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Public Institutions of Culture and the First Amendment: The New Frontier

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ARTICLES

PUBLIC INSTITUTIONS OF CULTURE AND THE FIRST AMENDMENT: THE NEW FRONTIER

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INTRODUCTION

The general subject of my lecture today is the relationship between the First Amendment and public institutions of culture, which I take to be those sponsored and supported by the state with the clear purpose of preserving and promoting high culture in the United States. These include universities, museums, theaters, libraries, public broadcasting networks, programs for art in public places, and the national endowments for the arts and the humanities. All of these institutions or programs are vested with the responsibility of insuring the preservation of high human achievement in the areas to which they are devoted (knowledge, art, music, and so on), of transmitting those achievements to new generations, and of fostering or nurturing new achievements to add to these results of human labor over the centuries. Because all of this involves ideas and values, it is perfectly natural, indeed it is inevitable, that there are conflicts over who controls these institutions and what standards they employ. And because "speech" is involved, this in turn ignites conflicts with the First Amendment, which extols the virtues of an open marketplace of ideas and harbors a seemingly fathomless distrust of government involvement in that marketplace. That, at least, is the new frontier of the First Amendment that I hope to explore with you this morning.

I. THE CONFLICT

One major point of conflict we have witnessed over the past decade has been between legislative bodies and those who more directly control these cultural institutions. All of you, I am sure, are aware of the controversy between Congress and the National Endowment for the Arts (NEA) arising out of the NEA's support of two exhibits, one

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involving Robert Mapplethorpe's photographs at the Corcoran Gallery in Washington, D.C., and the other involving a work entitled "Piss Christ" by the artist Andres Serrano. Senator Jesse Helms waged a legislative campaign to restrict the grant-making powers of the NEA, arguing that the majority of American citizens surely did not approve of Mapplethorpe's homoerotic photographs or of Serrano's picture of a crucifix submerged in a bottle of his urine and, accordingly, that the citizens of this country did not have to support such "art."

Senator Helms did not, in the end, get the legislation that he sought, but the NEA's charter was amended to include the so-called "decency" clause, which stipulates that when awarding grants to artists, the NEA must take into account "general standards of decency and respect for the diverse beliefs and values of the American public."[1]

This, of course, was not the end of the controversy. It spilled over into other arenas across society. In the city of Cincinnati, for instance, the Director of the Museum of Contemporary Art was prosecuted on obscenity charges when the museum exhibited Mapplethorpe's photographs. He, as you know, was acquitted. The NEA also became a major issue in the 1992 presidential race. Patrick Buchanan claimed that the NEA was a significant cause and symptom of the degradation of American values, a claim that found a sufficiently warm reception within the American public that President Bush felt compelled to fire the hapless head of the NEA, John Frohnmayer.

It turned out, however, that these events also mobilized the artistic community into strong opposition. One of their strategies was to go to court and challenge the decency clause as a violation of the First Amendment. Four performance artists—John Fleck, Holly Hughes, Tim Miller, and Karen Finley, along with the National Association of Artists' Organizations—sued the NEA and John Frohnmayer for, among other things, violating their rights to free speech by denying their applications for federal grants. In *Finley v. National Endowment for the Arts*,[2] a federal district court in California agreed with the artists that the decency clause is unconstitutional.[3]

I begin with an analysis of this decision both because it is important in its own right and because it is representative of how we are failing to achieve a viable First Amendment theory for dealing with public institutions concerned with culture.

The artists' claim in *Finley* was straightforward and simple--artistic

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

2. 795 F. Supp. 1457 (C.D. Cal. 1992).

3. *Id.* at 1476.

expression is protected by the First Amendment, and "public subsidization of art, like public funding of the press and university activities, demands government neutrality."[4] The court was eager to accept the first claim and "to recognize a protected First Amendment interest in artistic expression funded by the government."[5] "Artistic expression, no less than academic speech or journalism," it proclaimed, "is at the core of a democratic society's cultural and political vitality."[6] The court found that this view of artistic expression is confirmed by Congress' "Declaration of findings and purposes" at the beginning of the NEA's authorizing statute, which cites the role of artistic expression in achieving "a better understanding of the past, a better analysis of the present, and a better view of the future"; in advancing "wisdom and vision" needed in a democracy; in promoting tolerance among "diverse beliefs and values of all persons and groups"; in helping to "create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent"; in enabling citizens "to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression"; and in honoring and preserving our "multicultural artistic heritage."[7] From all this, the court concluded that "artistic expression serves many of the same values central to a democratic society and underlying the First Amendment as does scholarly expression in other fields."[8] Art and culture, in other words, are important to democracy, just like the other forms of speech that the First Amendment protects.

The Government's position in *Finley* focused not on the question whether the scope of the First Amendment encompasses artistic expression, but rather on the artists' claim that when the government chooses to subsidize such speech, it must do so on a "neutral" basis.[9] This, the Government argued, is simply not possible. Because the NEA dispenses a "scarce resource"—money— the Government said, it "cannot parcel out its limited budget on a purely content-neutral, first-come-first-served basis."[10]

The court came down somewhere between these two positions. It did not agree that the government must be completely neutral when setting up a system of, or an institution for, allocating subsidies among artists

4. *Id.* at 1472.
5. *Id.* at 1472-73.
6. *Id.* at 1473.
7. *Id.* at 1474.
8. *Id.*
9. *See id.* at 1475.
10. *Id.*

in the society.[11] As with funding to universities, the court said, some "content-based decisions are unavoidable."[12] But to accept that proposition, the court reasoned, does not compel one to "permit the government to impose whatever restrictions it pleases on [the] speech" of the recipients of these subsidies.[13] In public universities, for example, decisions made on what the court called "professional evaluations of academic merit" are permissible, but not decisions made on criteria that are "vague" or "intended to suppress unpopular expression."[14] Hence, it concluded, Congress may set up an NEA that awards grants on the basis of "professional evaluations of artistic merit," but not one in which decisions are "based on [a] wholly subjective criterion of 'decency.' "[15] In short, a system with "professional judgment" is both "unavoidable" and "permissible," but one with "vague" criteria or a purpose of "suppressing unpopular expression" is not, at least not under the First Amendment.[16]

From this position, the court concluded that the standard of decency is impermissibly overbroad.[17] Pointing out that the First Amendment has long been held to protect offensive or indecent speech against censorship, the court seemed to think that its analysis was at an end—even though, here, the government was not censoring, but was subsidizing speech.[18] "The decency clause sweeps within its ambit speech and artistic expression which is protected by the First Amendment," the court pronounced.[19] The court, therefore, held "that the decency clause, on its face, violates the First Amendment for overbreadth and cannot be given effect."[20]

In reaching this result, it should quickly be said, the district court seemed to rely on a now firmly established doctrine of the First Amendment: the government cannot censor or restrict speech activity within society because it disapproves of or fears the message or the idea being communicated. This basic doctrine of the First Amendment means that we, in the United States, must tolerate an extraordinary amount of speech, some of it extremely distasteful to nearly all of us and harmful to many of us. Even the movements of the past decade to

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11. *See id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 1476.
18. *See id.* at 1475-76.
19. *Id.* at 1476.
20. *Id.*

curb pornography and so-called hate speech, which thus far have been largely unsuccessful in deflecting the course of the First Amendment, would, if successful, still leave us living with much highly offensive, objectionable speech—all because of the doctrine that the government cannot ban speech because its ideas are offensive or objectionable.

So, when the *Finley* court looked at the language saying that no grants would be given to artists who intended to communicate certain ideas, it probably thought it fairly obvious that this was directly at odds with the now firm principle that there shall be no regulation of speech according to its content. The problem, however, is that the NEA is left still having to decide between competing applicants for grants. What criteria can be used after *Finley*?

II. *FINLEY v. NEA*

Now, as I said at the outset, I begin with the NEA controversy and the resulting federal court decision in *Finley v. National Endowment for the Arts* because it is, in my judgment, one of the most significant disputes of our time and because the judicial analysis that I have just summarized is representative of how inadequate our conceptual tools are for resolving these conflicts. Let me try to explain why this is so.

To analyze the problems of *Finley*, you must be prepared to think through three major issues. First, you must explain why cultural or artistic expression is protected by the First Amendment. Second, you must explain why the state can support cultural or artistic expression using a standard such as artistic quality instead of employing a content-neutral system of allocation such as first-come-first-served. You must, in other words, present a *positive* case for why the state should be involved in promoting quality in this area. And, third, you must articulate the limits, under the First Amendment, on the state's power to support cultural expression according to its content. In sum, your analysis must explain why cultural expression is protected, why the state can choose to support or subsidize cultural speech by making distinctions based on content or quality, and what limits there are on this power.

The *Finley* court's analysis of these issues was inadequate, but no less adequate than First Amendment jurisprudence generally. As to the first issue—namely, whether and why artistic expression is protected by the First Amendment—the court is least to be faulted for its reasoning. It identified the issue and offered a more or less conventional analysis: the First Amendment is concerned with protecting open debate among citizens, which a democratic system of government demands; artistic expression is relevant and important to that debate. The pri-

mary problem with this reasoning is not that it is incorrect, but that it is too limited a conception of the First Amendment. It is now rather firmly established in our First Amendment law that the freedom of speech includes, not just explicitly political speech, but also cultural or artistic speech, such as painting, music, sculpture, and scholarship. Few individuals have contended the contrary. The most notable attempt is still an early 1970s *Indiana Law Review* article by then-Professor Robert Bork.[21] Bork claimed that the term "freedom of speech" is so vague that it must be limited by some other, more concrete principle in the Constitution.[22] That could be done, he maintained, by linking freedom of speech to the principle of a democratic system of government, which is established by the constitutional document as a whole.[23] Because citizens in a democracy must have the freedom to discuss public policy, freedom of speech can legitimately (in terms of the judicial power to strike down legislation) be linked to that principle.[24] To take freedom of speech beyond that, beyond protecting speech necessary to the democratic system of government, would be to leave us with no "principled" line to stop us from protecting all speech (such as price-fixing and perjury).[25] Thus, he concluded, artistic speech, while certainly socially valuable, is not essential to democratic discussion—or, at least, it is no more essential than lots of other "communication" that we clearly cannot protect without turning judges into autocrats—and, hence, is not protected by the First Amendment.[26]

This argument, however, has not won the day. There is nothing illogical about Bork's argument; you just have to decide how concerned you are over the risks of untethered judicial review and how much you value the protection of artistic speech and believe that you can distinguish its protection from other speech that is not protected. What has more or less won the day, however, is the idea that artistic or cultural expression is protected on the ground that it is relevant to the functioning of a democracy. This was the claim of Alexander Meiklejohn, who is regarded as the foremost proponent of the theory that freedom of speech must be linked to democratic politics.[27] In order to discuss and

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21. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

22. *See id.* at 22-23.

23. *See id.* at 23.

24. *Id.*

25. *See id.* at 20.

26. *See id.* at 25.

27. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 46-48 (1986) (discussing Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government, in* POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS

vote on public issues intelligently, Meiklejohn said, you need Shakespeare as well as social theory.[28] This, then, was the theme pursued by the court in *Finley*. I will explain later why I think that this view of the First Amendment and cultural expression is too constricted.

Let me turn now to the second step in the analysis—the problem of explaining why, if the government is going to be involved in subsidizing or supporting cultural expression, it should be able to do so by evaluating the quality or the content of the expression. Remember that the court in *Finley* treated the answer to this question as self-evident, saying that it was "unavoidable" for the government to be involved with content.[29] Perhaps this seems self-evident to everyone here as well: it would seem odd if the First Amendment compelled the NEA to award grants on a first-come-first-served basis. Nevertheless, it is a more difficult problem than it seems, and explaining why it should be the way that we intuitively think it should be is, in my view, critical to the rest of the analysis that follows.

We ought to recognize that the Government's claim in *Finley*--that a content-neutral system of distributing subsidies is impossible because the NEA is dispensing a "scarce resource"—is wrong.[30] It is wrong because streets and parks, which are the archetypal public fora and, therefore, are constitutionally commanded to be allocated to speech activities on a first-come-first-served basis, are an equally scarce resource. There is really no important difference in this respect between land and money: both are scarce. The only question concerns the type of allocation system that should be used to resolve the conflict—more people would like to have or to use that resource than there is of it to distribute. A first-come-first-served method of allocation is always one possible method for allocating scarce resources. That is not to say that it is the most desirable, only that it is always possible; and it *is* content neutral, which may, from a First Amendment standpoint, be thought of as a certain advantage.

Indeed, one important Supreme Court decision in the area of cultural institutions strongly intimated that just such a system might be required. In *Southeastern Promotions, Ltd. v. Conrad*,[31] a municipal theater in Chattanooga, Tennessee, refused to permit a group to use the theater for a performance of the musical *Hair*. The theater had

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OF THE PEOPLE (Oxford Univ. Press 1965) (1948)).

28. *Id.* at 47-48 (citing Alexander Meiklejohn, *The First Amendment as an Absolute*, 1961 SUP. CT. REV. 245, 263).

29. 795 F. Supp. 1457, 1475 (C.D. Cal. 1992).

30. *See id.*

31. 420 U.S. 546 (1975).

been set up to provide "clean, healthful entertainment" for the community, and the governing board of the theater determined that *Hair*, with its nudity, did not comply.[32] The Supreme Court held that the municipal theater was, indeed, a public forum—akin to streets and parks—and that, accordingly, various procedures applicable to such fora had to be followed, which the board had not done.[33] By invoking the analysis of the public forum doctrine, the Court seemed strongly to suggest that some kind of first-come-first-served system of allocating use among multiple applicants would be constitutionally required.

This, of course, (as the dissent in *Southeastern Promotions* was quick to point out) would mean the end of municipal theaters and, if the logic were extended, of public museums and universities, at least *as we know them.*[34] From here on out, the National Gallery in Washington, D.C., for example, would be required to display the art of all would-be artists on a first-come-first-served basis and would not be able to exercise any content control over its collection through evaluations of quality. Such a conclusion, of course, strikes us as absurd, but that is only because we feel that the government should be free to establish public cultural institutions guided by standards such as "quality." That may be the better view—a view that I share—but it is a view that must be explored and fully articulated, not presented as a self-evident, logically "unavoidable" conclusion, as both the Government and the court tried to do in *Finley.*

And, as I have said, the case is not so easy to make. Allow me to repeat what I stressed earlier, that the history of the First Amendment in this century has been one of denying the government the authority to control the marketplace of ideas through the tool of censorship. That history has been accompanied by countless expressions of how important it is for the government to "remain neutral" with respect to that marketplace, of how wary we ought to be of the government's motives whenever it seeks to control speech in the marketplace, of how slippery are concepts like "quality" when placed in the hands of government censors, and of the necessity of living by a rule that says we will rarely ever permit the government to control or limit speech because it disapproves of the "message" or the "content" of that speech. Thus, First Amendment jurisprudence is enamored of phrases like that in the well-known case of *Gertz v. Robert Welch, Inc.*,[35] in which Justice Powell, writing for a majority of the Court, announced that, under the First

32. *Id.* at 549 n.4.
33. *Id.* at 554-56.
34. *See id.* at 572-73 (Rehnquist, J., dissenting).
35. 418 U.S. 323 (1974).

Amendment, "there is no such thing as a false idea."[36] A major part of the thrust of First Amendment thinking, therefore, has been toward creating an atmosphere in which courts essentially say to a government trying to censor: "We—the state—must not become involved in regulating what is and is not spoken in the marketplace of ideas. We may have our views about what is true and false, about what is good and bad, about what is right and wrong, but we are not to be trusted and we are not to try to impose our views on the world of discussion." To many, therefore, the First Amendment embodies a fundamental relativism, clearly reflected in Powell's dictum that under the First Amendment "there is no such thing as a false idea."[37]

Against this background, then, we perhaps should not be surprised at our uncertainty over how to think about government involvement in subsidizing certain ideas or speech at the expense of others. For the government is no longer being "neutral," and it certainly is in a position to affect—to *distort*—the marketplace of ideas, if not by excluding speech, then at least by overwhelming speech that it dislikes, which is precisely the reason why we have said to the government that it cannot use its property in the form of streets and parks to favor some speakers over others, even on a standard of the "quality" of the speakers.

That there is, at least, a valid First Amendment concern here helps to explain why so many intelligent people say things such as the artists, the Government, and the judge said in *Finley*. The development of First Amendment doctrine and rhetoric necessarily, and appropriately, makes us feel uncomfortable as we approach this new area of government involvement with speech.

What is called for is a new and different approach to this area of the First Amendment. Of foremost importance is that we understand the potential for positive benefits to the First Amendment itself from a system of public institutions of culture.

Let me now turn to what I have called the third and final major issue—namely, what are the limits of the government's power to control these institutions? What are the standards and principles that should guide us here?

The *Finley* court's analysis was grossly oversimplified in one way and wrong in another. Recognizing that there should be some limits on the government's freedom to structure these institutions to support some speech and not others, the court tried to set up a dichotomy between government efforts involving "suppression of unpopular ideas"

36. *Id.* at 339.
37. *Id.*

and those involving the exercise of "professional judgments" about quality.[38] The judge then concluded that the decency clause falls into the former category, because the First Amendment protects against censorship various kinds of speech that would be covered by the term "decency."[39] This, however, does not work. First, just because speech is protected against censorship by the First Amendment does not mean—if we are committed to permitting the government to support "quality" cultural expression—that it cannot be denied support. Given any reasonable notion of "quality," this type of exclusion will happen to plenty of otherwise "protected" speech. Second, it is likewise true that "unpopular" ideas will sometimes, perhaps often, be excluded from support under a standard of quality. Take pornography, for example. Does *Finley* stand for the proposition that pornography cannot be denied an NEA subsidy because it is unpopular, or because, as things now stand, such speech may be protected against censorship by the First Amendment? I do not think that this is what the court intended; nor do I think that it should be required.

The main difficulty with the *Finley* court's attempt to establish principles by which conflicts like that involving the "decency" clause can be resolved under the First Amendment, however, is that it is inadequately developed. There may be some hope for the concepts that the court began to employ, perhaps between an "intention" on the part of the government to exclude certain kinds of speech that a "professional" approach might very well consider "qualified" for support. But, if this is the direction in which we should be moving, it is going to require more analysis than the district court in *Finley* provided.

III. The Supreme Court's Approach

I have explored in some depth the NEA controversy and the confrontation that controversy brought to the First Amendment, along with one court's efforts to analyze that problem, because, as I said earlier, it is representative of how we seem to be defeated in our efforts to develop workable principles. In this regard, I have mentioned the *Southeastern Promotions* case and the puzzling way in which the Supreme Court there tried to think through the standards by which a public theater can decide what is to be performed on its stage.[40] Now I want to mention briefly three other Supreme Court cases that bear on

38. *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992).

39. *Id.* at 1476.

40. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

these general issues, all of which further cloud our thinking and yet, I will end up arguing, point the way toward a more helpful route.

The first of the three cases is *Board of Education v. Pico*,[41] decided in 1982. Members of a local board of education returned from a conference at which had been distributed a list of books deemed to be "objectionable" and "improper fare for school students."[42] Consulting the list, the board ordered several books (eleven in total) from the school library and read them.[43] Eventually, nine were ordered to be removed from the high school library.[44] Students in the school system sued the board, claiming that this violated the First Amendment.[45] The Supreme Court affirmed the court of appeals' decision, ordering a full trial on the merits with respect to the board's reasons for removing the books.[46] A plurality of the Court put forward the principle that, whatever the power of school boards to control the selection of books, their power to *remove* books once on the shelf is limited by the First Amendment.[47] The plurality stated that, although the board

> rightly possesses significant discretion to determine the content of their school [libraries, that] discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of ideas.[48]

Everything, the plurality said, depends "upon the motivation behind" the school board's actions.[49] If, the Court continued, the board "decided to remove the books at issue because those books were pervasively vulgar [or educationally unsuitable]," that would not violate the First Amendment.[50] Such a motivation "would not carry the danger of

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41. 457 U.S. 853 (1982).

42. *Id.* at 856.

43. *Id.* at 857.

44. *Id.* at 857 n.3.

45. *Id.* at 858.

46. *Id.* at 875.

47. *Id.* at 871-72. The plurality of the Court included Justices Brennan, Marshall, Stevens, Blackmun, and White.

48. *Id.* at 870-71. The last phrase helps us to understand the origins of some of the rhetoric of the district court in *Finley*.

49. *Id.* at 871.

50. *Id.*

an official suppression of ideas."[51]

Parenthetically, let me just mention a case that followed the *Pico* analysis, a case involving a sculpture by the well-known sculptor Richard Serra commissioned by the federal government as part of the art in public places program.[52] Called "Tilted Arc," the piece was a long, slightly slanted wall of corton steel that bisected a plaza in front of one of the rather ordinary federal buildings in lower Manhattan.[53] "Tilted Arc" produced such an outcry by federal employees and others who objected to the work that, following an extensive public hearing, the acting administrator of the General Services Administration recommended that the piece be relocated.[54] Serra sued, saying that this violated the First Amendment.[55] But the Court of Appeals for the Second Circuit rejected his argument, stating that under *Pico*, the test is whether the government recommended relocating "Tilted Arc" because of disagreement with its "message" and holding that the evidence showed that the piece was to be relocated because it was deemed to be "ugly"[56] (not because of its "message").

There are two other Supreme Court cases to mention. One is *FCC v. League of Women Voters*,[57] in which the Supreme Court held that the federal government cannot forbid public broadcasters from editorializing about public issues.[58] The Government claimed that the restriction was a reasonable means of preventing public broadcasters from propagandizing and from creating the mistaken impression that the government "endorsed" whatever editorial position was taken.[59] The Court found that these concerns were insufficient when weighed against the benefits of additional voices in the marketplace of ideas.[60]

The last case is *Rust v. Sullivan*.[61] *Rust* arose out of federal regulations that restricted recipients of federal grants for family planning from advising their clients about the possibility of abortion.[62] Here, the Court bought the Government's argument that, even though this restricted the speech of the recipients of federal money, it did not violate

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51. *Id.*
52. Serra v. United States Gen. Servs. Adm., 847 F.2d 1045 (2nd Cir. 1988).
53. *Id.* at 1047.
54. *Id.* at 1047-48.
55. *Id.* at 1048.
56. *Id.* at 1050-51.
57. 468 U.S. 364 (1984).
58. *Id.* at 374-402.
59. *Id.* at 375.
60. *Id.*
61. 500 U.S. 173 (1991).
62. *Id.* at 178 (citing Title X of the Public Health Service Act, 84 Stat. 1506, 42 U.S.C. §§ 300 to 300a-6).

the First Amendment, because the government should not have to support positions with which it does not agree and because these organizations could exercise their own speech in other contexts where they were not federally funded.[63]

The main reason for mentioning the *Rust* case in my lecture today is that the Court added a significant paragraph, saying that not all government-subsidized activities are the same for purposes of the First Amendment.[64] While the government may use its property to control the speech of Planned Parenthood, it may not so freely control universities, for example.[65] This is true, the Court said, because "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 funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."[66]

IV. The New Frontier

By this point, it should be apparent that the First Amendment faces a difficult dilemma with the issue of government subsidies for cultural expression. There is a deep tension between the doctrine and rhetoric amassed over the past seventy years in cases involving censorship of speech and the manifest desire (revealed in the several Supreme Court cases that I have just mentioned, as well as in the *Finley* decision) both to permit the state to establish and support cultural institutions and to confer on them at least some considerable degree of constitutional autonomy. While the First Amendment articulates a deep fear of government intervention in the marketplace of ideas (because of the risk of distortion), it also seems prepared to permit state-sponsored and -supported cultural institutions that exercise considerable control over which art to fund, which pictures to hang, and which courses to teach. That these choices necessarily involve judgments about favored and disfavored content—judgments clearly prohibited in the realm of censorship--is indisputable. The best that one can say of the current justification for this state of affairs is that we are hiding from reality when we suppose that these choices are actually "neutral" or merely "professional" or "unavoidable."

If the analysis is to move forward, several principles must be estab-

63. *See id.* at 196-200.
64. *See id.* at 199-200.
65. *Id.* at 200.
66. *Id.*

lished. First, I would say, it is important to broaden the conception of the fundamental purposes of the First Amendment. By this, I mean that we must recognize that the First Amendment protects all efforts to understand and to express our understandings of the human and natural world, not just for the sake of democracy, but also for the sake of possibly achieving more meaningful individual and social lives. To make cultural expression merely an appendage to the First Amendment interest in democratic politics both demeans and distorts our appreciation of the constitutional value of artistic and intellectual inquiry and expression. This important area of speech should be dignified with the recognition of its full and independent worth. All this must, of course, be argued for in far more depth than I can do at this moment. But it can be confidently asserted, I think, that there is plenty already within the First Amendment tradition to support this view.

Second, we must separate our approach to what I have been calling the censorship side of the First Amendment from our approach to the subsidy (or government property) side. It is—as I have argued at length in other writings—a vastly oversimplified view of the history of the First Amendment in this century to see it as embodying a complete distrust of government in the marketplace of ideas and a kind of official relativism. Although such rhetoric exists, the case law and jurisprudence are far more rich than that. Certainly, there is no constitutional logic that would say the nearly total bar on censorship must lead us to forbid all government support of speech or to require that any such support be content neutral. More to the point, it is permissible—and I think desirable—to see the current extreme rejection of censorship as reflecting goals such as preserving *some* opportunity for nearly all speech or pressing the virtue of tolerance in this limited sphere, which still leaves substantial room for identifying an overarching constitutional interest in the *quality* of public debate. And if the First Amendment is interpreted as retaining an interest in the quality of public thought and discussion, and as embodying a deep respect for cultural expression in particular, then it is a short step to seeing the First Amendment value in state support for the promotion and enhancement of the quality of cultural speech in the United States.

Justifying a constitutional principle of autonomy for these public institutions (which *League of Women Voters* and *Pico* enforced, and *Rust* acknowledged) requires a more complicated and extended analysis. The problem is in carving out the kinds of public programs and institutions that are entitled to this autonomy. In a sense, these special institutions may be seen as bracketed on one side by public fora and on the other by all other public programs (such as programs to promote "family values"). In neither of these outside cases is there any constitu-

tionally recognized autonomy. In one case (public fora), there is no discretion to deal selectively with expression, while in the others, the discretion may be nearly total. Cultural institutions, however, as the *Finley* court struggled to articulate, operate under some constraints imposed by the First Amendment. They have autonomy from some government control, yet may themselves become "government" and transgress the constitutional principle of freedom of speech by certain actions.

It is tempting to try to resolve which institutions are entitled to autonomy by using history or "tradition" as the dividing line (as *Rust* tried when it referred to "the university" as "a traditional sphere of free expression").[67] But this is just as inadequate for this purpose as it is in the public forum area. Genuine judgments about the value of expression emanating from these institutions are instead required, and we already have an emerging concept of "cultural institutions": *Finley* recognized the arts and humanities programs as such;[68] *Pico* recognized libraries;[69] *League of Women Voters*, public broadcasting;[70] and *Rust*, universities.[71]

As to the issue of internal First Amendment constraints, we are more at sea than we seem prepared to recognize. Language seems inadequate to our task. I have already discussed how unhelpful several attempts have been. I do not yet have a satisfactory solution to offer, but I have one tentative suggestion. It is that we think about what constitutionally improper decisions are, not by examining discrete decisions (asking whether this particular course was offered for bad motives), but by assessing the integrity of the processes as a whole. This, it seems to me, is what courts like *Finley* and others have in mind when they refer to the permissibility of "professional judgments." We still have a long way to go, and it will not be easy to refine what we mean by "professional," but it is at least a pointer in this new First Amendment frontier.

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67. *See Rust*, 500 U.S. at 200.

68. *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1472-74 (C.D. Cal. 1992).

69. *See* Board of Educ. v. Pico, 457 U.S. 853, 870-72 (1982).

70. *See* FCC v. League of Women Voters, 468 U.S. 364, 374-402 (1984).

71. *See Rust*, 500 U.S. at 200.