

ARTICLE

THE ARTS: A TRADITIONAL SPHERE OF FREE EXPRESSION? FIRST AMENDMENT IMPLICATIONS OF GOVERNMENT FUNDING TO THE ARTS IN THE AFTERMATH OF *RUST v. SULLIVAN*

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TABLE OF CONTENTS

| | |
|--|-----|
| Introduction | 353 |
| I. A Brief History of Government Funding of the Arts . . | 360 |
| A. Support for the Arts Before 1965 | 360 |
| B. The National Endowment for the Arts (NEA) | 363 |
| C. Recent NEA Funding Controversies and the Call for Government Oversight | 366 |
| II. Funding Restrictions and the Constitution | 370 |
| A. Positive and Negative Liberty | 370 |
| B. Unconstitutional Conditions | 378 |
| C. Alternatives to the Doctrine of Unconstitutional Conditions | 386 |
| 1. Limiting government power to bargain with funding beneficiaries | 386 |
| 2. Spheres of neutrality | 389 |
| III. The Arts and Traditionally Protected Forms of Expression | 392 |
| A. Artistic Expression and the First Amendment | 394 |
| B. A Protected Sphere | 401 |

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IV. The Future of Government Funding of the Arts:

Four Options 402

A. Eliminate All Government Subsidies to the Arts . . . 403

B. Subsidize the Arts Through Tax Exemptions 407

C. Continue the Current Practices 409

D. Reform Current NEA Practices Selectively 410

Conclusion 412

INTRODUCTION

As the quantity and scope of federal funding to public and private grantees has grown over the past decades,¹ programs implicating the constitutional rights of grant recipients have increasingly become the subject of controversy.² In the arts, such controversy has encom-

1. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-53 (1985) (referring to Department of Treasury and Bureau of Census federal expenditure reports). Annual federal subsidies to state and municipal governments increased from approximately \$7 billion in 1960 to \$96 billion in 1985. *Id.* These figures would, of course, be larger if grants to private individuals, businesses, nonprofit charities, service organizations, and universities were included. Additional governmental support, in the form of tax abate-ments or exemptions, constitutes an indirect but substantial subsidy. Although more difficult to calculate, such tax relief to the nonprofit sector alone amounts to many billions of dollars annually. For example, in 1984, private charitable contributions amounted to \$73.3 billion. If taxed as income at a low rate of 15%, the revenue gained by the IRS would amount to almost \$11 billion. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 3-22 (4th ed. 1993) (updating current IRS regulations, court decisions, public and private letter rulings); Boris Bittker & George Rahtert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 301 (1976) (studying federal tax status of public service and mutual benefit organizations, including social clubs, cooperatives, unions, and business leagues); Richard Gershon, *Tax Exempt Entities: Achieving and Maintaining Special Status Under the Watchful Eye of the Internal Revenue Service*, 16 CUMB. L. REV. 301, 326 (1986) (examining types of organizations granted tax exempt status, IRS procedures, and their underlying justifications). See generally GILBERT M. GAUL & NEIL A. BOROWSKI, *FREE RIDE: THE TAX-EXEMPT ECONOMY* (1993) (critiquing tax exempt status of nonprofit organizations in American economy). Since the mid-1980s, the level of governmental support for the nonprofit sector has continued to grow, although at a somewhat slower pace. HOPKINS, *supra*, at 18-22. See generally INDEPENDENT SECTOR, *A PORTRAIT OF THE INDEPENDENT SECTOR* (1993) (providing lavish statistical profile of nonprofit sector of American economy).

2. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (health-care services); *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992) (arts); *Board of Trustees of Leland Stanford Junior Univ. v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991) (university science research); see also *infra* notes 76-92 and accompanying text (discussing recent controversies surrounding grant funding). Funding for scientific research, health care, and the arts has traditionally come from private sources such as industry, private foundations, and individual benefactors. Such private funding historically lay outside the reach of constitutional law and was legally subject to the contractual rights of the parties. Government funding for these areas has undergone profound growth in the past thirty years. Between World War II and the 1960s, government support for scientific research, although substantial, was limited largely to defense-related projects and subject to First Amendment restrictions based on the compelling need for secrecy and national security. See, e.g., National Security Act of 1947, ch. 343, 61 Stat. 496 (codified as amended at 50 U.S.C. §§ 401-432 (1988 & Supp. V 1993)) (establishing controls over government-sponsored national defense and security research); 42 U.S.C. § 1862 (1988 & Supp. V 1993) (governing federal sponsorship of national security research through National Science Foundation); *Snepp v. United States*, 444 U.S. 507, 510-13 (1980) (upholding federal restrictions on speech of former CIA agent for national security reasons).

passed not only the general inappropriateness of government subsidies, but more serious charges of abuse of government funding by projects that have offended public standards of decency.³ Both Congress and administrative agencies have often come under heavy pressure to restrict the use of government funding to avoid results that offend public sensibilities.⁴ The arts and nonprofit communities have fiercely resisted such restrictions, which they regard as unconstitutional restrictions on their freedom of self-expression.⁵ The debate over restrictions on funding to the arts reached a climax immediately following the Supreme Court's 1991 decision in *Rust v. Sullivan*.⁶ In *Rust*, the Court held, *inter alia*, that the government could "refus[e] to fund activities, including speech, which are specifically excluded from the scope of the project funded."⁷ If limits on programmatic funding did not single out a specific group for discrimination on the basis of speech content, then the government was free to pursue its goals within the scope of the project.⁸ Although *Rust* was primarily concerned with restrictions placed on Federal Title X funding for family planning programs,⁹ its implications shook the confidence of other government grant recipients, whose own ability to pursue work unimpeded by governmental restrictions in areas previously secured

3. See JOHN W. ZEIGLER, ARTS IN CRISIS 67-122 (1994) (discussing debate over controversial art funded by Federal Government). Some of the most prominent controversies surrounding government-funded arts projects included exhibitions of homoerotic photographs by the late Robert Mapplethorpe and of a photograph entitled "Piss Christ" by Andres Serrano in which a crucifix is shown submerged in a jar of the artist's urine. *Id.* at 69, 73-74.

4. Congressional debate on the matter of restricting the content of artistic expression in federally funded projects became particularly heated during the 1989 and 1990 re-authorization hearings for the National Endowment for the Arts (NEA). See Catherine R. Stimpson, *The Arts-Endowment Crisis Is the Latest Encounter in the Battle Between Freedom and Fear; Higher Education Must Join the Fray*, CHRON. OF HIGHER EDUC., Sept. 26, 1990, at B1 (reviewing re-authorization battle over NEA and advocating that academe take stand against content restrictions in government funding). The debate regularly resurfaces during the annual appropriation process for the NEA. See *infra* note 90 and accompanying text (reviewing congressional concerns about NEA grants).

5. See Julie Alagna, *1991 Legislation, Reports and Debates over Federally Funded Arts: Arts Community Left with an "Indecent" Compromise*, 48 WASH. & LEE L. REV. 1545, 1577 (1991) (criticizing 1991 congressional legislation implementing general decency standards for NEA grants); *infra* notes 91-93 and accompanying text (discussing legislative activities and tension surrounding government subsidies of Arts).

6. 500 U.S. 173 (1991) (upholding federal regulations prohibiting federal funding of abortion counseling, referral, and advocacy).

7. *Rust v. Sullivan*, 500 U.S. 173, 194-95 (1991).

8. *Id.* at 195 (noting that government may restrict conduct within project, so long as it does not prohibit recipient from engaging in protected conduct outside scope of program).

9. See Family Planning and Population Research Act of 1970, Pub. L. No. 91-572, § 6(c), 84 Stat. 1506-08 (codified as amended at 42 U.S.C. §§ 300-300(a-6) (1988 & Supp. V 1993)) (codifying ban on funding family planning programs that discuss abortion); 42 C.F.R. §§ 59.8 to .9 (1994) (requiring grantee to offer Title X family planning counseling in physically separate facilities, with different personnel, and accounts maintained separately from any other counseling services independently offered by grantee that referred to or suggested abortion as alternative to child birth).

under the doctrine of unconstitutional conditions was no longer clear.¹⁰

The doctrine of unconstitutional conditions holds that the government may not allocate a benefit on the condition that the beneficiary sacrifice a constitutional right, even if the government is under no obligation to provide the proffered benefit.¹¹ By upholding Title X regulations that effectively prohibited grant recipients from discussing abortion as a reproductive option unless undertaken in completely separate facilities,¹² the Court in *Rust* cast doubt on the extent of the doctrine's protection. The Court's holding is especially troubling to nonprofit service organizations that depend on federal and state grants to support substantial portions of their programs. Organizations that provide controversial or unpopular services as part of their programs are especially vulnerable to funding conditions; such conditions would implicitly restrain constitutionally protected activities that are privately funded as well as actions reasonably taken within the scope of the government program.¹³ At

10. *But see Hearing on the First Amendment Implications of the Rust v. Sullivan Decision Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 102d Cong., 1st Sess. 13 (1991) (statement of Deputy Assistant Attorney General Leslie Southwick) (noting that *Rust* decision "merely recognizes that when the government sponsors speech for certain purposes, it has the right to regulate the content of the government-funded portion of the message"). In her testimony, Ms. Southwick also noted that "when the government funds a certain view, the government is itself speaking . . . and need not fund viewpoints with which it disagrees." *Id.* at 10-11.

11. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (explaining doctrine of unconstitutional conditions); *see also* RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 307-08, 312 (1993) [hereinafter EPSTEIN, *BARGAINING WITH THE STATE*] (alleging that government has unfair advantage in bargaining with parties who receive benefits, and may unfairly impose conditions); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 675 (1992) (arguing that government-funded clinics and art programs are within same category of protected speech as public universities and press); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 102-04 (1988) (arguing that judiciary should protect economic liberty); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 849 (1979) (contending that judiciary is most effective protector of state sovereignty); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1109-10, 1125 (1987) (exploring whether Congress could lawfully regulate matters beyond its power to legislate by attaching conditions to expenditures); *cf.* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 595 (1990) [hereinafter Sunstein, *Unconstitutional Conditions Doctrine Is an Anachronism*] (rejecting traditional doctrine and proposing to examine whether government has "constitutionally sufficient justification" for interfering with protected right); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337, 338 (1989) [hereinafter Sunstein, *Unconstitutional Conditions Doctrine*] (arguing that focus of inquiry should be whether condition hurts protected interest in "constitutionally troublesome way").

12. *Rust*, 500 U.S. at 196-97 (noting that merely requiring Title X recipients to conduct abortion advocacy in separate facilities burdens no constitutional right).

13. In fact, government-funded project grants to most nonprofit organizations are predicated on the grantee receiving matching funds from private sources. *See, e.g.*, 20 U.S.C. § 954(e) (1994) (limiting NEA grants to 20% of total cost of project or production); 45 C.F.R.

stake is the freedom of nonprofit organizations to remain faithful to their own institutional mandates while meeting governmental requirements that might curtail their primary interests.

With the convergence of congressional debate over federal funding policies for the National Endowment for the Arts (NEA)¹⁴ and the Supreme Court's decision in *Rust*, the issue of unconstitutional conditions and governmental grants to nonprofit organizations has reached a crossroads. In the balance is the relative freedom that nonprofit organizations previously asserted while administering federal grants and the prospect of significantly increased governmental control over the operation of the arts organization or individual who accepts government funding.¹⁵ At issue is whether proactive restrictions on the use of government funds will have a chilling effect on the work of artists and organizations, either by discouraging them from soliciting and accepting government funding,¹⁶ thus reducing their resources to act, or by curtailing the artistic freedom within which funding recipients ordinarily pursue their objectives. To the

§ 1100.1(b) (1994) (requiring arts organizations to obtain matching private grants of private funds in ratio no less than two private dollars to one federal dollar for project budget). A restriction on government funds would, of course, extend to the use of private funds within the project as well. See, e.g., *Rust*, 500 U.S. at 199 n.5 (stating that "[b]y accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income"). In circumstances where governmental funding is allocated for general use but is proportionately small and impossible to segregate from other sources of funding, restrictions that may impede the use of private funding are invalid. See *FCC v. League of Women Voters*, 468 U.S. 364, 400-01 (1984) (holding bar on noncommercial educational broadcasting station editorializing unconstitutional where government funding comprised 1% of budget).

14. See 136 CONG. REC. S16,626 (daily ed. Oct. 24, 1990) (statement of Sen. Helms) (proposing amendment to bill, H.R. 5769, that no NEA funding support obscene materials). Notably, conservative members of Congress called for the restriction or elimination of public funding for arts projects that produce "obscene materials" and for other activities or works that display a disdain for the "moral and religious sensibility of the majority of the American people." *Id.* Pressure to restrict funding for the arts has continued in the aftermath of the 1994 mid-term elections. See *Art Solicitors Go on the Offensive*, ATLANTA CONST., Sept. 15, 1995, at A18; *Congress: Back to the Trenches*, BUS. WK., Sept. 18, 1995, at 42.

15. See Michael J. Elston, *Artists and Unconstitutional Conditions: The Big Bad Wolf Won't Subsidize Little Red Riding Hood's Indecent Art*, 56 LAW & CONTEMP. PROBS. 327, 329-31 (1993) (reviewing potential effects of recent government attempts to restrict content of arts projects).

16. Many organizations have protested such restrictive conditions by refusing to accept future funding or returning grants already received. *The American Poetry Review*, *The Paris Review*, and *The Boston Review* all rejected NEA grants. ZEIGLER, *supra* note 3, at 114-18. Joseph Papp, Director of the New York Shakespeare Festival, also refused to accept NEA monies, denouncing the Endowment's restrictions and new procedures as "a kind of cultural vice squad." William A. Henry III, *Are Artists Godless Perverts? In the Battle over Public Funding, Opponents Seem to Be Winning*, TIME, Sept. 10, 1990, at 81; see also ZEIGLER, *supra* note 3, at 114-18 (discussing NEA's position against content restrictions and artists refusals to accept grants based on content restrictions).

arts community, and to a considerable proportion of the public at large, neither choice is attractive.¹⁷

The Court's decision in *Rust* has also fueled a growing debate over the authority of the doctrine of unconstitutional conditions and its appropriateness as a guide for judicial oversight of funding restrictions in governmental programs.¹⁸ What is needed is an alternative constitutional theory that will more predictably determine the boundaries of political control over funding programs. It is imperative that such a new approach reconcile traditional political and social values while preserving fundamental rights of expression. This alternative theory must also answer the familiar regulatory argument that the government's "greater power" to deny funding for a good reason encompasses the "lesser power" to condition funding for the same reason,¹⁹ an argument which underscores many of the infirmities of the unconstitutional conditions doctrine.²⁰

A middle ground is necessary in the doctrinal conflict between constitutional theories that require absolute protection of the expressive rights of grant recipients and those approaches that permit unfettered governmental regulation of a grantee's expression within

17. See Tom Mathews, *Fine Arts or Foul? In Galleries, Theaters, Congress and the Courts, a Battle over Freedom of Expression Is Raging*, NEWSWEEK, July 2, 1990, at 46, 50. At the height of the debate over restrictions on federally funded arts projects, a Gallup Organization poll showed that 75% of the respondents felt that it was more important for individuals to have the right to determine what they may see or hear, than to allow society to impose laws prohibiting "material offensive to some segments of the community." *Id.* When asked whether federal officials or an independent panel of established art experts should exercise control over federally funded arts projects, 63% preferred the experts and only 30% responded that more official control was necessary. *Id.*

18. Although attractive in theory and well established in legal scholarship, the doctrine of unconstitutional conditions has been under attack for some time. The chief complaint of its critics arises from the doctrine's failure to guide court decisions with any consistency. See Sunstein, *Unconstitutional Conditions Doctrine*, *supra* note 11, at 344-45 (criticizing unconstitutional conditions doctrine for being overbroad and ignoring particular circumstances of cases); see also *infra* notes 197-250 and accompanying text (discussing weaknesses of unconstitutional conditions doctrine and alternate doctrines); cf. Cole, *supra* note 11, at 694-97 (arguing that doctrine is consistent, but noting that courts have only addressed legitimacy of restrictions within confines of grant, not restrictions extending beyond it).

19. Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 350-52 (1935) (contending that courts should consider whether condition is germane to regulation's purpose); see *infra* note 100 (citing examples of regulatory argument).

20. Justice Holmes dismissed the entire doctrine of unconstitutional conditions as a logical and conceptual error: "Even in the law the whole may generally include its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting). Later in his career, Justice Holmes softened his view of the government's privilege to regulate. He acknowledged the duty of government to respect the freedoms declared in the *Bill of Rights*, notwithstanding its discretionary power to participate in many areas of economic and private life: "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

the scope of a funded program. In *Rust*, the Supreme Court offered, in dicta, a solution to this dilemma when it explained that within certain "traditional spheres of free expression," government-funded projects might well be protected from any restrictions that would curtail recipients' exercise of fundamental rights, even within the narrow scope of the project itself.²¹ The Court used the example of the university, which is "so fundamental to the functioning of our society," as one such traditionally protected sphere of discourse.²² In light of increasing concern among legislators and policy commentators that the government should be much more vigilant in its oversight and control over funding for arts projects that might be deemed blasphemous or offensive to community standards of decency,²³ the question naturally arises whether the arts are similarly protected as a traditional sphere of free expression.

This Article explores the issue of governmental funding to the arts and the constitutional limits on how severely the government may restrict the activity of a recipient. Part I briefly reviews the history of government support of the arts, especially as it has developed since the New Deal. Part II considers the paradox of governmental funding for the arts: the desire to nurture and yet maintain some control over the results of the artistic activity. Part II further discusses the conflicting nature of governmental funding, whether as a discretionary benefit or as an entitlement, in light of the constitutional background of governmental funding restrictions prior to the *Rust* decision.

Part III examines specific aspects of funded "speech" activity in the arts. Elements of speech such as the location or medium of its expression, content, subject matter, viewpoint, artistic merit, as well as obscenity are discussed in view of the special symbolic values accorded the arts as a recipient of government support. In this context, the Article explores whether the arts constitute a traditional sphere of protected speech within constitutional jurisprudence in light of the *Rust* decision. The Article concludes that under conventional time, place, and manner limitations, the arts are a traditional sphere of public discourse and, therefore, subject to the protection of the First Amendment.

21. *Rust*, 500 U.S. at 200 (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967)).

22. *Id.*

23. See, e.g., 136 CONG. REC. S16,626 (daily ed. Oct. 24, 1990) (statement of Sen. Helms) (arguing that federal government should stop funding offensive art).

Part IV presents four policy options that address the dilemma of the government's wish to promote the arts while maintaining some control over the artistic products of its largesse. This Article proposes finally that the government focus its funding efforts on programs that nurture a national arts infrastructure. This goal could be accomplished primarily through the promotion and support of state and private arts organizations, rather than by grants to individual artists. While such a proposal still leaves the government open to criticism for indirectly supporting controversial projects that it once may have supported directly, it removes the government's burden and responsibility of directly administering the individual work of the artist. At the same time, this proposal allows the government to fund directly those organizations and programs that are in the best position to promote art, artists, and their audiences on a national basis.

The Article cautions that continued political support for the arts will depend increasingly on the development of a legislative strategy aimed at selectively funding those programs in the arts that meet Congress' mandate to promote the arts but avoid unsettling controversies over the artistic results. In the end, the choice to fund the arts is a political decision. Curtailing support is also political, irrespective of the fact that judicially secured rights to freedom of artistic expression exist. Congress will not fund the arts unless there is a broad consensus to do so.

I. A BRIEF HISTORY OF GOVERNMENT FUNDING OF THE ARTS

A. *Support for the Arts Before 1965*

Governmental interest in artistic enterprises is as old as the nation.²⁴ Before moving the capital to the District of Columbia, the Federal Government spent considerable energy and funds commissioning Pierre L'Enfant to create a plan for the new capital city, which included erecting major buildings and monuments.²⁵ After specifying the general spirit and thrust of the project, President Washington

24. See ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 545 (1941) (surveying right of free speech from nation's founding). In a declaration issued in 1774, the first Continental Congress stated that basic freedom would include "the advancement of truth, science, morality and the arts in general." *Id.*

25. See HANS PAUL CAEMMERER, *THE LIFE OF PIERRE CHARLES L'ENFANT, PLANNER OF THE CITY BEAUTIFUL, THE CITY OF WASHINGTON* 127-38 (1950) (discussing planning of capital city and debate over its location). See generally ELIZABETH S. KITE, *L'ENFANT AND WASHINGTON* (1970) (discussing life of L'Enfant and providing excerpts of letters between L'Enfant and government); *THE BRITANNICA ENCYCLOPEDIA OF AMERICAN ART* 340 (Milton Rugoff et al. eds., 1981) (providing brief biography of L'Enfant).

and Congress left the artistic formulation of the capital's design in L'Enfant's hands.²⁶ As might be expected in such a grand undertaking, disagreements occurred between the artist and the government over many aspects of the project.²⁷ Nevertheless, the government largely implemented L'Enfant's plan²⁸ and history has borne out both the wisdom and aesthetic reward of the government's support of L'Enfant's vision.

Since that early time, funding entities at all levels of government have commissioned, sponsored, and otherwise supported artistic projects and the artists who create them.²⁹ For example, governmental support for artists and the arts typically came by way of contracts for architectural or decorative work that became public property upon completion or delivery.³⁰ In addition, among the performing arts, musical ensembles have always been a part of the armed forces.³¹ Despite the government's support of the arts, the establishment of an official administrative agency for the arts was slow in coming.³² The prevailing American mode of support and subsidy for the arts

26. See CAEMMERER, *supra* note 25, at 134-68 (providing excerpts of communications between Washington, Jefferson, and L'Enfant reflecting government's confidence in L'Enfant's artistic abilities).

27. See CAEMMERER, *supra* note 25, at 169-216 (providing excerpts of communications between government and L'Enfant reflecting disagreements over exhibition of plan, demolishing of private house that interfered with city plan, expenses, and conflicts with government-appointed authorities over construction matters).

28. See CAEMMERER, *supra* note 25, at 168 (stating that despite attempts of others to change L'Enfant's plan, it remained intact).

29. See *Serra v. General Servs. Admin.*, 847 F.2d 1045, 1047 (2d Cir. 1988) (noting long history of government support for art and architecture).

30. This tradition is most notably implemented through the Federal Government's Art-in-Architecture Program in which one half of one percent of a building's cost is allocated to the incorporation of artwork by American artists. *Serra*, 847 F.2d at 1047; see also 34 C.F.R. § 490.10 (1994) (explaining how to apply for grant). Many progressive minded municipalities and states have followed the Federal Government's lead in promoting the arts through the dedication of set percentages of public revenues or construction costs to the artistic enhancement of public spaces. See, e.g., MINNEAPOLIS, MINN. CODE §§ 36.10-36.80 (1974) (establishing Minneapolis Arts Commission and vesting in it power to accept art gifts and to recommend city commissions of new art).

31. See NATIONAL ENDOWMENT FOR THE ARTS, 1965-1985: A BRIEF CHRONOLOGY OF FEDERAL INVOLVEMENT IN THE ARTS 5 (1985). After the defeat of Cornwallis' army at the battle of Yorktown, the bands played the old English tune "The World Turned Upside Down" and "Yankee Doodle" during the surrender ceremonies. See THOMAS J. FLEMING, BEAT THE LAST DRUM: THE SIEGE OF YORKTOWN, 1781, at 328-29 (1963). At the first White House celebration following news of Lee's surrender, President Lincoln asked the Marine Corps Band to play "Dixie." See COURTLANDT CANBY, LINCOLN AND THE CIVIL WAR 350 (1960). Before going on to international fame for his musical marches, John Philip Sousa began his career as an officer in the Marine Corps Band. See generally PAUL E. BIERLEY, JOHN PHILIP SOUSA, AMERICAN PHENOMENON (1973).

32. President Buchanan sought to establish a National Commission of Fine Arts in the 1850s, but was unable to persuade Congress to allocate the necessary funding. LEONARD D. DUBOFF, ART LAW 154 (1993). Similar efforts by Presidents Theodore Roosevelt and William Howard Taft during the first decade of this century were unsuccessful. *Id.* at 154-57.

followed the eighteenth and nineteenth century European paradigm in which wealthy individuals, including aristocrats and the newly emerging bourgeoisie, sponsored artistic works or events.³³

The first significant effort by the federal government to support art and artists on an institutional basis occurred during the New Deal era.³⁴ In response to the economic hardships of the Depression, Congress established the Works Progress Administration (WPA) to help the unemployed get off relief rolls through massive public works projects.³⁵ Within the WPA, Congress created four arts projects: the Federal Arts Project (FAP), the Federal Musicians Project (FMP), the Federal Theater Project (FTP), and the Federal Writers Project (FWP).³⁶ Primarily intended to relieve unemployment, the FAP alone supported over 5000 artists, and sponsored the creation of tens of thousands of art works including paintings, murals, sculptures, photographic exhibitions, theater performances, and concerts, as well as scholarship and literary publications.³⁷ Artists supported by the WPA included Jackson Pollack, Mark Rothko, David Smith, Grant Wood, Orson Welles, Aaron Copeland, James Michner, Rockwell Kent, James Agee, and Dorothea Lange.³⁸ Until overtaken by the events of World War II, the WPA was a vital and driving force in the develop-

33. In the 1760s and 1770s, Benjamin Franklin bemoaned the lack of any evidence of civilizing institutions within the new metropolis of Philadelphia, and worked his entire life to find patronage and create a distinguished place for the arts and learning in colonial Philadelphia. RONALD W. CLARK, *BENJAMIN FRANKLIN: A BIOGRAPHY* 50-51 (1983). Under Franklin's direction, the first free public library was founded. *Id.* He was also instrumental in the creation of the Pennsylvania Academy of the Arts, the University of Pennsylvania, and the country's first hospital. *Id.* at 52. As the economy of the nation grew, wealthy merchants, financiers, and industrialists increasingly promoted the arts. Such figures as Peter Cooper, Cornelius Vanderbilt, Andrew Mellon, J.P. Morgan, Andrew Carnegie, John Rockefeller, Thomas Corcoran, John Hay Whitney, and Solomon R. Guggenheim built theaters and museums, created symphony orchestras, and supported the founding of art academies. See ALVIN TOFFLER, *THE CULTURE CONSUMERS* 170 (1964) (discussing U.S. intellectual life, arts, and society).

34. Some states and cities, however, such as New York through its Civic Works Administration, had already established modest arts programs to help unemployed artists before the New Deal era. DUBOFF, *supra* note 32, at 155.

35. See generally FINAL REPORT ON THE WPA PROGRAM 1935-43 (1947) (providing figures for employment provided and funds expended by WPA); DONALD S. HOWARD, *THE WPA AND FEDERAL RELIEF POLICY* (1973) (detailing program's requirements, number of people it benefitted, and its shortcomings); THE BRITANNICA ENCYCLOPEDIA OF AMERICAN ART, *supra* note 25, at 606 (providing brief synopsis of WPA Federal Art Project).

36. DUBOFF, *supra* note 32, at 155-57.

37. THE BRITANNICA ENCYCLOPEDIA OF AMERICAN ART, *supra* note 25, at 606. These creations remain evident in murals, paintings, and sculpture in public buildings, schools, and parks as well as in frequent museum exhibitions and retrospectives on Depression era art. See, e.g., DUBOFF, *supra* note 32, at 155-56 (providing numbers of murals, sculptures, and paintings produced by WPA's Federal Art Project); ROCKEFELLER PANEL, *THE PERFORMING ARTS REPORT ON THE FUTURE OF THEATRE, DANCE, MUSIC IN AMERICA* 110-48 (1965) [hereinafter ROCKEFELLER REPORT] (reviewing historical role of government in supporting arts); ZEIGLER, *supra* note 3, at 6-8 (discussing work created by WPA).

38. ZEIGLER, *supra* note 3, at 6-8.

ment of American art.³⁹ Notwithstanding the many successes of these programs, there was a constant undercurrent of opposition at that time to federal support for the arts and artists.⁴⁰ Part of this opposition was a general disagreement with the concept of non-essential, "make-work" projects of any sort, but other criticisms focused on political or aesthetical views that invariably arose from government-sponsored works that offended the sensibilities of certain segments of the public.⁴¹

Following a decade of pre-occupation with World War II and post-war readjustments by the Federal Government,⁴² the Eisenhower administration in 1955 proposed, unsuccessfully, to establish a federal commission to support the arts.⁴³ Later, Jacqueline Kennedy forcefully advocated this project in the early 1960s.⁴⁴ Subsequently, Presidents Kennedy and Johnson appointed executive assistants to advise them on the arts,⁴⁵ and Congress created the National Council on the Arts⁴⁶ as a prelude to the establishment of the NEA.

B. *The National Endowment for the Arts (NEA)*

In 1965, Congress created the National Foundation on the Arts and Humanities (National Foundation).⁴⁷ The National Foundation

39. Although the WPA did not officially mandate or espouse any particular artistic style, its workers were instrumental in the development of both the Regionalist style and the American school of realism. See generally HALLIE FLANAGAN, *ARENA: THE HISTORY OF THE FEDERAL THEATER (1940)* (noting great variety of theatrical styles employed by Federal Theatre Project (FTP) artists); FRANCIS V. O'CONNOR, *THE NEW DEAL ART PROJECTS (1966)* (reviewing extraordinary range of expression and style used by artists in Federal Art Project (FAP)).

40. See FLANAGAN, *supra* note 39, at 334-36 (discussing that continued unjustified accusations that WPA was dominated by communists led to 1938 termination of FTP).

41. See FLANAGAN, *supra* note 39, at 335-37, 341 (discussing belief that FTP disseminated communist propaganda); ZEIGLER, *supra* note 3, at 7-8 (discussing plays, such as *The Cradle Will Rock*, that asserted artists' desire for freedom from government interference, and overall criticism of FTP productions as vulgar and full of communist propaganda).

42. See ZIEGLER, *supra* note 3, at 10-11 (stating that 1947-54 was "low point" in government-arts relationship because artists were target of McCarthyism). Individual agencies of the government continued to support artistic events and projects. For example, the Agency for International Development (AID) and the State Department sponsored overseas tours by the Martha Graham Dance Company to Europe and Asia in 1954 and 1955. DON McDONOUGH, *MARTHA GRAHAM: A BIOGRAPHY* 227-53 (1973). Louis Armstrong and his orchestra toured Africa and Latin America in the late 1950s under AID sponsorship. See ROCKEFELLER REPORT, *supra* note 37, at 134-36 (discussing federal government programs that incidentally support arts, such as United States Information Agency, which arranges cultural programs overseas for individual artists and groups of artists).

43. ZEIGLER, *supra* note 3, at 8-18.

44. ZEIGLER, *supra* note 3, at 9.

45. ZEIGLER, *supra* note 3, at 13-14, 18.

46. National Arts and Cultural Development Act of 1964, Pub. L. No. 88-579, § 5(a), 78 Stat. 905, 905-06, reprinted in 1964 U.S.C.A.N. 1030, 1031 (appointing council of 24 distinguished experts in arts to develop national arts policy).

47. National Foundation on the Arts and Humanities Act of 1965, Pub. L. No. 89-209, § 2, 79 Stat. 845, 846-49 (codified as amended at 20 U.S.C. § 951 (1994)).

served as an umbrella organization for both the National Endowment for the Humanities and for the NEA, the first national agency expressly dedicated to the development and support of the arts.⁴⁸ Congress broadly conceived the NEA as a means to address two seemingly conflicting themes debated by supporters and opponents of federal subsidies to the arts. The main thrust of the NEA would be the promotion of excellence in the arts and culture.⁴⁹ To calm fears that an "official" culture might be established, however, the legislation creating the NEA emphasized both the private sector's traditional role in promoting the arts and principles of artistic freedom.⁵⁰ The purpose of the NEA lay in the creation of a "climate encouraging freedom of thought [and] imagination" and in the nurture of "conditions facilitating the release of creative talent."⁵¹ The national government desired a program embodying these values, reasoning that an "advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to . . . scholarly and cultural activity."⁵² Congress recognized that, as a world leader, the United States must promote its status by advancing "high qualities . . . in the realm of ideas and of the spirit."⁵³

Within this context, the NEA's enabling legislation emphasized the importance of local initiative from individuals, private organizations, and state agencies in the furtherance of the arts.⁵⁴ The NEA's future direction was to stem from a "broadly conceived national policy" for the arts.⁵⁵ Congress specifically limited the authority of the NEA and any other contributing federal agency to condition or dictate the

48. *Id.* § 5 (codified as amended at 20 U.S.C. § 954 (1994)).

49. *See* 20 U.S.C. § 954(c) (1994) (setting forth goals and responsibilities of NEA leadership).

50. *See id.* § 951(2) (stating that support for arts is "primarily a matter for private and local initiative"). During the debate to authorize the NEA, some expressed a fear that private enthusiasm to fund the arts would dissipate. *See* ZEIGLER, *supra* note 3, at 14-16, 33-37 (expressing that federal funding would have "deadening" effect on arts). Five years later, President Nixon recalled this same concern, finding that it was no longer justified. President's Remarks at the ACA's Annual Conference, 7 WEEKLY COMP. PRES. DOC. 816, 817 (May 26, 1971). Despite such concerns, it appeared that private funding for the arts had actually grown. *Id.* at 819; *see* ZEIGLER, *supra* note 3, at 34-37, 61-66 (indicating that NEA funding has stimulated private donations to arts); *see also* INDEPENDENT SECTOR, A PORTRAIT OF THE INDEPENDENT SECTOR: THE ACTIVITIES AND FINANCES OF CHARITABLE ORGANIZATIONS 35 (1993) (finding that when governmental funding to non-profit area is increased, overall private contributions to that area increase correspondingly).

51. 20 U.S.C. § 951(7) (1994). *See generally* NATIONAL ENDOWMENT FOR THE ARTS, A GUIDE TO THE NATIONAL ENDOWMENT FOR THE ARTS 1993-94 (1993) [hereinafter GUIDE] (expressing agency's purpose to fund artists and setting forth goals of each agency program, such as for dance, literature, opera, and theater).

52. 20 U.S.C. § 951(3).

53. *Id.* § 951(8).

54. *See id.* §§ 951(2), 954(c), (g).

55. *Id.* § 953(b).

manner in which the recipients operated their programs.⁵⁶ "In the administration of [the Act] no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any school or other non-Federal agency, institution, organization, or association."⁵⁷

Decisions about the actual grant-making by the NEA are left principally in the hands of special "advisory panels"⁵⁸ that report to the National Council on the Arts.⁵⁹ The advisory panels are composed of experts from appropriate fields in the arts.⁶⁰ The Council includes the Chairperson⁶¹ of the NEA plus twenty-six members from the private sector who are appointed by the President of the United States on the basis of their expertise in the arts "so as to include practicing artists [and] civic cultural leaders."⁶² Members of the Council serve six-year terms on a rotating basis,⁶³ and the Chairperson is appointed to serve a four-year term.⁶⁴ The Council advises the Chairperson on matters of "policy, programs, and procedures" and reviews grant applications recommended for funding by the advisory panels.⁶⁵

The general standards for approving grants focus on projects that "have substantial . . . artistic and cultural significance, giving emphasis to American creativity . . . and [contribute] to the encouragement of professional excellence."⁶⁶ Other criteria include support for projects "of significant merit" that would otherwise be unavailable to the public for geographic or economic reasons,⁶⁷ as well as projects that promote the "wider distribution of [artists'] works" or projects designed "to achieve standards of professional excellence."⁶⁸ In the

56. *Id.* § 953(c).

57. *Id.*

58. *Id.* § 959(a)(4).

59. *Id.* § 955(b).

60. *Id.* § 959(a)(4).

61. *Id.* § 954(b).

62. *Id.* § 955(b)(2).

63. *Id.* § 955(c).

64. *Id.* § 954(b)(2).

65. *Id.* § 955(f).

66. *Id.* § 954(c)(1). The grant-making process begins with the filing of an application for funding under one of the various programs within the NEA. GUIDE, *supra* note 51, at 8-9. The NEA staff first reviews the application to see whether all legal requirements have been satisfied. *Id.* Then the application is referred to the appropriate advisory panel. *Id.* at 9. The panel reviews the application and formulates a recommendation that is then forwarded to the Council. *Id.* The Council in turn advises the Chairperson who makes a final determination. *Id.* The Chairperson is responsible for approving all grants.

67. 20 U.S.C. § 954(c)(2) (1994).

68. *Id.* § 954(c)(3).

1980s, Congress added provisions to the National Foundation on the Arts and Humanities Act to foster excellence, diversity and vitality in the arts⁶⁹ and help broaden the availability and appreciation of the arts, with the goal of increasing minority participation.⁷⁰

Standards with respect to the actual qualities of a given project are similarly broad. Advisory panelists must consider the artistic quality and merit of the project⁷¹ in addition to other objective factors such as an organization's stability and evidence of community support.⁷² Factors such as "merit" and "artistic quality" are supremely subjective terms. The potential for misapplication, favoritism, or abuse of authority by a granting agency possessing this degree of discretion is substantial. To protect the government, the tax-paying public, and grant applicants from the capricious distribution of funding, Congress established both an independent council and advisory panels of experts to review applicants and recommend projects for funding.⁷³ By deferring to private experts, who serve essentially as volunteers,⁷⁴ Congress ensured that subjective judgments would be rendered fairly in light of the best professional opinion available.⁷⁵

C. *Recent NEA Funding Controversies and the Call for Government Oversight*

For the most part, the grant-making process has worked extremely well. In its thirty year existence, the NEA has made over 100,000 grants.⁷⁶ During that time, the agency received very few formal

69. *Id.* § 954(c)(1).

70. *Id.* § 954(c)(4).

71. *Id.* §§ 954(c)(1), (2).

72. GUIDE, *supra* note 51, at 33, 37, 42.

73. See *supra* notes 58-65 (discussing structure of NEA and role of advisory panels in recommending projects for funding to Chairperson).

74. See 20 U.S.C. §§ 955(e)-(f) (1994) (outlining how advisory panelists work on part-time basis and are paid small stipend plus expenses). Many hundreds of panelists serve the NEA at any given time. The chief rewards for the panelists would seem to be the prestige associated with serving the NEA and the opportunity to work with a distinguished group of colleagues. ZEIGLER, *supra* note 3, at 159-61. See generally NATIONAL ENDOWMENT FOR THE ARTS, HANDBOOK FOR PANELISTS (1994) (providing basic information about NEA's budget, grant-making process, and structure for members of advisory panels).

75. See 20 U.S.C. §§ 959(a)(4), (5) (1994) (allowing NEA Chairperson to employ experts or to accept their voluntary services).

76. NATIONAL ENDOWMENT FOR THE ARTS, THE ARTS ENDOWMENT IN BRIEF (Press Release) (1993). Congress established The Independent Commission in 1989 to: "(A) [review] the [NEA] grant making procedures, including those of its panel system, and (B) consider whether the standard for publicly funded art should be different than the standard for privately funded art." Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304(c)(1), 103 Stat. 701, 742. See generally THE INDEPENDENT COMM'N, A REPORT TO CONGRESS ON THE NATIONAL ENDOWMENT FOR THE ARTS (Sept. 1990) [hereinafter INDEPENDENT COMMISSION] (discussing re-authorization of NEA and recommending excision of content-based restrictions on funded projects). The Independent Commission was a temporary creature

complaints about misapplied funds or projects that abused the public trust.⁷⁷

Nevertheless, the recent outcry against the NEA for funding galleries that had supported the Serrano and Mapplethorpe exhibitions⁷⁸ was not the first time that public complaints had prompted Congress to attempt to assert greater administrative control over the grant-making process.⁷⁹ In 1984, leaders from the Italian-American community criticized a performance of Puccini's *Rigoletto* by the English National Opera at the Metropolitan Opera in New York, underwritten in part by an NEA Touring Program grant.⁸⁰ They argued that the opera depicted characters in an ethnically offensive manner.⁸¹ Representative Mario Biaggi of New York complained to the NEA and threatened to introduce legislation to ensure that the Federal Government would be impeded from funding productions containing "any ethnic or racially offensive material."⁸²

A year later, a controversy arose concerning an NEA-funded publication of allegedly pornographic poetry.⁸³ Nevertheless, until

formed by the appointment of twelve members: four were appointed by the President, four by the Speaker of the House, and four by the President *pro tempore* of the Senate. *Id.* at 43-45.

77. See INDEPENDENT COMMISSION, *supra* note 76, at 37-41 (discussing various controversies over grants for art that were criticized for lacking artistic quality or for being offensive or obscene).

78. See *supra* note 3 and accompanying text; see also INDEPENDENT COMMISSION, *supra* note 76, at 39 (discussing exhibitions and their surrounding controversy). "The Serrano work 'Piss Christ,' was of a photograph of a crucifix submerged in a container of the artist's urine." INDEPENDENT COMMISSION, *supra* note 76. The Mapplethorpe exhibit contained "explicit photographs portraying sadomasochistic and homoerotic activities, and nude children." *Id.*

79. See Karen Fricker, *Culture with Clinton*, FIN. TIMES, Jan. 23, 1993, at xviii (stating that 12 years of Republican administrations had been, at times, "openly hostile to the arts" and had "suffocated the arts").

80. See INDEPENDENT COMMISSION, *supra* note 76, at 38.

81. See INDEPENDENT COMMISSION, *supra* note 76, at 38. The English National Opera (ENO) production portrayed the opera's characters as mafioso gangsters and reset the action "from sixteenth century Mantua to New York's Little Italy in the 1950s." Roland Gellatt, *London's Other Opera*, OPERA NEWS, June 1984, at 8-9. In the production, the Duke ran "a chrome-plated restaurant" that served as a front for racketeers, while *Rigoletto* was played as a wise-guy waiter. *Id.* Sparafucile appeared as a hit man from New Jersey. *Id.* Supernumeraries were conspicuously dressed in pin-striped suits and fedora hats. *Id.* The local cop on the beat was pointedly paid-off. Robert Jacobson, *New York*, OPERA NEWS, Oct. 1984, at 40, 46. The Order of Sons of Italy deemed the performance to be ethnically disparaging and an offensive re-enforcement of a stereotypical image of Italian-Americans. Robert D. McFadden, *A Modernized "Rigoletto" is Attacked*, N.Y. TIMES, Mar. 6, 1984, at B1.

82. *The Grant Making Process of the National Endowment for the Arts: Hearing Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 98th Cong., 2d Sess. 2 (1984) (statement of Rep. Mario Biaggi). For an extensive analysis of the controversy over the NEA's funding of the ENO's *Rigoletto*, see Enrique R. Carrasco, Note, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 GEO. L.J. 1521, 1521-24 (1986) (concluding that content-based restrictions on federal subsidies to arts are constitutionally invalid).

83. See Mary Battiata, *NEA's Pornography Ruckus*, WASH. POST, Sept. 12, 1985, at C1 (summarizing views of members of Congress who believed that, because government provides

Congress passed the Helms Amendment in 1989,⁸⁴ legislative efforts to require the NEA to screen projects for ethnic and racially offensive subject matter or for other indecent content had consistently failed.⁸⁵ Reasons for not passing such legislation varied from the desire to keep politics and personal bias out of the funding process,⁸⁶ to the belief that such regulation was unconstitutional.⁸⁷

funds, it could set standards for refusing to fund "offensive" works); Irvin Molotsky, *Of Pornography and U.S. Subsidies*, N.Y. TIMES, Sept. 10, 1985, at A20 (discussing contentions by Congressmen Thomas D. DeLay and Dick Armey that NEA granted funds to poets who wrote obscene works).

84. The Helms Amendment originally sought to prohibit the funding of "obscene" and "indecent" works of art, and "material which denigrates the objects or beliefs of the adherents of a particular religion or nonreligion" and "material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age or national origin." 135 CONG. REC. S8862 (daily ed. July 26, 1989). The language eventually adopted by Congress stated:

None of the funds authorized to be appropriated for the National Endowment for the Arts . . . may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts . . . may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.

Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989) (codified at 20 U.S.C. § 954 (1994)). NEA regulations subsequently required that all grant recipients, certify under oath that they would remain in compliance with the language of § 304(a) and not produce obscene art. *Bella Lewitsky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 776 (C.D. Cal. 1991); INDEPENDENT COMMISSION, *supra* note 76, at 87-88.

85. INDEPENDENT COMMISSION, *supra* note 76, at 38-39 (discussing attempts in 1971 and 1985 to amend NEA control over artistic freedom of grantees); see Alagna, *supra* note 5, at 1548-53 (listing unsuccessful proposals to prohibit funding of material that is offensive to religious groups, races, genders, handicapped persons, ethnic groups, or age groups).

86. See *supra* text accompanying notes 54-57 (discussing how Congress limited authority of federal agencies to control how recipients of NEA money operated programs); see also INDEPENDENT COMMISSION, *supra* note 76, at 83-91 (recommending independent evaluation of NEA-funded projects without decency restrictions imposed by Congress).

87. INDEPENDENT COMMISSION, *supra* note 76, at 83-87. With respect to the constitutionality of restrictions on federal subsidies to the arts, the Commission's Consensus Statement states in pertinent part:

When funding denials are the product of invidious discrimination with the aim of suppressing a particular message and for no other reason, a particularly powerful case might be made that the decision was unconstitutional. . . .

The NEA currently requires all grant recipients to certify, under oath, that they will adhere to and enforce a ban on any use of NEA funds for purposes which the NEA "may consider" to be obscene. Some of the legal advisors to the Independent Commission believe this requirement is unconstitutional; all believe the insistence on such a requirement is unwise and recommend against it.

Id. at 86, 87.

It should be noted that "speech" that is obscene is not protected by the Constitution under the test enunciated in *Miller v. California*, 413 U.S. 15, 20-21, 24 (1973). It is well within the right of Congress to forbid the funding of obscene art as defined in *Miller*. Indecent or offensive speech, however unappealing to the community, is protected by the First Amendment. *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); see also *infra* note 319 and accompanying text.

The Helms Amendment and the revised (and softened) legislation of the following year⁸⁸ were the first content-based regulations successfully imposed on the NEA. Although courts eventually found both enactments to be unconstitutional,⁸⁹ the call for similar regulation now seems to have become an annual ritual in Congress.⁹⁰ The congressional and public discontent with the NEA, which is limited to a relatively small but vocal number of partisans,⁹¹ points to the unavoidable tension that has always characterized the concept of government subsidies to the arts. This tension is between the general desire to support the creative talent of artists and their artistic achievements⁹² and a fear that the government will either attempt to censor the content of funded projects,⁹³ or impose a dominant artistic ethos on the arts community which would have the same censorial effect.⁹⁴

In terms of the political give-and-take behind this tension, the professional, if subjective, standards applied by the NEA in its grant-

88. Department of the Interior and Related Agencies Appropriations Act of 1991, Pub. L. No. 101-512, § 103, 104 Stat. 1915, 1963 (1990) (codified at 20 U.S.C. § 954(d) (1994)) (modifying 1989 Act to ban only funding of "obscene" art and eliminating oath requirement).

89. See *Finley v. NEA*, 795 F. Supp. 1457, 1472-76 (C.D. Cal. 1992) (holding content-based restrictions imposed by 1990 Act on NEA grantees to be unconstitutional); *Bella Lewitsky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 781-85 (C.D. Cal. 1991) (holding § 304 of 1989 Act and NEA "decency oath" unconstitutional on grounds of vagueness and overbreadth).

90. See, e.g., Fricker, *supra* note 79 (reviewing legislative proposals and opposition's criticism of Clinton administration's plans for NEA); Robert Hughes, *The NEA Trampled Again*, TIME, June 22, 1992, at 43 (discussing renewed political debate over NEA appropriations); Jacqueline Trescott, *Arts Agency Regains Some Ground in Senate*, WASH. POST, Aug. 10, 1995, at C1 (reviewing most current congressional action); Jacqueline Trescott, *NEA Chief Endorses Artistic Freedom*, WASH. POST, Oct. 12, 1994, at C2 (discussing recent attacks by congressional critics of NEA's funding policies).

91. See Mathews, *supra* note 17, at 50 (noting that minority of people interviewed for Gallup Organization poll felt laws were necessary to prohibit offensive material as products of federally funded arts projects).

92. See *supra* notes 47-53 and accompanying text (observing that legislation that created NEA emphasized importance of artistic creativity).

93. See *National Arts and Humanities Foundations: Joint Hearings Before the Subcomm. on Arts and Humanities of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st Sess. 57-58 (1965) (statement of actor Charlton Heston) ("The artist's point of view, I suppose, has always been reduced to its simplest terms, 'Give me the money, but do not tell me what to do.'"). See generally H.R. REP. NO. 618, 89th Cong., 1st Sess., reprinted in 1965 U.S.C.C.A.N. 3186-88.

94. H.R. REP. NO. 618, *supra* note 93, at 3203-08 (describing minority views that political control of arts will reduce America's "cultural level" and preferring alternatives to direct funding). Russell Lymes, editor of *Harper's*, commented, "Federal subsidies will . . . contribute to a spirit of compromise and conservatism in art." *Id.* at 21. But see *supra* notes 54-57 and accompanying text (indicating Congress' intent that NEA would not control policies or curriculum of non-federal organizations). Fears that the federal government's involvement in funding the arts would lead to a situation similar to a Soviet style Zhdanovian control over the arts or, more mildly, the "official" influence of the Beaux Arts style under Napoleon III in France in the 1860s, have proven to be completely misplaced. See generally EDWARD ARIAN, *THE UNFULFILLED PROMISE: PUBLIC SUBSIDY OF THE ARTS IN AMERICA* (1989); DONALD NETZER, *THE SUBSIDIZED MUSE* (1978).

making process are both a strength and a weakness. If the grant process is fair and supports genuine artistic merit, all constituents, including the public, elected officials, and the arts community, should be satisfied by the independent and professional administration of NEA funds.⁹⁵ When a particular group is especially offended by a publicly funded arts project, however, the appearance of fairness and accountability dissolves, breaking down the decisionmaking consensus.⁹⁶ Although the offending artistic expression may be protected by the Constitution,⁹⁷ the rationale for public funding of such work runs into serious difficulty. Consequently, the essential administrative challenge for the NEA is to maintain a balanced funding policy that respects the artistic freedom of its grantees but also produces work that does not unduly shock or offend the public.

II. FUNDING RESTRICTIONS AND THE CONSTITUTION

A. *Positive and Negative Liberty*

Governmental subsidies for the arts are not entitlements under the Constitution.⁹⁸ The discretionary right of the government to grant or deny funding to recipients, consequently, would seem to give the government the power to restrict the use of its largesse.⁹⁹ In essence, the government's greater power to deny carries with it the lesser power to restrict.¹⁰⁰ Chief Justice Rehnquist, writing for the

95. See Carrasco, *supra* note 82, at 1534 (noting that perception of fairness is critical to public confidence in NEA's grant-making process).

96. Carrasco, *supra* note 82, at 1534.

97. See *infra* Part III.

98. See INDEPENDENT COMMISSION, *supra* note 76, at 85. The commission noted:

1. There is no constitutional obligation on the part of the federal government to fund the arts. That is a policy decision to be determined by Congress based upon its views as to whether it is useful and wise for the federal government to play a role in the arts funding process. The Constitution offers no guidance as to whether the arts should be funded by the federal government.
2. If federal funds are used to subsidize the arts, however, constitutional limitations on how the arts are funded may come into play. The most important of these is that while Congress has broad powers as to how to spend public funds, it may not do so in a way that the Supreme Court has said is "aimed at the suppression of dangerous ideas."

Id. (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

99. See *Rust v. Sullivan*, 500 U.S. 173, 195 (1991) (holding that government could fund abortion while placing restrictions on use of "abortion counseling as a method of family planning"); see also *supra* notes 10, 19 and accompanying text (noting that restrictions involved in receipt of federal funds had previously been thought to be prohibited under Constitution).

100. See *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986) (stating that "the greater power to completely ban casino gambling necessarily includes the lesser power" to discourage it through advertising ban); *Stephenson v. Binford*, 287 U.S. 251, 264-65 (1932) (Sutherland, J.) (holding that state may condition carrier's use of public funded highways in any manner it deems appropriate); *Western Union Tel. Co. v. Kansas*, 216 U.S. 1,

Court in *Rust*, believed that government funding for a specific project comes as a package.¹⁰¹ The recipient must accept the package "as is," or decline the offer and operate with private funds.¹⁰² The Supreme Court relied on similar reasoning in *Buckley v. Valeo*¹⁰³ to uphold government funding for political campaigns conditioned on recipients being subject to limits on the use of private funds.¹⁰⁴ Thus, if candidates for public office chose to spend unrestricted private funds, they were foreclosed from accepting government subsidies.¹⁰⁵

This line of reasoning also prevailed in *Regan v. Taxation With Representation*¹⁰⁶ in which the Court held that the government could deny certain tax exemptions to nonprofit organizations that engaged in political lobbying.¹⁰⁷ The Court found that, because tax exemptions for donations to nonprofit organizations were discretionary subsidies for specified activities, such as political lobbying,¹⁰⁸ the government could properly choose not to consider political lobbying for such a subsidy.¹⁰⁹

An excellent articulation of the philosophical foundation for this line of reasoning is found in Isaiah Berlin's essay on the concept of positive and negative liberty.¹¹⁰ Berlin writes that negative liberty is based in the concept that there are pre-existing spheres of private freedom within which the government may not exercise controlling authority.¹¹¹ The government may not limit the freedom of a private party to act or spend private resources in the exercise of these freedoms.¹¹² The essential element of this principle is that one may

53 (1910) (Holmes, J., dissenting) (arguing that power to deny whole encompasses ability to restrict parts); *supra* notes 19-20; *cf.* *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) (ruling that state's power to deny building permit did not authorize Fifth Amendment taking of related property right from owner as condition of granting permit).

101. *Rust*, 500 U.S. at 198-99.

102. *Id.* at 196.

103. 424 U.S. 1 (1976).

104. *Buckley v. Valeo*, 424 U.S. 1, 90-96 (1976).

105. *Id.* at 99.

106. 461 U.S. 540 (1983).

107. *Regan v. Taxation With Representation*, 461 U.S. 540, 545-46 (1983).

108. *Id.* at 546.

109. *Id.* at 547-48.

110. See ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118-72 (1969) (arguing that individual liberty is distinct and autonomous from governmental initiatives to control or promote public interests); see also JOHN STUART MILL, *ON LIBERTY* (Bobbs-Merrill Co., Inc. 1956) (1859) (proposing thesis, later adopted by Libertarians, that government is entitled to do nothing more than prevent people from harming each other). See generally ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974) (advocating libertarian argument that sole function of government is to protect negative rights).

111. BERLIN, *supra* note 110, at 122-31.

112. BERLIN, *supra* note 110, at 122-31.

act insofar as one is able through the use of one's own resources.¹¹³ Within this sphere of private freedom, the government may not restrict actions but, at the same time, there is no entitlement to government assistance to enable the act.¹¹⁴

At the opposite philosophical pole is the concept of positive liberty, postulating that one cannot exercise a right within a protected sphere of freedom if resources are unavailable to enable the action to take place.¹¹⁵ For example, in *Gideon v. Wainwright*,¹¹⁶ the Supreme Court held that the constitutional right to representation by counsel would be rendered meaningless if an indigent person's poverty prevented him from fairly presenting a defense in the face of the state's vast power to prosecute.¹¹⁷ Although the Constitution does not specifically grant the right to *appointed* counsel, it does give each person the right to a fair trial.¹¹⁸ In the context of a criminal prosecution, the Court in *Gideon* ruled that the state must provide resources that enable the indigent person accused of a serious crime to obtain effective assistance of counsel to ensure a fair trial.¹¹⁹

Our national experience and traditional view of individual rights, however, has weighed heavily in favor of the concept of freedom embodied in negative liberty.¹²⁰ The constitutional right to exercise a certain freedom has almost never included the right to a government subsidy in support of such action.¹²¹ Rather, we think of

113. BERLIN, *supra* note 110, at 122-31.

114. BERLIN, *supra* note 110, at 131-34.

115. BERLIN, *supra* note 110, at 144, 162-63.

116. 372 U.S. 335 (1963).

117. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). In *Gideon*, the Court emphasized:

[O]ur state and national constitution and laws have laid great emphasis on procedural and substantive safeguards designed to ensure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id.

118. *Id.* at 342; see U.S. CONST. amend. VI (giving accused in criminal prosecutions right to "speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation" and to be able to confront prosecution witnesses).

119. *Gideon*, 372 U.S. at 344; see also *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (extending right to counsel to indigent misdemeanor defendants threatened with imprisonment); *In re Gault*, 387 U.S. 1, 36-37 (1967) (indigent juveniles); *Douglas v. California*, 372 U.S. 353, 357 (1963) (indigents who appeal criminal convictions as matter of right).

120. See Sullivan, *supra* note 11, at 1423 (stating that constitutional tradition places many limits on government but mandates few affirmative benefits for individuals).

121. One notable exception to the negative liberty presumption is the right of an indigent criminal suspect to government appointed counsel if accused of a crime carrying the possibility of a jail sentence. See *Argersinger*, 407 U.S. at 32; *Gideon*, 372 U.S. at 347; *supra* notes 115-19 and accompanying text.

governmental subsidies as a form of public philanthropy or largesse¹²² that is handed out as a matter of political discretion and not as a constitutionally mandated right or liberty.¹²³ In this discretionary context, a subsidy that benefits the recipient is subject to governmental restriction. For example, in *McAuliffe v. Mayor of New Bedford*,¹²⁴ Justice Holmes rejected a policeman's claim that he was unconstitutionally fired from his position because of his political views.¹²⁵ In an opinion written early in his career, while serving on the Massachusetts high court, Holmes wrote, "[He] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."¹²⁶ To Holmes, the work of a policeman and the discussion of politics were separable. The constitutional right to talk politics simply did not coincide with the right to hold a public job, and the City of New Bedford was perfectly entitled to deny the policeman the largesse of municipal employment.¹²⁷

Thus, *Gideon* is something of an exception when it comes to the direct application of the concept of positive liberty.¹²⁸ Efforts to secure constitutional entitlements in the areas of education,¹²⁹

122. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) (commenting that from mid-1950s through mid-1960s, one of most important "developments in United States . . . has been the emergence of government as a major source of wealth").

123. See EPSTEIN, BARGAINING WITH THE STATE, *supra* note 11, at 309-12 (arguing that amendment designed to limit scope of government should not be converted into provision that mandates perpetual government involvement in funding); Sullivan, *supra* note 11, at 1424 (explaining that constitutional law regards most governmental benefits as discretionary policies, which are to be reviewed with deference).

124. 29 N.E. 517 (Mass. 1892).

125. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 518 (Mass. 1892).

126. *Id.* at 517. "There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him." *Id.* at 517-18. First Amendment restrictions such as those imposed upon policemen in New Bedford remained prevalent in government employment well into the first half of this century, not only for positions in public safety and services, but significantly for school teachers and university professors. See *Scopes v. State*, 289 S.W. 363, 366 (Tenn. 1927) (holding that law forbidding teaching of evolution in public schools did not violate state or federal Constitutions). See generally David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981) (discussing history of first amendment right to free speech prior to World War I).

127. *McAuliffe*, 29 N.E. at 518-19.

128. Subsequent to the *Gideon* line of jurisprudence, the Supreme Court has held that there is no constitutionally protected right to court appointed counsel in optional criminal appeals. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (state courts); *Ross v. Moffitt*, 417 U.S. 600, 615 (1974) (federal courts).

What is true for criminal appeals *a fortiori* extends to civil claims that are by nature optional even where implicating a fundamental right. See *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 26-27 (1981) (holding that court appointed lawyer is not required in child custody action against indigent woman serving prison sentence).

129. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (holding that application of strict scrutiny test was improper where system provided for basic educational needs).

welfare,¹³⁰ housing,¹³¹ food,¹³² and public safety¹³³ have all failed, and these failures illustrate the weakness of the concept of positive liberty as a force in our political tradition.

There are, nonetheless, areas of government action in which the courts have split the difference between the government's power of discretionary funding (negative freedom) and the recipients' entitlement to mandatory subsidies (positive liberty). This is evident in First Amendment cases where certain types of governmental property or services are used in the exercise of fundamental rights,¹³⁴ or when the government acts as an employer¹³⁵ or supports education and the arts.¹³⁶

130. See *Jefferson v. Hackney*, 406 U.S. 535, 550-51 (1972) (holding that allocation of welfare benefits is discretionary and not constitutionally required); *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (ruling that state provision of welfare benefits was matter of legislative discretion).

131. *Lindsay v. Normet*, 405 U.S. 56, 74 (1972) (stating that assuring adequate housing is legislative function, not judicial one).

132. See *Lyng v. Automobile Workers*, 485 U.S. 360, 372-73 (1988) (holding that federal regulations denying food stamps to striking workers is within discretion of Congress); see also *Liparota v. United States*, 471 U.S. 419, 433-34 (1985) (upholding restrictions on use of food stamps by recipients, including imposition of criminal penalties for use violations).

133. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543-44 (1985) (noting that public services now taken for granted were not originally required or expected of government). Police and fire protection, for example, are not mentioned in the Constitution. Cf. Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1175-90 (1977) (arguing that Congress' power to regulate "traditional" and "integral" state functions is based primarily on affirmative duty of states to provide those functions to their citizens rather than on notions of federalism).

134. See, e.g., *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2405 (1992) (holding discretionary charge for police protection of public demonstration invalid); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 639 (1980) (upholding solicitation through public canvassing); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556-57 (1975) (use of public theaters); *Saia v. City of New York*, 334 U.S. 558, 562 (1948) (use of loudspeakers in public place); *Martin v. Struthers*, 319 U.S. 141, 149 (1943) (door-to-door canvassing); *Hague v. Committee for Indus. Org. (CIO)*, 307 U.S. 496, 515-16 (1939) (fair use of streets and parks); *Lovell v. Griffin*, 303 U.S. 444, 451-52 (1938) (distribution of literature along public streets). This right to exercise one's First Amendment rights on government property is known as the public forum doctrine. See GERALD GUNTHER, *INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW* 920-24 (1992). The doctrine holds that "traditional" forums of public expression, typically streets, parks and public theaters, are not subject to governmental bans on speech or assembly without the most compelling justification. *Id.* at 920-21 & n.1. The doctrine encompasses protection from discretionary licensing, fees, and ejection on the basis of content or speakers' viewpoint. *Id.* at 921-22, 961-63.

135. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) (upholding law that prohibited federal employees from engaging in political activity while working, but re-emphasizing freedom of governmental employees to exercise their First Amendment freedoms separately from their governmental occupations); *Pickering v. Board of Educ.*, 391 U.S. 563, 563 (1968) (reversing dismissal of teacher who wrote letter to newspaper criticizing local school board and its policies). But see *Hatch Act Reform Amendment of 1993*, Pub. L. No. 103-94, § 9(a), 107 Stat. 1003 (codified at 5 U.S.C. § 7324 (1994)) (prohibiting federal employees from engaging in political activity while on duty).

136. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (stating that academic freedom rests upon First Amendment grounds whether it pertains to "who may teach, what may be taught, how it shall be taught, and who may be admitted to study"); *Healy v. James*, 408 U.S. 169, 187-88 (1972) (holding that academic freedom encompasses freedom of students

In these situations, the courts have generally found that when the government acts with its "public face," the First Amendment protects the beneficiary.¹³⁷ When, however, the government acts with its "private face," the First Amendment will not apply except for certain limitations with respect to discrimination on the basis of viewpoint.¹³⁸

The government acts with a "public face" when it operates facilities or spaces that are recognized as public forums, such as streets, sidewalks, public theaters and parks.¹³⁹ In areas where the government has a monopoly on the given activity, such as law enforcement, the government is subject to constitutional restrictions on its ability to limit public activity within recognized spheres of freedom. These spheres encompass the home and person,¹⁴⁰ the voting booth,¹⁴¹

to exercise fundamental rights within educational sphere); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (striking down loyalty oaths for faculty as violation of First Amendment protection of academic freedom); *see also* *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (noting that dramatic production in municipal theater is immune from ban under First Amendment principles); *Poe v. Ullman*, 367 U.S. 497, 514 (1960) (Douglas, J., dissenting) ("The actor on stage or screen, the artist whose creation is in oil or clay or marble . . . are beneficiaries of freedom of expression."); *Piarowski v. Illinois Community College*, 759 F.2d 625, 628 (7th Cir. 1985) (holding that First Amendment protects artistic expression unless it is legally obscene).

137. *See, e.g.*, *Board of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (recognizing First Amendment rights of students in school library); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969) (asserting that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"); *Poe*, 367 U.S. at 513-14 (acknowledging First Amendment rights of doctors to advise patients about medical issues).

138. *See* *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 788 (1985) (finding that federal government offices are non-public forums and upholding limits on access by private organizations and persons not engaged in government business); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 789 (1984) (upholding municipal ordinance forbidding advertising on lampposts and telephone poles in order to promote more efficient maintenance so long as restrictions are viewpoint neutral); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 37 (1983) (upholding limitations on private access to inter-school mail system in order to facilitate inter-office communication).

139. *See* *United States v. Kokinda*, 497 U.S. 720, 736-37 (1990) (re-affirming protected status of traditional public forums for expressive activity, but asserting that non-traditional public forums may be subject to reasonable time, place, and manner restrictions); *see also supra* note 133 and accompanying text (describing how government has assumed certain obligations in area of public safety which were not originally anticipated). Courts are beginning to accord certain quasi-public spaces, such as privately owned shopping malls, the legal status of a public forum. *See* *New Jersey Coalition Against War v. J.M.B. Realty Corp.*, 650 A.2d 757, 775 (N.J. 1994) (holding that shopping centers, as quasi-town centers, are required to permit distribution of leaflets on societal issues, subject to reasonable conditions).

140. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."); *see also* *Harris v. McRae*, 448 U.S. 297, 316-18 (1980) (discussing how woman's right to choose abortion falls within personal liberty interest of Fourteenth Amendment's Due Process Clause).

141. *See* U.S. CONST. amends. XV, XIX, XXIV, XXVI (guaranteeing federal voting rights for citizens over age of eighteen, regardless of race, previous condition of servitude, sex, and financial ability); *see also* *Anderson v. Celebrezze*, 460 U.S. 780, 805-06 (1983) (striking down discriminatory restrictions on independent candidates); *Bullock v. Carter*, 405 U.S. 134, 149

and a court of law.¹⁴² The government acts with a "private face" when it operates a facility as if it were the private owner of a non-monopolistic enterprise, such as a post office,¹⁴³ an office building,¹⁴⁴ or an airport.¹⁴⁵ In these areas, the government may act as a private owner might and turn away public speakers at its door without implicating First Amendment rights.

Interestingly, when the government subsidizes education, it acts with both its "public" and "private face." High school students do not abandon their right to free speech or assembly when they enter the schoolhouse.¹⁴⁶ The Supreme Court, however, has distinguished occasions in which a public school acts with a "private face," such as when it attempts to regulate the content of a school's curriculum.¹⁴⁷

Similarly, public employees no longer waive their right to free speech at the government's office door¹⁴⁸ as the Massachusetts court held in *McAuliffe*.¹⁴⁹ A government employee may talk politics as a citizen about public issues of the day.¹⁵⁰ Public employees may criticize the President¹⁵¹ or the local district attorney,¹⁵² so long as

(1972) (invalidating filing fee requirements for candidates); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (striking down state restrictions on voting qualifications not related to age and residency).

142. See U.S. CONST. amends. V, XIV (guaranteeing due process, fundamental fairness, and equal protection of laws); see also *Little v. Streater*, 452 U.S. 1, 16-17 (1981) (holding that financially imposed evidentiary burdens on indigent people in civil proceedings violate due process and equal protection); *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (holding that state may not restrict criminal appellants' access to judicial review by imposition of financial obstacles).

143. See *Kokinda*, 497 U.S. at 727-30 (holding that location and physical characteristics of property do not necessarily dictate level of judicial scrutiny).

144. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (upholding time, place, and manner restrictions on First Amendment activities in non-public forums).

145. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2709 (1992) (finding that municipal airports are not public forums, and therefore, upholding ban on solicitations in terminals).

146. See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 514 (1969) (upholding high school student's right to free speech if not disruptive of school's program and activities).

147. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (upholding principal's right to censor articles published in school newspaper where such journalism is part of instructional program).

148. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979) (holding that private, as well as public, expression by public employees concerning matters of public import are protected by First Amendment).

149. See *supra* notes 124-27 and accompanying text (discussing Holmes' decision in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892)).

150. *Givhan*, 439 U.S. at 419; see *Perry v. Sindermann*, 408 U.S. 593, 603 (1972) (invalidating non-renewal of employment contract because of government employee's exercise of First Amendment rights); see also *Keyishian v. Board of Regents*, 385 U.S. 589, 608-09 (1967) (holding that academic freedom includes right to speak publicly).

151. See *Rankin v. McPherson*, 483 U.S. 378, 392 (1987) (holding that county may not dismiss clerk for comment that someone should assassinate President Reagan where such speech posed no danger to work place functions).

152. See *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding criticism of public policy valid if not disruptive of agency operations).

the speech does not disrupt governmental functions or is done on the employee's own time.¹⁵³ These rights, however, may be limited in the context of workplace grievances.¹⁵⁴ If the employee's speech activity constitutes insubordination, it may result in job loss.¹⁵⁵ Likewise, government employees may participate in political campaigns,¹⁵⁶ but not in the workplace or on the government's time.¹⁵⁷ In sum, the example of the government employee illustrates the distinction between the government's "public" and "private faces." As a *citizen*, the employee may exercise his or her First Amendment rights. As a *worker*, however, the same employee faces the sort of speech restrictions that any private employer might impose in the workplace.

The difference between government action, in either its public or private modes, illustrates the paradox of government support for the arts. On the one hand, the public desires to support artistic values and works.¹⁵⁸ On the other hand, there is an urge to dominate or control the artistic output of those recipients who benefit from the government's largesse.¹⁵⁹ As a promoter of the public expression of images and ideas, the government wears its "public face."¹⁶⁰ As the contractor of benefits to private individuals and groups, however, the government may be viewed as acting in a private capacity.¹⁶¹ Within this framework, both advocates and opponents of the constitutional basis for restrictions on governmental subsidies have struggled to establish whether a public or a private function underlies a given

153. *Id.* at 151; *see also* Pickering v. Board of Educ., 391 U.S. 563, 574-75 (1968) (invalidating school policy restricting rights of employees to criticize policy because employment was only "tangentially and unsubstantially in the subject matter of the public communication").

154. *See Connick*, 461 U.S. at 147-48 (upholding finding that employee's grievance did not fall under rubric of matters of "public concern").

155. *Id.* at 148.

156. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973) (holding that neither First Amendment nor other provisions of Constitution would invalidate law "barring partisan political conduct by federal employees").

157. *Id.* at 558; *see supra* note 134 and accompanying text (discussing use of government property to exercise fundamental rights).

158. *See supra* text accompanying notes 48-53 (discussing Congress' aim to develop and support arts through its creation of NEA).

159. *See supra* note 94 (discussing fear that government may attempt to censor funded projects or compromise artists' works).

160. *See supra* notes 134-42 and accompanying text (discussing how First Amendment protects beneficiary when government acts with its "public face").

161. *See* EPSTEIN, BARGAINING WITH THE STATE, *supra* note 11, at 5 ("[T]he government (sometimes conceived as an individual, sometimes not) may be able to withhold certain benefits absolutely from a person, or it may be able to confer those benefits to a person unconditionally.").

subsidy.¹⁶² If the functional baseline falls within the public sphere of governmental activity, the imposition of restrictions that inhibit or curtail the exercise of fundamental rights will likely be struck down.¹⁶³ If the functional baseline falls within a private sphere of government activity, then restrictions generally will be upheld.¹⁶⁴ The predominant legal theory that courts have applied to ascertain the public/private baseline of a governmental action is the doctrine of unconstitutional conditions.

B. *Unconstitutional Conditions*

For some time, the Court has held unambiguously that content-based speech restrictions imposed by the government violate the First Amendment.¹⁶⁵ When restrictions involve government-funded speech, however, the protection afforded by the First Amendment is less clear. Professor Kathleen Sullivan writes, "The imposition of the condition on the benefit poses a dilemma: allocation of the benefit would normally be subject to deferential review, while imposition of a burden on the constitutional right would normally be strictly scrutinized."¹⁶⁶ Over the decades, the doctrine of unconstitutional conditions has evolved to address such matters in order to prevent the government from indirectly burdening constitutional rights that would otherwise be strictly scrutinized as restrictions that directly impede assertion of those rights.¹⁶⁷ Although the doctrine does not provide that government benefits are entitlements, or that they need to be provided at all, it holds that such benefits may not be conditioned upon the surrender of fundamental rights or be distributed according to unconstitutional standards once the benefits are granted.¹⁶⁸

The doctrine developed during the *Lochner* period when the Court struck down state statutes that limited economic activities of private

162. See, e.g., *Serra v. General Servs. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988) (affirming GSA's Authority to maintain government property prevails over First Amendment rights of Artist commissioned to create work).

163. See *Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991) (recognizing that existence of government "subsidy" does not justify restriction of free speech in traditional public areas).

164. See *id.* at 194-95 (arguing that group was not being singled out because of content of speech, but because speech was outside scope of funding).

165. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."); see also *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) ("[O]ur people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.").

166. Sullivan, *supra* note 11, at 1422.

167. Sullivan, *supra* note 11, at 1421-22.

168. Sullivan, *supra* note 11, at 1415.

citizens on the principle that such governmental restrictions or regulations infringed upon the constitutional right of the individual to contract freely.¹⁶⁹ During the New Deal era when the hegemony of the *Lochner* decisions over states' economic authority dissolved, the applicability of the doctrine to cases of individual rights remained quietly intact.¹⁷⁰ An early case in a line of decisions strictly scrutinizing governmental benefits predicated on conditions limiting speech activities of the beneficiary is *Speiser v. Randall*.¹⁷¹ In *Speiser*, Justice Brennan wrote that the denial of a government benefit for engaging, or refusing to engage, in certain forms of speech "necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is frankly aimed at the suppression of dangerous ideas."¹⁷² The Court extended this line of reasoning to conditions of political conformity, or silence, imposed on government employees¹⁷³ and to employment benefits based on a requirement to work on the Sabbath.¹⁷⁴

In *FCC v. League of Women Voters*,¹⁷⁵ the Court held that a funding condition that prohibited editorializing by public broadcasting stations

169. See *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down state economic regulation of private corporations and applying strict scrutiny to such legislative conditions under due process clauses of Fifth and Fourteenth Amendments). The Court in *Lochner* accorded the liberty to contract free from state interference fundamental status under principles of substantive due process. *Id.* at 57.

Although not explicitly stated in the Constitution, but well-established in common law, this right to contractual freedom was viewed as integral to a fundamental understanding of constitutional authority. The *Lochner* decision ushered in a historical era, falling roughly between 1900 and 1937. See Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 8-2 to 8-4, at 567-74 (2d ed. 1988) (discussing *Lochner* era where Court invalidated much state and federal legislation). See generally Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (discussing 1971 Supreme Court treatment of equal protection); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (postulating that politically powerful persons receive greater constitutional protections).

170. Rosenthal, *supra* note 11, at 1144.

171. 357 U.S. 513 (1958).

172. *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (internal quotations omitted).

173. See *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (stating that county patronage system, whereby civil employees not sharing specific political party affiliation were dismissed, limited freedom of belief and association); *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (holding that threat of dismissal from public employment inhibits freedom of speech and, therefore, public school teachers could not be dismissed for speaking on public issues where employment was not subject of public communication).

174. See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 138 (1987) (stating that employer's denial of employment benefits to one who observes her religion by refusing to work on Saturdays violated Constitution); *Thomas v. Review Bd., Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981) (holding that employer could not withhold benefits from employee who exercised First Amendment right to free exercise of religion); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963) (holding that employee cannot be denied benefits for refusing to work on Saturdays based on religious reasons).

175. 468 U.S. 364 (1984).

was unconstitutional because it was based "solely on the . . . content of the suppressed speech."¹⁷⁶ Although the federal funds accepted by the broadcasting station constituted only one percent of its operating budget, the FCC restriction burdened the use of private funds for editorial purposes because both resources were indistinguishably part of the same budget.¹⁷⁷ Such a restriction was "motivated by nothing more than a desire to curtail expression of a particular point of view"¹⁷⁸ and amounted to an unconstitutional penalty on the right of the station to use its private funding to editorialize.¹⁷⁹

Similarly, three years later in *Arkansas Writers' Project, Inc. v. Ragland*,¹⁸⁰ the Court held that a state tax on general-interest magazines, which exempted certain other publications such as sports, religious, trade, and professional journals, violated the First Amendment because the tax burdens were based on each journal's particular subject matter or content.¹⁸¹ In *Speiser, League of Women Voters*, and *Arkansas Writers' Project*, the Court viewed the benefit as an impermissible penalty on the recipient's exercise of a fundamental freedom.¹⁸² This line of jurisprudence is completely consistent with the essential tenets of the doctrine of unconstitutional conditions.

Parallel to the above cases, the Court has developed a complementary scheme of jurisprudence. If conditions imposed by government funding may be properly classified as "nonsubsidies," rather than as "penalties" that would violate the Constitution, they are not subject to strict scrutiny.¹⁸³ A nonsubsidy may be defined as funding dedicated to a specific purpose for which the recipient must agree to use the

176. *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984).

177. *Id.* at 400.

178. *Id.* at 383-84 (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring)).

179. *Id.* at 384 (explaining that FCC restriction abridged First Amendment freedoms because it singled out noncommercial broadcasters to deny them right to address issues of public importance).

180. 481 U.S. 221 (1987).

181. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228-30 (1987).

182. *Id.* at 230 (holding that state's system of selective taxation required state's examination of particular content of magazine publications and violated First Amendment); *League of Women Voters*, 468 U.S. at 395 (holding Public Broadcasting Company Act's regulation prohibiting noncommercial stations that received public funding from editorializing impermissibly reached variety of speech having no nexus to government); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (invalidating conditioning of governmental benefit on recipient's espousal of particular views as violation of free speech).

183. *See Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983) (explaining that government's decision not to fund particular exercise of fundamental political right to lobby is not subject to strict scrutiny because nonsubsidies do not function as obstacle to exercising such right).

funds exclusively. In *Buckley v. Valeo*,¹⁸⁴ for example, the Court distinguished between a constitutional penalty and a nonsubsidy when it noted that a general cap on private contributions to political campaigns would violate the First Amendment,¹⁸⁵ but held that limits on private contributions could be imposed on candidates who accepted public campaign funding.¹⁸⁶ The Court noted that public funding of political campaigns had the opposite effect of limiting candidates' First Amendment rights because it expanded, rather than restricted, the opportunity for public debate on the issues of the day.¹⁸⁷

The most frequently cited nonsubsidy case is *Regan v. Taxation With Representation*.¹⁸⁸ In *Taxation With Representation*, the Court viewed tax exemptions as subsidies which Congress was free to withhold without harm to the exempted organization's right to lobby.¹⁸⁹ The Court held unanimously that the IRS's anti-lobbying conditions imposed on nonprofit organizations that wished to maintain their tax-deductible status were "content neutral" and did not "discriminate invidiously" on the basis of viewpoint.¹⁹⁰

In a more recent case, *Lyng v. International Union*,¹⁹¹ the Court held that the government's denial of food stamps to striking workers did not unconstitutionally place the workers in the position of having to choose between exercising their right to strike or receiving food stamps.¹⁹² The striking workers' disqualification from the food stamp program simply reflected "Congress's judgment not to provide

184. 424 U.S. 1 (1976).

185. *Buckley v. Valeo*, 424 U.S. 1, 53-54 (1976) (explaining that political candidate's personal expenditures to support his or her candidacy could not be limited by government's interest in preventing corruption).

186. *Id.* at 90-91 (allowing Congress to limit private contributions to campaigns if public funding is accepted for promotion of general welfare, to reduce monetary influence, to facilitate communication, and to reduce fundraising need). For a discussion of the impact of *Rust* on current efforts to reform political campaign funding and the *Buckley* decision, see generally Kenneth J. Levit, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 469 (1993).

187. *Buckley*, 424 U.S. at 52-53.

188. 461 U.S. 540 (1983).

189. *Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983); see also *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (holding that Congress is not required by First Amendment to subsidize lobbying activities). In *Taxation With Representation*, the Court held that a nonprofit organization could not engage in certain lobbying activities prescribed by Congress with the use of tax deductible contributions. 461 U.S. at 544. The organization, however, could establish a separate affiliate to conduct such lobbying activities funded by private contributions that would not be deductible under the relevant statute. *Id.*

190. *Taxation With Representation*, 461 U.S. at 548.

191. 485 U.S. 360 (1988).

192. *Lyng v. International Union*, 485 U.S. 360, 365-66 (1988).

financial support to strikers."¹⁹³ Finally, in *Rust v. Sullivan*,¹⁹⁴ the Court further extended its concept of nonsubsidies to encompass funding restrictions on a recipient's speech within the scope of a government-subsidized program so long as the recipient's freedom to exercise fundamental rights outside the scope of the funded program remained unimpeded.¹⁹⁵ In these nonsubsidy cases, the Court ruled that the regulations did not prohibit or restrict a protected activity, but simply provided that the government would not pay for the activity as part of a subsidized program.¹⁹⁶

The penalty and nonsubsidy lines of case law have created confusion over the application of the unconstitutional conditions doctrine to government-funded programs. The distinctions between what constitutes a penalty and a nonsubsidy have become nearly impossible to ascertain and seem more a matter of perspective than substantive difference.

Previously, if funding criteria were content-based in a way that generally restricted the recipient's speech, the Court would apply strict scrutiny.¹⁹⁷ Content-based conditions on speech, however, are not always unconstitutional.¹⁹⁸ If a compelling state interest can be demonstrated and if the restriction is narrowly crafted to fit the state's purpose, a court may uphold the restriction.¹⁹⁹ In practice, the Court has divided content-based conditions into three categories: viewpoint, subject matter, and artistic quality. With regard to viewpoint-based conditions, the Court has almost always found them

193. *International Union v. Lyng*, 648 F. Supp. 1234, 1245 (D.D.C. 1986) (app.), *rev'd*, 485 U.S. 360 (1988).

194. 500 U.S. 173 (1991).

195. *Rust v. Sullivan*, 500 U.S. 173, 193-95 (1991) (stating that Congress may choose to fund programs in public's interest without funding alternative or competing programs).

196. *Id.* at 203 (upholding federal funding of family planning services that failed to include abortion as family planning method because individuals freedom of choice and access to abortion was not impacted by adoption of governmental restrictions); *Lyng*, 485 U.S. at 370-73 (holding congressional limits of food stamp program for striking workers required Court's deferential review and was rationally related to legitimate government goal even though strikers and their families could not increase their food stamp receipts while on strike).

197. *See Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) (applying strict scrutiny to city ordinance forbidding picketing based on subject matter and group identity). Justice Marshall wrote for the Court in *Mosley* that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.*

198. *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545-46 (1992) (stating that prohibitions on content-based restrictions apply differently to speech that may be proscribed than fully protected speech).

199. *See id.* at 2548-50 (striking down city ordinance prohibiting "hate speech" because it was not narrowly crafted); *Snepp v. United States*, 444 U.S. 507 (1980) (upholding CIA restrictions on former agent who signed written agreement not to divulge classified information or publish agency information without authorization).

to violate the First Amendment.²⁰⁰ Generally, subject matter conditions have been closely scrutinized by the Court, although with somewhat less vigor than viewpoint-based conditions.²⁰¹ In the realm of funding to the arts and the humanities, standards for artistic quality have been found to meet constitutional muster.²⁰² This judicial tolerance for conditional funding rests in large part on the finite resources available to the arts and the legislative intent which encourages creativity, pluralism, and artistic merit.²⁰³

Whether a funding condition is viewed as a penalty or as a nonsubsidy has become increasingly a matter of distinguishing facts that could fall within either category. The absence of a uniform rule has made it difficult to discern a sharp line between a penalty and a nonsubsidy, leading courts to case-by-case determinations. For instance, in *Taxation With Representation*, the Court found contributions to nonprofit organizations used for lobbying were distinguishable from other activities.²⁰⁴ The Court required these funds to be segregated and accounted for separately under the auspices of an affiliate in order for the principal organization to maintain its

200. See *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 226-28 (1987) (declaring state sales tax imposed only on general interest magazines unconstitutionally discriminatory and selective); *American Booksellers Ass'n v. Hudnut*, 475 U.S. 1001 (1986), *aff'g* 771 F.2d 323, 331-32 (7th Cir. 1985) (holding anti-pornography ordinance unconstitutional because it promoted one viewpoint over another); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 13-17 (1986) (holding requirement that electric utility enclose third party newsletter in its billing envelope violated utility company's First Amendment speech rights by mandating imposition of unwanted viewpoint).

201. See *R.A.V.*, 112 S. Ct. at 2542, 2547 n.6. The Court invalidated a city ordinance that prohibited otherwise permitted speech "solely on the basis of the subjects the speech addresses." *Id.* at 2542. Delivering the opinion of the Court, Justice Scalia conceded "that presumptive invalidity does not mean invariable invalidity, leaving room for such exceptions as reasonable and viewpoint-neutral, content-based discrimination in nonpublic forums." *Id.* at 2547 n.6 (citations omitted).

202. See *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575 (9th Cir. 1984) (explaining that court must evaluate regulation of artistic expression by considering definition of artistic form or category and standards used by government to determine if particular work falls within category), *cert. denied*, 471 U.S. 1054 (1985); *cf.* *Advocates for the Arts v. Thomson*, 532 F.2d 792, 797-98 (1st Cir.) (upholding denial of state arts grant to literary magazine on grounds that Constitution did not warrant judicial evaluation of standard used by governor), *cert. denied*, 429 U.S. 894 (1976).

203. See 20 U.S.C. §§ 954(c)(1)-(2), 955(f), 959(a)(8) (1994) (authorizing NEA to selectively support projects having substantial artistic and cultural significance, and not otherwise available to public). The National Science Foundation (NSF) and the National Institutes of Health (NIH) similarly discriminate on the basis of content in order to allocate limited funding resources to the most meritorious projects. See 42 U.S.C. § 1862 (1988 & Supp. V 1993) (authorizing National Science Foundation to initiate and support scientific research and development); *id.* § 241 (authorizing Secretary of Health and Human Services to assist and cooperate with other public authorities and scientific institutions).

204. See *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983) (supporting tax-deductible status for contributions to nonprofit organizations that are used only for non-lobbying activities).

nonprofit status under IRS regulations.²⁰⁵ In contrast, a year later in *League of Women Voters*, the Court found no distinction between funds dedicated to editorializing and funds used for educational programming.²⁰⁶ Lobbying and editorializing are both protected speech activities.²⁰⁷ A consistent application of the doctrine of unconstitutional conditions would have protected both activities. Obviously, this scenario did not occur.

The Court's decision in *Rust* further contributed to the confusion. In *Rust*, the Court permitted viewpoint-based conditions on previously upheld content-neutral restrictions when the conditions were confined only to the project's scope.²⁰⁸ The Court declared that as long as the restriction was defined within the narrow terms of the *project*, and not directed toward a particular *grantee*, the restriction passed constitutional muster.²⁰⁹ This decision confuses the doctrine of unconstitutional conditions because it opens the door to the government carefully limiting the scope of the missions of the programs it funds to specific activities, effectively permitting the expression of only one viewpoint.²¹⁰ If a potential recipient objects to the restriction, the recipient can simply go elsewhere for private funding for the same activity. As long as the government does not exercise a monopoly over that activity, the Court will uphold the government's restrictions.²¹¹ Such a program, in practice, censors other viewpoints by subsidizing only the favored viewpoint. Thus, under *Rust*, federal funds for family planning programs could be earmarked to promote only childbirth options without being considered as viewpoint-discriminatory although other views could not be admitted within the programs' narrowly defined scope.²¹²

If such reasoning were applied to arts funding, a program narrowly defined to promote only "decent" art would, in theory, pass constitu-

205. *Id.* at 544.

206. *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984).

207. *See League of Women Voters*, 468 U.S. at 381-84 (stating that free expression of editorial opinion is at heart of First Amendment); *Taxation With Representation*, 461 U.S. at 552 (Blackmun, J., concurring) (stating that lobbying is protected by First Amendment (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961))).

208. *Rust v. Sullivan*, 500 U.S. 173, 194-95 (1991) (stating that government may choose not to fund activities outside scope of funded project).

209. *Id.* at 196-97.

210. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490, 507 (1989) (holding that government had no obligation to provide subsidy to constitutionally protected activity).

211. *See Rust*, 500 U.S. at 201-02 (stating that government may refuse to subsidize constitutionally protected activity as such refusal does not impede individual's ability to exercise right elsewhere).

212. *See id.* at 197-98 (holding that government's funding of family planning services which promoted only childbirth options did not require government to fund alternative options such as right to abortion).

tional muster. Whether such single purpose programs would constitute a form of indirect content-based censorship or simply sponsorship of a narrowly defined project is entirely unclear in view of the Court's recent jurisprudence. The doctrine of unconstitutional conditions in its pure form is too often ignored by the Court to make such distinctions reliably.

A generally unacknowledged difficulty with the doctrine of unconstitutional conditions is that its simplicity and the seductive logic of its essential argument generate practical applications that exceed the Supreme Court's willingness or ability to implement the fullest reach of the doctrine. Nevertheless, at least one scholar faults the Court for not following a more consistent and vigorous application of the doctrine, but concedes that realistically the current membership of the Court is not likely to alter its meandering jurisprudence.²¹³ In effect, this view presumes that the constitutional theory predicates constitutional jurisprudence.

Others argue that further clarifications of the doctrine's tenets can distinguish and resolve the Court's apparently erratic path through constitutional challenges to restrictive governmental funding.²¹⁴ This latter approach brings to mind an exegesis in Ptolemaic astronomy,²¹⁵ so heavily encrusted with qualifications and considerations that it inevitably must collapse under its own weight. Instead, a simpler, heliocentric model is needed. In this regard, several well-reasoned alternatives are available.

213. See Sullivan, *supra* note 11, at 1417-18 (noting that while unconstitutional conditions doctrine needs to be applied more vigorously, Supreme Court Chief Justice Rehnquist does not advocate such use).

214. See Rodney A. Smolla, FREE SPEECH IN AN OPEN SOCIETY 182-83 (1992) (stating that unconstitutional conditions doctrine provides little guidance because challenge remains in distinguishing between permissible and impermissible conditions); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1296-1304 (1984) (supporting further evaluation of allocational sanctions method to assess rights and privileges distinction used in unconstitutional conditions doctrine); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1106-07 (1987) (focusing on relationship between powers of Federal Government and permissibility of conditional spending to determine validity of government actions).

215. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1835 (1986) (defining ptolemaic system as "the system of planetary motions according to which the earth is at the center with the sun, moon, and planets revolving around it and each orbit except for the sun and moon is composed of a principle circle upon which moves a smaller circle carrying the planet").

C. *Alternatives to the Doctrine of Unconstitutional Conditions*

1. *Limiting government power to bargain with funding beneficiaries*

An interesting alternative to the doctrine of unconstitutional conditions is simply to avoid the inherent difficulties of funding regulations by limiting the scope of governmental activity to programs that operate on the basis of a substantial consensus.²¹⁶ Using this approach, known as the Pareto Optimality Principle,²¹⁷ one inquires whether the bargain offered by a government program benefits all citizens or all affected parties in a positive fashion, or conversely, whether any citizen is worse off than he or she was under the status quo ante.²¹⁸ If any individual benefits and no negative effects occur, then the program satisfies its constituents and is socially justified.²¹⁹ If the program's effect leaves some participants worse off, however few in number they may be, the program is not socially justified and should be abandoned.²²⁰

In this vein, Professor Richard Epstein argues that a bargaining by consensus approach to the issue of restrictions on government funding would render the doctrine of unconstitutional conditions unnecessary.²²¹ If a substantial consensus can be established for a program's objectives, procedures, and ultimate results, there would be no need for constitutional protection.²²² Everyone would be satisfied with the program's benefits. When a consensus among potential beneficiaries, participants, and any other affected party

216. See EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 12 (advocating that government should be limited in its power to regulate and contract only when substantial public consensus exists).

217. See Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 540-51 (1980) (arguing that Pareto Optimality Principle as applied to government programs is too rigid to be practically or politically implemented).

218. EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 8-9.

219. EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 8-9.

220. See EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 8 (explaining that if program leaves individuals worse off, then government should not fund it and individuals may choose to enter into their own bargains which may leave them better off than before). This calculus includes a consideration by which the beneficiary of the program might overcome a negative effect on any party who is left worse off by the program through direct compensation and thus create, by a secondary effort, a positive benefit for all, thereby justifying the program under the Pareto Principle. *Id.* at 8-9.

221. EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 309-12 (arguing for reduced governmental funding for education and arts because of lack of broad social consensus to support such activities).

222. EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 309 (commenting that arts funding will be secure only so long as consensus exists in support of agency actions).

cannot be reached, Epstein suggests that the government should decline to create the program and leave it to private initiative or the free market to resolve the perceived need.²²³ The bargaining theory assumes a before-and-after baseline to evaluate whether all parties to the government's bargain gain from the transaction and whether the bargain simultaneously respects the legitimate interests of third parties.²²⁴

The bargaining theory would limit the range of government activity.²²⁵ The theory recognizes that a regulatory state, with its manifold programs of taxes and subsidies, is inherently subject to controversy.²²⁶ Such controversy is socially inefficient.²²⁷ Consequently, avoiding government-funded programs that lack a political consensus concerning their implementation or administration will better serve the public interest. Rather than directly subsidizing a controversial activity such as the arts, the bargaining approach would leave it to the private sector and market forces to support the activity.²²⁸ Alternatively, the approach would allow governmental support through selective and indirect means, such as tax exemptions or credits, that subsidize parties who support a controversial activity, but would remove the government from regulating the activity itself.²²⁹ If these forms of indirect government subsidies nevertheless constrained the fundamental rights of any party to the activity, the doctrine of unconstitutional conditions would apply and the constraints would be strictly scrutinized by the courts.²³⁰ In practice, the consensual bargaining theory could be viewed as unconstitutional conditions applied to a preemptively small universe of government activity.

The drawbacks to the consensual bargaining theory approach are manifested in the difficulty of defining a threshold of consensus for

223. EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 309-11 (suggesting that government non-involvement in arts funding and programs eliminates danger of First Amendment violations).

224. EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 97-98, 102.

225. *See* EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 311-12 (arguing that if government's bargaining powers are watched closely, then government activities based on this power will be limited).

226. *See* EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 4-5 (outlining risks associated with government's unbridled power to bargain with individuals who waive their constitutional rights).

227. EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 13, 33.

228. EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 312.

229. EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 240-51.

230. *See* EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 101-03 (stating that unconstitutional conditions doctrine does not allow state to coerce, pressure, or induce waiver of constitutional rights in order for individual to receive government offered benefit or privilege).

a given program. What constitutes a consensus? At what point in public debate does disagreement or vigorous dissent dissolve a consensus? As most funding programs are created by a political decision, the test for initial consensus would seem to be a simple majority vote.²³¹ As conditions and priorities change within the political landscape, decisions to expand, maintain, or eliminate such programs will be made by elected officials according to their perceptions of public sentiment. Yet, many programs have so little public input or identity that they call the consensual model into question.²³² Furthermore, many public initiatives that began amidst great controversy or uncertainty, have since become icons of universal support, examples include Social Security, Medicare, and government funding of national parks. Other programs of substantial merit that started with broad public support have since withered, such as agricultural subsidies, public housing, prohibition, and the sale of public lands. As a practical and political matter, the public's desire for government involvement in many aspects of economic and private activities is simply too strong to be constrained by a vague requirement of consensus before program implementation.

As political decisions are made to create programs and their attendant regulations, so too may political decisions modify or rescind such programs. Any approach that seeks to evade the difficulties and potential controversy of governmental funding restrictions by eschewing them outright, unless supported by consensus, is politically unrealistic. With limited public resources, various constituencies will inevitably fight against some programs, and support other programs favorable to their own interests, as a matter of self-preservation.²³³ As a measure for discretionary governmental action, consensus is too difficult to reckon in the whorl of practical politics. Compromise and accommodation are the more likely pattern for discretionary

231. A simple majority vote is necessary for the passage of most legislation. In many legislative bodies, procedural rules, often of dubious constitutional validity, sometimes effectively require a three-fifths majority vote, or even two-thirds, to overcome a "filibuster" or similar tactic that impedes the passage of legislation.

232. For example, the public has very little input on government programs that involve classified spending for national security agencies, such as the CIA, and other secret projects. Many ordinary appropriations, often described as "pork," that are appended to legislation without the opportunity for debate and separate voting, also involve a similar lack of public input or identity.

233. The tendency to support some programs while opposing others is especially true in times of declining revenues or budgets. For example, religious groups have lobbied for governmental support for sectarian educational programs while opposing government subsidies for family planning programs that include counseling for birth control or abortion.

government action and the restrictions that inevitably accompany such activity.

2. *Spheres of neutrality*

Another alternative to the doctrine of unconstitutional conditions embodies a structural rather than a procedural approach to governmental regulation. Under a "spheres of neutrality" approach, one examines the substance and the public purpose of a funded institution or individual in light of the potential for government funding, with its attendant restrictions, to further or reduce the recipient's unfettered ability to contribute to public debate in the marketplace of ideas.²³⁴ This approach seeks to resolve the Court's apparently inconsistent decisions under the doctrine of unconstitutional conditions²³⁵ by establishing a different critical baseline that looks at funded activities the Court has historically protected from restrictions on fundamental rights.

Proponents of the spheres of neutrality approach argue that in a non-neutral, political world, funding is inherently restrictive or, at the least affirmatively discriminatory.²³⁶ Rather than proceed on a case-by-case examination of whether the regulations themselves are unduly restrictive, as would occur under a conventional unconstitutional conditions analysis, the structural spheres of neutrality approach considers a regulation's potential to enhance or diminish the recipient's ability to participate in public debate as the measure of whether fundamental rights are harmed.²³⁷ Under this approach what is important is not whether regulatory provisions impinge on the exercise of fundamental rights, but whether the defining function of the recipient institution falls within a traditionally protected sphere of liberty.²³⁸ The spheres of neutrality approach is retrospective and results oriented. Institutions that the Court has declared to be crucial to public discourse, such as traditional public forums, the

234. See Cole, *supra* note 11, at 681-82 (explaining that "spheres of neutrality" approach would be better solution than unconstitutional conditions doctrine because new approach would not be content-specific); see also Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1047 (1991) (supporting application of consistent methodology to determine whether government should fund specific programs).

235. See Cole, *supra* note 11, at 682 (explaining that new rationale is needed in Court's review of selectively funded speech activities to replace unconstitutional conditions doctrine); see also *supra* notes 197-215 and accompanying text (explaining Supreme Court's inconsistent application of unconstitutional conditions doctrine).

236. See Cole, *supra* note 11, at 682.

237. See Cole, *supra* note 11, at 715-17 (arguing that structural approach would consider regulated institution's role in public debate).

238. Cole, *supra* note 11, at 716.

press, schools and universities, public libraries, and the arts, would be subject only to content-neutral regulation of their activities, notwithstanding governmental funding.²³⁹ These institutions fall within a protected spheres of neutrality.²⁴⁰ Other institutions, whose defining functions fall outside articulated spheres of neutrality, such as welfare agencies and medical clinics, would not be similarly protected until deemed so by the Supreme Court.²⁴¹ In *Rust*, for example, the Court found that the essential function of a medical clinic does not embrace public debate traditionally protected under the First Amendment.²⁴² In fact, many functions of a clinic involve activities inconsistent with public discourse, for instance, the private and intimate doctor-patient relationship.

A First Amendment analysis that focuses on spheres of neutrality has the same general result as the doctrine of unconstitutional conditions—the protection of fundamental rights from government domination or indoctrination through the guise of funding regulations. A spheres of neutrality analysis, however, measures the risk of regulatory harm by different criteria. Under such an analysis, the emphasis is on the restrictive effect of regulations on robust public debate.²⁴³ By emphasizing an institution's function and its relationship to public discourse, an analysis based on spheres of neutrality can help reconcile the Court's seemingly contradictory decisions in *Taxation With Representation* and *League of Women Voters*.²⁴⁴ A spheres of neutrality analysis would justify the IRS's scrupulous application of a content-neutral denial of tax exemptions for deductions on charitable gifts to nonprofit organizations that wish to lobby because these organizations would remain free to lobby in an unrestricted and

239. Cole, *supra* note 11, at 736-38, 748.

240. Cole, *supra* note 11, at 736.

241. See Cole, *supra* note 11, at 716 (stating that those functions not falling within protected spheres do not require neutral governmental support).

242. *Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991) (stating that governmental funding of family planning clinics does not implicate First Amendment protections related to public debate).

243. Cole, *supra* note 11, at 736-38. Cole suggests a three-prong analysis to determine whether the government may impose First Amendment restrictions on funding beneficiaries:

First, the Court should ask whether government control of the content of speech in the institution would be threatening to a vigorous public debate or to the autonomy of the listeners; second, the Court should ask whether the internal operation of the institution is consistent with a First Amendment neutrality mandate; and third, where non-neutrality poses a threat to free speech values, but strict neutrality would impede the institution's internal functioning, the Court should ask whether the independence of the speakers can be structurally accommodated in some intermediate fashion.

Id. at 736.

244. See Cole, *supra* note 11, at 687-88, 716, (stating that Court's application of unconstitutional conditions doctrine, as illustrated in *Rust*, has led to misapplication of principles set forth in *Taxation With Representation* and preceding cases).

unfettered manner.²⁴⁵ The IRS's offer of a tax deduction can be viewed simply as a nonsubsidy to those groups that choose to lobby. By the same token, under a spheres of neutrality analysis the Court's determination in *League of Women Voters*, that an FCC prohibition on all editorial programming by public broadcasting stations was constitutionally incompatible with the principle of free expression, is consistent because the government sought to regulate a major medium of public discourse in a content-discriminatory fashion.²⁴⁶

When activities of the institution are less crucial to public debate, funding restrictions would be scrutinized less strictly.²⁴⁷ For example, government programs that distribute food stamps or government subsidies to institutions, such as private welfare agencies, whose primary functions are not essential to public discourse, would undergo a more deferential review. Non-neutral bases for support would be acceptable to these institutions if rationally related to a legitimate governmental purpose. This analysis justifies the Court's decisions to uphold funding restrictions in *Lyng* and *Rust* because the respective institutions concerned, a federal agricultural agency and private family planning services, did not purposefully function within an arena of public debate protected by the First Amendment.²⁴⁸

A significant advantage of a spheres of neutrality analysis is that it moves the discussion about funding conditions away from case-specific analyses toward the broader perspective of an institution's purpose and role within the sphere of public discourse. This perspective will provide the Court with more accurate guidance concerning regulatory infringements of fundamental rights.²⁴⁹ Most importantly, a spheres of neutrality analysis offers a methodology that can more effectively accommodate both the recipient's fear of undue government

245. See *Regan v. Taxation With Representation*, 461 U.S. 540, 550 (1983) (holding that Congress has discretion to subsidize selectively certain organizations or activities in public interest).

246. See *FCC v. League of Women Voters*, 468 U.S. 364, 381-84 (1984) (holding that restriction on editorial opinions was unconstitutional because it violated right to express political views).

247. *Cole*, *supra* note 11, at 716.

248. See *Lyng v. International Union*, 485 U.S. 360, 365-67 (1988) (holding that Omnibus Budget Reconciliation Act's refusal to extend or increase new food stamp benefits to striking workers did not infringe First Amendment because Act did not prevent any individuals from dining together and did not infringe on associational rights); see also *Cole*, *supra* note 11, at 743-47 (advocating application of spheres of neutrality analysis to professional fiduciary counseling because such counseling implicates fundamental rights). *But cf.* *Rust v. Sullivan*, 500 U.S. 173, 219 (1991) (Blackmun, J., dissenting) ("The manipulation of the doctor-patient dialogue . . . is clearly an effort `to deter a woman from making a decision that, with her physician, is hers to make.' As such it violates the Fifth Amendment." (citations omitted)).

249. See *Cole*, *supra* note 11, at 715-16 (stating that Court could avoid making elusive distinctions and case-by-case determinations by use of more structural approach).

restriction and domination over the recipient's activities, and the government's desire to promote activities for the public good.²⁵⁰ By examining the role that the recipient institution plays in the marketplace of ideas and the functional means by which the institution accomplishes its objectives, a rationale can be developed that protects fundamental rights, where appropriate, without imposing the onerous requirement of neutral treatment for every case of restricted funding.

III. THE ARTS AND TRADITIONALLY PROTECTED FORMS OF EXPRESSION

The body of constitutional jurisprudence covering artistic expression is surprisingly meager. This paucity of constitutional jurisprudence is due, in part, to the infrequency of litigation over rights inherent to artistic expression.²⁵¹ Typically, artistic expression has raised constitutional issues only when the content or presentation of the art is obscene or somehow so seriously disturbing to those exposed to it that the government has taken action to remove or prohibit the offending object from public view.²⁵² A question that necessarily precedes the issue of whether it is within the government's authority to take such action is a determination of the constitutional status of art.

Speech that bears a political content has long been accorded the highest level of judicial scrutiny.²⁵³ Speech that informs or that communicates religious thought is accorded similar protection.²⁵⁴ The purely aesthetic attributes of artistic expression, however, have a less certain status than political or informative speech. From a legal point of view, the hybrid nature of artistic speech may have caused this phenomenon. On the one hand, art informs its audience by its presentational form and technique.²⁵⁵ Art critics have asserted that

250. Cole, *supra* note 11, at 747-49.

251. For a general overview of modern jurisprudence relating to artistic expression, see RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 315-23 (1989); Leonard D. Duboff, *What is Art?: Toward a Legal Definition*, 12 HASTINGS COMM. & ENT. L.J. 303 (1990), reprinted in 23 INTELL. PROP. L. REV. 555, 602-03 (1991) (concluding that law has not yet developed single universal definition of what constitutes art); Robert M. O'Neil, *Artistic Freedom and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 177, 177-82 (1990) (describing fine arts' lack of First Amendment protection).

252. See generally *infra* Part III.2.A.

253. See *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (stating that debate on public issues should be "uninhibited, robust and wide open").

254. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 877 (1990) (commenting that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires").

255. See SUSANNE K. LANGER, *PROBLEMS OF ART* 13-26 (1957) (explaining that art's expressiveness is determined by its form).

even the most abstract formulation may convey powerful messages to its audience.²⁵⁶ On the other hand, an art work may simply be intended to entertain its audience, unaccompanied by the communication of any discernible ideas or viewpoints. An additional issue arises in cases where the elements of an art form are essentially non-verbal but contain images that nevertheless disturb or offend, such as nude dancing or photographs of genitalia.²⁵⁷ Because the non-verbal characteristics of the expression tend to remove it from paradigmatic speech, such as expressions of political belief that would ordinarily be afforded First Amendment protection, the artistic activity is seen less like conventional "speech" and more like commercial or professional activity, which the courts traditionally accord less protection.²⁵⁸

Because the courts have heard only occasional cases, general principles of First Amendment protection for artistic expression have developed in a piecemeal and haphazard fashion, often one artistic medium at a time.²⁵⁹ While the Supreme Court has developed a fairly clear body of case law related to what constitutes legally obscene speech, it has not yet enunciated a clear standard for what constitutes "serious artistic value" under the test laid out in *Miller v. California*,²⁶⁰ which was an attempt to delineate work that may be properly subjected to state regulation. Moreover, other issues remain problematic. For example, should the communicative intention in the art work itself or of its presenter bear, in any way, on the degree of constitutional protection accorded to a work of art?²⁶¹ The

256. *Id.* at 20.

257. See Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 247-49 (citing judicial hostility to offensive speech where courts have accorded less value and protection to such works); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570 (1991) (upholding restrictions on nude dancing and finding nude dancing only marginally protected as form of expressive conduct); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975) (explaining that some forms of non-verbal expression, such as nude dancing, may be entitled only to minimum First Amendment protection).

258. See *Serra v. General Servs. Admin.*, 847 F.2d 1045, 1050 (2d Cir. 1988) (noting that government's relocation of sculpture purchased from private individual did not violate First Amendment).

259. O'Neil, *supra* note 251, at 180.

260. 413 U.S. 15 (1973). The *Miller* test asks:

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

Id. at 24 (internal quotations and citations omitted).

261. See Pamela Weinstock, Note, *The National Endowment for the Arts Funding Controversy and the Miller Test: A Plea for the Reunification of Art and Society*, 72 B.U. L. REV. 803, 820-22 (1992)

paucity of case law on these points, however, ought not deter one from finding that extensive constitutional protection should be accorded to art as a form of speech.

A. *Artistic Expression and the First Amendment*

Although the Supreme Court has never fully defined the scope of First Amendment protection for the fine or performing arts, it has enunciated a number of useful principles. In *Joseph Burstyn, Inc. v. Wilson*,²⁶² the Court struck down a New York statute that banned "sacrilegious" motion pictures.²⁶³ A unanimous Court held that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."²⁶⁴ In dicta, the Court set forth salient criteria that would apply to any artistic media. First, motion pictures, like all art, are a "significant medium for the communication of ideas."²⁶⁵ Second, the Court suggested that regardless of the manner in which these ideas take form, either through particular political or social doctrines or through subtle shades of thought, artistic expression, by its nature, contains the communication of such ideas.²⁶⁶ The Court in *Burstyn* declared that whether such motion pictures were intended to inform or simply entertain did not lessen their importance as an expression of public opinion.²⁶⁷

Later, in *Poe v. Ullman*,²⁶⁸ Justice Douglas, writing in dissent on other issues, echoed the reasoning in *Burstyn* when he asserted that artists in both the fine and performing arts "are [the] beneficiaries of freedom of expression."²⁶⁹ In addition, in *Sweezy v. New Hampshire*,²⁷⁰ Justice Frankfurter noted that just as the educational system requires that government tolerate the free exchange of ideas, a similar "sense of freedom is also necessary for creative work in the arts."²⁷¹

The Supreme Court's holdings in the area of obscenity have also contributed to an understanding of the meaning and breadth of First

(advocating that value of art should be measured according to standards in *Miller* test).

262. 343 U.S. 495 (1952).

263. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952).

264. *Id.* at 502.

265. *Id.* at 501.

266. *See id.*

267. *Id.*

268. 367 U.S. 497 (1961) (plurality opinion).

269. *Poe v. Ullman*, 367 U.S. 497, 514 (1961) (Douglas, J., dissenting).

270. 354 U.S. 234 (1957).

271. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (Frankfurter, J., concurring).

Amendment protection for artistic expression.²⁷² For instance, the Court in *Miller* stated that judgments "in the area of freedom of speech and press . . . must always remain sensitive to any infringement on genuinely serious literary, artistic, political or scientific expression."²⁷³ Although the context of the Court's reasoning is the prohibition of obscene speech, the explicit inclusion of serious literary and artistic work as co-equal to political and scientific expression speaks strongly for the protected status of artistic expression.²⁷⁴ While some lines must be drawn, one could fairly conclude on this basis that a work of any "serious" artistic expression falls within the First Amendment.

Yet, anomalies exist within the Supreme Court's jurisprudence on obscenity subsequent to *Miller* that point out the absence of a clear declaration that artistic expression is speech for constitutional purposes. In *New York v. Ferber*,²⁷⁵ the Court upheld a state child pornography law that forbid the knowing promotion, creation, and distribution of materials showing children under the age of sixteen engaging in sexual performances.²⁷⁶ Although the Court's opinion did not explicitly distinguish material prohibited under the New York statute from "genuinely serious literary, artistic, political or scientific expression,"²⁷⁷ the distinction appears plausible.²⁷⁸

The case in which the Supreme Court has come closest to enunciating First Amendment protection for artistic expression is *Southeastern Promotions, Ltd. v. Conrad*.²⁷⁹ In *Southeastern Promotions*, the Court invalidated the exclusion of *Hair*, a musical production, from a public auditorium.²⁸⁰ The Court noted that the facts of the case would allow the Court to overturn the exclusion on strictly procedural grounds "if [the Court] were to conclude that live drama is unprotected by the First Amendment—or subject to a totally

272. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (holding that nude dancing under certain circumstances may be entitled to First Amendment protection).

273. *Miller v. California*, 413 U.S. 15, 23 (1973).

274. In the obscenity proceedings against a Cincinnati gallery for exhibiting the Mapplethorpe photographs, there was strong testimony on the artistic quality of the photographs which weighed heavily in the acquittal of the gallery and its director. O'Neil, *supra* note 251, at 179.

275. 458 U.S. 747 (1982).

276. *New York v. Ferber*, 458 U.S. 747, 773-74 (1982).

277. *Id.*

278. See O'Neil, *supra* note 251, at 179 (proposing that works deemed "art" cannot also be obscene because "the very notion of constitutionally unprotected art may be logically untenable").

279. 420 U.S. 546 (1975).

280. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561-62 (1975).

different standard from that applied to other forms of expression."²⁸¹ While none of the Justices suggested that a dramatic production should be viewed as anything but a protected expression, the Court added that "[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."²⁸² Without further guidance from the Court, this dicta remains somewhat troubling. An art form that does not primarily use the printed or spoken word in its expression could conceivably enjoy less protection under the First Amendment. The Court, however, did declare in *Ward v. Rock Against Racism*²⁸³ that, "[m]usic, as a form of expression and communication, is protected under the First Amendment."²⁸⁴

The United States Court of Appeals for the First Circuit seemed to rely on this case-by-case premise in *Close v. Lederle*.²⁸⁵ In *Close*, an art exhibit, initially endorsed by the University of Massachusetts at Amherst, was ordered dismantled by the school administration because the displayed paintings were deemed inappropriate for a well-traveled corridor.²⁸⁶ The district court held in favor of the artist who claimed that the school's order violated his First Amendment rights.²⁸⁷ The court found that the exhibition was protected speech because the artist followed all procedural requirements of the university, the display area was in a public forum, and the art work was not inappropriate.²⁸⁸ On appeal, the First Circuit reversed the decision noting that the paintings were "merely art" and lacked the necessary content that would place them within the same category of protection afforded to campus speakers who express political or social thought.²⁸⁹ Because the art lacked a political message or theme, the First Circuit was willing to grant the administration considerable deference in deciding the appropriate criteria for displaying or removing works of art from its gallery.²⁹⁰

281. *Id.* at 557.

282. *Id.*

283. 491 U.S. 781 (1989).

284. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (holding that content-neutral time, place, and manner restrictions on volume of amplification of rock concert are valid).

285. 424 F.2d 988 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970).

286. *Close v. Lederle*, 424 F.2d 988, 990 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970).

287. *Close v. Lederle*, 303 F. Supp. 1109, 1112 (D. Mass. 1969), *rev'd*, 424 F.2d 988 (1st Cir. 1970), *cert. denied*, 400 U.S. 903 (1970).

288. *Id.* at 1111-12.

289. *Close*, 424 F.2d at 990.

290. *Id.*

More recently, in *Piarowski v. Illinois Community College District 515*,²⁹¹ the United States Court of Appeals for the Seventh Circuit held that unless the artistic expression falls within the legal definition of obscenity, it is protected by the First Amendment.²⁹² The facts in *Piarowski* were nearly identical to those in the *Close* case with one crucial difference. In *Piarowski*, a state college chose to move an exhibit of paintings to another campus gallery rather than to dismantle it.²⁹³ The court ruled that the college could control the time, place, and manner of an exhibit within reasonable limits without violating the First Amendment rights of the exhibitor.²⁹⁴ While the school could relocate the exhibit, the public had the right of reasonable access to view the work in its alternate location.²⁹⁵ To ban a work, once properly accepted by the state for exhibition, may amount to an impermissible censorship of the artist's freedom of speech.²⁹⁶ In this sense, *Piarowski* can be read to imply that once the government, or its surrogate, has chosen to act with its "public face" toward a work of art, it must accord the arts the status of protected speech.

Other case law supports the general notion that artistic expression is protected speech. In *Sefick v. City of Chicago*,²⁹⁷ a federal district court held that "the art form in this case constitutes speech within the meaning of the First Amendment and thus is entitled to constitutional protection."²⁹⁸ In *Sefick*, the art work at issue was a sculptural installation at Chicago City Hall that consisted of unflattering depictions of local political figures.²⁹⁹ The court drew heavily on the holding in *Southeastern Promotions*³⁰⁰ and held that the element of political caricature would entitle the work to protection regardless

291. 759 F.2d 625 (7th Cir.), cert. denied, 474 U.S. 1007 (1985).

292. *Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625, 627 (7th Cir.), cert. denied, 474 U.S. 1007 (1985).

293. *Id.* at 630.

294. *Id.* at 629-30; see also *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976) (upholding time, place, and manner restrictions on speech activities of adult bookstores and movie theaters).

295. See *Piarowski*, 759 F.2d at 630 (declaring that all rooms of gallery must be viewed as one forum, and as such, changing exact location within forum is less menacing to artistic freedom than decision to exclude it altogether).

296. See *id.* at 632 (suggesting that preventing employee from displaying art anywhere on campus may chill future desire to create art).

297. 485 F. Supp. 644 (N.D. Ill. 1979).

298. *Sefick v. City of Chicago*, 485 F. Supp. 644, 648 (N.D. Ill. 1979).

299. *Id.* at 646-48 (involving sculptures of judges and city transportation authorities that satirized local government policies).

300. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552 (1975) (holding that municipal board's rejection of theater group's application to present musical *Hair* in city-leased theater constituted impermissible prior restraint).

of its medium.³⁰¹ In another case, *Brown v. Board of Regents*,³⁰² a federal district court overruled the University of Nebraska's ban on a scheduled showing of Jean-Luc Goddard's *Hail Mary*, a contemporary film depiction of Christ's birth.³⁰³ The university banned the film in response to complaints from the community that the film was blasphemous and sacrilegious.³⁰⁴ In staying the university's ban, the court in *Brown* reasoned that action taken by the state "merely to avoid controversy from the expression of ideas is an insufficient basis for interfering with the right to receive information."³⁰⁵ The court cited both the academic setting of the film's showing and the film's artistic content to find that the film was protected under the First Amendment.³⁰⁶ It is worth noting that the medium of film had by that point in time received substantial First Amendment protection.³⁰⁷

More recently, in *Bella Lewitsky Dance Foundation v. Frohnmayer*,³⁰⁸ a federal district court held that certification requirements proscribing the use of NEA funds for obscene purposes were unconstitutionally vague and an infringement on the artist's exercise of free speech.³⁰⁹ The court pointed out that the NEA's certification requirements would have a two-fold chilling effect. First, the certification requirement would temper artistic expression for fear that the NEA might find the work obscene.³¹⁰ Second, prospective recipients would risk the harm of losing the substantial imprimatur that NEA support carries with other private sources of funding should they refuse to certify their work, leaving them worse off for not accepting the NEA's conditions.³¹¹ The court in *Bella Lewitsky Dance Foundation* equated artistic expression with First Amendment speech and cited the decision in *Speiser* to affirm that "free speech may not be so inhibited" by a vague oath.³¹²

301. See *Sefick*, 485 F. Supp. at 648 n.11 (stating that several prior cases, including *Southeastern Promotions*, have expanded definition of protected speech beyond "mere oral expression").

302. 640 F. Supp. 674 (D. Neb. 1986).

303. *Brown v. Board of Regents*, 640 F. Supp. 674, 675 (D. Neb. 1986).

304. *Id.* at 676.

305. *Id.* at 679.

306. *Id.* at 681.

307. *Id.*; see also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (concluding that motion pictures are within reach of First Amendment protection).

308. 754 F. Supp. 774 (C.D. Cal. 1991).

309. *Bella Lewitsky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 782 (C.D. Cal. 1991).

310. *Id.* at 784-85.

311. *Id.* at 783.

312. *Id.* at 782-83 (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

These three decisions set the stage for the federal district court's holding in *Finley v. NEA*³¹³ that content-based denials of funding to the arts violated the First Amendment.³¹⁴ In 1990, the NEA rejected the grant applications of four controversial performance artists for failing to meet the "decency" clause requirement in the NEA's application.³¹⁵ The artists brought suit attacking the "decency" clause as a facially unconstitutional violation of free speech.³¹⁶ The district court invalidated the decency clause because it allowed NEA officials to determine eligibility for NEA grants using content-based criteria.³¹⁷ Because of the inherent subjectivity of such a standard, the clause violated the Fifth Amendment's due process requirement.³¹⁸ While the decency clause did proscribe "obscene" speech, the clause could also suppress permissible forms of speech, including "indecent" speech.³¹⁹ The court in *Finley* recognized that in light of *Rust* and other recent Supreme Court decisions, the government could regulate certain forms of government-funded speech activities.³²⁰ The court, however, noted that certain "protected" areas of speech, such as public speech made in academic settings, may not be suppressed by the withdrawal of government funding.³²¹ The court further declared that because academic speech and artistic expression reached "the core of a democratic society's cultural and political vitality," arts funding demanded government neutrality with respect

313. 795 F. Supp. 1457 (C.D. Cal. 1992). The *Finley* case remains on appeal to the Ninth Circuit. Jacqueline Trescott, *NEA to Pay 4 Denied Art Grants But 'Decency' Rule Challenge Unresolved*, WASH. POST, June 5, 1993, at D1.

314. *Finley v. NEA*, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992).

315. *Id.* at 1463 n.15 (explaining that under 20 U.S.C. § 954(d)(1) application evaluations may consider whether art form conforms to "general standards of decency and respect for the diverse beliefs and values of the American public").

316. *Id.* at 1472. Originally, the suit also claimed violations of the Privacy Act, 5 U.S.C. § 522(a) (1994), and that the chairman failed to follow established decisionmaking procedures in denying the artists' funding. Trescott, *supra* note 313, at D1. This portion of the suit was eventually settled out of court, the NEA agreeing to pay each artist the amount of his or her denied grant plus \$6000 for Privacy Act violations as well as all legal fees. *Id.* The settlement did not affect the portion of a pending appeal disputing the constitutionality of the decency clause. *Id.*

317. *Finley*, 795 F. Supp. at 1475.

318. *Id.* at 1471 (explaining that vagueness of terms impermissibly allows "arbitrary and discriminatory enforcement").

319. *Id.* at 1476; *see Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) (holding that "expression which is indecent but not obscene is protected by the First Amendment"); *FCC v. Pacifica Found.*, 438 U.S. 726, 740 (1978) ("[P]urient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to non-conformity with accepted standards of morality.").

320. *See Finley*, 795 F. Supp. at 1463 (stating that decision in *Rust* reaffirmed well-established rule that applicants have no "right" to governmental subsidy and that government may deny awarding grants for any number of reasons).

321. *Id.* at 1475.

to content.³²² In effect, the *Finley* decision affirmatively established a newly protected First Amendment interest: government-funded art.

In the above cases, the courts readily acknowledged the speech-like status of artistic expression. Because most of these cases involved expressive content of a political or religious nature, the courts found it convenient to rely on well-established First Amendment jurisprudence that protected such subject matter, rather than to focus definitively on the artistic medium as sufficient in itself to justify full protection.³²³ Other litigation has considered tangentially the constitutional protection afforded artistic expression through the exception to the obscenity rule.³²⁴ Although there are almost no suggestions in case law or scholarship that the arts are any less deserving of full protection under the First Amendment than political or religious speech, the natural inclination of the courts is to rely on well-established principles of political or religious freedom as the paradigm of privileged speech.

A consequence of this practical jurisprudence is that artistic expression has yet to receive unqualified protection as a form of First Amendment speech. The absence of a definitive declaration that art is categorically as deserving of protection as traditionally protected forms of speech may produce inconsistencies. For example, a crudely drawn political cartoon or graffiti may be given First Amendment protection, while a universally admired work of art that lacks a specific political or religious content may not receive similar protection. Such a distinction over content leads to the inference that art makes less of a contribution to the civic and cultural values of society than do politics or religion.³²⁵ Countless examples exist of non-democratic societies that have officially censored artistic expression in fear of art's communicative power and illustrate that this inference is untenable.³²⁶

322. *Id.* at 1473.

323. See *supra* note 297-307 and accompanying text (analyzing court decisions finding that satirical sculptures of political figures and film depiction of Christ's birth were protected forms of artistic expression).

324. See Weinstock, *supra* note 261, at 807-09 (describing successful applications of *Miller* test's third prong to cases where materials deemed to be of "serious literary, artistic, political or scientific value" survived obscenity test).

325. Cf. Ellen T. Harris, *It Takes Practice and Serious Thought to Learn How to Dislike Art Properly*, CHRON. HIGHER EDUC., Sept. 19, 1990, at A56 ("[A]rt moves your emotions or makes you think. . . . Disliked art and art with disliked subjects can be as powerful as liked art, sometimes more powerful. It deserves both our attention and our protection.").

326. See generally MOSHE CARMILLY-WEINBERGER, FEAR OF ART: CENSORSHIP AND FREEDOM OF EXPRESSION IN ART (1986) (describing art censorship from ancient times to present day).

B. A Protected Sphere

Democratic societies are also cautious about the communicative power of art. This wariness usually manifests itself as an unwillingness to support, through public funds, artistic activity that produces disturbing or offensive material. While the government is under no mandate to fund art of any sort, when it decides to subsidize an artistic endeavor, it has a constitutional duty to operate as it would toward any other form of speech. Therefore, the government must act without the imposition of prior restraints or other restrictions that would suppress or distort the speaker's voice.³²⁷ Artistic expression logically exists in the sphere of protected speech embodied in the Bill of Rights and enforced through the Fifth and Fourteenth Amendments. Thus, the case for constitutional protection of the arts is compelling. To promote free and robust debate on issues facing the community, the individual, the group, and the state, freedom to express thoughts and ideas on any subject and by any appropriate means must exist.³²⁸ All forms of communication, particularly artistic expression but also scientific and scholarly expression,³²⁹ must be protected regardless of whether some may find the message unwise, disagreeable, or offensive. In this sense, the arts inhabit the traditional sphere of free expression protected by constitutional law against the vicissitudes of governmental control.

327. See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-31 (1987) (holding unconstitutional state sales tax scheme that taxed certain periodicals while exempting others based on content); *FCC v. League of Women Voters*, 468 U.S. 364, 386-87 (1984) (striking down federal statute prohibiting expression of editorial opinions by public television stations as impermissible restriction on speech); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (finding the requirement of loyalty oaths by public school teachers unconstitutional).

328. For example, authors from Harriet Beecher Stowe to Norman Mailer, whose writings depend upon allusion and metaphor to comment on contemporary matters, are often best able to communicate their ideas when not speaking in express political terms. See generally HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (Alfred Knopf ed. 1995) (1851); NORMAN MAILER, *THE ARMIES OF THE NIGHT* (1968); NORMAN MAILER, *WHY ARE WE IN VIETNAM* (1967). The Paintings of Ben Shahn (e.g., *Sacco and Vanzetti*), Robert Indiana (e.g., *Alabama*), and Picasso (e.g., *Guernica*) depended on a like technique of artistic treatment and pictorial allusion to move their audiences on important issues of their day, such as anarchism, racism, and war, respectively. Indeed, our greatest and most beloved leaders have been superb storytellers: Benjamin Franklin, Abraham Lincoln, Franklin Roosevelt, and Winston Churchill.

329. See William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 *LAW & CONTEMP. PROBS.* 79, 152 (1990) (chronicling history of academic freedom in United States).

IV. THE FUTURE OF GOVERNMENT FUNDING OF THE ARTS: FOUR OPTIONS

Although the recent controversies surrounding federal funding to the arts may have temporarily faded from the public's attention, they were headed toward another noisy congressional review when appropriations for the NEA came up for consideration during the 104th Congress. Joining the usual calls to curtail overall government spending by the Republican-controlled Congress, were all the old complaints against NEA sponsorship of indecent or inappropriate artistic enterprises.³³⁰ In view of the growing jurisprudence supporting the First Amendment right to artistic expression,³³¹ interest inevitably turned toward better methods to regulate the disbursement of government funds in order to avoid past controversies.

In the past, courts have invalidated clumsy efforts to preempt federal support of potentially obscene or indecent works of art by Congress and the NEA's director.³³² Moreover, any future efforts involving 'decency' oaths or other content-based requirements to regulate artistic expression by grantees are likely to be invalidated. Rather than repeat the same battles between intransigent parties to the old controversies, a more appropriate and useful approach would be to review the purpose and desirability of federal and all government funding to the arts in order to ascertain the value of subsidies to the grantees and the benefit to the public from increased exposure to art as a result of government funding.

Although admittedly cliché within political commentary, a fair and constant question is whether an investment in the arts justifies the return in terms of the use of tax revenues drawn from all quarters of

330. Congressman Dick Arney (R-Tex.) who led much of the House opposition to the NEA funding debate in 1989 and 1990 is the new Majority Leader in the 104th Congress. Although Republicans made no mention of the NEA or the arts in their "Contract with America," which seems to be the overwhelming political focus of the 104th Congress, the new Congress has already indicated that funding for the NEA, National Endowment for the Humanities (NEH), and the Corporation for Public Broadcasting will come under close scrutiny. See Robert Pear, *A Hostile House Trains Its Sights on Funds for Arts*, N.Y. TIMES, Jan. 9, 1995, at A1 (quoting House Republican leaders as advocating elimination of or severe reduction in NEA budget).

331. See *supra* notes 251-326 and accompanying text (enumerating principles defining breadth and scope of First Amendment protections of artistic expression).

332. See *Finley v. NEA*, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992) (holding that NEA's invocation of "decency" clause to deny artists' grant applications constitutes suppression of speech); *Bella Lewitsky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 782 (C.D. Cal. 1991) (holding invalid NEA requirement that grant recipients certify that funds will not be used "to promote or produce obscene materials").

the population.³³³ Are these programs efficiently productive in both artistic output and public intake? Another consideration is the degree of popular support and demand for the various funded projects. If there is or has been controversy over certain funding projects, is the controversy a matter of general public concern or a case of the heckler's veto?³³⁴ Finally, is there a coherent set of policy priorities that government funding seeks to accomplish and have these priorities been achieved? Although most of these questions are routinely reached in agency requests for appropriations, the purpose here is to examine them in light of the foregoing discussion of spheres of free expression and the selectivity or restrictiveness with which the government may promote vigorous public expression on the issues of the day. The following options are intended to cover a wide range of policy approaches to future government funding of the arts and to sketch out plausible directions that such funding might take.

A. *Eliminate All Government Subsidies to the Arts*

Although rather extreme in its form and not likely to occur,³³⁵ the option of eliminating all forms of federal support to the arts is worth some consideration if for no other reason than to consider its negative implications. This approach would guarantee that the government would no longer fund controversial projects. But using such a sweeping approach to solve a small number of relatively isolated problems is like throwing the baby out with the bath water.

333. See *supra* notes 216-33 and accompanying text (discussing bargaining-by-consensus approach which advocates leaving support for arts to private sector).

334. See, e.g., *In re Kay*, 464 P.2d 142, 147 (Cal. 1970) ("Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment."). The theory that the government may censor or ban the speaker in order to avoid public disorder or discontent with a speaker is a double-edged sword. On one hand, there is the need to protect the public from imminent harm, but on the other there is the temptation to use the heckler's threat of disorder as a convenient means to squelch the protected right to express unpopular views. See *Terminiello v. Chicago*, 337 U.S. 1, 6 (1949) (finding unconstitutional conviction of individual for political speech that aroused discontent or public unrest); *supra* notes 302-07; see also *Brown v. Board of Regents*, 640 F. Supp. 674, 681 (D. Neb. 1986) (invalidating university action to prohibit film showing as result of public pressure to ban allegedly sacrilegious film).

335. Vigorous attempts in the 104th Congress to terminate the NEA failed despite concerted efforts by the new Republican leadership. See Michael Kilian, *Senate Vote Keeps Arts Funding Alive*, CHI. TRIB., Aug. 10, 1995, at 3 (describing compromise reached by Senate that would reduce NEA's budget but save arts funding from House-approved elimination); David Rogers, *House Rejects Bid to End U.S. Funds for National Endowment for the Arts*, WALL ST. J., July 18, 1995, at A16 (reporting 337-79 vote in House rejecting elimination of arts funding by end of 1996); Trescott, *supra* note 90, at C1 (describing how \$150 of NEA funding for one-night performance of artist who carved design into back of another artist caused Congress to threaten 5% cut in NEA budget).

The elimination of federal funding to the NEA, for example, would save \$170 million, or approximately 68 cents per citizen.³³⁶ But in terms of the quality of service, the cost to the public would be high. The number of grantees is quite large while the number of staff that administers the NEA is relatively small for an agency of its funding size and scope.³³⁷ This relatively small staff can be attributed in large part to the fact that significant numbers of quasi-volunteers serve on the NEA's advisory panels.³³⁸

In terms of total dollars disbursed by the NEA, state and municipal arts agencies, which directly received approximately thirty-five percent of all funds granted by the NEA, would lose the most if the NEA were abolished.³³⁹ The NEA allocated less than five percent of its funds directly for career development grants and project-specific subsidies to individual artists.³⁴⁰ Private institutions with local, regional, and national identities are the second largest category of NEA grantees and receive roughly thirty-two percent of all NEA disbursed funds.³⁴¹ The remaining balance of NEA funding grants are disbursed to programs in arts education.³⁴² For every dollar allocated by the NEA, approximately twelve dollars are distributed from state, regional, and local arts agencies, private foundations, corporations, businesses, and individual citizens.³⁴³

Most complaints regarding funded projects that offended standards of public decency have been directed toward grants to individual artists, such as the career development grants made to Andres Serrano³⁴⁴ and Karen Finley.³⁴⁵ A smaller number of complaints concern private institutions that received federal grants to support broad-based institutional activities such as exhibitions, performances, or publications.³⁴⁶ For example, the Corcoran Gallery in Washington, D.C., originally sponsored, but then withdrew, an exhibition of

336. National Endowment for the Arts, FY 93 and FY 94 Budgets (table summary) [hereinafter FY 93-94 Budgets] (on file with *The American University Law Review*); see also NEA, THE ARTS IN AMERICA 1992: A REPORT TO THE PRESIDENT AND TO THE CONGRESS I-1 (1992) [hereinafter NEA, THE ARTS IN AMERICA].

337. See *supra* notes 58-65, 74 and accompanying text.

338. See *supra* notes 58-65 and accompanying text (describing composition duties of NEA advisory panels). Administrative costs of the NEA were less than 14% of the total budget in 1993 and 1994. FY 93-94 Budgets, *supra* note 336.

339. See NATIONAL ENDOWMENT FOR THE ARTS, THE ARTS IN BRIEF, *supra* note 76.

340. NATIONAL ENDOWMENT FOR THE ARTS, THE ARTS IN BRIEF, *supra* note 76.

341. FY 93-94 Budgets, *supra* note 336.

342. FY 93-94 Budgets, *supra* note 336.

343. NATIONAL ENDOWMENT FOR THE ARTS, AMERICA IN THE MAKING 5 (1995).

344. See *supra* notes 3, 78.

345. See *Finley v. NEA*, 795 F. Supp. 1457, 1462-63 (C.D. Cal. 1992).

346. See *Bella Lewitsky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 775-76 (C.D. Cal. 1991).

Robert Mapplethorpe's photography under an NEA threat that funds allocated for future exhibitions might not be forthcoming.³⁴⁷ Although state governments also face severe budgetary constraints, no state has yet proposed to abolish or to reduce substantially its funding to the arts.³⁴⁸

The abrupt withdrawal of federal funding would have a three-fold effect. First, it would eliminate a sizable portion of support to the arts. For example, since 1978 an average of eleven percent of the funding to non-profit arts organizations receiving NEA challenge grants came directly from the NEA.³⁴⁹ Loss of federal funding would also reduce the diversification of non-governmental fundraising by arts organizations and individuals. It would remove the statutory compulsion to seek out matching grants because the prestige of federal support that attracts such private initiatives would be missing. There is, after all, only one Federal Government.

Second, withdrawing federal funding for the arts would result in the loss of a national presence and imprimatur in the development of the arts. The success of the NEA rests in large part on its effort to promote new but promising arts programs by giving them professional recognition at the national level. Even though the actual dollar amount of the NEA grant is usually a small percentage of the typical grantee's budget, this recognition is a substantial factor in the organization's ability to attract collateral funding from local and regional sources.³⁵⁰ Due in significant part to the NEA, the number of arts organizations serving the nation has grown to over ten times the number operating in 1966.³⁵¹ Yet, over the last fifteen years, the level of funding to the NEA has remained essentially unchanged,³⁵² while the rest of the federal budget has more than tripled in size.³⁵³ By promoting the development of an arts infrastructure within local

347. See John Garvey, *Black and White Images*, 56 LAW & CONTEMP. PROBS. 189, 190-91 (1993) (reviewing Corcoran Gallery debacle and other controversial art shows supported by NEA funding).

348. Total state agency funding surpassed NEA allocations in 1986 and continues to grow at a steady, if slow, pace. NEA, THE ARTS IN AMERICA, *supra* note 336, at II-7.

349. NATIONAL ENDOWMENT FOR THE ARTS, 1994 ANNUAL REPORT 17, 65 (1994). Last year, state legislatures as a group matched NEA funding to state arts agencies at a six to one ratio. *Id.* at 73.

350. See *Bella Lewitsky Dance Found.*, 754 F. Supp. at 783, 785 (citing amicus brief of Theatre Communications Group which called NEA grant awards "critical to the ability of artists and companies to attract non-federal funding sources").

351. See NEA, THE ARTS IN AMERICA, *supra* note 336, at II-2 to II-17 (describing numerous organizations which have grown and benefitted from 20 years of federal funding).

352. In Fiscal Year 1980, the NEA allocation was \$154 million. NEA, 1965-1985: A BRIEF CHRONOLOGY 37 (1986); FY 93-94 Budgets, *supra* note 336. In 1994, it was \$170 million. FY 93-94 Budgets, *supra* note 336.

353. See OFFICE OF THE PRESIDENT, A CITIZEN'S GUIDE TO THE FEDERAL BUDGET 17 (1995).

and regional communities, federal support to the arts has initiated an economic as well as artistic momentum. The growth in community level investment in the arts not only enriches the cultural quality of life but also reenforces the economic strength of the community.

Another important benefit to the arts community is the modest but ongoing support of the NEA to prestigious institutions, such as the Metropolitan Opera or the Minnesota Children's Theatre, that deserve recognition for their unique contributions to the nation's international status as a leader in the arts. If Congress eliminates federal funding, these organizations would probably survive financially, but the loss of the special recognition implicit in the receipt of NEA grants would amount to an embarrassing withdrawal of federal support for organizations that are considered national treasures.

Finally, the enabling legislation of the NEA proclaimed that federal support for the arts was essential to the promotion of this nation as a "high civilization" and "world leader."³⁵⁴ In fact, the NEA has contributed significantly to an unparalleled improvement in the stature of American art and civilization throughout the world, such as the international artistic dominance of American dance companies since the 1960s. Abandoning the NEA's mandate would send a terribly negative message both here and abroad about this country's values and priorities.

While the above discussion largely relies on policy ramifications to justify continued support for the NEA, its relevance to the issue of funding a small number of controversial but constitutionally protected forms of artistic expression is important. The unpleasant results of a few projects cannot reasonably justify jeopardizing the enormous value generated by the rest of the NEA. In effect, abolishing the NEA would hold a respected institution hostage to the heckler's veto.³⁵⁵ While the basis for the allegations made by NEA's congressional detractors against the controversial projects may have some merit, the implication that other work of the NEA is similarly tainted is baseless. Moreover, the question of whether congressional tastes and views should influence the curtailment of other worthy projects, or even the questioned project itself, is an issue that touches on constitutional values as well as the proper role of the political process, which the enabling legislation of 1965 sought to preempt.³⁵⁶ A better solution

354. Arts and Humanities Act of 1965, 20 U.S.C. §§ 951-960 (1994).

355. See *supra* note 334 (explaining problems associated with censoring speech to avoid public disorder or discontent with message of speaker).

356. 20 U.S.C. § 951 (establishing NEA as independent organization responsible for advancement of arts and humanities).

would avoid occasional unpleasant or marginal results from NEA funding without the risk of the wholesale elimination of an otherwise successful agency. In this regard, constitutional jurisprudence offers a few interesting avenues for exploration.

B. Subsidize the Arts Through Tax Exemptions

One potential solution is to devise a scheme that substitutes tax exemptions or credits for direct federal subsidies to the arts.³⁵⁷ Alternatively, such a scheme could apply to those particular projects or programs within the NEA that seem to produce offending results. This tax exemption model could offer more than a dollar for dollar deduction on the donor's tax return. For example, the scheme could provide an exemption at double or triple the amount actually contributed, up to a declared maximum.³⁵⁸ In either scheme, the use of the tax incentives would indirectly continue federal subsidization of the arts through a benefit to the donor and in artistic areas that have an established public support base. The revenue losses likely to be incurred in excess of those already taken for charitable contributions to the arts could be projected and calculated into the actual amount of the deduction. Although it is beyond the scope of this Article to develop these calculations fully, the concept of an aggressively orchestrated tax policy in support of the arts has a number of advantages over direct subsidies from a government agency.³⁵⁹

The scheme removes the government from the business of making grants and having to take direct responsibility for the consequences of the grants. By their nature, tax incentives remove the government's role in the particular choice or treatment of artistic subject matter, yet encourage significant financial support for those endeavors. The government will lose tax revenue, but will save in the area of administrative overhead, which is no longer needed to run the

357. See EPSTEIN, *BARGAINING WITH THE STATE*, *supra* note 11, at 240 (suggesting that tax exemption is second best alternative but that elimination of governmental subsidies altogether where program lacks broad consensual support is preferable).

358. See HOPKINS, *supra* note 1, at 22-28 (outlining general tax regulations and policies toward private donations to nonprofit organizations); ZEIGLER, *supra* note 3, at 186-92 (same).

359. The principal advantage is the relative insulation from critical review arising from policy and administrative contact with the art projects. There is also an efficiency argument that pushing project administrative functions down to the local level saves an extra layer of overhead. See Stephen E. Weil, *Tax Policy and Giving*, in *PUBLIC MONEY AND THE MUSE* 153-81 (Stephen Benedict ed., 1991) (addressing ways adjustments to federal tax code could act as incentive for private giving to arts and humanities, including returning to pre-1986 method of calculating deduction for gift of artwork valued over \$5000 and allowing lower and middle income taxpayer to deduct some multiple of cash given to charitable institutions).

agency or the aspect of the agency that is no longer funded. In effect, the scheme would channel resources more efficiently into arts activities supported directly by the public's own initiative.

Opponents of government support to the arts in any form, however indirect, can argue that offending art may still be produced under this scheme. This argument against tax deductions to private nonprofit arts organizations has yet to arise, although a debate over the suitability of tax exemptions for certain arts-related projects could arise. There already exists, however, an ancillary issue of governmental requirements to which an institution must conform before it, or its donors, becomes eligible for tax benefits. For example, the IRS refused to continue tax exemptions for Bob Jones University because its policies on race were contrary to federal civil rights statutes.³⁶⁰ In effect, the IRS imposed a public purpose test to determine whether a tax advantage would apply. These instances may be rare, but they can be critical to the affected institution and its donors.

The principal basis for previous criticism of controversial arts projects was the public's alleged distaste over federal allocation of public funds for offensive work.³⁶¹ A tax-based scheme avoids this result by keeping the government out of the business of allocating funds to the arts from public revenues. Indirect funding of non-profit organizations has essentially been sanctioned by federal tax policy since the enactment of the modern tax code in 1916,³⁶² and has remained untouched through far more prudish times and fashions than those prevailing today.³⁶³

Other policy based arguments, however, can be raised against a tax incentive scheme. There exists the assumption that tax induced subsidies will uniformly follow the public will. One cannot assume,

360. See *Bob Jones Univ. v. Simon*, 461 U.S. 574, 581 (1983) (holding, on public policy grounds, that IRS was within its authority to revoke tax exempt status of institution in violation of federal Civil Rights Act of 1964, and that revocation was not in violation of institution's freedom to exercise religion); see also *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 392 (1990) (holding California's imposition of tax liability on sale of religious materials does not violate First Amendment freedom to exercise religion). NEA requires grantees to assure compliance with federal civil rights law. See GUIDE, *supra* note 51, at 8 (explaining how NEA operates and listing eligibility requirements for grant seekers).

361. See *supra* Part II.C. (discussing history of public outcry against NEA and calls for revocation of funds for projects perceived as racially, religiously, ethnically, or sexually offensive).

362. See 26 U.S.C. § 501(c)(3) (1994).

363. See generally *id.* Section 501(c)(3), which exempts charities under the Internal Revenue Code, has hardly been amended, and then only cosmetically, since the current Code's adoption in 1954. Before that time, the exemption of charitable organizations from various forms of taxation was routinely recognized and upheld in IRS statutes and regulations. See also *Waltz v. Tax Comm'n of New York*, 397 U.S. 664, 676-80 (1970) (discussing history of tax exemption for religious and charitable organizations). See generally *Bittker & Rahdert*, *supra* note 1 (discussing British and American history of tax exemptions for charitable organizations).

however, that individual donors with the means to take advantage of the tax laws will have the same tastes and interests as the public as a whole.

The fact that those people who allocate monetary resources to the arts will see their contributions go where they want them is not necessarily a bad result. In fact, this scheme is a perfectly fair distribution of resources under the bargaining theory, which dictates that private initiative should resolve demand in the absence of a broad consensus. In this context, the most likely scenario is that established arts organizations will benefit under a tax-based scheme while less prominent or fledgling organizations will suffer. Because the promotion of worthy new arts organizations, particularly in those areas of the country that historically have lacked such services, is an important function of the NEA, a tax-based scheme would appear self-defeating to the goal of developing the arts on a national basis. Not even well-established organizations would support such a result because it is hardly in their own interest to do so. The tax-based scheme also runs the risk of overlooking artistically worthy but publicly unknown projects that might otherwise be recognized under the current system. Presently, the government acts to promote projects or types of art that hold great professional promise.³⁶⁴

A tax-based scheme, therefore, cannot entirely replace a nationally focused program that distributes its benefits in a consistent and fair manner among the public at large, notwithstanding the advantages to the government of withdrawing from controversial areas of arts funding. A tax-based solution to federal support for the arts, moreover, is an evasive approach to a problem that requires an affirmative investment and direction at the national level. To resolve the problem fully, a more sophisticated solution is required that accounts for both national and local needs.

C. Continue the Current Practices

One obvious approach to the issue of federal funding to the arts is to resolve its difficulties by the same congressional debate that has taken place over the past thirty years. When complaints are raised against a project or programmatic result of NEA funding, Congress has responded by exercising its oversight power, resulting in appropriations to the NEA being reduced either generally or with regard to

³⁶⁴. For obvious reasons, privately donated money tends to flow to established organizations that are familiar and artistically comfortable to the donor.

specific aspects of its program that were the focus of the complaints.³⁶⁵ But to leave the process the way it is provides no solution at all. The NEA would remain exposed to the same uncertainties it faces today with respect to contentious accusations, negative publicity, and a generally undeserved loss of stature. If the experience of such political battles over the past five years is any indication, the prospect of renewed calls for decency oaths and other content-based restrictions on the grant-making process is inevitable. As these restrictions are likely to be invalidated upon judicial review, an impasse of sorts would develop in which the NEA would be increasingly pitted against its natural constituencies in the arts world.

As a point of First Amendment honor, it is difficult to concede anything in the way of artistic freedom to the heckler's veto, or any effort to stifle protected speech. Placing a relatively vulnerable program in the unpleasant position of having to defend itself against annual attack, which eventually may come to be viewed in all or nothing terms, is also risky. Until recently, support for arts funding has been enthusiastic, solid, and bipartisan.³⁶⁶ Federal support to the arts directly affects every state and congressional district.³⁶⁷ With substantial changes in the new Congress' membership, such support is likely to be reevaluated in a less friendly environment.³⁶⁸ The presumption of broad political support has to be reassessed and bolstered by restructuring the NEA's operational methods to better meet the complaints of its critics, as well as the long-established needs of its constituents. In this sense, the status quo no longer suits the NEA.

D. *Reform Current NEA Practices Selectively*

A restructured NEA that emphasizes its most successful programs, such as those that channel funds toward the support and promotion of a national arts infrastructure, is the best solution to congressional criticism and the most strategic use of the NEA's limited funding. This type of approach would continue the principal thrust of the NEA's work, which is to direct its largesse mostly to state and municipal agencies, private institutions of professional stature, and

365. This was utilized during the 1989 and 1990 congressional debates over the NEA's grant-making policies. On constitutional as well as artistic policy grounds, Kathleen M. Sullivan has supported retaining the status quo ante. This is the majority view among constitutional scholars and the arts community. *Id.* Kathleen M. Sullivan, *Public Funding and the Constitution*, in PUBLIC MONEY AND THE MUSE, *supra* note 359, at 80-95.

366. See INDEPENDENT COMMISSION, *supra* note 76, at 9-11.

367. See NEA, THE ARTS IN AMERICA, *supra* note 336, at II.

368. See *supra* note 330 (discussing wavering congressional opinions toward arts funding).

special initiatives in arts education. Programs that directly subsidize individual artists would be phased out or shifted to state or local control where community standards may be legitimately articulated and considered in implementation decisions.³⁶⁹

Likewise, disputes over First Amendment rights of artistic expression are best exercised and defended in places where they have an actual public impact. A decentralized decisionmaking process, especially with respect to projects that tend to create controversy, would properly place the issue of artistic freedom into the sphere of local public debate where the effect of the expression is most immediately felt rather than in the removed and artificial atmosphere of Washington, D.C. The enlightened administration or adjudication of such controversies at the local level is bound to resolve the matter in a more satisfactory manner to those immediately affected than by a distant rumble over abstract principles in the nation's capital. The NEA could protect itself against cases in which a court finds a funded project's work obscene by including a basic contract provision in its agreement with the grantee. The clause would provide that in such situations all funding received by the project shall be returned to the NEA along with attorney fees and costs associated with recovery. Such a provision would greatly allay congressional and public concern that NEA funding recipients are not subject to any meaningful oversight of the results of their work. A provision of this type would also avoid the constitutional difficulties of the "decency oath" provisions because it operates retrospectively and leaves it to the courts, not the NEA, to find a work obscene.³⁷⁰ The Independent Commission noted that it was unable to find a single case in which an NEA-funded project had been found to be judicially obscene.³⁷¹

For its part, Congress would avoid some of the past rancor over funding oversight by appropriating block-type grants to the states, still subject to NEA general direction, and by narrowing the focus of other arts funding to specific areas where substantial consensus exists. Selectively and affirmatively targeting successful programs ensures Congress that a broad consensus stands behind its arts funding. By channeling federal support into the national arts infrastructure and

369. Jane Alexander, the current chairman of the NEA, recently ordered an end to all grants to individual artists, and the funds shifted to state agencies. Kilian, *supra* note 335, at 3. A provision in the 1995 Senate bill to re-authorize the NEA would formally ban any future grants to most individuals and redirect more funds to cultural institutions. Jennifer Corbett & Janet Hook, *Senate Adopts Cuts in NEA Funding, 92-6*, L.A. TIMES, Aug. 10, 1995, at A2.

370. See *supra* notes 308-22 and accompanying text (explaining that language of "decency oaths" is generally vague and invites subjective interpretation by government officials).

371. INDEPENDENT COMMISSION, *supra* note 76, at 84.

by minimizing the NEA's funding for individual or idiosyncratic projects, Congress could legitimately and effectively continue to fulfill the mandate of the NEA's enabling legislation and nurture artistic expression relatively free from official interference and unconstitutional restraint.

CONCLUSION

When Congress created the NEA, it expressed its will that a great nation must be recognized for its achievements in the arts as well as in science and technology. In order to flourish as a national enterprise, the NEA was directed to promote the development of a national arts policy. Over the past twenty-eight years, the NEA has played a significant role in the expansion of the number of artists and arts organizations that serve the public. At the same time, Congress recognized that the role of the Federal Government should promote and nurture the arts without the imposition of official styles and tastes, and should protect the administration of the NEA from political tampering. To a large degree, this approach has worked smoothly and without controversy. Nevertheless, it was inevitable that a small handful of projects would provoke controversy and require the NEA and Congress to consider whether and what funding restrictions might be necessary to avoid allegedly indecent or otherwise offensive art.

By their nature, such regulations on government subsidies raise the potential for unconstitutional restrictions on otherwise protected areas of speech. The courts have consistently, if haltingly, found artistic expression to be protected by the First Amendment in a manner not unlike academic speech and that artistic expression properly belongs in the same category as traditionally protected speech. In this sense, art and artistic expression inhabits a traditional sphere of free expression.

With regard to the degree to which government subsidies to traditionally protected speech activities may condition the content or viewpoint of the speech, it would seem clear that artistic expression, like academic speech, occupies a special place within our constitutional jurisprudence. Even though the government is under no constitutional obligation to support the arts, once it decides to fund a protected activity, the recipient is free to pursue the project unencumbered by restrictions that would curtail its expressive content.

The Supreme Court's emphasis in *Rust* on the scope of the funded program as the measure of the limit by which a funding regulation may restrict the freedom of a recipient to speak remains problematic.

The Court's reasoning leads to the conclusion that even within the realm of a protected sphere of free expression, it is theoretically possible that the government may so selectively define the funded activity as to effectively eliminate all but one viewpoint on a given subject matter. To the arts funding recipient, the prospect of such congressional micro-management is troubling and unprecedented. Yet, supporting the arts through a federal agency is ultimately a political decision and will continue to be a political decision as to whether to continue the NEA's mandate in the future.

Central to the NEA's original mandate was the preservation of the autonomy of artists and arts organizations. Moreover, the NEA is unique among arts agencies because it is the only organization that is truly national in character and that takes as its ongoing charge the nurture and development of the arts as it affects the entire population. As such, the NEA and all state and municipal governments that support the arts serve the important function of bringing the benefits of the arts to *all* segments of society. Consequently, the most effective means of sustaining a broad consensus for federal leadership in the arts is by emphasizing NEA programs and policies that have created and sustained the foundation on which a substantial national arts infrastructure now exists and which the arts require in order to flourish. Because the NEA remains the single most important factor in the development of a national arts infrastructure, its continued functioning is essential.

Equally important is recognition of the constitutional principle that the NEA and other arts organizations must be allowed administrative breathing room to pursue the development of the arts unfettered by restrictions on content and viewpoint. This Article discusses four policy options for future government support to the arts: elimination of all governmental funding, substitution of tax credits for direct government grants, preservation of the status quo, and finally a more selective policy of governmental funding to the arts. To accommodate both the government's desire to protect the quality of the arts it supports and artists' need to work freely, this Article proposes that the government adopt the fourth option and selectively focus its funding efforts on programs that nurture an arts infrastructure within which organizations and artists may operate with maximum flexibility and freedom. While this proposal leaves the government open to criticism for indirectly supporting controversial projects that it once may have supported directly, the proposal eliminates the government's burden and responsibility to administer directly the individual work of the artist. At the same time, it allows the government to fund directly

those organizations and programs that are in the best position to promote art, artists and their audiences.