

Note

An American Vision of Federal Arts Subsidies: Why and How the U.S. Government Should Support Artistic Expression

Daniel Reid*

INTRODUCTION

Debate over arts policy in the United States today rightly focuses on the legal background of market regulations, asking how our property rights regimes, intellectual and otherwise, should adapt to the internet's revolution in reproducibility and to the growing consolidation of distribution channels and backlists. Issues of copyright, digital rights management, and frequency access have obvious and fundamental ramifications for the creation, availability, and quality of a broad range of artistic endeavors. Adjustments to these policies are the most important form of "intervention" undertaken by the federal government because only it can legitimately craft and enforce these necessary rules.

This Note focuses on *financial* interventions in the arts, which have also been the subject of heated, if less productive, dispute. In the last few decades, the American conversation about government subsidies to the arts has been highly politicized, with many of the arguments wielded by supporters contributing little beyond ideological posturing. Despite the rhetorical force of appeals for money for the arts, virtually all of the major justifications advanced by proponents fail to build a persuasive case for direct federal funding. This Note argues that these proponents have largely overlooked by far the strongest justification for direct arts subsidies, one

* J.D., Yale Law School 2009.

that is uniquely American and uniquely persuasive: a civic argument for government funding.

Developing this argument will occupy the final Part of this Note, but a brief sketch is in order here. In a pluralist, democratic society, citizens have an obligation to consider the background and position of a diverse range of interlocutors. The arts are a crucial means of cultural expression and communication; as such, they play a vital role in bringing citizens to a deeper understanding of one another. On the strength of this civic benefit, and because this important civic role, as shall be explained, is a kind of externality not accounted for in arts markets, the government is justified in intervening through direct subsidies. Explicitly identifying and embracing this purpose will allow legislators and administrators to craft a legitimate, effective, and inspiring subsidy policy. This in turn will have important consequences for the legal background of arts markets, which is the focus of so much attention today.

Part I of this Note sketches the structure of financial support, both public and private, available to the arts in the United States and in the West more generally. Part II discusses the origins, operation, and historical development of the National Endowment for the Arts (NEA), emphasizing its guiding ideology of elitism prior to the nearly-fatal scandals of the 1990s. Part III explains the conventional justifications for government intervention in arts markets and examines some of the weaknesses that severely limit their power to persuade. Part IV develops an under-acknowledged civic argument for direct subsidy and advocates a new American arts policy derived from it; it also points to ways the democratic justification for government financial intervention might influence the contemporary debate over the legal background to arts markets.

It will be useful, as a preliminary matter, to clarify several distinctions. First, funding for the arts can be considered in three broad categories. *Direct governmental subsidy*, or grants of money or materials from a public entity, may be paid directly to artists or institutions, may be paid indirectly through a public or private intermediary (often an arm of a more local government) that allocates the funds to particular artists or institutions, or may involve the direct provision of art through the establishment of a public museum or poet laureateship funded by the state (which in turn, of course, supports the artists whose work is shown or who fill the office). Direct subsidy may be provided by any level of government, although this Note is concerned primarily with federal subsidies. A second source of funding is *donations of money or materials by private individuals* to artists or arts institutions; these gifts are encouraged by the government through the indirect subsidy of tax exemptions. Finally, funding can take the form of *earned income* derived from the market.

Although this Note primarily considers the arts as a whole, it should be noted that earned income takes different forms for different arts: the market for (and costs associated with) a live performance of a new avant-garde dance piece, a new pop music CD, and a famous Impressionist painting look very different. To abstract a bit, the factors that distinguish types of art include performance vs. object; live vs. recorded; unique vs. reproduced; new vs. used or pre-existing; and “high” vs. “popular.” Thus, the earned income of a theater company specializing in live performance, will consist primarily of ticket sales, whereas a musician can draw on both performances of her own and others’ music as well as recordings of such performances. Of course, the market for art is a vast structure that provides income to a host of participants beyond the artists themselves; however, when this Note refers to the art market, it generally means that portion of the market that supplies earned income, rather than the entire chain of transactions treating art as a market good. (The professionals who write grant applications to state arts councils or court wealthy donors may protest that they “earn” their income, too, but this Note will refer to the fruits of their labor as direct subsidy and private donation supported by indirect subsidy, respectively.)

As a final note on terminology, the distinction between “high” and “popular” art is the murkiest and most controversial, in part because it conflates judgments about merit with the objective question of the size of the market for a given art form. The discussion that follows will largely take for granted the most familiar categorizations—opera is “high,” rap music is “popular”—even while questioning its relevance to government funding. A fine parsing of the distinction or a deeper reflection on whether it is meaningful is outside the scope of this Note.

I. PORTRAIT OF THE ARTIST AS A GRANT RECIPIENT: SUPPORT FOR THE ARTS IN THE UNITED STATES TODAY

Given the prominence of late-twentieth-century political controversies over the National Endowment for the Arts (NEA), it might surprise many Americans to learn that the organization’s budget for fiscal year 2006 was less than \$125 million (0.046% of the total federal expenditure) and that the budget at its peak in 1992 was just over \$175 million (0.01% of the total).¹ This amounted to only 68¢ per American in 1992 and 42¢ in 2006. In its first 40 years, ending in 2005, the agency awarded less than \$4 billion in grants.²

1. NATIONAL ENDOWMENT FOR THE ARTS, NATIONAL ENDOWMENT FOR THE ARTS APPROPRIATIONS HISTORY, <http://www.nea.gov/about/Budget/AppropriationsHistory.html>.

2. NATIONAL ENDOWMENT FOR THE ARTS, 40TH ANNIVERSARY FACTS, <http://www.nea.gov/about/Facts/40.html>.

In fact, although “the NEA” and “direct arts subsidies” are often used interchangeably by commentators on both sides of the debate over the value of government intervention in the art market, the NEA budget is a very modest slice of total direct arts subsidy. Given the ambiguity concerning what sorts of project should be counted as “art,” it is difficult to estimate how much the federal government spends in this area. Adopting a moderately broad view of “art” that encompasses libraries and museums of all sorts, a number of federal agencies regularly pay more for art than the NEA, including the Smithsonian (whose relevant 2006 expenditures have been estimated at \$517 million), the Corporation for Public Broadcasting (\$460 million), the Institute for Museum and Library Services (\$247 million), the Department of Defense (which spends in the vicinity of \$200 million on military bands), and the National Endowment for the Humanities (\$142 million).³ Numerous smaller programs diversify the portfolio. For example, the General Services Administration’s “Art-in-Architecture” program sets aside at least one half of 1 percent of the construction budgets for new federal buildings and major renovations for public art (amounting to about \$7 million in 2006), and the Department of the Interior hosts artists-in-residence through the National Parks Service.⁴ Even using conservative definitions of cultural activity, the NEA’s budget makes up less than 10% of direct federal arts funding.⁵

Total federal arts spending is itself a relatively small source of arts funding: it accounts for only 9% of financing for nonprofit arts organizations in the United States, with state and local funding making up an additional 4%. (Private donations account for 43% of all such financing, and earned income makes up the remaining 44%.⁶) Federal funding of the arts is proportionally much higher in other Organization for Economic Cooperation and Development countries. A 1998 study by the Arts Council of England estimated that the United States government spent \$6 per person on the arts in 1995; in similar years, Australia and the United Kingdom each spent approximately \$25, Canada and the Netherlands \$46, and Germany and Finland more than \$85 per person.⁷ In these countries, government funds constitute upward of 80% of the budgets of many major arts institutions; in some cases, governments

3. TYLER COWEN, GOOD & PLENTY 87 (2006); NEA OFFICE OF RESEARCH & ANALYSIS, HOW THE U.S. FUNDS ART (second edition), at 10 (2007).

4. Ronald Lee Fleming & Melissa Tapper Goldman, *Public Art for the Public*, PUB. INT., Spring 2005, at 55, 59; HOW THE U.S. FUNDS ART, *supra* note 3, at 13-14.

5. COWEN, GOOD & PLENTY, *supra* note 3, at 91.

6. HOW THE U.S. FUNDS ART, *supra* note 3, at 1. The constituencies of federal and state or local funding are not identical: the latter tend to support smaller institutions and less-established artists. COWEN, GOOD & PLENTY, *supra* note 3, at 89.

7. NEA RESEARCH DIVISION, NOTE #74: INTERNATIONAL DATA ON GOVERNMENT SPENDING ON THE ARTS, at 9 tbl.1 (2000). Because of the difficulty of determining which government expenditures should be counted, these numbers are imperfect. *See Id.* at 3. However, the obvious disparity is undisputed.

pledge to make up any operating deficits incurred by state-sponsored festivals or organizations.⁸

Thus, direct government spending on the arts in the United States is quite low by any measure, whether compared to total government expenditure, total arts financing, or the amounts spent on the arts by other developed countries. However, these numbers dramatically understate the extent of the U.S. government's financial involvement in the arts, which largely takes the form of *indirect* subsidy through tax exemption.⁹ In 2003, according to the American Association of Fundraising Counsel, Americans donations in the category of "Arts, Culture, and the Humanities" exceeded \$29 billion, or \$100 per American.¹⁰ Today, donations by individuals, foundations, and corporations account for about 43% of the funding of nonprofit arts organizations—roughly the same amount derived from earned income. If the donated time of volunteers were taken into account, the ratio would shift even further toward private giving.¹¹ The federal government encourages this private largesse—which is certainly much greater than in the other countries cited above¹²—by granting tax exemptions to donors to nonprofit organizations, including arts groups, and by granting the organizations themselves income tax exemption.

It is not clear how the United States stands in comparison to other countries when this indirect funding is taken into account. One problem is the paucity of foreign data on indirect subsidy. Another is the difficulty of determining how much indirect subsidy costs the government; economists' estimates range from \$1.64 billion a year to \$26 billion to \$41 billion a year in foregone tax revenue.¹³ We may also question whether all foregone income should actually be counted as arts support, given the uncertainty of the effect of this fiscal restraint on private giving. U.S. tax policy undoubtedly generates greater private arts support, but given the long history of patronage before the arrival of the income tax and the wide range of motives for donation, only some of which are financial, there is every reason to think that much of the money from individuals and foundations would be flowing into the coffers of arts organizations even in the absence of indirect subsidies.¹⁴ Despite the difficulty of determining

8. COWEN, GOOD & PLENTY, *supra* note 3, at 32

9. In fact, the United States became the first country to offer tax exemption for arts donations in 1917-1918. Toby Miller, *The National Endowment for the Arts in the 1990s*, 43 AM. BEHAV. SCIENTIST 1429, 1430 (2000).

10. Cited in COWEN, GOOD & PLENTY, *supra* note 3, at 33.

11. *Id.*

12. *Id.*

13. The first of these estimates, from Arthur C. Brooks, *In Search of True Public Arts Support*, PUB. BUDGETING & FIN., Summer 2004, at 88, 93, concedes a downward bias in the methodology. The second is from COWEN, GOOD & PLENTY, *supra* note 3, at 34.

14. This may be less true for corporations, although public relations campaigns like Phillip Morris's suggest that even entities primarily concerned with maximizing profit might support the arts

whether the American private-giving model results in more or less government support for the arts than the European public model, it is telling that one 1985 study suggested that the United States remains at the bottom of the rankings even when indirect subsidies are counted.¹⁵

Even relatively large indirect subsidies, then, seem to play a relatively small role in both the overall government budget and in the total funding to arts organizations—and, of course, direct government spending plays an even smaller role. The NEA's budget, a small fraction of that small fraction, therefore seems insignificant in financial terms. However, the Endowment has unique influence as the public face of government arts policy, which grants it economic significance far beyond its annual budget. The NEA imprimatur can launch or boost the career of an artist or troupe; it boasts that every dollar it grants generates more than seven additional dollars in private gifts.¹⁶ Of course, much of this money is probably not so much "generated" as redirected from other potential recipients, but the financial power of the NEA is clear.

More important for the purposes of this paper, the NEA's prominence carries with it significant symbolic value. As the only general arts organ of the federal government, it is the closest thing America has to a Ministry of Culture. Indeed, it has been referred to as the government's "chosen instrument for promoting the arts" and "the most visible 'bully pulpit' for the arts."¹⁷ Because it is funded by taxes, taxpayers feel (or may be provoked to feel) invested in the NEA's activities in a way that they are not invested in the gifts of private foundations, even large ones like the MacArthur Foundation or prestigious ones like the Pulitzer Committee.

Indeed, by the turn of the twenty-first century, the name of the NEA had itself become a provocation. The highest pitch of outrage over the arts and the deepest passion on their behalf have been summoned in the last two decades not by the bestowal of great honors by the cultural elite or the critical response to a controversial work, but rather by the expenditure of federal funds on art like Chris Ofili's *The Holy Virgin Mary*, a portrait-collage incorporating elephant dung that might be described as brilliant and penetrating or sacrilegious and depraved.

Sensations like the scandal over *The Holy Virgin Mary* suggest how important the NEA is to any consideration of national arts policy, but they have also induced an important change in the way the NEA manages its financial interventions in the art world. As Part IV will explain, this nascent shift helps illuminate the role arts subsidies should play in a democracy as diverse as ours—and, ultimately, it is the NEA that must

in the absence of indirect subsidy.

15. INTERNATIONAL DATA ON GOVERNMENT SPENDING ON THE ARTS, *supra* note 7, at 5.

16. HOW THE U.S. FUNDS ART, *supra* note 3, at 3.

17. DICK NETZER, THE SUBSIDIZED MUSE 74 (1978); Laura H. Chapman, *A Century of Distancing Art from the Public*, ARTS EDUC. POL'Y REV., Jan.-Feb. 2000, at 27, 28.

lead the implementation of the civic argument for arts subsidies.

II. ART AS THE OPIUM OF THE INTELLIGENTSIA: THE IDEOLOGICAL ORIGINS OF THE NEA

This Part examines the history of the NEA and its entanglement with the Western European fine arts establishment, as well as the funding crisis of the 1990s that nearly destroyed the Endowment. As we shall see, the NEA initially played a conciliatory role as a gesture of goodwill by Presidents to the cultural elite; as the political scene began to change in the 1980s and 1990s, the role of the agency was called sharply into question, leaving it in need of a new mission.

A. The Slow Development of Direct Art Subsidies in the United States

The United States was still young when it established the U.S. Marine Band (1790), created its first national library (1800), and commissioned its first paintings (1817: the four Revolutionary War scenes by John Trumbull that still hang in the Capitol Rotunda). It would take nearly two centuries for the country to set up a permanent, general organization to promote the arts. Although Presidents, Senators, and Congressmen proposed the establishment of such a body nearly a dozen times before 1963, and despite the success of narrower projects focused on Washington, these earlier efforts were defeated by a widespread perception of the arts as elitist.¹⁸ A tradition of limited government reinforced by the Jacksonian revolution of the 1820s, and the historical absence in this country of an arts-friendly aristocracy connected to the government meant that cultural institutions had grown accustomed to looking almost exclusively to wealthy private donors for financial support beyond their earned income.¹⁹

The first large-scale arts schemes undertaken by the federal government were the cultural divisions of the Works Progress Administration (WPA) and a parallel program run by the Treasury Section beginning in 1935 as part of a more general program of economic relief. The two programs were organized quite differently, with the WPA distributing its money widely and without a great deal of institutional formality while the Treasury Section disbursed funds through expert panels. The former model proved more successful, supporting large numbers of artists who are widely acknowledged today as exceptionally talented. At their peak, the WPA's Federal Art, Music, Theater, and Writers Projects provided work for more than 45,000 artists, including such luminaries as Jackson

18. These earlier attempts are listed in Office of Communication, National Endowment for the Arts, "A Brief Chronicle of Federal Support for the Arts," revised edition, at 6-8 (2000). See also NETZER, *supra* note 17, at 53.

19. Annette Zimmer & Stefan Toepler, *The Subsidized Muse*, 23 J. CULTURAL ECON. 33, 42, 46 (1999).

Pollock and Edward Hopper, Aaron Copland and Virgil Thomson, Arthur Miller and Orson Welles, and John Steinbeck and Zora Neale Hurston. Together, the WPA and Treasury programs spent about \$160 million (\$2 billion in 2005 dollars), but despite the massive scale, they ended abruptly when normal economic activity resumed at the end of World War II.²⁰

Any momentum for a national arts organization that the WPA might have generated died with it. The arts programs had come under attack from two corners. First, some artists and observers feared that treating an out-of-work artist like an out-of-work farmhand was at odds with the highest standards of artistic creation; this skepticism of work for hire became much easier to maintain when the Depression had ended and other means of support were more widely available. Second, many political conservatives were provoked by the emphasis the programs gave to artists from urban areas, where the program administrators assumed their budgets would generate better art; these critics felt that the WPA had neglected non-urban constituencies and tastes.²¹ As the Cold War got underway, both of these concerns seemed only to intensify. Abstraction and surrealism swept the New York art world, delighting the avant garde but inviting denunciation from political leaders. President Truman himself was heard to remark, "So-called modern art is merely the vaporings of half-baked lazy people."²² Artists, for their part, grew increasingly wary of state involvement in the arts as they watched the spread of state-enforced Social Realism and the widespread suppression of dissident artists of the Iron Curtain. Painter John Sloan commented, "Sure, it would be fine to have a Ministry of the Fine Arts in this country. Then we'd know where the enemy is."²³

However, by the 1960s, both artists and politicians had undergone a change of heart. The Cold War that alarmed the artists helped win over the politicians, who quickly realized that the arts were a powerful propaganda device for demonstrating American ingenuity and freedom. Cultural diplomacy efforts by the State Department, the CIA, and the White House, including President Eisenhower's \$16.2 million Program for Cultural Presentations Abroad, gradually culminated in the sense that a firm commitment to the arts was necessary to wage the cultural Cold War.²⁴ Meanwhile, President Kennedy, whose inauguration prominently featured Robert Frost and 57 other artists, wooed a cultural establishment that

20. NETZER, *supra* note 17, at 54-56; COWEN, GOOD & PLENTY, *supra* note 3, at 68-73; BILL KAUFFMAN, CATO INSTITUTE POLICY ANALYSIS 137: SUBSIDIES TO THE ARTS (1990), available at <http://www.cato.org/pubs/pas/pa137.html>.

21. NETZER, *supra* note 17, at 54-55.

22. Quoted in ALAN HOWARD LEVY, GOVERNMENT AND THE ARTS 94 (1997).

23. Quoted in KAUFFMAN, *supra* note 20.

24. LEVY, *supra* note 22, at 94-106; NETZER, *supra* note 17, at 57.

proved more pliable than individual painters like Sloane.²⁵

Kennedy had proposed a federal arts advisory agency during his candidacy,²⁶ and in March of 1962, he appointed August Hecksher, director of the Twentieth Century Fund, to prepare a study on government and the arts. When it was submitted in May of 1963, Hecksher's report called for the establishment of an Advisory Council on the Arts and a National Arts Foundation to administer grants.²⁷ Kennedy's assassination left the work of lobbying for the new Foundation to Lyndon Johnson, whose initial reluctance gave way to enthusiasm for the prospect of appeasing his party's liberal intelligentsia.²⁸ The legislative battle was won through an alliance between arts organizations and the higher education lobby, which strongly supported the establishment of what would become the National Endowment for the Humanities, the NEA's sister organization.²⁹ Kennedy's tragic death and his association with the cause—Johnson had just renamed the nascent National Cultural Center the Kennedy Center—also worked subtly in Johnson's favor. On September 29, 1965, he signed into law Public Law No. 89-206, the National Foundation on the Arts and Humanities Act.³⁰

B. The Cautious Structure and Elitist Operation of the NEA

The structure of the new organization, which remains essentially intact today, was designed in part to assuage the fears of artists who worried that government involvement would politicize the arts.³¹ The agency is headed by a Chair appointed by the President with the advice and consent of the Senate, but to insulate the Endowment's funding decisions from political pressure, the Chair's four-year term was staggered against the President's. Congress also inserted two additional layers of review further down the chain: the National Council on the Arts and peer review panels. The National Council on the Arts (NCA) originally comprised 26 private citizens widely recognized for their cultural expertise who were appointed

25. Milton C. Cummings, Jr., *To Change a Nation's Cultural Policy*, in *PUBLIC POLICY AND THE ARTS* 141, 144 (Kevin V. Mulcahy & C. Richard Swaim eds., 1982). Even Camelot couldn't charm everyone, though: the American Symphony Orchestra League was so skeptical of federal aid that it declined to partake of NEA funds until the Nixon administration. JOSEPH WESLEY ZEIGLER, *ARTS IN CRISIS* 14-15 (1994).

26. Cummings, *supra* note 25, at 143.

27. A BRIEF CHRONICLE OF FEDERAL SUPPORT FOR THE ARTS, *supra* note 18, at 8-9.

28. KAUFFMAN, *supra* note 20.

29. ZEIGLER, *supra* note 25, at 16.

30. A BRIEF CHRONICLE OF FEDERAL SUPPORT FOR THE ARTS, *supra* note 18, at 9-11. Although Johnson's proposal enjoyed widespread support, many conservative politicians continued to resist until the end: the Republican Policy Committee's official position in 1965 was that "the arts and humanities are thriving today and will continue to thrive so long as the deadening hand of the federal bureaucracy is kept from the palate [sic], the chisel and the pen." Quoted in NETZER, *supra* note 17, at 59.

31. See HOW THE U.S. FUNDS ART, *supra* note 3, at 3-4; Elizabeth E. DeGrazia, *In Search of Artistic Excellence*, 12 CARDOZO ARTS & ENT. L.J. 133, 137-40 (1994).

by the President and approved by the Senate for six-year terms; in 1997, Congress amended the statute to provide for only 14 full members and an additional 6 members of Congress sitting *ex officio* for two-year terms.³² Beneath the NCA lies the first line of consideration for grant applications, the peer review panels. Although the recommendations of these panels are subject to approval by the NCA and ultimately the Chair, both have historically deferred to the decisions of the peer reviewers.³³ The Endowment was further protected against politicization by restrictions forbidding it to provide more than 50% of a project's costs, limiting the possibility of pork-barrel art.³⁴

The three-tiered system thus shields the primary decision-makers from political heat and corruption.³⁵ But the idea of multi-layered government intervention in the arts also conjures up the bogeyman of the soulless bureaucrat who, with no inappropriate political motive, nevertheless drains the aesthetic appeal of anything he tags with his red tape. In an effort to preserve artistic quality, Congress populated the peer review panels with arts experts drawn from the disciplines in which they considered grants. The difficulty of prescribing a method for defining artistic quality was addressed by legislative hand-waving: the enabling statute refers to "professional excellence," "professional standards," and "artistic and humanistic excellence."³⁶

Thus calibrated to appeal to skeptical lawmakers and the arts community it was meant to support, the NEA set out to fulfill its objectives, namely, "to make the arts more widely available to millions of Americans; to preserve our cultural heritage for past and future generations; to strengthen cultural organizations; and to encourage the creative development of talented individuals."³⁷ The goal of creating a national arts policy is conspicuously absent from this list, and indeed, politically savvy supporters of the NEA insisted from the beginning that the agency was not intended for this purpose.³⁸ The fear of a Soviet-style Ministry of Culture loomed large, and it was not long before the federal government explicitly renounced such ambitions. At the Monaco Round

32. NATIONAL ENDOWMENT FOR THE ARTS, NATIONAL COUNCIL ON THE ARTS: HISTORY AND PURPOSE, http://www.nea.gov/about/NCA/About_NCA.html. The structural change, coming in the wake of a number of scandals, was largely intended to ensure that NEA funds would not be spent in ways that would offend taxpayers or provoke further controversy.

33. As the number of grant applications increased over the years, the support role of NEA staff has grown; they sometimes pare down applicant pools for the panels.

34. Typically, NEA funding is a much smaller fraction of the total project budget, often around 10%. COWEN, GOOD & PLENTY, *supra* note 3, at 96.

35. C. Richard Swaim, *The National Endowment for the Arts: 1965-1980*, in PUBLIC POLICY AND THE ARTS 169, 178 (Kevin V. Mulcahy and C. Richard Swaim eds., 1982).

36. DeGrazia, *supra* note 31, at 137.

37. NETZER, *supra* note 17, at 62.

38. John K. Urice, *Three Contemporary Reports That Influenced the Creation of the National Endowment for the Arts*, J. ARTS MGMT., L., & SOC'Y, Spring 2005, at 5, 7.

Table on Cultural Policies hosted by the United Nations in 1969, the Americans opened their presentation by noting, “The United States has no official cultural position, either public or private.”³⁹

However, operative goals have a way of diverging from official ones.⁴⁰ The expenditures by the NEA over its first two decades reveal a clear pattern of support for elite artistic forms and established cultural organizations.⁴¹ Although the agency did fund non-elite art forms and local programs through initiatives like state-centered Folk Arts Apprenticeships and a \$2 million City Spirit program,⁴² on the whole it evinced a clear bias for “high” culture. From 1978-1984, for example, one analyst estimates that a total of only 18-30% of funds disbursed by the NEA went to “mass-constituency” art forms like jazz, folk arts, and arts education; new arts organizations; and programs to stimulate artistic creation directly.⁴³

The Metropolitan Museum of Art in New York (the Met) and the Art Institute of Chicago (AIC) are illustrative beneficiaries of this bias. Obviously, these organizations are established and, at least with regard to the kinds of art they house, elite. They also earned spots on the *Chronicle of Philanthropy*’s 1992 “Philanthropy 400,” a list of the nonprofit organizations with the largest income from the private sector⁴⁴—the Met’s annual income exceeds the NEA’s.⁴⁵ And yet, although most of the NEA’s grants are measured in the tens of thousands, yearly awards to the Met and the AIC have often exceeded \$100,000, so these rich, established institutions receive a significant portion of both private and public largesse.⁴⁶ The confluence of private and public money is doubly alarming: not only does it call into question the necessity of the direct subsidies, but it also reinforces an existing tendency of individual donors to favor classical, Western European arts and enrich established organizations.⁴⁷ Even the money the NEA passes along to state and local agencies follows this trend: small-city museums often use grants to purchase works from New York artists.⁴⁸ In New York itself, arts organizations report that despite the “phenomenal growth of community

39. Quoted in Miller, *supra* note 9, at 1430.

40. Swaim, *supra* note 35, at 182.

41. EDWARD ARIAN, *THE UNFULFILLED PROMISE* 58 (1989); COWEN, GOOD & PLENTY, *supra* note 3, at 99.

42. A BRIEF CHRONICLE OF FEDERAL SUPPORT FOR THE ARTS, *supra* note 18, at 23, 38.

43. ARIAN, *supra* note 41, at 41-44; 65-66.

44. NETZER, *supra* note 17, at 63-64.

45. COWEN, GOOD & PLENTY, *supra* note 3, at 97.

46. It seems unlikely that the NEA grants are generating new private money for—or even directing new private money to—these bastions of high culture, given their long history of private support. Despite the much-vaunted “multiplier” effect of NEA grants on private giving, the income streams are probably independent for this sort of institution.

47. ZEIGLER, *supra* note 25, at 65.

48. KAUFFMAN, *supra* note 20 (citing EDWARD C. BANFIELD, *THE DEMOCRATIC MUSE* 7 (1984)).

and minority arts programs,” funding for these non-elite groups “has come exclusively from the state.”⁴⁹

Unsurprisingly, the primary beneficiaries of this favoritism were the elite audiences who patronized traditional high culture events.⁵⁰ Art museums in the mid-1980s, for example, drew a clientele that was quite disproportionately white, college educated, and professional.⁵¹ One commentator described funding of the arts as “highbrow pork barrel,” a brazen wealth transfer from society to the elite.⁵²

In part, this unspoken national arts policy resulted from the very structure meant to ensure artistic independence.⁵³ The deliberate informality of the panel procedures, the use of working artists and arts administrators to evaluate applicants whom they may know well, and the sheer volume of applications received all give a decided advantage to established artists on good terms with members of the cultural elite.⁵⁴ Staff members or jurors sometimes facilitated deliberation by screening the applicant pool before the panel even convened,⁵⁵ and even so a group charged with assessing the quality of orchestras might have heard only a fraction of the applicants in the few years prior to judging.⁵⁶ One early panel reportedly ignored the grant applications and debated only how to allocate awards among the artists they already knew.⁵⁷ These problems were largely hidden, thanks to the absence of any mechanism for measuring the success or efficacy of grants. Because Congress refrained on political grounds from requiring periodic reviews, informal reports on grants awarded were the only internal instruments of accountability.⁵⁸

These structural issues have been exacerbated by the fact that agents of the NEA tend, at every level, to share the agency’s elite bias. NEA staff members “often have background association and training in those areas of art activity most closely associated with traditional white, Western European culture and its milieu, creating an instinctive bias on their part toward applications who are representative of that milieu.”⁵⁹ Appointees

49. ARIAN, *supra* note 41, at 55.

50. Arthur C. Brooks, *Who Opposes Government Arts Funding?*, 108 PUB. CHOICE 355 (2001).

51. KAUFFMAN, *supra* note 20 (citing WILLIAM D. GRAMPP, PRICING THE PRICELESS 57-58 (1989)).

52. *Id.* (citing Robert J. Samuelson, *Highbrow Pork Barrel*, NEWSWEEK, August 21, 1989, at 44).

53. ARIAN, *supra* note 41, at 32.

54. DeGrazia, *supra* note 31, at 141.

55. Philip Pearlstein, *Censorship on Stylistic Grounds*, ART J., Winter 1991, at 65, 70.

56. ARIAN, *supra* note 41, at 52.

57. MICHAEL BRENSON, VISIONARIES AND OUTCASTS 49-51 (2001).

58. Fleming, *supra* note 4, at 74. The NEA is planning to experiment with a qualitative review system for a random sampling of grants. Whether such a program will offer meaningful accountability remains to be seen. NATIONAL ENDOWMENT FOR THE ARTS, STRATEGIC PLAN: FY 2006-2011, at 10 (2006), available at <http://www.nea.gov/about/Budget/StrategicPlanFY06-11.pdf>.

59. ARIAN, *supra* note 41, at 57. The “traditional, white Western European culture” referred to here is, of course, “high” art, rather than “traditional” folk art or popular culture.

(the actual peer reviewers, as opposed to the full-time professional staff) have followed this rule, too, from the beginning. The review panel for the first visual arts grants included the director of the Walker Art Center and painter Robert Motherwell;⁶⁰ higher up the chain of command, the first members of the NCA included Marian Anderson, Leonard Bernstein, Harper Lee, Gregory Peck, Sidney Poitier, and John Steinbeck.⁶¹ With the *crème de la crème* of high culture manning the ship, the elitist course may have been inevitable.

C. A Political History of the NEA

The elitist course was also desirable, for the political establishment no less than the cultural one. Indeed, earning the goodwill of the cultural elite was the unspoken intention of the politicians who built the Endowment. The assumption that the agency should support the elite was challenged unsuccessfully by an investigative study in 1979. Among other concerns, the report noted,

The problem in peer review faced by the Endowment is the selection of a panel of experts in a field who can offer quality judgments acceptable to the field because of recognized competence and yet seek an ever-broadening geographical and *social* representation of the various art disciplines that have traditionally been compartmentalized, specialized, and representative of *white western-European* culture.⁶²

The study had been requested by Sidney Yates, the NEA's champion in the House of Representatives, as a routine review, and its sharp criticism surprised both the Congressman and the Endowment. When the NEA filed a lengthy response that overlooked the accusation of discrimination, Representative Yates eschewed the original report, saying "I found nothing instructional or beneficial about the endowment's work commented upon. It isn't what I intended."⁶³

In truth, the elitism of the NEA was the natural outgrowth of the political purpose for which it was devised. The agency has served successive administrations as a pawn for political maneuvering; in the first decades of its existence, it was deployed by Presidents on both sides of the political spectrum to woo the liberal literati who reaped its benefits while funding enough alternative projects to maintain a plausible claim of even-handedness. Although there is every reason to believe that President Kennedy's affection for the cultural establishment was genuine, he also, as his friend Gore Vidal has pointed out, "knows the propaganda value of

60. ZEIGLER, *supra* note 25, at 21.

61. *Id.* at 19.

62. Quoted in ARIAN, *supra* note 41, at 51.

63. Quoted in ZEIGLER, *supra* note 25, at 42.

artists and he has . . . tried to win them over.”⁶⁴ Lyndon Johnson’s advocacy of the NEA was much more cynical: Arthur M. Schlesinger, a champion of the Hecksher report, elicited the new president’s support with the calculated assurance that an organization like the NEA “can strengthen the connections between the Administration and the intellectual and artistic community—something not to be dismissed when victory or defeat next fall will probably depend on who carries New York, Pennsylvania, California, Illinois, and Michigan.”⁶⁵ Without this political motivation or the need to appear an appropriately cultivated successor to Kennedy,⁶⁶ it is doubtful that the president who hosted a hootenanny as his first musical evening in the White House would have lent much aid to the cause of federal subsidies for “high” art.⁶⁷

Richard Nixon, known for his support of the House Un-American Activities Committee’s investigations of artists in the 1950s, seemed even less likely than Johnson to become a friend to the NEA. Once in office, however, he fully supported his appointee Nancy Hanks as the Endowment’s second Chair;⁶⁸ together, they presided over a skyrocketing appropriation that had increased by a factor of nearly twelve by the end of Hanks’s second term.⁶⁹ Hanks was known for her savvy and powers of persuasion, but Nixon had political reasons of his own for throwing his weight behind the burgeoning Endowment. As his Special Counsel Leonard Garment explained, “It was the classic strategy: ‘Hit ‘em where they ain’t.’ Surprise the snobs: For God’s sake—Richard Nixon has become a patron of the arts!”⁷⁰

In keeping with Nixon’s political strategy, it was under Hanks that the agency’s alliance with the cultural and intellectual elite was cemented.⁷¹ As noted above, some members of the cultural establishment, notably museums, orchestras, and opera, were skeptical of government funding. When Hanks assumed control in 1969, the NEA featured no formal programs for these organizations; by 1973, they accounted for nearly half of all program funds.⁷²

The shift was prompted in part by the symphonies, museums, and operas themselves, who had seen that involvement with the NEA did not

64. Quoted in KAUFFMAN, *supra* note 20.

65. Quoted in Cummings, *supra* note 25, at 160.

66. NETZER, *supra* note 17, at 62.

67. Kennedy, Johnson, and, later, Nixon, may also have been eager to defuse the possible future candidacy of Nelson Rockefeller, the great patron of the arts who founded the New York State Council on the Arts in 1960. See NETZER, *supra* note 17, at 62; Miller, *supra* note 9, at 1431.

68. Roger Stevens, Johnson’s appointee, was the first.

69. NATIONAL ENDOWMENT FOR THE ARTS APPROPRIATIONS HISTORY, *supra* note 1.

70. Quoted in ZEIGLER, *supra* note 25, at 26.

71. Swaim, *supra* note 35, at 184.

72. ZEIGLER, *supra* note 25, at 27. Hanks also increased funding to less obviously elite programs to cultivate balance and to appease individual Congressmen, although nothing approaching parity was desired or achieved.

eviscerate aesthetic standards and who had encountered economic trouble toward the end of the 1960s.⁷³ On the other side of the process, politicians were inclined to respond generously to these arts organizations' change of heart. As one commentator noted at the time, "When the President [Nixon] thinks of the arts, I have been told, he pictures museums and symphonies. When congressmen think of the arts they think of cultural programs involving large audiences."⁷⁴ But the NEA's reorientation toward the heart of high culture was not simply the product of a natural and unconscious alliance between the political and cultural elite. Leonard Garment sent a memo to Nixon informing him of the new receptivity of orchestras and museums and advising him to take advantage of it as a political tactic:

For an amount of money which is minuscule in terms of the total federal budget, you can demonstrate your commitment to 'reordering national priorities to emphasize the quality of life in our society.' The amount proposed . . . would have high impact among opinion formers. It is, on the merits, justified, i.e. the budget for the arts and humanities is now completely inadequate. Support for the arts is, increasingly, good politics. By providing substantially increased support for cultural activities, you will gain support from groups which have hitherto not been favorable to this administration. . . . We are talking about the vast majority of theatre board members, symphony trustees, museum benefactors, and the like who, nevertheless, feel very strongly that federal support for the arts and humanities is of primary importance. It is well for us to remember that these boards are made up, very largely, of business, corporate and community interests.⁷⁵

It was thus that "[t]he haves of the arts constituencies saw the priorities of the agency adjusted in line with their needs."⁷⁶

Politically speaking, there was one problem with supporting the cultural establishment: it is located almost exclusively in major cities, which makes it less appealing to representatives from rural states. Toward the end of Hanks's second term, Dick Netzer, Dean of the Graduate School of Public Administration at New York University, observed, "In congressional committee hearings on NEA authorizations and appropriations, the endowment's area of greatest vulnerability is its support of established artistic institutions and of activities concentrated in New York."⁷⁷ This issue was to dominate NEA appropriations under her successor, Livingstone Biddle, who presided over a battle between the old

73. NETZER, *supra* note 17, at 67.

74. ARIAN, *supra* note 41, at 49 (quoting Barry Schwartz, *Politics and Art: A Case of Cultural Confusion*, ARTS IN SOC'Y, Fall-Winter 1973, at 28).

75. Swaim, *supra* note 35, at 185-186.

76. Swaim, *supra* note 35, at 189.

77. NETZER, *supra* note 17, at 73.

“elitism” and a new “populism.”⁷⁸

Biddle himself favored the latter and successfully adjusted funding so that approximately half the agency’s budget went toward “populist” projects. However, it is important to understand what he and other leading advocates meant by “populism.” He envisioned not a rise to prominence of folk art or other forms and media outside the bounds of high culture; rather, he wanted to be sure that Americans outside major cities had access to the fruits of “high” cultural traditions. He declared, “[W]e are dealing with the arts across the whole length of the country, and that outreach, availability to quality in the arts is what is most basic with our program, access to quality in the arts.”⁷⁹ He thus divorced the organizational component of the cultural establishment (e.g., the Mets and the Boston Symphony Orchestras), which was firmly based in major cities, from the expressive component (e.g., the works of “high” artists like Picasso, Verdi, and Chopin), moving funds away from the former in order to advance the latter more broadly. Biddle’s “populism” was about access, about spreading an elite idea of “artistic quality” to parts of the country where the national cultural elites rarely found themselves. This is, at best, half populism; given that the theaters, orchestras, and museums newly funded by the NEA presented high culture for an audience of local elites, it may hardly qualify as populism at all.⁸⁰ As Princeton Sociologist Paul DiMaggio noted, “Congress nearly always wants the same thing: an agency that is both popular and populist without deserting the artistic elite.”⁸¹

The election of Ronald Reagan reflected the growing power of political and moral conservatives and augured a new, more fundamental kind of battle at the NEA. For the first time, the agency would be seen primarily as a political liability and would have to struggle to maintain funding. Initially, the mounting opposition to the agency was predominantly fiscal and achieved only limited success. Reagan had originally planned to replace the NEA entirely with a public corporation to raise private money for the arts, following the model of the Corporation for Public Broadcasting,⁸² but Democrats in Congress resisted his proposed halving of the agency’s budget.⁸³ The appropriation fluctuated in subsequent years, so that by 1989 it had risen only \$10 million from its pre-Reagan peak of \$159 million. Frank Hodsoll, whom Reagan appointed Chair, continued to direct the bulk of this money to the Western European arts

78. ZEIGLER, *supra* note 25, at 38-39. Biddle served as Chair from 1977-1981. He was a Carter appointee, President Ford having reappointed Nancy Hanks.

79. Quoted in Swaim, *supra* note 35, at 183.

80. ARIAN, *supra* note 41, at 42.

81. *Id.* at 50.

82. *Id.* at 60.

83. Miller, *supra* note 9, at 1432.

establishment.⁸⁴

The NEA's support of these organizations translated into support of the avant-garde art these recipients favored.⁸⁵ This consequence of elitism proved nearly fatal when controversy erupted over two of the agency's grants in 1989. The awards had made their way through institutional intermediaries to a retrospective of Robert Mapplethorpe's work, including homoerotic and sadomasochistic images, and an exhibition including the art of Andres Serrano, whose photograph *Piss Christ* depicts a crucifix submerged in the artist's urine. The religious right, fuelled by the vocal denunciations of the American Family Association, turned their objection to federal funding of this art into a national issue.⁸⁶ Although the NEA had suffered scandal before—most recently over a production of *Rigoletto* in Virginia whose advertising stereotyped Italian-Americans, to the displeasure of Congressman Mario Biaggi⁸⁷—it now became a battlefield in the struggle for control of national politics, and particularly for the heart of the Republican Party.⁸⁸ Moderate President George H.W. Bush made a show of political strength—or miscalculation—by submitting the usual reauthorization bill in 1990 as though nothing untoward had happened; Senator Jesse Helms led the enraged Congressional response, which asserted the power of the Republican's conservative base by calling for the total elimination of the Endowment.⁸⁹

For the first time since 1965, the nation seriously considered the question of whether and how government support of the arts could be justified. In the two months before the 1990 vote on the life of the NEA, the *Washington Post* and *Washington Times* alone published more than eighty articles and editorials on the subject.⁹⁰ The arts community was shaken by this unusually forceful opposition. Arts institutions and individual artists proved unable to agree on why or even whether the grants in question should be defended, much less on how to respond to the political heat.⁹¹ Although, as the next Part will explain, much of the arts community would later rally behind economic impact studies, it proved

84. ZEIGLER, *supra* note 25, at 60; *see also* ARIAN, *supra* note 41, at 61.

85. Thus, by supporting traditional institutions, the NEA has often supported nontraditional art. *See* Pearlstein, *supra* note 55, at 68.

86. Gregory B. Lewis & Arthur C. Brooks, *A Question of Morality*, PUB. AMIN. REV., Jan.-Feb. 2005, at 8, 10; Gregory B. Lewis, *Public Spending on the Arts as Morality Policy*, 34 POL'Y STD. J. 131, 132 (2006). Although social conservatives have generated a great deal of publicity and political capital by attacking the arts on moral grounds, surveys suggest that the link between religious values and attitudes toward art and art funding have not changed significantly since the 1989 scandals. A negative attitude toward government spending generally—that is, fiscal conservatism—remains the strongest predictor of opposition to arts funding. Lewis, *Public Spending*, at 136.

87. ZEIGLER, *supra* note 25, at 54-57.

88. *See* Editorial, *Wretched Excess*, NAT'L REV., February 23, 2004.

89. Chris Burgess, *Multiple Streams and Policy Community Dynamics*, J. ARTS MGMT., L., & SOC'Y, Summer 2006, at 104, 106-07.

90. *Id.* at 113.

91. *Id.* at 117-18.

unable to organize effectively under the pressure of this first major attack.

In the event, President Bush helped prevent any funding cuts (and save face) by calling for the appointment of an independent commission to study the NEA. Congress appeased conservative Republicans by implementing a variety of structural changes to the agency, increasing the amount of NEA funding that had to be passed on to the states (it is now 40%) and eventually eliminating direct grants to artists (even though the Mapplethorpe and Serrano awards had been institutional, supporting the museums that displayed the works in question).⁹² The crisis simmered, with every year of the 1990s witnessing congressional calls for the defunding of the NEA, until the Republican Revolution of 1994 allowed the agency's opponents to cut its budget in half (to \$99.5 million) for 1996. The agency survived by restructuring its budget to allocate roughly three-fourth of its funds to relatively safe projects of heritage, preservation, education, access, planning, and stabilization, leaving only a quarter of its reduced budget for "creation and presentation."⁹³ Although it enjoyed a minor revival recently under President George W. Bush and Chair Dana Gioia, the Endowment's 2007 appropriation, \$124.5 million, was only about 70% of its 1992 peak.⁹⁴

With its standard-bearer the casualty of a political skirmish, the arts community suddenly found itself on the defensive in the culture wars and ill-prepared to agree on a battle plan—or even on which policies would be most desirable. A sort of crisis of identity ensued, in which arts organizations and individual artists were forced to justify themselves, to confront the question of why their activities deserved federal funding.⁹⁵ This question is the subject of the next Part.

III. TAXING PETER TO PAY PICASSO?: JUSTIFICATIONS FOR ARTS SUBSIDIES

Economists, artists, and civilians who support arts subsidies have devised an impressive variety of arguments on their behalf. The burden, if the merit of the arts can no longer be assumed, is a heavy one: advocates must show that the government is justified in interfering with the generally laissez-faire system that characterizes American markets. This Part considers the major justifications for arts subsidies available in the literature, including arguments based on the inherent value of the arts, arguments employing the tools of the economist, and instrumental

92. Lawrence D. Mankin, et al., *The National Government and the Arts*, J. ARTS MGMT., L., & SOC'Y, Fall 2001, at 184, 187.

93. Molly Bendall, *Ms. Smith Goes to Washington*, NEW REPUBLIC, Dec. 11, 2000, at 36 (reviewing Jane Alexander, *Command Performance* (2000)).

94. NATIONAL ENDOWMENT FOR THE ARTS APPROPRIATIONS HISTORY, *supra* note 1.

95. KEVIN F. MCCARTHY, ET AL., *GIFTS OF THE MUSE*, at 1 (2004).

arguments based on externalities.⁹⁶ Ultimately, nearly—but not quite—all of them are unpersuasive with regard to direct, federal, NEA-style subsidies in the American context.

A. Arguments from Above the Market

1. Arts as Merit Goods

Lovers of the arts, especially the traditional “high” arts historically favored by the NEA, often consider their worth to be self-evident. Confirmed in their taste by centuries of expert testimony and aristocratic cultivation, they may regard art as inherently civilizing, uplifting, and ennobling. Since art is perceived as a good in both the positive and the normative sense, funding it, from the public coffers or otherwise, is a valuable end in itself. This idea enjoyed special prominence among the entrepreneurs-turned-philanthropists who endowed museums, libraries, and other arts institutions in the first part of the last century, but it persists today in a less overtly paternalistic guise. British socialite and journalist Barbara Amiel recently wrote in an account of Placido Domingo’s performance of Verdi’s *Stiffiello* at the Royal Opera House of London, “Giving funds to opera when you yourself don’t like it is akin to giving to a charity for an illness that you will never get.”⁹⁷ Amiel’s statement, made in a piece titled “In Defence of Elitism,” suggests that opera, like medicine, is inherently good.

On this view, the arts are too important to leave to the vagaries and degradations of the private market. The argument, put forcefully, might follow this course: given the present woeful level of public subsidy, even the lofty Metropolitan Opera, which regularly receives hefty grants from the NEA, must depend on ticket sales for part of its revenue. In fact, the Met budgets for 96% occupancy,⁹⁸ which means that it may be forced to pander to audiences, contaminating the value of pure art in order to fill the house. Government subsidy could alleviate these financial constraints and free artists to channel the muse more effectively.

This sketch of a naïve merit good argument is so broad as to be reductive. This Part will shortly explore more sophisticated variations that attempt to shore up some of its obvious flaws, but, because this instinctive response seems to underlie the thinking of many arts supporters, it is worth noting four equally broad objections to this kind of justification. First, the merit good assertion, even if accepted, is useless as a guide to

96. The discussion will necessarily be somewhat broad and non-technical in order to address the full range of these arguments.

97. Barbara Amiel, *In Defence of Elitism*, MACLEAN’S, July 31, 1995, at 9.

98. Werner W. Pommerehne & Bruno S. Frey, *Public Promotion of the Arts: A Survey of Means*, 14 J. CULT. ECON. 73, 75-76 (1990), reprinted in 2 CULTURAL ECON. 674 (Ruth Towse ed., 1997).

public policy. The argument draws its rhetorical force from an invocation of lofty ideas—the arts, the muse—that cannot survive the appropriations process. How much money should the government devote to the arts? How would the muse disburse the funds? Subsidy proponents have to tackle these practical questions, too, and they need more nuanced arguments to do so.⁹⁹

The second broad objection is based on another distinction muddled by the naïve merit good argument: is the desideratum the act of artistic creation or the aesthetic experience of the work created? If the experience of the audience is a significant part of the value of art, there might be better ways of achieving the elements of that experience; we would have to specify them to demonstrate otherwise.¹⁰⁰ And, as long as we are analyzing the value of aesthetic experience, we might note that it seems frivolous compared to, say, the experience of having enough to eat. If the federal budget is inadequate to eliminate poverty and hunger, how could we justify diverting money to the arts? The merit good argument fails to show *why* the arts are so good, which is useful for forging a big-tent alliance but fatally evasive in a conversation with skeptics.

This suggests a third kind of objection: surely not everything called *art* deserves federal funding. A naïve merit good defense overlooks the difficulty of deciding what art—or even what sorts of art—should be subsidized. Without resolving this conundrum of quality and category, it is virtually impossible to get any useful policy guidance out of the claim that art *per se* should receive government largesse.

If the naïve merit good argument is advanced in the presence of an economist, a fourth broad (but fundamental) objection is likely to surface quickly. In its least sophisticated form, the merit good argument is paternalistic in a way that violates one of the most basic assumptions of neoclassical economics: consumer sovereignty. Capitalist societies regard the individual as the best judge of his own welfare and conclude that, in the absence of systemic market failure, illegal activity, or (perhaps) congenital distributive inequality, the individual should be allowed to vote freely with his dollars. The default position under this system is that the level of arts funding will be determined by individual consumers, both spectators and donors, in a competitive free market.¹⁰¹

Advocate of subsidies, who want the government to treat the market for the arts as an exception to this general policy of noninterference, must

99. Shauna Saunders, *The Case for the National Endowment for the Arts*, 37 HIST. POLITICAL ECON. 593, 602 (2005).

100. David Cwi, *Merit Good or Market Failure*, in PUBLIC POLICY AND THE ARTS 59, 63 (Kevin V. Mulcahy and C. Richard Swaim eds., 1982).

101. Alan Peacock, *Economics, Cultural Values and Cultural Policies*, in CULTURAL ECONOMICS at 9, 10 (Ruth Towse and Abdul Khakee eds., 1992), reprinted in 2 CULTURAL ECONOMICS 547 (Ruth Towse ed., 1997).

advance an argument on grounds other than pure paternalism or elitism. As *Washington Post Book World* critic Jonathan Yardley has asked, “Why should the struggling young artist be entitled to government subsidy when the struggling young mechanic or accountant is not?”¹⁰² This Part presents several responses to Yardley’s question and considers their merits in light of the history of American federal arts subsidy. The rest of this Section looks particularly at arguments based on access to and conservation of the arts, both of which seem to rest on the idea that the arts are inherently meritorious.

2. *Equity, Access, and Taste*

The first more nuanced merit good argument to be examined here points to inequities in access to the arts. In March 1965, the Rockefeller Brothers Fund published an influential report laying out arts policy recommendations; August Hecksher, who had just advocated the creation of the NEA to President Kennedy, was a member of the Rockefeller panel. The report heralded the value of the arts and the need for subsidy, emphasizing that “the arts are not for a privileged few but for the many. . . . their place is not on the periphery of society but at its center. . . . they are not just a form of recreation but are of central importance to our well being and happiness.”¹⁰³ This line of reasoning supplements the merit good assertion with an argument about equity or access. Not only are arts in themselves worthy of greater levels of production and consumption; a large potential audience would actually like to participate in the art market but are prevented because they are too poor or they live in small communities that cannot support an outpost of the arts industry. Given the spiritually uplifting qualities of the arts, the government should work to increase the availability of the arts, at least to these populations.

It is certainly true that participation in the traditional “high” arts is correlated with income and education (and even with parental education and income)¹⁰⁴ and with proximity to a major urban center. Some NEA programs address this disparity, including the Expansion Arts grants for emerging organizations, awards to preserve heritage and folk art, and Carter-era bureaucratic initiatives like a 1978 task force to determine the arts needs of the Hispanic community.¹⁰⁵ However, we have seen that, historically, the NEA has not treated increasing access in this way to be its central mission, although access was Livingston Biddle’s watchword; if this argument holds up, it would also demand a shift in the way federal

102. KAUFFMAN, *supra* note 20 (citing Jonathan Yardley, *The NEA Debate, Derailed by Drama*, WASH. POST, Apr. 9, 1990, at C2).

103. Quoted in Saunders, *supra* note 99, at 604.

104. NATIONAL ASSEMBLY OF STATE ARTS AGENCIES, ARTS EDUCATION IN ACTION (1999).

105. A BRIEF CHRONICLE OF FEDERAL SUPPORT FOR THE ARTS, *supra* note 18, at 28-29.

subsidies are deployed.

To the extent that this argument avoids naked paternalism, it depends on the empirical assertion that poor and rural populations would like to consume more art but are prevented from doing so by high ticket prices or problems of coordination. If the economic concerns are to rise to the level of market failure, this untapped demand for traditional non-profit arts would have to be fairly widespread in these populations. Some tangential evidence suggests this isn't so. For instance, from 2001 to 2005, the American GDP grew nearly 12% and recreational consumer spending rose more than 31%, but admission to performing arts events increased by less than 2%; most of the increase in leisure spending went to video and audio goods, toys and sports supplies, and "commercial amusements."¹⁰⁶ Supporters might point to surveys suggesting a large willingness to pay for arts to refute this evidence; the next Section discusses this sort of argument. Certainly, these numbers are not conclusive, but they offer some support to the idea that many people would not choose to spend extra income on the arts typically supported by the NEA, which in turn suggests that lack of access is not the main explanation for low ticket sales. If this is so, this argument about access collapses back into a claim that arts are inherently meritorious.

Even if poverty and distance suppress a large actual demand for the arts, it is by no means clear that federal subsidy is the correct solution. Simple inability to pay is not treated as a market failure by neoclassical economics; the cure for inequity is not usually considered payment-in-kind but redistribution through taxation (or through social and political policies to redress systemic inequality). This seems especially appropriate in the present context, given that the arts, no matter how valuable, are not necessary to life, unlike some other goods that may also be out of reach for the poor. Rural populations can make a stronger market-failure argument on the basis of economies of scale in production and start-up costs, but they have a weaker claim to untapped demand; true art lovers would presumably choose to move to a place where the arts are already available. (If lack of resources prevents this, the distance argument seems to shift to a general distributive inequality argument.)

Even granting a large, unfulfilled demand in the lower income brackets and assuming that government money should be used to address the problem, NEA-style supply-side subsidy would seem to be an inefficient means of doing so. Indeed, economists such as William Baumol¹⁰⁷ and Edwin G. West¹⁰⁸ have advocated arts voucher systems as a way to

106. NEA OFFICE OF RESEARCH & ANALYSIS, NOTE 91: CONSUMER SPENDING ON PERFORMING ARTS, at 7 (2006).

107. See Interview with William Baumol, *The Case for Subsidizing the Arts*, CHALLENGE, Sep.-Oct. 1995, at 52, 56.

108. See EDWIN G. WEST, SUBSIDIZING THE PERFORMING ARTS (1985).

increase access without subsidizing the more typical rich and educated arts audience. One such (private) program, the nonprofit Theater Development Fund (TDF) in New York City, charges members \$5 for tickets to Off-Off-Broadway shows and pays the theater \$7; Broadway tickets may be priced as low as \$28. The program had some limited success in attracting new audiences, although this effect has leveled off.¹⁰⁹

In addition to the contestability of their economic assumptions and the paternalism inherent in identifying the institutions or genres at which vouchers can be spent, these programs are vulnerable to two criticisms. First, any large-scale voucher system must overcome considerable logistical problems, from identifying the members of the beneficiary class to ensuring that members of this class do not resell tickets. The Theater Development Fund, for example, is open to students, teachers, union members, seniors, civil service employees, nonprofit organization employees, performing arts professionals, and members of the armed forces and clergy. Some of these groups are already eligible for discounted tickets at theaters; others seem very imperfect substitutes for income or education levels, or for a lack of prior arts consumption.¹¹⁰ If a voucher program were to attempt to defray travel expenses to extend its benefits to remote populations, this would further compound administrative costs.¹¹¹

Second, it is not clear exactly how vouchers would affect arts audiences. Henry Hansmann's work on nonprofit organizations suggests that "for an audience-maximizing arts firm a ticket subsidy has no greater effect on audience size than does a lump sum subsidy, while for the quality maximizer a ticket subsidy may actually lead to a smaller audience than a lump-sum subsidy."¹¹² If the only goal were to increase attendance by the underprivileged, these findings might not be a problem; however, to the extent that they are part of a broader argument in favor of the arts, the mere substitution of one kind of audience member for another would be undesirable, particularly if the quality of the arts or overall attendance were to suffer.

The access argument for vouchers, and for direct subsidy generally, has

109. www.tdf.org. Inflation has cut deeply into the amount of the subsidy; the program is currently working to restore it. See Interview with William Baumol, *supra* note 107, at 56.

110. TDF's mission is two fold: to "identify and provide support, including financial assistance, to theatrical works of artistic merit" and to "encourage and enable diverse audiences to attend live theatre and dance in all their venues." www.tdf.org. This sets up a tension between providing subsidy to more groups in order to funnel more money to the arts and focusing more narrowly on new theatergoers; regardless, their membership policy suggests the difficulty of targeting such theatergoers.

111. Alan Peacock, *Welfare Economics and Public Subsidies to the Arts*, MANCHESTER SCH. ECON. & SOC. STUD. Dec. 1969, at 323, 333-35, *reprinted in* 2 CULTURAL ECONOMICS 501 (Ruth Towse ed., 1997).

112. Quoted in Ruth Towse, *Achieving Public Policy Objectives in the Arts and Heritage*, in CULTURAL ECONOMICS AND CULTURAL POLICIES 143, 154 (Alan Peacock & Ilde Rizzo eds., 1994), *reprinted in* 2 CULTURAL ECONOMICS 697 (Ruth Towse ed., 1997).

been bolstered by reference to information costs.¹¹³ If poor consumers do not actually exhibit unfulfilled demand for the arts, the thinking goes, this is in large part because they have not been exposed to them. The controlling inequity is thus a lack of education in taste, the exclusion of poor consumers from the virtuous cycle whereby some arts experience awakens the desire for more. Subsidy intended to increase exposure to the arts would fill this need, and eventually render the subsidy itself obsolete.

This is a potent argument for arts education, albeit one grounded on the paternalistic assumption that certain arts will be recognized as meritorious with the proper training. Its force is undercut, however, by the fact that opportunities to develop a taste for the arts are present in many poor communities. Even if this taste could only be acquired through firsthand experience, it is far from obvious that amateur, school, and (for the remote but not poor) for-profit programs are unable to provide this experience.¹¹⁴ Although arts education in low-income school districts may well be inadequate for many reasons, it seems unlikely that information costs alone impose serious limits on demand for the arts. Indeed, increasing access has been an important political concern in discussions of the NEA since at least the Carter Administration, but a 2002 study shows that the percentage of adults who have attended traditional “high” arts events has not increased in the last two decades.¹¹⁵

A final concern about the taste-formation argument is that, like the naïve merit good argument, it provides little policy guidance beyond calling for the diversion of some amount of money to expose underprivileged and rural populations to taste-forming art. The benefits of this program defy quantification, and any attempt to define the class of taste-forming art would inevitably reduce the argument’s qualitative appeal.¹¹⁶

3. *Preservation for Future Generations*

Like antiquities and the environment, the techniques and fruits of artistic endeavor are sometimes considered part of our national heritage or the heritage of Western civilization. Regardless of current demand for the arts, a devotee might argue that we have an obligation to support them in order to preserve and pass on our inheritance to future generations. Rhetoric supporting federal arts subsidy has employed this sort of language from the beginning. Hallie Flanagan, the former head of the WPA’s Federal Theatre Project, wrote,

113. See, e.g., NETZER, *supra* note 17, at 161-64.

114. David Cwi, *Public Support to the Arts*, 4 J. CULT. ECON. 39, 52 (1980), *reprinted in* 2 CULTURAL ECONOMICS 514 (Ruth Towse ed., 1997).

115. NEA RESEARCH DIVISION, NOTE 81: 2002 SURVEY OF PUBLIC PARTICIPATION IN THE ARTS, at 1.

116. Towse, *Achieving Public Policy Objectives in the Arts and Heritage*, *supra* note 112, at 158.

The Federal theatre came into being because Mr. Harry Hopkins, administrator of the Works Progress Administration, believed not only that unemployed theatrical people could get as hungry as unemployed accountants and engineers, but—and this was much more extraordinary—that their skills were as worthy of conservation. He believed that the talents of these professional theater workers, together with the skills of painters, musicians and writers, made up part of the national wealth which America could not afford to lose.¹¹⁷

One difficulty with the preservation argument is that it requires an estimate of what level of cultural activity today would be adequate to preserve our cultural heritage in the future. This would probably be impossible to do with much precision, but even in general terms, it would be quite controversial to claim that the present state of arts funding threatens the very existence of the arts for posterity.

The conservation argument also requires judgments about what kinds and forms of culture should be preserved. Should we preserve both painting and opera? Both individual paintings and painterly technique? What about reproductions and recordings? And these are the easy issues; much more divisive is the question of which styles or works should be preserved. *Which* painterly techniques must we be able to pass on? Which paintings should be kept in the country, or on public display? Which plays should be preserved by live performance, and which can be preserved by maintaining a video recording or even just the text?¹¹⁸ And what about contemporary art? As philosopher Noel Carroll has pointed out, “Bluntly, contemporary art is not our heritage yet, nor is it clear how much of it will be.”¹¹⁹ In the absence of consensus on these issues, the conservation argument, too, despite its rhetorical force, fails as a guide to specific policies.

Even at the most general level, other objections arise. First, broad decisions about preservation assume that we can predict the taste of future generations, or that we are better positioned than they to know what they *should* like. With regard to air purity and global temperatures, scrying future preferences is easy; with regard to artistic traditions, prognostication is problematic. Second, what would prevent us from simply allowing future generations to determine their preferences and revive any obsolete techniques? Our descendants are likely to be considerably richer in real terms and to be equipped with more powerful technology than we are; supporting arts now in order to keep them available for the future may be a needless and expensive solution, even if

117. Quoted in ZEIGLER, *supra* note 25, at 7.

118. Cwi, *Public Support to the Arts*, *supra* note 114, at 42-43

119. Noel Carroll, *Can Government Funding of the Arts Be Justified Theoretically?*, in PUBLIC POLICY AND THE AESTHETIC INTEREST at 68, 69 (Ralph A. Smith & Ronald Berman eds., 1992).

it could be justified ideologically.¹²⁰ Third, in a country as pluralist as the United States, the need to preserve the arts is complicated by the fact that traditional Western arts are only a portion of our cultural heritage; indeed, many people might not regard them as any part of their heritage. It is obvious, not least from the disparity in government arts funding, that Americans identify less with the arts than many Europeans, and the power of the conservation argument is correspondingly weakened.

Each of the arguments considered so far (merit, access, and preservation) has depended in part on the paternalistic assumption that the arts or aesthetic experiences are desirable for their own sakes, regardless of the price they command in the market. This assumption is problematic in the context of American capitalism, and it was especially problematic when conservative politicians began to present the arts, as subsidized by the federal government, as actively anti-meritorious. These attacks encouraged arts supporters to set aside the assertion that culture is too important to leave to the market and to adopt instead the tools of the economist and the language of the market. The next Section will explore some of the justifications for subsidy that emerged from this new bilingualism.

B. Taking up the Economist's Tools

Debate over arts subsidies has unquestionably shifted focus since 1965. The arguments of arts supporters now tend to emphasize the instrumental value of the arts for other goals like educational achievement and economic growth. The primary impetus for this change was the growing threat from cultural and political conservatives in the early 1990s, but the trend has been encouraged by the rise of professional arts policy advocates and increased interest in the utility of the arts among public and private development stakeholders.¹²¹ Even the NEA's public statements reflect this shift: whereas references to the influence of the arts on economic activity are largely absent from the annual reports of the 1970s, it has now become one of the agency's key selling points.¹²² Some state arts agencies have even formally aligned themselves with departments of tourism or economic development.¹²³ This Section assesses the fruits of this new emphasis.

120. Cwi, *Merit Good or Market Failure*, *supra* note 100, at 72.

121. Elizabeth Strom with Angela Cook, *Old Pictures in New Frames*, 21 REV. POL'Y RES. 505, 506 (2004).

122. Strom, *supra* note 121, at 508.

123. Bill Ivey, *America Needs a New System for Supporting the Arts*, CHRON. HIGHER EDUC., Feb. 4, 2005, at B6.

1. Baumol's Cost Disease

Many of the economic arguments for subsidies advanced by arts advocates since the early 1990s have their academic origins in the field of cultural economics, which was founded by the 1966 publication of William Baumol and William Bowen's *Performing Arts: The Economic Dilemma*.¹²⁴ One of the book's central theses is now referred to as Baumol's Cost Disease. It was the most widely used economic arguments for subsidizing arts institutions through the end of the 1970s,¹²⁵ and it is still sometimes cited,¹²⁶ although its applicability has proved to be limited.

The theory addresses the question of whether art even needs subsidy in order to thrive. After all, it is for-profit arts organizations that produce most American art,¹²⁷ and a good deal of what they produce, from Broadway musicals and jazz concerts to independent film and HBO miniseries, has earned critical accolades using investments rather than donations. Even non-profit arts prospered in this country for more than 150 years without significant federal subsidy.¹²⁸

Addressing this fundamental question, Baumol and Bowen argued that some arts, including most performing arts, will gradually become unsustainable in the market because of strict limits on productivity that cannot be alleviated by new technology. The Brandenburg Concertos occupy the same number of musicians for the same number of hours today as they did in the eighteenth century; it is hard to imagine any development that would allow a person to fiddle faster without disturbing the tempo. This effect does not hold for most other industries, where technology increases the productivity of labor and reduces the need for labor inputs. Over time, this disparity will raise relative input costs and thus relative prices, constricting expansion of the artistic sector.¹²⁹ As computer and cell phone technology gets cheaper and cheaper, opera tickets will only become more expensive. While this may not eliminate the arts entirely, it is likely to reduce the professionalism, quality, and variety of arts experiences available if the government does not step in. Baumol himself has recently pointed to the rise of the blockbuster movie and Broadway play to suggest that rising prices will crowd out more experimental work, and he has noted that the cost of arts events has increased approximately 100% more than inflation since World War II—the same rate as a visit to a doctor,

124. WILLIAM J. BAUMOL & WILLIAM G. BOWEN, *PERFORMING ARTS: THE ECONOMIC DILEMMA* (1966). See Ruth Towse, Introduction in 1 *CULTURAL ECONOMICS* xiii, xiii (Ruth Towse ed., 1997); Saunders, *supra* note 99, at 600.

125. NETZER, *supra* note 17, at 74.

126. See, e.g., Interview with William Baumol, *supra* note 107.

127. Cwi, *Merit Good or Market Failure*, *supra* note 100, at 71.

128. A BRIEF CHRONICLE OF FEDERAL SUPPORT FOR THE ARTS, *supra* note 18.

129. Peacock, *Welfare Economics and Public Subsidies to the Arts*, *supra* note 111, at 323-25.

which exhibits a similar cost disease.¹³⁰

Many economists have questioned the applicability of cost disease to the arts, on several grounds. First, the theory neglects the extent to which technology does increase productivity in the arts. One obvious example is broadcast technology, which allows a given performance to reach a much larger audience with very little degradation of sound or video quality. Viewers outside the concert hall contribute to the income of the orchestra, so that the purest experience—listening to the concerto performed by actual instruments only feet away—is subsidized by the new audience made possible by telecommunications. To the extent that ticket prices have increased anyway, this may well be the result of other factors, such as reduced demand for Bach—or at least for live Bach, since recording technology represents another obvious means of increasing the effective productivity of artists.

A related argument, rarely advanced in the literature, is that technology may actually improve the artistic experience, justifying any increased cost. Technology enabling better acoustics, truer instruments, and more discreet hearing aids would all presumably increase the desirability of and demand for aesthetic experience. Some economists have also argued that the empirical evidence indicates that cost disease cannot in fact be responsible for increases in the prices of the arts. Edwin G. West undertakes to prove that real unit costs in the performing arts *decreased* during the 1970s;¹³¹ if prices increased despite this, Baumol's theory may overlook the inability of arts organizations to use their resources efficiently thanks to poor management.¹³²

Even if technology does inevitably lead to higher relative prices for the arts, this may not affect the level of service demanded or provided, particularly since technology also increases relative wealth.¹³³ The wealth effect may increase demand for tickets, and for opportunities to donate to the arts. The elasticity of demand for the arts may also be quite low: the price of high arts attendance increased faster than the Retail Price Index in the 1980s, but attendance itself did, too.¹³⁴ Economists have also noted that the existence of cost disease alone would not call for federal arts subsidy; even if the arts were in danger of becoming less competitive, supporters would need to develop a separate argument for the value of preserving them—or preserving the variety supported during a less technologically-advanced era—despite their lack of market viability.¹³⁵

130. Interview with William Baumol, *supra* note 107, at 54.

131. See WEST, *SUBSIDIZING THE PERFORMING ARTS*, *supra* note 108.

132. Cwi, *Merit Good or Market Failure*, *supra* note 100, at 76.

133. Peacock, *Welfare Economics and Public Subsidies to the Arts*, *supra* note 111, at 327.

134. Towse, *Achieving Public Policy Objectives in the Arts and Heritage*, *supra* note 112, at 156. See also Cwi, *Public Support to the Arts*, *supra* note 114, at 53.

135. Saunders, *supra* note 99, at 601.

Baumol's analysis, if accurate, might even raise equity concerns about NEA-style direct subsidy. If constant labor prices were driving up the relative price of some art forms, a general subsidy policy might differentially encourage art forms with higher input costs—the ones that tend to be favored by the rich and educated.¹³⁶ It is an open question whether the distribution of taste for opera, say, is caused by cost disease, although its pre-modern association with the upper class suggests otherwise. Regardless, a policy explicitly favoring high-cost arts at the expense of more popular forms of entertainment would be in effect a subsidy for the rich; supporting this would require much the same paternalism assumed in the arguments explored in the previous Section.

2. *Economic Impact Studies*

The most popular kind of economic argument for subsidy today seeks to avoid the problem of paternalism, meeting the market on its own assumptions by asserting the *economic* benefits of artistic activity. The link between the arts and commerce is by no means new: one arts lover in the 1850s declared that “the city of America which first possesses a fine gallery of art will become the Florence of this continent in that respect, reaping a reward in reputation and money sufficient to convince the closest calculator of the dollar that no better investment could have been made.”¹³⁷ But in the decades since the 1970s, assertions of this link, especially using economic impact (EI) studies, have become the most widely funded form of arts research¹³⁸ and, according to some advocates, the “most potent” tool, “the one that resonates most with elected leaders, public and private sector funders, and policymakers”¹³⁹ because it connects the arts, a relatively unpopular electoral plank, with improving the economy.

The advantage of this sort of argument is obvious: the government need not donate to art for art's sake but should instead invest in art for the sake of the economy. A slew of studies have attempted to quantify the economic benefits of arts, which boost tourism, seduce desirable residents and businesses, and attract investments in infrastructure.¹⁴⁰ The trend is by no means restricted to arts advocacy; a recent article on a local Seattle

136. NETZER, *supra* note 17, at 33.

137. Quoted in Strom, *supra* note 121, at 507.

138. Arthur H. Sterngold, *Do Economic Impact Studies Misrepresent the Benefits of Arts and Cultural Organizations*, J. ARTS MGMT., L., & SOC'Y, Fall 2004, at 166, 167.

139. Randy Cohen, William Schaffer, & Benjamin Davidson, *Arts and Economic Prosperity*, J. ARTS MGMT., L., & SOC'Y, Spring 2003, at 17, 17.

140. JOSHUA GUETZKOW, CENTER FOR ARTS AND CULTURAL POLICY STUDIES WORKING PAPER 20: HOW THE ARTS IMPACT COMMUNITIES, at 8 (2002). The appeal to tourism suggests a certain tension between the economic development argument and the earlier argument from access: to the extent that a program of arts support is designed for visitors, it may not be well suited to spreading access within the city or region in question.

website headlined “A Study of Seattle Media Obsession with Studies” counted seven organizations that had recently released EI studies in bids for state money, including the Sonics, NASCAR fans, the bio-tech industry, and the Washington tree-fruit industry.¹⁴¹

The recent wrangling over President Obama’s first economic stimulus package demonstrates the pervasiveness of EI-inspired arts advocacy. The \$50 million earmark for the National Endowment for the Arts (NEA) that was included by the House and removed by the Senate made up a tiny portion of the \$787 billion spending bill,¹⁴² but it provoked intense lobbying by arts supporters including Robert Redford and dismissive judgment of the value of the arts from conservatives like Senator Tom Coburn, who sponsored an amendment that would have prevented stimulus funds from being directed to support of the arts, as well as casinos and golf courses.¹⁴³ In the end, the NEA funding was included in the bill passed by both houses of Congress on February 13, 2009, the Coburn Amendment’s restriction was removed, and the arts community celebrated. “‘It’s a huge victory for the arts in America,’ said Robert L. Lynch, the president of Americans for the Arts (AFA), a lobbying group. ‘It’s a signal that maybe there is after all more understanding of the value of creativity in the 21st-century economy.’”¹⁴⁴

Given the nature of the American Recovery and Reinvestment Act of 2009, it may not be surprising that pro-NEA lobbying adopted the language of economic stimulus. Arts leaders, state officials, and celebrities all pointed to the “creative economy” as an important employer and source of other economic activity.¹⁴⁵ In his phone call to Speaker Nancy Pelosi, Redford pointed out that “his Sundance Film Festival brings more than \$60 million to Park City, Utah each year.” Kate D. Levin, cultural affairs commissioner for New York City, made the point succinctly. “One of the profound things about culture is the amount of indirect employment and spending it generates,” she said. “Even the smallest organization can record the fact that the parking lot down the street and the dry cleaner around the corner and the restaurant nearby all do better when the

141. Knute Berger, *A Study of Seattle Media Obsession with Studies*, CROSSCUT SEATTLE, <http://crosscut.com/mossback/3899/A+study+of+Seattle+media+obsession+with+studies> (June 7, 2007).

142. See, e.g., Laura Meckler, *Obama Signs Stimulus into Law*, WALL STREET J., Feb. 18, 2009, available at <http://online.wsj.com/article/SB123487951033799545.html>.

143. See, e.g., Robin Pogrebin, *Saving Federal Arts Funds: Selling Culture As an Economic Force*, N.Y. TIMES, Feb. 15, 2009, available at <http://www.nytimes.com/2009/02/16/arts/16mone.html>.

144. *Id.*

145. See, e.g., Elizabeth Blair, *Stimulus Package Includes Millions for the Arts*, All Things Considered, NPR, Jan. 27, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=99916513>; Michael Kranish, *Stimulus Funding for Arts Hits Nerve*, BOSTON GLOBE, Feb. 5, 2009, available at http://www.boston.com/news/nation/washington/articles/2009/02/05/stimulus_funding_for_arts_hits_nerve.

organization is functioning.”¹⁴⁶ But the tone of this debate is common among arts promoters in many other contexts today.

The most prominent and broad-based arts EI study is *Arts & Economic Prosperity III*, released in 2005 by Americans for the Arts. The organization boasts that it “documents the key role played by the nonprofit arts and culture industry in strengthening our nation’s economy. . . . [and] demonstrates that the nonprofit arts and culture industry is an economic driver in communities—a growth industry that supports jobs, generates government revenue, and is the cornerstone of tourism.” Estimating that “the nonprofit arts and culture industry generates \$166.2 billion in economic activity every year,” the report itemizes the benefits: 5.7 million full-time equivalent jobs, \$104.2 billion in household income, and nearly \$30 billion in local, state, and federal tax revenue.¹⁴⁷

The Americans for the Arts report, like most economic impact studies, was expressly designed to help advocates persuade state or local authorities to invest in the arts. Such studies are much less persuasive at the national level, so that even if state and local government should be swayed by them (a proposition challenged below), the NEA should not. Most of the effect of investing in the arts, particularly in the short term, involves diverting artistic resources from one place to another: if Seattle funds a new nonprofit theater organization, it will draw actors, directors, and technicians from the surrounding area. This will, of course, affect the local economy, but largely at the expense of neighboring economies. EI studies often do not show that the arts actually generate wealth; the numbers may well be reached almost entirely by *relocating* it. At the national level, the economic gains and losses induced by NEA grants may essentially cancel out.¹⁴⁸

In theory, this problem could be incorporated into an EI study designed to demonstrate that national investment of the arts over time would also generate more artistic activity and, in turn, more economic benefit. However, the weaknesses of existing studies do not inspire confidence that such a well-designed study, even if possible, is forthcoming. In a frequently asked questions section for lobbyists on its website, the organization acknowledges that EI studies have come under fire from some economists, but defend their methodology:

You can be confident that the input-output analysis used in this study is a highly regarded model in the field of economics (the basis of two Nobel Prizes in economics). However, as in any professional field, there is disagreement about procedures, jargon, and the best way to

146. Pogrebin, *supra* note 143.

147. Americans for the Arts, Homepage: Arts & Econ Prosperity III, http://www.artsusa.org/information_resources/research_information/services/economic_impact/default.asp (2005).

148. Sterngold, *supra* note 138, at 169-170.

determine results. Ask 12 artists to define art and you will get 24 answers; expect the same of economists. You may meet an economist who believes that these studies should be done differently.¹⁴⁹

This pre-emptive defense was not crafted out of an abundance of caution. Economic impact studies have been criticized by economists for a variety of reasons, leading one to characterize the studies generally as “a parody of economic analysis.”¹⁵⁰ Some of the more technical critiques involve the difficulty of discounting local expenditures that are simply diverted from other existing activities or accurately generalizing from local economic statistics.¹⁵¹ These technical concerns lie outside this paper, but it is worth noting that “nearly every economist who reviews ‘economic’ impact studies of the arts expresses concern over the technological and practical limitations of the methodologies.”¹⁵²

The less technical concerns include the fact that some of these studies (especially earlier ones) use only gross measures of economic impact, ignoring the substitution effects of arts spending.¹⁵³ The fact that arts activities have some economic impact is unremarkable; the relevant question is whether they are the best means to achieve this impact. The arts may also generate some *negative* economic impact such as noise pollution, which these studies generally ignore.¹⁵⁴ Without demonstrating that the arts are the best way to boost the economy, EI studies do not show market failure.¹⁵⁵ Only if no better alternative were available could issues like collective action problems justify government intervention, and then only with further argument.¹⁵⁶

EI studies also confront the difficulty of defining the nonprofit arts and culture industry (NACO, to the horror of any poets being promoted), sometimes quite creatively. Different studies count different groups, sometimes including organizations as diverse as professional opera companies, amateur theatrical troupes, and major league sports teams.¹⁵⁷ It is telling that two of the most rigorous and disinterested EI studies, conducted by the NEA in 1977 and 1981, concluded that “there was universal agreement . . . that artistic and cultural amenities by themselves

149. Americans for the Arts, FAQ: Arts & Econ Prosperity III, http://www.artsusa.org/information_resources/research_information/services/economic_impact/003.asp (2005).

150. Bruce A. Seaman, *CVM vs. Economic Impact*, Jan. 2002, available at <http://culturalpolicy.uchicago.edu/CVMpapers/Seaman.html>.

151. *Id.*

152. Christopher Madden, *Using ‘Economic’ Impact Studies in Arts and Cultural Advocacy*, *MEDIA INT’L INCORPORATING CULT. & POL’Y*, Feb. 2001, at 161, 165.

153. Sterngold, *supra* note 138, at 169.

154. GUETZKOW, *supra* note 140, at 19.

155. Madden, *supra* note 152, at 161.

156. *Id.* at 170.

157. GUETZKOW, *supra* note 140, at 12.

are not a *determining* factor in industrial location decisions” and that “one cannot conclude that support for the arts, given particular economic goals such as the creation of jobs, is more desirable than other uses of public dollars.”¹⁵⁸

To the extent that EI encourages bidding for artistic capital among various local governments, they may actually invite economic waste. Informed participants in this process will presumably bid the price of artistic resources up to the level of the expected economic gains, so that the net economic impact is actually zero, even locally.¹⁵⁹ Any temporary gains would prompt parallel investment in nearby communities, so that an equilibrium of artistic resources would be restored after a potentially costly arms race.¹⁶⁰ Alternatively, bidding may lead to a regulatory race to the bottom, generating negative externalities in, for example, tax policy; these costs are not accounted for in EI studies.¹⁶¹ Finally, the authors of EI studies should be careful what they wish for. Even if they persuade local leaders to invest in artistic infrastructure, those politicians may base their bids on their own sense of which arts are valuable, and how much they are worth.¹⁶²

3. *Promoting Innovation*

Economic impact studies often fail to show that the arts actually generate wealth (as opposed to diverting it from nearby markets), but another line of argument for subsidies hopes to suggest that they do. This sort of advocacy points to mutual reinforcement among developments in creative undertakings in science, industry, design, and the arts. Innovation in the arts thus spurs development of the economy and industry in indirect ways, so that more artistic activity would not simply redistribute resources; it would actually create innovative capital. One gallery owner in Rochester, New York, illustrates the ways arts can enrich everyday life by pointing to designer bathroom fixtures, which draw on principles of design developed by artists.¹⁶³ Economist and painter Hans Abbing makes an even broader claim, arguing that the arts shape our very perspective of the world:

The introduction of central perspective [in painting] reforms the image of the world as we perceive it. We begin looking at reality in a different

158. Quoted in Strom, *supra* note 121, at 508 n.2.

159. Tyler Cowen, *When Should Regions Bid for Artistic Resources*, 20 *Rev. Austrian Econ.* 1, 2 (2007).

160. Don Fullerton, *On Justifications for Public Support of the Arts*, 15 *J. CULT. ECON.* 67, 74-5 (1991), *reprinted in* 2 *CULTURAL ECONOMICS* 559 (Ruth Towse ed., 1997).

161. Cowen, *When Should Regions Bid for Artistic Resources*, *supra* note 154, at 3.

162. *Id.* at 5.

163. E. Catherine Salibian & Paul Ericson, *Roundtable: Public Funding of the Arts*, *ROCHESTER BUS. J.*, Oct. 29, 1990, at A12. *See also* Edwin G. West, *Arts Vouchers to Replace Grants*, *ECON. AFF.*, Feb.-Mar. 1986, 9, *reprinted in* 2 *CULTURAL ECONOMICS* 665 (Ruth Towse ed., 1997).

way. Romanticism opens our eyes to nature. With surrealism we start seeing things behind things. . . . And through our often retarded and indirect acquaintance with constructivism and futurism, at last we really dare to face the new forms of our industries and workshops.¹⁶⁴

The high value of artistic innovation, the argument goes, derives in part from its experimental nature, which in turn means a high failure rate of individual undertakings. These failures win no friends in the market, but they are valuable to society because other artists or thinkers in other fields may learn from them.¹⁶⁵ Even when an artist is successful, she will be inadequately rewarded for her success because much of its value cannot be internalized—it is impossible to copyright the innovative principle of a new technique or style.¹⁶⁶ In this respect, art is akin to pure science: in both cases, it is generally quite difficult to control intellectual property rights through price exclusion or secrecy.¹⁶⁷ In order to realize the benefits of innovative arts, then, the government should provide subsidies to bring the rewards of artistic activity more in line with the capital it generates. Economist Tyler Cowen, a vigorous advocate of indirect subsidies to the arts, characterizes this justification as advocating “investing in decentralization [of innovation] and nonprofits as a way of improving society,” which is an argument for arts subsidies that might even withstand comparison to (other) antipoverty programs.¹⁶⁸

Cowen concedes, however, that the argument does not single out the arts for special support; it situates the arts as one innovative activity to be supported along with many others.¹⁶⁹ If the government is going to allocate money to redress market failure due to risk and uncertainty, what proportion of that money should go to the arts? Quantifying the benefits of any sort of innovation is difficult, which is part of the reason why the market supposedly fails in the first place; since the most obvious ramifications of artistic innovation are on other artists, it is especially difficult to trace the influence of a given artistic endeavor, successful or otherwise, on the economy. This murkiness complicates the justification; supporters tout the power of the arts to generate capital, but cannot show that subsidy for the arts will, at the margin, be at least as good an innovative investment as a similar subsidy for chemistry.¹⁷⁰ If the goal is

164. Hans Abbing, *On the Rationale of Public Support to the Arts*, in *ECONOMIC POLICY FOR THE ARTS*, at 34, 38-39 (William S. Hendon et al., eds., 1980), *reprinted in* 2 *CULTURAL ECONOMICS* 538 (Ruth Towse ed., 1997).

165. DeGrazia, *supra* note 31, at 152 (citing NETZER, *supra* note 17, at 24).

166. JAMES HEILBRUN & CHARLES M. GRAY, *THE ECONOMICS OF ART AND CULTURE* 208 (1993).

167. Abbing, *supra* note 159, at 40.

168. COWEN, *GOOD & PLENTY*, *supra* note 3, at 139.

169. *Id.* at 24.

170. Towse, *Achieving Public Policy Objectives in the Arts and Heritage*, *supra* note 112, at 145-46.

really to promote the economy, the most natural conclusion may be that technological and industrial research should get the bulk of any innovation subsidy; arts advocates would have trouble demonstrating otherwise.

The economic argument from innovation holds some potential, then, although its power is limited. To the extent it succeeds, it seems to call particularly for *indirect* subsidy. Tyler Cowen points out that government is poorly situated to identify the individual innovators who are most likely to generate useful ideas or products. For one thing, “[n]o single institution will be able to spot more than a small number of winners, due to limited resources and the intrinsic difficulty of the task.” Even as one funding institution among many, “[m]ost deliberate governmental attempts to stimulate the discovery process have failed, and for reasons that Hayek and other economists have outlined. Government does not have the knowledge needed to centrally plan innovation.”¹⁷¹

Because the focus of this Note is direct federal subsidies, a thorough examination of the merits of indirect subsidy is beyond its scope, although there is an obvious argument that encouraging private gifts through tax breaks favors the tastes of the wealthy. (Indeed, in 1997, nearly 58% of private giving came from the top income decile.¹⁷²) Regardless of the power of indirect subsidy to spur innovation, direct subsidy holds little promise in this regard. Certainly the NEA’s historical preference for traditional arts and established organizations seems a losing strategy for encouraging experimentation.¹⁷³ More generally, the frequent failure that accompanies experimental arts makes them unappealing to politicians accountable to taxpayers for any perceived failures.¹⁷⁴

4. Contingent Valuation Surveys

As an alternative to EI studies, arts advocates also try to demonstrate that the public values artistic activity much more highly than the market. The contingent valuation method (CVM) is a technique drawn from environmental advocacy that uses surveys to assess people’s willingness to pay (WTP) for the availability of cultural opportunities or their willingness to accept (WTA) money for the foreclosure of cultural opportunities. The assumption is that the aggregate WTP for art will exceed its market value because, for example, people believe they benefit from having the arts around, or they expect to attend an arts event someday and would be willing to contribute to keep that option open, or

171. COWEN, GOOD & PLENTY, *supra* note 3, at 21-22, 47.

172. Brooks, *In Search of True Public Arts Support*, *supra* note 12, at 94.

173. Towse, *Achieving Public Policy Objectives in the Arts and Heritage*, *supra* note 112, at 156.

174. Direct support of opera in Germany, for example, has not led to a widespread performance of new work. Of the nearly 300 operas performed in Germany since World War II, 200 were written in the twentieth century, but these new works accounted for less than 10% of all performances. Pommerehne, *supra* note 98, at 75-76.

they would like their children to inherit a city with an art museum, even if they never visit it themselves.¹⁷⁵ Environmental groups use CVM to place a numerical value on resources like air quality that are not traded directly on the market; arts groups use CVM to show that the market price of art does not capture its true value. Since collective action problems, other market failure, or simple inequality must be behind this discrepancy, the argument goes, the government should intervene to set things right. A simple version of this principle is at work in a recent survey of British employees that found that 41% wanted discounted tickets to arts establishments but only 32% wanted gym benefits. The group that commissioned the survey suggested that companies should therefore spend at least as much money on arts perks as gym memberships.¹⁷⁶

CVM surveys are fraught with problems, and many economists believe that reliable instruments have not yet been developed—and may never be. Richard Epstein, who views the device as a necessary evil in some contexts, believes that most surveys “tend[] to overestimate the value of” the public goods they study.¹⁷⁷ Among the problems he identifies are the near impossibility of using CVM to value a resource from the ground up, the difficulty of deducting the opportunity costs of artistic activity, and the legerdemain involved in aggregating the results of a survey, which could translate many individuals’ willingness to contribute \$1 to support a local writer into a titanic salary for a state poet laureate.¹⁷⁸

Bruce Seaman and Cass Sunstein, who are even more critical of CVM studies, expand some of these concerns. According to Seaman, the surveys, like economic impact studies, not only fail adequately to assess opportunity cost, but also tend to underestimate the effect of negative externalities by framing questions to expect a positive valuation. He also believes that “both approaches are subject to serious aggregation anomalies where extending the results of one study to similar cases can imply absurd results,” as when the WTP for a few local cultural institutions is extrapolated to all of them, quickly exhausting the local treasury.¹⁷⁹

Sunstein emphasizes the problem of framing.¹⁸⁰ If respondents are asked without context how much they would be willing to pay to support a community theater, they will probably not be able to give a meaningful answer. Some surveys have attempted to address this difficulty by

175. *Id.* at 79.

176. Peter Aspdon, *Workers ‘Favour Arts Subsidies over Gym’*, FIN. TIMES, Sep. 29, 2004, at 6.

177. Richard A. Epstein, *The Regrettable Necessity of Contingent Valuation*, 27 J. CULT. ECON. 259 (2003).

178. *Id.*

179. Seaman, *CVM vs. Economic Impact*, *supra* note 150.

180. Cass R. Sunstein, Cultural Policy Center Working Paper, *Coherent and Incoherent Valuation* (Feb. 2002).

providing information about current levels of subsidy, by asking how the respondent would value each of several disparate items, or by asking multiple choice questions, but each of these techniques will affect the answer in a predictable, but not necessarily accurate, direction. In one experiment, the reported WTP for coral reef preservation and for bone marrow cancer research, each asked in isolation, was \$70; when the two were assessed together, coral reefs got about \$60 and cancer research about \$105.¹⁸¹ It is impossible to frame the question in a neutral way that would not invite strategic exaggeration. Even if we assume away malicious preferences, WTP is only a stand in for utility, and it is a very crude proxy. Sunstein also advances a further difficulty, namely how to translate WTP responses into government policy. He argues that government is not meant to be “a maximizing machine, with the goal of aggregating preferences in accordance with the market model.”¹⁸²

Even if CVM surveys were not deeply flawed, it is unclear whether they would actually show a need for more federal arts subsidies. One Australian CVM study that attempted to correct for some of these methodological problems concluded that residents of Sydney, Australia supported a two- to three-fold increase in national subsidy.¹⁸³ However, a relatively sophisticated Canadian study found that public arts spending in Ontario was about right.¹⁸⁴ No national CVM survey has been undertaken in the United States, but the General Social Survey inquired about government spending on culture and the arts in 1985, 1990, and 1996. An average of 41.6% of respondents thought that current funding levels were appropriate; 15% favored greater spending, and 43.4% wanted less. CVM is by no means guaranteed to reveal an undervaluation of the arts in this country.

Regardless of what they might show, WTP surveys do not seem to outperform consumption and donation levels as indicators of individual taste. “The decisive Hayekian insight was that no system of centralized planning could provide” the level of information available in a free market, “even if it used the techniques of contingent valuation.”¹⁸⁵ In the end, CVM may offer supporters of arts subsidies little more than quantitative flair.

5. *A Note on the Limitations of Market Analysis*

These attempts to use econometric tools, which would be one way to

181. *Id.* at 3.

182. *Id.* at 7.

183. David Throsby & Glenn A. Withers, *What Price Culture?*, 9 J. CULT. ECON. 1, 27-28 (1985), reprinted in 2 CULTURAL ECONOMICS 577 (Ruth Towse ed., 1997).

184. William G. Morrison & Edwin G. West, *Subsidies for the Performing Arts*, 15 J. BEHAV. ECON. 57, 66 (1986), reprinted in 2 CULTURAL ECONOMICS (Ruth Towse ed., 1997).

185. Epstein, *supra* note 177.

avoid the paternalism of the merit good and related arguments, have not developed into clear and convincing arguments for direct federal arts subsidies. Given their weak persuasive force, it is possible that they may do arts advocates more harm than good, because the language of the market carries with it several risks.

One hazard of this sort of economic analysis is that it may lead to further economic reasoning.¹⁸⁶ The idea of market failure depends on an assessment of the right amount, variety, and quality of artistic activity. If the benefits of the arts are financial, the calculation of the desirable amount of the arts may take place in comparison to the economic value of related events like Boy and Girl Scout troops or baseball games, or even of less comparable policies like low property taxes or public transportation.¹⁸⁷ This could lead to an “optimal” level much lower than arts advocates would like—and possibly lower than current levels.

More broadly, government intervention in the arts guided by the hope of economic gain may provide additional funding at the price of values the arts community holds dear. “Financial objectives are not everywhere harmonious with artistic or cultural objectives, so government intervention will at best be only coincidentally consistent with cultural objectives.”¹⁸⁸ Some artistic activities might be regarded as more useful economically than others, resulting in differential funding among organizations that seem arbitrary from the aesthetic perspective.¹⁸⁹

Since market arguments may establish cultural policy as a “mere adjunct to policies aimed at wealth or job creation,”¹⁹⁰ it is tempting to abandon them, admitting that “[i]t may be better, all things considered, to have a less efficient but more beautiful society.”¹⁹¹ Better, perhaps, to use arguments that offer no policy guidance than ones that point to policies advocates may not like. But this would leave supporters without a strong argument for direct subsidy—unless an economic argument could be found that emphasizes the inherent benefits of the arts rather than the language of the market. There currently appears to be a trend in arts policy research toward just such an argument: the argument from externalities.

C. Benefits Beyond the Buyer

Externalities are benefits (or costs) that extend beyond the parties to a transaction, the value of which is thus not included in the market price. The strongest argument for government intervention based on externalities arises in the case of public goods, like national defense, from the use of

186. Cwi, *Public Support to the Arts*, *supra* note 114, at 56.

187. GUETZKOW, *supra* note 140, at 18.

188. Madden, *supra* note 152, at 172.

189. Cwi, *Merit Good or Market Failure*, *supra* note 100, at 81.

190. Madden, *supra* note 152, at 172.

191. COWEN, GOOD & PLENTY, *supra* note 3, at 13.

which it is virtually impossible to exclude individuals (they are nonexcludable goods) and which can be “consumed” by an individual without diminishing the next person’s use of the good (they are nonrival goods).¹⁹² The arts are generally not pure public goods—much of the value of a volume of poetry or a poetry reading recurs to the poet and the organizers of the publication or event on one hand and the readership or audience on the other. However, even exclusive and expensive arts events may have benefits that are nonexcludable and nonrival.¹⁹³ In this respect they are like hygiene and education: just as a clean and well-informed citizenry enhances life in a society, the argument goes, so, too, does a cultivated citizenry.¹⁹⁴

This kind of argument is by no means new. Some of the justifications for subsidy examined in the last Section, particularly contingent valuation and the argument from innovation, were based on externalities. However, as market arguments, these emphasized economic benefits at the expense of less quantifiable ones. In the Canadian contingent valuation survey mentioned in the last Section, nonusers of the arts who nevertheless supported public subsidy were asked what benefits led them to this intriguing position. Forty percent could not explain themselves. Of those who mentioned specific benefits, most cited their own potential use (20%) or that of their children (11%); only a few mentioned less tangible benefits like national pride (7%) and educational importance (7%). (Interestingly, respondents seemed most skeptical about the central claim of economic impact studies: only 2% cited the ability of the culture industry to attract business.)¹⁹⁵ When economists Werner W. Pommerehne and Bruno S. Frey catalogued the “public-good components, or positive external effects” of the arts in 1990, they included only option, existence (as of historic buildings), bequest, prestige, and innovation value.

This Section considers externality arguments of a different sort, based primarily on less tangible benefits inherent to the arts. Aside from prestige, they have largely been glossed over by economists, perhaps because they lend themselves to inspiring rhetoric but not to the kind of quantification that would aid policymakers.¹⁹⁶ While it is true that many of these arguments must currently leave precise amounts of funding to the

192. Cwi, *Public Support to the Arts*, *supra* note 114, at 41.

193. Saunders, *supra* note 99, at 593.

194. Peacock, *Welfare Economics and Public Subsidies to the Arts*, *supra* note 111, at 329-30. Although it might at first seem as though public museums are a public good, in fact they simply take a good that is rival and excludable—access to a painting, say—and use government funding to minimize its rival-ness (by extending its reach to a large swath of the public) and excludability (by theoretically providing access to anyone who makes the trip). Visual art provided through public museums does not become a public good in the economic sense, any more than subsistence money provided through welfare does; this is merely a device to increase access.

195. Morrison, *supra* note 184, at 69.

196. Cwi, *Public Support to the Arts*, *supra* note 114, at 55.

political process, economists and students of arts policy have lately begun taking them more seriously.¹⁹⁷ Although not all of these benefits can form the basis of persuasive cases for direct federal subsidy, the strongest justification emerges from an argument from externality.

1. *Beauty*

The most obvious externality of many artistic activities is the aesthetic enrichment of passersby or free riders. This effect is clearest for architecture or public sculpture (which approach the status of pure public goods), but it is also at play when a catchy song from a new musical is spread by the amateur imitations of attendees or when a product designer takes his inspiration from an exhibit at a local art gallery. The arts make the world a more beautiful place, and not just for those who buy tickets.

Obvious though this point may be, it makes for a deeply problematic justification of direct subsidy. The most fundamental difficulty is the broad variety in American taste. Our judgments of beauty are as diverse as our politics. Comparing the United States to Europe on this regard, Tyler Cowen notes, "The American citizenry, more ethnically diverse in nature, and less connected to historical high culture, cannot target direct subsidies with equal facility."¹⁹⁸ For example, a poll taken during the NEA crisis found that an overwhelming majority of respondents felt that "[a]rtistic excellence can be found in popular and folk culture just as much as in the fine arts."¹⁹⁹ Unaccountable taste is why much public "art"—from elevator music to waiting-room painting—aims not for maximum achievement but minimum offense.

Because we cannot agree on what is good—or even beautiful—art, the force of the aesthetic enrichment argument is diluted. In fact, my aesthetic enjoyment of the world may be diminished by the irritating theatergoers who foist Broadway showtunes on me as I stroll through the park, or by the eyesore of a sculpture that I have to walk around each morning on my way to work, or by the expense of the designer home furnishings I have to sift through when I buy a new house. As we have seen from the controversies over Serrano and Mapplethorpe, some might find works of art not only unattractive but actively offensive. Subsidizing art based on aesthetic externalities, even if a net gain in society's perception of beauty, would enrich some at the expense of others. This risk is compounded by the power of government grants to divert private donations. Since individual gifts often follow NEA money, the government's taste effectively selects projects not only for public but also for private support,

197. See, e.g., the RAND Corporation's comprehensive 2004 study of these benefits. MCCARTHY, *supra* note 95.

198. COWEN, GOOD & PLENTY, *supra* note 3, at 45.

199. Quoted in Ivey, *supra* note 123.

undermining the diversity of aesthetic standards that art will appeal to.

A skeptic might also wonder about the effect of direct subsidy on the quality of aesthetic experience provided by the arts. Some economists fear that government assistance may distort the market, attracting people to artistic professions who might be better suited to other things and crowding out those most capable of providing enrichment.²⁰⁰ For the artists who remain, subsidies may stifle personal creativity by undermining intrinsic motivation.²⁰¹ As the most recent NEA Chair, Dana Gioia, has noted, the financial “rigors of serving Milton’s ‘thankless Muse’ also delivered the collective cultural benefit of frightening away all but committed artists.”²⁰²

Even if direct subsidy could be channeled to suitable creators, this argument must still reckon with the economic bugbear of efficiency. Direct subsidy has historically been aimed primarily at arts institutions, perhaps in recognition of the government’s inability to select talented artists directly. This means that the bulk of subsidy money has gone to construction and infrastructure rather than directly to production. “To some extent at least, increased subsidy is absorbed by higher pay for producers of art, including star solo performers and rich painters and sculptors as well as starving actors, dancers, and assistant curators.” This is akin to subsidizing contractors in order to increase home ownership.²⁰³

One solution to the problem of efficiency, the peer-review panels that used to award grants directly to artistic creators, raises problems of its own. As we have seen, these panels tend to stifle innovation, since members of the arts community will favor repeat players they are likely to encounter in their private lives. This makes funding new artists, or even choosing artists solely on the basis of aesthetic experience, difficult.²⁰⁴ This point is reinforced by comparing the WPA and Treasury Section programs discussed in Part II. Compared to the Treasury Section’s program using expert panels to select artists, the WPA’s policy of mass, sometimes indiscriminate funding proved unquestionably more successful at generating desirable aesthetic experience, if the consensus of posterity is any judge.²⁰⁵ If the argument from aesthetic externality has any validity for direct subsidy, then, it would seem to call for a very different means of distributing funds than the expert panels employed by the NEA.

200. See, e.g., Ernest van den Haag, *Should the Government Subsidize the Arts?*, in PUBLIC POLICY AND THE AESTHETIC INTEREST 52, 57 (Ralph A. Smith & Ronald Berman eds., 1992); HANS ABBING, *WHY ARE ARTISTS POOR* (2002).

201. BRUNO S. FREY, *ARTS AND ECONOMICS* 149 (2000).

202. DANA GIOIA, *CAN POETRY MATTER?* 11 (2002).

203. NETZER, *supra* note 17, at 33-34.

204. Peacock, *Economics, Cultural Values, and Cultural Policies*, *supra* note 101, at 16-17.

205. COWEN, *GOOD & PLENTY*, *supra* note 3, at 70.

2. Prestige

Another externality cited by advocates of arts subsidy is the prestige that accrues to a country with prominent and excellent artistic institutions. The state has an obvious interest in fostering pride in national identity and respectability among nations and perhaps an obligation to do so. It would be an embarrassment if the United States were regarded as culturally backward, and it may be just as shameful that many American artists, particularly in the fine performing arts like opera, depend on European engagements to support themselves.²⁰⁶ Rather, we should be as a sculpture on a hill, showcasing artistic freedom and accomplishment for other nations and earning the admiration of the Third World.²⁰⁷

This line of thinking figured prominently in the creation of the NEA during the Cold War. Indeed, the Eisenhower Administration spent more on cultural outreach programs in real terms than has been spent in total on the NEA.²⁰⁸ Since the end of the Cold War and the beginning of the culture wars, the argument from prestige has lost popularity and force, but there are signs of revival amid today's clash of civilizations and the War on Terror. Artistic activity is one way to burnish the image of the United States abroad, especially in the Middle East—as long as the art selected does not offend local beliefs. Rendering the American perspective palatable through entertainment has deep roots; Mormon missionaries in Paris in the mid-1960s enticed potential converts with music and basketball,²⁰⁹ and Congress in the new millennium has spent millions of dollars on Arabic-language radio and TV stations, which often mix local entertainment with news from an American perspective.²¹⁰ The State Department has enlisted the NEA in this effort: the two agencies recently reinstated an advisory committee to recommend artists to represent the United States and international arts exhibitions.²¹¹

This argument calls specifically for direct subsidy, as opposed to market support for the arts or indirect subsidy. One implicit assumption is that market support for the arts is inadequate, either because no private arts expenditures, no matter how large, can compete with public support as a means of demonstrating a national commitment to the arts, or because the large private American art market is supported by relatively few buyers in comparison to the equally thriving market for less prestigious products.

206. COWEN, GOOD & PLENTY, *supra* note 3, at 91.

207. LEVY, *supra* note 22, at 105. Note that this argument assumes that the existence or vibrancy of an art market is not sufficient to secure prestige, but that government spending is (also) necessary.

208. COWEN, GOOD & PLENTY, *supra* note 3, at 74.

209. Michael Kranish & Michael Paulson, *The Making of Mitt Romney: Centered in Faith, A Family Emerges*, BOSTON GLOBE, June 25, 2007.

210. COWEN, GOOD & PLENTY, *supra* note 3, at 77.

211. Carol Vogel, *Panel Will Pick Artists To Represent the U.S.*, N.Y. TIMES, Feb 25, 2005, at E30.

Similarly, although indirect subsidy may enhance prestige by generally promoting arts and creativity, direct federal grants declares much more forcefully that the government—and the people who elect it—cherish the arts, which is a civilized position worthy of international admiration. Of course, this tends to make the NEA an arm of the State Department, since it ties the purpose of subsidy to foreign policy, but arts supporters might not mind this if it leads to greater funding of the arts without too much government interference with content.

However, it is unclear just how much prestige can be bought with direct arts subsidy. From the international perspective, the commitments of many other Western nations to direct spending to secure a thriving artistic environment seem likely to outweigh any small increases in American federal arts spending. A stronger worry arises from the domestic point of view. To the extent that the argument from prestige emphasizes national pride, it is vulnerable to the criticism that the nonprofit arts are a poor way of achieving that pride. Americans' national identity appears to be more closely tied to technological, economic, athletic, and even military achievement than to culture.²¹² To the extent that we do take pride in our national arts, we often boast of the popular movies and music that are consumed so widely throughout the world. Unlike many European countries, national identity in the United States is generally not tied in the popular mind to a long history of excellence in the fine arts. The vitriol of the culture wars suggests that some citizens would actually take greater pride in a nation that does not support the arts at all.²¹³ The government would most likely get a better return on its investment by funding sports, industry, or Hollywood than the nonprofit arts.

3. *Social integration*

Some of the most recent arts policy research has focused on what might be called the social benefits of the arts. Alvin Toffler sketched one version of this justification in 1969: "The arts play an important role in integrating individuals into subcultures within the larger society; they act on value systems that accelerate or retard change and they educate individuals to new role possibilities and style of life."²¹⁴ Economists James Heilbrun and Charles M. Gray captured the thrust of the argument, and its vagueness thus far, in 1993: "It has sometimes been alleged that participation in the arts makes us better human beings by exercising our sensibilities or by exposing us to the highest and best achievements of our fellows."²¹⁵ More ambitious and particular inquiries into this potential benefit are quite

212. Peacock, *Welfare Economics and Public Subsidies to the Arts*, *supra* note 111, at 329-30.

213. COWEN, GOOD & PLENTY, *supra* note 3, at 95.

214. Quoted in Cwi, *Merit Good or Market Failure*, *supra* note 100, at 80.

215. HEILBRUN, *supra* note 166, at 207.

recent, and they have focused on the arts' ability to promote social interaction, community identity, social capital, and organization for local collective action.²¹⁶ One recent study by the NEA indicates that "[r]egardless of a person's education level, gender, or age, performing arts attendance increases the likelihood of volunteering by 25 percentage points."²¹⁷ Although the study does not show a causal relationship (and indeed any causation seems likely to be highly attenuated), the very existence of the study and the boldness of its conclusion is telling.²¹⁸

In economic terms, justifications based on the social advantages of the arts contend that their ability to strengthen social ties are externalities benefiting society as a whole in addition to whatever utility or aesthetic uplift direct consumers of the arts enjoy. Because the value of the social effects are nonrival and nonexcludable, this argument goes, they are not captured by the prices of arts experiences, so the government should intervene to redress this market failure. Moreover, social benefits from the arts are obviously linked not just to the amount of cultural activity but also to the breadth of community participation in those activities. Unlike most other economic arguments, even ones based on externalities, social benefit arguments not only call for subsidies to encourage or preserve artistic creation but also supply a powerful and paternalism-free reason to expand involvement in the arts to new artists and audiences. Since the fine arts tend to thrive in economically and socially privileged communities, these arguments also appeal to concerns of equity in a sophisticated way. Whereas a naïve merit good argument demands better access to cultural activities for less privileged groups based on the inherent value of art or its character-building moral function, the social benefit argument demands better access because of the demonstrable results to any community that chooses to take advantage of that access.

This justification, particularly when cast in economic terms, appears vulnerable to some of the concerns that have emerged consistently above. First, if the argument for subsidy is to be based on the instrumental social value of participation, proponents need to demonstrate that the arts are an efficient way to achieve the cited benefits. If similar levels of social capital, neighborhood spirit, and community involvement can be achieved more cheaply through sports, parades, or Rotary clubs, this justification would seem to collapse.²¹⁹ Just as opera, say, seems a less direct route to national prestige than basketball, so, too, does it seem a dubious path to

216. MCCARTHY, *supra* note 95, at 14 (collecting recent studies).

217. BONNIE NICHOLS, NEA OFFICE OF RESEARCH & ANALYSIS, NATIONAL ENDOWMENT FOR THE ARTS, RESEARCH NOTE 94: VOLUNTEERING AND PERFORMING ARTS ATTENDANCE, at 1 sidebar (2007).

218. *See, e.g.*, GUETZKOW, *supra* note 140, at 17.

219. MCCARTHY, *supra* note 95, at 29

cohesion.²²⁰ Second, even if arts turn out to be the most efficient route to social benefits (or to be a significant ingredient in the most efficient recipe), arts advocates would have to show that indirect subsidy through tax breaks would not supply enough of the right kind of cultural activity. To do so, they would have to argue that the government or its agents would be better at choosing the arts that will bind or develop a community than private citizens in that community spending their own money—an easy case if the community is very poor, but a difficult one where a large portion of the population could afford at least modest donations. If a community is able but unwilling to donate to the arts, even with significant tax relief, advocates might have a hard time persuading the government that residents would take advantage of arts events sponsored by direct subsidy. Third, even if arts are efficient and direct government funding is needed, the rhetoric of social benefits seems, like that of economic impact, to be essentially local. Enhancing community engagement is a proper goal for state and local governments, but it would seem to be beyond both the mandate and the expertise of the federal government. Finally, even if the social benefit argument convincingly demanded direct federal subsidies, arts advocates might be wary of advancing the claim, since the resulting funding would be disbursed based not on artistic merit but on contribution to social capital.

All of these concerns suggest that the social argument for arts subsidies is incomplete, if not highly problematic; however, they can all be addressed by developing a variant of the argument. In fact, the next Part argues that the *civic* externalities of the arts provide the strongest justification for direct federal arts subsidy in the American context, developing and defending this justification and considering how it should guide NEA policy.

IV. AN AMERICAN VISION: THE CIVIC ARGUMENT FOR DIRECT FEDERAL ARTS SUBSIDIES

The most powerful argument for direct federal arts subsidy is grounded in the externality of civic education. In a democracy as plural as the United States, citizens have a political duty to try to understand their fellow Americans, and the national government has an obligation to foster this understanding. This is most obvious and least controversial when the government refrains from active suppression of moral or political viewpoints so that robust civic debate is not impaired. Constitutionally-imposed viewpoint-neutrality, which has served as the backdrop for many of the NEA's legal battles, springs from the same principle: the government must not skew public discussion by choosing sides with

220. Van den Haag, *supra* note 200, at 54-55.

public resources. As a policy matter, the government should and does go even further: it actively promotes education and civic understanding through public schooling, indirect media subsidies, and campaign finance reform.

Most of these activities are primarily concerned with enhancing engagement with a diversity of explicitly political opinion.²²¹ Art that either embodies political ideas directly or takes politics, political discourse, or political history as its subject without advancing a partisan agenda—a significant amount of art—fits neatly into these goals. However, the civic benefits of the arts extend beyond “political” art to encompass the lion’s share of cultural activity. The civic justification for subsidy begins with the unique ability of the arts to represent and communicate the deeply-held beliefs, values, and characteristics that make up the social, political, and moral worldview of groups and individuals.

A. The Expressive Power of the Arts

The expressive power of the arts has two important consequences for civic life. First, by representing the subjectivity of the artist in a unique way, art can encourage awareness of the sharp diversity of human understanding. Art demonstrates that our own experiences of the world are not exhaustive. As J.M. Coetzee has noted, “one of the great virtues of the novel is to teach us that there is no perfect way of carving up the world or recounting its stories.”²²² This realization is vital to life in a truly pluralist society, where a failure to appreciate the depth of diversity can only impede social harmony and the smooth operation of democratic politics. The arts, which appeal to both our aesthetic faculties and our reason, can shock us into insight in a way that expository prose often cannot. In the words of Martha Nussbaum, “[h]abits of wonder promoted by storytelling define the other person as spacious and deep, with qualitative differences from oneself and hidden places worthy of respect.”²²³ The most powerful experiences of empathy, with other Americans or people elsewhere in the world, may well arise from aesthetic stimuli. A recent London School of Economics working paper goes so far as to argue that fiction may be superior to nonfiction reports or social scientific research as a way for Western readers to understand, say, the realities of daily life in Afghanistan under the Taliban.²²⁴

221. Cass Sunstein has argued vigorously for government encouragement of political speech, including cultural activities that “promote education about civic affairs.” Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 549 (2000). Although he also supports general arts subsidies, he does so on the basis of “improv[ing] cultural life” rather than advancing democratic deliberation. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 226-27 (1993).

222. Jonathan Rée, *The Democracy of Don Quixote*, PROSPECT, June 2007.

223. Quoted in MCCARTHY, *supra* note 95, at 40.

224. David Lewis, Dennis Rodgers & Michael Woolcock, *The Fiction of Development*:

In addition to a general respect for the pluralism of experience, expressive art communicates particular values in a singularly accessible way. Art is a declaration of who the artist is, so that “communities find an artist’s work meaningful because they find elements of themselves and what matters to them expressed there more eloquently than anywhere else.”²²⁵ As an example, Michael Linton, an eloquent opponent of arts subsidies, has noted that this expressive ability is not restricted to certain kinds of communities or certain kinds of values: his own “highly dissonant and rhythmically disjointed” modern music celebrates his Christianity, whereas David Wojnarowicz’s photography embodies the very different values of a radical leftist, queer worldview.²²⁶ Linton uses this assertion to argue that the members of one culture should not be dragooned into supporting the expression of the values of another. But if provocative cultural differences are inevitable in contemporary America, there is good reason to ensure the availability of the tools to make sense of them. We are already bound in discord; art is a way to ease the strain of pluralism by rendering other cultures comprehensible.

The arts thus offer benefits that are indispensable to American democracy—indeed, they are in a sense democracy in action. They invite us to sympathize with people with whom we may bitterly disagree on issues of great importance to us. By humanizing alternative worldviews, they encourage self-reflection and the valuable democratic impulse to think for oneself. And they advance the political and social dialogue carried on through newspapers, books, and television through alternative, sometimes more effective, means. Artistic experience can provide a lifelong education in democratic citizenship,²²⁷ and it is for this reason that the federal government should provide direct subsidies to the arts.

B. Defending the Civic Justification

The previous Part raised four general objections to the social benefit argument for arts subsidy (indeed, to any instrumental argument): arts may not be the most efficient way to achieve given benefits; indirect subsidies may be superior; the argument may not apply to the *federal* government; and the policy guidance offered by the argument may not match the objectives of arts supporters who advance it. A civic justification offers the strongest defenses against these attacks.

Knowledge, Authority, and Representation, Working Paper 05-61, London School of Economics and Political Science (2005). See Stephen Adams, *Novels ‘Better at Explaining World’s Problems than Reports’*, DAILY TELEGRAPH, Nov. 6, 2008.

225. Michael Linton, *The Blight of Cultural Rights*, FIRST THINGS, June-July 2001, at 12, 13.

226. *Id.* at 12.

227. The reciprocal connection between arts and education has been widely studied; a full consideration of the issue is beyond the scope of this paper. The idea that cultural amenities “supplement the school system, and do so for adults . . . is widely understood.” Sunstein, *Coherent and Incoherent Valuation*, *supra* note 180, at 7.

This Note has evinced skepticism that government investment in the arts could be the best way to amass national prestige, boost an economy, or spur industrial and scientific innovation. Why then should the arts be the most efficient way to educate citizens? The claim here is actually more modest: that the arts play a unique and indispensable function in the civic education of adult citizens.²²⁸ This does not imply that the arts serve a *more* important civic purpose than the media, public debate among political candidates, or the preservation of historical sites like Monticello, all of which benefit from direct or indirect subsidies. However, the civic purposes of these various activities are ultimately incommensurable. While political debate might offer a better forum for reasoned exchange of views, art offers a chance for an exchange of values and subjectivities that operates largely *around* reason.²²⁹ Because our political views arise out of these deeper characteristics, debate and art are complementary; by supporting art, we advance the civic purpose of debate—but much more important, we advance the civic purpose peculiar to art.

It is also worth noting that political deliberation favors and is often restricted to an “articulate class,”²³⁰ but culture has the potential to communicate with a much broader audience. Indeed, the arts help define how we communicate by shaping our perception of reality and our capacity to render it into words and images. “The common coin may be provided by the forms of narrative that the culture offers us.”²³¹ Because other means of civic education serve different purposes, investment in the arts represents the most efficient—perhaps the only—means of achieving certain benefits.

So some level of artistic activity is vital to a pluralist democracy. But does Congress need to tinker with the market to ensure it? From an economic perspective, the market for art fails to account for civic externalities, which means that the government may be justified in redressing market failure. However, given the difficulty of quantifying these benefits, how can we be sure the market level or distribution of culture is inadequate? Why is government investment required at all?

One response to this objection would be grounded in fairness concerns. Our obligation to understand our fellow citizens extends to those groups that may not have the resources to create expressive art or the leisure to

228. The complicated question of the proper role of the arts in primary and secondary education, where civic education is only one complex goal among many, is outside the scope of this Note.

229. The sublimation that values undergo before they are expressed in art may render them less incendiary than bald expository assertions—although pictures like Andres Serrano’s may speak louder than words.

230. Richard Posner, *Smooth Sailing*, LEGAL AFF., Jan.-Feb. 2004, available at http://www.legalaffairs.org/issues/January-February-2004/feature_posner_janfeb04.msp.

231. Quoted in MCCARTHY, *supra* note 95, at 40. See also COWEN, GOOD & PLENTY, *supra* note 3, at 10.

experience it.²³² If structural inequality means that such groups exist, the government would be justified in alleviating those inequalities specifically with respect to art, since art carries with it unique civic benefits.²³³ Identifying and characterizing such underprivileged groups would be a contentious process, but ultimately a worthy one.

There is a better, broader argument for active government involvement. Although it is difficult to prove that the market level of artistic expression is flatly insufficient, significant government funding for the arts carries its own civic benefits that reinforce those provided by art itself. First, subsidy carries with it the message that the recipient of the funding is important; as part of a broad-based grant program with the explicit goal of fostering civic understanding, the seal of approval would be conferred not so much on individual creators as on the project of artistic expression generally. Properly publicized grants would attract the attention of private citizens, both potential donors and potential communicants, as NEA awards have since 1965. Second, by including unpopular or little-understood cultures among the recipients, the government could address an enhanced variant of the market failure mentioned above: in some cases, a low market demand for expressions of a given culture would actually reflect a *greater* need for those expressions to cure blithe or willful ignorance. Finally, even-handed support for expressive art would emphasize the equality of various worldviews—not with respect to their ultimate truth, which is beyond the mandate of the government, but with respect to their importance to individual citizens—and the consequent value of understanding them. Government subsidy thus advances the civic function of the arts in a way the market alone cannot.

But surely “even-handed support for expressive arts” would be better served by *indirect* subsidy through tax breaks to donors or artists? Establishing a value-neutral procedure for the broad promotion of cultural expression through direct grants would be a logistical nightmare, and we may well be skeptical of the government’s ability to maintain it efficiently and in good faith. Indirect subsidy has the advantage of not forcing the government to select which artists or organizations to support, instead allow it passively to support anyone who wishes to express herself through culture.

This criticism raises important concerns about how civic subsidies could work; unfortunately, indirect subsidies do not circumvent those concerns, and they create difficulties of their own by entrenching the current distribution of art among worldviews. Tax breaks for donors favor the

232. There may also be groups, and there will certainly be individuals, without the desire to create expressive art. There are obvious arguments against forcing such people to paint.

233. Even Bruce Ackerman, who staunchly opposes subsidies to value-expressing art outside the context of education, concedes that truly suppressed cultures would deserve state subsidy. Bruce Ackerman, *Should Opera Be Subsidized?*, *DISSENT*, Summer 1999, at 89, 90.

wealthy, which means they also favor the white and educated, and the viewpoints associated with these characteristics. Tax breaks for the producers of art are more promising, but there is bias in the population of artists, too. Most obviously, fine artists, especially performing artists, tend to live in and near urban centers. Tax breaks to institutions are equally problematic, since administrators are driven by professional standards and reputational concerns rather than civic virtue.²³⁴ Of course, indirect subsidies might induce members of underrepresented groups to begin making art, and indirect subsidy would certainly be useful in promoting artistic expression; however, the idea of a neutral distribution of expressive art that would be disturbed by government interference is a chimera.²³⁵ The general tendency of indirect subsidies to favor existing cultural forms and ideas leaves them unable to secure the full civic benefits of the arts.

If the government is going to have to choose which artistic speakers to subsidize in order to supplement or correct the distribution of private donations or to demonstrate the nation's commitment to cultural understanding, shouldn't it be state or local governments who make those choices? Local and state government should indeed subsidize the arts, and should perhaps do the bulk of the choosing. However, the federal government must also be involved, in part because the civic boost considered above is much stronger when the official seal of approval on expression comes, at least in part, from a national body. In addition, although citizens should certainly strive to understand their fellow New Haven residents, or their fellow Nutmeggers, the contemporary American must also work to understand his farther-flung countrymen; this message is driven home most effectively by *federal* subsidy for art, including art that can travel between states or regions to reach less familiar audiences. Tactical interests such as the promotion of expression by minorities and a balancing of grants will also be advanced most effectively if all levels of government participate in arts subsidies—the classic federalist argument from checks and balances.

The final objection to the civic justification to be addressed here is based on the policy guidance the argument offers. The next Section will return to the question of guidance, but it is clear that the argument points in a somewhat different direction from the naïve merit good argument, or the instinctive belief of many advocates of arts subsidies that cultural experience is to be valued for its own sake and evaluated mostly in terms of “artistic quality.” Vladimir Nabokov, one of the last century's most thoroughly aesthetic thinkers, would have dismissed the civic function of art as unworthy. In his summation of a course in comparative literature, he

234. Cwi, “Merit Good or Market Failure,” *supra* note 100, at 77.

235. See, e.g., COWEN, GOOD & PLENTY, *supra* note 3, at 103.

told his students,

I have tried to make of you good readers who read books not for the infantile purpose of identifying oneself with the characters, and not for the adolescent purpose of learning to live, and not for the academic purpose of indulging in generalizations. I have tried to teach you to read books for the sake of their form, their visions, their art. I have tried to teach you to feel a shiver of artistic satisfaction, to share not the emotions of the people in the book but the emotions of its author—the joys and difficulties of creation.²³⁶

This Note is flirting with philistinism—and may indeed have been entirely seduced by it—especially since it does not advance the civic argument cynically to secure arts funding actually deserved on other grounds. However, as much as a subsidy proponent might delight in art for its own sake, and as much as she might hope others will choose—for whatever reason—to support the art that appeals to her, the preceding discussion has demonstrated that the government would not be justified in enforcing her taste, or the taste of a large majority of voters, through subsidy. The arts serve many purposes, and, *pace* Nabokov, communication and expression are among the more important. These purposes also happen to furnish the most legitimate basis for government intervention in the art market—an intervention that avoids the paternalism and elitism of evangelical fine art devotees and the dubious claims of economic impact studies. If the policies this argument supports are, as A.O. Scott has suggested, “emasculated” ones,²³⁷ it is important to note that the robust funding system provided by individuals, businesses, indirect subsidy, and earned income will still be available to art on the basis of judgments of quality. Direct federal subsidies, though, should be geared to a different goal.

C. A Pluralist Program of Arts Support

The civic argument offers several qualitative insights into what kinds of projects should be funded.²³⁸ Unsurprisingly, the NEA’s pattern of grants, at least through the crisis of the 1990s, does not promote the civic function of arts especially well. We have seen that the endowment was (and was

236. VLADIMIR NABOKOV, LESSONS ON LITERATURE 381-82 (2002).

237. Quoted in Nanette Byrnes, *The Man Who Saved the NEA*, BUS.WK. ONLINE, Nov. 13, 2006.

238. With regard to the exact level of funding or specific schedule of disbursement, the civic argument is less clear; to some extent, these numerical decisions must be left to the political process. Obviously, the level of funding should be significant in order to signal the importance of the creation and appreciation of expressive art; it also seems likely that, as mentioned in the last Section, some federal subsidy money should be channeled through the states, which will be able to select recipients with less elaborate bureaucratic prostheses. The 40% of NEA appropriations Congress requires to go to the states probably satisfies the latter requirement, and the agency’s 2006 budget of \$125 million may even qualify as “significant”—although advocates could make a strong political argument that funding levels should at least be restored to their 1992 high of \$176 million.

intended to be) a political favor to established arts organizations; it therefore favored the narrow, elitist range of expressive art deemed worthiest by those organizations. The agency did not arise out of a concern for the uncaptured political externalities of aesthetic experience; “government support for the arts and culture today is not the result of market failures, but of former policies.”²³⁹ To put it mildly, “in the course of its justifiable concern with professionalism, institution-building and experimentation during the 60s and 70s, the [NEA-funded] arts community neglected those aspects of participation, democratization and popularization that might have helped sustain the arts when the political climate turned sour.”²⁴⁰

NEA policy has developed since its narrow escape from defunding, and some of the new trends are aligned with the civic purpose of art. However, considerably more change is needed in several areas: the system of grants encouraging artistic creation, projects designed to improve the understanding of art, and national policy advocacy on behalf of the arts community.²⁴¹

1. Stimulating and Expanding Artistic Expression

The most radical change demanded by the civic justification is a new emphasis on *expressive* art in both recipient selection criteria and in the assessment of balance in grant distribution. The drafters of the NEA’s enabling legislation were careful to give the agency and its experts a free hand in awarding grants based solely on artistic merit. This criterion, though useful, is not enough to ensure the civic benefits of art; the process of choosing award recipients must therefore take account of whether the art in question contributes to civic dialogue—the extent to which it expresses values, beliefs, or worldviews in order to correct the historical failure of grants to “organize its participants in lasting ways, to link them with local communities, or to help them voice an alternative to the market’s definition of ‘quality.’”²⁴²

A great deal of political conversation will be necessary to determine how we should evaluate art’s expressiveness, but a few preliminary points emerge from the foregoing discussion. First, art that expresses *contemporary* values should be favored over less relevant art, no matter how expressive. This means that some of the money the NEA spends on

239. Zimmer, *supra* note 19, at 35.

240. Fleming, *supra* note 4, at 64 (quoting GARY O. LARSON, *AMERICAN CANVAS* (1997)).

241. The author argues elsewhere that the lynchpin of local governments’ arts policy should be promoting the informal or amateur arts on the grounds that these will bring the strongest and most widespread civic (and possibly economic) benefits. An NEA initiative to support informal artists would be a similarly useful policy change.

242. Julie Ardery, *Art and Fellowship*, *AM. PROSPECT*, May 7, 2001, at 53 (reviewing BRENSON, *supra* note 57).

the preservation of artistic heritage should be shifted to grants that support or disseminate more relevant artistic activity, although art need not be contemporary in order to address present concerns. Second, some *forms* of art may be more expressive than others: a novel or a play communicates more obviously than a painting or a sonata simply because a large part of its effect is achieved through language, our normal medium of exchange. This is not to say that music and visual arts should not be subsidized; just as arts generally offer an incommensurable alternative to expression through political debate or expository prose, so the language of music can communicate some things more effectively, or more effectively to some listeners, than dialogue declaimed on a stage. It is important to fund not only a variety of voices but also a variety of media, as well as educational initiatives to render more esoteric languages comprehensible. However, a legitimate bias toward art forms that communicate more clearly or accessibly may naturally emerge. Third, setting aside differences in media, individual artists and works will undoubtedly be more—or more obviously—expressive of the views or values of the creator and her culture. Such expression need not be heavy-handed to fit into this category; indeed, overly didactic “art” might be better regarded as expository than artistic. The civic benefits of art do not derive from its ability to advance a logical argument, but rather from its ability to embody a uniquely comprehensible version of the artist’s subjectivity.

This suggests a major systemic problem: can the government or its agents possibly be expected to evaluate a quality in art that cannot at present even be defined with precision? As a preliminary matter, note that expressiveness is no less elusive a concept than the current standard of artistic merit, although the former has certainly been less thoroughly debated. More important, precision is not required. We need not try to pay the exorbitant information costs of quantifying the expressiveness of a given artwork so that grants may be directed only to the *most* communicative; given the varieties of means and subjects of expression, the idea of a “most communicative” artwork is probably meaningless. When the goal is to fund artistic excellence, deeming a proposal “good enough” may be inadequate; when the goal is to promote the civic benefits of art, a binary judgment that a given artwork is or is not expressive at some, vaguely-defined threshold level in the community where it will be experienced is perfectly sufficient. The NEA should not claim to be identifying and elevating the most expressive artwork available; it should only aim to advance the civic exchange by funding a variety of expressive art.

One procedural step toward achieving this end would be to replace the peer review panels with juries drawn from the American citizenry more broadly. Juries in the criminal system have been shown to be surprisingly scrupulous, even in cases where passions might be expected to run high.

Prejudice and predispositions undoubtedly creep into deliberation, but in the context of selecting recipients for modest arts subsidy, this is not a fatal concern. Clear instructions as to the criteria of selection would help counter the natural tendency to favor one's own values, and restricting the amount of funding a given jury may disburse would help balance one set of prejudices with another.²⁴³ The diverse selections of a range of juries would stimulate broad discussion, defeating the objection that the government is illegitimately endorsing a given viewpoint to the exclusion of others. The decisions of peer review panels have always been political; the use of citizen juries would embrace this inevitability and put it to good use.

Although the NEA has not seriously considered abandoning its peer review system, it has developed since the 1990s in ways that seem to suggest openness to the civic argument. Dana Gioia, George W. Bush's two-time appointee and the most recent NEA Chair, has denounced the fact that the arts are "viewed as expendable, elitist luxuries rather than necessary elements of a healthy democratic society."²⁴⁴ Without developing an explicit civic justification for subsidies, Gioia has implemented at least one major national initiative that will stimulate and expand artistic expression in accordance with the agency's appropriate civic function. Operation Homecoming, a joint initiative with the military services and the Department of Defense, sponsored writing workshops for troops returning from Afghanistan and Iraq, eventually producing a published anthology drawn from more than 1,200 submissions by soldiers and their families.²⁴⁵

Operation Homecoming was unusual for the NEA in two ways. First, it was initiated by the agency itself rather than responding to a grant proposal. Second, it focused on the military, an underrepresented group of potential artists and an underrepresented audience.²⁴⁶ Both of these innovations are to be encouraged. Proactive programs help avoid the mere entrenchment of the present distribution of artistic activity and they further emphasize the importance of artistic expression. Similarly, by identifying and reaching out to groups that tend not to produce expressive art, the government will broaden the range of expression and achieve both breadth and balance in its funding.

243. See, e.g., Peacock, *Welfare Economics and Public Subsidies to the Arts*, *supra* note 111, at 333 ("The best means of protection seems to be a rapid circulation in the membership of the grant-giving bodies so that all shades of cultural opinion can be reflected in the allocation of funds through time.")

244. Quoted in Gioia: *Lean NEA Is Best*, BACKSTAGE, July 11, 2003.

245. STRATEGIC PLAN: FY 2006-2011, *supra* note 58, at 5-6; 40TH ANNIVERSARY FACTS, *supra* note 2.

246. Bynres, *supra* note 237.

2. *Fostering Arts Appreciation and Discussion*

The civic justification for the arts calls not only for reform of the process for selecting artists to receive grants but also for the expansion of the equally important category of funding to promote appreciation and discussion of arts among adults. The purpose of this funding would be twofold: to bring new audiences to arts and to ensure that the enjoyment of art is regarded in part as a civic experience. The first purpose, expanding audiences, has been an important goal for the NEA since Livingstone Biddle first emphasized access. The best way to achieve this goal is probably to ensure that students are exposed to a variety of art forms while in school, although the extensive policy debates about arts education are beyond the scope of this Article.

The second purpose, shaping the way the public engages with art, would be more novel for the NEA. Just as the most ardent arts advocates do not value the arts primarily or even significantly because of their civic value, reflection on the values a work of art expresses—what we might call civic appreciation of or engagement with—often makes up only a small portion of an audience's aesthetic experience. This is entirely appropriate: the arts offer many pleasures and many benefits, so excessive focus by the viewer of a painting on its expression of a worldview would reflect an alarming closed-mindedness. Nevertheless, because direct federal funding is justified mostly on the narrow grounds of the civic function of arts, the NEA should work to foster specifically civic appreciation of the works it supports and of culture more generally. One means to this end would be explicitly educational programs for adults on how artists express themselves in various media, particularly less direct ones like music and abstract painting. Another possibility would be community discussions of the meaning of art sponsored and facilitated by the agency. The NEA could also attach to its funding a requirement that the artist prepare a statement about her art or be available to talk about his work when it is first presented. By making art more accessible, programs like these may also help broaden the audience for expressive art.

The 21st century NEA has to some extent already moved in this direction. Dana Gioia has described the Endowment as a “public-service agency” and views “supporting audiences” as a “more urgent priority than supporting artists.”²⁴⁷ In keeping with this priority, he has implemented two national initiatives that promise to advance the civic function of the arts. The first, The Big Read, “provides resources and materials to communities across the country to encourage citizens to read and discuss a single” classic of American literature, such as *To Kill A Mockingbird* or *The Great Gatsby*.²⁴⁸ The purpose of the program is not merely to

247. Bruce Weber, *Poet Brokers Truce in Culture Wars*, N.Y. TIMES, Sep. 7, 2004, at E1.

248. STRATEGIC PLAN: FY 2006-2011, *supra* note 58, at 5-6.

encourage literary reading at a time when it is in sharp decline but also to use the chosen book to generate community discussion. At present, that discussion is intended to be primarily aesthetic; the NEA should develop questions and select books in order to focus the conversation on civic appreciation in the broad sense this Section has been advocating. The NEA should also be less timid in its choice of books. The selections to date are entirely suitable for civic conversation, but Gioia has expressed a general desire to promote art that is uncontroversial; his favorite NEA programs involve sending jazz musicians and Shakespeare on tours throughout the country.²⁴⁹ Gioia's caution is certainly justified for tactical reasons, given the Endowment's tenuous claim to federal funds, and plenty of civic benefit can be derived from uncontroversial art. However, the agency should aspire to sponsor discussions of more provocative work to whatever extent proves politically feasible, since art's expressive power may be especially useful when it concerns controversial issues.

A second recent national initiative that furthers the NEA's civic role is the establishment of Arts Journalism Institutes. Three annual sessions, addressing dance, classical music and opera, and theater, are held at major universities to educate journalists who cover these arts for media based outside the largest markets.²⁵⁰ From the civic perspective, the idea of an intense education for popular critics who can serve as intermediaries for public engagement with art is brilliant. The NEA should implement similar programs for arts administrators and community leaders and incorporate training in the civic role the arts can play.

3. Advocating Policies to Support Expressive Art

As the Introduction made clear, just as the NEA is a small but important component of overall arts funding in the United States, so the question of subsidy is only one among many important policy questions that affect the arts. Bill Ivey, who led the NEA under Bill Clinton, has suggested that while the arts community has often focused on the question of funding, a "quiet onslaught of business practices and regulations [has been] reshaping our cultural system."²⁵¹ It is therefore fitting to conclude with a few reflections on how the civic justification for the arts might inform these other debates.

One major concern among arts advocates is the concentration of distribution networks and a resulting homogeneity of artistic offerings. For example, "[t]oday the average radio station in a large market in the United States programs music from a playlist of 20 to 22 selections. (On average two tracks are substituted on the playlist each week.) Only five years ago

249. Weber, *supra* note 247.

250. STRATEGIC PLAN: FY 2006-2011, *supra* note 58, at 5-6.

251. Ivey, *supra* note 123.

[in 2000], stations routinely rotated 40 cuts, adding three or four each week.” Major mergers in the music industry and the growing market share of the radio station giant Clear Channel are likely to exacerbate this trend.²⁵² Although for-profit arts like popular music have traditionally not been within the NEA’s bailiwick, an agency reoriented toward its proper civic function would advocate regulations to preserve diversity even in lucrative artistic fields. Private corporations with responsibilities to shareholders cannot be expected to ensure the expressive benefits of art, so the government should take measures to prevent the market from excluding them.

Copyright law is another sphere of heated debate in which the civic perspective yields insights. The tension in this area is between the dependence of new art on inspiration from existing art on the one hand, which argues for the free use of artists’ works by other artists, and the need to enforce intellectual property rights to ensure that artists are rewarded for their achievements so that they may continue creating on the other.²⁵³ Because individual values and worldviews are shaped in part through artistic experience, the expressive power of art is especially dependent on the availability and free use of arts by artists. The civic benefits of art thus provide an additional argument for a copyright system that promotes the use and dissemination of artistic creation, perhaps through a compulsory licensing scheme that would force the holder of a government-granted copyright monopoly to share some of his monopoly position for civic purposes.²⁵⁴ As this brief sketch indicates, acknowledging the force of the civic justification for arts subsidy will have consequences beyond the question of NEA grants. The NEA should therefore undertake research and policy advocacy to ensure that the legal underpinnings of the art market promote civic engagement with the arts.

CONCLUSION

The skeptics of arts subsidies who rose to political prominence under Presidents Reagan and Bush were wrong. There is at least one sound economic and political justification for direct federal arts subsidies: the argument based on the vital role the arts can play in civic education. Indeed, in a pluralist democratic state, the government has an obligation to encourage citizens to reap the civic benefits of the arts. This uniquely valid argument for direct subsidies requires considerable changes in the once-elitist NEA; recent developments are promising in this regard, but

252. Ivey, *supra* note 123.

253. The debate also encompasses the right of the audience to the fruits of thought and creativity, which after all arise out of the social experience of the artist; this argument is too broad to be considered here.

254. See, e.g., COWEN, GOOD & PLENTY, *supra* note 3, at 130.

the agency must go much farther. A good first step would be the explicit recognition of the Endowment's proper civic function.

Implementing the civic role of the arts will not be easy. The concept itself will require much fleshing out through democratic discussion. Even as a working definition is developed, opposition is likely to arise from some members of the arts community, who would like to see direct grants used for a purely aesthetic purpose, and from socially conservative politicians, who may exploit the controversial nature of any art properly funded on the grounds of civic expression. But simply having these conversations, and moving toward the civic ideal in small ways, will put direct federal arts subsidies on firmer ground. It will also make better Americans out of all of us.