



Public Funding of Controversial Art

MICHAEL RUSHTON

Department of Economics, University of Regina, Regina, Saskatchewan S4S 0A2, Canada

Abstract. In 1990, the Act governing the United States' National Endowment for the Arts was amended requiring the Chairperson to ensure that judges of grant applications should take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public". This provision has been widely debated, and was challenged on the basis of whether it violated the right of freedom of expression. But a recent decision by the U.S. Supreme Court found the provision to be constitutional. This paper examines rationales that have been put forward by philosophical liberals, economists, and communitarians in support of public funding of the arts. It finds that for each of these rationales the decency-and-respect provision on funding is justifiable. The paper concludes with a speculative discussion of the economics of the "artworld".

Key words: cultural economics, freedom of expression, public funding of art

1. Introduction

In his admirable survey of the field of cultural economics, David Throsby (1994, p. 24) claimed that when it came to the question of public funding of the arts, "by now there are few theoretical stones left unturned within the confines of the competitive model". This paper is an attempt to look underneath a couple of those few remaining stones to see what life might be under them.

Why is there public funding for the arts at all? Various reasons have been put forward, by economists and by others. In this paper I group them into three types: liberal, the individual rights-based philosophy whose best-known modern exponent is John Rawls (1971); utilitarian or wealth-maximizing, which is the traditional approach for economists to questions of public policy; and communitarian, which has come to mean many things but which I will take as a political philosophy which sees the individual as someone inextricably linked to the community in which she lives and in which she has developed her very character, as expressed in the writings of MacIntyre (1984), Sandel (1982), or Taylor (1995). It can even be the case that the different rationales can be grouped together. The American Assembly (1997), summarizing why public funding of the arts is a good thing, lists four factors:

1. The arts help to define what it is to be an American. . . .
2. The arts contribute to quality of life and economic growth. . . .
3. The arts help to form an educated and aware citizenry. . . .
4. The arts enhance individual life.

The first item is communitarian, the third liberal, and the second and fourth economic.

In this essay the focus is on public funding for the arts apart from that directed at minors, either through schools or through other programs aimed at making art and education about art accessible to children. Since there is virtual unanimity for that kind of public expenditure we need not consider it here.

But the purpose of the essay is not to evaluate the different arguments for public funding of the arts. Rather, I wish to trace the *implications* of the arguments put forward to an issue of some controversy, especially in the United States. The issue is as follows. In 1990, the Act governing the U.S. National Endowment for the Arts (NEA) was amended requiring the Chairperson to ensure that “artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public”.¹ This requirement that the NEA consider general standards of decency in making its allocations has met with resistance, both in academic essays and in the courts. The question is whether, given the rationale for public funding of the arts, it is good policy to place restrictions on the content of artworks which receive NEA funding. Central to answering this question is the role of the peer-review panels that make recommendations to the Chairperson for the allocation of funding.

2. Liberalism and Public Funding of the Arts

The central text of modern liberalism is Rawls (1971). The liberal society in this vision consists of the maximum personal liberty that is consistent with all individuals having the same liberty, equality of opportunity and equality before the law, very broad public consent for any collective policies, and a government that is neutral with respect to conceptions of what constitutes the “good life”. It should be made clear that with its emphasis on equality I am using “liberal” in the modern, American sense, rather than in the older, European sense one might associate with, for example, Hayek.

Within his framework, Rawls arrives at a very limited role for the state regarding public support of the arts. Since Rawls believes in inter-generational equity, he claims that each generation has a duty to preserve general knowledge and culture as part of its bequest to the next generation. This contributes not only to inter-generational equity, but also to the enhancement of opportunities and freedom in future generations (see also Gutmann, 1982). This is made especially important by the fear that there are aspects of culture which, once lost, cannot be retrieved.² But there is no duty to expand the culture, and it is not acceptable that the state would take on the role of trying to perfect its citizens, “to develop human persons of a certain style and aesthetic grace” (Rawls, 1971, p. 328). If individuals wish to pursue culture collectively, they must find the resources themselves: “the social resources necessary to support associations dedicated to advancing the arts and

sciences and culture generally are to be won as a fair return for services rendered, or from such voluntary contributions as citizens wish to make" (Rawls, 1971, p. 329).

Fellow liberal Ronald Dworkin (1985), however, thinks justification for public funding of the arts can be found within the liberal framework. Tellingly, he remarks early in his essay that he begins, "as many of us do, by wanting to find some justification for a generous level of state support" (p. 222). I return to the importance of the personal preferences of commentators below. Dworkin rejects economists' analysis of public funding of the arts because the economists use preferences as a basic input in their evaluation, and, as Dworkin sees it, we cannot make the question "what culture do people want?" intelligible, since preferences are themselves determined by that culture. (Communitarians will make the same critique of economists). Like Rawls, Dworkin sees the importance of providing future generations with a rich culture. But unlike Rawls, Dworkin thinks that culture will only remain rich if there is a structure in place that provides for innovation:

We should identify the structural aspects of our general culture as themselves worthy of attention. We should try to define a rich cultural structure, one that multiplies distinct possibilities or opportunities of value, and counts ourselves trustees for protecting the richness of our culture for those who will live their lives in it after us (1985, p. 229).

But what about those people whose taxes subsidize culture, especially high culture, who do not enjoy it and do not want to pay for it? Dworkin argues that they benefit from the public spending anyway, since there will be a "trickle-down" effect, where low culture is enriched by drawing on sources from high culture.

Dworkin is not convincing. He wishes to defend the public funding of high culture, even in the face of public opposition, while sticking with a liberal philosophy which demands broad public support for any tax-financed activity, and which also demands that the state remain neutral as to notions of what constitutes the good life. Black (1992) claims that if we adopt the precepts of liberalism as Rawls and Dworkin set them out, only Rawls' conclusion on public funding of the arts is coherent. He suggests that at the root of Dworkin's problem is that in our actual, real-world, liberal democratic societies we do in fact have broadly shared notions of what things make life good, but liberals want to minimize their theory's reliance on a shared culture. So Dworkin is in a bind; he wants liberal theory to justify what is a non-liberal conclusion.

Brighouse (1995) sets out the criteria for liberalism with slightly different emphasis. He says that the implications of liberalism for public policy is that any state activity should follow (1) the neutrality principle, which is that government has the consent of the governed, does not favour any particular conception of the good life, and treats citizens as equal before the law, and (2) the publicity principle, which is that "the actual reasons for government action must be understandable to, and available for scrutiny by, reasonable citizens" (p. 41). Like Rawls, Brighouse finds that liberalism can support the maintenance of culture and the transmission to future generations, but that any state funding beyond that is not on secure ground.

The publicity principle is crucial, because it demands public understanding and acceptance of art that is being funded, and beyond education in cultural heritage that acceptance is unlikely to be obtained.

To summarize, although Dworkin wishes to find reasons for public funding of art, and of high culture and innovative art in particular, within a liberal philosophy, in fact liberalism leaves little room for such activity by the state. Within the confines of liberal conceptions of justice, state support for the arts is to be directed at ensuring future generations are not put at a loss.

3. The Economists

The economic rationale for state support of the arts is well known, and so will not be dealt with at length. Surveys are found in Throsby (1994) and O'Hagan (1998). What is worthy of some discussion is what differentiates the economic perspective on the question from other perspectives.

I claimed in a different paper (Rushton, 1999) that with some issues in cultural economics, including the question of state support, the method of economics was not innocuous. The economic method begins with the preferences of individuals. Within this framework there are three possible rationales for state intervention: the outcome of markets is judged inequitable; the outcome of markets is inefficient; individuals are acting governed by a set of preferences which do not reflect their "true" or "higher" preferences. (None of these is mutually exclusive).

There are reasons to doubt whether public funding of the arts contributes to a more equitable distribution of well-being, although it is certainly the case that one rationale for arts councils is to try to more broadly distribute the consumption of culture (Robbins, 1963). The teaching of art in public schools has, among other goals, an aim to put children from different economic backgrounds on a somewhat more equal footing when it comes to appreciation of art. But public funding destined to be enjoyed by adults is a different matter, and is certainly not the strongest case an economist could make in support of public funding.

The second "economic" rationale for state subsidy of the arts is that markets are inefficient. In practical terms this means Kaldor-Hicks inefficiency, since possibilities for true Pareto improvements are very rare. Positive external effects and the characteristics of a public good (in the Samuelsonian sense of being non-rival) are traditional reasons for state subsidy of activities. The degree to which various forms of the arts actually do generate positive external effects or have public goods aspects is less clear. Globberman (1987) is sceptical whether any of the oft-cited market-failure rationales for state subsidy of the arts hold any water. However, there is positive evidence from surveys that individuals are willing to pay taxes for state subsidy even if they are not frequent viewers (or listeners) of the artistic product; see Frey and Pommerehne (1989), Orivel (1996) or Bille Hansen (1997) for some European evidence.

Merit wants can mean different things to economists. One version holds that over time “shared preferences” can develop in a community, and that the government has a role in maintaining those preferences. I deal with that kind of merit want in the section on communitarianism that follows. A different version places greater emphasis on the individual, and considers whether individuals have different “levels” of preferences within themselves; see Head (1991). Levels of preferences might run from one’s most basic desires, to preferences formed away from the “heat of the moment”, to interests, to those “ethical” preferences we know we would have if we were stronger and better people. Public support for the arts, as noted above, may arise from individuals wanting public funding for what they believe might reflect their higher preferences; an individual might say to herself, “I could not be bothered to attend the symphony, but I know that I *should* want to attend, so I will not object to my taxes subsidizing the concert for others”.

What differentiates the economic approach from the liberal? Realizing that we are painting with very broad brush-strokes here, a couple of general points can be made. First, on the question of equality, the liberal approach places more stress on the “equality of opportunity” as an important function of the state. Unequal access to culture leads to unequal opportunities for the more rewarding stations in society. Where economists turn to distributional issues, the emphasis is more on outcomes: how unequal is the distribution of wealth and the ability to achieve higher levels of utility. Second, liberals require a broad consensus on what would be funded by general taxation, while economists are less concerned with this. Economists would use taxation and subsidy even if there were not broad agreement, if it were the case that total wealth would be increased. Liberals might resist a wealth-increasing policy if it were the case that achieving a Pareto-improvement from the policy was unlikely. Third, liberals will have an aversion to employing anything like the merit good concept; that the state should be neutral with regard to conceptions of what constitutes the good life is at the very heart of liberalism.

4. Communitarianism

If a fundamental tenet of liberalism is that the state must be neutral regarding conceptions of what constitutes the good life, communitarians believe “a democratic society *needs* some commonly recognized definition of the good life”. (Taylor, 1995, p. 182 [emphasis mine]). While communitarians may well place a high value on individual liberty, it is seen as an achievement of a healthy democracy, not an article of faith.

An American variation on the theme is “civic republicanism”, which places high value for the state in creating the conditions that would shape individuals as virtuous, productive, and capable of maintaining a vigorous democracy (see Sandel, 1996; Netanel, 1996). This leads to a role for the state which is not only not neutral with regard to conceptions of the good life, but is also not neutral with regard to conceptions of good *character*; it is “statecraft as soulcraft”. Sandel (1996) draws

the comparison to what he calls a “procedural republic”, where all the goals of the state are regarding fair and just procedures.

Taylor (1993, 1995) devotes his criticism of both liberals and the economists to their underlying assumption of “atomism”: the notion that the purpose of the state is to facilitate individuals’ pursuit of ends which are primarily individual. His vision of an alternative role for the state is best exemplified by the Canadian province of Quebec, where the state explicitly has as a goal the preservation of the distinct language and culture (not only regarding the arts) of that province.

In such a philosophy, the role of the state with respect to the arts has less to do with satisfying existing individual preferences, as with the economists, but rather is to shape society and the individuals who will inhabit it. Sandel (1996, pp. 208–211) tells of the Progressive reformers of the turn-of-the-century United States, who saw in public art and architecture and in city planning ways to elevate the moral and civil character of its citizens. This represents a different sort of “merit good” than discussed in the previous section, a notion described by Musgrave (1987):

Without resorting to the notion of an “organic community”, common values may be taken to reflect the outcome of a historical process of interaction among individuals, leading to the formation of common values or preferences which are transmitted thereafter.

In this world the state recognizes those “common values” as ones worth preserving and will pursue policies that maintain them.³

5. Controversial Art

The amendment to the Act governing the NEA which requires the Chairperson to ensure that “general standards of decency” are taken into consideration, as well as “respect for the diverse beliefs and values of the American public”, arose out of a political controversy regarding NEA funding of institutions which exhibited controversial works by Andres Serrano and Robert Mapplethorpe (see Steiner (1995) for some of the case history). This amendment has been criticized on different fronts, and we will focus on two of them. Each has the implicit assumption that there should be an NEA. But what I wish to argue here is that using *any* of the rationales for public funding of the arts given in the previous sections of this essay, or any combination of them, it is hard to make a case against the decency-and-respect amendment.

The first case made against the amendment is that it violates freedom of speech. Kathleen Sullivan (1991: 84) writes, “the government’s threat to withhold money if one speaks out too freely is little different from the levy of a criminal fine for that speech”. Her argument is based on the distinction between government as a patron of the arts and private patrons. Private patrons can put any kind of content restrictions they want on art they commission or support, and withdraw funding if the artist or curator objects. But government is also a regulator, and the law insists that these regulatory powers be held strictly in check; government cannot restrict

speech in a public park on the grounds that it owns the park, and it cannot restrict the political speech of civil servants unless the speech would seriously disrupt the functioning of government. In particular, there is the “doctrine of unconstitutional conditions”: government may not grant benefits such as money, space, or jobs in exchange for the surrender of constitutionally protected expression.

The question of the constitutionality of the NEA restrictions made its way to the U.S. Supreme Court, where the restrictions were upheld (after having been struck down by lower courts). In the case of *Karen Finley v. National Endowment for the Arts*,⁴ the performance artist Finley claimed that the decency-and-respect amendment both violated protection of free speech and was unconstitutionally vague. Finley and three other artists had had an advisory panel recommend NEA funding of their project, but the National Council on the Arts, which advises the Chairperson of the NEA, recommended disapproval. The Circuit Court ruled in favour of Finley, agreeing that artists will not be able with any certainty to know what “decency” means in any given case, and that artists could well be treated capriciously. In its judgement, The Circuit Court noted the decency-and-respect provision “may chill the exercise of important constitutional rights”.⁵

The Supreme Court reversed the Circuit Court decision.⁶ The Supreme Court noted that the decency-and-respect amendment did not force the NEA to preclude certain types of speech and does not allow it to suppress any distinctive political viewpoint. Rather, it becomes a *part* of the selection process. While people are in general unlikely to agree on what constitutes “decency” or “respect”, in a committee’s deliberations these are reasonable considerations. They are surely no more vague than what is supposed to be the primary criterion, “artistic excellence”.⁷

One can view free speech as a right intrinsic to a just society, which government is justified in curtailing only in extreme circumstances, and/or as a right that tends to generate good consequences for the wealth and well-being of citizens. But in either case it does not follow that government therefore must subsidize whatever art is deemed to be “excellent” without regard to other factors, in particular if a segment of society is likely to be profoundly offended by it. Sullivan’s argument that denying funding on decency grounds is akin to criminal fines for outrageous speech cannot be sustained. It is an argument that assumes if government is going to subsidize any particular kind of art, it must subsidize all.⁸

A second case made against the amendment is that it arises from a misunderstanding of the nature of art. Susan Sontag (1969, p. 30) wrote, “art is not only about something; it is something”. Weil (1995) sees in this aphorism the heart of the confusion in the NEA debates. Curators will by their training and occupation focus on the “isness” of a work, but the lay public will also think about the “aboutness”. Weil thinks there are good reasons that government should subsidize art according to how experts value the “isness” of a work, and so the decency-and-respect provision, which concerns “aboutness” is a bad thing. As an example, Weil claims that if American museums did have to take what artworks are about into account, they would run into difficulties exhibiting some of the great works of

religious art, since that would run afoul of the First Amendment. In addition, the evaluation of “isness” is very difficult, and based on an “idiosyncratic knowledge” (Bonus and Ronte, 1997) that is incapable of translation into written form, or of being communicated to laypersons.

The difficulty with Weil’s line of argument is that one cannot separate “isness” and “aboutness” so easily. Can a student of film watch Leni Riefenstahl’s “Triumph of the Will” and evaluate its “isness” independently of what the film is about? When the Contemporary Arts Center in Cincinnati was put on trial for obscenity for its exhibition of Mapplethorpe photos, the trial descended to the level of farce as the curator defended the depictions of sexual torture by referring to such aspects of the photographs as the “strong and opposing diagonals of the design”, “extremely central image”, and the “almost classical” composition (Steiner, 1995). Robert Hughes (1992) called the defences of the exhibition “an aestheticism that was so solipsistic as to be absurd”.

So there are weaknesses in each of the arguments against the decency-and-respect clause. But more to our point, neither of the arguments against it can find support in the arguments that have been put forward for public funding of art in the first place.

Consider Weil’s argument that curators should focus on the “excellence” of a work independently of its subject matter. If one has adopted the liberal reasons for public funding, then one is bound to insist on broad-based public support for the funding, and also what Brighouse (1995) refers to as the publicity principle. By Weil’s own admission the means by which curators will evaluate art will not only be different from the way in which the public evaluates art, but will also be virtually impossible to explain. “Isness” might well be the appropriate aspect for an art expert to focus on, but the public is entitled to know how decisions are being made, or at least to understand to what end decisions are being made. I return to the question of expert opinion in the following section. If one has adopted economic reasons for public funding, then one is beginning from the premise that public preferences matter. Unless one is taking the merit good case for funding, the fact that the public will evaluate art at least partly on the basis of its “aboutness” means that it’s perfectly reasonable to ask public funding agencies to make this a consideration in their funding allocation process. If one does adopt the merit good notion, in this case in terms of Head’s (1991) “levels of preferences” approach, we are still left with the problem of establishing that the art expert’s opinion is what the public would “really want” in the cool calm of reason.

Baumol (1997, pp. 12–13) attempts to justify the funding of controversial art in merit good terms, that future generations will be grateful for investments made now in innovative art that is not universally appreciated. He notes that modern art, originally thought very strange, now hangs on the walls of banks. “Today’s shocking art works, it is true, offend sensibilities in very different ways from the works of the impressionists, but the indignation elicited by the two is not all that disparate”. However, it is the difference in the nature of the offence that matters

here. Those who are offended by the work of Serrano or Mapplethorpe are offended because of what is being depicted, not because there is a revolutionary technique or vision. Banks display works whose “aboutness” isn’t, and never has been, controversial. They may hang reproductions of Monet or Mondrian on their walls, but one cannot imagine any bank in future generations hanging reproductions from Mapplethorpe’s *X Portfolio* any more than one could imagine a bank today displaying a print of Goya’s *Saturn Devouring One of his Children*.

If one has adopted the communitarian’s view on public funding, then one is expecting the publicly funded art to be one of the “irreducibly social goods” (Taylor, 1995) that benefit individuals through creating stronger communities. But this again means that the impact on the layperson viewer of the art must be considered; the rationale for public funding is precisely that it affects how the ordinary citizen perceives himself and his world. George Will (1990, pp. 17–18) wrote, “the argument for subsidizing the arts must be communitarian, not severely individualistic. . . . Opponents of the amendment [the decency-and-respect clause] say government is obligated to support art and equally obligated not to think about what art is, or is good for”. The “aboutness” of the art cannot be ignored. In sum, if we believe for any number of reasons that there should be public funding of art, we cannot follow Weil’s advice that funding should be allocated solely on the basis of expert opinion of the quality of art *qua* art.

Now consider Sullivan’s argument that the decency-and-respect clause is wrong because it violates the principle of freedom of speech. First we notice that for both the economists (for example, Posner, 1992, pp. 665–677) and the communitarians (for example, Sandel, 1996, pp. 71–90) free speech is something which has useful consequences, and is not an end in itself. For the economists it is seen as something which will, in general, enhance a society’s ability to create wealth. For the communitarians, it enables citizens to form healthy democracies, a necessary part of the good society (see also Netanel, 1996). In each of these cases, it is not enough to say that the decency-and-respect provision violates free speech; rather, it must be demonstrated that this represents a restriction of free speech that is in some way harmful. If we are assessing the situation as economists, we would ask whether the imposition of the decency-and-respect provision leads to an allocation of funding for projects that is better or worse at satisfying citizens’ preferences. Since the essence of the provision is that public preferences at least not be ignored by the selection committees, it is hard to see how the restriction is harmful. If we are assessing the situation as communitarians, we would ask whether the provision enhances the civic life of the people. Importantly, communitarians do *not* make their primary focus the ability of a controversial artist to express herself. Since the provision instructs the funding committees to consider community values, it is difficult to see how a communitarian would object on freedom-of-speech grounds.

Of course it is the liberals who will treat freedom of speech as something more valuable than just the sum of its consequences. But as Brighthouse (1995) points out, liberals cannot make the claim that controversial art is being punished by

the amendment, because there is no entitlement to funds in the first place. In the Supreme Court's judgement upholding the decency-and-respect provision, Justice O'Connor writes, "the NEA has limited resources and it must deny the majority of the grant applications that it receives, including many that propose 'artistically excellent' projects". That some projects will be denied funding in part because of content is unavoidable, and are "a consequence of the nature of arts funding". There are certainly artists who feel that because they are entitled to freedom of expression, they are entitled to funding of that expression. But as the Supreme Court ruled in a separate case, "the government has no obligation to subsidize even the exercise of fundamental rights, including 'speech rights' ".⁹

6. The Artworld

The decency-and-respect clause is a direction to a public agency regarding considerations to be taken into account in making its recommendations. It was generally not well-received by artists, curators, and those drawn from those groups who make up the peer-review panels that evaluate grant proposals. This is a situation well-suited to analysis from a public choice perspective. This section of the essay briefly raises some considerations that would be a part of a more thorough public choice analysis of the artworld.¹⁰

The term "the artworld" is from Danto (1964), although the same idea was developed independently at the same time by Diffey (1991). It is an "institutional" theory of art. The question that has taken up so much of the effort of aestheticians, for good or ill, is "what is art?" The answer is that something is a work of art if and only if members of an artworld confer arthood upon it. This means that an object's being an artwork is not something intrinsic to the object itself, but rather it is an artwork because of the particular way it is received in the world. The persons who compose the artworld are those who have mastered the history and theory of art; these will be the people capable of saying whether Warhol's Brillo boxes are or are not art.

Members of the artworld are individuals with preferences and facing a particular incentive structure. Young (1997) provides some first steps in analysing this situation. He notes that for objects that would be considered for "arthood" there are no evidential reasons that can be given; since there are no intrinsic properties of the work that would justify arthood, the artworld must rely on practical reasons, reasons provided by desires or interests, to justify arthood. These practical reasons must be in the form of guidelines, rather than something applied on a case-by-case basis; that way an object can be a work of art even if the artist herself were the sole viewer of the work and it was never actually seen by other members of the artworld. Young's (1997, p. 61) suggestion, which is very "economic", is that members of the artworld "should choose those [guidelines] which maximize the probability that good works of art will be produced". This advice is in the tradition of mainstream normative public economics; the public choice economist would ask

how an incentive structure could be designed so that members of the artworld will *want* to do exactly as Young suggests.

When Sullivan (1991, p. 86) makes her case for public funding of the arts allocated by a committee unhindered by concerns about local standards of decency, she claims funding for the arts is comparable to funding for science: “in art as in science, there is a simple solution to keeping government from politicizing this criterion [artistic excellence] too much: defer to peer review of art by artists, much as in the scientific world”. Likewise the composer Babbitt (1958) compared modern, high-art music composition to theoretical physics, claiming both were worthy of funding even though very few people would have any understanding of it. He even took the argument over elite peer-reviewed art a step further than most by saying that since nobody actually enjoys concerts featuring work by difficult composers, such works should simply be withdrawn from public performance.¹¹ The composers would be subsidized through university positions which allowed them the time and resources to compose.

But there are ways that the two fields are not comparable. I might know as little about performance art as I do about subatomic physics, but there are two crucial differences. First, I know what research into subatomic physics is *for*: to increase knowledge about the world in which we live. I may or may not think it is worth devoting a large amount of taxpayer support to such a venture, but at least I know in principle what the purpose is. Second, I know on what basis physicists on peer-review panels will accept something as “science”: that it is deriving testable, progressive theories that enable us to make predictions. I’m not a scientist, but I can understand why astrology is rejected by the “scienceworld”. Young (1997) thinks the artworld needs to articulate some function of art, whether it be to “make aesthetic experience possible”, to “express or convey emotion”, or to “help us understand what it is to be human”. But without being able to articulate this, it has no way of setting standards that would ultimately lead to the creation of better art.

Economists who have thought about issues of freedom of speech and the decency-and-respect provision in public funding come to two sorts of conclusions. Spitzer (1998) suggests that the decency-and-respect provision is a rational way for members of the Supreme Court to satisfy their own preferences. The law-and-economics approach assumes judges have some latitude in making decisions and will pursue their self-interest when doing so. We could postulate that members of the Court might be people who want there to be public funding of the arts, although they may not particularly enjoy works that would fall afoul of the decency-and-respect provision. The judges might realize that striking down the provision as unconstitutional would ultimately lead to legislators reducing public funding for the arts. So upholding the provision serves their own interest. Indeed, in the Supreme Court decision in *National Endowment for the Arts v. Karen Finley*, Justice O’Connor notes, “the legislation [the decency-and-respect provision] was a bipartisan proposal introduced as a counterweight to amendments aimed

at eliminating the NEA's funding or substantially constraining its grant-making authority". This does not imply that judges, legislators, or bureaucrats necessarily think that public funding of the arts should always reflect broadly-based public support of such funding; these are generally highly educated people with more elite tastes than the general public, who will seek ways to achieve funding that satisfies their preferences.¹² It simply means that decision-makers will understand the consequences of whatever decisions they make.¹³

Coase (1974) takes a different approach. He thinks that intellectuals and academics will tend to place a higher value than will the general public on freedom of speech. The self-esteem of intellectuals magnifies the importance of the market in which they trade – the market for ideas – and their self-interest is to have as little regulation as possible in that market. While some intellectuals might think government has all the necessary information and expertise to regulate markets for goods in the public interest, they think government will not have that ability in the market for ideas. It would follow from this that intellectuals would support the idea of a peer-review panel from the artworld giving grants according to its judgement of which best exhibited artistic excellence, without any interference from legislation instructing it to also take the concerns of the general public into account. Intellectuals will be in favour of public subsidy to the market for ideas, but without regulation. Recall that Dworkin (1985, p. 222) wrote that he approaches the question of public funding for the arts beginning "as many of *us* do, by *wanting* to find some justification for a generous level of state support" [emphasis mine]. Sullivan (1991, p. 95) concludes, "in a free society, artists do best when they are not the government's puppets, but dance rather each to his or her own tune. The solution is not to abolish the NEA, but to unfetter it".

Crucial to this debate is the perceived role of the artworld. Exactly what sort of expertise does it bring to the evaluation of "artistic excellence", and why is it that this expertise should not be fettered by concerns over public reaction to works? Writing from opposite sides of the Atlantic, Amis (1990) and Hughes (1992) each trace the rise of the artworld's prestige to a loss of confidence by the ordinary citizen that he can evaluate a work of art.¹⁴ Although the level of public subsidy may be small, especially in the United States, the awarding of public funding is a signal that the artworld has accepted and praised a particular work; the award instructs the public as to what is worthwhile. (Clotfelter, 1991; Oliver, 1991). As Hughes notes, a consequence of the public controversy of the exhibition of Mapplethorpe's photographs, which generated a spirited defence by members of the artworld of the value of Mapplethorpe's work, led to a massive appreciation in the value of his prints.¹⁵ It is not unreasonable to believe that members of the artworld have an incentive to maintain the perception that they are best equipped to evaluate art for purposes of public funding, without being fettered by the sensitivities of the general public. How the artworld developed its current position, and the strategies it would use to maintain it, provide a very interesting avenue for future research.

7. Conclusion

If Coase (1974) is correct about the attitudes of intellectuals towards regulation of the market for ideas, then this essay's conclusion will not be a popular one. Under any justifiable reason for public support of the arts, asking the granting agency to consider, as one aspect of its deliberations, general standards of decency and to respect the variety of sensitivities held by the public, is not unreasonable. Whether one approaches the question of public funding for the arts from a liberal, economic, or communitarian stance, the case has not been made that a peer-review committee from the artworld, using standards of artistic excellence which cannot be explained either in terms of the end to which the art is directed or the means by which it strives for that end, can make its decisions in *complete* isolation from public concerns. If, as Weil (1995) says, art is both *about* something and *is* something, then it is not enough to say that any public concerns regarding what the art is *about* can be suppressed in favour of an artworld which believes that what the art *is* is what matters.

Acknowledgements

A version of this paper was presented as "On the Allocation of State Support for the Arts: Liberal, Utilitarian, and Communitarian Perspectives" at the "Conference on Artists' Career Development and Artists' Labour Markets, Support and Policy for Artists", Tokyo, May 1999. The author thanks the following people for reading the earlier version, without wishing to imply that they agree with the author's views: Patrick Fafard, Bruno Frey, Roderick Hill, Arjo Klamer, and David Throsby. He also thanks an anonymous referee for helpful comments.

Notes

1. 20 U.S.C. § 954(d)(1).
2. A vivid account of the hopelessness of retrieving lost culture, in this case an attempt to perform *Romeo and Juliet* following a few generations during which such performances were banned, is given in Kingsley Amis' (1980) novel *Russian Hide-and-Seek*.
3. The question of state support for the arts and the communitarians is taken up further in Rushton (1999).
4. 100 F. 3d 671 (9th Cir. 1996).
5. *Ibid.*, at 675.
6. *National Endowment for the Arts v. Karen Finley*, 118 S.Ct. 2168 (1998).
7. Schauer (1998) claims that this is not a strong enough ground to reverse the decision.
8. Zelinsky (1998) notes the difference between funding through tax-exempt status for art institutions and grants obtained through competition. He notes that the decency-and-respect provision would likely be struck down in the former case as an unconstitutional restriction, but not in the latter as shown in the Supreme Court's ruling. When government makes direct appropriations to only a limited number of applicants, the sponsorship of government is more intimate.
9. *Rust v. Sullivan* 500 U.S. 173 (1991).

10. See Frey (1994) for a public choice analysis of some aspects of museum behaviour. Mossetto (1994) provides an analysis of rent-seeking in the artworld, where members of the artworld perform an information gathering-and-transmission function. These “certifiers” seek to create monopoly rents from their ability to ensure quality in works of art.
11. Compare with Richard Serra (1992), creator of *Tilted Arc*, a public sculpture in New York removed some years after its installation because of public dislike of the work (see also Cordes and Goldfarb (1996) for discussion of the controversy).
12. See Lynn and Jay’s (1984) *locus classicus* of applied public choice analysis, for example.
13. Galligan (1995) and Young (1997) also make the point that giving some respect to the layperson’s taste towards art is important in preserving a public support for art which ultimately leads to more generous funding of art which appeals to more elite tastes.
14. Mossetto’s (1994) “certifiers” exist for exactly the purpose of telling consumers what they should value.
15. This is not strictly a *modern* American phenomenon: “Then at the bottom [of the handbill] was the biggest line of all – which said: LADIES AND CHILDREN NOT ADMITTED. ‘There’, says he, ‘if that line don’t fetch them, I don’t know Arkansaw!’ ” (Clemens, 1977 [1885]).

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