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Artistic Freedom and Government Subsidy: Performing Arts Institutions in the United States and West Germany

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Member of the Class of 1983

My colleague in Hamburg does contemporary opera after contempo-
rary opera and the press loves him, and he plays to empty houses,
and the state pays. But in America the state does not pay.¹

Sir Rudolph Bing's statement, while not entirely accurate,² reflects
a difference in attitude towards contemporary creativity between the
established performing arts institutions in West Germany and those in
the United States. Although an “overdose of ancestor worship”³ is
common to the repertory of the performing arts in both countries,⁴
West German institutions tend to more actively encourage the creation
and performance of contemporary works than their American
counterparts.⁵

1. R. BING, 5000 NIGHTS AT THE OPERA 212 (1972). Bing was the general manager of
the New York Metropolitan Opera from 1950 to 1972. He questions whether the federal and
New York state governments should take over the Metropolitan Opera's entire budget defi-
cit. “I would think they will want a decisive influence on the artistic policies. That is the
danger.” R. BING, supra.

2. The statement is inaccurate because the average audience attendance was 87.1% of
house capacity during Rolf Liebermann's 14-year tenure as general manager of the
Hamburg State Opera. H. DAIBER, DEUTSCHES THEATER SEIT 1945 328 (1975). Further-
more, as discussed infra notes 99-104 and accompanying text, the United States government
“pays” by indirect subsidy via the tax laws.

3. P. HART, ORPHEUS IN THE NEW WORLD 417 (1973). The repertory of the perform-
ing arts today, particularly in music, demonstrates a marked predilection for the small per-
centage of works which have survived as great works of art; hence the phrase “ancestor
worship.” Id.

4. See A. HÄNSEROTH, ELEMENTE EINER INTEGRIERTEN EMPIRISCHEN THEATERFOR-
In music, at least, this problem is common to practically all western nations. A. COPLAND,
MUSIC AND IMAGINATION 17 (1952).

5. This is especially clear in the more abstract performing arts such as music and op-
era. Compare the repertory of the New York Metropolitan Opera with that of the Deutsche
Oper Berlin in W. DACE, PROPOSAL FOR A NATIONAL THEATER 46, 52-55 (1978). There are
American composers who are forced to live abroad in countries such as West Germany in
The purpose of this Note is to examine the role of the government in securing and maintaining artistic freedom in the performing arts institutions of these two countries. The primary basis for comparison will be the ability of the artistic directors of performing arts institutions to program the works they desire. Given the disinclination often expressed in this country for government involvement in the arts, the Note will focus on the various advantages and disadvantages of a direct subsidy approach as opposed to the emphasis on indirect government support found in the United States.

I. WEST GERMANY

A. Emphasis on Direct Support

West Germany has a long tradition of government patronage of the arts. States and municipalities gradually acquired this role from local sovereigns. Today, the majority of West German performing arts institutions are publicly owned, and many private organizations receive sizeable subsidies.

Government patronage in West Germany is decentralized, generally coming from bodies equivalent to state and municipal governments in the United States. The amount of direct financial support to public institutions is generally from seventy to ninety percent of their...
budgets, making these institutions probably the best endowed in the world.12

B. Constitutional Mandate to Support the Arts

While there were earlier attempts to legislatively guarantee freedom from governmental interference with the arts,13 the 1919 Weimar Constitution was the first document to contain an explicit provision: "The arts, the sciences and their teaching are free. The state grants them protection and takes part in their cultivation."14 The extreme politicization of the arts which occurred during the centralized National-Socialist, or Nazi, regime severely emasculated and distorted this constitutional provision.15

Article 5(3) of the current West German Constitution of 1949 provides simply that "[art and science, research and teaching are free]."16 On its face, and particularly following bad experiences under the Nazis, this provision can be read to preclude any government involvement in the arts.17 Although article 5(3) has been considered a reaction to the Nazi experience,18 the commentators and courts overwhelmingly agree that the provision does not imply total government abstinence from the arts.19 One writer, relying on the legislative history of the 1949 constitution, asserts that the provision is a conscious distillation of the Wei-

12. T. OPPERMAN, KULTURVERWALTUNGSRECHT 452 (1969); M. PATTERSON, GERMAN THEATRE TODAY 5 (1976). See W. DACE, supra note 5, at 77-82, for specific subsidy statistics on a number of West German institutions.


15. See F. DORIAN, supra note 11, at 256-63, for a description of the Gleichschaltung, the totalitarian control of the arts to serve Nazi politics. See also W. KNIES, supra note 13, at 192; Rockwell, MUSIC UNDER HITLER, OPERA NEWS, Jan. 15, 1972, at 8, who interestingly notes a similarity between the anti-modernism of the centralized Nazi cultural bureaucracy and contemporary denunciations of cultural snobism by American politicians—"all form part of the same communally-inspired anti-intellectualism." Id. at 10.

16. GRUNDGESETZ [GG] art. 5 (W. Ger.), ¶ 3. The German word for this document, Grundgesetz, literally means "Basic Law." "1949 constitution" will be used herein to prevent confusion concerning the function of this document. Note that the West German Federal Constitutional Court has found that for purposes of constitutional analysis, artistic expression is not a subcategory of other speech, which is provided for separately under art. 5, para. 1. See infra note 42.


18. Id. at 175; W. KNIES, supra note 13, at 194.

19. G. ERBEL, supra note 10, at 174; W. KNIES, supra note 13, at 213; T. OPPERMAN, supra note 12, at 442, 454. See also infra text accompanying notes 25-33.
mar Constitution provision, as the entire basic rights section of the modern constitution is shorter than that of the old one.\(^{20}\) Another rationale is based on the concept of decentralization, or federalism, embodied in the 1949 constitution. Accordingly, it was unnecessary to provide for the federal government's involvement with the arts because the existing state constitutions already allowed for government support.\(^{21}\) Finally, the commentators cite practical reasons to justify the permissibility of government involvement. Private support following World War II would have been impossible given the widespread economic chaos,\(^{22}\) and without government aid there would have been a break in the development of German art.\(^{23}\) In addition, post-war competition from the expanding technology of reproduction and dissemination of all forms of art has made the withdrawal of government support increasingly difficult.\(^{24}\)

Beyond merely finding government support of the arts to be permissible, the West German Federal Constitutional Court\(^{25}\) has interpreted article 5(3) as dictating a positive obligation of the government not only to protect, but also to promote the arts. This extraction of a constitutional mandate to support the arts has its roots in the older concept of the *Kulturstaat*,\(^ {26}\) in which the state, as representative of the community, provides cultural leadership.\(^ {27}\)

The *Hochschule* decision,\(^ {28}\) for example, involved a determination by the Federal Constitutional Court that some internal decision-making processes of a state university did not comply with article 5(3) of

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25. This court is roughly equivalent to the United States Supreme Court in constitutional matters. See generally Benda, *Constitutional Jurisdiction in West Germany*, 19 COLUM. J. TRANSNAT'L L. 1 (1981).

26. A *Kulturstaat* is literally a "cultured" or "civilized state."

27. For historical background, see generally O. JUNG, *Zum Kulturstaatsbegriff* 65-68 (1976). In the 1949 constitution, this concept is embodied in the basic right to education, the autonomy of art and science, and the principle of the welfare state (*Sozialstaat*). T. MAUNZ, *supra* note 14, at 5-102. The concept should not be confused with a *Staatskultur*, or official state culture. Reuhl, *Kulturstaatlichkeit im Grundgesetz*, 10 JURISTENZEITUNG 321, 321 (1981).

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the 1949 constitution. It was found necessary to modify the university's decision-making apparatus by granting the faculty a voting majority over other groups, such as the student body, to ensure the faculty's constitutionally guaranteed freedom of scientific inquiry. In reaching this conclusion, the court stated:

[Article 5(3)] is based on the key function which furnishes scientific freedom with both self-realization of the individual and development of society as a whole. This value decision does not only mean the renunciation of state intervention in the previously distinguished sphere of science; it includes much more the responsibility of the state, which understands itself as a Kulturstaat, to uphold the idea of scientific freedom and participate in its realization, and obligates the state to organize its actions for this positively—this means protection and promotion to prevent an undermining of this guarantee of freedom.

The court made clear that the state is obligated to provide institutions capable of fulfilling this function.

Soon after the Hochschule decision, the court had the opportunity to reiterate its interpretation of article 5(3) with regard to the arts in a case involving the taxation of a record company. It was stated as a mere preliminary matter that "[a]s an objective value decision for the freedom of the arts [article 5(3)] provides the state, which understands itself in the setting of goals also as a Kulturstaat, with the duty to maintain and promote a free artistic life."

These judicial statements comport closely with the attitude of modern German legal commentators. According to one writer, the government is a better patron of the arts with respect to artistic freedom than society, which is composed of many strong, one-sided forces: "[T]he arts in the mass democracy of today, whose tendency towards harmonizing leveling in pluralistic compromise is becoming more prominent, needs protection more likely from society than from the state." Thus, the government has a duty to enable the artist "to find his development in the individual artistic striving after his own set of

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29. The opinion analyzes the same constitutional provision under discussion and is structurally applicable to the arts. T. MAUNZ, supra note 14, at 5-101; O. JUNG, supra note 27, at 69 n.44.
30. 35 BVerfGE at 114.
31. Id. at 115.
32. Judgment of Mar. 5, 1974, BVerfG, 36 BVerfGE 321. This case is discussed in greater detail later in this Note. See infra text accompanying notes 75-79.
33. 36 BVerfGE at 331.
34. T. OPPERMANN, supra note 12, at 443.
artistic rules" and to protect him from the "taste-flattening tendencies of the modern mass democracy." More succinctly, these statements recognize that the arts do not function with optional freedom in the marketplace. The presence of a multiplicity of donors does not remedy this situation, according to another writer, because artists and institutions compete for donors, not vice versa. Private donors as a group therefore exercise "commercial censorship."36

The President of the Federal Constitutional Court has written that the concept of the positive government obligation to protect and promote fundamental rights, such as the artistic freedom guaranteed by article 5(3), is a "very significant development" in West German constitutional law.37 Such rights, he continued, "are not of great value in and of themselves because before they have any independent legal significance it is necessary for the state to implement them by means of affirmative . . . programs."38

C. General Limitations on Government Involvement

The most influential case concerning the freedom of the arts in West Germany is the Mephisto decision.39 The case involved a private suit for defamation which alleged that a novel about a corrupt actor who had been successful during the Nazi period defamed the memory of a real actor.40 The Federal Constitutional Court agreed with this claim, holding that the novelist's constitutional freedom of artistic expression may be limited by his subject's constitutional right to human dignity.41

In reaching this conclusion, the court expressed a number of important principles regarding the freedom of the arts.42 The guarantee of artistic freedom in article 5(3), according to the court, is composed of two essential norms:43 a subjective right which protects the individual

35. Id. at 454.
36. Wahl-Zieger, supra note 9, at 228.
37. Benda, New Tendencies in the Development of Fundamental Rights in the Federal Republic of Germany, 11 J. MAR. PRAC. & PROC. 1, 6 (1977). This article also discusses some other recent cases where similar principles have been announced.
38. Id. at 9.
41. GG art. 1 (W. Ger.).
42. It should be noted that the court did not find freedom of the arts to be a sub-category of freedom of expression, which is provided for separately in article 5(1) of the 1949 constitution. 30 BVerf at 191.
43. Id. at 188.
from the state, and an objective value decision (objective Wertentscheidung) regulating the relationship of art as a whole to the state. These norms protect both artistic creative activity and the performance and dissemination of the work. The court further stated:

The meaning and purpose of the basic right of Article 5 is above all to keep processes, modes of behavior, and decisions based on the inherent laws of art and determined by aesthetic considerations free from every interference by public authorities. The manner in which the artist encounters reality and shapes events that he experiences in this encounter may not be prescribed for him if the process of artistic creation is to develop freely. The "rightness" of his attitude towards reality can only be decided by the artist himself. In this respect, the guarantee of artistic freedom signifies a prohibition against influencing methods, contents, and tendencies of artistic activity, particularly against restricting the sphere of artistic creativity or prescribing generally binding rules for this creative process.

The autonomy of the arts, continued the court, is guaranteed "without reservation."

The Mephisto opinion reveals that article 5(3) of the 1949 constitution functions to restrain the Kulturstaat from developing a Staatskultur, or official state culture. Censorship, of course, is clearly precluded. The government is also prohibited from "fixing" artistic trends. Further clarification of how the autonomy of the arts is achieved requires analyzing public performing arts institutions separately from private organizations.

D. Public Institutions—An "Institutional Guarantee"

Publicly owned performing arts institutions generally receive well

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44. See also Benda, supra note 37, at 6.
45. The court remarked, in clear reference to the Nazi period, that not extending the guarantee of artistic freedom from the individual's subjective right to such an objective value decision would severely hamper constitutional protection of the arts. 30 BVerfGE at 189. See also W. Knies, supra note 13, at 178, who calls this the "super-personal" aspect of the guarantee of artistic freedom.
46. 30 BVerfGE at 189.
47. Id. at 190.
48. Id. at 191.
49. See T. Maunz, supra note 14, at 5-104; W. Knies, supra note 13, at 214 n.18; T. Oppermann, supra note 12, at 454; Kewenig, Theater und Staat, 58 Archiv für Urheber-, Film-, Funk-, und Theaterrecht [UFITA] 91, 92 (1970). But see infra note 64.
50. See T. Maunz, supra note 14, at 5-142; W. Knies, supra note 13, at 214 n.18; T. Oppermann, supra note 12, at 444; Kewenig, supra note 49, at 103; Stiller, Kunstfreiheit und Gleichheitsgebot bei staatlicher Kunstförderung, 60 UFITA 171, 183 (1971).
over half of their financial support directly from the government.\textsuperscript{51} West German legal scholars write of an "institutional guarantee" of artistic freedom\textsuperscript{52} to ensure the autonomy of the artistic leadership within these organizations. In public performing arts institutions, an example of an "institutional guarantee" is the office of the \textit{Intendant}, or general manager of a public theater or opera house.

The \textit{Intendant} is generally selected by the city or state Minister of Culture (\textit{Kultusminister}) with authority over the institution in question, in cooperation with the respective city council or state legislative committee.\textsuperscript{53} In some cities recent changes have democratized the selection process by utilizing the opinions of the performers who must work with the new \textit{Intendant}, and even the opinions of the institution's audience.\textsuperscript{54} The selection of both the conductor and manager of the Berlin Philharmonic, for instance, is made by the orchestra members, although the city council possesses a veto power which has rarely been exercised.\textsuperscript{55}

Under the Uniform Intendant Contract of the German State Stage Association,\textsuperscript{56} the \textit{Intendant} is free to determine the repertory of his theater within the budget allowed for the year. Since the \textit{Intendant} alone is responsible for the artistic results of the theater under this commonly used contract, government officials can neither force specific repertory onto the program nor veto the \textit{Intendant}'s repertory or personnel decisions.\textsuperscript{57} There is some question regarding whether a contract with excessive government control over an \textit{Intendant} violates article 5(3) of the 1949 constitution. Those commentators who address this question agree that it would be unconstitutional, although they differ as to the rationale for this conclusion.\textsuperscript{58} At least one unreported


\textsuperscript{52} T. MAUNZ, \textit{supra} note 14, at 5-101; Kewenig, \textit{supra} note 49, at 102.


\textsuperscript{54} See \textit{id}. The selection of the \textit{Intendant} may be at the mercy of local politicians in places which have not democratized their procedures. R. DÜNNWALD, \textit{supra} note 51, at 50; H. DAIBER, \textit{supra} note 2, at 276.


\textsuperscript{56} See R. DÜNNWALD, \textit{supra} note 51, at 42. An English translation of the contract appears in Hutton, \textit{supra} note 53, at 546-51. The German State Stage Association (\textit{Deutscher Bühnenverein}) is an association composed of the state theaters.

\textsuperscript{57} R. DÜNNWALD, \textit{supra} note 51, at 50, 52.

\textsuperscript{58} G. ERBEL, \textit{supra} 10, at 188, says it would violate the objective value decision regulating the relationship of art as a whole to the state. \textit{See supra} note 45 and accompanying text. Kewenig, \textit{supra} note 49, at 103, rejects this view but finds a violation of the \textit{Intendant}'s
decision indicates that the *Intendant* is to be considered the highest authority in all artistic matters of the theater and is not subject to any government control or direction.59

The office of the *Intendant* is an “institutional guarantee” for the freedom of the arts because it attempts to insulate the artistic direction of public performing arts institutions from the state by placing its control in the hands of an individual with great expertise in the performing arts. The power hierarchy in German theaters is not without its critics, of course, especially since government officials do wield considerable power.60 Government control over the institution’s budget, for example, may be influential.61 Furthermore, the commentators indicate that government authorities possess considerable discretion to fire an *Intendant*.62 West Germans consider public control over theaters to be a virtue, however, because the public possesses ultimate control over politicians and bureaucrats who attempt to influence the arts.63

Those repertory disputes which have been made public have generally involved political theater, as opposed to attempted censorship based on differences in artistic opinion.64 Others have noted that compromises are often reached in repertory disputes, and thus the disputes are not publicized.65 But when covert attempts are made to influence

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59. See R. DÜNNWALD, supra note 51, at 58, for excerpts from this 1955 Düsseldorf labor court case. H. DAIBER, supra note 2, at 276, also discusses this decision.

60. H. DAIBER, supra note 2, at 292. The former *Intendant* of the Hamburg State Opera notes that his role sometimes involved acting as a “shock absorber between the public and the state.” R. LIEBERMANN, OPERNJAHRE 210 (1979).


62. Kewenig, supra note 49, at 107, indicates that an *Intendant* may be fired at any time. R. DÜNNWALD, supra note 51, at 51, suggests that an *Intendant* may be fired only if artistic quality is poor. Hutton, supra note 53, at 532 n.7, maintains that *Intendants’* contracts are generally renewed as long as the repertory is well-rounded and within budget.

63. Wahl-Zieger, supra note 9, at 228; G. ERBEL, supra note 10, at 178.

64. A full discussion of direct censorship for political reasons is beyond the scope of this Note, in which the emphasis is on censorship based on artistic taste. Nevertheless, two highly publicized instances involved plays, by Bertolt Brecht and Albert Camus, whose performances ostensibly would have encroached on sensitive foreign policy matters. See G. ERBEL, supra note 10, at 190; Kewenig, supra note 49, at 101. Rolf Liebermann, the former *Intendant* of the Hamburg State Opera, discusses a delay in the performance of an opera whose libretto was written by Brecht, an East German. The pressure on the *Intendant* resulted from outcries from the performers and the public over the construction of the Berlin Wall. The city government was in favor of performance, which occurred a year later. R. LIEBERMANN, supra note 60, at 266-67.

65. Kewenig, supra note 49, at 101. This might explain the lack of reported litigation concerning the constitutional powers of an *Intendant*.
repertory, unjustifiably fire an *Intendant*, or restrict a theater's budget, such events tend to be more publicized than under the American system of exclusively private institutions, because the public has a direct interest in the running of its own theaters. At least some West Germans find such a system of open and direct government support preferable to the American system of predominantly indirect subsidy, in which there is no control over those private individuals in power.

E. Direct Subsidy to Private Organizations

Private performing arts organizations also receive substantial direct financial assistance from various government bodies in West Germany. While this is of secondary importance, it furnishes an opportunity to compare West German direct subsidy to private groups and artists with the United States direct subsidy system, as represented by the National Endowment for the Arts.

Under article 5(3) of the 1949 constitution, there is no government obligation to ensure the existence of a private performing arts organization corresponding to the duty to provide public institutions which secure the freedom of the arts. There is considerable doctrinal confusion among the courts and commentators regarding the precise nature of the government's discretion under article 5(3) in funding private organizations and artists. This confusion is compounded by the application of the equal treatment clause found in article 3 of the 1949

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66. See L. LEISS, *KUNST IM KONFLIKT* 399 (1971), for an example of a State Minister of Culture who had a contemporary ballet, composed by Werner Egk, removed from the repertory of a public institution. The event was highly publicized, and the Minister was eventually fired.

67. One writer puts it quite bluntly:

Naturally one finds glittering orchestras in San Francisco and New York and Boston. These orchestras there are not infrequently supported by rich private persons. These rich private persons sometimes have certain programming ideas, to which a German chief conductor or general music director would certainly not submit, even if they came from the Minister of Culture himself.


68. See infra text accompanying notes 118-55.

69. T. MAUNZ, supra note 14, at 5-143. See supra text accompanying notes 25-33.


The constitutional concept of “art” is highly disputed. T. MAUNZ, supra note 14, at 5-111. One commentator asserts that the state may distinguish art from non-art. *Id.* at 5-117. But see Judgment of Feb. 24, 1971, BVerfG, 30 BVerfGE 173, discussed supra notes 39-48. There the Federal Constitutional Court stated that attempts to restrict the guarantee of artis-
In one case, a traveling private theater which catered to East German refugees and received a partial subsidy for years was cut off from funding because of government budget difficulties. Unless the plaintiff could demonstrate unequal treatment in relation to other theaters in violation of article 3, no right to a subsidy could be found. The court stated that the government "has to promote the arts wherever and however it finds them. A valuation does not belong in principle." No violation of the equal treatment clause of the 1949 constitution was found, however, because of "material" differences between the plaintiff's theater and the six state theaters in question. These differences included the special repertory of the plaintiff which did not cater to the general public, unlike the state theaters, and the fact that the plaintiff was a touring theater. Since the six state theaters were thus not competing with the plaintiff, no violation of the principle of free competition embodied in the equal treatment clause of article 3 was found. The "valuation" of which the court had spoken was obviously intended to mean as among "material equals." The opinion mentioned one practicality which may most readily explain its holding: it would not make sense, according to the court, that a private theater would have the right to receive a subsidy while the public theaters would be forced to close down.

Similar reasoning has been applied to indirect support through preferential tax treatment. In one case before the Federal Constitutional Court, the complainant record company argued that the constitutional mandate for government support of the arts which the court had developed in its decisions obligated the government to treat all segments of the arts community equally. This would have required a lowering of the company's tax burden. The court found such a conclusion unwarranted, but carefully limited its holding to the situation at

71. GG art. 3, ¶ 1 provides: "All persons are equal before the law." See generally Stiller, supra note 50.
73. Id. at 876. Compare supra note 70; infra note 85.
74. 21 DVBI at 877.
75. Id. at 875. This reasoning is somewhat overextended since, at most, the public theaters would have to cut back on programming, not close down.
76. Judgment of Mar. 5, 1974, BVerfG, 36 BVerfGE 321. This case is also discussed supra text accompanying notes 32-33.
77. See supra text accompanying notes 25-33.
hand by stating that the government possessed wide enough discretion to take the financial success of the record company into account.\textsuperscript{78} The court justified this holding by remarking that the complainant's thesis would even injure the state's mandate to ensure the freedom of the arts, in that on the one side it would hardly contribute anything towards artistic production, in quality or quantity, and on the other side would deprive the truly needy arts institutions of the always restrictedly available state support.\textsuperscript{79}

In other words, the state would forego needed tax revenues from a financially healthy medium that does not produce art, but merely reproduces it.\textsuperscript{80}

The preceding cases demonstrate that West German arts organizations have the same constitutional right to freedom of artistic expression, but not necessarily a constitutional right to the same financial support. German legal scholars recognize the potential danger of vesting discretion for funding decisions in the government,\textsuperscript{81} but the danger is at least partially offset by the availability of administrative\textsuperscript{82} and judicial\textsuperscript{83} review. A number of cases demonstrate this assertion. In one case,\textsuperscript{84} a visual artist was excluded from a list from which artists were

\begin{itemize}
  \item \textsuperscript{78} 36 BVerfGE at 332.
  \item \textsuperscript{79} \textit{Id.} at 333.
  \item \textsuperscript{80} One writer has developed the reasoning of the court's opinion, which essentially involves equalizing market imbalances brought about by technology, into an "interference model," in which the government interferes exclusively to promote new and weak forms of art. O. Jung, \textit{supra} note 27, at 72.
  \item \textsuperscript{81} W. Kries, \textit{supra} note 13, at 227, is particularly concerned with possible abuse of discretion in this area, which explains why he opposes qualitative judgments by the government. \textit{See supra} note 70.
  \item \textsuperscript{82} West Germany enacted a new Federal Law on Administrative Procedure in 1976. Verwaltungsverfahrensgesetz, 1976 Bundesgesetzblatt I 1253 (W. Ger.). \textit{See also} Pakuscher, \textit{The Use of Discretion in German Law}, 44 U. CHi. L. REV. 94, 108 (1976). Besides requiring disclosure in detail of the reasons for a particular decision, pertinent records must be made available to a rejected applicant for his inspection. \textit{Id.} at 109. \textit{Compare} Wu v. Keeney, 384 F. Supp. 1161, 1166-67 (D.D.C. 1974), where an unsuccessful applicant for a grant from the National Endowment for the Humanities (the companion foundation to the National Endowment for the Arts) was unable to judicially discover the statements of the experts used in denying his application.
  \item \textsuperscript{83} West German courts are competent to review cases involving abuse of discretion in the arts subsidy area. \textit{See} Judgment of Jan. 28, 1966, BVerwG, 23 \textit{ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHT [BVerwGE]} 194, 200. \textit{Compare} the following statement from Advocates for Arts v. Thomson, 532 F.2d 792, 795-96 (1st Cir. 1976), cert. denied, 429 U.S. 894 (1976), discussed \textit{infra} text accompanying notes 145-56: "Given this focus on the comparative merit of literary and artistic works equally entitled to first amendment protection as 'speech,' courts have no particular institutional competence warranting case-by-case participation in the allocation of funds."
  \item \textsuperscript{84} Judgment of Feb. 9, 1972, OVG Lüneburg, 10 DVBI 393 (1972).
\end{itemize}
selected for work on government buildings. The court found that a qualitative, subjective evaluation was necessary for the selection process, but found arbitrariness in violation of the equal treatment clause of article 3 of the 1949 constitution because of the admittedly different standards used for the two methods of getting on the list. The case additionally reveals one of the administrative safeguards used in the selection process: the plaintiff was given the opportunity to appeal his first denial to a second, different jury of experts for an independent evaluation of his artistic ability.

In another case, the plaintiff, who ran a private musical theater, was notified after she was contractually liable to actors and other personnel that a needed subsidy which she had received for a number of years would not be renewed. She claimed a form of detrimental reliance. The court stated that normally one cannot rely on the continuation of a subsidy, but here a relationship of trust had developed between the plaintiff and the government official involved, making the government potentially liable.

F. Other Features of the West German System

The decentralized nature of the West German system of government support to the arts embodies a crucial strength. States and municipalities are the primary patrons, which help prevent conformity to any national artistic trends and standards. Local support thus "conserves culture and in so doing it preserves individualism; and individualism means, or at least can mean, freedom." Since West Germans recognize that any bureaucracy can lead to conformity, strong federalism reduces the necessary bureaucracy to somewhat more manageable state and municipal levels.

Another important safeguard against politicization of performing arts institutions in West Germany is the competition between public

85. See supra note 70.
86. 10 DVBl 397. The methods were by competition and by merely exhibiting one's work at an annual art show.
87. Id. at 394.
89. Id. at 389.
90. Benda, supra note 37, at 4.
91. T. OPPERMANN, supra note 12, at 447.
92. Even greater decentralization, by reducing the already minimal federal involvement and increasing cooperation between state and municipal governments, has been advocated as a way of stimulating more cultural variety in West Germany. See generally Pappermann, Grundzüge eines kommunalen Kulturverfassungsrechts, 17/18 DVBL 701 (1980).
and private organizations. Ideally, the public can observe when a state institution begins to promote certain messages over others and compare what it is getting for its tax money by attending performances of private organizations. The German system, however, creates an unfortunate dilemma because the heavily subsidized public institutions charge far less than the actual production cost for admission, both to justify the amount of subsidy and to encourage attendance at performances. Private organizations are thus unable to compete with public institutions because they must pay for the cost of production through ticket revenues, and are occasionally forced to close. This situation has provoked strong criticism from one legal scholar, although the courts have not addressed the issue.

Finally, the existence of strong, direct government financial support in West Germany does not necessarily preclude private patronage of the performing arts. Such support has been used to fund experimental and less commercially viable projects that would normally not be available because of budget considerations. Private donations, moreover, are recognized as indirect government support by West Germans, because charitable contributions are tax-deductible.

II. UNITED STATES

A. Emphasis on Indirect Subsidy

There is no significant tradition of direct government support to the performing arts in the United States. The charitable contribution deduction in the Internal Revenue Code is the primary form of sub-

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93. Admittedly, the public institutions are generally larger, better funded, and well established; however an outlet does exist for nongovernment funded expression.
94. This was the fate of the theater which was denied a subsidy in the case discussed supra text accompanying notes 72-75. Nordemann, supra note 70, at 221 n.27.
95. Nordemann, supra note 70, at 220-22.
96. It has been held that the equal treatment clause of art. 3 of the 1949 constitution does not mandate market equality between public and private schools. Judgment of Sept. 22, 1967, BVerwG, 27 BVerwGE 360, 364.
97. R. LIEBERMANN, supra note 60, at 143. W. BAUMOL & W. BOWEN, supra note 8, at 372, are uncertain as to the effects of increasing government support on the level of private contributions.
98. R. LIEBERMANN, supra note 60, at 143. The amount of charitable contributions deductible for income tax purposes is significantly lower for individuals in West Germany than in the United States. See H. GUMPFL, TAXATION IN THE FEDERAL REPUBLIC OF GERMANY 773 (2nd ed. 1969). Compare infra note 100.
100. Individuals are permitted to deduct up to 50% of their adjusted gross income as a charitable contribution. This limit is 30% for long term capital gain property. I.R.C.
sidy to performing arts institutions in the United States. Though often described as "private support," it is an indirect method of assistance since the federal government loses potential tax revenues. It has been estimated that using the budget of the National Endowment for the Arts alone to determine the amount of federal support understates the real amount of subsidy by at least a factor of four, because of the considerable amount of tax deductible contributions made to the arts every year.

B. Decision Making in American Institutions

Performing arts institutions are generally organized in the United States as private, non-profit corporations. The board of trustees, or directors, which hires and fires artistic management, wields considerable power. Since members of the board are often selected on the basis of the tax deductible contributions they have made to the institution and on their ability to raise additional money, they are generally drawn from the business and social elite. Those responsible for the

§ 170(b) (1980). Contributions in excess of these limits can be carried over for the succeeding five years. I.R.C. § 170(d) (1980).


The grant of tax-exempt status to an institution also constitutes a form of government support. Walz v. Tax Commission, 397 U.S. 664, 674-75 (1970). W. Baumol & W. Bowen, supra note 8, at 353, note that tax exemptions, whether a subsidy or not, do not amount to significant savings because virtually all performing arts organizations operate at a deficit.

103. See infra note 119 and accompanying text.

104. Vandell & O'Hare, Indirect Government Aid to the Arts: The Tax Expenditure in Charitable Contributions, 7 Pub. Fin. Q. 162, 177 (1979), based on 1975 statistics. D. Netzer, supra note 8, at 44, estimates the amount of this form of indirect subsidy to be at least $400 million as of 1978.


106. P. Hart, supra note 3, at 471; Rockefeller Report, supra note 105, at 150.

107. W. Dace, supra note 5, at 115.

108. P. Hart, supra note 3, at 334, 479.

109. R. Bing, supra note 1, at 134, mentions one chairman of the New York Metropolitan Opera board whose primary interest in the opera was social. In addition, according to
artistic direction of the organization, such as conductors or theater managers, do not possess absolute authority regarding the artistic affairs of the organization.110

Market pressures acutely affect the decision making process. The reliance placed on a performing arts "market" stifles innovation and experimentation111 through "commercial censorship" by audiences.112 Donors often make contributions subject to conditions which are predicated on their own tastes and desires.113 Private foundations, for example, have been criticized for being more philistine than government agencies.114 No judicial or administrative controls are available against

the ROCKEFELLER REPORT, supra note 105, at 151: "[P]eople about whom practically nothing is known often are chosen to be trustees."

110. After discussing several of the conditions which contribute to the "maintenance of artistic standards," including the audience/repertory problem, the ROCKEFELLER REPORT, supra note 105, at 159 states: "Each of these conditions is to an extent controllable by trustees and management, artistic and business. Each decision carries a price tag and each requires judgment, knowledge, and taste, in order that proper decisions may be arrived at by all concerned." Additional statements are also illuminating:

Too often the relationship between a board and the artistic director of an arts organization deteriorates into a squabble between traditionalists who "know what they like" and artists who insist on pressing outward against the boundaries of the usual. A certain amount of tension is undoubtedly healthy, but board members will sacrifice some of the strength of their position—and the respect of their artist colleagues—if they do not bring to these discussions of aesthetic questions a degree of knowledgeability and sophistication.

Id. at 152 (emphasis added). P. HART, supra note 3, at 471, states that symphony boards do not "refrain completely from concerning themselves with a conductor's musical program."

R. LIEBERMANN, supra note 60, at 143-44, asserts that New York Metropolitan Opera donors interfere with artistic plans because they pay for productions put on by their "favorite toy." He states that he would not want to be the general manager of the Metropolitan Opera because he would have "to run to every cocktail party to beg again for a few thousand dollars," preferring instead to fight over his budget with a government finance minister. Id. at 142. There is little recourse available against a board of trustees which censors a work, aside from the conductor or manager quitting the post and, assuming the contract allows for artistic autonomy, suing for damages for breach of contract.

111. D. NETZER, supra note 8, at 38; R. SCHECHNER, supra note 4, at 35.

112. Wahl-Zieger, supra note 9, at 228. "Only at its peril does an artistic director ignore his audience's taste." ROCKEFELLER REPORT, supra note 105, at 159.

113. See supra note 109; see also P. HART, supra note 3, at 331. See R. BING, supra note 1, at 325, for a humorous example of this problem, in which a potential donor repeatedly offered money to the Metropolitan Opera on the condition that his own work be performed. In addition, artistic directors find that they must perform repertory which pleases their major contributors in order to ensure later donations. A. TOFFLER, supra note 101, at 194.

114. D. NETZER, supra note 8, at 38. See also P. HART, supra note 3, at 337. Some foundations' funding policies tend to force reliance on the market by promoting new artistic activities not supported by other donors in conjunction with not funding the recipient indefinitely. R. SCHECHNER, supra note 4, at 17. A detailed discussion of private foundations is beyond the scope of this Note. See generally W. NIELSEN, THE BIG FOUNDATIONS (1972). Foundation support to the performing arts has been declining in recent years. R. BRUSTEIN,
donors such as these, although defenders of the system maintain that the multiplicity of available sources of private funding compensates for any pressure from potential donors. As noted above, this is an unrealistic view of the economics involved, because private donors as a group exercise "commercial censorship." The result is that the artistic leadership of an American performing arts organization is relatively restricted in the programming of repertory.

C. Direct Subsidy in the United States

In response to the increasing operating deficits in the arts, Congress passed an Act which established the National Endowment for the Arts (NEA) in 1965, finding that "encouragement and support of the arts, while primarily a matter for private and local initiative, is also an appropriate matter of concern to the Federal Government." The NEA distributes grants, which are limited to no more than half of the support of any one project for which aid is requested, to tax exempt, nonprofit private groups. Grants are also made directly to individual artists "of exceptional talent." The Act purports to emphasize "American creativity and cultural diversity" and expressly prohibits government control over recipient arts organizations.

Critical Moments, Reflections on Theatre and Society 1973-1979, at 45-48 (1980). Corporate support in 1976 was approximately two and one-half times the budget of the National Endowment for the Arts, but most money is used to sponsor television programs concerning the arts. This tends to "confirm a suspicion that much corporate support for the arts tends to be a dignified form of institutional advertising, avoiding the hard-sell approach of traditional sponsorship but retaining many of the same prohibitions." Id. at 48.

115. P. Hart, supra note 3, at 331. Wahl-Zieger, supra note 9, at 228, states: "In sponsoring art [private donors] can either grant freedom to the artists, or they can exert political pressure—whichever they like."

116. D. Netzer, supra note 8, at 38; A. Toffler, supra note 101, at 202; H.R. 618, supra note 7, at 23. This so-called "pluralism" argument maintains that such broad-based support will secure artistic freedom. See D. Freeman, The Handbook on Private Foundations 3 (1981).

117. See supra notes 34-36.

118. See supra note 8.


121. Id. § 954(e). This provision was designed to prevent the government from becoming the primary patron of organizations, thereby dominating cultural expression. M. Straight, Twigs for an Eagle's Nest, Government and the Arts: 1965-1978, at 87 (1979). Between 1965 and 1978, a 10% to 15% level prevailed in grants to organizations, which kept the NEA out of management and administrative problems. Id.


123. Id. § 954(c) (Supp. IV 1980).

124. Id. § 954(c)(1) (Supp. IV 1980).
In addition, grants are made to independent state arts agencies, most of which were set up in response to the creation of the NEA, for disbursement locally. The Act also created a National Council on the Arts to advise and make recommendations regarding funding decisions to the chairman of the NEA. The chairman is not bound by these recommendations. The use, however, of panels of arts experts appointed by the chairman to select grant recipients and advise the Endowment has become prevalent and institutionalized.

In summary, the NEA essentially functions as a public foundation with more safeguards against directly influencing the arts than private foundations because of political restraints and the statutory prohibition against its engaging in such activity. In both types of foundations, however, determining who will receive assistance is discretionary. It therefore cannot be seen as fundamentally altering the market oriented process of choosing repertory in American performing arts institutions discussed previously.

125. Id. § 953(c), which states: "In the administration of this chapter no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any school or other non-Federal agency, institution, organization, or association."

126. Id. § 954(g) (Supp. V 1981). The most important of the state arts agencies is that of New York, which was established before the NEA and makes sizeable contributions of its own, besides distributing NEA funds. D. NETZER, supra note 8, at 94. By 1970, there were statutory agencies in every state distributing their basic NEA grant plus additional state funds in many instances. These independent agencies have pressed for greater involvement in developing NEA programs and policies. M. STRAIGHT, supra note 121, at 93. Straight, a former NEA administrator, laments the lack of coordination between the NEA and state agencies because the latter grant funds above those given by the NEA to major arts institutions, at the expense of smaller organizations. Id. at 97. However, 20 U.S.C. § 953(c) precludes any NEA control over state arts agencies. See supra note 125.

127. The Council is composed of 26 private persons associated with the arts who are appointed by the President for staggered six-year terms. 20 U.S.C. § 955(b), (c) (Supp. IV 1980).

128. The Chairman is appointed by the President for a four-year term. Id. § 954(b) (1976).


130. Id. § 959(a)(4) (Supp. V 1981), which authorizes the Chairman of the NEA "to utilize from time to time, as appropriate, experts and consultants, including panels of experts . . . ." See H.R. REP. NO. 1024, 94th Cong., 2nd Sess. 4400 (1976); M. STRAIGHT, supra note 121, at 77. In 1973, 185 experts residing in 31 states were used by the NEA. Id. at 77. The panels tend to develop the Endowment's policies. Id. at 80. Straight questions the wisdom of using panels for determining excellence in the creative arts because the selection is so subjective that it becomes arbitrary. He asserts that performers, on the other hand, may be judged by somewhat more objective criteria. Id. at 169.

131. D. NETZER, supra note 8, at 37.

132. See supra text accompanying notes 105-117.
Prior to passage of the Act, some legislators feared that the creation of the NEA would lead to censorship, excessive bureaucracy, and mediocrity in the arts.\(^{133}\) In practice, outright censorship by the NEA or state agencies has been a rarity.\(^{134}\) Excessive bureaucracy in the arts, moreover, has "long been at work under private control," especially with regard to fund-raising machinery.\(^{135}\) Some legislators feared that mediocrity would be fostered in the arts because they felt that decisions would be made by committee and thus "contribute to a spirit of compromise and conservatism. . . ."\(^{136}\) Charges of mediocrity, however, being particularly subjective in the area of contemporary creativity,\(^{137}\) are difficult to refute. The NEA has been criticized for spreading its funds too thin, for example, thereby promoting a lowering of standards.\(^{138}\) Nonetheless, the West German attitude that the government must combat the compromise and conservatism of the private sector is worthy of comparison here.\(^{139}\)

Relatively little criticism of the NEA has come from the arts community.\(^{140}\) There have been protests against the Endowment's refusal to fund operating costs,\(^{141}\) a policy obviously designed to keep government involvement in the internal affairs of organizations to a minimum. Another writer asserts that the NEA places contemporary creativity too low on its list of priorities.\(^{142}\) Outside review panels,
formed to alleviate the effects of favoritism in the National Council due to conflicts of interest, have also been recommended because the Council is composed of persons in the arts who are serving temporarily and who therefore tend to favor their own organizations.143

The NEA has received scant criticism from the legal community as well. The incorporation of basic administrative due process into the Act has been advocated upon the premise that judicial review is ill-suited for the protection of artists.144 This criticism proved to be accurate in the aftermath of Advocates for Arts v. Thomson.145 In this case, the Governor of New Hampshire vetoed a small grant of NEA funds from the state arts agency to a literary magazine by means of his power to authorize disbursement of the funds, which were held in the state treasury.146 The decision was made because the Governor found language in a poem published in a previous issue of the magazine to be filled with obscenities.147

The plaintiffs in Thomson restricted their attack on appeal to the First Amendment. While the plaintiffs did not challenge the principle of government funding for the arts, the First Circuit noted that this was clearly permissible under the Supreme Court’s interpretation of the First Amendment in Buckley v. Valeo.148 Rather, the plaintiffs claimed that the funding decision in question constituted a prior restraint of free expression because it was motivated by personal preference alone. The court rejected this claim on the ground that the doctrine of prior restraint acts only when the government restricts expression based on its content.149 Arts funding, according to the court, does not seek to restrict speech “but rather to use public money to facilitate and enlarge” artistic expression.150 The court further stated:

and decentralize the patronage power of the Endowment. M. STRAIGHT, supra note 121, at 171.

143. D. NETZER, supra note 8, at 194.
144. Comment, Media and the First Amendment in a Free Society, 60 GEO. L.J. 867, 1064 (1972). After discussing several potential legal remedies for censorship and the difficulties of obtaining judicial relief, the author suggests subjecting any action by the NEA’s Chairman which is contrary to the National Council’s recommendations to a two-thirds majority vote by the Council, along with the addition of an appeals procedure for rejected applicants.
145. 532 F.2d 792 (1st Cir. 1976), cert. denied, 429 U.S. 894 (1976).
146. Id. at 793.
147. Id.
148. 424 U.S. 1, 93 (1976), stating that public financing of political campaigns “furthers, not abridges, pertinent First Amendment values.”
A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants.\textsuperscript{151}

The plaintiffs conceded that such content-based decisions were necessary, but asserted that "narrow standards and guidelines" were constitutionally required to ensure that funding decisions were based on artistic merit as opposed to personal preference or prejudice.\textsuperscript{152} The court, however, found it "unwise to require an objective measure of artistic merit . . . [i]n the absence of ascertainable principles by which to define artistic merit."\textsuperscript{153} It did note in dicta that a claim of discrimination would be actionable:

The real danger in the injection of government money into the marketplace of ideas is that the market will be distorted by the promotion of certain messages but not others. To some extent this danger is tolerable because [sic] counterbalanced by the hope that public funds will broaden the range of ideas expressed. But if the danger of distortion were to be evidenced by a pattern of discrimination impinging [sic] on the basic first amendment right to free and full debate on matters of public interest, a constitutional remedy would be appropriate.\textsuperscript{154}

The \textit{Thomson} case amply demonstrates the need for more administrative safeguards in the NEA's statutory funding structure.\textsuperscript{155} The First Circuit found the arbitrary treatment of the magazine in the \textit{Thomson} case "troubling,"\textsuperscript{156} but absent any right to public subsidy, decisions to be content-based determinations and thus prior restraints on expression, thereby necessitating objective standards of evaluating artistic merit. \textit{See also} Comment, supra note 144, at 1054.

\textsuperscript{151} 532 F.2d 792, 795 (1st Cir. 1976). \textit{See also} T. Emerson, \textsc{The System of Freedom of Expression} 652 (1970); Shiffrin, \textsc{Government Speech}, 27 U.C.L.A. L. Rev. 565, 642-43 (1980).

\textsuperscript{152} 532 F.2d at 796. Plaintiffs were not asserting that the procedural safeguards applicable to public places controlled in this situation. \textit{See}, e.g., Southeastern Promotions, Ltd. \textit{v.} Conrad, 420 U.S. 546, 561 (1975), which requires discretionary official action regulating expression in a municipal theater to be accompanied by "rigorous procedural safeguards." Nonetheless, the \textit{Thomson} Court rejected this argument, finding no tradition of neutrality in government subsidization of expression, such as political campaigns. 532 F.2d at 796.

\textsuperscript{153} \textit{Id.} at 797.

\textsuperscript{154} \textit{Id.} at 798 (citations omitted).

\textsuperscript{155} \textit{See} Shiffrin, supra note 151, at 646-47.

\textsuperscript{156} 532 F.2d at 797.
the court doubted that a sufficient interest existed to claim a right to procedural due process under the Fourteenth Amendment. Procedural safeguards, stated the court, would be of little value "given the ultimate necessity of subjective judgment." 157

Certainly, however, administrative procedural safeguards would be of immense value to NEA grant applicants. The most important concern is to ensure that only persons with an acknowledged expertise in the arts make funding decisions. 158 Rejected grant applicants should also have the opportunity to appeal their denial to a second, independent group of arts experts. 159 Finally, the states and their respective arts agencies must comply with these procedures in the disbursing of NEA funds, in order to avoid another incident such as the one which inspired the Thomson decision. 160

III. CONCLUSIONS AND SOME PROPOSALS

This Note has demonstrated that direct and open government support of the performing arts, such as in West Germany, can be a more viable solution from the standpoint of artistic freedom than indirect support through the tax laws, assuming that the government is to be involved at all. 161 Under the German system of government support, the arts are less market oriented in terms of both donors and audiences than in the United States. If artistic freedom is considered an objective of a society 162 and one accepts that greater artistic freedom exists where

157. Id.

158. Other suggestions for improvement of the government funding structure include shortening the terms of office for all members of the National Council and the Chairman, with no opportunity to serve again. This would at least limit the effects of favoritism over the long run. The Chairman should be elected by the National Council from their own ranks for a very short term of office, for example, one or two years, rather than becoming a political appointee of each incoming President. Restrictions on the Chairman's total decision-making authority and autonomy to insure against arbitrariness and favoritism, such as a National Council veto power, would certainly be of value.

159. See supra notes 87, 144.

160. The lower court in Thomson noted that "[n]owhere in the statute is there any indication that the State agency's determination of merit is to be final and binding." Advocates for Arts v. Thomson, 397 F. Supp. 1048, 1053 (D.N.H. 1975). Elimination of this statutory loophole is an advisable precaution to avoid further instances of direct censorship by state officials.

161. According to one West German legal scholar: "[O]ne of the paradoxes of our society is that artistic freedom for the most part only allows itself to be realized when the state not only occasionally, but continually and with considerable expense, promotes the arts," Kewenig, supra note 49, at 96.

162. 20 U.S.C. § 951(5) (Supp IV 1980) states that the United States government should "help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry . . . ."
the arts are not considered competitive goods, then such insulation from the market is desirable.

This attitude towards the arts explains in large part how German jurisprudence has extracted a mandate for government support of the arts from a constitutional guarantee of artistic freedom. At the same time, the German system attempts to achieve insulation from government influence in the arts by granting autonomy to the artistic leadership of its public performing arts institutions. Though obviously limited by budget considerations, this autonomy may be judicially enforced, and allows artistic directors to program the works they desire during their tenure. Inevitably these artists program more contemporary works than their American counterparts, not necessarily out of a greater understanding of the importance of this part of their role as artistic directors, but because of greater freedom to do so.

In the United States, the federal government indirectly subsidizes performing arts institutions through the tax laws. Substantial influence over the arts is thereby vested in private donors who are generally not artists nor even persons with adequate expertise in the arts to make the decisions crucial to maintaining the vitality of the arts. The arts thus tend to be elitist in the sense that the taste of the patrons who most heavily contribute influences artistic trends. Nothing indicates, however, that foundations or boards of trustees are more qualified in the arts or less likely to influence them than government officials. Further, they cannot be controlled by legal mechanisms.

This situation results from the lack of a tradition of government support for the arts in the United States and a deep-seated concern over government involvement with virtually any form of expression. But

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163. "Vitality" in this sense is not used with regard to performance standards and practices, but in relation to the promotion of new works.
164. Price, supra note 101, at 1202, comments that the taste of the wealthy, therefore, becomes that of the community.
165. D. Netzer, supra note 8, at 37.
166. P. Hart, supra note 3, at 350.
167. W. Baumol & W. Bowen, supra note 8, at 375, state:

   Indeed, one can make a strong case to the effect that interference by private patrons is far more frequent and poses a far more imminent threat than does government control. It has been charged more than once that some performing organizations share the tribulations of the group "controlled by a handful of people who consider the operation as their own private domain. They dictate not only administrative policy, labor policy, fund raising policy, but public standards of taste. . . ." We know of at least one case where a leading patron of an orchestral group has virtually banned contemporary music. . . . In such circumstances government support, instead of reducing the freedom of the arts, can serve to increase it.
perhaps the creative aspect of the performing arts does not thrive in the "marketplace of ideas," at least on the commercial level. Even if one refuses to accept a view of art as something to which the market is inimical, it is arguably in the interest of society to protect the performing arts from such influences. The costs of performing a work of moderate proportions is clearly beyond the resources of most individual composers and playwrights. Thus, heavy reliance is placed on a market of "culture consumers" whose consumption is dominated by a predilection towards the slight percentage of older works which have proven to be great works of art over time. The vitality of new creation in the performing arts can only suffer.

The relatively recent arrival of direct subsidy in the United States, through the National Endowment for the Arts and various state and local arts agencies, merely channels additional money into the arts. It does not fundamentally alter the situation of the performing arts because each agency functions as another consumer in the arts market. In this regard, both German and American judicial opinions recognize the necessity of discretionary, qualitative evaluations of artistic merit in the distribution of funds to private institutions and individuals. Fortunately, the NEA has largely avoided improperly influencing the arts, and additional statutory procedural safeguards could ensure that only artists and arts experts make funding decisions so as to protect the performing arts from politicians and bureaucrats.

It is important to assess what the United States can learn and apply from the West German system, aside from suggestions for purely administrative changes in the existing structure. According to a former deputy chairman of the NEA, "More insidious than outright censorship, because it is less visible, is the threat that government will come to dominate the cultural life of the nation. . . ." The West Germans have certainly learned of the dangers of a centralized, coordinated cul-

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168. See supra text accompanying note 154. In response to the "cultural populists," or anti-elitists, whose opinions concerning the arts are prevalent in government circles, R. BRUSTEIN, supra note 114, at 82, states:

[T]here is very little danger today that mass taste will go unsatisfied, if only because satisfying this taste is a source of enormous profit for a large number of commercial entrepreneurs. No, the greater danger to a pluralistic society is that the less popular, more unpalatable forms of creative expression will somehow wither and die, partly because genuine works of art are not always accessible to large audiences, being thought difficult, provocative, arcane, or experimental—at least, at first.

169. See generally A. TOFFLER, supra note 101.

170. M. STRAIGHT, supra note 121, at 87. One House Report has stated that "the Arts Endowment has recently made important strides to co-ordinate and consult with state arts
Artistic Freedom

Artistic Freedom from the Nazi experience. With this in mind, a wise course for reform of the American direct subsidy system must involve the dissolution of the NEA as a grant-making body. Instead, federal appropriations should be administered by state and local arts agencies alone, and they should be administered on an equitable basis to encourage maximum cultural diversity. A federal statute, however, would be advisable to ensure compliance with minimum standards for the administration of funds.¹⁷¹

More intriguing is the question of whether publicly owned performing arts institutions are a viable solution to the current lack of artistic freedom in the performing arts in the United States. To be sure, the West German system operates within a different legal and social framework and is not free of imperfection, but the desirability of insulating the repertory of the performing arts from commercialization remains the same in both countries. Prevailing political attitudes undoubtedly preclude the introduction of such a direct system of support on a significant scale in the United States. Nonetheless, states and state arts councils should be encouraged to attempt such a program on a modest basis.¹⁷² Even a limited number of public institutions might prove to be a significant step towards securing greater artistic freedom in the performing arts in the United States and could serve as models for emulation by other states in the future.


¹⁷² Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 561 (1975), which requires “rigorous procedural safeguards” accompanying official discretion regarding the use of a municipal theater, arguably would not preclude a public institution devoted to the performing arts where decisions were made by an autonomous artistic director. The Conrad case involved a theater which was available generally for a multiplicity of purposes, including “entertainment.” 420 U.S. at 549 n.4.