures for decisionmaking, then courts should balance the government's legitimate interests in regulation against the value derived from the agency's independence, thereby shielding the agency from inappropriate politicization. This Note argues that the proposed approach better supports the greater goals underlying the First Amendment.

## I. FIRST AMENDMENT THEORY AND DOCTRINE

### A. *Three Theoretical Rationales Underlying Protection of Freedom of Speech*

One central issue to address about this Note's proposed protection of a government entity's right to free speech is whether such protection comports with the general purpose of the First Amendment. No definitive answer exists as to why the Framers

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(pointing out that the First Amendment was originally understood to support the goals of federalism and positing that state governments should be able to sue the federal government for violations of their free speech rights).

included speech as one of the core values enunciated in the Bill of Rights, but three theories have gained wide acceptance as jointly explaining why this nation values freedom of expression: the marketplace of ideas theory, the self-fulfillment theory, and the democratic self-governance theory.<sup>16</sup>

1. *The Marketplace of Ideas Theory.* The marketplace of ideas theory is one of the most widely accepted explanations for the Constitution's protection of speech. The theory "assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems."<sup>17</sup> Its roots are generally recognized in the writings of John Milton and John Stuart Mill,<sup>18</sup> and its establishment as the dominant theory of the First Amendment has been traced to Justice Holmes's dissent in *Abrams v. United States*:<sup>19</sup>

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>20</sup>

This idea that the Free Speech Clause promotes free competition among ideas has informed Supreme Court jurisprudence since the time of Justice Holmes, and it continues to perform an important function in guiding the Court's First Amendment opinions.<sup>21</sup>

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16. See, e.g., SMOLLA, *supra* note 4, § 2:3 (explaining that "marketplace of ideas," "human dignity and self-fulfillment," and "democratic self-governance" are the "[t]hree classic free speech theories").

17. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3.

18. See *id.* ("[T]his classic image of competing ideas and robust debate dates back to English philosophers John Milton and John Stuart Mill . . ."); see also SMOLLA, *supra* note 4, § 2:15 ("The marketplace of ideas justification for freedom of speech is grounded in the tradition of Milton and Mill.").

19. *Abrams v. United States*, 250 U.S. 616 (1919).

20. *Id.* at 630 (Holmes, J., dissenting).

21. See, e.g., *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000) ("The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed.").

2. *The Self-Fulfillment Theory.* Unlike the marketplace theory, which supposes that the Free Speech Clause primarily serves to protect the search for truth via group debate, the self-fulfillment theory of the First Amendment conceptualizes the provision's goal as guarding individual expression, regardless of its value, truth, or acceptance.<sup>22</sup> This theory is grounded in the idea that "freedom to speak without restraint provides the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment."<sup>23</sup> Under this theory, protection of freedom of expression logically flows from the inherent right to freedom of thought.<sup>24</sup> Courts have drawn a distinction between the absolute protection of thought and the more circumscribed First Amendment protection of expression, which does not reach nonexpressive actions.<sup>25</sup> Though its scope is necessarily limited, however, the idea that speech should be protected because individual free expression has inherent value also guides much Supreme Court jurisprudence in the First Amendment realm.<sup>26</sup>

3. *The Democratic Self-Governance Theory.* The final commonly accepted theory underlying constitutional protection of speech states that free expression must be protected to allow democratic government to function.<sup>27</sup> Unlike the marketplace theory, the democratic self-governance theory supports the idea that "freedom of speech . . . should cover only speech that is related to self-governance."<sup>28</sup> This concept, devised and championed by philosopher

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22. See SMOLLA, *supra* note 4, § 2:21 ("[F]ree speech is also an end itself, an end intimately intertwined with human autonomy and dignity.").

23. *Id.*

24. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.").

25. See SMOLLA, *supra* note 4, § 2:25 (quoting *Doe v. City of Lafayette*, 334 F.3d 606, 610 (7th Cir. 2003), *rev'd on reh'g en banc*, 377 F.3d 757 (7th Cir. 2004)); see also *id.* ("A persuasive case can be made that speech is different in kind from most other forms of self-gratification, and is therefore deserving of special solicitude."). Nonexpressive action refers to conduct that, because it lacks an expressive element, is unprotected by the Free Speech Clause.

26. See, e.g., *Procurier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) ("The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.").

27. See SMOLLA, *supra* note 4, § 2:27 ("The relationship of free speech to democracy is well entrenched in the American constitutional tradition.").

28. *Id.* § 2:28 (emphasis omitted).



and free speech advocate Alexander Meiklejohn,<sup>29</sup> envisions that the Free Speech Clause was intended not to create “a dialectical free-for-all or a truth-seeking process,” but rather to support the “business of self-governance.”<sup>30</sup> Though it would be difficult to make an argument at this point in the Court’s jurisprudence that First Amendment protection is limited to political speech, the self-governance theory is still influential, and political speech is considered to be at the core of the First Amendment’s protections.<sup>31</sup>

As this Note argues in Part IV, affording First Amendment rights to a limited number of government institutions does not conflict with any of these foundational First Amendment theories. In fact, it would support these free speech goals to a greater extent than does the status quo.

*B. First Amendment Doctrine and the Problem of Governmental Selection of Nongovernmental Speech*

In addition to theory, one must also grasp the current state of Supreme Court doctrine to understand why government agencies might require free speech protection. Though the aforementioned foundational theories apply most naturally to individuals or independent groups, the growth of the state and its foray into educational and cultural affairs have resulted in situations in which individuals cannot feasibly defend their free speech rights. The following three examples of this phenomenon are typical of cases involving governmental selection of nongovernmental speech. They each involve a government entity that must make selections among the speech of private speakers due to scarcity of resources, when the government’s promotion of a certain private speaker’s message is a privilege, rather than a widely available right. As these cases demonstrate, scarcity of resources and the right-privilege distinction make it difficult for plaintiffs to vindicate their rights under a First Amendment theory, resulting in a series of Supreme Court decisions maximizing governmental discretion in institutions charged with

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29. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (positing that the proper role of the First Amendment is to foster the political dialogue necessary for self-governance).

30. SMOLLA, *supra* note 4, § 2:28 (emphasis omitted).

31. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“The First Amendment affords the broadest protection to . . . political expression . . .”).

choosing, promoting, or distributing private expression protected under the First Amendment.

Thus, the following examples show that the Court has made a consistent, pragmatic decision to place its faith in expert agencies' abilities to make apolitical, merit-based decisions about which speech to promote, protecting these decisionmakers from being sued by the nongovernmental actors whose speech is disfavored. In subsequent Parts, this Note argues that because the Court has given such deference to those agency decisions, they must be treated as speech to preserve the independent characteristics that warrant the Court's deference in the first place. Describing these three decisions serves the dual purpose of familiarizing the reader with the Court's most relevant jurisprudence and introducing key First Amendment concepts that will be referenced throughout the remainder of this Note: public forum analysis, content and viewpoint neutrality, and the unconstitutional conditions doctrine.

1. *Public Forum Analysis and Arkansas Educational Television Commission v. Forbes.* In *Arkansas Educational Television Commission v. Forbes*,<sup>32</sup> the Court examined the claim that Ralph Forbes, an independent candidate running for a seat in Arkansas's Third Congressional District, had been wrongfully excluded from a candidate debate facilitated by the Arkansas Educational Television Commission (AETC), a state-funded public broadcaster, in violation of his First Amendment rights.<sup>33</sup> Forbes's exclusion was based on the AETC's decision to "limit participation in the debates to the major party candidates or any other candidate who had strong popular support."<sup>34</sup> Given Forbes's reputation as a "perennial candidate who had sought, without success, a number of elected offices in Arkansas,"<sup>35</sup> the AETC defended its decision as a "bona fide journalistic judgement [*sic*] that [its] viewers would best be served by limiting the debate."<sup>36</sup> After the Eighth Circuit held that the AETC had created a public forum by "open[ing] its facilities to a particular group—candidates running for the Third District Congressional

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32. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

33. *Id.* at 669–71.

34. *Id.* at 670.

35. *Id.*

36. *Id.* at 671 (quoting App. to Pet. for Cert. 61) (internal quotation marks omitted).

seat”<sup>37</sup> and found that Forbes’s First Amendment rights had been violated, the Supreme Court examined the applicability of forum analysis to the case.<sup>38</sup>

Forum analysis, in its simplest form, divides government property into three main categories: “the traditional public forum, the public forum created by government designation, and the nonpublic forum.”<sup>39</sup> Traditional public fora include streets, parks, and other locations that “by long tradition . . . have been devoted to assembly and debate.”<sup>40</sup> In a traditional public forum, “the rights of the State to limit expressive activity are sharply circumscribed” and are subject to strict scrutiny review.<sup>41</sup> This same standard of review applies to the second category, the designated public forum, in which a state opens a forum to the public “even if it was not required to create the forum in the first place.”<sup>42</sup> Though the state can freely take away the “open character” of these fora or limit them to “use by certain groups” or “the discussion of certain subjects,”<sup>43</sup> exclusion of a “speaker who falls within the class to which a designated public forum is made generally available . . . is subject to strict scrutiny.”<sup>44</sup> The final category, the nonpublic forum, is any other government property to which the state can restrict access “as long as the restrictions are reasonable and . . . not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>45</sup>

Analyzing the facts of *Forbes* through the public-forum lens, the Court determined that the AETC had not created a designated public forum, due to the special nature of television broadcasting, as well as the fact that access to the debate was “selective” rather than “general.”<sup>46</sup> Further, the “broad rights of access for outside speakers”

37. *Forbes v. Ark. Educ. Television Comm’n*, 93 F.3d 497, 504 (8th Cir. 1996), *rev’d*, 523 U.S. 666 (1998).

38. *Forbes*, 523 U.S. at 672.

39. *Id.* at 677 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

40. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

41. *Id.*

42. *Id.*

43. *Id.* at 46 n.7.

44. *Forbes*, 523 U.S. at 677.

45. *Id.* at 677–78 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (internal quotation marks omitted)).

46. *See id.* at 680 (comparing the AETC’s candidate-by-candidate determinations to *Cornelius*’s agency-by-agency determinations and therefore finding that the AETC’s debate “was a nonpublic forum”).

required in a designated public forum “would be antithetical . . . to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.”<sup>47</sup> Even with political speech in play, the Court nonetheless concluded that “the debate was a nonpublic forum,” primarily based on the fact that the “AETC made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate.”<sup>48</sup> Having made this determination, the Court held that the exclusion of Forbes also had a viewpoint-neutral rational basis: the executive director of the AETC cited the lack of public interest in Forbes’s campaign as the overriding reason for his exclusion.<sup>49</sup> Thus, the Court reversed the Eighth Circuit and upheld a public broadcaster’s right to make editorial decisions, even those concerning which politicians to include in candidate debates.<sup>50</sup>

With this decision, the Court demonstrated that it is highly unlikely that forum analysis will create a situation in which the editorial decision of a government-funded institution with characteristics similar to those of the AETC<sup>51</sup> will be subject to strict scrutiny review.<sup>52</sup> This decision also indicates that when making a value judgment between providing all First Amendment speakers

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47. *Id.* at 673.

48. *Id.* at 680.

49. *See id.* at 682 (“It is, in short, beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest.”). The Court’s conclusion is supported by an earlier jury verdict that “Forbes[s] exclusion was not based on objections or opposition to his views.” *Id.* (internal quotation marks omitted).

50. *See id.* at 683 (“The broadcaster’s decision to exclude Forbes was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment.”). Justice Stevens’s dissent pointed out that the majority did not harmonize this decision with the neutrality rules that would have applied to analogous situations involving private broadcasters under the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, and 47 U.S.C.). *See Forbes*, 523 U.S. at 685–86 (Stevens, J., dissenting) (arguing that the AETC’s decision, whether based on “newsworthiness” or “political viability,” did not use preestablished objective criteria required by the Federal Election Campaign Act of 1971). Yet the Court stressed that it did not intend to permit public broadcasters to exercise unlimited editorial discretion in the realm of political coverage, even within the bounds of viewpoint neutrality. *See id.* at 675–76 (majority opinion) (“The very purpose of [a] debate [is] to allow the candidates to express their views with minimal intrusion by the broadcaster.”).

51. Part III, *infra*, argues that a number of government institutions are similar to public broadcasting outlets like the AETC.

52. Under the tripartite formula for forum analysis, regulations of both traditional public fora and limited public fora are subject to strict scrutiny and must be both content- and viewpoint-neutral. SMOLLA, *supra* note 4, § 8:9. Speech regulations in nonpublic fora only require a viewpoint-neutral rational basis. *Id.* § 8:10.

access to government-sponsored broadcasters with limited resources—assuming the ability of those speakers to express their views through alternate venues—and preserving the editorial integrity of those institutions, the Court favors the latter.<sup>53</sup>

Although this case indicates how courts should, moving forward, resolve claims that the government has created a public forum when the case involves a subsidy with an editorial character, the Court's unwillingness to find the existence of a traditional or designated public forum does not eliminate the requirement that the government choose among different actors on a viewpoint-neutral basis.<sup>54</sup> It does, however, ensure that the state must only articulate a reasonable, viewpoint-neutral reason for its editorial choice.<sup>55</sup> This Section next examines *National Endowment for the Arts v. Finley*<sup>56</sup> to explore whether this minimal requirement has any real meaning—in terms of providing an upper limit on the government's power—within the context of state subsidies for journalism, libraries, or the arts.

2. *Unconstitutional Vagueness, Viewpoint Neutrality, and National Endowment for the Arts v. Finley*. Unlike *Forbes*, in which the Court largely accepted the AETC's claim that its decision to exclude *Forbes* from the debate was not viewpoint-related, *Finley* involved a situation in which the concern about undue government influence on arts funding was warranted. The controversy underlying this case stemmed from the 1990 amendment to the National Foundation of the Arts and Humanities Act of 1965,<sup>57</sup> which required the chairperson of the National Endowment for the Arts (NEA) to implement procedures in which the “general standards of decency

53. See *Forbes*, 523 U.S. at 681–82 (“Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates’ views at all. . . . In this circumstance, a ‘[g]overnment-enforced right of access inescapably dampens the vigor and limits the variety of public debate.’” (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 662, 656 (1994)) (internal quotation marks omitted)).

54. See *id.* at 682 (“[N]onpublic forum status ‘does not mean that the government can restrict speech in whatever way it likes.’” (quoting *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992))).

55. See *id.* at 677–78 (“The government can restrict access to a nonpublic forum ‘as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view.’” (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985))).

56. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

57. National Foundation of the Arts and Humanities Act of 1965, 20 U.S.C. §§ 951–960 (2006), amended by Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, tit. III, § 318, 104 Stat. 1958, 1960.

and respect for the diverse beliefs and values of the American public” would be “tak[en] into consideration” in the awarding of grants.<sup>58</sup> Public outrage over the NEA’s funding of certain controversial artists, especially Robert Mapplethorpe and Andres Serrano, eventually led Congress to reevaluate its oversight of the institution.<sup>59</sup> The final text of the amendment was a much milder alternative to other versions, which sought to “eliminat[e] the NEA’s funding or substantially constrain[] its grant-making authority.”<sup>60</sup> Nevertheless, it raised suspicion of political motivations in the selection process and was subsequently challenged by four artists whose applications for grants were denied following its adoption.<sup>61</sup> Both the district court and the Ninth Circuit ruled that the provision violated the First Amendment on its face because of the overbreadth and vagueness of the “decency and respect” language, and because it “violat[e] the First Amendment’s prohibition on viewpoint-based restrictions on protected speech.”<sup>62</sup>

In a decision reversing the Ninth Circuit, the Supreme Court contemplated whether the requirement to consider “decency and respect” in arts funding actually promoted—and consequently required the NEA to advance—any particular viewpoint.<sup>63</sup> The Court determined that it did not based on three main factors: that the provision merely required “consideration” rather than absolute adherence;<sup>64</sup> the bipartisan nature of the coalition supporting the

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58. 20 U.S.C. § 954(d)(1).

59. See *Finley*, 524 U.S. at 574–75 (explaining the “public controversy” stemming from Mapplethorpe’s exhibit containing “homeroetic photographs that several members of Congress condemned as pornographic” and from Serrano’s “Piss Christ, a photograph of a crucifix immersed in urine,” both of which were indirectly funded by the NEA).

60. *Id.* at 581.

61. *Id.* at 577. The four artists—Karen Finley, John Fleck, Holly Hughes, and Tim Miller—claimed that the denial of funding was based on their “sexual politics,” and specifically their graphic depictions of sexual abuse and homosexuality. Julie Ann Alanga, Note, *1991 Legislation, Reports and Debates over Federally Funded Art: Arts Community Left with an “Indecent” Compromise*, 48 WASH. & LEE L. REV. 1545, 1545 n.2, 1546 n.4 (1991).

62. *Finley*, 524 U.S. at 578, 579.

63. See *id.* at 580–81 (looking at the plain language and political context of the statute in response to “respondents’ assertion that the provision compels the NEA to deny funding on the basis of viewpoint discriminatory criteria”).

64. See *id.* (“Section 954(d)(1) adds ‘considerations’ to the grant-making process, it does not preclude awards to projects that might be deemed ‘indecent’ or ‘disrespectful,’ nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application.”).

amendment in Congress;<sup>65</sup> and that the vagueness of the requirement, instead of promoting arbitrary enforcement, allowed for “multiple interpretations” and therefore would not automatically “preclude or punish the expression of particular views.”<sup>66</sup>

The Court also observed that the NEA necessarily had to take content into consideration as a consequence of the nature of the grantmaking process.<sup>67</sup> By confining this discussion to decisions based on content, the majority made a tenuous distinction between permissible content-based criteria for awarding grants and impermissible viewpoint-based criteria, which in practical terms allowed the NEA to continue using subjective criteria in its grantmaking process. In a concurring opinion, however, Justice Scalia proclaimed that the provision “unquestionably constitute[d] viewpoint discrimination” and expressed doubts over whether any meaningful distinction between the two can exist.<sup>68</sup> Though advocating for the opposite outcome in the case, Justice Souter reached the same conclusion in his dissent: “[T]he decency and respect provision on its face is quintessentially viewpoint based.”<sup>69</sup>

This disagreement among the Justices about the meaning of and difference between content and viewpoint discrimination demonstrates the difficulty of relying upon a prohibition of viewpoint discrimination, subject to review for its reasonableness, as the lone check on overextension of government authority in the subsidy context. As Professor Robert Post points out, “[i]n . . . settings [analogous to the awarding of grants], speech is necessarily and routinely constrained on the basis of both its content and its viewpoint.”<sup>70</sup> Professor Frederick Schauer likewise expresses skepticism about the applicability of the content-viewpoint dichotomy to the arts-subsidy context, observing that “[t]o support painting but not installations might not strike everyone as being about point of

65. *See id.* at 582 (“The legislation was a bipartisan proposal introduced as a counterweight to amendments aimed at eliminating the NEA’s funding or substantially constraining its grant-making authority.”).

66. *See id.* at 583 (“[T]he provision does not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views.”).

67. *Id.* at 585.

68. *Id.* at 593 (Scalia, J., concurring). Justice Scalia noted that “[i]f there is any uncertainty on the point, it relates only to the adjective . . . . That is, one might argue that the decency and respect factors constitute *content* discrimination rather than *viewpoint* discrimination, which would render them easier to uphold.” *Id.* at 593 n.1.

69. *Id.* at 603 (Souter, J., dissenting).

70. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 166 (1996).

view, but my strong suspicion is that many contemporary artists would disagree.”<sup>71</sup>

The difficulty of articulating a constitutionally relevant distinction between content and viewpoint discrimination in the context of subsidies likely means that, following the formula articulated in the majority opinion, courts will afford relief only for the most egregious violations under an as-applied challenge. In preserving a cause of action under the Free Speech Clause in cases like *Finley*, however, the Court demonstrated its ongoing concern with the possibility that an overbearing government could exercise excessive control over the funding of speech activities close to the core of First Amendment protections.

3. *The Unconstitutional Conditions Doctrine and United States v. American Library Ass’n.* According to the unconstitutional conditions doctrine, the state may not “deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.”<sup>72</sup> In *United States v. American Library Ass’n*,<sup>73</sup> the Court confronted a complicated case dealing with the constitutionality of a congressional requirement that any library accepting federal assistance<sup>74</sup> to provide Internet access to its patrons must adopt “a technology protection measure . . . that protects against access’ by all persons to ‘visual depictions’ that constitute ‘obscen[ity]’ or ‘child pornography,’ and that protects against access by minors to ‘visual depictions’ that are ‘harmful to minors.’”<sup>75</sup> The Children’s Internet Protection Act (CIPA)<sup>76</sup> required a “technology protection measure” that would “block[] or filter[] Internet access” to the categories of materials described above.<sup>77</sup> The district court found CIPA unconstitutional on

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71. Schauer, *supra* note 9, at 105.

72. *Id.* at 210 (quoting *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996)) (alteration in original) (internal quotation marks omitted).

73. *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (plurality opinion).

74. Federal assistance came in the form of either discounted rates under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.), or grants from the Institute of Museum and Library Sciences (IMLS). *Am. Library Ass’n*, 539 U.S. at 201.

75. *Id.* (quoting 20 U.S.C. § 9134(f)(1)(A)(i), (B)(i) (2006); 47 U.S.C. § 254(h)(6)(B)(i), (C)(i) (2006)).

76. CIPA, Pub. L. No. 106-554, tit. XVII, 114 Stat. 2763A-335 (2000) (codified in scattered sections of 20 & 47 U.S.C.).

77. *Am. Library Ass’n*, 539 U.S. at 201 (quoting 47 U.S.C. § 254(h)(7)(1)).



its face on the basis that it imposed an unconstitutional condition on public library funding.<sup>78</sup>

The Supreme Court thus needed to determine whether CIPA imposed “an unconstitutional condition on the receipt of federal assistance” on libraries themselves.<sup>79</sup> In past cases, the unconstitutional conditions doctrine had been used to find that it was impermissible “for the state to condition tax exemptions, welfare benefits, and some forms of non-policy public employment on refraining from engaging in otherwise protected speech unrelated to the purpose of the governmental program.”<sup>80</sup> But Professor Schauer notes the difficulty in distinguishing unconstitutional conditions from government speech.<sup>81</sup> The decreasing success rate of unconstitutional conditions claims and the increasing number of cases decided upon the ground of the government speech doctrine bolster his observation.<sup>82</sup>

The Court provided a suitable example of this concept by basing its denial of the American Library Association’s unconstitutional conditions claim on the government’s ability to “define the limits of [a] program” it has funded.<sup>83</sup> Without reaching the question of whether a public library has First Amendment rights,<sup>84</sup> the majority upheld the ability of Congress to “insist that these public funds be spent for the purposes for which they were authorized.”<sup>85</sup> The Court did so with the understanding that “[t]o the extent that libraries wish

78. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 453 (E.D. Pa. 2002), *rev’d*, 539 U.S. 194 (2003). The district court did not decide whether the plaintiffs had to demonstrate that it was impossible for a library to comply with CIPA without violating the First Amendment to succeed in facially invalidating the provision. *Id.* The court did, however, “assume without deciding . . . that a facial challenge to CIPA require[d] plaintiffs to show that any public library that complies with CIPA’s conditions [would] necessarily violate the First Amendment” and “that CIPA’s constitutionality fail[ed] under this more restrictive test.” *Id.* Thus, though the district court refrained from deciding which test was required, it did determine that CIPA would fail the more restrictive test. *Id.*

79. *Am. Library Ass’n*, 539 U.S. at 210 (plurality opinion).

80. Schauer, *supra* note 9, at 102.

81. *See id.* (“Requiring an employee or contractor to speak the government’s message will . . . look like an unconstitutional condition insofar as it conditions employment . . . on speaking words with a certain content, but will look like government speech insofar as it embodies the government’s prerogative of sending out its own message.”).

82. For an explanation of the government speech doctrine, see *infra* Part II.

83. *Am. Library Ass’n*, 539 U.S. at 211 (plurality opinion) (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

84. *See infra* Part IV.

85. *Am. Library Ass’n*, 539 U.S. at 212 (plurality opinion) (quoting *Rust*, 500 U.S. at 196) (internal quotation marks omitted).

to offer unfiltered access [to the Internet], they are free to do so without federal assistance,” which does not amount to a suppression of the speech activity involved in providing Internet access.<sup>86</sup> Further, the Court explained that “[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”<sup>87</sup>

Though the plurality did not explicitly characterize the provision in question as government speech, it used the language and principles associated with the government speech doctrine to justify the ability of the government to impose speech-related restrictions that support an overriding governmental interest.<sup>88</sup> The idea that, in cases involving government subsidies, a restriction on speech within the context of those subsidies will not violate the unconstitutional conditions doctrine has led to an increasing tendency of lower courts to decide as-applied challenges according to government speech principles, characterizing the activity as the government’s own speech, and thus not subject to First Amendment protection.<sup>89</sup> This expansion of the government speech doctrine threatens to diminish the independence of smaller government entities by eliminating the possibility of a distinction between politically motivated speech mandated by the larger federal government and merit-based speech propagated by an independent, government-funded entity.

## II. THE EXPANDING GOVERNMENT SPEECH DOCTRINE

Though the Court might have reached similar results had it relied upon the government speech doctrine to resolve the preceding three cases, none of them analyzed the actions as speech of the government itself. The number of situations in which courts use the “recently minted government speech doctrine”<sup>90</sup> in free speech cases, however, has expanded greatly since *American Library Ass’n*. Lower courts have shown an increased willingness to characterize speech selection by the government as government communication through editorial decisions, thus freeing the government from the First Amendment scrutiny it is subject to when acting as a regulator of speech. This Part briefly touches upon the development of the modern government

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86. *Id.*

87. *Id.* (quoting *Rust*, 500 U.S. at 193).

88. *See id.* at 210–14 (adopting the logic of *Rust* to explain the Court’s holding).

89. *See infra* Part II.C.

90. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring).

speech doctrine; explains why its use in the context of public broadcasters, libraries, and arts organizations could be problematic for independent entities that, though funded by the government, are not created to express the views of the party in power; and demonstrates how lower courts have nevertheless drawn upon it when dealing with issues involving editorial decisionmaking in arts and broadcasting.

#### A. *Origins and Tenets of the Government Speech Doctrine*

The idea that one unified government speech doctrine exists is somewhat misleading, as the question of what constitutes government speech is without clear resolution.<sup>91</sup> Despite this fundamental definitional ambiguity, however, most scholars recognize the origins of the modern government speech doctrine in *Rust v. Sullivan*,<sup>92</sup> a controversial decision in which the Court determined that a provision requiring doctors who received Title X funding to refrain from discussing abortion with patients did not violate the doctors' First Amendment rights.<sup>93</sup> This decision rested upon the concept that the government may provide funding to support programs "dedicated to advanc[ing] certain permissible goals" consistent with state policy without affording similar support to other organizations.<sup>94</sup> Further, the majority distinguished the selective funding decision in *Rust* from an absolute regulation on speech—which would draw stricter scrutiny under the Free Speech Clause—because the doctors affected were "free . . . to pursue abortion-related activities when they [were] not acting under the auspices of the Title X project."<sup>95</sup>

Despite continuing discomfort among scholars about this opinion,<sup>96</sup> courts have adopted two general principles from *Rust* when

91. See, e.g., Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380–87 (2001) (outlining questions left unanswered by the Court's formulation of the government speech doctrine and presenting eight typologies of government speech).

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

93. *Id.* at 192–96.

94. *Id.* at 194. The Court illustrated this principle by analogy, noting that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." *Id.*

95. *Id.* at 198.

96. See, e.g., Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1271–73 (2010) (arguing that the Court erred in *Rust* by failing to engage in a searching inquiry of what message the

dealing with government speech cases. First, when a government entity is “speak[ing] for itself,” it has the right to “select the views that it wants to express,” and “the Free Speech Clause has no application.”<sup>97</sup> Second, a decision to subsidize private expression will likewise be exempt from First Amendment scrutiny if funding is distributed “for the purpose of delivering a government-controlled message.”<sup>98</sup>

This second point must be read in conjunction with the first. Courts analyze a government’s choice to subsidize certain messages instead of others when not speaking for itself under public forum doctrine, as exemplified by the decision in *Rosenberger v. Rector and Visitors of University of Virginia*.<sup>99</sup> In *Rosenberger*, the University of Virginia’s policy of excluding student “religious activit[ies]” from eligibility for funding by the Student Activities Fund (SAF), which provided payment to certain groups “related to the educational purpose of the University of Virginia,”<sup>100</sup> did not constitute government speech.<sup>101</sup> The Court grounded this decision on its determination that “the University [did] not itself speak or subsidize transmittal of a message it favor[ed] but instead expend[ed] funds to encourage a diversity of views from private speakers.”<sup>102</sup> Thus, the university had created a limited public forum for the expression of private speech, which it could not limit based on viewpoint-based criteria.<sup>103</sup>

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government sought to communicate); Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1163–64 (2010) (noting that “*Rust* and *Finley* were deeply unpopular decisions among scholars”).

97. *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1131 (2009) (citation omitted).

98. *Id.*

99. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) (“It does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”); *see also Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (“If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case.”).

100. *Rosenberger*, 515 U.S. at 824–25. The University also excluded “philanthropic contributions and activities, political activities, activities that would jeopardize the University’s tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses” from SAF support. *Id.* at 825.

101. *Id.* at 837.

102. *Id.* at 834.

103. *See id.* at 830 (“The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”).

*Rosenberger* and *Rust* seem to create the possibility of distinguishing between government speech and government subsidy of private speech by examining whether the government is purposefully espousing a certain message.<sup>104</sup> Recent decisions, however, suggest that the government speech doctrine applies even in situations in which the government has created a message but not specifically claimed that message as its own.<sup>105</sup> These decisions suggest the expansion of the government speech doctrine and create the possibility that it may be applied in the speech-selection context.

*B. Why Analyzing Editorial Decisions of Government Actors as Government Speech Is Problematic*

Cases in which government actors make editorial choices in the realm of the arts or humanities fall somewhere between the two paradigms envisioned by the *Rust* line of cases and the *Rosenberger* decision. On the one hand, the *Forbes* Court indicated that, at least in the realm of broadcasting decisions, the “exercise[ of] editorial discretion in the selection and presentation of . . . programming” is “speech activity,” but the Court stopped short of calling it government speech, thus distinguishing *Forbes* from *Rust*.<sup>106</sup> On the other hand, though these decisions deal with a situation similar to the one in *Rosenberger*—in which “the State acts against a background and tradition of thought . . . that is at the center of our intellectual and philosophical tradition”<sup>107</sup>—unlike in *Rosenberger*, the Court deemed public forum analysis inapposite.<sup>108</sup> Up to this point, the Court has duly treated the cases examined in this Note as something of a middle ground between government speech cases and public forum cases. This Section posits that it would be problematic for the government to move toward the *Rust* side in future analyses of cases in which a

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104. See Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 22 (2007) (“The key difference between *Rust* and *Rosenberger*, then, lay in understanding whose message was really at issue. In *Rust*, the government enlisted private actors to deliver a governmental message, whereas in *Rosenberger* it attempted to discourage certain private viewpoints.”).

105. See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564–67 (2005) (concluding that the government speech doctrine was applicable when analyzing a First Amendment challenge to the government’s creation of advertising attributed to “America’s Beef Producers”).

106. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998).

107. *Rosenberger*, 515 U.S. at 835.

108. See, e.g., *Forbes*, 523 U.S. at 675 (“[P]ublic broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine . . .”).

government institution selects among the expressive acts of independent actors because the government is not communicating any specific message.

Professor Randall Bezanson has extended *Forbes's* logic to argue “that government has the power to select speech by others as part of its own expressive freedom.”<sup>109</sup> This reasoning raises an important point of contention: how clear must a governmental message be in order to be deemed government speech? Justice Souter has criticized recent decisions determined according to the government speech doctrine as too tenuously identified as the government’s own opinion to be excused from First Amendment analysis.<sup>110</sup> Scholars have likewise found fault with government speech cases in which the governmental nature of the message communicated is not clear, primarily based on the idea that political checks on government abuses—like voting and protest—cannot function properly if the public is not aware of the government’s backing of a certain viewpoint.<sup>111</sup> These criticisms counsel against characterizing the speech-selection judgments of organizations such as libraries, public broadcast stations, and arts funding organizations as government speech, as they do not clearly advance a particular government message and, indeed, would likely be best understood by an observer as communicating the message intended by the original speaker—that is, the artist, writer, or journalist responsible for the original creative act.

Those who do claim that cases such as *Finley* constitute government speech argue that, though the government did not

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109. Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 975 (1998) (positing that the Court’s decision in *Finley* could be explained only if “through the selection system itself and in the totality of selected expression, government is pursuing an expressive end, which is to persuade and teach people to value art that satisfies certain tastes and standards—and necessarily to devalue art that fails those standards”).

110. See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring in the judgment) (“To avoid relying on a *per se* rule to say when speech is governmental, 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 . . .”); *Johanns*, 544 U.S. at 571–72 (Souter, J., dissenting) (“[A] compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own.”).

111. See generally Helen Norton, *The Measure of Government Speech*, 88 B.U. L. REV. 587 (2008) (“[T]he Supreme Court has shielded the government’s expression from Free Speech Clause scrutiny, identifying political accountability measures like voting and petitioning—rather than First Amendment litigation—as the appropriate resource for those displeased with their government’s message.”).

articulate a specific message like the anti-abortion agenda in *Rust*, the NEA's "programmatic" selection of certain artworks at the exclusion of others could be seen as a communicative act, expressing what the government considered to be excellence in art.<sup>112</sup> Professor Bezanson asserts that selective editorial judgments made by government entities like arts organizations, museums, and universities can be considered government speech as long as (1) "the purpose served by such government speech-selection judgments [is] itself . . . expressive" and (2) "government's expressive activities [do] not displace competing speech from the market."<sup>113</sup> Although the claim that the government is expressing its views on "excellence" through speech-selection judgments is theoretically plausible, it does not account for the fact that the judgment of experts, performed independently and shielded from political influence, is one of the key characteristics that allows these organizations to perform their designated functions.<sup>114</sup> Thus, it would be strange to equate this exercise of independent judgment with any calculated, predetermined message the government intended to convey. Though this Note suggests that it would be problematic to treat these types of cases as government speech cases, lower courts have begun to interpret controversies involving similar fact patterns using the government speech doctrine as their determinative framework.

### C. *The Government Speech Doctrine and State Editorial Judgment in the Circuits*

In the lower courts, the idea that an editorial decision made by a government-funded entity is government speech has been used as the rationale for exempting the judgments of arts and broadcast organizations from First Amendment scrutiny. Because the Court has not articulated a precise test to guide the lower courts in determining when the government is speaking for itself,<sup>115</sup> the circuits' use of the

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112. Bezanson, *supra* note 109, at 978–79. The slippage in Professor Bezanson's argument about who in the government is creating the "programmatic" message—Congress, the president, or the NEA—is part of the problem that arises when "government speech" is treated as a monolithic entity. This Note seeks to illuminate that issue.

113. *Id.* at 979.

114. *See infra* Part III.A.

115. *See generally* Lilia Lim, *Four-Factor Disaster*, 83 WASH. L. REV. 569 (2008) (arguing that "[w]hile the Supreme Court has explained some of the things government can do when it is speaking, it has not clearly explained how to tell whether government is speaking in the first

government speech doctrine to analyze these cases is not unexpected. Moreover, given that the Court's practical approach has been to defer to the judgment of arts and broadcast organizations when they are acting within an acceptable institutional framework and according to their articulated goals, the outcome of these cases appears correct. The fact that these courts have used the government speech doctrine as a way to exempt these organizations from First Amendment analysis, however, appears problematic based on the reasoning discussed in the previous Section.

In *People for the Ethical Treatment of Animals v. Gittens*,<sup>116</sup> the D.C. Circuit considered whether the District of Columbia Commission on the Arts and Humanities (Commission) violated the First Amendment rights of the animal-rights-advocacy organization People for the Ethical Treatment of Animals (PETA) in denying PETA's submission to a public art project, which the organization paid to have displayed as part of a sponsorship program.<sup>117</sup> The Commission "reserve[d] the right of design approval" for works submitted by sponsors.<sup>118</sup> Pursuant to this stated policy, the Commission rejected three sketches—primarily depicting elephants in circuses exposed to harsh conditions<sup>119</sup>—submitted by PETA.<sup>120</sup> PETA sued, arguing that the Commission had created a designated public forum for those participating in the sponsorship program and had violated PETA's First Amendment rights by excluding it from that forum.<sup>121</sup>

The D.C. Circuit rejected this argument, concluding that "[a]s a speaker, and as a patron of the arts, the government is free to communicate some viewpoints while disfavoring others."<sup>122</sup> On the one hand, the court's recitation of doctrine is accurate, given that when it speaks, the government is free to communicate some

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place," and advocating for the abandonment of a four-factor test created and applied by certain circuits).

116. *People for the Ethical Treatment of Animals v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005).

117. *Id.* at 25–26.

118. *Id.* at 26.

119. PETA's rejected designs included "an elephant with a sign tacked to its side stating: The CIRCUS is Coming See: Torture Starvation Humiliation All Under the Big Top," "a sad shackled circus elephant with a trainer poking a sharp stick at him," and "a shackled elephant crying" with a sign on it reading "The Circus is coming. See SHACKLES—BULL HOOKS—LONELINESS. All under the 'Big Top.'" *Id.*

120. *Id.*

121. *Id.* at 27.

122. *Id.* at 30.



viewpoints at the exclusion of others. On the other hand, the court's equation of the government in its role as a speaker with its role as patron of the arts is not supported by existing First Amendment case law.<sup>123</sup> Further, it did not articulate the reasoning behind the leap from the characterization of the selection activity as speech to the classification of the speech as a government message. As explained at the beginning of this Section, the D.C. Circuit's decision is reasonable given the circumstances. The point here is simply to problematize the fact that government speech was the determinative rationale cited in taking the Commission's actions out of the realm of First Amendment review.

A case in which a circuit similarly exempted a government entity's selection decisions from Free Speech Clause scrutiny was *Knights of the Ku Klux Klan v. Curators of the University of Missouri*.<sup>124</sup> This decision involved the claim of the Ku Klux Klan (KKK) that a university-owned public radio station violated its First Amendment rights by denying the KKK's request to sponsor the station.<sup>125</sup> In analyzing this claim, the Eighth Circuit began by stating "first and foremost" that the station's "underwriting acknowledgments constitute governmental speech on the part of [the University of Missouri]." <sup>126</sup> The court properly interpreted *Forbes* in concluding that the station's editorial activities constitute speech. But, like the D.C. Circuit in *People for the Ethical Treatment of Animals*, the Eighth Circuit did not explain the analytical leap from the university-owned radio station—which the government has clearly indicated should not be considered an entity expressing views of the state<sup>127</sup>—engaging in speech activity to the government speaking for itself.

Instead of trying to make these editorial decisions fit into a government speech doctrine that does not seem particularly

123. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 611–12 (1998) (Souter, J., dissenting) ("[T]he Government would have us liberate government-as-patron from First Amendment strictures not by placing it squarely within the categories of government-as-buyer or government-as-speaker, but by recognizing a new category by analogy to those accepted ones. The analogy is, however, a very poor fit, and this patronage falls embarrassingly on the wrong side of the line between government-as-buyer or -speaker and government-as-regulator-of-private-speech.").

124. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000).

125. *Id.* at 1089–90.

126. *Id.* at 1093.

127. See *supra* notes 135–39 and accompanying text.

appropriate for their unique circumstances, this Note proposes that, as a complement to giving these organizations the freedom they need to operate as the government intends, their speech-selection activity should be treated as speech subject to First Amendment protection. This characterization would allow courts to shield independent agency actors in a situation in which the larger government oversteps its bounds and subverts a government agency into a forum for expressing political, social, or other viewpoints of the party in power.

### III. SPECIALIZED FIRST AMENDMENT TREATMENT WHEN THE GOVERNMENT ACTS AS “[P]ATRON OF THE [A]RTS, . . . [B]ROADCASTER, AND [L]IBRARIAN”

Scholars have recognized the fundamental difference between the government’s role as a regulator and its role as an allocator<sup>128</sup>—specifically, as “patron of the arts, . . . broadcaster, and librarian.”<sup>129</sup> As an allocator, the federal government plays an important part in supporting and subsidizing the cultural life of the nation through its funding of agencies and corporations. It also steps into a realm of complicated First Amendment considerations, as the line between controlling speech and speaking becomes blurry. Professor Schauer has argued that in certain situations, it makes sense to “allow[] First Amendment outcomes to turn on the particular characteristics of . . . specific institutions.”<sup>130</sup> This Part examines why organizations such as libraries, arts organizations, and public broadcasting entities should be afforded specialized First Amendment status on the basis of their institutional characteristics. The three main justifications for treating these types of institutions as unique for Free Speech Clause purposes are their particular institutional goals and framework, their close proximity to the goals of the First Amendment, and the resemblance of their independent editorial decisions to speech activity.

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128. See, e.g., OWEN M. FISS, *THE IRONY OF FREE SPEECH* 27–29 (1996) (recognizing “another sphere of state activity of growing importance in the twentieth century, in which the state acts not as a regulator but as an allocator”).

129. *People for the Ethical Treatment of Animals v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005).

130. Schauer, *supra* note 9, at 86.

### A. *Unique Institutional Characteristics*

To support the goal of promoting excellence in the arts and humanities, the federal government has created three federal agencies responsible for public broadcasting, arts funding, and support and maintenance of libraries and museums: respectively, the Corporation for Public Broadcasting (CPB),<sup>131</sup> the NEA, and the Institute of Museum and Library Services (IMLS).<sup>132</sup> Though government funding in these functional areas is far-reaching and includes within its purview many state, local, and nonprofit organizations, an examination of these three principal federal organizations illustrates the internal framework that makes these types of institutions worthy of special consideration under the First Amendment.

One of Congress's main concerns when creating these institutions was the need to maintain their independence. Its approach to implementing this goal was, primarily, to create a decentralized governing structure for organizations promoting development in arts<sup>133</sup> and journalism<sup>134</sup> as a way to ensure that their decisions were made according to the guidance of experts and not the influence of outside government actors. The CPB, for example, provides a model for congressional protection of the independent decisionmaking process of institutional journalists. First, its enabling act explicitly states that it is "not . . . an agency or establishment of the United States Government."<sup>135</sup> It goes on to require that the CPB's board of directors, appointed by the president, be comprised of members of diverse political parties<sup>136</sup> and of experts in the relevant field.<sup>137</sup> The act specifies that the CPB must choose which programs to

131. 47 U.S.C. § 396 (2006).

132. The NEA, the National Endowment for the Humanities, and the IMLS are all established within the National Foundation on the Arts and the Humanities. 20 U.S.C. §§ 953, 9102 (2006).

133. See S. Rep. No. 91-879, at 1-2 (1970), *reprinted in* 1978 U.S.C.C.A.N. 3461, 3462 (noting the concern that "legislation to foster support of the arts and humanities could bring about establishment of a central federal control of the arts and humanities" and reporting that this problem had not arisen in large part due to the "26-member council, which represents a broad geographical, cultural, and school cross section of the country").

134. See 47 U.S.C. § 396(a) ("[A] private corporation should be created to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control.").

135. *Id.* § 396(b).

136. *Id.* § 396(c)(1).

137. *Id.* § 396(c)(2).

fund “on the basis of comparative merit” as determined by “panels of outside experts.”<sup>138</sup> Finally, to further distance the CPB from the final product presented to the public, it is not permitted to “own[] or operat[e] any television or radio broadcast station,” nor is it able to directly “produc[e] programs.”<sup>139</sup> In most instances the CPB provides funding to stations that are directly owned or primarily supported by state or local governments, but these channels are subject to similarly strict governing structures.<sup>140</sup>

Arts organizations and public libraries have put into place similarly restrictive procedural mandates designed to separate these types of institutions from political influence. The activities of the NEA, for example, are reviewed by the National Council on the Arts (Council), a panel composed of eighteen voting members, not employed by the government, who are appointed according to their demonstrated expertise in the arts and their diversity of perspectives.<sup>141</sup> The majority in *Finley* favorably cited the Council and the smaller advisory panels that review grant applications as part of its rationale behind upholding the NEA’s grantmaking decisions.<sup>142</sup>

Public libraries generally have their own stated policies regarding the acquisition and removal of books, which tend to comport with the values of the American Library Association (ALA), the leading nonprofit organization providing guidance on the operation of public libraries.<sup>143</sup> Both the plurality and the dissent in *American Library*

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138. *Id.* § 396(g)(2)(B)(i).

139. *Id.* § 396(g)(3).

140. *See, e.g.*, *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 761–62 (1996) (plurality opinion) (explaining that “[p]ublic access channels . . . are normally subject to complex supervisory systems of various sorts”).

141. 20 U.S.C. § 955(b)(1)(C) (2006). Six members of Congress also sit on the Council, but they are not permitted to vote and are selected to represent a diverse cross section of both houses and both main political parties. *Id.* § 955(b)(1)(B).

142. *See Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 573–75, 580–81 (1998) (pointing out the importance of “ensuring the representation of various backgrounds and points of view on the advisory panels that analyze grant applications”).

143. *Compare NYPL’s Mission Statement*, N.Y. PUB. LIBRARY, *Mission & Priorities*, <http://www.nypl.org/help/about-nypl/mission> (last visited Jan. 9, 2011) (“The mission of The New York Public Library is to inspire lifelong learning, advance knowledge, and strengthen our communities.”), with *Mission of Priorities*, AM. LIBRARY ASS’N, <http://www.ala.org/ala/aboutala/missionhistory/mission/index.cfm> (last visited Jan. 9, 2011) (“The stated mission is, ‘To provide leadership for the development, promotion, and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all.’”).

*Ass'n* point to the ALA's *Library Bill of Rights*<sup>144</sup> as an example of how public libraries' collection development is governed, and both suggest that, due to this stated governance procedure, collection development should be afforded deference.<sup>145</sup> The aforementioned institutions' federally mandated or independently adopted governing procedures afford them the independent status necessary to make them institutions deserving special treatment under the First Amendment.

### B. Upholding Core Free Speech Values

As Professor Schauer points out, “the arts, libraries, . . . and the institutional press” share “a certain First Amendment aura.”<sup>146</sup> These organizations, through their shared function of compiling and distributing information to the public, are central contributors to the First Amendment goal of “affording the public access to discussion, debate, and the dissemination of information and ideas.”<sup>147</sup> Professor Owen Fiss places the value of these organizations in their capacity to “free art from strict dependence on the market or privately controlled wealth” and, by doing so, to “further[] the value that underlies the First Amendment: our right and duty to govern ourselves reflectively

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144. AM. LIBRARY ASS'N, LIBRARY BILL OF RIGHTS (1996), available at <http://www.ala.org/ala/issuesadvocacy/intfreedom/librarybill/lbor.pdf>.

145. See *United States v. Am. Library Ass'n*, 539 U.S. 194, 203–04 (2003) (plurality opinion) (citing the ALA's *Library Bill of Rights* as a demonstration of a public library's traditional role); *id.* at 239–41 (Souter, J., dissenting) (citing various ALA policies as conflicting with the government policy of requiring filtering software to be installed on Internet terminals in public libraries).

146. Schauer, *supra* note 9, at 116. Professor Schauer includes “universities” in his list of institutions holding a special place in First Amendment jurisprudence. *Id.* This Note does not address universities or other public educators because, though they do share the need to make editorial choices with the three types of institutions discussed—for example, in the selection of teachers, curriculum, and speakers—there are a number of other factors that make public schools and universities unique, and the Court has afforded them an individualized species of review based on these factors. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (“[The] danger [of chilling individual thought and expression] is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (“[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.”).

147. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978).

and deliberately.”<sup>148</sup> Though this is not the only widely recognized value underlying the Free Speech Clause,<sup>149</sup> it is a central reason why these organizations deserve special status under the First Amendment. By funding the communication of viewpoints that might otherwise be silenced,<sup>150</sup> their activities further the public’s “right to receive information and ideas.”<sup>151</sup>

To demonstrate how these types of agencies help to fulfill this goal, it is instructive to revisit the enabling acts of the IMLS, NEA, and CPB. These statutes are uniformly concerned with the need to educate the public by providing access to a wide variety of viewpoints and with conducting targeted outreach to disadvantaged persons and communities. For example, the Library Services and Technology Act,<sup>152</sup> the current enabling statute for the IMLS, charges the organization “to facilitate access to resources in all types of libraries for the purpose of cultivating an educated and informed citizenry”<sup>153</sup> and mandates that a large percentage of its funds be used for “targeting library services to individuals of diverse geographic, cultural, and socioeconomic backgrounds, to individuals with disabilities, and to individuals with limited functional literacy or information skills.”<sup>154</sup> In a similar fashion, the enabling statute for the NEA, as amended in 1990, describes its purposes in terms of “fulfill[ing] its educational mission, achiev[ing] an orderly continuation of free society, and provid[ing] models of excellence to the American people.”<sup>155</sup> This statute, too, has specific provisions pointing to the organization’s goal of reaching diverse communities and supporting multiple viewpoints.<sup>156</sup> Likewise, the Public Broadcasting Act of 1967,<sup>157</sup> which created the CPB, stated as its aim to “encourage the development of programming that involves

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148. FISS, *supra* note 128, at 48.

149. See discussion *supra* Part I.A.2.

150. See FISS, *supra* note 128, at 37 (arguing that the First Amendment interest in promoting public debate should include a “qualitative dimension” concerned with “exposing the public to diverse and conflicting viewpoints on issues of public importance”).

151. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

152. Library Services and Technology Act, 20 U.S.C. §§ 9101–9176 (2006).

153. *Id.* § 9121(3).

154. *Id.* § 9141(a)(5).

155. *Id.* § 951(11).

156. See *id.* § 951(10) (“It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas . . .”).

157. Public Broadcasting Act of 1967, 47 U.S.C. §§ 390–399 (2006).

creative risks and that addresses the needs of unserved and underserved audiences.”<sup>158</sup>

Because their resources are finite, these organizations must make choices about what information to disseminate to the public, and they cannot give voice to every minority viewpoint.<sup>159</sup> The institutional structures discussed in Section A, however, make these organizations particularly well suited to engage in important editorial decisions consistent with the First Amendment goals discussed in this Note.

### C. *Engaging in Speech Activity*

In addition to the similar goals underlying their creation, these institutions are similar in the way they must promote “excellence” by making editorial judgments about which stories are worthy of coverage, which art works are worth funding, and which books will make a positive contribution to a library. These functions, although diverse in the subject matter with which they deal, are similar in that they require “the freedom to make viewpoint-based choices in the selection of speech.”<sup>160</sup> Likewise, these organizations’ editorial activities involve selection from among the speech of other actors rather than the direct creation of content. A salient question, therefore, is whether the compilation of the speech of other actors can itself be viewed as a type of speech. This Note argues that it can be in the particularized contexts discussed herein.

As discussed in Part I, the Court in *Forbes* explicitly recognized that the act of “exercis[ing] editorial discretion in . . . selection and presentation” and “the compilation of the speech of third parties” can be viewed as “speech activity” in the broadcast context.<sup>161</sup> To come to this conclusion, the *Forbes* majority relied heavily on the unique characteristics of broadcasting to justify why a television station’s

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158. *Id.* § 396(a)(6).

159. *But see* FISS, *supra* note 128, at 42 (arguing that institutions like the NEA must be cautious not to apply their discretion in a way that would “impoverish public debate by systematically disfavoring views the public needs for self-governance”).

160. Bezanson & Buss, *supra* note 91, at 1440. Professors Bezanson and Buss term this activity an exercise of “[e]ditorial judgment” in the context of public broadcasting. *Id.* But given that all of the institutions discussed in this Note undergo the similar task of choosing from among the speech of other actors based necessarily, in part, on content- or viewpoint-related criteria, this Note uses the term in a broader sense. In an earlier article, Professor Bezanson refers to the same types of decisions as “speech selection judgments,” a term this Note also uses throughout. Bezanson, *supra* note 109, at 954.

161. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998).

editorial decisions should be viewed as speech.<sup>162</sup> Thus, instead of requiring the “intent to convey a particularized message” typically considered when the Court decides whether an activity should be considered speech under the First Amendment,<sup>163</sup> the majority simply stated that the station’s selection decisions should be considered speech in order to allow it to fulfill its journalistic role.<sup>164</sup> In other words, the public broadcasters in *Forbes* were engaging in speech activity because they were acting with the discretion required “to fulfill their journalistic purpose and statutory obligations” in a situation in which viewpoint-based decisionmaking was inevitable and public forum analysis was inapposite.<sup>165</sup>

One can easily extend the Court’s reasoning behind recognizing the editorial decisionmaking in *Forbes* as speech to organizations that engage in similar activities. Just as content-based discrimination is an intrinsic part of creating a television or radio broadcast, so too is it unavoidable in the awarding of arts grants. In this context, the “editorial” activity of the NEA and its affiliates is to review competing submissions, with the inevitable result that some artists—or organizations, given the current limitations on providing individual funding to artists—do not receive funding. The Court has conceded that “[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding,”<sup>166</sup> and has gone even further to say that “[t]he ‘very assumption’ of the NEA is that grants will be awarded according to the ‘artistic worth of competing applicants,’ and absolute neutrality is simply ‘inconceivable.’”<sup>167</sup>

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162. *Id.* at 673–75; see also Schauer, *supra* note 9, at 91–92 (“[I]n the end it is the institutional character of public broadcasting as broadcasting, heightened here by the involvement of broadcasting professionals in the very decision under attack, that appears to have determined the outcome of [*Forbes*].”).

163. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam); see also Robert Post, Essay, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1251 (1995) (explaining that the “*Spence* test” is typically used to determine “whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play” (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)) (internal quotation marks omitted)).

164. See *Forbes*, 523 U.S. at 673–75 (“Were the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.”).

165. *Id.*

166. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998).

167. *Id.* (quoting *Advocates for the Arts v. Thomson*, 532 F.2d 792, 795–96 (1st Cir. 1976)).



Finally, as with the other two categories under examination, the Court has stated that “[t]o fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons.”<sup>168</sup> Consistent with this discretion, “[p]ublic library staffs necessarily consider content in making collection decisions.”<sup>169</sup> Indeed, the Court has explicitly recognized the analogous principles underlying the need for government-sponsored broadcasters, arts supporters, and librarians to use content-based analysis in making decisions consistent with their statutory obligations.<sup>170</sup> Therefore, analyzing these types of decisions as similar speech activity appears to be consistent with the Court’s understanding of the First Amendment status of these institutions. The next Part discusses how the independent judgment and expressive activity of these types of organizations could allow them to be characterized as First Amendment rightsholders.

#### IV. AFFORDING INDEPENDENT AGENCIES FIRST AMENDMENT RIGHTS

This Note suggests that when a government agency compiles the independent speech of other First Amendment actors, the agency may be engaging in speech activity. This speech activity is separate from that of the primary speakers—that is, those who created the books or artworks being selected—and it is also different from the clearly articulated governmental message typically associated with the government speech doctrine. Though finding a meaningful limitation on the selection processes of libraries, museums, arts organizations, and journalists is demonstrably difficult, this Note suggests a somewhat counterintuitive solution: recognizing the First Amendment rights of these types of government institutions. This Part first addresses the theoretical justification for treating a government agency as a First Amendment rightsholder; it then explores the procedural safeguards necessary for recognition of this right to be protective and encouraging of speech, rather than chilling

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168. *United States v. Am. Library Ass’n*, 539 U.S. 194, 204 (2003) (plurality opinion).

169. *Id.* at 205.

170. *See id.* (“The principles underlying *Forbes* and *Finley* also apply to a public library’s exercise of judgment in selecting the material it provides to its patrons. Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.”).

and inhibiting. Finally, this Part revisits *American Library Ass'n* as an example of how this Note's proposed framework could have been used to better preserve the free speech interests of public libraries without infringing upon their need to exercise editorial judgment in collection development activities.

A. *Government Institutions as First Amendment Rightsholders: A Theoretical Framework*

Professors Randall Bezanson and William Buss succinctly pose the question this Section proposes to answer: "Why should government speech be viewed as a First Amendment right, or freedom, rather than a form of government regulation or government action entitled to a degree of privilege or immunity from First Amendment scrutiny?"<sup>171</sup> To address this query, one must first consider the actual text of the Free Speech Clause to elucidate whether a government institution could be considered a rightsholding entity according to the plain language and the historical meaning of the text. Second, one must consider what goals the First Amendment is trying to achieve. Depending upon the type of government they envision, scholars have provided different answers to this question, and the manner in which this question is answered has direct bearing upon the Supreme Court's First Amendment jurisprudence.

1. *Supporting a Government Claim to First Amendment Protection with Text and History.* The Free Speech Clause of the First Amendment is remarkably simple, considering the complex legal questions it has inspired over the years. It simply states that "Congress shall make no law . . . abridging the freedom of speech."<sup>172</sup> Despite the sparse nature of the text, Professor David Fagundes has pointed out the significance of the fact that the plain language "does not identify any limitations on the identities of the speakers on whom [its protections are] bestowed."<sup>173</sup> This "object-neutrality" distinguishes the First Amendment from others that grant rights to specific persons or entities.<sup>174</sup> Though Professor Fagundes's

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171. Bezanson & Buss, *supra* note 91, at 1452.

172. U.S. CONST. amend. I.

173. Fagundes, *supra* note 15, at 1648.

174. *See id.* ("For example, section one of the Fifteenth Amendment and section two of the Fourteenth Amendment grant voting rights and privileges and immunities safeguards, respectively, but only to 'citizens of the United States.'").

observation does not necessitate an understanding of the Free Speech Clause as protective of the government's own speech, it does "militate[] against a doctrinal rule that categorically excludes any speaker from the ambit of the clause's protection."<sup>175</sup>

Other scholars have read the plain language of the amendment differently, arguing that the First Amendment functions as an explicit restraint on government power, making its operation as a protector of the government nonsensical.<sup>176</sup> This argument relies, however, on the dual assumptions that the First Amendment's primary goal is to restrain the government and that "the government" is one entity. Based purely on the text of the First Amendment, Professor Fagundes's point about its object neutrality seems to be the more persuasive guide to interpreting its plain meaning. Therefore, the plain language of the amendment does not appear to provide any indication that the government should be excluded from receiving the protections promised by the Free Speech Clause.

The legislative history behind the Bill of Rights and events from the early republic support the idea that the Framers purposely omitted a specific entity from the First Amendment and that government speech rights are not antithetical to the Framers' understanding of the amendment.<sup>177</sup> First, the text of the amendment was changed from prohibiting abridgement of the right of the people to speak to its current object-neutral form.<sup>178</sup> The adopted form was also enacted in the face of proposals to make the amendment's applicability to individual persons clearer.<sup>179</sup> Second, in the early republic, political figures such as James Madison and Thomas Jefferson placed great importance upon the ability of state and local governments to promote freedom of expression and to speak out against the federal government.<sup>180</sup>

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175. *Id.* at 1651.

176. *See* Bezanson & Buss, *supra* note 91, at 1501–04 (“If the government can claim to act as a First Amendment right holder, the First Amendment loses coherence, for in such situations there is nothing for the First Amendment to act on or constrain.”).

177. *See* Fagundes, *supra* note 15, at 1651–58 (“[T]he available historical evidence does aid in understanding the problem at hand, both by shedding some additional light on the object-neutrality of the First Amendment and by revealing that the framers did possess some understanding of government speech and expected such speech to play a significant role in the nascent constitutional republic.”).

178. *Id.* at 1652.

179. *Id.*

180. *Id.* at 1654–58.

Professor Fagundes interprets these historical facts as indicating the Framers' intention not to limit the applicability of the Free Speech Clause to individuals and their recognition of the need to allow at least state and local governments to speak in order to fulfill their roles in the federal system.<sup>181</sup> Further, his historical analysis supports the idea that the original intent of the Framers was not to categorically exclude government expression from the ambit of Free Speech Clause protection. Though this interpretation addresses potential claims that the First Amendment excludes government speech on its face, the counterargument does raise important concerns about the central aims of the Free Speech Clause—aims that must also be considered when interpreting the amendment.

2. *Reconciling First Amendment Goals with the Protection of Government Speech.* The commonly held understanding of the Free Speech Clause is that it is libertarian in its aims, “operat[ing] to protect individual liberty against government oppression.”<sup>182</sup> A number of scholars, however, have suggested that the amendment may have an alternate or complementary purpose, enabling rather than limiting in nature. As discussed in Part I, the democratic self-governance theory posits that the First Amendment is “a mechanism for protecting the robustness of public debate [and] for exposing the public to diverse and conflicting viewpoints on issues of public importance.”<sup>183</sup> This understanding of the amendment not only eliminates the aforementioned concern about the disconnect between protection of state speech and the idea that the Free Speech Clause primarily operates to limit state action, but also elevates the government speech act to one that could “further[] the Constitution’s systemic goal of maintaining a free and open marketplace of ideas.”<sup>184</sup>

Professor Fiss takes this theory one step further, arguing that, when the state is acting as an allocator, not only does the First Amendment require the promotion of increased public debate, but

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181. *See id.* at 1659 (“[S]ources from the post-revolutionary period suggest not only that the framers had some rudimentary notion of government (or at least, state) speech, but also that they regarded this speech as central to the constitutional scheme both in terms of substance (informing and enriching the system of freedom of expression) and structure (providing an additional bulwark of protection against possible federal overreaching).”).

182. *Id.*

183. FISS, *supra* note 128, at 37; *see also* Fagundes, *supra* note 15, at 1659–61 (discussing the influence of James Harrington on the Framers and explaining his view that the state was “a body that could enhance individual rights through democratic participation”).

184. Fagundes, *supra* note 15, at 1662.

also that a correlative affirmative duty exists for the state to remain a neutral participant by ensuring that disadvantaged viewpoints have the opportunity to be heard.<sup>185</sup> Professor Fagundes adopts a similar principle, which he refers to as the “public rights view,” as the underlying rationale behind his argument that protection of government speech should sometimes be recognized under the Free Speech Clause.<sup>186</sup> Under this view, protection for expressive activity of the state makes sense when two criteria are fulfilled. First, the state’s actions must promote public debate and expose the citizenry to a variety of ways of looking at the world.<sup>187</sup> Second, the institution speaking must be speaking in a way that is central to its intended purpose and in which it is particularly well-suited to engage.<sup>188</sup>

The problem with advocating for this view of the First Amendment is that, although the Supreme Court has expressed ideas sympathetic to it at times,<sup>189</sup> the dominant view expressed in the Court’s jurisprudence is the libertarian interpretation of the Free Speech Clause.<sup>190</sup> These two views, however, are not necessarily

185. See FISS, *supra* note 128, at 27–49 (using the Mapplethorpe controversy to argue that supposedly neutral criteria like decency and artistic excellence “should never be employed in a way that impairs the robustness of public debate or cuts the public off from unorthodox ideas” and must be considered in conjunction with the need to preserve “views the public needs for self-governance”).

186. Fagundes, *supra* note 15, at 1672–76.

187. See *id.* (“If we are to determine whether speech merits constitutional protection by reference to a substantive rather than a formal conception of expressive freedom—that is, by looking at whether the speech at issue tends to ‘facilitate the public debate required for self-government’—then the speech of government, as much as of individuals or private organizations, may further this goal and thereby attain constitutional stature.” (footnote omitted)).

188. See *id.* at 1676–77 (“[W]here the expressive conduct at issue is so central to the identity and purpose of the public entity that to allow it to be overborne by the will of another sovereign would undermine the reason for allocating institutional discretion to that speaker in the first instance, then constitutional status for that speech may be appropriate.”).

189. See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853, 866–72 (1982) (“If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners’ decision, then petitioners have exercised their discretion in violation of the Constitution.” (footnote omitted)); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“[T]he Constitution protects the right to receive information and ideas.”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”).

190. See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (“The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government.” (emphasis omitted)); see also Fagundes, *supra* note 15, at 1674 (“Courts have been chary of adopting the public rights view, and the pluralist commitment to content-neutrality still retains its centrality in Speech Clause jurisprudence.”).

diametrically opposed.<sup>191</sup> Through institutions engaging in speech selection, the government could be understood to be both promoting public debate and potentially limiting it, depending on the motivation behind the selection judgments and the source of the principles by which these judgments are made. In the specific types of institutions with which this Note deals, promotion of public discourse is inextricably bound up with the character and purposes of the agency.<sup>192</sup> Therefore, it follows that the public-rights conception of the First Amendment—which is essentially the same as Meiklejohn’s democratic self-governance conception—is a particularly useful free speech framework to consider when dealing with these types of cases.

Having demonstrated that protection of creative agencies under the Free Speech Clause is possible based on the amendment’s text, history, and goals, the next step is to discuss how this protection may realistically be afforded to have the desired effect of promoting democratic discourse through these agencies’ actions.

*B. A Model for Granting First Amendment Rights to Agencies Acting as Broadcaster, Arts Patron, and Librarian*

As this Note has argued, granting First Amendment rights to certain government institutions could provide an appropriate analytic framework in cases in which the discretion needed to promote the democratic exchange of ideas conflicts with the need for protection from the overreaching of the larger federal government. Professor Fagundes has posited that a principled approach to determining when government institutions should be treated as First Amendment rightsholders would involve granting these rights only when the “expressive conduct at issue is . . . central to the identity and purpose of the public entity” and when the speech furthers the goal of promoting free democratic exchange.<sup>193</sup> Given the difficulty of formulating a test for when government action has actually promoted free democratic exchange, however, this Note proposes that a more workable solution would be to presumptively recognize First

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191. Fagundes, *supra* note 15, at 1676 (“Government speaks, but its twin capacities to both enrich and imperil the system of freedom of expression, along with its coercive authority, make it unlike any other speaker. A completely theorized account of the constitutional status of government speech must take this duality into account.”).

192. *See supra* Part III.B.

193. Fagundes, *supra* note 15, at 1676–77.

Amendment rights for a certain category of institutions.<sup>194</sup> The institution's right to engage in speech-selection judgments would then be protected as long as the organization were functioning according to an appropriate internal regulatory framework, which the institution's experts are better suited to create than the courts. Courts' recognition of a particular category of government institutions in which state speech is protected by the First Amendment would allow these organizations to turn to a neutral arbiter when their discretion is being infringed by an outside state actor without forcing them to give up their decisionmaking power by becoming an unrestricted forum for expression.<sup>195</sup> This Section examines the plausibility of such a solution by reviewing precedential cases in which the Supreme Court has indicated that certain government institutions may have independent rights under the Free Speech Clause and considering the procedural framework that must be in place to prevent abuses of the system.

1. *Building upon Precedent.* This Note has pointed out that in *American Library Ass'n*, a plurality of the Court left open the possibility of granting First Amendment rights to government institutions. But in another plurality opinion, the Court went beyond allowing for the possibility of granting a government institution First Amendment rights to implicitly doing so. In *Denver Area Educational Telecommunications Consortium v. FCC*,<sup>196</sup> the Court struck down an FCC regulation permitting cable operators to prevent transmission of offensive programming on public access channels, effectively upholding the local public access channels' right to speak over the federal government's grant of the power of censorship to private cable operators.<sup>197</sup> Supporting this conclusion was the fact that the

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194. Professor Fagundes explores the possibility of a similar solution, which he refers to as the "institutional rights theory." *Id.* at 1667–71. He rejects the theory as too vulnerable to systematic abuses. *See id.* at 1670–71 ("[A]n institutional rights approach offers some promise, but the risk of abuse it poses makes it inadequate as a sole means of determining when government speech merits constitutional status.").

195. *But see* Bezanson, *supra* note 109, at 993 ("The responsibility for limiting government speech claims cannot be placed on those persons or offices or branches that themselves engage in the speech. Nor can an informed public be relied upon to limit government's speech activities, for it is in misinforming the public that the greatest danger of government speech exists. So the duty must fall, by necessity, on the judicial branch, which must administer and judge the utility of government speech, its accuracy, value, and effect . . .").

196. *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996).

197. *See id.* at 760–66 (plurality opinion) (explaining that the provision must be struck down in light of "the risk that the [cable operator's] veto itself may be mistaken; and its use, or

regulation did not appear necessary to achieve the legislative goal of protecting children from inappropriate conduct, in light of the procedures put in place by the government entity and the relationships already existing between the public access channels and the local community.<sup>198</sup> Another strike against the regulation was that it would “greatly increase the risk that certain categories of programming (say, borderline offensive programs) [would] not appear.”<sup>199</sup> Though the plurality never specifically stated that its analysis involved a consideration of the public access channels’ independent First Amendment rights, its use of a form of intermediate scrutiny<sup>200</sup> to analyze the government regulation and its concern with preserving the public entity’s editorial freedom only make sense if the local public broadcaster’s expressive acts—its selection of which programs to air—were protected by the Free Speech Clause.<sup>201</sup>

The Court similarly implied that the speech acts of a public broadcaster could be protected in *FCC v. League of Women Voters of California*.<sup>202</sup> In this case, a 5–4 majority invalidated a section of the Public Broadcasting Act of 1967 that forbade public broadcasters from expressing editorial opinions on the air.<sup>203</sup> Though the Court again did not specifically recognize that the First Amendment protected public broadcasters’ speech, it characterized the prohibition on editorializing as overly broad and a “substantial abridgment of important journalistic freedoms which the First Amendment jealously protects.”<sup>204</sup> Although the stations restricted by the provision in question were both publicly and privately owned—thus making it possible to justify the decision based upon the free speech rights of

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threatened use, could prevent the presentation of programming, that, though borderline, is not ‘patently offensive’ to its targeted audience”).

198. *Id.* at 766.

199. *Id.*

200. *See* *United States v. Am. Library Ass’n*, 539 U.S. 194, 217–18 (2003) (Breyer, J., concurring in the judgment) (citing *Denver* as a case in which “circumstances call[ed] for heightened, but not ‘strict,’ scrutiny”).

201. *See* *Bezanson & Buss*, *supra* note 91, at 1448–49 (“[T]he result in *Denver* can be explained only in light of the plurality’s full-bodied idea of editorial freedom exercised by the local government agencies that controlled the local public channels. In other words, the local government was acting as a speaker for purposes of the First Amendment.”).

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

203. *Id.* at 402.

204. *Id.*



the private broadcasters and not the state-owned entities<sup>205</sup>—*League of Women Voters* represents another situation in which the Court has flirted with the possibility of granting Free Speech Clause protection to the editorial decisions of a government entity.

As the decisions in *Denver* and *League of Women Voters*, as well as the dicta in *American Library Ass'n*, demonstrate, the Supreme Court has at times expressed a willingness to treat the expressive conduct of certain government institutions as protected by the First Amendment.<sup>206</sup> The limited contexts in which this right has been contemplated—thus far, primarily broadcasting and library management—lend support to the idea that Free Speech Clause protection for state speech could be restricted on an institution-specific basis. A second limiting factor on First Amendment protection for government agencies' editorial judgments that these cases illustrate is the need for certain institutional safeguards, such as clearly stated policies and a transparent decisionmaking process. Thus, the second factor that courts should examine when determining whether to afford speech acts of government agencies First Amendment protection is the soundness of the internal structure of the organization and the degree to which the expression conforms to its procedural norms.

2. *Mandating Procedural Fairness.* In both *Denver* and *League of Women Voters*, the Court emphasized the protections provided by the structural framework of the public broadcasting organization whose speech was at issue.<sup>207</sup> Justice Souter's dissent in *American Library*

205. See Bezanson & Buss, *supra* note 91, at 1444 (“Because the ban on editorializing in [*League of Women Voters*] applied to privately owned public television as well as publicly owned stations, the First Amendment right upheld was that of private companies not in court; it was not the right of the in-court public advocate.” (footnote omitted)).

206. Other cases demonstrate this same willingness to consider government entities as First Amendment rightsholders in similar contexts. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Court considered whether the government infringed upon the free speech rights of a group of law schools that refused to allow military recruiters on campus in protest of the “Don’t Ask, Don’t Tell” policy. *Id.* at 51. Without differentiating between the public and private schools involved in the protest, the Court determined that the schools’ First Amendment rights had not been violated. *Id.* at 61–65.

207. See *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 761–63 (1996) (plurality opinion) (“Whether these locally accountable bodies prescreen programming, promulgate rules for the use of public access channels, or are merely available to respond when problems arise, the upshot is the same: There is a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children . . . .”); *League of Women Voters*, 468 U.S. at 388–91 (“[T]o the extent that federal financial support creates a risk that stations will lose their independence through the bewitching

*Ass'n*, which relied on CIPA's conflict with internal policies promulgated by the ALA in arguing that the provision should be overturned, also demonstrated the Court's interest in these institutional safeguards.<sup>208</sup> Given courts' historical deference to decisions made by government agencies in accordance with their stated purposes, it follows that an agency's independent status and the transparent pursuit of its goals would factor into a court's analysis of whether its speech should be protected under the First Amendment. This requirement is similar to the first of Professor Fagundes's proposed criteria, which would take into account "the extent to which . . . expression is congruent with the original purpose for which it was created; falls within the ambit of its delegated or original authority; or represents a subject matter over which the speaker possesses distinctive expertise."<sup>209</sup>

A related consideration that would provide additional protection for the primary speakers in the speech-selection realm and clarify when another sovereign has encroached upon the protected expression of a government agency is whether the agency has a stated policy regarding its speech-selection methods.<sup>210</sup> Formal selection policies provide unbiased explanations to individuals whose speech was not selected. They also provide a baseline account of selection policies created by experts in the field, which can be contrasted with a conflicting governmental policy in a First Amendment analysis.<sup>211</sup> Given that most, if not all, of the institutions to which this Note proposes extending First Amendment protection already have these

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power of governmental largesse, the elaborate structure established by the Public Broadcasting Act already operates to insulate local stations from governmental interference.").

208. See *United States v. Am. Library Ass'n*, 539 U.S. 194, 239–41 (2003) (Souter, J., dissenting) (outlining the openly stated policies of the ALA articulated in the *Library Bill of Rights*, as well as its stance against labeling of books and restricted shelf policies).

209. Fagundes, *supra* note 15, at 1677.

210. This idea is adapted from Professor Gia Lee's article advocating clear speech policies as a way to justify judicial deference to state institutions in the face of individual employees' First Amendment claims. See generally Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691 (2009) (arguing in favor of a "free speech conditional deference model," which suggests that courts should apply reasonableness review to regulations of the speech of government employees only if the government entity's restriction of speech is enforced pursuant to a clearly stated policy).

211. See *Am. Library Ass'n*, 539 U.S. at 239–41 (Souter, J., dissenting) (citing a comparison of the ALA's stated policies against censorship to the CIPA provision requiring Internet filtering software to be installed on library computers and concluding that the CIPA provision is not consistent with "the historical development of library practice").

kinds of institutional safeguards in place,<sup>212</sup> it would be a simple matter for a court to determine whether an agency has acted according to its purpose, authority, expertise, and stated policies. Further, if an agency has adhered to these guidelines and another, more powerful state actor encroaches upon its discretion, then a court should recognize the free speech claims of the agency against the violating entity.

### C. *The Model in Practice*

In practice, an agency would look to vindicate its First Amendment rights when Congress or the president sought to regulate its activities in a way that conflicted with its mission of promoting discourse by independently selecting speech to broadcast or promote. To demonstrate that a court should afford it rights under the Free Speech Clause, the agency or organization would demonstrate (1) that it possesses institutional characteristics that make its core functions protective of free speech and (2) that the activity the broader federal government seeks to control is speech activity. Thus, under the second part of this rubric, the government's attempt to regulate the CPB's broadcasting activities would trigger scrutiny, whereas an attempt to regulate its internal accounting policies would not.

If the organization's activity was determined worthy of First Amendment protection, the court would then apply the form of heightened scrutiny used in the broadcasting context.<sup>215</sup> Justice Breyer suggested this level of scrutiny in his *American Library Ass'n* concurrence,<sup>214</sup> and it appears apposite in situations involving "competing constitutional interests" or "speech-related harm [that] is potentially justified by unusually strong governmental interests."<sup>215</sup> Thus, the court would balance "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives," taking into account "the legitimacy of the statute's objective, the extent to which the statute will tend to achieve

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212. *See supra*

that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that, in relation to that objective, is out of proportion.”<sup>216</sup>

The dissenting opinions of Justices Stevens and Souter in *American Library Ass’n* demonstrate how the proposed analysis might function in a particular case. First, Justice Stevens’s opinion examined the unique properties of a library—the institutional characteristics that this Note argues should be the first consideration when granting First Amendment rights to a government entity.<sup>217</sup> He then explained that the choice of whether to install Internet filtering software is one of the library’s unique selection decisions and concluded that “a library’s exercise of judgment with respect to its collection is entitled to First Amendment protection.”<sup>218</sup> Justice Souter’s dissent, meanwhile, addressed the factors that would be involved in a heightened scrutiny analysis by noting the ALA’s clearly stated policies, promulgated by experts and designed to allow libraries to function according to their stated purpose, and pointed out the conflict between these policies and the provision challenged in court.<sup>219</sup> He thereby provided the information needed to convincingly argue that the government’s stated interest in protecting minors may not be compelling enough to undermine the library’s right to provide information to the public and to abide by its independently derived standards. Together, these two opinions demonstrate the workability of the proposed model for granting certain government institutions First Amendment rights and suggest that separating the speech of the organization from its organic statute allows the federal regulation to properly be analyzed as a restriction of protected speech.<sup>220</sup>

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216. *Id.* at 217–18.

217. *Id.* at 225–26 (Stevens, J., dissenting) (“[O]ne of the central purposes of a library is to provide information for educational purposes . . .”).

218. *Id.*

219. *Id.* at 239–41 (Souter, J., dissenting).

220. *See id.* at 226–28 (Stevens, J., dissenting) (arguing that “it . . . [is] clear that the First Amendment protects libraries from being denied funds for refusing to comply with [a] . . . rule” that restricts their editorial choices).

## CONCLUSION

The interaction of the Free Speech Clause with government-funded arts, library, and broadcast organizations is a complicated one. On the one hand, to allow these institutions the freedom to function as true supporters of cultural achievement, courts must afford them the discretion to exclude certain speech activities based on content and viewpoint, thereby avoiding cacophony and upholding the selective nature of their organizations. On the other hand, there is a patent discomfort with the idea that the federal government can mandate any limitations it wishes on these organizations just because it is merely refusing to fund speech, rather than extinguishing it. This disquiet results from a shared understanding of these organizations as providers of art, news, and literature that represent the diverse spirit of the United States. The clear political lines along which debates over this subject too often divide suggest that a transparent, neutral, court-enforced standard might provide a solution that avoids constantly subjecting these organizations to the push and pull of partisan politics. This Note has suggested how such a framework could be constructed, while preserving the delicate balance between the competing free speech interests of the state as broadcaster, librarian, and patron of the arts and those of the free speech actors whose activities these organizations affect.