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Art Speech

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Although many scholars have been in favor of providing first amendment protection for art, no one has offered a justification for its constitutional protection suited to art's singular capacities. Rather, commentators and courts have been inclined to place art under the rubric of general speech, which limits protection to ideas and content. Professor Hamilton argues that art offers significantly more than its content and deserves first amendment protection tailored to its particular potential. Art enables individuals to experience unfamiliar worlds and thereby to gain new perspectives on the prevailing status quo, including the government's. It performs this function without exposing the individual to the risks inherent in actually experiencing a foreign world view. Moreover, its subversive potential not only occurs at the moment artwork is experienced but also can be stored, making art a powerful and immanent tool of critique.

Professor Hamilton concludes that governmental funding of art projects should be examined with the closest scrutiny, because governmental involvement in the art market skews the market away from works that defamiliarize. Finally, public funding of arts education and appreciation should be a high priority so that students can build a storehouse of reorientation experiences that will protect them against the bewitchment of common sense posed by official power.

Art Speech

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"If I could say it, I wouldn't have to dance it."

—Isadora Duncan

I. INTRODUCTION

Historically and consistently, American culture has treated art as inconsequential to the democratic enterprise.[1] Under the Puritan tradition, art has been treated as a fillip to the good life—enjoyable, but inessential.[2] By regarding art as mere entertainment, the culture

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1. See Louise Harmon, *Law, Art, and the Killing Jar*, 79 Iowa L. Rev. 367, 368 (1994) ("We pretend that law and art have nothing to do with one another").

By "art" I do not mean any particular set of objectively determined characteristics but rather the group of works valued by a particular culture at a given time. See generally Terry Eagleton, *Literary Theory: An Introduction* (U. Minn., 1983).

My project is limited to describing art's capacities in a republican democracy. By way of clarification, I am not making either of the larger arguments that all art is necessarily subversive or that all that is subversive is necessarily art. Nor am I suggesting that anything which is art might not also carry a political message. In the latter instance, first amendment protection can be predicated on hoth its artistic elements and its political speech. Whether a particular work *is* art in a particular case is a question of fact better left to a case-by-case determination. Most works are easily identifiable as art. For works on the margins, the judge would have to make a judgment call, employing the views of the parties' competing expert witnesses. Undoubtedly, this is not a perfect scheme but it is the best that can be expected in a litigation setting. Some works deserving of protection will not be protected under this scenario and others not deserving may be protected. Given the conservative bent of most judicial decision making, the former is the more serious worry and warrants a warning to judges that the range of artworks is not a static universe. Judges are already engaged in a similar inquiry in construing the Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat 5128 (Dec. 1, 1990), codified in scattered sections of 17 U.S.C. (1994 ed.). See, for example, *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995) (discussing whether an installation sculpture is "a work of visual art as defined by VARA"). See also Note, *Post-Modern Art and the Death of Obscenity Law*, 99 Yale L. J. 1369 (1990) (pointing out the difficulties of providing a static definition of the universe of artworks).

2. See, for example, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 27 (1971) (agreeing that an analogy exists between criticizing the government and publishing a novel "like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is also an analogy, not an identity. . . . If the dialectical progression is not to become an analogical stampede, the protection of the first amendment . . . must be cut off when it reaches the outer limits of political speech").

Protestant culture has set the tone for the American indifference to the larger societal value of art. The early American Puritans viewed art not as an evil but rather as frivolous. John Dillenberger and Claude Welch, *Protestant Christianity: Interpreted Through Its Development* 105 (Scribner, 1954). The entirety of life was to be organized under God and for God. Id. at 104-05. Pastimes such as literature were considered nonessential. Many a Puritan man was well-read in fine literature, but the Puritan social order warned against being sidetracked from "the main business of life." Id. at 105. In general, the dominant religious faith of the American culture, Protestantism, especially Lutheranism and Calvinism, has treated art as little more than ornamental. See generally David Morgan, *The Protestant Struggle with the Image*, 1989 Christian Century 308. It is distracting. Theologian Joseph Sittler makes a related point that Christians have a tendency to "walk through the world holding [their] noses, as it were, as if God's creation somehow smelled bad and [they] ought not to get too close to it." Joseph Sittler, *Provocations on the Church and the Arts*, 1986 Christian Century 291, 291. The trivialization of

has underestimated its instrumental, liberty-reinforcing role in a representative democracy. This Article employs literary and sociological theory to explain the links between art, democracy, and liberty.[3]

A striking indication of American society's underestimation of art's power resides in a first amendment jurisprudence that only tangentially acknowledges the force of art. First amendment doctrine foregrounds political speech as having the highest political value and obscenity as utterly valueless. At the same time, it largely ignores the liberty value of art.[4] Another indication of this country's under-

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art in the larger culture is duly reflected in the legal world. See notes 120-24 and accompanying text.

The Puritans nevertheless contributed to the challenge structure of American government. "[W]orkable democratic structures have arisen primarily in lands influenced by Puritan traditions." Dillenberger and Welch, *Protestant Christianity* at 106. Their understanding of the importance of decentralizing power and their foundational belief in the necessity of challenging systems of power, whether it be the church or the state have proved durable and important. Id.

3. The self-conscious attacks of modernism and postmodernism on the prevailing definition of fine art have aggravated the American culture's tendency to undervalue art's larger, societal value. For discussion of the art world's marginalization of itself, see John Roberts, *Postmodernism: Politics and Art* 15 (Manchester U., 1990) (discussing the postmodernists' "indifference, in the name of political and aesthetic contingency, to an understanding of art as grounded in articulatory struggle within a hegemonic culture" (emphasis omitted)); David Tracy, *The Analogical Imagination: Christian Theology and the Culture of Pluralism* 12-13 (Crossroad, 1981) (recognizing art's increasing marginalization in our society "[w]hether avant-garde artists or countercultural movements . . . have chosen or have simply recognized their effective absence from the realm of the people"); id. at 13 (observing that many artists "accept their marginalized status in society"); José Ortega y Gasset, *The Dehumanization of Art,* in James B. Hall and Barry Ulanov, eds., *Modern Culture and the Arts* 39, 42, 46 (McGraw-Hill, 1967) (summing up the "peculiarities of modern art" in the "one feature of its renouncing its importance").

In an intensely self-referential way, the fine art world has spoken increasingly to itself about itself in a manner that is inaccessible to the general public, in terms such as Dadaism, pop art, abstract art, and appropriative art. Sean O'Casey, *The Arts Among the Multitude,* in Hall and Ulanov, eds., *Modern Culture and the Arts* at 15, 17. See generally Abraham Kaplan, *The Aesthetics of the Popular Arts,* in Hall and Ulanov, eds., *Modern Culture and the Arts* at 62.

Although many have mistaken this internal dialogue as evidence of the death of art, it is not. See Arthur C. Dante, *The End of Art,* in Berel Lang, ed., *The Death of Art* 5, 21 (Haven, 1984); id. at 6 (stating the possibility "that art itself has no future, though artworks may still be produced post-historically . . . in an aftershock of a vanished vitality"). Rather, it serves as proof that the art world itself is not immune to art's capacity to undermine the status quo.

4. For a discussion of political speech and obscenity cases, see notes 125-46 and accompanying text. Judge Richard Posner has offered an interesting and plausible summary of the reasons why the federal judiciary in particular has found it difficult to extend first amendment protection to nude dancing, even if identified as a form of art. He states that the judiciary is disinclined to protect nude dancing under the First Amendment:

> in part because we are either middle-aged or elderly men, in part because we tend to be snooty about popular culture, in part because as public officials we have a natural tendency to think political expression more important than artistic expression, in part because we are Americans—which means that we have been raised in a culture in which puritanism, philistinism, and promiscuity are complexly and often incongruously inter-

valuation of art is the public education system's continuing history of marginalizing arts education.[5] Yet another is the fact that neither the Court nor legal scholars have felt compelled to provide a particularly well-suited theoretical justification for art's first amendment treatment.[6]

The inclination to bracket art from the political culture is not unique to the American experiment with representative democracy. Conventional readings of Plato, for example, indicate that he believed that art should be censored because it threatens order and stability.[7] Yet, art is essential to a representative democracy *because* it can be subversive. Unchallenged and entrenched orders threaten freedom.[8] Art permits individuals to experience alternative worlds, thereby providing an efficient and effective means of testing the status quo without risk.[9] Plato's fear of art was warranted—art can be destabilizing—but his censorship prescription is treacherous to liberty overall. In biological terms, stasis is death; only growth and change keep the organism alive.[10] Representative democratic government

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woven—and in part because like all lawyers we are formalists who believe deep down that the words in statutes and the Constitution mean what they say, and a striptease is not a speech.

Miller v. Civil City of South Bend, 904 F.2d 1081, 1100 (7th Cir. 1990) (Posner, J., concurring), rev'd sub nom., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

5. Howard Gardner, *Art Education and Human Development* 35 (Getty, 1990) ("[A]rt education has continued to be seen as a vehicle for promoting self-expression, imagination, creativity, and knowledge of one's affective life—not as a scholastic subject"). In the mid- to late-nineteenth century, arts education was most prominent in "affluent circles" and could not be found generally in "ordinary . . . scholastic settings." Id. at 34. Today, as children progress with their education, "art classes wane in frequency" and the "study of the artistic practices of the past has not been considered relevant to youthful production." Id. at x.

6. See notes 118-24 and accompanying text.

7. See Francis M. Cornford, trans., *The Republic of Plato* bk. 10 (Clarendon, 1941). See also Sheldon Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime, and the First Amendment*, 1987 Wis. L. Rev. 221, 224 n.12, 227 (noting that Plato considered art so powerful that his ideal Republic required that the state control art for the good of society).

8. See Robert M. Cover, *The Supreme Court, 1982 Term: Foreword:* Nomos *and Narrative*, 97 Harv. L. Rev. 4, 47-54 (1983); Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 Ohio St. L. J. 713, 725, 772 (1993).

9. See Part II.B.

10. See J.H. Woodger, *Biological Principles: A Critical Study* 442 (Routledge & K. Paul, 1967) ("Change is apt to be contrasted with 'permanence' or 'persistence,' but in the organism both notions are involved, for we see that continual intrinsic change is essential to its persistence, and . . . that causal regularities are themselves 'permanences in nature' "); Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 Mich. L. Rov. 1647, 1660-61, 1668 (1989) (recognizing the requirement of change in autopoietic systems).

The study of ecosystems reveals a correlation between a system's relative stability or resilience and its spatial and temporal homogeneity or heterogeneity. The more diverse the subsystems, the more resilient the overall system. Resilience corresponds to a system's ability to absorb perturbations and evolve into a metastable level of organization characterized by renewed entropy production. Whereas the degree of fluctuation around

thrives on this paradox: it is legitimated more by external challenge than by the entrenchment of its institutions.

While it is generally accepted that the First Amendment contemplates protection of art,[11] the questions why and to what extent have not been satisfactorily answered to date. In this Article, I posit that art cannot receive its due as long as attempts to justify its place in the pantheon of first amendment freedoms are focused only upon the protection of ideas or information. Art can carry ideas and information, but it also goes beyond logical, rational, and discursive communication. It provides a risk-free opportunity to live in other worlds, enlarging individual perspective and strengthening individual judgment.

A strong analogy can be drawn between the protection of art and the protection of religion, which also cannot be fully explained by reference to its content. For art to be fully and strongly protected, the existing interpretations of the First Amendment's Speech Clause, all of which turn on the protection of ideas or information,[12] should be understood as partial justifications for a limited category of speech. Art and religion form a prism through which the First Amendment is transformed from a haven for ideas to a means of protecting vital spheres of personal freedom. These spheres are anathema to totalitarian regimes and crucial to securing liberty alongside a representative democracy.

Art and the artistic community construct paths out of repression.[13] Understood from this perspective, art should be at the center

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specific states is a function of stability, survival and extinction are functions of resilience. A system which is very resilient can have a very low stability—that is, it may fluctuate greatly—but survive. Conversely, a system with high stability may lack resilience such that any change or disturbance simply destroys the system.

Alicia Juarrero-Roqué, *Fail-Safe Versus Safe-Fail: Suggestions Toward an Evolutionary Model of Justice*, 69 Tex. L. Rev. 1745, 1749 (1991) (footnotes omitted). Similarly, the theory of dissipative structures created under nonequilibrium conditions recognizes that "nonequilibrium may be a source of order." Id. at 1747 (quoting Ilya Prigogine, *From Being to Becoming: Time and Complexity in the Phyical Sciences* 81 (W.H. Freeman, 1980)).

11. See Part IV.A.1.

12. See notes 124-39 and accompanying text.

13. See, for example, Robert J. Lifton, *Thought Reform and the Psychology of Totalism* 471 (Norton, 1989) (citing "the artistic" as one of the "alternatives to totalism"); Steven Lukes, *Introduction*, in John Keane, ed., *The Power of the Powerless: Citizens Against the State in Central Eastern Europe* 11-12 (Sharpe, Paul Wilson trans. 1985) (citing Czech writer Vaclav Benda's call for a "cultural underground," including rock music, graphic art, alternative theatre, and unofficial publishing, as important in the Czech reform movement); Vaclav Benda, *Catholicism and Politics*, in Keane, ed., *The Power of the Powerless* at 120 (stating that the cultural underground formed "one of the largest identifiable constituencies" of the Czech reform movement). See also Timothy G. Ash, *The Magic Lantern: The Revolution of '89 Witnessed in*

of our efforts to understand and promote the anti-tyranny mission of the First Amendment.[14] Accordingly, first amendment jurisprudence should reflect art's integral role in preserving the constitutional balance between the governed and the governing.[15] The existing jurisprudence falls far short of this goal.[16]

This Article offers a theory within a theory: it posits that representative democracy demands means of challenging government and that art performs this function in a singular way. In Part II, I articulate a theory of representative democracy that requires a strong, liberty-reinforcing First Amendment, and I set forth art's integral function in a successful representative democracy. In short, art provides the opportunity to experience alternative worlds and therefore to gain distance and perspective on the prevailing status quo. Part III provides empirical examples that illustrate art's destabilizing potential and the hand-in-glove relationship between totalitarian regimes and art censorship. In Part IV, I describe the existing treatment of art in American jurisprudence, and I paint with broad strokes what art's constitutional power—as described in Part II—portends for first amendment doctrine and for public funding related to art. In short, art should receive the most stringent first amendment protection; governmental funding of art should be strictly scrutinized; and arts education in the public schools serves important constitutional ends and therefore should be a high priority.

Warsaw, Budapest, Berlin and Prague 81-82, 121 (Random House, 1990) (noting the active and prominent role that drama students and actors played in the Czech reform movement).

Dedicated to helping ensure democracy in Eastern Europe, the Soros Foundation has poured millions of dollars into supporting the literature and the arts in those countries. Between 1990 and 1992 the Soros Foundation established sixteen new foundations in formerly communist countries and gave over $30 million annually to fund programs including scholarships and travel grants for writers, filmmakers, newspapers, magazines, and theatre. Connie Bruck, *The World According to Soros*, New Yorker 54, 64-65, 72 (Jan. 23, 1995).

14. See Part IV.A.2.

15. See id.

16. See Part IV.A.1.

II. THE ENTROPIC AND VITAL FUNCTION OF ART IN A REPRESENTATIVE DEMOCRACY

> Self-preservation cannot be achieved merely by following principles; it depends on the realization of human potentials, and these can only be brought to light by literature, not by systematic discourse.[17]

Systems of power, once in place, tend to perpetuate themselves and to become encrusted and unresponsive to external demands for accommodation.[18] In other words, they tend to resist change as they become increasingly self-defining and self-referential.[19] The only force that will keep freedom alive is that which irritates the behemoth.[20] The source of the behemoth in the American experience—the scheme of representative democratic government—and the constitutional safeguards against its potential abuses must be delineated before the necessity of art's destabilizing power can be fully appreciated.

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17. Wolfgang Iser, *The Act of Reading: A Theory of Aesthetic Response* 76 (Johns Hopkins U., 1978).

18. See Niklas Luhmann, *Ecological Communication* 16 (U. Chicago, John Bednarz, Jr. trans. 1989) ("[S]ociety does not have to react to its environment"); id. ("[T]he system uses its boundaries to screen itself off from environmental influences and produces only very selective interconnections [with the surrounding and challenging environment]").

This phenomenon is evident in the critique of the Catholic Church levelled by Protestants during the Reformation and of the Protestant Church by the Puritans, and the Churches' reaction (or lack thereof) to these demands for change. See Roland H. Bainton, *The Reformation of the Sixteenth Century* 59-61 (Beacon, 1952) (describing the trial of Martin Luther before the Diet of Worms, which had been "turned inte a church council," where Luther refused to repudiate portions of his teachings and was "put under the ban of the Empire before being subjected to the excommunication of the Church"); id. at 65 (narrating Luther's banishment of Carlstadt who had embraced elements of a program anticipating English Puritanism); Harold J. Grimm, *The Reformation Era, 1500-1650* at 478 (MacMillan, 1969) (observing that, because the Puritans were "[o]pposed both te the all-inclusiveness of Anglicanism and the rigidity of Calvinism as being unscriptural, they proposed a church without ritual and a learned ministry"); Pierre Janelle, *The Catholic Reformation* 8, 11 (Bruce, 1951) (demonstrating how "the main obstacle to reformation in the Church was the complicated entanglement of vested interests," and noting "how tempting it was for the members of the [Catholic Church's] hierarchy to neglect dioceses in which they met the resistance on every hand").

The isolation of the power elite is also fundamental to the Marxist critique of culture, which operates on the notion that the ideology of the power structure is enslaving. See Karl Marx, *On Society and Social Change* 19 (U. Chicago, Neil J. Smelser ed. 1973) (describing the basis of the state as arising from the need to monitor class antagonism and infighting therefore resulting in a state "of the most powerful, economically ruling class, which by its means becomes also the politically ruling class, and so acquires new means of holding down and exploiting the oppressed class"); Ralph Milibrand, *The State and the Ruling Class,* in Tom Bottomore and Patrick Goode, eds., *Readings in Marxist Sociology* 132 (Clarendon, 1983) (noting the Marxist argument that "the state is an essential means of class domination").

19. See notes 72-73 and accompanying text.

20. See notes 8-10 and accompanying text.

The following discussion of art's role in society requires a preliminary caveat: the character of art cannot be fully glimpsed through the lens of the Constitution. There is a devilishly strong temptation in constitutional scholarship to treat the Constitution as the frame or context for all social issues. Yet, the Constitution—for all its absorbing complexity—is only a mechanism for the construction and limitation of government. Art unquestionably has transcendent power, but from the perspective of the Constitution, its value is solely instrumental.[21] Art and the artworld safeguard liberty by serving as a counterweight to the government.

This Article is not intended to be a complete theory of art but rather an account of art's instrumental function in a representative democracy. Because the Constitution is only a plan for government, not a prolegomenon to a comprehensive metaphysics, the phenomenon of art and its value stretch well beyond this Article. In the final analysis, art should not be perceived as being fully defined by the Constitution's treatment of it.

A. Representative Democracy's Mandate for a Liberty-Reinforcing First Amendment

The Constitution is a Janus-faced document. On the one side, it establishes a strong central government and provides this government broad powers to create an effective, efficient, and successful state. On the other side, the document is steeped in the belief that such power must be restrained for the sake of liberty.[22] Thus, the

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21. See Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Free Exercise Jurisprudence*, 29 Ga. L. Rev. 81, 92 n.37 (1994) (criticizing Scott Idleman's observation that "by talking about religion in terms of social utility, we not only place logical limits on the special treatment of religion, we potentially alter the way our culture perceives of religion generally," and noting that religion's instrumentalism, within the constitutional scheme, simply reflects "the fact that the Constitution is a plan for government, not for life").

22. Basic to the constitutional structure established by the Framers was their recognition that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (quoting *Federalist No. 47* (James Madison)). See Bernard Bailyn, *The Ideological Origins of the American Revolution* 56 (Harvard U., 1967) (observing that "the [Framers'] discussion of power centered on its essential characteristic of aggressiveness: its endlessly propulsive tendency to expand itself beyond legitimate boundaries"); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* at 559 (U.N.C., 1969) (asserting that during the convention, Federalists emphasized the "need to distribute and separate mistrusted governmental power"); Hamilton, 29 Ga. L. Rev. at 85-90 (cited in note 21) (discussing the historical milieu from within which the Constitution and the Bill of Rights were drafted); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section Five of the Fourteenth Amendment*, 16

Constitution simultaneously attempts to consolidate political power and to subvert the overreaching exercise of that power.

The Constitution's subversive character resulted from the Framers' threshold decision that effective and efficient government required a representative system, not direct democracy.[23] This pivotal decision to transfer public decision making power from the governed to the governing raised the threat of tyranny, a concern which grounded a significant portion of the convention's debate and produced a constitutional scheme oriented toward limiting government.[24] The original constitutional proposal limited representative government to those powers enumerated, separated power between mutually opposing branches, established a bicameral legislature, divided power between the federal and state governments, and legitimated the constitutional scheme only through a grant of limited authority from the people.[25]

The necessary failure of equivalence between governed and governing not only led the Framers to search for multiple and effective means of limiting the government's power but also led the colonial citizens to protest when no bill of rights accompanied the original Constitution.[26] In response to the people's objection to the insufficiency of the constitutional plan for limiting representative govern-

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Cardozo L. Rev. 357, 361 (1994) (noting that the entire constitutional scheme is "intended to . . . rein in the potentially tyrannical impulses of government").

23. See generally Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L. J. 1503, 1522-24 (1990); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, 527-44 (1994) (describing James Wilson's conceptualization of representation).

24. See Geoffrey Seed, *James Wilson* 62, 74, 131 (KTO, 1978) (discussing Wilson's belief that legitimate governmental authority only flowed from the people); Bailyn, *The Ideological Origins* at 56 (cited in note 22). Hamilton, 69 N.Y.U. L. Rev. at 482-83, 540-44 (cited in note 23). See also Marci A. Hamilton, *Power, Responsibility, and Republican Democracy*, 93 Mich. L. Rev. 1539 (1995) (reviewing David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale U., 1993)).

25. See James Madison, *Notes of Debates in the Federal Convention of 1787* at 616-26 (Ohio U., 1981) (providing the text of the proposed constitution); Hamilton, 69 N.Y.U. L. Rev. at 530-34 (cited in note 23) (describing Wilson's views of popular sovereignty).

26. The absence of a bill of rights from the final draft issuing from the Constitutional Convention resulted in "the most violent attacks on the Constitution." Charles Page Smith, *James Wilson, Founding Father, 1742-1798* at 265 (U.N.C., 1956). "[M]ost . . . citizens throughout the United States [were] unconvinced that a bill of rights was not a necessary safeguard against governmental tyranny." Seed, *James Wilson* at 102 (cited in note 24). See Adrienne Koch, *Madison's "Advice to My Country"* 29 (Princeton U., 1966) (stating that "the extent and vociferousness of the demands for a bill of rights throughout the country" impressed Madison).

ment, and to provide double insurance against governmental overreaching, the Bill of Rights was added to the Constitution.[27]

The function of the First Amendment is to preserve a sphere of private liberty beyond the government's jurisdiction. Whereas the main body of the Constitution erects functional mechanisms to keep the government within acceptable boundaries, the First Amendment explicitly forbids the government from manipulating certain private spheres, such as religion, art, and philosophy. These spheres in turn limit government by serving as counterweights to the government's potential hegemony. Unmediated direct democracy, wherein the governed are the governing, might not require a constitutional scheme so focused upon limiting government or a bill of rights demarcating an extra-governmental sphere.[28] The American blend of representation and democracy, by contrast, can be successful only to the extent that such schemes of limitation and counterbalance succeed.

To understand the notion that the American system of representation requires strong protection for liberty, it is important to stress the distinction between direct democracy—a system alien to the American experience—and representative democracy. Schemes of majoritarian direct democracy, for example, create the possibility of majoritarian tyranny. Every governing decision reintroduces this

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27. James Madison, 2 *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 556 (Prometheus, Gaillard Hunt and James Brown Scott eds. 1987) (remarks of Colonel Mason) (asserting that "a Bill of Rights . . . would give great quiet to the people").

28. By unmediated direct democracy, I do not mean the diluted forms of direct democracy currently in existence in various states. Popular referenda and initiatives are mediated direct democracies, which generally rely on the actions and judgments of elected officials. The citizens' only direct participation in such public decisionmaking is through voting on prepared texts. The people have little involvement with the content per se; others are responsible for the drafting and distribution of the information necessary to reach an appropriate decision. See Eule, 99 Yale L. J. at 1510-12 (cited in note 23). Rather, I invoke the Athenian form of direct democracy where all "citizens," a term that excluded women, slaves, and foreigners, were also rulers vested with public decision making authority.

> Democracy, which reached its most advanced and most active form in Athens, arose from a series of extensions of power to a bigger and bigger class, until in the end this included all free male citizens. It soon developed a marked character which distinguishes it from modern democracies in more than one way.

C.M. Bowra, *The Greek Experience* 73 (Weidenfeld and Nicholson, 1957). See A.H.M. Jones, *Athenian Democracy* 46, 76 (B. Blackwell, 1957) (describing the right of every Athenian citizen, meaning free adult males, to speak and vote in the assembly); I.F. Stone, *The Trial of Socrates* 10-11 (Little, Brown, 1988) (observing that "in democracies like Athens, where all freeborn males were citizens, . . . [e]very citizen had the right to vote and speak in the assembly"); William Scott Ferguson, *Athens: An Imperial Democracy,* in Jill N. Claster, ed., *Athenian Democracy: Triumph or Travesty* 11 (R.E. Krieger, 1967) (noting that "[t]here never was a people which made the principle that all its citizens were equal a more live reality than the Athenians made it; and no state to my knowledge was more cunningly contrived to insure the government of the people than was theirs").

potential problem so that the protection of minority interests becomes the sine qua non to a constitutional scheme intent upon justice and freedom.[29]

Unlike direct democracy, anti-majoritarianism is not the singular touchstone for liberty in a representative democracy. Representatives are independent of the voters, both majorities and minorities, during the term of representation and decision making.[30] In the American system, a majority's power is confined to choosing representatives. Those representatives chosen are not subject to instruction from the majority (or anyone else) on governing decisions.[31] Indeed, voters limit representatives during the term in only two ways: (1) through a two-way communication process, and (2) through the representative's desire to please his constituents for the purpose of winning the next election.[32]

Representatives' decisions are constitutionally legitimate even when they do not reflect the desires of the people. Their power can be wielded against any group or individual regardless of their minority *or majority* status. Indeed, James Madison, often credited as the

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29. James Madison expressed concerns about the tyranny of the majority, which have been translated into an American jurisprudence that focuses rather singlemindedly on majority-minority issues. See *Federalist No. 10 (Madison)*, in Clinton Rossiter, ed., *The Federalist Papers* 77, 80 (Mentor, 1961) (noting that government must strive to "secure the public good and private rights, against the danger of [the majority] faction, and at the same time to preserve the spirit and the form of popular government"). See also Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245 (1994); Hamilton, 29 Ga. L. Rev. at 85-91 (cited in note 21).

30. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1694 (1984) (declaring that the role of the representative is to "deliberate rather than to respond mechanically to constituent pressures"); Cass R. Sunstein, *Interests Groups in American Public Law*, 38 Stan. L. Rev. 29, 79 (1985) (noting that the "original constitutional framework was based on an understanding that national representatives should be largely insulated from constituent pressures").

31. Madison, 2 *The Debates* at 381 (cited in note 27) (remarks of James Wilson) ("The people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings"); Robert Green McCloskey, ed., 1 *The Works of James Wilson* 421 (Belknap, 1967) ("In order to enable and encourage a representative of the publik to discharge his publik trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech").

James Wilson fervently believed that citizens should be able to express their views about government and their representatives through direct elections. See Rebert Green McCloskey, *James Wilson*, in Leon Friedman and Fred L. Israel, eds., 1 *The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions* 88 (Chelsea House, 1969).

32. See generally Carl Schmitt, *The Crisis of Parliamentary Democracy* (M.I.T., Ellen Kennedy trans. 1985). See also George Schwab, *Introduction*, in Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* xi, xviii (M.I.T., George Schwab trans. 1985) ("The core exception of this authority is its exclusive possession of the right of, or its monopoly of, political decisionmaking").

source of the anti-majoritarianism principle, did not limit the potential evils of a representative system to minority suppression. Rather, he recognized that representatives could oppress both the society and minorities, stating, "It is of great importance in a republic, *not only to guard the society against the oppression of its rulers*, but to guard one part of the society against the injustice of the other part."[33]

The potential evil of representative democracy therefore is not fully captured by reference to tyranny by the majority. Rather, the evil to be feared is the tyranny of representatives who hold the power to make legitimate decisions while trampling the liberty interests of any or all of their constituents. Representative democracy makes necessary a constitutional scheme dedicated to protecting the liberty interests of all citizens.

In sum, the American form of representative democratic government is predicated on the desirability of promoting significant counterweights to governmental authority.[34] The First Amendment's contribution to that project lies in the various ways it fosters emotional, intellectual, and spiritual independence from the government. It does so by preventing government from interfering with the autonomous development of religion, art, politics, and family.

A common thread runs through the First Amendment's protection of religion, speech, the press, assembly, and the right to redress. Each is essential to the central and continuing project of preserving liberty in the face of a representative democracy. The First Amendment enshrines the most effective means of challenging the ever-entrenching institutionalization of a government that is inher-

33. *Federalist No. 51 (Madison)*, in Rossiter, ed., *The Federalist Papers* at 323 (cited in note 29) (emphasis added).

34. By "counterweight" I mean private communities or associations and include under this category religion, art, private social organizations, and families. I would distinguish Robert Cover's more restrictive treatment of communities. Cover identifies communities as lawmaking to make the argument that such communities interact with, affect, and define the larger communities' notion of law. Cover, 97 Harv. L. Rev. at 4 (cited in note 8). In effect, he reduces the salient features of community-making to rationally apprehendable normativity and lawmaking activity. By doing so, he brackets off the most interesting aspects of many power structures, for example, those whose power is explicable through more mysterious forces such as religion. See Søren Kierkegaard, *Either/Or* (Princeton U., Howard V. Hong and Edna H. Hong eds. and trans. 1987). But see Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 Harv. L. Rev. 813 (1993) (discussing the incongruity between Cover's notion of law and lawmaking and Jewish notions of the same). Viewing all social constructions as law-defining undermines the multitude of ways in which communities hold and exercise power in the context of human existence, and trivializes art's vital power in the society. Cover's concept of *nomos* falsifies the complexity and mystery of human interaction and therefore fails to explain the essentially extrarational role of art and religion in the society.

ently separate from the people themselves.[35] This balance between liberty and order is achieved through constructive means of subversion. The First Amendment reinforces the subversive quality of the Constitution by preventing government from suppressing the private spheres of religion, art, and philosophy that can enrich the people's capacity to challenge government's ideological hegemony.[36] The thesis of this Article is that art, in all its forms, provides an effective and unique means to this goal and therefore should be protected against governmental encroachment at the highest levels of the first amendment pyramid.

The First Amendment not only provides a haven for ideas but also carves out a sphere of extrarational human empowerment. For example, it protects a sphere of religious freedom that permits religions to maintain their vitality through protection of belief and conduct, protection that stretches well beyond religious ideas per se.[37] A vital religious culture,[38] as well as a thriving press and a lively political discourse carried on through words as well as symbols,[39] are crucial to this function. Similarly, art plays a critical role in unsetting the government's hegemony by increasing the people's capacity to

35. Hamilton, 29 Ga. L. Rev. at 85-94 (cited in note 21) (examining the First Amendment's historical development as a tool to keep government accountable to the people); Hamilton, 16 Cardozo L. Rev. at 362-64 (cited in note 22) (describing the First Amendment's role as a limitation on Congress). Compare with Hamilton, 69 N.Y.U. L. Rev. at 482-83 (cited in note 23) (arguing for an "attorneyship" model of representation that "capture[s] the optimal role for the representative in a liberal republican democracy while preserving a sphere of individual self-rule" and relying on the existence of the legislature's constitutionally limited powers and the Bill of Rights to prevent "overzealous regulation or power grabbing by representatives" and to erect a communication matrix between the governed and the governing). See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar Found. Res. J. 523.

36. The constriction of these private spheres, especially those involving the varieties of human communication, was the target of the thought reform experiments conducted by the Chinese Communist Party. See Lifton, *Thought Reform* at 20-30, 471 (cited in note 13); Petr Uhl, *The Alternative Community as Revolutionary Avant-Garde*, in Keane, ed., *The Power of the Powerless* at 188, 192 (cited in note 13) ("Alternative communities provide the soil in which is nurtured the critical spirit that can influence the whole of society").

37. See generally Hamilton, 29 Ga. L. Rev. at 81 (cited in note 21).

38. See id. at 94 ("[T]hriving religions are compatible and perhaps even necessary for accountable government").

39. See, for example, *United States v. Eichman*, 496 U.S. 310, 315 (1990) (rejecting, where the government conceded, "as it must," that flag burning constitutes expressive behavior, the government's request to reconsider the claim that flag burning as a mode of expression does not enjoy first amendment protection); *Texas v. Johnson*, 491 U.S. 397, 404, 410 (1989) (determining that a state statute prohibiting flag burning violates the First Amendment because the state's concern with protecting the flag as a symbol arose "only when a person's treatment of the flag communicate[d] some message" and recognizing that first amendment protection "does not end at the spoken or written word").

question government on their own terms, rather than the government's.

If liberty is to be certain, there are three essential if not sufficient counterweights to representative government: religion,[40] art,[41] and philosophy.[42] Of the three, philosophy has been privileged by Western Enlightenment thought because of the West's faith in reason;[43] yet art and religion are also crucial to the health of a representative democracy. I have previously argued for the least governmental intrusion possible on religious belief and conduct.[44] In this Article, I focus upon art as a countervailing force that threatens the status quo and checks the oppressive tendencies of representative democracy, capacities which make art deserving of the most stringent first amendment protection.

B. Art's Function in a Representative Democracy

Some Marxist theorists have viewed art (and religion) as simply another manifestation of the power elite's inherent tendency to isolate and crush the lower caste.[45] As discussed below, Marxist

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40. See, for example, Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* 273 (Basic Books, 1993); Tracy, *The Analogical Imagination* at 11 (cited in note 3) (recognizing that religion "formulat[es] conceptions of a general order of existence," and therefore "demands careful analysis from all those interested in values, including those interested in 'fuller' theories of the good for the polity"); David Tracy, *Blessed Rage for Order: The New Pluralism in Theology* 14 (Seabury, 1975) (describing Christian culture as a counterculture); Hamilton, 29 Ga. L. Rev. at 96-97 (cited in note 21).

41. See Part II.B (describing art's challenge function).

42. "Philosophy is a battle against the bewitchment of our intelligence by means of language." Ludwig Wittgenstein, *Philosophical Investigations* § 109, 47e (Oxford U., G.E.M. Anscombe trans. 1953).

43. This tendency is most keenly observed in the contemporary first amendment theories that value speech for its truth-finding capacities and its capacity to contribute to a marketplace of rational discourse. See notes 123-34 and accompanying text.

44. See generally Hamilton, 54 Ohio St. L. J. at 91-96 (cited in note 8); Hamilton, 29 Ga. L. Rev. at 133-35 (cited in note 21).

45. See Henri Arvon, *Marxist Esthetics* (Cornell U., Helen R. Lane trans. 1973) ("Just as the class struggle in general has not yet ended, . . . so it has not yet ended on the literary front. In the class society there is no neutral art nor can there be any such art"); Dave Laing, *The Marxist Theory of Art* 11 (Harvester, 1978) ("The spectator or believer is meant to be overawed, the work of art is a piece of establishment furniture, which makes it clear where power resides"); Leon Trotsky, *Proletarian Culture and Proletarian Art*, in Berel Lang and Forest Williams, eds., *Marxism and Art: Writings in Aesthetics and Criticism* 62 (McKay, 1972) ("Every ruling class creates its own culture, and consequently, its own art"). See also Donald F. Brosman, *Serious but not Critical*, 60 S. Cal. L. Rev. 259, 302 (1987) ("[Marxism advocates that] political and legal representations, art, religion, and philosophy 'must be criticized in theory and overthrown in practice' along with the economic and political structures of society on which they rest"); Lawrence Joseph, *Theories of Poetry, Theories of Law*, 46 Vand. L. Rev. 1223, 1231 (1993) (quoting Michael Hamburger, *The Truth of Poetry* 31 (Harcourt, Brace & World, 1969)) ("[O]ne [does not] need to be a Marxist to recoguize that all poetry has political, social and moral impli-

Mikhail Bakhtin's (and many other non-Marxist thinkers') insight that art can be subversive of culture, even though it might also be its errand boy, is closer to the mark.[46] The insights of sociologist Niklas Luhmann and literary theorist Wolfgang Iser help to illuminate art's challenge function.[47]

Through the imagination, art evinces what purely didactic speech cannot—the "sensation" of an experience never had, a world never seen.[48] Conjuring up that which has not been experienced, it poses a challenge to the participant's preconceived and preordained world view.[49] At a level similar to empathy—a repressed emotion in the Enlightenment's atomistic, rational mindset that permeates constitutional theory[50]—the imagination takes one beyond one's preexisting conceptions and intuitions about life, power, and reality. The aesthetic experience does not occur at the level of the semantic but rather the imaginary; thus, to be conceptually available, it must

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cations, regardless whether the intention behind it is didactic and 'activist' or not"); Richard M. Thomas, *Milton and Mass Culture: Toward a Postmodernist Theory of Tolerance*, 62 U. Colo. L. Rev. 525, 527 (1991) ("The more orthodox Marxist critic, Frederick Jameson, . . . views postmodernist art . . . as being simply 'the cultural logic of late capitalism,' which reproduces on the cultural level the 'reprehensible' instabilities of capitalist modes of production").

46. See Mikhail Bakhtin, *Rabelais and His World* (M.I.T., Helene Iswolsky trans. 1984). See also notes 76-92 and accompanying text; note 87 and accompanying text (discussing the capacity of art to confirm pre-existing values).

47. See notes 17-18 and accompanying text.

48. We ought not permit the meaning of the term "experience" to be confined within "the brackets of one's own existence. The meaning of experience is a poor and haggard thing if it refers only to what has happened to me. The meaning of education and of culture is that we live vicariously a thousand other lives." Sittler, 1986 Christian Century at 293 (cited in note 2). Of course, some art is didactic, or propagandistic, and that art tends to confirm existing world views, rather than to challenge them. See Iser, *The Act of Reading* at 189-90 (cited in note 17).

49. Iser, *The Act of Reading* at 70 (cited in note 17) ("The term *reality* is already suspect [when speaking of literature], for no literary text relates to contingent reality as such, but to models or concepts of reality, in which contingencies and complexities are reduced to a meaningful structure. We call these world-pictures or systems").

50. Liberal theory has failed to recognize the central importance of empathy in governmental structures. This failure is evidenced most clearly in the writings of John Hart Ely and other equal protection theorists (especially Lani Guinier) and in liberalism's theories of representation which depict the ideal representative as a mirror image of her constituents on the ground that empathy is impossible. See John Hart Ely, *Democracy and Distrust* 158 (Harvard U., 1980). In these theories, difference is a necessary danger to freedom for which liberalism offers no way out. See generally Hamilton, 69 N.Y.U. L. Rev. at 496-502 (cited in note 23). Jürgen Habermas most explicitly makes this mistake when he argues that the legitimacy of a representative democracy should be tested against the paradigm of whether the addressees of a law can be identified as its authors. See Hamilton, 93 Mich. L. Rev. at 1555 (cited in note 24) (citing Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Typescript, William Rehg trans. 1995)).

always be translated into the semantic.[51] Art does not challenge existing reality by posing counterfactuals.[52] Nor is the work of art a representation of "concepts of reality"[53] or a copy of reality.[54] Instead, it creates the condition for imaginatively living through a different world altogether. Two phenomena occur simultaneously within the participant's experience of art: (1) the recognition of preexisting world views,[55] and (2) the act of defamiliarization, the distancing of oneself from one's assumptive world view.[56] They operate together to create a reorientation experiment, the commitment-free experiencing of a perspective different from one's own.[57]

1. World Views

> "What possible relationship do I [as a woman] have to a urinal other than to clean it?"[58]

A world view is the individual consciousness of what has been called a " 'thought collective' [which is] a community of persons mutually exchanging ideas or maintaining . . . interaction."[59] Thought collectives have their own "thought styles" that encompass a "given stock of knowledge and level of culture."[60] Art conjures up the experience of foreign world views by imaginatively introducing resonating elements from the environment, which have been neutralized or negated by the domestic social system.[61] It operates to dissolve and

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51. Wolfgang Iser, *Prospecting: From Reader Response to Literary Anthropology* 232 (Johns Hopkins U., 1989) ("[M]eaning as such is not the ultimate dimension of the literary text, but of literary theory, whose discourse is aimed at making the text translatable into terms of understanding").

52. Id.

53. Karel Kosik, *Dialektika Konkretniho: Studieo Problematica Cloreka a Sreta* 123 (Praha, 1965) (quoted in Iser, *The Act of Reading* at 29 (cited in note 17)).

54. Id. at 181. While Plato criticized art for its incapacity to match reality, reader response theory celebrates art's contrast to reality.

55. See Part II.B.1.

56. See Part II.B.2.

57. See Part II.B.3.

58. Jody Kolodzy, *. . . But a Woman's Work is Never Done (especially on canvas)*, Seven Arts 36, 39 (Nov. 1993) (quoting Rhonda Shearer's comments on Marcel Duchamp's *The Fountain*).

59. Ludwik Fleck, *Genesis and Development of a Scientific Fact* 39 (U. Chicago, Thaddeus J. Trenn and Robert K. Merton eds., Thaddeus J. Trenn and Fred Bradley trans. 1979) (emphasis omitted).

60. Id.

61. Iser, *The Act of Reading* at 70-72 (cited in note 17). The notion that art, politics, and society inhabit different but overlapping spheres and that each provides contextual meaning for the other is not uncommon. See, for example, Salman Rushdie, *Imaginary Homelands* 9-21 (Granta, 1992), and Edward W. Said, *Orientalism* 13 (Vintage, 1979), for discussions of this

recombine existing social meaning, which is to say reality.[62] Art is not so far removed from reality as it might make itself seem at times.[63] It can only operate within the limits of possible communication: visual art must be seeable, music hearable, and text readable. Within those contours, art is an agent of challenge to preexisting world views. The system of art itself can be an environment for politics and government.[64]

The most vexing problem for contemporary literary criticism has not been the post-Enlightenment problem of *escaping* the subject/object divide.[65] Theorists have persuasively accounted for the literary experience as neither wholly textual (objective) nor wholly experiential (subjective).[66] Rather, the key problem[67] has been accounting for the possibility of change or the experience of the "new" within the interpretive community.[68] Late twentieth-century literary criticism seems to have left us "adrift in the intertext."[69] If all

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concept, and K. Dian Kriz, *Dido Versus the Pirates: Turner's Carthaginian Paintings and the Sublimation of Colonial Desire*, 18 Oxford Art J. 116 (1995), for an example of the application of the concept.

62. Niklas Luhmann, *Essays on Self-Reference* 225 (Columbia U., 1990).

63. Id.

64. Murray J. Edelman, *From Art to Politics: How Artistic Creations Shape Political Conceptions* (U. Chicago, 1995).

65. It would be true to say that the old Subjective-Objective paradox is, and always has been, irrelevant to the arts. Clearly each and every response to a work of art is personal. However, since we live in Western Civilisation and are biologically similar, it is equally clear that in certain circumstances one individual's reaction will very much resemble that of another.

Philip Hobsbaum, *Theory of Criticism* xiii (Indiana U., 1970).

66. One of the best among these theorists is Wolfgang Iser. See generally Iser, *The Act of Reading* (cited in note 17); Iser, *Prospecting* (cited in note 51); Wolfgang Iser, *The Implied Reader: Patterns of Communication in Prose Fiction from Bunyan to Beckett* (Johns Hopkins U., 1974).

67. This problem is most difficult for interpretive community theorists such as Stanley Fish who are attempting to correct the errors of objectivism and subjectivism simultaneously. See Stanley Fish, *Is There a Text in This Class: The Authority of Interpretive Communities* 1-17 (Harvard U., 1980). Fish heavily criticizes Iser on the ground that Iser is trying to have it both ways: total subjectivity coupled with complete objectivity. Stanley Fish, *Why No One's Afraid of Wolfgang Iser*, 11 Diacritics 2, 12-13 (March 1981) (reviewing Iser, *The Act of Reading* (cited in note 17)). Fish says there is no textual objectivity, the text means what the community says it means (whatever the text might "say"). Id. at 9-12. Fish thus escapes what he perceives as the greatest evil in modern literary theory—infinite relativism—but his theory does raise the prohlem of infinite self-referentiality within the interpretive community. Luhmann, on whom Iser explicitly builds his literary theory, provides a path out of that problem in his general systems theory, discussed in notes 70-75 and accompanying text. Fish's criticism of Iser is therefore faulty in its failure to apprehend the deep structure of Iser's thought.

68. Fish, 11 Diacritics at 9-12 (cited in note 67).

69. Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights—Comment on Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work,"* 68 Chi.-Kent L. Rev. 805, 805 (1993).

meaning is created within and governed by a self-contained community, then how does this given experience of the "new" occur?[70] And where does it come from? Intersubjectivity, intertextuality, and deconstruction evidence the postmodern destruction of modernism's subject/object division but leave us with a critical theory which cannot account for the experience of the "new." If nothing is new, then time is standing still, and all art is merely copying.

Postmodern literary theory, depicting a one-time event between reader and text, seems to deliver us into a frozen present tense.[71] The object is no longer characterized as timeless, nor is the subject—it has been widely accepted that perspectives on each (and therefore each themselves) are inherently transmutable—but the relationship between the subject and the object seems to be wallowing in a timeless morass, with no way out. The project for postmodernity then is to bring time, or even more importantly, its marker, change, into the phenomenological framework of communication.

Systems perpetuate themselves even when they are internally contradictory or based on paradoxical premises. A system "cannot see what it cannot see . . . [m]oreover, it cannot see that it cannot see this."[72] Furthermore, there is "negligible resonance capacity among the subsystems of society as well as the relation of society to its environment."[73] Systems *can* be adjusted, however, via irritation from the environment. The backgrounded environment can stimulate the system to alter itself if the irritation produces sufficient resonance within the system's communication structure.

Systems reduce the complexity of the data present in the environment through ordained structures that are matrices of communication. Our limited capacity for apprehension prohibits us from operating within a system-less environment of data. Because of our radical finitude, systems by their nature tend to be closed communication matrices that contain within them only the latent potential for change.[74] The project of change and accommodation, or evolution, is therefore one of identifying the means of interconnection between

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70. The necessity (and difficulty) of accounting for the "new" is most acute in the system of art, which internally defines its evolution as the continual appearance of the new. See Luhmann, *Essays on Self-Reference* at 191-214 (cited in note 62); Niklas Luhmann, *The Differentiation of Society* 242, 355 (Columbia U., 1982).

71. The very title of Wolfgang Iser's pathbreaking work, *The Act of Reading*, illustrates this point.

72. Luhmann, *Ecologieal Communication* at 23 (cited in note 18).

73. Id. at 35.

74. See generally id. at 11-23. For an illuminating discussion on autopoietic systems, and their simultaneously closed and dynamic properties, see Jacobson, 87 Mich. L. Rev. at 1649 (cited in note 10).

systems and their multiple environments. At one level, there is fundamental similarity between all systems and subsystems because a system is by definition a matrix of communication.[75] But interconnection between the system and that which is beyond the system (whether it be another system or unsystematized data) is a question of translation. The environment is the collection of data to which the system has not yet attached meaning. It has the capacity to irritate a system but only if the system has a communication structure which will resonate in response to the irritation. Irritations continue to be only irritations until they can be translated into the language of the system, but the possibility of such irritation phenomenologically describes how systems change. Art is an ever-present irritant to the social and legal system.

2. Defamiliarization

> "I was walking by the Thames. Half-past morning on an autumn day. Sun in a mist. Like an orange in a fried fish shop."[76]

So begins one of the great novels in British literature. The vagabond artist Gulley Jimson's description of the time of day and the sun illustrates the point I make for the duration of this Section: Art defamiliarizes[77] preexisting systems of meaning. By defamiliarization, I mean the phenomenon of consciousness by which one permits a familiar world to move to the background and simultaneously experiences a new world. The new world is comprehended through its difference from the familiar. For example, one familiar experience of a forest includes the color green, leafiness, and somewhat random positioning of the trees in nature. In contrast, a painting could depict the trees as gray, aligned as though in military formation, and barren. During the experience of the painting, the familiar world of green trees is backgrounded and the quite different world of gray trees is foregrounded. This new "forest" challenges preconceptions of forests in general, stretching the imagination to fit gray, military trees under the rubric "forest." The experience teaches one to see the gray forest as different from the

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75. Luhmann, *Ecological Communication* at 16-17 (cited in note 18).
76. Joyce Cary, *The Horse's Mouth* 1 (Harper, 1944).
77. See Victor Shklovsky, *Art as Technique*, in Paul A. Olson, ed., *Russian Formalist Criticism: Four Essays* 3-24 (U. Nebraska, Lee T. Lemon and Marion J. Reis trans. 1965).

usual image and to see a green forest as a nonuniversal phenomenon. Thus, the defamiliarization experience threatens conventional world views by offering an alternative and by making the conventional world view appear less determined.

For the ordinary observer, the sun is that star in the sky that provides light following night, and morning is a period of hours calculated by the clock. "Half-past morning" is a phrase we simply do not use. But as you read *The Horse's Mouth* and step into Gulley Jimson's shoes, you "see" that the sun can look like an orange in a fried fish shop and that the experience of daylight can feel like "half-past morning." Your horizon of meaning has been revised. The sun and the daily experience of time have been defamiliarized. Art's instrumental, first amendment value lies in its capacity to bring to the foreground some aspect of the environment's complexity that, within the autopoietic system of meaning, had been excluded and to compare the foregrounded material against the reader's previously held, but now backgrounded, original world view.

Defamiliarization is the capacity for a work to reveal new perspectives.[78] Art does not elegantly simplify our world views for merely one moment of aesthetic bliss but rather turns us away from one reality to another. Drawing upon this insight, twentieth-century reader response theory has detailed how defamiliarization occurs for the reader of the literary text. In order to be systems at all, systems necessarily exclude certain possibilities latent in the environment. "[L]iterature supplies those possibilities which have been excluded by the prevalent system [and] endeavors to counter the problems produced by the system," doing so through what Iser has labelled the "literary repertoires."[79]

The act of reading is composed of two competing and interacting repertoires, that of the text and that of the reader. A reader brings to the reading experience a set of closed world views. The text brings to the experience a tension between the world view it takes as given (in other words, that which it backgrounds) and the world view it suggests in contrast (or foregrounds).[80] "The contemporary reader will find himself confronted with familiar conventions in an unfamiliar light, and, indeed, this is the situation that causes him to become

78. See generally id.

79. Iser, *The Act of Reading* at 73 (cited in note 17).

80. Id. at 94 ("In the literary text, not only is the background unformulated and variable, but its significance will also change in accordance with the new perspectives brought about by the foregrounded elements; the familiar facilitates our comprehension of the unfamiliar, but the unfamiliar in turn restructures our comprehension of the familiar").

involved in the process of building up the meaning of the work."[81] As that project proceeds, the reader backgrounds her preexisting world view as she experiences a world view presented by the text.[82] There is no transportation of the reader away from her preexisting world views, rather they remain the meaningful backdrop against which this new experience unfolds.[83] "Those elements of the [text's] repertoire which are familiar to the reader through their application in real-life situations, lose their validity when transplanted into the literary text. And it is precisely this *loss* of validity which leads to the communication of something new."[84] The function of the text then is to permit the reader to examine "familiar reality with new eyes."[85]

The experience of the new, which is part and parcel of the reader's capacity to background his preexisting world view, is made possible by the ever-latent negativity of the text.

> [N]egativity is the structure underlying the invalidation of the manifested reality. It is . . . the nonformulation of the not-yet-comprehended, it does no more than mark out a relationship to that which it disputes, and so it provides a basic link between the reader and the text. If the reader is made to formulate the cause underlying the questioning of the world, it implies that he must transcend that world, in order to be able to observe it from outside. And herein lies the true communicatory function of literature.[86]

The phenomenon of defamiliarization does not *necessarily* undermine the reader's world views but rather creates the possibility for challenge. The encounter may also result in reaffirmation of preexisting world views.[87] Whatever conceptual evaluation follows the encounter between reader and text, however, "the same [initial]

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81. Id. at 78.

82. There is no one world view evinced by the work. The genius of Iser's approach lies in its capacity to explain multiple interpretive variations while rejecting the notion of an infinity of subjective, relativistic interpretations. See id. at 85 (arguing that access is not arbitrary).

83. Id. at 80 ("[T]he fact that an old context is replaced by a new one does not mean that it disappears altogether. Instead, it is transformed into a virtual background against which the new subject matter can stand out in clear relief").

84. Id. at 83.

85. Id. at 181.

86. Id. at 229-30. See also David Bleich, *Intersubjective Reading*, 17 New Lit. Hist. 401 (1986).

87. Because the two repertoires may overlap to varying degrees, different types of literature introduce the "new" to varying degrees. "[R]hetorical, didactic, and propagandist literature will generally take over intact the thought system already familiar to its readers. . . . This observation holds good for medieval mystery plays right through to present-day socialist realism. What such texts set out to communicate is a confirmation of values already known to the public." Isser, *The Act of Reading* at 83 (cited in note 17).

balancing function" occurs.[88] Tension between the text and the reader is experienced as disorientation, which demands a fresh interpretation or a retreat to reaffirmation of the status quo.

The variety of artforms have this defamiliarizing potential, from literature to visual art to music.[89] Modern visual art has taken its challenge function with respect to one particular world view very seriously. Its project has been to challenge the concept of art itself.[90] The examples are obvious and well known: Duchamp, Warhol, and Lichtenstein, among others. They have incorporated the mundane into their works, backgrounding the history of aesthetics as they foregrounded an object previously perceived as solely utilitarian or pop.[91]

The defamiliarizing capacity of a particular work of art is proportional to the particular reader's store of the familiar. For the art critic, Duchamp's *The Fountain* challenges preexisting and antique notions of the definition of art and the permissible content of art. Other world views can also be brought to bear on *The Fountain*. Some, in fact, would indicate that there are times (probably many) when the intended challenge function of a particular work misses the mark. As the quote at the beginning of the preceding section intimated, a woman may take a rather different view of *The Fountain* than a man for the very reason that the urinal intimately familiar to the man, and therefore a strong candidate for ironic defamiliarization, while it is simply another porcelain object to be cleaned to the woman and, therefore, the force of *The Fountain*'s challenge to prevailing aesthetic values may fall flat. In other words, how the work resonates with some aspect of the participant's preexisting world view shapes the contours of the reorientation experiment.

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88. Id.

89. See id. at 227-28. See also Nelson Goodman, *Ways of Worldmaking* 40 (Hackett, 1978).

90. Monroe C. Beardsley, *Aesthetics: Problems in the Philosophy of Criticism* 267-69 (Harcourt, Brace, 2d ed. 1981).

91. The tension set up between background and foreground is intensely self-referential within the art world's system of communication, creating a tendency to think that art itself has been relegated to a system that is open only to elites and insiders. See Luhmann, *Essays on Self-Reference* at ch.11 (cited in note 62). That, in my view, however, is an inductive error. The fact that modern art has posed questions to the definition of art itself and that challenge has had little relevance to the world views of the larger public does not argue against the power of art to challenge other existing world views. It mistakenly identifies art's capacity to challenge a particular target (what art means within the community of the art elite) for the full range of art's challenge capacities. This focus is wrong. Rather than focus upon the fashionable and contemporary target of some art, we should focus on art's inherent capacity to drive a wedge into an otherwise closed system, namely its challenge function.

In sum, the experience of art is one of disorientation and defamiliarization. It is a clash between the given and the not-yet-incorporated. By decontextualizing the already-given, it creates the possibility for critique and change of existing world views. And it does so without forcing the reader through a factual experience of the challenging world view. It is a marvelous time, energy, and resource economizer: "Art, especially literature, is a great hall of reflection where we can all meet and everything under the sun can be examined and considered. For this reason it is feared and attacked by dictators, and by authoritarian moralists."[92]

3. The Ongoing Reorientation Experiment

> "[A] work of art . . . makes it appear to us for the time that we have lived another life—that we have had a miraculous enlargement of experience."[93]

Through defamiliarization, the participant has the opportunity to engage in a reorientation experiment. Ironically, the post-Enlightenment tendency to trivialize the importance of art is evident in aesthetic theory. There is an unstated presumption that all one will derive from a work of art is what one perceives in the presence of the work. Iser seems to be guilty of this fault in his concentrated focus on the "act of reading," as are most other theorists who attempt to describe the *experience* of art.[94] Henry James himself, who succinctly described the experience of art in the quote above, fell into the trap of limiting the experience to "the time" of reading the work. Missing from these descriptions of aesthetic experience is the phenomenon of memory.

The experience of art is not complete following factual perception of it, whether it was seen, heard, or felt. The defamiliarization effect of the work may occur simultaneously with one's factual perception, or it may be stored and triggered later. In other words, its defamiliarization capacity can remain latent.

This universal aspect of art is illustrated by the following hypothetical. One could read Sinclair Lewis's novel, *Babbitt*,[95] as a teenager and be ill-prepared to respond to its vision. The book's de-

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92. Iris Murdoch, *The Fire & the Sun* 86 (Clarendon, 1977).
93. James E. Miller, Jr., ed., *Theory of Fiction: Henry James* 93 (U. Nebraska, 1972).
94. Beardsley, *Aesthetics* at 44 (cited in note 90).
95. Sinclair Lewis, *Babbitt* (Harcourt Brace, 1922).

scription of a middle-aged company man enslaved by society's rules may be absorbing, but not particularly relevant, to the limited experience of a teenager. Babbitt's ethical choices are not therefore provocative. Twenty years later, laden with pressing responsibilities and attempting to live a virtuous life, while becoming increasingly aware of the difficulty of both living such a life and knowing whether one is doing so, that same person might find herself (without returning to the book) reliving the experience of the book. *Now* she sees the tension in the book; she sees that Babbitt's dilemmas were difficult and that the novel's judgment of him was perhaps harsh but right. As a sixteen-year-old, it would have been easy to finish the book and tell oneself that one should not live Babbitt's life. But that conclusion reflects the conviction of an individual whose virtue has been untried. A teenager's world view makes it impossible for *Babbitt* to initiate a reorientation experiment. In short, the teenager lacks the familiar to be defamiliarized. Once one has earned familiarity with the world view being challenged by *Babbitt*, however, *Babbitt*'s defamiliarization potential is realized. The thirty-five-year-old can experience the book (without rereading it) as a newly opened world that challenges the newly created status quo.

The value of art lies not merely in its contemporaneous experience, but also in its capacity to be a future, potent, immanent tool of critique. A store of such experiences is invaluable against the bewitchment of one's common sense by the potent and prevailing powers in society, including those of the government.

III. EXAMPLES OF THE RELATIONSHIP BETWEEN ART AND GOVERNMENT

History is replete with examples where art threatened entrenched power structures and in so doing secured a measure of freedom. Although the many examples are too numerous to catalogue here, it is worthwhile to provide a handful of illustrative examples to make my art speech thesis more clear.

In modern times, novels have defamiliarized generations from a variety of social conditions. A striking instance is Abraham Lincoln's famous comment to Harriet Beecher Stowe, author of *Uncle Tom's Cabin*, who upon meeting her said in all seriousness, "So this is

the little lady who made this big war."[96] *Uncle Tom's Cabin* was an incendiary work in its time. Its power to subvert the prevailing status quo is evidenced by the strong reaction to it. Schools in the North and the South prohibited students from reading the book and some even required students to pledge never to read it.[97] Its world view was so starkly removed from the familiar that neither side of the Civil War found it palatable, even fifty years after its publication.[98] During the Victorian era, numerous authors wrote creative works that brought to light government-sanctioned, dismal social and working conditions.[99] The worlds these novels evoked were instrumental in expediting social critique and change.[100] In contemporary times, Salman Rushdie's novel, *The Satanic Verses*, undermined the accepted orthodoxy of the Islamic culture and was met by the Iranian government's call for his assassination.[101]

Turning to the world of music, where original works typically transport the hearer away from prevailing reality, rock and roll music and the culture surrounding it regularly defamiliarize accepted status quo presuppositions.[102] Indeed, rock music has initiated a subversive dialectic on culture which has turned back upon itself.[103] Finally, visual art since Impressionism has been one era after another that reorients the view's perspective, prompting dictatorial ideologues such as Hitler and Stalin to destroy and suppress the new.

Yet even that art which does not foment a revolution and is not directly aimed at the government accomplishes the end of eularging the sphere of liberty. Recent communist and totalitarian regimes provide a vivid and practical context that emphasizes the utility of art. Along with religion and philosophy, art is a hedge against ideological totalism.[104] A multiplicity of world views and the

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96. Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* 3 (Oxford U., 1962).

97. Id. at 4-5.

98. Id.

99. See, for example, Christopher Hampton, ed., *A Radical Reader: The Struggle for Change in England, 1381-1914* at 454-546 (Penguin, 1984).

100. See Kate Flint, ed., *The Victorian Novelist: Social Problems and Social Change* 7 (Croom Helm, 1987) (explaining how these novelists' rhetorical choices were chosen "to publicise dreadful social conditions, and, beyond this, to stimulate a belief in the need for action").

101. Salman Rushdie, *The Satanic Verses* (Consortium, 1989).

102. See generally Linda Martin and Kerry Segrave, *Anti-Rock: The Opposition to Rock 'n' Roll* (Anchor Books, 1988); any issue of Wired Magazine.

103. See Martin and Segrave, *Anti-Rock* at chs.12, 15, 28 (cited in note 102).

104. When power leads man toward arrogance, poetry reminds him of his limitations. When power narrows the areas of man's concerns, poetry reminds him of the richness

individual's capacity to test differing views threaten the totalitarian state's basic tenet: unanimity of viewpoint through the atrophy of the individual qua individual.[105] The totalitarian state pursues citizen control through either voluntary or forced repressive measures, overtly treating citizen independence as a menace to the status quo and its ruling authority.[106] In particular, governmental arts funding

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and diversity of his experience. When power corrupts, poetry cleanses, for art establishes the basic human truths which must serve as the touchstones of our judgment.

Charles Champlin, *The Blessings of Liberty*, L.A. Times F1 (Dec. 28, 1989) (discussing the artists' role in the downfall of Communism in Eastern Europe). See John Russell, *Tyrants Fall; Art Endures*, N.Y. Times § 2 at 1 (Feb. 18, 1990) (concluding that "[i]n the face of fragmentation and alienation [art] restores our identity, reactivates our memory and gives us precisely the reorientation that we sometimes need," whereas "it is the function of the tyrant to destroy memory, black out identity, and obliterate the alternative"). See generally Harvey M. Weinstein, *Psychiatry and the CIA: Victims of Mind Control* (American Psychiatric, 1990); Harry Kalven, Jr., *The Negro and the First Amendment* 15-16 (Ohio St., 1965) ("The doctrine that criticism of government officials and policy may be viewed as defamation . . . [and] punished as a serious crime . . . is found as the hallmark of all closed societies throughout the world. . . . [T]he absence of seditious libel as a crime is the true pragmatic test of freedom of speech").

105. Edgar H. Schein, Inge Schneier and Curtis H. Barker, *Coercive Persuasion: A Socio-psychological Analysis of the "Brainwashing" of American Civilian Prisoners by the Chinese Communists* 55 (W.W. Norton, 1961). See Theodore H.E. Chen, *Thought Reform of the Chinese Intellectuals* 79 (Hong Kong U., 1960) (stating that "[i]ndividualism is . . . a central target of [totalism's] attack. . . . [T]he replacement of individualism by collectivism means in the last analysis the total surrender of the individual to the Party and the state. Once this has been accomplished, thought reform will have been complete"); Schein, Schneier and Barker, *Coercive Persuasion* at 61 (outlining the "avowed and implicit aims of thought reform" as creating a new man, changing attitudes, producing obedient and energetic party workers, initiating individuals not yet committed ideologically into Communist society, and producing ideological unanimity); Uhl, *The Alternative Community*, in Keane, ed., *The Power of the Powerless* at 192 (cited in note 13) (observing that in Stalin-like bureaucratic dictatorships "any form of expression that is not under bureaucratic control is necessarily disruptive. Every independent act, both individual and, even more, collective, consequently provokes conflict with bureaucratic power, regardless of whether it is deliberately aimed against the system or whether it merely desires to exist . . . without provoking conflicts"). See generally F.A. Hayek, *The Road to Serfdom* (U. Chicago, 1944) (stressing the importance of the concept of individualism to freedom); M. Stanton Evans, *The Theme Is Freedom: Religion, Politics, and the American Tradition* (Regnery, 1994) (same).

106. Janusz Bugajski and Maxine Pollack, *East European Fault Lines: Dissent, Opposition, and Social Activism* 48 (Westview, 1989) (arguing that a challenge to communism's overriding objective of silencing critics provokes repressive measures from party elite because the party/state apparatus's survival depends on "stifling dissent and maintaining the status quo").

The political indoctrination of an ideologically totalist state can result in not only political uniformity but also thoroughgoing conformity at many levels. One China observer stated in 1961 that:

> Almost everyone who has had contact with Communist China in recent years has been struck by the degree to which all the citizens look alike, speak alike, and act alike.... In fact, many observers feel somewhat terrified by this massive conformity because it implies a tremendous power potential and has a strong appeal for anyone seeking to lose himself in a powerful cause.

Schein, Schneier and Barker, *Coercive Persuasion* at 56 (cited in note 105). See id. at 57 (observing that "the Communists have clearly come to rely increasingly on repression and control and decreasingly on voluntary support" until the Cultural Revolution (citation omitted)). See also Chen, *Thought Reform* at 77 (cited in note 105) (describing methods of indirect coercion

has been used to redirect the market toward the status quo. No historical example makes the point more clearly than the Cultural Revolution in China where the price for extensive governmental involvement in arts education and creation has been conformity and mediocrity of artistic works.[107]

Because of its destabilizing character, art traditionally has been the target of totalitarian governments. For example, the "thought reform" or "persuasion" experiments in China attempted to eradicate a panoply of art forms,[108] the governments of Eastern Europe suppressed and marginalized art and artists,[109] and Nazi Germany censored all art that would not assist Hitler's ideological goals.[110] Apropros, the Czech Charter of 1977, the manifesto of the

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of a political message). The Cultural Revolution, with its subtler means of suppression led to the same result: "the voices of dissidence [were] effectively stilled, and the People's Republic . . . reverted once again to being a culturally two-dimensional society, a flatland of the mind." Steven W. Mosher, *Broken Earth: The Rural Chinese* 288 (Free Press, 1983).

107. See Fox Butterfield, *China: Alive in the Bitter Sea* 436 (Times Books, 1982).

108. All information from the West is censored and all unorthodox ideas are excluded from the carefully co-ordinated complex of media (e.g., the newspapers, the movies, the radio, loudspeakers in public places, dramatic productions, cartoons, comics, magazines, books, pamphlets, painting, poster art, dances and songs, operas, and village storytellers).

Scbein, Schneier and Barker, *Coercive Persuasion* at 46 (cited in note 105). See also Chen, *Thought Reform* at 78-79 (cited in note 105) (discussing the "Communist disdain of book knowledge or what they consider to be theory unrelated to action").

109. See Jiri Ruml, *Who Really Is Isolated,* in Keane, ed., *The Power of the Powerless* at 181 (cited in note 13) (stating that the Czech reform movement was peopled by "actors banned from acting, singers and musicians condemned to silence, . . . writers and academics forbidden to publish, . . . [and] artists with no opportunity to exhibit," among others).

110. Geoffrey Hartman has mourned the fact that art was capable of being used to Hitler's monstrous ends. See Geoffrey H. Hartman, *Is an Aesthetic Ethos Possible? Night Thoughts After Auschwitz,* 6 Cardozo L. & Lit. 135, 135-37 (1994). Its capacity for "ideological perversion," leads him to question whether art has any saving capacity. Id. at 151. He has confused art with art censorship. Hitler's ideological success is as attributable to the art he suppressed as it is to the art he trumpeted. Censorship of all art except that which serves particular ideological goals is tyranny. Artistic freedom, however, is a force for liberty.

Nazi Germany exercised control over the distribution of art in order to control the emotions of the people. Eric Gibson, *Abstract Art's 'Elitist' Tag a Misnomer,* Wash. Times D2 (June 21, 1992) (noting that many modernists view their art as a means of communication, not the "insidious agent of social division and control those who label it elitist think it is," and warning that such elitist rhetoric was used in Nazi Germany to criticize modern art and "mandate an official, realistic style [making] art an instrument of government propaganda"); Eric Gibson, *Frohnmayer Paints Critics as Bunch of Neo-Nazis,* Wash. Times E1 (Mar. 27, 1992) (quoting John Frohnmayer as recognizing the Nazis' "wide cultural war," and as "be[ing] chilled to the bone with the similarities between even the language that was used in the words of Hitler and Goebbels to what is being used in the political discourse [in the controversy over NEA funding of controversial art]"). See *Menzel v. List,* 267 N.Y.S.2d 804, 806 (Sup. Ct. 1966), modified on other grounds, 279 N.Y.S.2d 608 (1967), rev'd on other grounds, 24 N.Y.2d 91, 246 N.E.2d 742 (1969); Ian Dunlop, *The Shock of the New* 224-59 (American Heritage, 1972) (describing the Nazis'

Czech reform movement, identified the evils of the Czech government as follows:

> Freedom of public expression is inhibited by the centralized control of all the communication media and of publishing and cultural institutions. No philosophical, political or scientific view or artistic activity that departs ever so slightly from the narrow bounds of official ideology or aesthetics is allowed to be published . . . no open debate is allowed in the domain of thought and art.[111]

For decades, the citizens of Eastern Europe lived under oppressive governmental (and political party) structures. Yet, they successfully rose up against these extraordinarily powerful forces.[112]

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confiscation of hundreds of modern masterpieces, including works by Picasso, Chagall, and Gaugin, and displaying them in an "Exhibition of Degenerate Art").

The Nazi *Entartete Kunst* (Exhibition of Degenerate Art) that was first displayed in 1937, was recently reproduced and toured the United States in 1991. The literal translation of *entartete* suggests "biology, natural growth, a natural species gone so far off its genetic course as to be virtually unrecognisable—a perverse mutation." Matthew Collings, *Resistance Heroes of Art*, Guardian 38 (May 20, 1992). "Part of the purpose of *Entartete Kunst* was to undermine the authority not just of well-known artists but of the existing institutions of art." Id.

> What has to be remembered in all this is that racism and anti-Semitism were not just an outgrowth or a byproduct of Nazism but its basis. What drew the millions to Entartete Kunst was the revelation in a highly compressed, spectacularised form of a certain negative ideal. The Nazis claimed that . . . [what] brought the Jews to Germany as well as intellectuals, homosexuality, whores, pacifism, communism, inflation and negro jazz music, were clearly figured in the distortions, disharmony and unnatural colours of modern art.
>
> Just as degenerate art could be weeded out and eventually destroyed—to be replaced by good, pure art by German artists approved by Hitler—so could degenerate elements of society be combed out of the body of the German volk.

Id.

111. Keane, ed., *The Power of the Powerless* at app.218 (cited in note 13).

112. See, for example, Colin McIntyre, *Half a Million East Germans March for Democracy*, Reuter News Service (Nov. 13, 1989); Charles T. Powers, *Commitment of Youth Key to East Europe Upheaval*, L.A. Times A1 (Jan. 21, 1990); Mark Trevelyan, *Walesa Ready to Claim Prize of Polish Presidency*, Reuter News Service (April 11, 1990) (noting Walesa's role in "steering Solidarity to power . . . a triumph that ended more than four decades of Communist rule").

During the historic fall of Eastern Europe in the late 1980s, the U.S. government and many of its citizens in their professional capacities felt the need to share the American democratic experience and even to provide prescriptive advice. See Joan Davison, *America's Impact on Constitutional Change in Eastern Europe*, 55 Albany L. Rev. 793, 793 (1992) (noting the silent impact of the "oldest working constitution" on the Eastern European constitutional development, and the advice and assistance provided by U.S. governmental and nongovernmental consultants in this process); A.E. Dick Howard, *How Ideas Travel: The Bill of Rights at Home and Abroad*, 63 N.Y. St. B. J. 6, 6-7 (1991) (observing that "[t]raffic is heavy between the United States and the emerging democracies," with those Americans who consult on Eastern European constitutions dubbed "constitutional Johnny Appleseeds"); Howard A. Wolf-Rodda, Note, *The Support for Eastern European Democracy Act of 1989: A Description and Assessment of Its Responsiveness to the Needs of Poland*, 17 Md. J. Intl. L. & Trade 107, 107-08 (1993) (discussing American programs in Eastern Europe aimed primarily at currency stabilization, development of private entities, and technical support for economic and political conversion). See generally Cass R. Sunstein, *On Property and Constitutionalism*, 14 Cardozo L. Rev. 907 (1993) (advising Eastern European governments on drafting constitutions). No doubt this

Many factors came into play in the fall of the Iron Curtain including a growing desire for consumer goods.[113] Although organized religion and world pressure played significant roles in facilitating the people's overthrow of their governments,[114] art's societal force clearly assisted the people of Eastern Europe to see beyond the oppression in their daily lives, providing perspective, hope, and a foundation for change.[115] Art is a weapon against the prevailing context, whether it be war,[116] oppression, or an ingrained status quo.

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country has much to teach on this score, but we can also learn plenty from the *failure* of socialism and communism in Eastern Europe.

113. Gale Stokes, ed., *From Stalinism to Pluralism: A Documentary History of Eastern Europe Since 1945* at 182-83 (Oxford U., 1991) (observing Gorbachev's realization that "despite its military strength the Soviet Union is in many ways a Third World country, unable to provide its citizens with what other Europeans consider the basic necessities of modern life," and noting that "[l]owered standards of living . . . and shortages [in Eastern Europe] increased unrest and made the necessity for reforms more and more obvious").

114. The influence of world pressure in the ultimate overthrow of Eastern Europe's communist regimes was evidenced in 1973 when the Conference on Security and Cooperation in Europe convened in Helsinki, and subsequently produced the Helsinki Final Act of 1975. William M. Brinton, *The Helsinki Final Act and Other Covenants*, in William M. Brinton and Alan Rinzler, eds., *Without Force or Lies* 471, 474-75 (Mercury House, 1990). "In return for the acceptance of postwar European borders, the Western powers at the conference demanded the addition of a series of clauses to the Final Act that guaranteed certain human rights." Stokes, ed., *From Stalinism to Pluralism* at 156 (cited in note 113). These fundamental freedoms included the freedom of thought, conscience, and religion, as well as liberty to exercise civil and political rights. Brinton, *The Helsinki Final Act*, in Brinton and Rinzler, eds., *Without Force or Lies* at 475. See *The Helsinki Accords*, in Stokes, ed., *From Stalinism to Pluralism* at 160-62 (cited in note 113). To enforce these human rights provisions, Helsinki Watch groups formed, and in Poland, the Catholic Church formed a similar organization. Id. at 156. The Charter 77 Declaration, signed by Václav Havel and numerous other Czechoslovakian writers, welcomed the Czech government's accession to the Helsinki Final Act, but observed that its existence "serves as an urgent reminder of the extent to which basic human rights in our country exist, regrettably, on paper only." Id. at 163. "It was the lip service paid to these solemn covenants that finally led to the revolution from below." Brinton, *The Helsinki Final Act*, in Brinton and Rinzler, eds., *Without Force or Lies* at 476. See Craig R. Whitney, David Binder and Serge Schmemann, *The Opening of the Berlin Wall*, in Stokes, ed., *From Stalinism to Pluralism* at 255, 256 (cited in note 113) (recognizing Hungary's momentous decision to allow émigrés to go to the West as a declaration that "international covenants on human rights were more important than treaties with other Warsaw Pact nations").

Additionally, "[t]he battle to preserve the morals and morale of traditional religious groups did . . . inspire resistance." Bugajski and Pollack, *East European Fault Lines* at 143 (cited in note 106). See also id. at 142-176 (discussing the organizational initiatives of organized religious hierarchies and the independent social drives of religious activists); Joni Lovenduski and Jean Woodall, *Politics and Society in Eastern Europe* 335-340 (MacMillan, 1987) (describing the German and Polish churches' ability to defend "a more widely defined political interest"); Stokes, ed., *From Stalinism to Pluralism* at 193 (cited in note 113) (observing the "significant role [the Catholic Church played] in the battle against secular totalitarianism").

115. See Shermakaye Bass, *A Man of Art and Letters*, Dallas Morn. News 1C (Jan. 31, 1995) (quoting mail artist John Held, Jr.'s observation that "mail is the way people in Eastern Europe were finding out about Western culture and art in the '60s, '70s and '80s . . . [and] it was through the hope people got through mail art contacts that [communism] toppled"); Champlin,

IV. THE IMPLICATIONS OF ART'S CONSTITUTIONAL FUNCTION

Art is a countervailing force. Because of its threat to the status quo, the government has an almost irresistible urge to meddle with it. Whether the government is funding, distributing, or suppressing artworks, there should be a presumption that such meddling is unconstitutional. The government can overcome this presumption only if its regulation passes the strict scrutiny now applied to political speech.[117] In other words, any regulation of art should be unconstitutional unless the government can prove a compelling interest in such regulation and it can show the regulation directly advances such an interest. Under this view, the Supreme Court's doctrine should be highly protective of art; governmental funding of new art becomes as troubling as its regulation of political speech, warranting skepticism and the highest level of scrutiny; and arts education becomes crucial for the health of a representative democracy.

The case is yet to be made for the compelling interest in arts funding. Time has proven that such funding has a natural tendency to become politicized and therefore unconstitutional. In contrast, arts education in the public schools is a compelling interest in a representative democracy, and decisions to suppress certain works in the schools require careful scrutiny.

A. The Treatment of Art in American Jurisprudence

The legal world has been slow to understand and articulate how art can assist the people to analyze and criticize authority, particularly the government's. If the First Amendment stands for

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L.A. Times at F1 (cited in note 104) (observing the significant role of artists in the fall of communism, and comparing the role of Eastern European writers with that "played by Tom Paine and the other firebrands of freedom in the American Colonies immediately after 1776"); Robin Knight, *Forever Winter in Prague*, U.S. News & World Rep. 30, 30 (Aug. 8, 1988) (finding a glimmer of hope in Czechoslovakia in 1988, with signs of renewed religious and cultural activism, including a wider range of films, plays, and independent art shows that demonstrated the "first stirrings of public consciousness in 20 years" and that "elicited a curiously muted response from the authorities"); Russell, N.Y. Times § 2 at 1 (cited in note 104) (citing specific instances of how "the novelist, the playwright, the poet, the composer, the movie maker, and sometimes the painter or sculptor have been chipping away ever since the end of World War II at the monolithic political structure").

116. Maralyn Lois Polak, *War Games: Interview of Suada Kapic*, Phila. Inq. Mag. 7, 7 (July 17, 1994) (discussing how art has been a "weapon of survival" in the midst of war).

117. See, for example, *Burson v. Freeman*, 504 U.S. 191, 211 (1992); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Carey v. Brown*, 477 U.S. 456, 462 (1980).

anything, the government cannot regulate speech simply because it finds a medium of expression threatening to its ideology.

1. The Error of Protecting Art Only for Ideas' Sake

There is a plethora of political theories explaining or justifying speech's general importance in a democracy, usually by treating speech as a vehicle for rationally apprehended ideas. Differences in approach are attributable to different values regarding the proper ends of a system for generating ideas.[118] Granted, proponents of these theories have been inclined to include art under the category of protected speech,[119] but they have not addressed, much less reconciled,

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118. The competing ends range from a marketplace of ideas, truth, self-fulfillment, venting and self-government. See generally Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford U., 1986) (discussing the limits of traditional theories); Thomas I. Emerson, *The System of Freedom of Expression* (Random House, 1970) (approving a first amendment system that ensures individual self-fulfillment and stability in the community); id. at 17 ("The root purpose of the First Amendment is to assure an effective system of freedom of expression in a democratic society"); Nat Hentoff, *The First Freedom: The Tumultuous History of Free Speech in America* (Delacorte, 1980) (discussing the freedom of speech doctrine vis-à-vis self-governance); Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford U., 1960) (proposing a self-governance theory); Martin H. Redish, *Freedom of Expression: A Critical Analysis* (Michie, 1984) (arguing for a first amendment scheme that fosters self-realization); Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge U., 1982) (discussing traditional theories explaining free speech); Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* 5 (Harvard U., 1990) ("If the first amendment is to have an organizing symbol . . . let it be the image of the dissenter"); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877 (1963) (canvassing various first amendment theories); R.H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 Am. Econ. Rev. 384, 384-86 (May 1974) (characterizing the freedoms contemplated by the First Amendment as a "market for ideas").

119. See, for example, William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 13 (1965) (noting that "literature and the arts . . . fall within the subjects of 'governing importance' that the first amendment absolutely protects from abridgment"); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245.

Dr. Meiklejohn addressed the issue as follows:

> [T]here are many forms of thought and expression within the range of human communications from which the voter derives the knowledge . . . a ballot should express.
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> . . .
>
> [For example, l]iterature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.

Id. at 256-57. See also Owen M. Fiss, *Freedom and Feminism*, 80 Georgetown L. J. 2041, 2057 (1992) ("[S]peech that specifically addresses some question of government policy has an immediate and direct claim to protection under [the self-governance] theory of free speech. But art and literature, even that which makes no mention of politics and government affairs, is . . . protected"); Christopher Pesce, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U. L. Rev. 782, 786 n.30 (1990) ("The First Amendment protects

the difficulty of explaining how a first amendment theory valuing speech for its rationally comprehensible ideas can comfortably accommodate the phenomenon of art.[120] Such a reconciliation is not possible. Art's value in the First Amendment's antityranny scheme is incompletely explained by a system that values speech only for its conceptual content.[121]

Although the Supreme Court has recognized, since at least 1952, that art should receive some first amendment protection,[122] it

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works of art as a form of speech"); Hentoff, *The First Freedom* at 297-313 (cited in note 118) (alluding to the protection of art within his discussion of unprotected work, namely, obscenity in books, movies, and magazines); Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 18-19 (Harper & Row, 1988) (citing cases that recognize first amendment protection of art as raising "speech issues" without reference to the artistic nature of the "speech" at issue).

Evidence of art's low status in the first amendment galaxy is the fact that no constitutional text has a chapter or subchapter devoted to art. See, for example, Edward L. Barrett, Jr., William Cohen and Jonathan D. Varat, *Constitutional Law: Cases and Materials* (Foundation, 8th ed. 1989); Gerald Gunther, *Constitutional Law* (Foundation, 12th ed. 1991); Steven H. Shiffrin and Jesse H. Choper, *First Amendment: Cases, Comments, Questions* (West, 1991); Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein and Mark V. Tushnet, *Constitutional Law* (Little, Brown, 2d ed. 1991); William W. Van Alstyne, *First Amendment* (Foundation, 1991); Ronald D. Rotunda, John E. Nowak and J. Nelson Young, 3 *Treatise on Constitutional Law: Substance and Procedure* (West, 1986); Laurence H. Tribe, *American Constitutional Law* (Foundation, 2d ed. 1988). See also John H. Garvey and Frederick Schauer, *The First Amendment: A Reader* (West, 1992).

120. See William Marshall, *Free Speech and the "Problem" of Democracy*, 89 Nw. U. L. Rov. 191, 199-200 (1994) (reviewing Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993)) (criticizing Sunstein's argnment for protecting artistic speech only to the extent of its political content). But see Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rov. 1, 15-16 (stating that artistic communication is not relevant to the political process and is therefore undeserving of first amendment protection under traditional rationales); Kim M. Shipley, Comment, *The Politicization of Art: the National Endowment for the Arts, the First Amendment, and Senator Helms*, 40 Emory L. J. 241, 258, 263, 265 (1991) (reducing art to its didactic content, "information").

121. Nahmod, 1987 Wis. L. Rov. at 222-23, 262-63 (cited in note 7) (attributing art's "second class status" in the Court's first amendment jurisprudence to the "centrality of political expression in theories of the first amendment," and noting that the marketplace of ideas theory fails to properly "account for the noncognitive aspects of artistic expression"); *Miller*, 904 F.2d at 1093 (Posner, J., concurring) (stating that if the First Amendment only protected ideas, most art would be unprotected).

122. *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952). See generally *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection"); *Southeastern Promotions v. Conrad*, 420 U.S. 546, 557-58 (1975) (noting that live drama is not unprotected by the First Amendment and should not be held to a "drastically different standard" than other forms of expression); *Miller v. California*, 413 U.S. 15, 22-23 (1973) ("[I]n the area of freedom of speech . . . the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression"); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("Wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons" (citation omitted)); *Interstate Circuit v. Dallas*, 390 U.S. 676, 682 (1968) (citing *Burstyn*, 343 U.S. at 495) ("Motion pictures are, of course, protected by the First Amendment"). See Note, *Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 Harv. L. Rev. 1969, 1980 & nn.58-59 (1990) ("An examination of first amendment doctrine strongly suggests that

has yet to provide a theory to undergird the assertion, or to make clear how much protection art ought to receive. Mirroring the commentators' approach, the Court tends to protect art only to the extent that it is a vehicle for ideas, especially political ideas.[123] This approach was summarized succinctly in a recent case. In *Bery v. City of New York*,[124] artists who sell their original works on public sidewalks challenged a city ordinance that requires street vendors to have licenses and excludes newspaper vendors from its coverage. Because there are a limited number of licenses, artists challenged the ordi-

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works of art are presumptively protected speech"). But see *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (commenting that "pictures, film, paintings, drawings, and engravings . . . have First Amendment protection until they collide with the long-settled position . . . that obscenity is not protected by the Constitution"). See generally Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech: A Treatise on the First Amendment* § 2.05[3] (M. Bender, 1994).

Before *Burstyn*, the Court did not contemplate protection of art. See generally John Wertheimer, Mutual Film *Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 Am. J. Leg. Hist. 158 (1993).

123. See *New York v. Ferber*, 458 U.S. 747, 754 (1982) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)) (recognizing that "the lewd and obscene . . . are no essential part of any exposition of ideas"); *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (emphasizing the "right to receive ideas" in the context of invalidating a school district's decision to ban certain literary works); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 61 (1976) (finding "a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance"); *Heller v. New York*, 413 U.S. 483, 487 (1973) (noting the defendant's argument that "the film had social, literary, and artistic importance in . . . providing observations 'about the political and social situation in this country today' "); *Miller*, 413 U.S. at 34-35 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change"); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (determining that the "right to receive information and ideas . . . is fundamental to our free society" (citation omitted)); *Ginsburg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) (observing that the First Amendment guarantees liberty of human expression to preserve a "free trade in ideas"); *Times Film Corp. v. Chicago*, 365 U.S. 43, 47 (1961) (determining, where petitioner claimed that "the nature of the film is irrelevant, and that even if this film contains the basest type of pornography . . . it may nonetheless be shown without prior submission for examination," and that "it has never been held that liberty of speech is absolute"); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959) (finding that New York had prohibited "the exhibition of a motion picture because that picture advocates an idea . . . [y]et the First Amendment's basic guarantee is of freedom to advocate ideas"); *Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 529 (1959) (noting that Congress had recognized that the "art of radio broadcasting" is an important medium for communicating political ideas); *Burstyn*, 343 U.S. at 501 (concluding that "[t]he importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform").

But see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) (noting "the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character"). In addition, one case in dicta has recognized the emotive value of expression. See *Cohen v. California*, 403 U.S. 15, 18-19 (1971).

124. 1995 WL 638797 (S.D.N.Y. Oct. 27, 1995).

nance on first amendment and fourteenth amendment grounds. They lost in large part because the court drastically undervalued art speech. Judge Cedarbaum acknowledged that "[a]rt is enormously important in advancing civilization," but erroneously reasoned that the encouragement of artistic activity was beyond the court's responsibility.[125] Thus, she ruled that the pictorial art at issue deserved less protection than political speech, reasoning as follows:

> Items bearing words that express political or religious views are much closer to the heartland of First Amendment protection of "speech" than the apolitical paintings in these cases. . . . Although some art may be very close to "pure speech" . . . plaintiffs' art does not carry either words or the particularized social and political messages upon which the First Amendment places special value.[126]

Judge Cedarbaum has captured the prevailing attitude toward art, an attitude that completely misses art's instrumental function in the constitutional scheme. While the Court has extended first amendment protection to works whose form defies a search for readily identifiable ideas, such as music or nude dancing,[127] it has never taken up the task of explaining why such works deserve protection even though they do not contribute to a marketplace of ideas per se.

The Court's treatment of the Speech Clause tends to devalue the extrarational, nondiscursive elements of art because its doctrine places so much freight upon ideas. According to the Court, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[128] The marketplace of ideas paradigm, which permeates the speech cases, tends to undervalue art by only recognizing its political, rational, discursive potential.[129] For example, one of the most quoted lines in the Court's first amendment jurisprudence is Justice Brennan's statement in *New York Times Co. v. Sullivan* identifying "a profound national commitment to the principle that debate on public

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125. Id. at *1 ("How the flowering of art is best encouraged in our society is not an issue for the court").

126. Id. at *5.

127. See, for example, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment"); *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) (holding that "entertainment [such as nude dancing], as well as political and ideological speech, is protected" by the First Amendment); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (same); *California v. LaRue*, 409 U.S. 109, 118 (1972) (same).

128. *Roth*, 354 U.S. at 484.

129. See note 123 and accompanying text (stating that the Supreme Court's cases have valued art only for its perceived message). See also Nahmod, 1987 Wis. L. Rev. at 221 (cited in note 7).

issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[130] On these terms, art—with its indirect and more subtle means of communication—appears to be a weak stepsister to reasoned argument, which justifies itself by proving the political content and strength of its message. The Court tends to measure art by its similarities to ordinary speech, rather than by its distinctive structural function that cannot be reduced to the terms of ordinary communication.[131] Even those cases that deal directly with art speech bisect art into message and medium. For example, in *Burstyn, Inc. v. Wilson*,[132] the Court explicitly recognized first amendment protection for motion pictures, but only on the ground that they are "organ[s] of public opinion . . . designed . . . to inform."[133]

Indeed, the Court's general speech doctrine, which examines laws according to whether they are *content*-based, *content*-neutral, or *viewpoint*-based,[134] similarly begs the question of why one would protect art in the first place by presuming that the phenomenon should be separated from an internal message. Although these categories serve a legitimate function, their domination of the Court's doctrine serves to obscure art's capacities beyond the delivery of a rationally apprehendable message.

The one instance where the Court has apparently valued art for its contribution to society is in the obscenity cases. Obscene works

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130. 376 U.S. 254, 270 (1964). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"); *Kingsley*, 360 U.S. at 688 ("[New York has prohibited] the exhibition of a motion picture because that picture advocates an idea . . . [yet] the First Amendment's basic guarantee is of freedom to advocate ideas"); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("The vitality of civil and political institutions in our society depends on free discussion. . . . The right to speak freely and to promote diversity of ideas and programs . . . sets us apart from totalitarian regimes"); *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from [incitements to overthrow the government], the more imperative is the need te preserve inviolate the constitutional right of free speech . . . to maintain the opportunity for free political discussion").

131. See Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993) (dividing the speech doctrine into a "tripartite system" of restrictions on speech: content-neutral, content-based, and viewpoint-based). The Court has made a similar error in its free exercise of religion doctrine wherein it has privileged belief (treated as an idea) and concomitantly failed to provide adequate protection for religious conduct. See Hamilton, 54 Ohio St. L. J. at 713, 722 (cited in note 8).

132. 343 U.S. 495 (1952).

133. Id. at 501.

134. See Sunstein, *Democracy* at 210 (cited in note 131).

are not accorded any first amendment protection.[135] In *Miller v. California*,[136] the Court declared a three-part test for determining whether purportedly obscene materials were obscene as a matter of law. According to the test, any work that is arguably obscene will be deemed not to be obscene if it has "serious . . . artistic . . . value."[137] Although it has been willing to employ aesthetic value in this defensive mechanism, the Court has never pursued the implications of this line of reasoning to *protect* art on grounds distinguishable from the grounds normally offered to protect ideas.[138]

Existing theories provide only fragile protection for the range of works of art. Because a significant number of artworks can be construed to have discursive content, existing theories of art's first amendment content undeniably provide protection to a degree. By basing art's protection on its discursive content, however, these theories compel the courts to find such content in every work of art and force them to struggle with artworks whose communicative essence is

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135. *Miller*, 413 U.S. at 23.

136. 413 U.S. 15 (1973).

137. Id. at 24.

138. For a discussion of how the obscenity doctrine should be transformed to ensure that the Court's doctrine does not devalue art's challenge capacities, see Part IV.A.2.

In addition, those cases plainly involving governmental regulation of artworks—the copyright and trademark parody cases—are curiously devoid of any searching inquiry into the First Amendment's treatment of art. See, for example, *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1179 (1994) (finding that 2 Live Crew's parody of Roy Orbison's "Oh Pretty Woman" may be a fair use within the meaning of the Copyright Act, 17 U.S.C. § 107 (1994 ed.), without delving into the first amendment arena); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F.2d 490, 493 (2d Cir. 1989) (presuming that "parody is a form of artistic expression, protected by the First Amendment" in deciding plaintiff's trademark infringement claim); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187-88 (5th Cir. 1979) (stating, without further elaboration, that "[t]he First Amendment is not a license to trammel on legally recognized rights in intellectual property"); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978) (dismissing the defendants' first amendment claim with a summary discussion of the relationship between copyright and the First Amendment); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964) (stating "as a general proposition . . . that parody and satire *are* deserving of substantial freedom—both as entertainment and as a form of social and literary criticism" and deciding the copyright claim with no explicit first amendment discussion); *Yankee Pub., Inc. v. News America Pub., Inc.*, 809 F. Supp. 267, 272, 279 (S.D.N.Y. 1992) (determining that the defendant's interest in "artistic expression, parody, comedy, or commentary of a type protected hy the First Amendment" far outweighed any injury caused by infringement of the plaintiffs' trademark rights whether or not deemed a parody because "parody is merely an *example* of the types of expressive content that are favored in fair use analysis under the copyright law and First Amendment deference under the trademark law"); Rohert J. Shaughnessy, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 Va. L. Rev. 1079, 1108-12 (1986) (noting that "[n]otwithstanding an occasional acknowledgement of the 'right of satirical expression,' the courts have for the most part ignored the constitutional implications of prohibiting trademark parody" (footnote omitted)).

nondiscursive and nonrational.[139] Moreover, the existing regime forces the courts into a case-by-case analysis of the constitutional value of every work of art. Dance, for example, has proved particularly difficult for the Supreme Court.[140]

While art can address and work through rational faculties, it is neither limited to nor dependent upon them, and even empowers such faculties to subvert their own assumptions. Art stands on much firmer ground if its capacity to communicate nondiscursively is recognized alongside its capacity to carry a more explicit and readily comprehensible message. The crabbed understanding of communication in existing first amendment jurisprudence should be transformed to include art's nondiscursive, perspective-enlarging capacities.

In sum, no one has, as of yet, provided theoretical support for the proposition that the nonrational, nondiscursive elements of art are important to the republican democratic enterprise. Nor has anyone explained how the experience of art—as opposed to the intellectual receipt of its apparent message—might further the democratic project. This Article offers such a theory.

2. Transforming the Doctrine to Protect the Nonrational, Nondiscursive Elements of Art

Art—like religion, political speech, the press, assembly, and grievance redress—is essential to freedom from the entrenched institutionalization of government.[141] No less than any other mode of ex-

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139. See notes 124-26 and accompanying text (discussing a case involving art street vendors' challenge to a city licensing ordinance).

140. Compare *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (categorizing an association for the purpose of recreational dancing as beyond the First Amendment's protection), with *Schad*, 452 U.S. at 66 (stating that nude dancing is accorded first amendment protection); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991) (plurality opinion) (stating that nude dancing for entertainment is "marginally" protected as "within the outer perimeters of the First Amendment"); id. at 585 n.2 (Souter, J., concurring) (indicating that nude dancing in a context other than entertainment, such as in "a production of 'Hair' or 'Equus' " would present a different first amendment question); id. at 592-93 (White, J., dissenting) (concluding that nude dancing, even for entertainment, generates "thoughts, ideas, and emotions [that are] the essence of communication" and therefore deserves the "most exacting scrutiny" (citation omitted)).

141. The best government is the government that governs least intrusively. People ideally want to lead their daily lives. The key value to be sought is freedom *from* government. This point was eloquently stated by playwright Wu Zuguang, speaking about China's Cultural Revolution: "[I] thirst for freedom. Why exactly are we scared? Because they won't leave us alone. So I long for an environment where I can be left alone. That for me is freedom." Ross Terrill, *China in Our Time: The Epic Saga of the People's Republic from the Communist Victory to Tiananmen Square and Beyond* 318 (Simon & Schuster, 1992). Carl Schmitt had the same

pression encompassed by the Speech Clause, art is a lifespring of liberty in the face of representative democracy. Each category of the First Amendment operates differently in and through human existence; each is necessary to accompany its corollary human capacity to bring existing governmental structures to account.

To realize art's full contribution to the First Amendment's task of shoring up counterweights to government, the doctrine must elevate art's value to the pinnacle of first amendment protection as it recognizes art's extrarational value. The obscenity cases in particular require transformation under this formulation. Before concluding that a particular work is obscene and therefore unprotected, the Court currently asks whether a work has "serious . . . artistic . . . value."[142] By insisting on "serious" value, the Court opens wide the way to suppressing scores of artistic works.[143] The history of artistic suppression proves that government should not have this power.[144] The Court should return to its earlier recognition that "[t]he portrayal of sex . . . in art, literature, and scientific works, is not itself sufficient reason to deny [this] material the constitutional protection of freedom of speech and press."[145] Rather than making obscenity the threshold consideration, the doctrine should ask first whether the work or symbolic conduct is communication, including not only discursive speech or conduct but also art's nondiscursive communicative elements that resound as much in the spirit and imagination as in the intellect. While artistic communication involving sexual imagery is currently protected at the margins of the obscenity label, such art speech pos-

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insight but took it to a false conclusion. Schmitt erred in his belief that a dictatorship could be the only path to freedom from government. Schmitt, *Political Theology* at 66 (cited in note 32). As I have argued elsewhere, totalitarianism is not the only alternative to liberalism's belief in rule by individuals. Rather, a limited representative democracy creates the possibility for freedom from government in Schmitt's sense without the submissiveness required of citizens in a dictatorship. See Hamilton, 69 N.Y.U. L. Rev. at Part III (cited in note 23); Hamilton, 29 Ga. L. Rev. at Part I (cited in note 21) (discussion religion's challenge function).

142. *Miller*, 413 U.S. at 24.

143. This was in fact the intention of the drafters of the amendments to the grantmaking regulations for the National Endowment for the Arts, which prohibit the funding of art depicting "sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts, which, when taken as a whole, do not have *serious* literary, artistic, political, or scientific value." Act of Oct. 23, 1989, § 304, Pub. L. No. 101-121, 103 Stat. 741-42 (1989).

144. See generally Edward deGrazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (Random House, 1992); *Roth*, 354 U.S. at 495 (Warren, C.J., concurring) ("The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments").

145. *Roth*, 354 U.S. at 487.

sesses the same insurgent capacities as nonsexual artistic communication and commands strong first amendment protection.

Explicitly recognizing the First Amendment's protection of art's nondiscursive elements would require the Court to break through the rigidity of the marketplace of ideas formulation. Such a move, however, is dictated by the First Amendment's larger mission against governmental intrusion into private liberties. Like religion, protection of art should not follow solely from the protection of a market for ideas or rational discourse. Ideas, surely, are important to the First Amendment's scheme, but focusing the inquiry solely upon ideas limits the Court's capacity to embrace fully art's unique contribution to the private sphere, which the First Amendment sets over against the government.

The Court should consciously elevate art to the top of the First Amendment's pyramid of protection, alongside political speech. There will be times when it *is* political speech, but even when it is not, it furthers the constitutional goal of placing parameters around government. The Court should reject attempts to fit art into the existing speech paradigms, which devalue its distinctive challenge capacities. Limiting first amendment protection to idea protection misses the fullness of the First Amendment's mission against tyranny. Rather than fitting all other types of first amendment interests into the existing rational speech paradigm, the democratic propensities of the particular expression should be identified in light of the First Amendment's challenge functions. Art, political speech, philosophy, and religion deserve first amendment protection geared to their respective instrumental functions.

To return to the thesis with which this Article began, republican democracy is best served by keeping government from meddling with art. Those who advocate governmental regulation and censorship of art for the greater good routinely fail to take into account the importance of the subversive, defamiliarizing value of art to the ongoing project of liberty.[146] A culture rich in a variety of artworks presses back the ever-encroaching reach of governmental ideology. Thus, the Constitution requires that government steer clear of meddling in the art world unless it can prove a compelling interest and no alternative means of regulating the particular issue.

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146. Compare with Amy Adler, *What's Left?: Hate Speech, Pornography and the Problem for Artistic Expression*, 84 Calif. L. Rev. (forthcoming 1996) (criticizing the views of Catharine MacKinnon and Andrea Dworkin).

The suggestion has been made that speech should be protected from governmental intervention because it is property.[147] This is decidedly not why art speech should be protected. Art speech deserves protection against governmental interference because its flourishing furthers the intangible and unquantifiable value of increasing the people's capacity to resist hegemony. One need not transform speech into property in order to conclude that governmental intervention is unacceptable. Much more important in arguing against governmental intervention in the artworld is an adequate and clear understanding of the interlocking relationship between representation and liberty.

Finally, it is difficult to overemphasize the point that the First Amendment only contemplates restrictions on the government. In the end, the Constitution is a rather small instrument in the grand scheme of things. A church, a club, a private school, or a family should be free to wield their private capacities—both financial and moral—to support or to boycott any particular artwork. Let the succeeding art cater to them or criticize them and, more importantly, let it defamiliarize them to their closely held assumptions. But do not let the government, with its force and authority, block the path from the familiar to the new.

B. Public Funding and Art

Art's subversive role in a representative democracy suggests that the government's involvement in the creation of new art ought to be carefully scrutinized and, comcomitantly, that arts education should be a priority.

1. Governmental Subsidization of Art

In the direct democracy of ancient Athens, public support of the arts led to classic examples of effective and stinging criticism of the community's leaders.[148] This is the result toward which art's sub-

147. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49 (forthcoming 1996).

148. See, for example, Aristophanes, 2 *Knights* (Aris & Phillips, Alan H. Sommerstein ed. and trans. 1981) (attacking the powerful demagogue Cleon and parodying Generals Demonthenes and Nicios while winning first prize at the Lenaea, a religious festival where the most important occurrence was the presentation of dramatic performances); Aristophanes, *Acharnians* (Aris & Phillips, Alan H. Sommerstein ed. and trans. 1980) (criticizing General Lamachus and also winning first prize at the Lenaea). See also Lowell Edmunds, *Cleon, Knights, and Aristophanes' Politics* (U. Press of America, 1987).

versive character aims. If one were to identify the American culture as a system of self-government, one might be tempted to cite Athens's direct democracy as an example that argues in favor of the National Endowment for the Arts ("NEA"). The American experiment with democracy, however, is a representative democracy, calling for more careful vigilance of the government, including its administrative decisions in the spheres of expression. In the art context, therefore, the NEA deserves intense scrutiny.

The Constitution does not make arts funding a per se violation. While the Establishment Clause suggests that it is unconstitutional for the government to make direct payments to religion,[149] no corresponding arts Establishment Clause exists to provide support for the argument that direct subsidization of new artworks is per se unconstitutional. As a matter of constitutional theory, then, Congress is arguably left with some leeway to engage in constitutionally sanctioned arts funding. Yet, as an empirical matter, this looks impossible.

The United States has experimented with two approaches to governmental arts funding in the twentieth century. During the Depression, the federal government provided comprehensive support for artists. More recently, it has provided limited grants for particular projects under the NEA. Neither effort has been a success.

In response to the Depression, President Franklin Roosevelt created the Works Progress Administration ("WPA") in the summer of 1935. The WPA provided massive governmental funding to put Americans back to work. Although only a small percentage of that funding was earmarked for artists, its "impact on the artistic community was diluvial."[150]

The Federal Arts Project ("FAP") provided living wages, studios, supplies, and patrons for thousands of artists and would-be artists. As a result, there was a massive shift in the number of those claiming to be artists[151] and draconian governmental directives on creative activity were instituted, which led to lesser quality artwork.

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149. See *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2523, 132 L. Ed. 2d 700 (1995) ("[W]e have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions" (citations omitted)); id. at 2533-34 (Souter, J., dissenting) (criticizing the majority's holding as allowing a first amendment violation by extending governmental funding to a religious organization).

150. Steven Naifeh and Gregory White Smith, *Jackson Pollock: An American Saga* 275 (C.N. Potter, 1989).

151. In New York City, it is estimated that the number of artists increased ten-fold under the FAP. See id. at 273.

Painters were forced to choose whether to do murals or easel painting, subjected to productivity quotas, and those choosing the latter were subject to a " 'force account,' which required [them] to show up at a supervised location, check in, and paint for a specified number of hours each week."[152] Because murals were required to have sponsors, and sponsors preferred conservative approaches, murals tended to be "flat wall decorations of the lowest order."[153]

Not only did the FAP foster mediocre works, it also increased tensions within the artistic community. The FAP's comprehensive support of artists' needs brought the artistic community more closely together than ever, which ironically rent it asunder as competition between artists increased and hostilities resulted. At the same time, it drove a wedge between artists and the public by paying artists more than many other members of society.[154]

Most important for this Article, the FAP proved that the government and the artistic community are not natural allies. Even as they enjoyed the rather princely sums they were being paid by the government, artists attempted to subvert the government's regulations at many points. They resisted the requirement that they work on demand in government-owned studios, chafed under the required governmental inspections, disdained work quotas, and pilfered the government's art supplies.[155] As one artist put it, "The government was going to civilize us, only we didn't want to be civilized in that way. It was a real clash of cultures."[156] By 1941, the WPA neared its demise. "After 2,500 murals, 17,000 pieces of sculpture, 108,000 easel paintings, and 240,000 prints, public tolerance and government money had finally run out."[157] Massive federal funding had provided artists and artist-aspirants with paying artistic jobs. In light of the mediocrity of the vast majority of works created, artists probably would have made a more valuable contribution to the culture as dishwashers, cooks, and janitors for various governmental agencies and offices.

An enthusiastic but naive Congress created the NEA in 1965, at a time when the country believed it had become a "major artistic power in the world," to encourage further "free inquiry and expres-

152. Id. at 274-76.
153. Id. at 275 (quoting a letter from Sande Pollock).
154. Id. at 276-77.
155. Id. at 274-76, 364.
156. Id. at 274.
157. Id. at 364.

sion."[158] Members of Congress spoke of the importance of art in a democracy,[159] but failed to grasp that art's importance in a representative democracy lies in its response to and independence from government. They declared that "it is essential to provide financial assistance to . . . artists and the organizations that support their work,"[160] which surely it is, but they did not engage in fact-finding to determine whether the *government* has a compelling interest in funding art. The creation of a federal arts bureaucracy has not served the end of "free inquiry." To the contrary, federal funding has tended to direct artistic energy away from the production of new and interesting works toward the creation of mediocre works.[161]

Peer review panels are composed of those artists who have already succeeded: the status quo of the art world. The "new" is automatically discounted in this environment and originality is sacrificed.[162] The arts bureaucracy invites lobbying and safe governmental investment instead of cutting-edge artistic development.[163] The government's funding decisions even affect the way in which the private arts market operates. Corporate America, inevitably conservative in its spending decisions, has preferred art bearing the federal government's imprimatur.[164] The work's market value becomes a tainted amalgam of some modicum of aesthetic value and governmental approval. Were the NEA's budget $2 billion, the

158. National Foundation on the Arts and the Humanities, Debates on S.1483, 89th Cong., 1st Sess., in 111 Cong. Rec. 13103, 13107-11 (June 10, 1965). See *Art Critic Says it's Time to Stop Funding the Arts*, on National Public Radio, *All Things Considered* (March 14, 1995) (statement of art critic Hilton Kramer).

159. "[I]t is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of . . . creative talent." 20 U.S.C. § 951(7) (1994 ed.). "Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants." Id. § 951(4). "It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work." Id. § 951(10).

160. Id. § 951(10).

161. *Art Critic*, on National Public Radio, *All Things Considered* (cited in note 158).

162. Lynne A. Munson, *Art by Committee*, N.Y. Times A23 (Sept. 21, 1995) (quoting Joseph Epstein, member of the National Council on the Arts, which reviews every NEA grant) (stating that NEA grants fall into "three categories: 'the mediocre, the political and the obscene' "); *Art Critic*, on National Public Radio, *All Things Considered* (cited in note 158).

163. *Art Critic*, on National Public Radio, *All Things Considered* (cited in note 158).

164. Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* 103 (Scribner, 1995) ("Support from the NEA has served as a seal of approval for art, which in the past had been seen as a 'safe' investment or contribution for conservative corporate and individual donors").

market-skewing potential of governmental arts funding would be easily identified. Only the inconsequential size of the NEA budget has permitted the NEA's participation in the marketplace to seem like benign assistance rather than the coercion of culture that it is.[165]

Even slight governmental funding can shift an arts organization's mission away from aesthetic development toward other social goals approved by the government. As a result, the variety and quality of cultural contributions is reduced. The NEA has favored particular causes, such as AIDS awareness and multiculturalism.[166] These political goals chill original artistic expression in favor of expression pandering to the government's agenda. For example, the Painted Bride Art Center in Philadelphia spent several years attempting to recast itself as a community arts outreach program in response to the tenor of federal and private funding.[167] As it did so, it lost sight of its original mission to present cutting-edge work. With the state and federal governments reducing spending, the Painted Bride has reassessed its artistic mission and returned to its original project: supporting avant garde work. The reduction in governmental giving has resulted in the recapture of an arts-driven mission that was derailed by a governmental agenda.

Some support governmental funding of the arts for the purpose of adding diverse voices to the artistic mix, on the theory that such voices would not be heard otherwise. Yet, the argument that federal funding of the arts is necessary for minority voices to be heard is hopelessly circular. If minority voices have found a haven in the federal government, they have proven political muscle. Ironically, federal recognition disproves the need for the funding.

The NEA has become "hopelessly politicized," with purportedly neutral peer review panels recommending grants based on political agendas rather than aesthetic merit.[168] While acknowledging the failure of the current system, some might argue that the NEA should simply reform itself into a more neutral arbiter of grant proposals. The adversarial nature of the relationship between government and art delineated above, however, makes such a hope unlikely to be fulfilled. Unless the governmental organization can prove its decisions

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165. For budget information, see National Endowment for the Arts, *History of Authorizations and Appropriations* (1994); National Endowment for the Arts, *FY94 and FY95 Budgets*.

166. Munson, N.Y. Times at A23 (cited in note 162).

167. Stephan Salisbury, *The Painted Bride's Going Fiscally Lean as it Zeroes in on Its Artistic Mission*, Phila. Inq. D1, D6 (Sept. 25, 1995).

168. Munson, N.Y. Times at A23 (cited in note 162).

are based solely on aesthetic criteria, arts funding should be (and has been) declared unconstitutional.[169] Indeed, where the instrumental value of art lies in its capacity to question and undermine the status quo, the art experts on whom the government would have to depend in such a scheme seem ill-placed. The American experiment with such funding bodes ill for the success of such an enterprise.

The problems posed by federal governmental funding of art are equally apparent at the state and local level. Once a local funding system is in place, state and local officials are as tempted as federal officials to encourage some messages and images and to discourage others. For example, Bucks County, Pennsylvania, which has always had a strong arts community, has a tradition of choosing a poet laureate, using independent poetry experts. Poet laureates receive $300, the title, and most important, opportunities to showcase their work for a year. Given the small market for poetry in general, the poet laureate program significantly impacts the market. Recent laureates have chosen topics of relevance to county residents—AIDS, sewers, and roadkill—which do not please county officials. As a result, officials are searching for a means of ridding county-supported poetry of offensive elements and are considering instituting guidelines to ensure more "uplifting" poetry.[170]

Like federal funding under the FAP, the marriage between government and the arts is a troubled one at the local level. Officials

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169. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1476 (C.D.C.A. 1992) (holding unconstitutionally vague a requirement that a proposal pass a "decency" criterion); *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774, 785 (C.D.C.A. 1991) (holding unconstitutional a requirement that grantees certify that their works will not be obscene). See Enrique R. Carrasco, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 Georgetown L. J. 1521, 1532-43 (1986) (noting that Congress's amendments reflect a willingness to consider factors other than artistic excellence, which include an emphasis on the importance of minority participation in the NEA); Shipley, 40 Emory L. J. at 256-257 (cited in note 120) (discussing congressional changes made to the NEA's grantmaking process that demonstrate Congress's willingness to consider factors other than "generalized artistic excellence," including minority recognition).

Art is also weakened when it is forced to abide by affirmative action schemes implemented in the private sphere.

> Whatever its impact on education or its success in minority communities, the new coercive philanthropy is demoralizing many artists and artistic institutions. The entire cultural world is bending itself into contortions in order to find the right shape for grants under the new criteria. . . . By forcing artistic expression to become a conduit for social justice and equal opportunity instead of achieving these goals through basic humane legislation, we are distracting our artists and absolving our politicians.

Robert Brustein, *Culture by Coercion*, N.Y. Times A25, A25 (Nov. 29, 1994).

170. Kathy Boccella, *Laureates' Verse Grates on Some Ears*, Phila. Inq. A1, A12 (Dec. 11, 1995).

fear offending particular constituencies, and therefore they are inclined to favor art that takes the middle ground: mild, prosaic, and safe. In contrast, the high-quality poets chosen have been more interested in questioning the status quo. The content guidelines suggested by the officials plainly violate the First Amendment and further illustrate why governmental funding for the arts is not good for art and is therefore not good for the people.

A wide berth for both religion and art are essential to a free society. Governmental funding of either, however, threatens the private sphere of freedom safeguarded by the First Amendment. In a diverse society, the establishment of an official art is an evil that should be avoided as assiduously as the establishment of an official religion. Such establishment directly threatens the scope of power individuals can exercise over their respective private spheres and therefore against the public sphere. NEA funding has not served the end to which it is directed—free inquiry—and cannot do so.

The vast majority of arts project funding has been provided by the private sector. In the absence of the NEA, such funding will continue and even increase. Moreover, the art market shows no signs of slowing down. There seems to be an endless supply of best-selling novels, popular motion pictures, and graphics. Recent fine art auctions set records for prices paid for particular works, and arts funding has recently experienced an upsurge.[171]

In short, we do not need the NEA and we certainly do not need a reprise of the FAP. The important question left to be answered is whether government can or should assist in ensuring that valuable artworks are created. One might argue that we have numbers of artworks, even too many works, but we are short on high quality works. As an empirical matter, such a view should be taken with a grain of salt. Hundreds of years behind European and Asian cultures, the American polity has long been apologetic about its high cultural offerings as compared to those cultures.[172] At the end of the twentieth century, however, much exists in the American artworld to be praised.

171. William Grimes, *"Business Said to Put More in Arts,"* N.Y. Times C15 (Oct. 12, 1995); Stephen Salisbury, *By One Measure: Giving to the Arts Has Increased Since '89*, Phila. Inq. C1 (Dec. 6, 1995) (citing a survey that shows a 20% increase in arts philanthropy, thereby debunking the "very strong presumption on the part of the cultural community that grant making to arts and culture was going down").

172. Compare Josepb J. Ellis, *After the Revolution: Profiles of Early American Culture* (Norton, 1979) (describing disappointment in American artistic offerings in the early-eighteenth century after many had predicted and expected a dramatic flowering of the arts following the Revolution).

Although government can do little to ensure the high quality of artworks in general, one profitable area of inquiry resides in copyright law. A full explanation of the operation of copyright law vis-à-vis artworks is well beyond the scope of this Article, but, as a preliminary matter, the requirement that copyrighted works be "original" may play an important role in creating a cultural milieu within which the highest quality works are encouraged. I leave further elaboration to a later Article.

2. Arts Education in the Public Schools

Although art's subversiveness encourages skepticism of the government's decision to fund the creation of new art, it recommends arts education. If a sufficient variety of aesthetic experiences were provided to children, they could gather a store of reorientation experiments valuable in later life, and just as important, learn to seek out further aesthetic experiences. As indicated by the *Babbitt* hypothetical above, literature classes have always contributed in this way.

The particular methods by which public schools should teach about art are well beyond the scope of this Article. It is worthwhile to note, however, that the undervaluation of the arts is well reflected in arts education. Consistent with Enlightenment values, more is known about science education than is known about arts education. And more is known about art productivity than arts education.[173] American schools have encouraged students to create artistic works but have done very little to foster aesthetic understanding or appreciation. Thus, crafting a successful, liberty-enriching arts education is a frontier challenge for the schools. The task is well worth the effort, however. And it may be getting marginally easier in the Information Era. As more artworks become available through online services, the opportunities for creative arts education increase.

A richer arts education should lead to more appreciation of art and therefore more private funding and a more vital artistic culture. Taking government out of the matrix promises a more independent artworld as well. Ironically, the public funding of arts education enriches the power of the private sphere over and against the government. This is no paradox, however. The regimes of China, Nazi

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173. Gardner, *Art Education* at 50 (cited in note 5).

Germany, and Eastern Europe illustrate that governmental control of arts access augments governmental control in general.[174]

On this score, however, it is important to distinguish between inculcation by the arts and arts education. Ideological inculcation arises where artistic works are chosen (or rejected) according to a singular political message.[175] A narrowly constrained arts education, with its repetitive reference to a predominant world view, may be more dangerous in some respects than no arts education at all. In contrast, a sufficiently nondogmatic arts education provides both a storehouse of reorientation experiences to draw upon and training of the emotions, intellect, and imagination to test and resist status quo worlds.

The constitutional importance of variety in arts education raises the specter of school censorship. As I have done throughout this Article, I will make an explicit analogy to religion jurisprudence. Despite the Establishment Clause's plain admonition against religious proselytization by public schools,[176] education about the history of religion or theology is well within the public schools' prerogative.[177] Analogously, tight governmental control over what art should be taught and distributed risks tyranny,[178] but does not counsel against a thoughtfully chosen program introducing students to artworks and teaching them about the history of art and its qualities. Just as there have been first amendment challenges to school district decisions to

174. See Part III.

175. See notes 108-15 and accompanying text (discussing totalitarian regimes).

176. See, for example, *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2490, 129 L. Ed. 2d 546 (1994) (determining that the legislature's carving out of a public school district which coincides with a Jewish Satmar Hasidic community violates the Establishment Clause); *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466-69, 125 L. Ed. 2d 1 (1993) (finding that a state-funded interpreter in a sectarian school does not violate the Establishment Clause because the state program was neutrally administered to all schools and did not encourage parents to choose sectarian schools over nonsectarian schools); *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) (holding that inviting clergy to recite benedictions at public school graduation ceremonies violates the Establishment Clause because the school officials determined whether such religious prayers should be delivered and selected the religious presenter); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 253 (1990) (concluding that the Equal Access Act, 20 U.S.C. §§ 4071-74 (1994 ed.), which allows equal access to school facilities for student groups, does not violate the Establishment Clause when the student group is a religious group).

177. See Brief for Respondents 14-15, 25, *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

178. See Part III (discussing Eastern Europe, Nazi Germany, and Communist China). See also Gardner, *Arts Education* at 35 (cited in note 5) (stating that artworks were displayed in nineteenth-century American schools to promote "patriotism, moral conduct, or broad philosophical themes").

include or refuse to include certain works of literature,[179] there are likely to be analogous charges brought with respect to art. Better to have progressed to the stage of working through such decisions, however, than to have left arts education behind altogether.

V. CONCLUSION

Most people enjoy art in some form, and many have argued in favor of its protection under the First Amendment. Yet to date no one has justified its protection beyond its discursive content. In addition to its content, art deserves constitutional protection for its singular capacity to offer the experience of new worlds and therefore new perspectives on the status quo. Its experience strengthens judgment, resistance, and the capacity for dissent. Thus, art plays an important and distinctive instrumental role in the calibration of governmental and private liberty.

The Constitution presumes the possibility and even the likelihood that representatives, and therefore government, will abuse their granted powers and suppress the people's liberty. The main text of the Constitution provides a set of mechanisms intended to prevent any one person, office, or branch of government from amassing overweening power. The colonists, however, viewed the existence of those mechanisms as inadequate by themselves to the task of limiting governmental power. An explicit bill of rights was required if a private sphere of freedom was to be inviolate.

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179. See, for example, *Pico*, 457 U.S. at 853 (invalidating a school district's decision to ban nine literary works it deemed "anti-American, anti-Christian, anti-[Semitic], and just plain filthy"); *Virgil v. School Bd. of Columbia County, Fla.*, 862 F.2d 1517 (11th Cir. 1989) (challenging a school board's removal of a previously approved textbook from an elective high school class because of objections to the vulgarity and sexual explicitness of the material, which included works by Chaucer and Aristophanes); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980) (arguing that a school's removal of books from certain courses and its subsequent grant of a request to convey the books for a public burning violated students' first and fourteenth amendment rights); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (arguing that removing a Bible from the school library and ordering a teacher to remove two books from her shelf violated the plaintiffs' first amendment rights of free speech, academic freedom, and access to information). But see *Silano v. Sag Harbor Union Free School Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994) (addressing the plaintiff's first amendment challenge to a school administration's prohibition against using "The Birth Scene," a portrayal of two women and one man naked from the waist up, one of six 35mm film clips used to illustrate the "persistence of vision" phenomenon in a guest lecture to a high school mathematics class); *Seyfried v. Walton*, 668 F.2d 214 (3rd Cir. 1981) (challenging a public school superintendent's decision to cancel a high school dramatic production because of its sexual content).

Along with the other enumerated rights in the Bill of Rights, the First Amendment attempts to clear such a space for the people by making it possible for them to construct power structures that can compete with government for hegemony. Art, religion, philosophy, and political debate each have their role in this struggle between the governed and the governing.

Art plays a distinctive and important role in permitting citizens to experience alien world views. A tightly controlled artistic culture can be the handservant to tyranny. When art is free from governmental coercion, however, it has the capacity to build resistance to such oppression. Rather than being relegated to the margins of first amendment jurisprudence, art should be given its due as one of the pillars supporting the First Amendment's dedication to freedom.