

Promoting the Progress of an Underused Art:  
Imagining an American National Theater

by

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# Table of Contents

<b>Acknowledgements .....</b>	<b>2</b>
<b>Introduction .....</b>	<b>3</b>
<b>Chapter One: What is a national theater? .....</b>	<b>7</b>
National Theaters as Defined by Theater Theory .....	7
National Theater Case Studies .....	10
A More Perfect Definition.....	24
<b>Chapter Two: A Brief History of Arts and Theater Funding in the United States .....</b>	<b>27</b>
Government Money for the Arts in General .....	27
The 1930s: First Attempts at Government Involvement in Theater.....	48
Further Attempts at Government-Sponsored Theater .....	54
Historical Trends and Congressional Tendencies .....	63
<b>Chapter Three: Challenges to the Idea of a Subsidized National Theater .....</b>	<b>70</b>
Clearing Up Some Assumptions .....	70
Two Extremes of Subsidized Speech .....	78
Other Types of Government Regulation of Subsidized Speech.....	85
<b>Chapter Four: National Identity and National Theaters.....</b>	<b>102</b>
States and Nations .....	102
What is the American National Identity? .....	106
National Identity Through the Lens of American Federalism .....	112
One Last Case Study, and Some Final Thoughts on National Identity .....	120
<b>Chapter Five: An American National Theater .....</b>	<b>131</b>
Criteria.....	131
A Proposal .....	135
Will the Time Ever be Right? .....	151
<b>Works Cited .....</b>	<b>153</b>

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# Introduction

It doesn't take very much knowledge of arts in the United States to realize that we do not have a theatrical body that has any claim to the term "national theater." In our country, where theater is generally centered in big metropolitan areas and most people conflate "good theater" with big-budget Broadway musicals, the idea of a national theater it is not a culturally familiar concept. We are all accustomed to seeing sports championships take on the "national" name, as well as lobbying groups, political parties, libraries, and government-funded parks, but the idea of a theater organization adopting a similar title (and having it mean more than simply that the owner wants to lend his or her business some legitimacy) is completely foreign. The US does not have a national theater, and for the most part, its citizens do not know or think about its absence, much less recognize that the lack of such a body in a prominent Western country is unique.

As it turns out, the United States is *very* unique in this way, particularly amongst the rest of the Western world. Albania, Austria, Croatia, France, Finland, Greece, Hungary, Ireland, Macedonia, Norway, Poland, Portugal, Romania, Scotland, Serbia, Slovenia, Spain, Sweden, Turkey, the United Kingdom, and Wales all have national theaters – and that's just in Europe, and not even the complete list!<sup>1</sup> The trend has also spread to other parts of the world, including (but certainly not limited to) Algeria, Australia, Egypt, Iraq, Israel, Senegal, South Korea, Syria, and Tunisia.<sup>2</sup>

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<sup>1</sup> Marvin Carlson, "National Theatres: Then and Now," in *National Theatres in a Changing Europe*, S. E. Wilmer, ed. (New York: Palgrave Macmillan, 2008), 22-32.

<sup>2</sup> *Id.* at 22-32.

While there are certainly many reasons that the United States can be considered very different from the vast majority of these countries, the sheer numbers suggest that we are much more exceptional by *not* having a national theater, than the other countries are by having them.

I was first introduced to the concept of national theaters when I spent a semester studying in London. In the United Kingdom, as in the rest of Europe, theater has, over many centuries, become a key part of the country's history, culture, and identity. And that interest in theater and culture in general is not limited to their own country, either – I need both hands to count the number of years my school curriculum covered the Great Depression, but I had still never heard of the Federal Theatre Project (a brilliant and unique part of Roosevelt's Works Progress Administration that employed thousands of people while bringing theater all across the country) until leaving the US. After 20 years spent in the American school system, I had never heard of the FTP's demise at the hands of the House Un-American Activities Committee when it became clear that, under the First Amendment, Congress was powerless to censor left-leaning productions; never discussed the controversies surrounding the National Endowment for the Arts' sponsorship of photographers Andres Serrano and Robert Mapplethorpe; never realized just how different our system of funding the arts was from those in other countries. All of these instances (and others) caused me to question our government's lack of direct involvement in supporting the arts and theater in particular... and thus, this thesis topic was born.

In the chapters that follow, I will attempt to show that the formation of an American national theater, though seemingly inconsistent with the government's past and current arts policies, might be not only desirable, but also distinctly possible. As this question of national theaters raises many issues that span multiple disciplines, I will adopt an interdisciplinary approach to this analysis, using political science as a lens through which to view additional contributions from the fields of theater studies, history, sociology, and others. To that end, in Chapter One, I will take up the question of what constitutes a national theater, beginning with a survey and critique of preexisting definitions, and then, using as examples three very well established and archetypical national theaters, develop a definition of my own. In Chapter Two, I will provide brief histories of government funding for the arts in the United States and of previous attempts at the formation of a national theater, and will end with a discussion of some trends and challenges that, given the events of the past, a national theater would be likely to face in today's world. Next, in Chapter Three, I will identify one of those challenges as stemming from the recently established government speech doctrine, and the related difficulties of categorizing subsidized speech with respect to the First Amendment. I will explore in detail how this challenge can be framed in light of current First Amendment jurisprudence, to the end of producing a framework through which First Amendment concerns about a national theater can be analyzed.

In Chapter Four, I will tackle the question of what it means to be a truly "national" organization in the United States, addressing issues of national identity and federalism, and will begin to look at various models for developing such an

organization. Finally, in Chapter Five, I will lay out a set of criteria for an American national theater, and then propose what I see as the best possible method of fulfilling those criteria. In doing so, I hope to present both the challenges and the rewards that might come with the formation of such a body, and to draw attention to what I think could be a highly successful and beneficial addition to our country's political and cultural landscape.

# Chapter One: What is a national theater?

## National Theaters as Defined by Theater Theory

Before beginning my analysis of the challenges to and benefits of creating a American national theater, it is necessary and useful to take a step back and answer the first question that comes to mind in such a discussion: *What is a national theater?* As with many things, there is not, as of yet, a single accepted definition.

Much of the literature in this area, which mainly comes from the field of theater studies, tends to define the term according to the representative natures of such organizations and the difficulties of creating theatrical bodies relevant to the diverse and geographically disparate citizenry of entire nations. As Bruce McConachie writes in his essay, “Towards a History of National Theatres in Europe,” “national theatres must address (or seek to address) a part of the national people that can legitimately represent the whole of it.”<sup>3</sup> This idea in turn follows naturally from theater scholar Lauren Kruger’s very prominent theory of “theatrical nationhood,” a term which she uses “to denote the representation of the nation not only *in* the theatre but *by* the theatre, and to bring to light the ambiguous if not outright contradictory character of the theory and practice of staging the nation, of constituting in the audience the synecdoche of the people while also, in key instances, standing in for an

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<sup>3</sup> Bruce McConachie, “Towards a History of National Theatres in Europe,” in *National Theatres in a Changing Europe*, S. E. Wilmer, ed. (New York: Palgrave Macmillan, 2008), 50.

absence of an imperfect nation state.”<sup>4</sup> Kruger and others<sup>5</sup> devote numerous books and papers to discussing the difficulty of such lofty goals, while skirting any attempts to define exactly how a national theater can be deserving of its title.

This does not mean, however, that attempts are never made to at least recursively describe the term “national theater” based on trends amongst existing examples. McConachie helpfully observes that one very common way to create a theater representative of an entire nation is through “an actor-audience relationship in which both parties could be perceived as representative of the nation.”<sup>6</sup> However, he then acknowledges that as ways of defining a “nation” change over time, these relationships do as well, thus rendering it very difficult to include them in a universal definition of the term “national theater.” Similarly, in his essay, “National Theatres: Then and Now,” Marvin Carlson observes that “the common image of a national theatre is of a monumental edifice locating in a national capital, authorized, privileged and supported by the government, and devoted wholly or largely to productions of the work of national dramatists.”<sup>7</sup> However, he immediately follows this definition with the disclaimer that “some national theatres adhere closely to this ideal model, but the

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<sup>4</sup> Loren Kruger, “The National Stage and the Naturalized House,” in *National Theatres in a Changing Europe*, S. E. Wilmer, ed. (New York: Palgrave Macmillan, 2008), 36.

<sup>5</sup> See Loren Kruger, *The National Stage: Theatre and Cultural Legitimation in England, France, and America* (Chicago: The University of Chicago Press, 1992); Jen Harvie, *Staging the UK* (Manchester: Manchester University Press, 2005); S. E. Wilmer, ed., *National Theatres in a Changing Europe*, (New York: Palgrave Macmillan, 2008); S. E. Wilmer, *Writing and Rewriting National Theatre Histories* (Iowa City: University of Iowa Press, 2004).

<sup>6</sup> McConachie, 51.

<sup>7</sup> Carlson, 21.

vast majority depart from it in one way or another.”<sup>8</sup> In one last example, Zoltàn Imre, in his article, “Staging the Nation: Changing Concepts of a National Theatre in Europe,” offers up a slightly different version of the same theory – that in “performing the (single) national language, establishing an (authentic) national dramatic literature, maintaining the (genuine characteristics of the) national character, and creating the (solely authorized) national past,”<sup>9</sup> national theaters aim to create and present a “single, fixed, and unified image of the nation and its identity.”<sup>10</sup> However, like the other theater historians and scholars, he immediately qualifies this point by discussing the inherent heterogeneity of such nations, and the impossibility of boiling down an entire national population to such basic characteristics, thus admitting the failings of such a definition.

Looking at these attempts at definitions in the aggregate, one can see that (aside from the tendency to propose a theory and then immediately recant or qualify it) there is an emerging trend of defining theaters by what they *do*, rather than by what they *are*. To boil it down to a single statement, these theorists and many of their contemporaries define a national theater as an organization with the goal of representing its nation through theater, and/or of creating theater representative of its nation. However, they neglect to address the numerous political and financial factors that distinguish these governmentally recognized “national theaters” from other

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<sup>8</sup> *Id.* at 21.

<sup>9</sup> Zoltàn Imre, “Staging the Nation: Changing Concepts of a National Theatre in Europe.” *New Theatre Quarterly*, vol. 24:01 (2008), accessed on 19 November 2013, available at <[http://journals.cambridge.org/abstract\\_S0266464X08000079](http://journals.cambridge.org/abstract_S0266464X08000079)>, 84.

<sup>10</sup> *Id.* at 84-85.

theatrical organizations seeking to appeal to national audiences in their respective countries. As such, I will attempt to formulate a more nuanced definition, one that encompasses both this theater-studies-based theory of representation while also addressing the political and economic trends that relate to their founding, funding, and continuity.

### **National Theater Case Studies**

In searching for a more complete definition of the term “national theater,” I find it useful to look at some of the most important national theaters of today, and the economic policies that govern their existence. In doing so, I hope to identify the defining traits of such institutions, and use them to create a universally applicable standard that can in turn be used to identify and define national theaters of the future. To that end, I have chosen as examples countries that have well-established and internationally acclaimed national theaters of their own, as well as arts funding policies that are fairly typical amongst their contemporaries as per economist John O’Hagan’s book, *The State and the Arts: An Analysis of Key Economic Policy Issues in Europe and the United States*. Similarly, since the end goal of this thesis is to identify the challenges to the formation of a national theater in the United States and to propose some ways in which they might be overcome, I have also attempted to choose as examples countries that are comparable to the United States in terms of government organization (i.e., republics and federal republics), economic organization (capitalist), cultural trends (generally fall into the “Western” category),

and linguistic trends (i.e., have one legal language, as countries with two nationally recognized languages sometimes have multiple national theaters).

Keeping all of this in mind, I have chosen to look at the national theater histories and policies of France, Austria, and the United Kingdom, all three of which fit the above criteria for comparability to the United States. The first two – France and Austria – possess the first- and second-oldest national theaters in Europe (the Comédie-Française and the Burgtheater respectively, although both countries have completely overhauled and expanded their national theater systems since the original organizations were founded). According to O’Hagan, these two examples are fairly characteristic examples of what he considers to be the European model of arts funding,<sup>11</sup> while at the same time remaining distinct from each other in terms of funding policies and national culture. Similarly, the Royal National Theatre in the United Kingdom is easily the most widely recognized national theater in the United States. The UK also presents the best example of what O’Hagan has termed the British model of arts funding, which he places on a spectrum somewhere between the European and American models.<sup>12</sup> Therefore, for the purposes of this thesis, these three countries present ideal case studies, especially because, in addition to the other characteristics, their respective national theaters are so well regarded internationally that any definition of the term cannot exclude them. As with many things, however, understanding the history of each of these theaters is crucial in understanding how

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<sup>11</sup> John W. O’Hagan. *The State and the Arts: An Analysis of Key Economic Policy Issues in Europe and the United States* (Cheltenham, UK: Edward Elgar Publishing Limited, 1998), 3-7.

<sup>12</sup> *Id.* at 7.

they have arrived at the policies they have today. Proceeding in chronological order, I will start with France.

Although France now has five officially chartered national theaters, their history began in the year 1680, when King Louis XIV authorized a merger between two existing theater companies, creating the Comédie-Française. In an official statute issued the same year, Louis XIV decreed that the national company would “comprise twenty-seven members, eighteen of whom would be whole shareholders; six, half shareholders; three, quarter shareholders and the rest would be coerced into either retirement or unemployment. The company [would be] placed under the control of the first gentlemen of the chamber, who reported directly to the king on matters of importance. The king also instigated a pension system worth 12,000 livres per annum, thereby providing the actors with economic security in return for their constitutional freedom.”<sup>13</sup> This highly controlling method, therefore, was likely employed to bring the theater – which the king saw as threatening, especially in light of the satirical plays that were popular at the time, and the fact that actors were not allowed to become citizens of the state – safely under the court’s control. As theater historian Anwen Jones theorizes in her book, *National Theatres in Context: France, Germany, England, and Wales*, “this national theater... was deliberately constructed as a declaration of its allegiance to and dependence on the figure of the monarch in the full public glory of his (and [the theater’s]) constitutional role.”<sup>14</sup>

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<sup>13</sup> Anwen Jones. *National Theatres in Context: France, Germany, England and Wales*. (Cardiff: University of Wales Press, 2007),19.

<sup>14</sup> *Id.* at 19.

However, the next few decades in the life of the Comédie-Française were marked by the company's attempts to use its governmental position to create and maintain a monopoly on high-quality French theater. For example, one particularly amusing attempt arose when the Comédie-Française successfully requested a legislative act by the government of the time that gave it a monopoly on the use of dialogue in theater.<sup>15</sup> This supremacy was also challenged by other theater professionals who wanted free reign to create more innovative and less stuffily traditional theater, even if they were, by doing so, giving up the very extensive monetary resources allocated to the national theater. Similarly, one can also see in the Comédie-Française's history repeating cycles of periods of government support, followed by periods of strict censorship and limitations when the theater expressed politics that those in charge found threatening, followed by periods of forced restructuring and reform.

The first iteration of this cycle came to a close towards the end of Louis XIV's reign, when he removed the theater from its home in his court and forced it to find other locations in which to perform. A second iteration happened during Revolution of 1789, when actors and theater professionals were awarded citizenship and all the privileges that came with it by the Declaration of the Rights of Man. However, this move was soon followed by strict censorial guidelines and a complete reordering of the Comédie-Française when Maximilien Robespierre, infamous leader of the revolution, realized that the existence of such a long-standing and generally free-thinking artistic institution was "antithetical to his ideal of theatre as a 'public school

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<sup>15</sup> *Id.* at 24.

of principles, of good manners and of patriotism.”<sup>16</sup> In light of this, he completely cleaned house, arresting those in charge of the Comédie-Française for not performing their civic duties and replacing them with his own people. Later, under the government of Napoleon, “who sought to revive [the national theater] to its former glory as a flagship of national excellence,”<sup>17</sup> the Comédie-Française experienced a third golden age. This was once again short-lived, though, because the rapidly changing and often disunified political culture of the post-Napoleon era made it very difficult for the Comédie-Française, with its values so rooted in the continuation of tradition, to remain timely and relevant amidst the rise of new theaters with more progressive missions and styles. Thus, by the turn of the twentieth century, “it was no longer a question of whether the Comédie-Française accurately represented a national truth but of establishing a network of national, theatrical investigations that might, or then again might not, include the spectacle of a centralized, subsidized national centerpiece.”<sup>18</sup> As Jones points out, “this search for a national identity did not take place within but rather around the Comédie-Française,”<sup>19</sup> a trend that continued through the German occupation of France and the post-war rebuilding processes of the 20<sup>th</sup> century.

As a reflection of the cultural nationalism inherent in this post-war rebuilding, the French government started pouring more money than ever before into the arts and theater in particular. Throughout the 20<sup>th</sup> century, and particularly after the student

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<sup>16</sup> *Id.* at 35.

<sup>17</sup> *Id.* at 39.

<sup>18</sup> *Id.* at 44.

<sup>19</sup> *Id.* at 45.

riots and near-collapse of the French government in 1968, a very complex and multi-tiered theater funding bureaucracy developed to fund and run the majority of the nation's theaters. Under the current scheme, funding is apportioned into three categories. In the least-subsidized tier are sixty or so National Stages (*Scènes Nationales*), theaters with no resident company, and whose main function is to host shows by touring companies or local production groups. Next are approximately forty National Dramatic Centers (*Centres Dramatiques Nationaux*, or CDNs), which are, according to theater scholar David Whitton, either "regionally-based private theatre companies which were adopted by the state," or, more recently, "are created and maintained as partnerships between the Ministry of Culture and Communication and the relevant municipal and regional authorities."<sup>20</sup> Finally, there are the five fully-subsidized national theaters (the Comédie-Française, the Odéon-Théâtre de l'Europe, the Théâtre National de Chaillot, the Théâtre National de Strasbourg, and the Théâtre National de la Colline), all of which are, to use Whitton's definition, "public institutions... created, owned and capable of being dissolved by the state and are placed under the direct control of a Minister of State."<sup>21</sup> In 1996, these five national theaters received a total of 317.5 million francs<sup>22</sup> (approximately € 67.2 million, using the 2013 value of the dollar) in direct subsidy through the Ministry of Culture

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<sup>20</sup> David Whitton, "Proliferation and Differentiation of National Theatres in France," in *National Theatres in a Changing Europe*, S.E. Wilmer, ed., (New York: Palgrave Macmillan, 2008), 154.

<sup>21</sup> *Id.* at 153.

<sup>22</sup> Jones, 46.

and Communication. This amount has risen significantly over the years, to € 132.6 million (or 179.3 million USD) in 2013.<sup>23</sup>

The Burgtheater in Austria followed a similar, if slightly less politically contentious path to national theater-hood. It was founded in 1741, and for the first few decades of its existence, served as a court theater, providing entertainment for the highly multinational court of the Holy Roman Emperor, Francis I. As such, it placed a much higher focus on things like Italian opera and French comedy, than it did on German-language theater. However, towards the end of Francis I's reign and the beginning of the reign of his son, Joseph II, Austria and the rest of the Empire embarked on sweeping enlightenment reforms, that in turn began to change the theater's focus. Although it had always been owned by the court and leased to private directors, from the early 1760s onwards, the Burgtheater and its companion, the Kärntnertortheater, were "subject to strict supervision in keeping with the aesthetics and the pedagogic idealism of the reformers. No longer was the theater perceived as serving the glory of the ruler and the amusement of populace; rather its function was specifically that of enlightenment. The intention to educate and improve necessitated strict control of the repertoire, so that, as [Austro-German writer Joseph Freiherr von

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<sup>23</sup> "Chiffres lés 2013: Théâtre et spectacles," *Ministère de la Culture et de la Communication*, 2013, accessed on 19 November 2013, available at <[http://culturecommunication.gouv.fr/content/download/62896/481991/version/2/file/Chiffres+c1%C3%A9s+2013\\_Th%C3%A9%C3%A2tre+et+spectacles.pdf](http://culturecommunication.gouv.fr/content/download/62896/481991/version/2/file/Chiffres+c1%C3%A9s+2013_Th%C3%A9%C3%A2tre+et+spectacles.pdf)>, 98; "Chiffres lés 2013: Danse," *Ministère de la Culture et de la Communication*, 2013, accessed on 19 November 2013, available at <[http://culturecommunication.gouv.fr/content/download/62895/481987/version/2/file/Chiffres+c1%C3%A9s+2013\\_Danse.pdf](http://culturecommunication.gouv.fr/content/download/62895/481987/version/2/file/Chiffres+c1%C3%A9s+2013_Danse.pdf)>, 90.

Sonnenfels] put it... plays might become a 'school of manners, courtesy, and language.'”<sup>24</sup>

In 1776, however, Joseph II bestowed the title of German National Theater on the Burgtheater. According to W. E. Yates, this change was predicated on three reasons: first, that the bourgeois audiences were becoming dissatisfied by the low-brow fare offered by touring companies and wanted more sources of high-quality vernacular theaters; second, that there was a “perceived need... for non-commercial (that is, subsidized) theatres, in keeping with the Enlightenment aim of cultural education;”<sup>25</sup> and third, that by providing a place to train actors and promote German plays, such a theater would aid in the Enlightenment goal of improving German national culture. The Burgtheater was soon established as an Austro-German counterpart to France’s Comédie-Française, and with that, the second national theater in Europe was founded.

Like its French model, though, the Burgtheater has gone through a number of shifts in funding and management policy since its founding. Up until the mid-1810s, it was mainly run as it always had been – owned by the court, but leased to private directors and their shows. However, when financial troubles almost caused the closing of the Burgtheater and some of its contemporaries in April of 1817, “the direction... finally returned technically to the exchequer, being administered through the Ministry of Finance.”<sup>26</sup> By the end of the 1820s, the subsidy that it received

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<sup>24</sup> W. E. Yates. *Theatre in Vienna: A Critical History, 1776-1995* (Cambridge: Cambridge University Press, 1996), 9.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Id.* at 50.

equaled approximately a fourth of its total income,<sup>27</sup> the rest of which mainly consisted of subscriptions and ticket sales. This general funding policy lasted until November of 1918, when the Burgtheater, previously owned and run by the Austrian court, was transferred to state control. This change, precipitated by the desire to make Vienna more of a national and international cultural center, also brought with it the understanding that “the Burgtheater must change in character; in the words of the music critic Paul Stefan, [it] could ‘no longer be [a theater] for the privileged.’”<sup>28</sup>

By the early 1920s, however, the Burgtheater was facing major financial difficulties again in the wake of World War I. The decreasing wealth of the middle class, combined with the increasing taxes levied on various types of theatrical productions by the 1918 reforms – 4% on spoken theater in 1918, although by 1921, it had risen to 10%, with a ceiling of 20% after 50 performances<sup>29</sup> – meant that theater on the whole became more of a luxury than an everyday activity. As such, many theaters and theater companies shut down during this time. By 1922, subscription levels were so low and the financial state of the theater so bad that several methods of part-privatization were considered. The then-director of the theater, Albert Heine, finding the building that housed the Burgtheater company too expensive to run, also considered proposals to either abandon the building altogether and move to a smaller, less costly theater, or to merge with another major Vienna company, the Volkstheater (or People’s Theater). However, due to two laws passed in 1918 that formalized

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<sup>27</sup> *Id.* at 59.

<sup>28</sup> *Id.* at 200.

<sup>29</sup> *Id.* at 206.

Austria's commitment to maintaining and running its national theater, the Burgtheater survived.

All of this is lead-up to 1998, when the legislation governing the funding of the Burgtheater (and other government-subsidized performing arts bodies) was significantly reorganized into its current form. With the passing of the Federal Theater Organization Act (*Bundestheaterorganisationsgesetz*), the government founded the *Bundestheater-Holding*, a holding company owned by the federal government. This in turn operates four subsidiary limited liability companies, one of which – the *Burgtheater GmbH* – is responsible for the Burgtheater itself. Under this arrangement, “the holding company has shifted its operative tasks and financial management to the subsidiaries, which can use their respective property free of charge,”<sup>30</sup> thus making theater directors fully responsible for their companies' financial management. However, much of the involved money still comes from the government – in addition to acting as the sole owners of the parent holding company, the government is required to provide it with a basic yearly stipend to be shared between the four organizations. For the 2008/2009 season, this totaled € 142.1 million (or 191.2 million USD).<sup>31</sup> Thus, although the Austrian system of national theater funding is somewhat less direct than France's, the Burgtheater, like all five of

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<sup>30</sup> “Austria: 7. Public institutions in cultural infrastructure: 7.3 Status and partnership of public cultural institutions,” *Compendium of Cultural Policies and Trends in Europe*. 8 December 2012, accessed on 19 November 2013, available at <<http://www.culturalpolicies.net/web/austria.php?aid=73>>.

<sup>31</sup> “Austria: 5.3 Sector specific legislation: 5.3.2 Performing arts and music,” *Compendium of Cultural Policies and Trends in Europe*. 8 December 2012, accessed on 19 November 2013, available at <<http://www.culturalpolicies.net/web/austria.php?aid=532>>.

France's national theaters, has received significant, statutorily mandated financial support from the Austrian government throughout its entire tenure as a federally recognized national theater. Similarly, the government is also required to pay an additional annual supplement to city and regional theaters, the amount of which is agreed upon every four to six years by federal and municipal authorities as a part of the Financial Equalization Act.<sup>32</sup> In 2010, this amount was € 21.5 million (or 28.9 million USD).<sup>33</sup>

For a third and final example, it is useful to look at the UK, and its Royal National Theatre of Great Britain (often referred to simply as the National Theatre, or NT). Although the history of theater in the UK is every bit as long and storied it is in France or Austria, the NT itself has a much shorter history than the national theaters of the other two. As such, the story of its founding is significantly different from the other two. Nevertheless, it maintains some of the same principles that will be useful in coming up with an all-encompassing definition for the term "national theater."

Although its first performance didn't open until 1963, the history of the NT began somewhat earlier. The British court and high society had a long history of backing the arts – those familiar with the life and times of William Shakespeare will know that from the company's formation in 1603 until his death in 1616, he served as a part of the King's Men, a theater troupe patronized by King James I. Calls for a national theater did not start in earnest until 1848, though, when a number of the

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<sup>32</sup> "Financing government tasks – Vienna as part of the Republic of Austria," *wein.at.*, accessed on 19 November 2013, available at <<https://www.wien.gv.at/english/administration/organisation/austria/financing.html>>.

<sup>33</sup> "Austria 5.3.2," *Compendium*.

leading intellectuals of the day, led by London publisher Effingham Wilson, called for the founding of such a body. At the time, though, they were largely ignored. In 1903, however, theater critic William Archer and actor-director Harley Granville Barker published a full proposal for a national theater in their book, *A National Theatre: Scheme & Estimate*. This book, which was never available to the public but was instead circulated privately by the authors,<sup>34</sup> included such details as “staff, specimen repertoire, size of company, wages, seating capacity, a subscription scheme and seat prices,”<sup>35</sup> as well as a cast list for their proposed theater’s first few productions. Unlike the early court theaters of France and Austria, however, Archer and Barker wished to establish a theater that would be “visibly and unmistakably a popular institution...”<sup>36</sup> and would be both economically and metaphorically “the property of the nation.”<sup>37</sup> The publication of their book helped bring political and popular attention to the cause, but the two world wars hit before any major legislative action could be taken and the idea was mostly dropped once again.

In 1949, however, Parliament considered and easily passed the National Theatre Bill, which allowed the government to contribute up to £1 million to the building and furnishing of a new National Theatre. Although such plans were delayed

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<sup>34</sup> The authors included in their text the stipulation that the book was “on no account to be communicated to, or criticised or mentioned in, the Public Press,” although the reasons for this are not given. (“The beginning 1848-1962,” *National Theatre*. 2013, accessed 19 November 2013, available at <<http://www.nationaltheatre.org.uk/discover-more/welcome-to-the-national-theatre/the-history-of-the-national-theatre/stage-by-stage/the>>.)

<sup>35</sup> *Id.*

<sup>36</sup> William Archer and H. Granville Barker. *A National Theatre: Scheme & Estimate* (London: Duckworth & Co., 1907), xvii.

<sup>37</sup> *Id.* at xviii.

for another couple of decades, in 1962, the Chancellor of the Exchequer informed the House of Commons that the government had decided to proceed with creating a national theater, to be included in a proposed arts center located on the South Bank of the Thames River. At this point, a National Theatre board was created, and famed actor Sir Laurence Olivier was appointed as the organization's first director. In 1963, the company's first performance was staged at the Old Vic, another London theater venue that agreed to temporarily house the fledgling NT's company until its own building was completed. Over the course of the NT's construction throughout the 1960s and first half of the 1970s, the amount of money granted to it by the government increased by way of individually considered acts of Parliament, until the National Theatre Bill of 1974 removed the previous funding limits, thus allowing for further monetary assistance to the project. Finally, in October of 1976, Queen Elizabeth II officially opened the theater building itself, where the NT has been housed ever since.

In terms of funding, the NT follows a rather different policy than the French national theater system, the Burgtheater of Austria, and most of the other national theaters in continental Europe. Instead of receiving the majority of its funding either directly from the government or via a government-owned holding company, the NT was always intended to be much more financially independent. As such, box office receipts make up a significant amount (59% for the 2012-13 season<sup>38</sup>) of its generated income, which is then supplemented by a government subsidy (which equaled 20% of

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<sup>38</sup> "Finance and Funding," *National Theatre*. 2013, accessed 19 November 2013, available at < <http://www.nationaltheatre.org.uk/discover-more/welcome-to-the-national-theatre/about-the-national-faqs/finance-faqs>>.

the theater's generated income for the same period<sup>39</sup>). Although this subsidy was negotiated directly with Parliament and the Treasury for the first two years of the NT's existence, it is now negotiated through Arts Council England (ACE), which currently provides substantial grants-in-aid to almost 700 regularly funded arts organizations (of which the NT is one), as well as a variety of single-time grants to arts and culture projects.<sup>40</sup> For the 1965-66 season, the amount of this grant determined as a proportion of reckonable receipts taken in by the theater, but that system "was not entirely satisfactory, for by keying grants to receipts, it could inhibit the presentation of new or less popular plays... which would not wish to jeopardize its subvention by limiting attendances."<sup>41</sup> Since then, however, the amount has been decided in joint negotiations between the theater and ACE. Although there have certainly been some minor problems in the almost 50 years since this policy was adopted, it has generally been successful in awarding the NT sufficient subsidiary funds – approximately £17.5 million in 2012-13 and £17.9 million in 2013-14<sup>42</sup> – to offset production costs and keep the theater running.

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<sup>39</sup> *Id.*

<sup>40</sup> "Investment in arts and culture 2012-15," *Arts Council England*, accessed 19 November 2013, available at <<http://www.artscouncil.org.uk/funding/our-investment/investment-in-the-arts-2012-15>>.

<sup>41</sup> John S. Harris. *Government Patronage of the Arts in Great Britain*. (Chicago: The University of Chicago Press, 1970), 202-203.

<sup>42</sup> "Royal National Theatre," *Arts Council England*, accessed 19 November 2013, available at <<http://www.artscouncil.org.uk/funding/browse-regularly-funded-organisations/npo/royal-national-theatre/>>.

## A More Perfect Definition

Looking at these examples, there are three overarching trends that I find particularly useful. First, all three theaters were founded by their respective governments, like the Comédie-Française and the NT, or were completely remade when they were named national theaters, like the Burgtheater and the other four French national theaters. Second, all three receive significant and continuous funding from their respective governments. Although the specific amount is renegotiated every year or every few years on a prearranged schedule, it is agreed that the government will always contribute *some* amount to its theater. The fact of any of the national theaters receiving funding is never in question.

In one last realm of comparison, it turns out that all three also conform to the performance-theory-based rule that national theaters must have the stated goal of seeking to represent their nations through theater, or of creating theater representative of said respective nations. Thus, the Royal National Theatre is “dedicated to the constant revitalisation of the great traditions of the British stage and to expanding the horizons of audiences and artists alike... [and] aspires to reflect in its repertoire the diversity of the nation's culture.”<sup>43</sup> Similarly, the Burgtheater (and the other performing arts organizations funded by the *Bundestheater* holding company) was charged with “[playing] an essential role in the Austrian cultural life”<sup>44</sup> by “promoting

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<sup>43</sup> “About the National Theatre,” *National Theatre*. 2013, accessed on 19 November 2013, available at <<http://www.nationaltheatre.org.uk/discover-more/welcome-to-the-national-theatre/about-the-national-theatre>>.

<sup>44</sup> “*Bundestheaterorganisationsgesetz – BThOG und Änderung des Bundesfinanzgesetzes 1998*,” *Bundesgesetzblatt für die Republik Österreich* (“Federal Theatre Organisation Act – BThOG and amend the Federal Financial Act 1998,” *Federal Journal of Law for the*

contemporary and innovative developments with special consideration to Austrian art creation and the strengthening of international standards,”<sup>45</sup> “international representation of [the] Austrian art scene,”<sup>46</sup> and the “targeted promotion of cultural productions of Austrian origin.”<sup>47</sup> France, unlike the other two, has five national theaters, so it divides up these missions, using each one to promote a different aspect of French theater and culture. To that end, the Comédie-Française is “devoted to preserving the classical repertoire,”<sup>48</sup> the Odéon is focused on “international outreach”<sup>49</sup> and the promotion of European theater, the Théâtre National de Chaillot aims to showcase French dance, the Théâtre National de Strasbourg hosts one of two national theater schools (the École Supérieur d'Art Dramatique), and the Théâtre National de la Colline aims to “stage an exclusively modern and contemporary repertoire, French and non-French,”<sup>50</sup> and to promote new theater writing. Regardless of this split, the same basic goals of creating theater that encompasses and represents French culture are still there.

Thus, to form a more perfect definition of the term that encompasses not just the programmatic and cultural aspects of a national theater, but also the political and

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*Republic of Austria*), translate.google.com, trans., accessed on 19 November 2013, available at <[http://www.ris.bka.gv.at/Dokumente/BgblPdf/1998\\_108\\_1/1998\\_108\\_1.pdf](http://www.ris.bka.gv.at/Dokumente/BgblPdf/1998_108_1/1998_108_1.pdf)>, 1.

<sup>45</sup> *Id.* at 1.

<sup>46</sup> *Id.* at 1.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> Whitton, 155.

<sup>49</sup> *Id.* at 158.

<sup>50</sup> *Id.* at 161.

economic characteristics as well, I will define the term “national theater” as a theatrical organization that

(a) is founded or remade by or with significant involvement from its nation’s government;

(b) receives significant and direct funding from the nation’s federal government in a manner such that, while the amounts might be renegotiated every year, the fact that it will receive funding is assumed; and

(c) has the stated goal of representing its nation through theater and/or of performing theater representative of its nation.

# Chapter Two: A Brief History of Arts and Theater Funding in the United States

## Government Money for the Arts in General

Although the United States does not have a national theater or a government-funded arts sector on the scale of those possessed by our European allies, that does not mean we have never considered creating either of those institutions, nor does it mean that the US has never funded the arts in any fashion. However, without a long history of royal and aristocratic patronage of the fine and performing arts, the United States had much less of a historical tradition of state-sponsored arts than did its European counterparts. In fact, many of the founders and other early Americans associated government support of the arts with the highly stratified British and European social structure that they tried so hard to avoid in founding their new country.<sup>51</sup> As such, it is no surprise that the founders were wary about establishing an official arts body.

The American government's first experience with directly subsidizing the arts came in 1817, when Congress commissioned John Trumbull to paint four pictures celebrating the Revolutionary War, to be hung in the capital building. He was paid

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<sup>51</sup> Alan Howard Levy, *Government and the Arts: Debates over Federal Support of the Arts in America from George Washington to Jesse Helms* (Lanham, MD: University Press of America, 1997), 4-7.

\$32,000 for his troubles,<sup>52</sup> but both the sum of money and the perceived lack of quality of the paintings led to many complaints about the very concept of the government spending money on art at all. Representative William McCoy of Virginia even went so far as to state that “if the Fine Arts cannot thrive in this country without government jobs... let them fail.”<sup>53</sup> Coming on the heels of the rise of Jacksonian politics and a tendency towards anti-elitism, the arts during this period, as Alan Howard Levy points out in his book, *Government and the Arts: Debates over Federal Support of the Arts in America from George Washington to Jesse Helms*, were thought of as “noble, disposable, [and] best left to state, local and private authority.”<sup>54</sup>

The next major advancement in the history of American arts funding came in 1835, when Congress accepted the bequest of James Smithson “to found at Washington... an establishment for the increase and diffusion of knowledge among men.”<sup>55</sup> After eleven years of Congressional debate, during which time a small but vocal faction, led by Senator John C. Calhoun, repeatedly insisted that such a project was outside the legitimate scope of the federal government, it was decided to use the funds (totaling approximately half a million dollars<sup>56</sup>) to create a “multi-faceted gallery”<sup>57</sup> in the nation’s capital. What eventually became the Smithsonian Institution was to be overseen by a board of directors, including, among others, the Vice

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<sup>52</sup> Tyler Cowen, *Good & Plenty: The Creative Successes of American Arts Funding* (Princeton: Princeton University Press, 2006), 66.

<sup>53</sup> Levy, 13.

<sup>54</sup> *Id.* at 17

<sup>55</sup> *Id.* at 19

<sup>56</sup> *Id.* at 19

<sup>57</sup> *Id.* at 20

President, and the Chief Justice of the Supreme Court. Although at the time of its founding the Smithsonian tended much more towards the sciences than the arts, it remains one of the best (and only) examples of a government-operated arts institution in the US.

During the next three quarters of a century, the American government did not succeed in creating any further arts funding policies or institutions. In 1859, President James Buchanan started a fledgling National Arts Commission, but it was disbanded after two years when Congress balked at the grand sum of money (\$166,900, or approximately \$4.2 million by today's standards<sup>58</sup>) that the Commission requested to redecorate the Capitol building. Later, in 1873, a petition came before Congress proposing that \$1 million be appropriated for the founding of a National School of Art, to be administered under Congressional control, "with each member of the House [appointing] one student per year from his district, copying the appointment system of West Point."<sup>59</sup> The petition also called for a nationwide arts competition to be held every four years, with significant cash prizes for gold, silver, and bronze medalists, and with submissions becoming the property of the National Gallery. Proponents of the idea argued that this would help build up the Gallery's collection at virtually no cost, but unfortunately, neither of these ideas made it out of committee. A flurry of anti-foreign sentiment toward the very end of the 1800s prompted a number of government initiatives to establish "national" arts organizations, during which time the government named a National Institute of Arts and Letters and a National

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<sup>58</sup> *Id.* at 24

<sup>59</sup> *Id.* at 30

Conservatory of Music. However, these and other similar undertakings generally amounted to little more than “the granting of the official ‘National’ status to privately endowed enterprises,”<sup>60</sup> and involved little to no grants of additional monetary assistance.

While it balked at the idea of spending money on arts for the people, however, the government did start to take an interest in beautifying its own quarters. The Tarnsey Act of 1893 allowed Congress to use private architects to design federal buildings rather than those employed by the Treasury, which, according to Tyler Cowen in his book, *Good and Plenty: The Creative Successes of American Arts Funding*, actually “improved architectural quality in many cases.”<sup>61</sup> Furthering this initiative only at the very end of his presidency, lame duck President Theodore Roosevelt issued an executive order establishing a Council on the Fine Arts, to “advise on structural, design, and esthetic issues regarding public buildings, bridges, parks, sculptures, and paintings.”<sup>62</sup> When William Howard Taft took office a few months later, he abolished the Council, believing that it was the duty of Congress to create such a body and not the president’s. Still, he was in favor of its reformulation, and when the issue came before Congress in 1910, it passed, creating the National Commission of Fine Arts. The new Commission was given a yearly budget of \$10,000<sup>63</sup> to oversee the design and decoration of many federal buildings, but was not

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<sup>60</sup> *Id.* at 33

<sup>61</sup> Cowen, 67.

<sup>62</sup> Levy, 41.

<sup>63</sup> *Id.* at 46.

involved in any further artistic or cultural policy. Unlike many of the other arts initiatives during this period, the Commission still meets today.<sup>64</sup>

It was not until 1917 and the eve of the United States' entrance into World War I that the government (accidentally) established the method of arts funding that has since come to dominate the American arts scene. Worried that increases in the federal income tax levels necessary to fund the war efforts would discourage wealthy citizens from giving to charitable organizations, Congress included in its Revenue Act of 1917 a provision stating that any itemized donations made within a given year to "corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or to societies for the prevention of cruelty to children or animals,"<sup>65</sup> would be eligible for significant tax deductions. Although the specifics have changed over the years as the maximum income tax rate and the maximum allowable deductions have been raised and lowered, the general theory was (and is) that a donor's tax liability would be reduced by "an amount equal to the donation multiplied by the tax rate in that person's marginal tax bracket."<sup>66</sup> To use the example given by James Heilbrun and Charles Gray in their book, *The Economics of Art and Culture (Second Edition)*, this means that if a person has a taxable income of \$100,000, has a marginal tax rate of .396, and gives a charitable donation of \$1000, the donor will save \$396 in taxes (the donation multiplied by the

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<sup>64</sup> More information can be found at its website, <http://www.cfa.gov/>.

<sup>65</sup> *An Act to Provide Revenue to Defray War Expenses, and for Other Purposes*, Public Law 65-50, *U.S. Statutes at Large* 40 (1917), 330.

<sup>66</sup> James Heilbrun and Charles M. Gray, *The Economics of Art and Culture, Second Edition*. (Cambridge: Cambridge University Press, 2001), 257.

tax rate), meaning that the \$1,000 donation only costs the donor \$604.<sup>67</sup> Thus, the larger the donation and the higher a marginal tax bracket a person occupies (or, in other words, the wealthier a person is), the less that donation will cost per dollar to the donor and the more incentive he or she will have to give large sums of money to charity.

Although it was certainly not the purpose of the statute at the time of its enactment, it has since evolved into the main form of government subsidy to the arts, indirect though it may be. While this system of funds given through tax incentives does not necessarily make up for the lack of specific funding grants given to the arts and to theater in particular, as seen in many other countries, it has led to a culture in which Americans donate much more money to non-profit arts organizations than do the citizens of almost any other nation in the world.<sup>68</sup> The merits of this system are certainly still debated by scholars and artists alike (see the end of this chapter and Chapter 3 for further discussion of this subject), but for better or for worse, it does account for most of the money available to arts organizations in the US today.

As the decades turned and the country made its way through the end of the First World War, the government did not give much further thought to institutionalized funding for the arts. As Dick Netzer points out in his book, *The Subsidized Muse: Public Support for the Arts in the United States*, the arts during this

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<sup>67</sup> *Id.* at 257.

<sup>68</sup> Elisabeth Eaves, "Who Gives the Most?" *Forbes*, 26 December 2008, accessed on 3 February 2014, available at < [http://www.forbes.com/2008/12/24/america-philanthropy-income-oped-cx\\_ee\\_1226eaves.html](http://www.forbes.com/2008/12/24/america-philanthropy-income-oped-cx_ee_1226eaves.html)>.

period “were considered elitist and as such undeserving of direct public support.”<sup>69</sup> Similarly, “the great industrial and financial barons... were establishing and subsidizing their own museums, symphony orchestras, and opera companies in the major cities,”<sup>70</sup> meaning that there was not as strong a need for the government to assist in the formation of such organizations. This did change somewhat when the country fell into the Great Depression of the 1930s, and in response, the Roosevelt administration pushed Congress to provide funds for the Federal Project Number One division of the Works Progress Administration (WPA), the purpose of which was to put unemployed artists in various disciplines back to work. The five organizations overseen by Federal One – the Federal Writers Project, the Historical Records Survey, the Federal Music Project, the Federal Art Project, and the Federal Theatre Project (discussed later in this chapter) – collectively represented a level of government involvement in the arts that had not previously existed in this country to that point and has *certainly* not been seen since. However, as the primary purpose of this institution was work relief and not the furthering of artistic innovation in the country at large, it did not lead to any permanent arts funding infrastructure after the WPA was disbanded in 1943. By that point, the country was already involved in World War II on two different fronts, and projects related to culture and the arts took a back burner to the war effort.

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<sup>69</sup> Dick Netzer, *The Subsidized Muse: Public Support for the Arts in the United States* (Cambridge: Cambridge University Press, 1978), 53.

<sup>70</sup> *Id.* at 53.

Given this history, it is not surprising that it took until the mid-1950s for the government to take up the issue of funding for the arts once again. In 1955, President Dwight Eisenhower proposed the founding of a (non-funded) Federal Advisory Commission on the Arts, to be run by the Department of Health, Education, and Welfare. Although Congress did not act on that suggestion, it did approve different legislation in 1958 that called for the building of a National Culture Center in Washington, D.C, to be operated as a bureau within the Smithsonian Institution by a Board of Trustees made up of, among others, the Secretary of Health, Education, and Welfare, the Librarian of Congress, the Director of the National Park Service, the Commissioner of the Office of Education, the Secretary of the Smithsonian, three members each of the House and Senate to be appointed by the Speaker for the House and the President of the Senate respectively, and 15 trustees appointed by the President.<sup>71</sup> This Board was charged by the National Culture Center Act with

(1) present[ing] classical and contemporary music, opera, drama, dance, and poetry from this and other countries;

(2) present[ing] lectures and other programs;

(3) develop[ing] programs for children and youths and the elderly (and for other age groups as well) in such arts designed specifically for their participation, education, and recreation; and

(4) provid[ing] facilities for other civic activities at the Culture Center.<sup>72</sup>

Initially, money for that project was to be raised through entirely private sources. In 1964, however, when it became clear that the new organization wasn't going to be

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<sup>71</sup> *National Culture Center Act*, Public Law 85-874, *U.S. Statutes at Large* 72 (1958), 1968.

<sup>72</sup> *National Culture Center Act*, 1699.

able to raise sufficient funds, Congress renamed the project the John F. Kennedy Center for the Performing Arts in honor of the recently assassinated president, and authorized the use of an initial \$15.5 million to be put towards construction costs.<sup>73</sup> The Center did not open to the public until September, 1971, but unlike many of the other arts institutions proposed during this time, it is still in operation today. It is also worth noting that at no time throughout its 43-year tenure has the Kennedy Center ever attempted to bill itself as a national theater.

In 1961, Eisenhower's successor, President John F. Kennedy, also suggested the creation of a Federal Advisory Council on the Arts. This time, the proposal did reach Congress, although it was ultimately defeated in a roll-call vote. Not to be deterred, however, Kennedy appointed August Heckscher, the director of a non-profit political and economic analysis agency, to investigate the state of federal government involvement in the arts, and to report back to him with some suggestions of ways to improve that involvement. In 1963, in response to the report, Kennedy issued an executive order establishing an Advisory Council on the Arts. Unfortunately, he was assassinated before the Council went into operation, but in the wake of his death, the Senate approved a bill establishing a National Arts Foundation and, more importantly, authorizing it to award matching grants to non-profit and state arts agencies. For its first year, Congress gave it a budget of \$5 million, and \$10 million for each year after that.<sup>74</sup> This bill did not make it to the floor of the House, likely

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<sup>73</sup> *Joint Resolution providing for renaming the National Culture Center as the John F. Kennedy Center for the Performing Arts, authorizing an appropriation therefor, and for other purposes*, Public Law 88-260, *U.S. Statutes at Large* 78 (1964), 4.

<sup>74</sup> Netzer, 58.

because its opponents were afraid that direct federal subsidies for the arts would lead to an impermissible amount of government control over the artists, although six months later, the same Congress passed a new version of the bill, establishing a National Council on the Arts, to act as an advisory body within the Executive Office. Unlike the first version, however, this body was not given funding by the government, and therefore was not authorized to dole out grants.

In 1965, the Johnson Administration proposed a new bill that would allow the government to offer financial support in the form of federal grants to cultural organizations in both the arts and the humanities. Although the bill was met with concern from both Congressional Republicans, who feared that “federal support would reduce the incentives for private support and that government intervention would produce mediocrity,”<sup>75</sup> and from some members of the arts community, who feared that government funds would increase the potential for censorship and increased government control, Congress passed the bill on September 29, 1965. Thus, the National Foundation on the Arts and Humanities and its subdivisions, the National Endowment for the Arts (NEA) and the National Endowment for the Humanities (NEH), were created.

Perhaps in response to some of the earlier attempts at arts funding, the National Foundation on the Arts and Humanities Act of 1965 included specific language that addressed many of the previously raised concerns about such a body. The declaration of purpose included in the bill started with the specification that “the encouragement and support of national progress and scholarship in the humanities

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<sup>75</sup> Netzer, 59.

and the arts, while primarily a matter for private and local initiatives, is also an appropriate matter of concern to the Federal government.”<sup>76</sup> Similarly, to address the fear that government money would lead to an undue amount of government influence over the arts world, the bill also specifically stated that “in the administration of this Act no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any school or other non-Federal agency, institution, organization, or association.”<sup>77</sup> In choosing which projects to fund under the NEA, the Chairman was “authorized to establish and carry out a program of grants-in-aid to groups or, in appropriate cases, to individuals engaged in or concerned with the arts, for the purpose of enabling them to provide or support in the United States—

- (1) productions which have substantial artistic and cultural significance, giving emphasis to American creativity and the maintenance and encouragement of professional excellence;
- (2) productions, meeting professional standards or standards of authenticity, irrespective of origin which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens in many areas of the country;
- (3) projects that will encourage and assist artists and enable them to achieve standards of professional excellence;
- (4) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;

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<sup>76</sup> *National Foundation on the Arts and Humanities Act of 1965*, Public Law 89-209, *U.S. Statutes at Large* 79 (1965), 845.

<sup>77</sup> *Id.* at 846.

(5) other relevant projects, including surveys, research, and planning in the arts.”<sup>78</sup>

Lastly, in order to continue to encourage arts organizations applying for funds to seek out private as well as public funding, the bill specified that “the total amount of any grant to any group pursuant to [the conditions specified above] shall not exceed 50 per centum of the total cost of such project or production.”<sup>79</sup> Congress authorized appropriations of \$10 million a year for three years to be shared by the NEA and NEH, but required that new appropriations levels be authorized after that time. The 1968 reauthorization under President Johnson moderately increased its funding for another three years, although when his successor, President Richard Nixon, took office in 1969, he interrupted the cycle by asking Congress for an early reauthorization.

Somewhat surprisingly, given his political and economic leanings, Nixon came out as a big supporter of federal arts funding initiatives. According to Donna M. Binkiewicz in her book, *Federalizing the Muse: United States Arts Policy & The National Endowment for the Arts 1965-1980*, Nixon originally toyed with the idea of establishing a more formal Ministry of Culture, but came to the conclusion that the NEA was successful enough that such an agency would be unnecessary. Still, the NEA budget increased dramatically over the course of his presidency, from just \$8.2 million in 1970 to \$60.7 million in 1973.<sup>80</sup> This is especially significant when viewed

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<sup>78</sup> *Id.* at 846-847.

<sup>79</sup> *Id.* at 847.

<sup>80</sup> Donna M. Binkiewicz, *Federalizing the Muse: United States Arts Policy & The National Endowment for the Arts 1965-1980* (Chapel Hill, NC: The University of North Carolina Press, 2004), 162.

in the context of the fact that during the Nixon administration, most federal programs, with the exception of the Department of Defense and the NEA, faced dramatic cuts in funding.<sup>81</sup>

In the following years, appropriations for the NEA generally grew steadily, and the agency itself, though still not universally popular, was met with very few challenges. However, that all changed in the late 1980s, when the NEA faced two major controversies, one right after the other. The first came in 1987, when the NEA provided the Southeastern Center for Contemporary Art (SECCA) with a \$75,000 Visual Arts Special Projects grant to carry out its seventh annual Awards in the Visual Arts program (AVA-7). Ten winners, selected from across the country each received a \$15,000 fellowship with the SECCA and space in a traveling exhibition that toured the country for the next few years. Photographer Andres Serrano was one of the winners, and SECCA chose as one of his contributions to the AVA-7 exhibition a photograph entitled *Piss Christ*, depicting a crucifix in a jar of urine.

As news of the photograph and the fact that the exhibition in which it featured was operated with money from the federal government became public, the White House began to receive angry letters from people who found the photograph problematic for religious reasons. For example, Donald E. Wildmon, head of the American Family Association, angrily wrote to President George H. W. Bush that the NEA was supporting “anti-Christian bigotry,”<sup>82</sup> and that whoever “[approved] federal

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<sup>81</sup> *Id.* at 162.

<sup>82</sup> David A. Smith, *Money for Art: The Tangled Web of Art and Politics in American Democracy* (Chicago: Ivan R. Dee, 2008), 191.

tax dollars for the promotion of this ‘work of art’ should be fired.”<sup>83</sup> The controversy eventually made it to the floors of Congress, where debate largely focused on the use of tax dollars to fund the dissemination of potentially offensive art. As New York senator Alphonse D’Amato, one of the NEA’s most outspoken critics, said, “If this is what contemporary art has sunk to, this level, this outrage, this indignity – some may want to sanction that, and that is fine. But not with the use of taxpayers’ money.” The scandal as a whole proved particularly complicated for the NEA, because, as one presidential aide pointed out, both sides – those defending the right of Serrano to use public funds just like any other artist, and those condemning the use of public funds to create art that might be construed as disrespectful of a particular religion – were using the First Amendment as justification for their actions.<sup>84</sup>

Just as the Serrano scandal was reaching its peak, another very similar scandal erupted around the work of photographer Robert Mapplethorpe. Not long before his death of AIDS in March of 1989, the Institute of Contemporary Art (ICA), using \$30,000 of NEA funds given to its “special exhibitions” program, assembled a major retrospective of his work to be toured throughout the country. The exhibition, which opened in 1988, incorporated portraits, still-lives, and figure studies, the latter of which included some very graphic photographs that sought to “destroy ‘the conventions of polite esthetic discourse’” by depicting “the sadomasochistic, male

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<sup>83</sup> *Id.* at 191.

<sup>84</sup> *Id.* at 195-196.

homo-sexual subculture.”<sup>85</sup> There were also a number of photos that many saw as bordering on child pornography.

Although the show as a whole received a great deal of critical acclaim from the arts establishment, in the political sphere it received very similar reactions to those directed at Serrano’s work. In response to the two incidents, more than a hundred congressmen signed an angry letter to Southern, condemning Mapplethorpe’s work as “morally repugnant materials of a sexual nature,”<sup>86</sup> asserting that although “the interpretation of art is a subjective evaluation... there is a very clear and unambiguous line that exists between what can be classified as art and what must be called morally reprehensible trash,”<sup>87</sup> and stating that “if the NEA has enough money to fund this type of project, then perhaps the NEA has too much money to handle responsibly.”<sup>88</sup>

Although many feared that a far worse fate would befall the NEA when the question of its appropriation for the following year came up on the floors of Congress a few months later, the House voted overwhelmingly in favor of a proposal that reduced the NEA’s budget by a symbolic \$45,000 – \$15,000 for Serrano’s prize money plus \$30,000 for the ICA grant – but did not include any other punitive measures.<sup>89</sup> The Senate, on the other hand, took a much sterner line, at first proposing (although ultimately rejecting) a five-year ban on further grants to SECCA and ICA.

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<sup>85</sup> *Id.* at 197.

<sup>86</sup> *Id.* at 197.

<sup>87</sup> *Id.* at 197.

<sup>88</sup> *Id.* at 197-198.

<sup>89</sup> *Id.* at 202.

Ultimately, it did decide to allocate \$100,000 to fund an outside study on the ways the NEA decided to award grants. After a voice vote in a largely empty chamber, the Senate also passed a controversial amendment to the original 1965 bill that would prohibit the use of government money in any projects that might produce or promote “obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; or material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion.”<sup>90</sup>

This amendment did not get past the conference committee, and the appropriations bill for fiscal year 1990 wound up awarding the NEA \$170 million – the largest amount of money it had ever received. However, various amendments were made to the text that changed the eligibility requirements for the awarding of grants. That year, text was added specifying that no government money could be used to “‘promote, disseminate, or produce’ things that, in the judgment of the NEA itself... ‘may be considered obscene, including but not limited to, depictions of sadomasochism, homo-eroticism, the sexual exploitation of children or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.’”<sup>91</sup> Although this addition was very similar to the rejected amendment proposed by the Senate, it was crucially different in that it omitted any reference to religion. The 1991 appropriations bill, signed into law in November of 1990, awarded an even higher sum of \$175 million, but also included an

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<sup>90</sup> *Id.* at 202.

<sup>91</sup> *Id.* at 207.

additional provision stating that “artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”<sup>92</sup> It was this line, known as the “decency clause,” that embroiled the NEA in multi-year litigation that eventually ended in the Supreme Court.<sup>93</sup>

In 1990, before the above amendment was passed, four performance artists known for their controversial work – Kate Finley, Holly Hughes, Tim Miller, and John Fleck – applied for individual grants from the NEA for their work. Although they were led to believe they would be receiving funding, their applications were ultimately rejected when their requests were vetoed by NEA chairman John Frohnmayer with no reason given. After their appeal of the decision was denied, they filed suit against the NEA, claiming that their First Amendment rights had been violated by the denial of funding, which, they claimed, was based on purely political reasoning. Once the 1991 amendment was passed and the decency clause became part of official NEA policy, they amended their complaints to challenge the new provision on the basis that it was viewpoint-based and overly vague and thus a violation of the First Amendment. But in addition to those questions, which are a staple of First Amendment litigation more generally, this case also turned on whether or not these kinds of content and viewpoint-based decisions might actually be permissible under

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<sup>92</sup> *Department of the Interior and Related Agencies Appropriations Act of 1991*, Public Law 101-512, *U.S. Statutes at Large* 104 (1990), 1963.

<sup>93</sup> See *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457, 1472 (1992); *Finley v. National Endowment for the Arts* 100 F.3d 671 (1996); and *National Endowment for the Arts v. Finley*, 524 U.S. 569, 582 (1998).

the First Amendment, when what would otherwise be deemed free and protected speech is subsidized by the government.

On June 9, 1992, a Los Angeles federal district court judge ruled in favor of the “NEA Four,” as they were known, stating that, “as the decency provision fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion, it cannot be given effect consistent with the Fifth Amendment's due process requirement.”<sup>94</sup> Similarly, after stating that “the decency clause clearly reaches a substantial amount of protected speech,”<sup>95</sup> it also held that “the decency clause, on its face, violates the First Amendment for overbreadth and cannot be given effect.”<sup>96</sup> The Bush administration did not appeal the decision before leaving office, but somewhat surprisingly and for reasons unclear, the Clinton administration decided in March 1993 that *it* would continue the case.<sup>97</sup> The US Court of Appeals for the Ninth Circuit heard the case on February 3, 1994, and on November 5, 1996, upheld the district court’s decision.<sup>98</sup> Although the then-chair of the NEA, Jane Alexander, asked the president not to appeal again, in August of 1997, the Clinton administration asked the Supreme Court to hear the case. In November they accepted, and a date was scheduled for March of the following year.

In an 8-to-1 ruling handed down on June 25, 1998 and written by Justice Sandra Day O’Connor, the Supreme Court overturned the lower courts’ decisions,

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<sup>94</sup> *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457, 1472 (1992).

<sup>95</sup> *Id.* at 1476.

<sup>96</sup> *Id.* at 1476.

<sup>97</sup> Netzer, 260.

<sup>98</sup> *Finley v. National Endowment for the Arts* 100 F.3d 671 (1996).

ruling instead in favor of the government. Deciding that the decency clause was “aimed at reforming procedures”<sup>99</sup> used to choose grant recipients “rather than precluding speech”<sup>100</sup> of American artists applying for grants, it was therefore not a violation of the NEA Four’s First Amendment rights. Similarly, after noting that “the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake,”<sup>101</sup> the Court applied the precedent, established in *Rust v. Sullivan* (1991), that “Congress may ‘selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.’ In doing so, ‘the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.’”<sup>102</sup> As regards the Fifth Amendment due process claim, O’Connor wrote that “in the context of selective subsidies, it is not always feasible for Congress to legislate with clarity,”<sup>103</sup> but that “when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.”<sup>104</sup>

Although further specifics of *NEA v. Finley* will be discussed in more depth in Chapter Three, it is easy to see from the above details the many ways in which the

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<sup>99</sup> *National Endowment for the Arts v. Finley*, 524 U.S. 569, 582 (1998).

<sup>100</sup> *Id.* at 582.

<sup>101</sup> *Id.* at 587-588.

<sup>102</sup> *Id.* at 588.

<sup>103</sup> *Id.* at 589.

<sup>104</sup> *Id.* at 589.

ruling affected the state of arts funding in the United States. The arts community lost faith in the NEA, believing that, as a *New York Times* article published after the case was decided put it, the ruling “would have a chilling effect on creativity and freedom of expression.”<sup>105</sup> Miller (one of the other respondents) called the decision “a further nail in the coffin of freedom of ideas and images in the country,”<sup>106</sup> and Finley expressed her fear that museums and other foundations would also be less willing to fund controversial work, stating that “it will be a free-for-all. The witch hunt can happen anywhere.”<sup>107</sup>

This discontent with and dislike of the NEA was also reflected in the halls of Congress, where the organization faced drastic budget cuts due to the changing political leanings of the House of Representatives and the negative press the Endowment was receiving from all sides. As such, the NEA went from receiving \$162 million in 1995 (already a significant drop from the previous year’s allocation of \$170 million) to \$99.4 million in 1996.<sup>108</sup> Appropriations continued to fall until 2001, when the NEA’s budget jumped from \$97.6 million to \$104.8 million.<sup>109</sup> In

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<sup>105</sup> Mel Gussow, “The Supreme Court: The Artist; Ruling on Indecency Prompts Fears of a Chilling Effect,” *New York Times*, 26 June 1998, accessed on 29 January 2014, available at <<http://www.nytimes.com/1998/06/26/us/supreme-court-artist-ruling-indecency-prompts-fears-chilling-effect.html>>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> “National Endowment for the Arts Appropriations History,” *National Endowment for the Arts*, accessed on 3 February 2012, available at <<http://arts.gov/open-government/nea-budget-planning-information/national-endowment-arts-appropriations-history>>.

<sup>109</sup> *Id.*

2010, it was awarded \$167.5 million<sup>110</sup> – the highest it had been since 1994 – but that level has since fallen back to \$146 million in 2012 and \$138.3 million in 2013 (a figure lower than originally expected due to the sequestration measures enacted by Congress).<sup>111</sup> Although the NEA was almost thrown into a crisis of sorts when the House Budget Committee’s initial budget proposal for 2014 included a reduction of 49% of its 2013 budget<sup>112</sup> because, according to the report released alongside the budget, “the activities and content funded by [the NEA and NEH] go beyond the core mission of the federal government, and they are generally enjoyed by people of higher-income levels, making them a wealth transfer from poorer to wealthier citizens,”<sup>113</sup> that section of the bill failed to make it into version eventually passed by the House and Senate on January 16, 2014. Accordingly, the NEA’s budget for fiscal year 2014 is \$146,021,000.<sup>114</sup>

As Congress continues to face long and torturous debates over not only the specific amounts of money given to government agencies, but also the legitimacy of many of those agencies in the first place, the NEA, which started out as the pet project of Presidents Kennedy and Johnson, remains one of the more highly contested

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> David Ng, “House Committee Proposes Funding Cuts for NEA, Other Arts Groups,” *The Los Angeles Times*, 24 July 2013, accessed on 29 January 2014, available at <<http://articles.latimes.com/2013/jul/24/entertainment/la-et-cm-nea-funding-20130724>>.

<sup>113</sup> U.S. House. Committee on the Budget, *Concurrent Concurrent Resolution on the Budget – Fiscal Year 2014* (H.Rpt. 113-17) Washington: U.S. Government Printing Office, 2013, 76.

<sup>114</sup> *Consolidated Appropriations Act, 2014*, Public Law 113-76 (2014), available at <<http://beta.congress.gov/113/bills/hr3547/BILLS-113hr3547enr.pdf>>, 821.

institutions. With appropriation levels always in flux and its existence constantly challenged by the more conservative members of House and Senate, it is perhaps no surprise that the NEA has never risen to the levels of efficacy reached by the Arts Councils and Ministries of Culture of our fellow nations. Thus, artists in America must still rely almost entirely on private donations (and the indirect government subsidies that come with them in the form of tax deductible contributions) to fund their work.

### **The 1930s: First Attempts at Government Involvement in Theater**

The history of American government involvement in and funding for theater, as opposed to the history of funding for the arts in general, follows a slightly different trajectory. While the federal government did not start working in earnest toward the creation of a Congressionally-funded arts agency until the mid-1950s, the idea of a federally owned and operated theater was raised almost two decades earlier when, in 1933, members of the Philadelphia Arts Alliance approached President Roosevelt with the revolutionary new idea that the United States Congress should charter a national theater like those belonging to various other Western nations. Nothing came of that proposal, but just a few years later, on April 22, 1935, Senator Robert F. Wagner of New York introduced a bill incorporating an “American National Theatre and Academy” (ANTA) to the Senate. On May 24, 1935, Representative Charles McLaughlin of Nebraska followed by introducing a similar bill to the House. Both bills were passed without much difficulty, and on July 5<sup>th</sup>, 1935, President Roosevelt signed Public Law 74-199. With that, the ANTA was thus officially chartered.

While this may seem to contradict a basic premise of this thesis – that the United States has no national theater – it is important to note that the ANTA does not meet the definition established in the previous chapter. To recap, that definition supposes that a national theater must (a) be founded or remade by or with great involvement from its nation’s government; (b) receive significant funding from the nation’s government in a manner such that, while the amounts might be renegotiated every year, the fact that it will receive funding is assumed; and (c) have the stated goal of representing its nation through theater and/or of performing theater representative of its nation. The ANTA easily passes the first rule, as it was chartered to be the official national theater of America, in name and in legal Congressional record. Similarly, Public Law 199 states that “[the ANTA’s] purposes shall embrace:

- (a) The presentation of theatrical productions of the highest type;
- (b) The stimulation of public interest in the drama as an art belonging both to the theater and to literature and thereby to be enjoyed both on the stage and in the study;
- (c) The advancement of interest in the drama throughout the United States of America by furthering the production of the best plays, interpreted by the best actors at minimum cost;
- (d) the further development of the study of drama of the present and past in our universities, colleges, schools, and elsewhere;
- (e) The sponsoring, encouraging and developing of the art and technique of the theaters through a school within the national Academy.”<sup>115</sup>

Thus, it easily satisfies the third requirement of the national theater definition as well.

However, the place where it fails to qualify is in the second rule, which requires that

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<sup>115</sup> *An Act to Incorporate the American National Theatre and Academy*, Public Law 74-199, *U.S. Statutes at Large* 49 (1935): 457.

the endeavor be at least partially funded by the government in a stable and continuous manner. Unlike the governments of France, Austria, and, later, the United Kingdom, Congress refused to fund the fledgling ANTA. To that end, the text of the preamble to the original Senate bill specified that the organization was to be “as far as possible self-supporting.”<sup>116</sup> Given that the country was in the midst of the worst economic depression it had ever seen, it is hardly surprising that attempts at fundraising did not succeed. Thus, the ANTA was unable to establish itself as a viable institution, both at the time of its founding, and, looking forward, for the entirety of existence as an organization.

Of course, another major reason for the ANTA’s failure to get off the ground, at least initially, had much to do with the Federal Theatre Project (FTP, mentioned above), which was launched as a part of the WPA’s work relief programs less than two months after the ANTA received its charter. Unlike the ANTA, whose primary goals were theater production and education, the FTP’s primary goal was to put those who lost their jobs to the Great Depression back to work – one of the Project’s most important tenets was that at any given time, at least 90% to 95% of its non-supervisory employees needed to be chosen from the relief rolls<sup>117</sup> – with purely artistic goals coming in second. However, because of this, the FTP also differed significantly from the ANTA in that it received large amounts of funding from the government. According to FTP director Hallie Flanagan in her book, *Arena: The*

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<sup>116</sup> “ANTA’s 40-Theater Circuit Plan: ANTA’s First Step in the Creation of a National Theatre,” *Theatre Arts* 39, no. 12 (December 1955), 70.

<sup>117</sup> Malcolm Goldstein, *The Political Stage: American Drama and Theater of the Great Depression*. (New York: Oxford University Press, 1974), 246.

*History of the Federal Theatre*, the FTP cost the government \$46,207,779 between the years of 1935 and 1939,<sup>118</sup> or, as Flanagan reminds her readers, “approximately the cost of one complete battleship” in 1939.<sup>119</sup> Of that total, almost \$42 million was spent on labor costs,<sup>120</sup> allowing the Project to employ approximately 10,000 people per year for four years<sup>121</sup> in 31 states plus Washington, D.C., each of whom supported an average of four dependents.<sup>122</sup> The rest, in addition to slightly over \$2 million in ticket sales<sup>123</sup> – Flanagan notes that “[the] Federal Theatre was established to employ and rehabilitate human beings and not to take in revenue; at the beginning of the project no provision was made for the receipt of money, and at the end 65% of the productions were still free of charge”<sup>124</sup> – covered the cost of producing approximately 1,200 fully staged shows over the course of three years,<sup>125</sup> along with approximately 3,000 radio programs per year for three years.<sup>126</sup>

Unfortunately but not entirely unexpectedly, this Herculean feat of bureaucracy and theater did not last for very long. Although the Federal Theatre Project was generally very popular amongst its employees and audiences, it was less well liked in the halls of Congress, where the increasingly powerful Dies Committee

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<sup>118</sup> Hallie Flanagan, *Arena: The History of the Federal Theatre* (New York: Benjamin Blom, 1940), 436.

<sup>119</sup> *Id.* at 436.

<sup>120</sup> *Id.* at 435.

<sup>121</sup> *Id.* at 436.

<sup>122</sup> *Id.* at 436.

<sup>123</sup> *Id.* at 436.

<sup>124</sup> *Id.* at 434.

<sup>125</sup> *Id.* at 432.

<sup>126</sup> *Id.* at 396.

(precursor to the notorious House Un-American Activities Committee, or HUAC) became concerned with the leftist political leanings of some of the shows. Like many of HUAC's *causes célèbres*, this concern had much more to do with the Project's reputation as a generally liberal body than with any provable subversive activities. As Flanagan informed the Dies Committee when she was called in to testify before them on December 6, 1938, only 10% of the shows produced by the FTP could be construed as possibly political or even educational in content.<sup>127</sup> During that same hearing, she was asked about the union choices of FTP employees and the content of the plays produced by the project. She was also asked whether or not she believed that "the Federal Theater should be used for the purpose... of conveying ideas along social, economic or political lines," to which she famously answered, "I would hesitate on the political."<sup>128</sup> (Earlier in the hearing, Flanagan was asked, in all seriousness, if Shakespeare's contemporary Christopher Marlowe was a communist,<sup>129</sup> and whether Ancient Greek playwright Euripides was "guilty of teaching class consciousness,"<sup>130</sup> so that should give an indication of the quality of the questions and the preparation of the questioners.)

Perhaps proving to be too difficult to trap into a false admission of Communistic tendencies, Flanagan was eventually asked to leave for a short break and was then not allowed to return to finish her testimony. Less than a month later, on

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<sup>127</sup> U.S. House. Special Committee on Un-American Activities, *Investigation of Un-American Propaganda Activities in the United States*, Hearing, 6 December 1938, Washington: U.S. Government Printing Office, 1939, 2871.

<sup>128</sup> *Id.* at 2871.

<sup>129</sup> *Id.* at 2857.

<sup>130</sup> *Id.* at 2858.

January 3, 1939, the Dies Committee filed a report stating that “‘a rather large number’ of Project employees were either members of the Communist Party or sympathetic to it.”<sup>131</sup> Following that pronouncement, it was only a matter of time until the Project was shut down entirely, an action which eventually came to pass on June 30, 1939 with the passage of a bill terminating the FTP as of that day.

Like the founders of the ANTA, Hallie Flanagan had had lofty goals for the Federal Theatre Project. Unlike anyone before her or since, she had managed to build a theater organization that successfully crossed both geographical and topical boundaries. However, as Jack Poggi relates in his book, *Theater in America: The Impact of Economic Forces, 1870-1967*, “[she] did not achieve her purpose of founding a national theater. Toward the end of the Federal Theatre’s career, she drew up a plan for a federal department of art, to be financed by proceeds from amusement taxes... But the time was not right, President Roosevelt believed, for such an undertaking.”<sup>132</sup> As such, the leader of what was easily the greatest and most far-reaching government-sponsored arts organization in the United States to that point was never allowed the chance to create a more permanent version of her institution, and the FTP simply faded into memory.

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<sup>131</sup> Goldstein, 291.

<sup>132</sup> Jack Poggi, *Theater in America: The Impact of Economic Forces 1870-1967* (Ithaca: Cornell University Press, 1968), 162.

## Further Attempts at Government-Sponsored Theater

Although the arts world took a few years to recover from the downfall of the Federal Theatre Project, its ultimate termination did clear the way for the American National Theater and Academy to once again attempt to live up to its title and official Congressional charter. It remained dormant through the end of World War II, but started to make headlines once more in the mid-1940s, when Robert Breen took over as director and started looking for ways to remake and revitalize the fledgling institution. To that end, in 1946, Breen and theater director Robert Porterfield published in *Theatre Arts* magazine plans for the revamping of the ANTA. After pointing out that “the country has abundance of talent and excellent theatre, but it does not reach more than 10% of the people,” their article detailed the creation of a “Public Theater Foundation”<sup>133</sup> that would “[make] loans or grants for the purpose of play production the basis of the quality and standard of the material submitted, and the demonstrated need of the community or territory where the production or productions are to be performed.”<sup>134</sup> These loans or grants, which would be overseen by a Central Board composed of members from six prominent theater organizations, would then be used for “the general, over-all purpose [of taking] the very best of professional theatre to sections that would not ordinarily receive it, at prices which the person of average means can afford.”<sup>135</sup>

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<sup>133</sup> “Toward a National Theatre” *Theater Arts* October 1945, 600.

<sup>134</sup> Robert Porterfield and Robert Breen, “Toward a National Theatre,” *Theatre Arts* 29, no. 10 (October 1945), 600.

<sup>135</sup> *Id.* at 601.

Based on England's Committee for the Encouragement of Music and the Arts (CEMA), which was established in 1940 with money from private (American) donors and the British Treasury (and was reformed into Arts Council England (ACE) about a year after Breen and Porterfield published their article), their new ANTA foundation was to be empowered to "accept funds from any source: industry, individuals, legacies, bequests, humanitarian foundations, [and] town, city, county, state or national governments."<sup>136</sup> They even went so far as to specify that they were "seeking substantial government financing without government involvement..." and that "there is no constitutional obstacle to such action by our government."<sup>137</sup> Although this plan was admitted to the Congressional Record on August 1, 1945, by Senator Elbert Thomas of Utah,<sup>138</sup> it completely failed to get off the ground, leaving the ANTA to survive, without any financial support from the government, on a very limited (and limiting) budget for the next ten years.

The dissolution of the Breen/Porterfield plan did not mean, however, that the dream of a truly national theater in the US had disintegrated. In April of 1949, Senator Irving Ives and Representative Jacob K. Javits, both of New York, introduced a bill to their respective houses that would empower the President to convene an assembly of interested persons – more specifically, "the theater in the United States in all its branches..., the opera and ballet in the United States in all its branches..., the

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<sup>136</sup> *Id.* at 600.

<sup>137</sup> *Id.* at 600.

<sup>138</sup> "Legitimate: National Theatre Plan in Congressional Record," *Variety (Archive: 1905-2000)*, vol. 159:9 (8 August 1945), accessed 10 Feb 2014, available at <<http://search.proquest.com/docview/1285862005?accountid=14963>>.

American National Theater and Academy..., critics of such arts..., universities, colleges, schools, workshops, and other educational institutions concerned with the theater, the opera, and ballet..., editors and publicists..., the public which attends the theater, the opera, and the ballet and constitutes their audiences..., and government officials...<sup>139</sup> – for the purpose of creating a plan for a national theater, opera, ballet, and academy. The bill itself left the specifics of the anticipated plan very open-ended, specifying only that “such plans shall be consistent with the purposes of our private economy, shall not be designed for unemployment relief, shall not hamper the existing theater, opera, and ballet, but shall supplement and improve their opportunities for development and expansion, and shall not involve government control or direction.”<sup>140</sup> In this way, Ives and Javits distanced their project from the relief-oriented programs of the Federal Theatre Project, and from the ANTA, which they viewed as “a step in the right direction, but only a step.”<sup>141</sup> Similarly, the bill left the decision of whether or not to rely on government funding up to the members of the assembly. To that end, Ives and Javits stated in their article in *Theatre Arts* that “the proposed assembly does not necessarily imply that federal aid will be sought for the support of these arts. That could happen if the delegates decided to request such aid, but it is equally possibly they will disapprove the idea of direct government financial support.”<sup>142</sup> However, their submitted bill did request that Congress give

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<sup>139</sup> Irving Ives and Jacob K. Javits, “Toward a National Theatre,” *Theatre Arts* vol. 33:3 (April 1949), 13.

<sup>140</sup> *Id.* at 13.

<sup>141</sup> *Id.* at 11.

<sup>142</sup> *Id.* at 10-11.

\$250,000 to the President for the convening of the assembly.<sup>143</sup> Like the previous attempts at motivating Congress to act on the formation of an active national theater, though, the Ives/Javits bill never made it out of committee.

While that was going on in the nation's capital, ANTA was engaged in talks in New York City to acquire a Broadway theater of its very own. In 1950, the plan finally went through, and the organization purchased the Guild Theatre on West 52<sup>nd</sup> Street, renaming it the ANTA Playhouse. The ANTA, though almost bankrupt at the time, was able to take control of the theater for an initial payment of \$70,000, which was raised largely through donations from supporters.<sup>144</sup> Although the building came with a hefty mortgage, the ANTA was confident that it would be able to make back the cost in ticket sales from the regional theater productions they planned to bring to the city. President Harry Truman even sent his well-wishes to the grand opening in 1951, and at the time the ANTA was sure it had finally hit on a successful strategy. However, the fare offered by the ANTA Playhouse was decried by critics as overly commercial, and the endeavor proved to be a catastrophic failure for the ANTA.<sup>145</sup>

Moving forward, the next notable event in the history of national theaters in the US and of ANTA in particular happened in December 1955, when the ANTA published another plan for its own redesign in the pages of *Theatre Arts* magazine.

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<sup>143</sup> *Id.* at 13.

<sup>144</sup> Louis Calta, "Truman Endorses ANTA Stage Plans," *The New York Times*, 25 April 1951, accessed on 4 February 2014, <<http://query.nytimes.com/mem/archive/pdf?res=F70814FB395F147B93C7AB178FD85F458585F9>>.

<sup>145</sup> Joseph Wesley Zeigler, *Regional Theatre: The Revolutionary Stage* (New York: Da Capo Press, 1977), 225.

Named the “Forty-Theatre Circuit Plan,”<sup>146</sup> its goal was to establish theater houses in 40 different small- and medium-sized cities, each of which would present 40 different touring shows in week-long engagements, thus filling out a standard 40-week theater season.<sup>147</sup> Each show was to be developed at an ANTA house in one of four “talent centers”<sup>148</sup> – the plan specified New York, Chicago, San Francisco or Los Angeles, and a southwestern city such as Dallas, Fort Worth, or Houston – using only local actors and technicians (or those who had commuted there on their own).

Unlike the Federal Theatre Project, Breen/Porterfield plan, and the Ives/Javits bill, the Forty-Theatre Circuit Plan did not ask for any government funding. In keeping with ANTA’s original mandate to be self-supporting, the writers of the plan went out of their way to state that it was not to be “a theatre created through government subsidy.”<sup>149</sup> Instead, the plan was to be financed by donations from “nonprofit foundations whose purposes are to assist educational and cultural enterprises”<sup>150</sup> and other private sources. It also stated that the cities hosting (and therefore benefiting from) ANTA regional circuit theaters should “raise half the money necessary for the establishment of its own theater, with the other half being provided by ANTA.”<sup>151</sup>

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<sup>146</sup> “ANTA’s 40-Theater Circuit Plan,” 67-82.

<sup>147</sup> Theater seasons traditionally start in September and run through May of the following year.

<sup>148</sup> “ANTA’s 40-Theater Circuit Plan,” 68.

<sup>149</sup> *Id.* at 70.

<sup>150</sup> *Id.* at 81.

<sup>151</sup> *Id.* at 81.

With this plan, the ANTA hoped to not only build theater infrastructure and educate theater audiences in each of the forty chosen cities, but also to encourage theater professionals to settle in places other than New York (hence the idea of four talent centers rather than one). Similarly, while the ANTA defended their proposal as the best way forward for the floundering organization, it also acknowledged that such a plan

would only be the first major step in the establishment of a national theater. It would not be the end-all, nor would its accomplishment be the final goal. [It] would provide theatre on a sound economic basis to a vast portion of our country where professional theatre presently does not exist, but being a touring operation, it would lack two important attributes of a truly national theatre: the integration of the theater artist into the life of the community, and the development of ensemble repertory companies.<sup>152</sup>

Even with this admission, though, the plan as written was decried by many theater professionals, scholars, and critics who disliked its top-down approach to the stimulation of local theater creation. As Joseph Wesley Zeigler put it in his book, *Regional Theatre: The Revolutionary Stage*, many saw the Forty-Theater Circuit as nothing more than “a sop thrown by the Broadway establishment to the rest of the country.”<sup>153</sup> In light of this lack of enthusiastic support from the theater community, the plan failed to attract the donors it needed, and as such never made it past the pages of *Theatre Arts*.

The Forty-Theatre Circuit Plan represents the last time the ANTA attempted to seriously reform and activate itself as an organization. Rather, it limped along for another few decades of inactivity until its financial affairs came to a crisis point at the

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<sup>152</sup> *Id.* at 75.

<sup>153</sup> Zeigler, 128.

end of the 1960s. However, the impending threat of almost certain death due to substantial first and second mortgages on its Broadway theater, due in 1976 and 1969 respectively, was dispelled when ex-NEA chair Roger Stevens stepped in with a plan to save the hapless company. To that end, Stevens drew up a special contract whereby the NEA would grant the ANTA \$438,000 toward the repaying of the 1969 mortgage and the planning of an invitational season,<sup>154</sup> during which time the ANTA Playhouse would host traveling regional theater shows from around the country. Importantly, this represented the first time that the congressionally chartered national theater received any sort of government funding. The ANTA received a further grant of \$694,000 to actually fund the 1969-70 season. Even with that amount, however, it only succeeded in bringing four regional companies to the city, and most of the shows they presented were either critical failures, popular failures, or both. As such, according to Zeigler, the season was deemed “a clumsy affair and a distinct embarrassment.”<sup>155</sup>

In 1981, the ANTA finally sold its 52<sup>nd</sup> Street theater for \$5 million.<sup>156</sup> By 1983, it was making plans to use that money to move to a new permanent home at the Kennedy Center for the Performing Arts in Washington, D.C. According to an agreement between Roger Stevens (now the chairman of the Kennedy Center) and ANTA chairman Donald Seawell, ANTA would provide \$1 million a year for five

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<sup>154</sup> *Id.* at 222-223.

<sup>155</sup> *Id.* at 225.

<sup>156</sup> Irvin Molotsky, “ANTA National Theater at Kennedy,” *The New York Times*, 18 October 1983, accessed on 25 January 2014, <<http://www.nytimes.com/1983/10/18/theater/anta-national-theater-at-kennedy.html>>.

years to finance the new American National Theater Company, and the Kennedy Center would provide \$1 million a year after that.<sup>157</sup> According to Stevens, this would help the new national theater become “self-sustaining, with the income from one production used to mount the next.”<sup>158</sup> By May of 1984, Seawell and Stevens had hired Peter Sellars, the 27-year-old director of the Boston Shakespeare Company, as artistic director, a move that surprised many in the theater world because of his age and tendency toward controversial productions. By January of 1985, a plan was published in the *Washington Post* that emphasized a concerted effort to use the space at the Kennedy Center, not as a “as a point of origin for serious work”<sup>159</sup> rather than as a “booking house for Broadway productions,”<sup>160</sup> to ticket price cuts, and to house “productions imported from or developed with other theaters across the country.”<sup>161</sup>

The plan met with mixed reactions from the professional theater community. While many hailed the ANTA/Kennedy Center alliance as, in the words of Joseph Papp, head of the Public Theater in New York City, “a very important move for theater in this country,”<sup>162</sup> others saw the use of the term “national theater” in relation to the plans as problematic. As Robert Brustein, head of the American Repertory

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> David Richards, “American Theater Plan Set: Kennedy Center to Cut Ticket Prices, Revamp Repertoire,” *The Washington Post*, 24 January 1985, accessed on 10 February 2014, available at <<http://search.proquest.com.ezproxy.wesleyan.edu/docview/138734622>>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Megan Rosenfeld, “Sellars’ Plan for Theater Praised: Caution Also About Project’s Identity,” *The Washington Post*, 25 January 1985, accessed on 10 February 2014, available at <<http://search.proquest.com.ezproxy.wesleyan.edu/docview/138707491>>.

Theater in Boston, pointed out, “National theaters are not created at press conferences. There *is* a national theater and it consists of a network of non-profit theaters throughout the country.”<sup>163</sup> In other words, while people were generally underwhelmed by the idea of an American national theater taking the form of a single brick-and-mortar location in Washington D.C., many were excited by the prospects of what the newly-restructured ANTA (which Sellars referred to as ANT, or American National Theatre) could do for the state of non-profit (although not specifically regional or community) theater in the country at the time.

Unfortunately, Sellars proved a disappointingly unsuccessful leader for the national theater. His productions routinely generated critical controversy, and most of the major shows produced by the ANT were, according to a *Washington Post* article from August of 1986, “met with indifference at the box office.”<sup>164</sup> Unable to fill seats, most of the ANT’s major productions resulted in catastrophic financial losses for the company, and after 18 struggle-filled months, Sellars announced that he was going on a yearlong sabbatical from his position as director. While the decision to leave largely appeared to originate with Sellars himself, according to ANT board member Jean Dalrymple in another *Washington Post* article from later that month, “no one begged him to stay,”<sup>165</sup> either. Upon Sellars’ departure, the ANT went into a period of what

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<sup>163</sup> *Id.*

<sup>164</sup> David Richards, “Kennedy Center Director Sellars To Go on Leave,” *The Washington Post*, 9 August 1989, accessed on 10 February 2014, available at <<http://search.proquest.com.ezproxy.wesleyan.edu/docview/138991258>>.

<sup>165</sup> David Richards, “Peter Sellars and the Unsolved Puzzle of ANT: For the American National Theater, an Intermission Filled With Doubts and Questions ANT,” *The Washington Post*, 24 August 1986, accessed on 9 February 2014, available at <<http://search.proquest.com.ezproxy.wesleyan.edu/docview/138934331>>.

he termed “hibernation.”<sup>166</sup> Although in 1986, the plan was definitely to reopen after a year’s hiatus, this never came to pass. Sellars never returned, the ANT never reopened its doors at the Kennedy Center, and the dream of an American national theater as imagined by the original founders of the American National Theater and Academy finally died for the last time.

### **Historical Trends and Congressional Tendencies**

Looking at the dual histories of government arts funding and national theater initiatives in the United States, there is much to be learned, both about the state of such things as they are now, and the possibilities for a (more effective and durable) form of a national theater in the future. Although many points will be discussed at length later on, I would like to draw particular attention to a few repeating trends.

The first important trend to notice is that the federal government, through its entire history, has tended to shy away from situations in which it is called upon to give any sort of direct subsidies to the arts, and to theater in particular. With the exception of the Federal Theatre Project, which was justified as work relief, the Kennedy Center, which is charged with presenting “classical and contemporary music, opera, drama, dance and poetry” (which distinctly does *not* include anything that can be construed as political), and the relatively minor grants given to the ANTA via the NEA in the late 1960s, the federal government has never given any direct funding to the national theater that it clearly at one time cared enough about to officially charter. This policy mostly holds true across the other disciplines of art as

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<sup>166</sup> Richards, “Kennedy Center Director Sellars To Go on Leave.”

well, and other than those grants processed by the NEA, Congress generally refuses to fund arts institutions directly.

In many ways, this refusal can be at least partially explained by the second trend, which is that the US government likes to maintain a great deal of control over the way its money is spent. As such, one can infer from the history presented above that Congress frequently opted to refuse funding requests rather than relinquishing that control, a case most clearly shown by the Federal Theatre Project. In forming the FTP, the government placed very few restrictions on the content of plays produced using its funds, focusing instead on making sure that federal money was used to further the work relief goals of the WPA. Because of this, Congress eventually found itself in the awkward position of disliking the fact that the FTP occasionally used its resources to produce shows that supported progressive political views. Since First Amendment jurisprudence at the time had not yet expanded to consider the question of whether the government can place restrictions on the speech of programs that it chooses to fund (see Chapter 3 for further discussion on the question of First Amendment protections for subsidized speech), Congress was powerless to censor the productions it did not like. Thus, it was forced to withdraw funding from the entire project in order to stop 10% of the shows it produced, choosing to end a very popular institution because it could not control the ways the FTP used its money once that money was given. As the ANTA and other national theater proposals were repeatedly denied funding by Congress, one can suppose that the lack of control over the use of those funds might have been an issue.

Although the existence of the NEA might seem to be the exception to this rule, it follows such a different funding model that in actuality, it presents not a challenge, but an affirmation of this trend. What the Federal Theatre Project had, and what the ANTA at various stages wanted, was a continuing subsidy, or, in other words, a subsidy given in a manner such that, although the specific amount might be renegotiated annually, the fact that it will receive funding is assumed. This is how the NEA receives its money from the federal government – as a line-item appropriation included in Congress’s yearly budget – but when the NEA in turn gives money to individual arts organizations, it does it solely through grants-in-aid. This allows the government, by way of the NEA’s chair and advisory council, to carefully consider the merits of each application before approving it to receive funds. Thus, government money can be quietly kept away from any projects to which Congress might object. When the government felt like it did not have enough control over the grant-making process, as in the aftermath of the Serrano and Mapplethorpe scandals, it simply gave itself more discretionary control with the addition of the decency clause, a move which, though controversial, was determined to be constitutional by the Supreme Court in *NEA v. Finley*. Thus, the NEA was allowed to continue its program of grants-in-aid, while both the FTP and the ANTA are nowhere to be seen. Lest these anxieties over control be written off as simply a right-wing fear of left-wing subject matter, it is also worth noting that the condemnation of the NEA during the scandals of the 1990s was generally bipartisan – for example, when D’Amato and other outspoken critics of the NEA sent a letter to the NEA chairman calling for procedural reform to save American taxpayers from being “forced to support such trash” as

Serrano's *Piss Christ*, several prominent Democrats, including as current Senate majority leader Harry Reid and 1992 presidential candidate Bob Kerrey, were included as signatories.

The one way in which the federal government does give significant amounts of money to the arts is through the long-standing policy of tax breaks on charitable donations to non-profit organizations. Since any money received by non-profits through this model comes directly from private sources, and the government involves itself only by deciding to charge donors less money in taxes, issues of government control over the use of funds are not raised. Recipients can use their funds as they please, as long as they maintain their non-profit status. However, this policy of indirect subsidies is neither specifically tailored to supporting any one type of non-profit (i.e., it is not intended to support the arts over public universities, hospitals, religious organizations, etc.), nor is it of any particular use to artists who either cannot attract substantial private support, or who receive most of their private funding via small donations from those in lower marginal tax brackets. In the case of a national theater, these indirect subsidies might prove helpful in possibly incentivizing the wealthiest donors to give *more* money rather than less, but would likely do very little to encourage small or first-time donors to give money in the first place.

The final trend to which I'd like to draw attention relates to what it means to be a truly *national* theater. In the past 100 years, there have been a number of different proposals for national theaters, each of which came with a new model for how to run such an organization. Depending on how one measures success – by financial profit, by popularity, by the mere fact of a plan being put into action – some

of them have clearly been more successful than others. However, looking at all of them together – the ANTA as originally chartered, the FTP, the Public Theater Foundation Plan as proposed by Breen and Porterfield, the institution that would hopefully be formed by Ives’ and Javits’ conference, the ANTA according to the Forty-Theater Circuit Plan, the ANTA as the owners of a destination for regional theaters on tour, and finally, the ANT as the resident company of a single theater in Washington, D.C. – one thing becomes clear: that the arts community generally supported initiatives that were more decentralized and geographically far-reaching, and tended to reject those proposals which either tied the national theater to a specific location in a large city, or which felt like extensions of the highly commercialized Broadway establishment. Thus, one can see that any national theater in the United States, in order to win the support of the pre-existing theater community, must be somehow relevant to, accessible to, and inclusive of people and communities all across the country (see Chapter 4 for further discussion of this subject). Such a devolved and decentralized theater organization would also go a long way toward solving the problem raised by Paul Ryan and the House Budget Committee – that although the NEA and NEH are funded using tax dollars from the entire nation, the benefits they provide are only really enjoyed by wealthier citizens in urban areas. Regardless of the fact that this portrayal of the NEA turned out to be factually untrue,<sup>167</sup> a national theater as described above would be much more likely to succeed

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<sup>167</sup> Patricia Cohen, “N.E.A. Funds Benefit Both Rich and Poor, Study Finds,” *The New York Times*, 4 February 2014, accessed on 11 February 2014, available at <<http://www.nytimes.com/2014/02/05/arts/design/nea-funds-benefit-both-rich-and-poor-study-finds.html>>.

in bringing theater to those people for whom it is not readily available, and in creating new theater pieces, theater infrastructure, and theater audiences in the communities where such people live.

Looking back at American national theater history, it is easy to see that in spite of the fact that its primary goal was work relief, the Federal Theatre Project came the closest of any group or ANTA proposal to creating this kind of organization. In my opinion, it is no coincidence that the Federal Theatre Project was also the only one of the attempted national theaters to receive significant government funding in the form of a continued Congressional appropriation. As Hallie Flanagan put it, “such a nationwide theatre require[d] government subsidy, since... its fullest development... is beyond the scope of purely private enterprise.”<sup>168</sup> If that and the fact that in other countries, national theaters are *very* highly subsidized by their respective governments are any indication, I do not think it is an exaggeration to say that such an endeavor would only be possible with monetary (and potentially administrative) assistance from the federal government.

Which brings us back to the first two trends regarding the willingness of the government to fund such projects, and the amount of control it wants to maintain over the way those funds are used. The First Amendment protects against government control of artistic expression, but at the same time, the government appears unwilling to fund such expression without at least some modicum of control. Thus, an impasse is reached – or at least, it appears that way, until one takes into account the fact that when the government itself is speaking or when it is funding the speech of others, the

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<sup>168</sup> Flanagan, 371.

rules surrounding free speech protections become less clear. In order to unpack this problem further, it is necessary to take a closer look at the First Amendment case law and theory surrounding the use of government money, and at the existing precedents and jurisprudence surrounding what has come to be known as the government speech doctrine.

# Chapter Three: Challenges to the Idea of a Subsidized National Theater

## Clearing Up Some Assumptions

Before going any further in discussing the First Amendment implications of subsidized speech for the arts, it is useful to briefly address some assumptions related to art and the First Amendment. First, this thesis has been generally operating under the assumption that the First Amendment shields art and, more specifically, theater, from government interference. Looking at First Amendment jurisprudence more broadly, one can see that the Supreme Court has, on numerous occasions, clarified that free expression in the form of art is indeed protected. For example, in reserving the right to classify art as “obscene” (and therefore unprotected) when it “lacks serious literary, artistic, political, or scientific value”<sup>169</sup> in *Miller v. California* (1973), the Court implies a protection for all art that is not obscene. Similarly, while defending the First Amendment protection of “oral utterances and the printed word”<sup>170</sup> in *Kaplan v. California* (1973), the Court mentions that “pictures, films, paintings, drawings, and engravings... have First Amendment protection.”<sup>171</sup> While neither of these examples explicitly mention that theater is protected as well, the Court has also shown that it views performance in a similar manner to other forms of

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<sup>169</sup> *Miller v. California*, 413 U.S. 15, 24 (1973)

<sup>170</sup> *Kaplan v. California*, 413 U.S. 115, 119 (1973).

<sup>171</sup> *Id.* at 119-120.

art. For example, in *Schad v. Borough of Mount Ephraim* (1981), the Court stated that “entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”<sup>172</sup>

Given the long-standing precedent of giving political speech the highest level of protection under the First Amendment, it is notable that although these cases *allude* to “political or ideological speech,” they make no clear distinction between political and non-political art or artistic expression. To address this very issue in his article, “Art and the Constitution,” Randall P. Bezanson thus divides art into two categories – “propositional”<sup>173</sup> and “non-propositional”<sup>174</sup> art. According to Bezanson, propositional art, which includes things like political cartoons and other clearly didactic items, “contains a coherent message intended by the artist and understood by the audience.”<sup>175</sup> As such, he proposes that, since “they are clearly ‘speech’ in the sense that they communicate intended messages or meanings to an audience... the Constitution should protect them as free speech.”<sup>176</sup> On the other hand, he defines non-propositional art as “more difficult to categorize as material that is protected under the free-speech guarantee,”<sup>177</sup> as it “conveys no single message and those

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<sup>172</sup> *Schad v. Mount Ephraim*, 452 U. S. 61, 65 (1981).

<sup>173</sup> Randall P. Bezanson, “Art and the Constitution,” *Iowa Law Review* 93 (2008), 1595. See also *Spence v. Washington*, 418 US 405 (1974).

<sup>174</sup> Bezanson, 1596.

<sup>175</sup> *Id.* at 1595.

<sup>176</sup> *Id.* at 1596.

<sup>177</sup> *Id.* at 1596.

viewing the art usually will not understand it as doing so (and should not understand it as doing so).”<sup>178</sup>

Both Bezanson and the Court eventually arrive at the opinion that both propositional and non-propositional art, being “major source[s] of expression and ideas,”<sup>179</sup> should be protected by the First Amendment. In *Joseph Burstyn, Inc. v. Wilson* (1952), the Court states that movies are protected because “they may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artist expression.”<sup>180</sup> The Court goes even further in protecting the latter type in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995), when it stated that, if the First Amendment were “confined to expressions conveying a ‘particularized message’... [it] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”<sup>181</sup> Thus, it would seem that the Court has already at least implied protection for both propositional and non-propositional art under the First Amendment, even if that protection is circumstantial at best.

Lastly, in *NEA v. Finley*, the Court addresses not only the fact of First Amendment protection for the arts, but also goes a little deeper into its reasons for doing so:

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<sup>178</sup> *Id.* at 1596.

<sup>179</sup> *Id.* at 1610.

<sup>180</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 501 (1952).

<sup>181</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 569 (1995).

The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their expressive character, which falls within a spectrum of protected "speech" extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our "cultural life," just like our native politics, "rest[s] upon [the] ideal" of governmental viewpoint neutrality.<sup>182</sup>

In other words, the Court has made it very clear that art and theater, regardless of whether they are "propositional" or "non-propositional," are protected forms of expression under the First Amendment.

A second assumption worth addressing is the idea that providing funding for the arts, and theater in particular, is a proper use of government money, especially since a large number of the debates regarding arts and theater funding in the United States have historically hinged on this issue. Looking back at relevant pieces of legislation, however, it is clear that the government has already decided that, at least for the time being, such uses of its funds are appropriate. For example, in the National Foundation on the Arts and the Humanities Act of 1965, which established the NEA, the Declaration of Purpose includes a provision stating that "the encouragement and support of national progress and scholarship in the humanities and the arts, while primarily a matter for private and local initiative, is also an appropriate matter of concern to the Federal Government."<sup>183</sup> It also states that "it is necessary and appropriate for the Federal Government to complement, assist, and add to programs for the advancement of the humanities and the arts by local, State, regional, and

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<sup>182</sup> *National Endowment for the Arts v. Finley*, 524 U.S. 569, 602-603 (1998).

<sup>183</sup> *National Foundation on the Arts and Humanities Act of 1965*, Public Law 89-209, *U.S. Statutes at Large* 79 (1965), 845.

private agencies and their organizations,”<sup>184</sup> and that “the practice of art and the study of the humanities requires constant dedication and devotion and that, while no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.”<sup>185</sup> While these are little more than simple assertions by the government, they have not, insofar as my research has shown, been facially challenged, and so one can assume an implicit endorsement on the part of the people for such actions, at least for the time being.

There is, however, another potential justification that is worth mentioning, and that comes directly from the Constitution itself. In Article I, Section 8, Congress is given the power “to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>186</sup> While this clause is generally understood to merely establish the power of Congress to grant patents and copyrights, historian Garry Wills presented a different take on it. In his lecture at the School of Arts and Sciences at the University of Pennsylvania, Wills stated that unlike the rest of Section 8, which presents the powers of Congress “in the infinitive: to regulate, commerce, to coin

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<sup>184</sup> *Id.* at 845.

<sup>185</sup> *Id.* at 845.

<sup>186</sup> U.S. Constitution, Art. 1, Sect. 8.

money, to establish a post office, to declare war,"<sup>187</sup> the founders decided in this instance to include a goal, or "mini-preamble,"<sup>188</sup> along with the explicit power. As a result, it is presented not as a power in its own right, but rather as a means of achieving the stated goal. According to Wills, this means that

our government is expressly commissioned by the Constitution to protect citizens' access to the benefits of artistic creativity. The mini-preamble goes beyond the protection of the individual artist or thinker or inventor, to the encouragement of science and the arts themselves. You only give those rights to the other people because there is a social benefit in the progress of science and the useful arts. Government is, in other words, not warned away from this – as it was from the support of religion – but encouraged to take part in promoting their progress."<sup>189</sup>

Thus, the power of Congress to promote the arts through its allocation of funding can be seen as coming directly from the Constitution itself. Hence, I will continue to move forward under the now-justified assumption that funding for the arts is a proper government endeavor.

One final assumption, alluded to at the end of the previous chapter, is the idea government subsidization somehow changes the degree of First Amendment protection a form of speech receives. In some ways, this assumption is actually the most difficult of the three to prove. In doing so, then, it is useful to look at the text of the First Amendment itself, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

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<sup>187</sup> "Deconstructing the Constitution In Support of the Arts," *The Pennsylvania Gazette*, 12 May 1998, accessed on 20 March 2014, available at <<http://www.upenn.edu/gazette/0598/0598gaz5.html>>.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

and to petition the Government for a redress of grievances.”<sup>190</sup> As with most of the rest of the Bill of Rights, this is a negative right – the freedom *from* government infringement on one’s speech, rather than the right *to* government protection. This means that, as far as the free speech clause goes, the First Amendment only protects against situations where the government restricts the speech of a private actor or actors. It does not protect against speech restrictions imposed by private actors on other private actors<sup>191</sup> and it does not, at least explicitly, address situations in which the government is acting as one of the speakers, either instead of or along with its role as potential restrictor or regulator. As Constitutional law scholar Robert C. Post puts it in his essay, “Subsidized Speech,” “from its inception... First Amendment doctrine has primarily sought to protect from government regulation an independent realm of speech within which public opinion is understood to be forged. The consequence of this orientation is that traditional First Amendment doctrine has had rather little to say about the speech of the government itself.”<sup>192</sup>

This problem is further complicated by the fact that in recent years, the Supreme Court has directly conflated the spending of money with the act of speaking or expressing oneself in a manner protected by the First Amendment. This was first established in *Buckley v. Valeo* (1976), when the Court held that a law limiting campaign expenditures violated the First Amendment because “a restriction on the amount of money a person or group can spend on political communication during a

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<sup>190</sup> U.S. Constitution. Amendment I.

<sup>191</sup> Unless state laws have passed laws that expand their individual free speech protections to include such provisions; see *Pruneyard Shopping Center v. Robins* (1980).

<sup>192</sup> Robert C. Post, “Subsidized Speech,” *The Yale Law Journal* 106 (1996): 151.

campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money."<sup>193</sup> Similarly, they also stated that while "some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two... this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non speech element or to reduce the exacting scrutiny required by the First Amendment."<sup>194</sup> Following this decision to its logical conclusion, one can see how the government choosing to spend money on the arts or theater or practically anything can be seen as a form of speech in and of itself. Thus, it is useful to keep in mind that just as the First Amendment does not protect against the government speaking in the same way that it does against the government regulating the speech of others, so too can the spending of money in and of itself, be regarded as speech or as substantially related to speech, regardless of any stipulations that might attached to the expenditure.

Of course, it is not particularly useful simply to state that the implications of First Amendment free speech protections change when government subsidization is involved without also discussing the specifics of how the rules might change. As with many areas of First Amendment law, however, the precedents surrounding government speech are rather less formally codified than one might hope. As it stands

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<sup>193</sup> *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

<sup>194</sup> *Id.* at 16.

now, there is no convenient test to determine what constitutes the government itself speaking versus the government patronizing the speech of others, for example, or to determine just how to categorize speech touched (but not “purchased”) by government money. In the absence of that knowledge, I will look at the different realms of government speech as proposed by Supreme Court precedent and various First Amendment scholars, and will attempt to determine which rules might apply to a potential American national theater.

## **Two Extremes of Subsidized Speech**

Looking at an imaginary spectrum of subsidized speech as relates to the First Amendment, one can imagine that the two extremes at opposite ends would consist of, on one side, speech that, although subsidized by the government, is considered to be within the domain of public discourse and therefore entitled to full First Amendment protection (as in the public forum doctrine), and on the other side, speech that can be seen as the government’s own (such as when the government hires an advertising firm to disseminate an approved message). Since “speech may be subsidized and yet remain within public discourse [and] the mere fact of subsidization is not sufficient to justify classifying speech as within or outside public discourse”<sup>195</sup> placement of speech along this spectrum often depends on the context and content of the speech in question, and what kinds of subsidies are involved.

The first instance can largely be found when the government supplies only an indirect subsidy, or, in other words, provides material assistance in ways other than

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<sup>195</sup> Post, 155.

directly granting, allocating, or paying funds to a specific project or institution. Historically, this has most often come up in the context of government control over speech that takes place on property that it owns. Although this particular type of subsidy was not always considered as such, the public forum doctrine has been around since *Hague v. Committee for Industrial Organization* (1939), which ruled, in the context of voiding a ban on political meetings in government-owned locations, that

wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions... The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.<sup>196</sup>

In other words, the government can regulate the use of public forums based on conduct, but if a certain *type* of speech-related conduct is generally allowed, then discrimination based on the viewpoint or content of said speech is impermissible. The court later clarified this idea in *Rust v. Sullivan*, stating that “the existence of a Government ‘subsidy,’ in the form of Government-owned property, does not justify the restriction of speech in areas that have ‘been traditionally open to the public for expressive activity.’”<sup>197</sup>

When framed simply as the government facilitating the free speech of private citizens, it is easy to see how the same First Amendment considerations can be

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<sup>196</sup> *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515-516 (1939).

<sup>197</sup> *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

applied to other forms of indirectly subsidized speech as well. For example, as discussed in the previous chapter, the government indirectly subsidizes non-profit organizations by providing tax deductions based on the amount of money donated. Since the deduction increases as the amount of money donated increases, wealthy donors are thus incentivized to give larger amounts of money to their organizations of choice. As mentioned above, if a donor has a marginal tax rate of .396 and gives a donation of \$1000, he or she receives a tax deduction of \$396, meaning that the amount of money lost by the donor as a result of the donation is only \$604. If one assumes that the donor in question would have given a smaller amount without the tax deduction, however, this can also be conceptualized as the government providing a \$396 subsidy (indirectly) to the recipient of the funds. These indirect subsidies are the same for all donations to any 501(c)(3) non-profit organization, meaning that in the eyes of the government, there is no difference between donations to a hospital, a church, an educational institution, or a non-profit theater. Just as in the instance of public use of government-owned parks, any potential claims that the government, by providing these subsidies, is violating the Establishment Clause, for example, or is impermissibly supporting one perspective over another is mitigated by the fact that the government is only subsidizing at a remove, and does so equally and without regard to viewpoint.

While this level of government non-involvement would be ideal for an arts organization like a national theater, in no small part because it keeps the government out of all decisions and therefore would be less likely to raise First Amendment concerns, it is unlikely that such an organization would, in reality, fall entirely within

this domain of speech. To begin with, a national theater that received only indirect subsidies from the federal government would not fit the second requirement of my national theater definition as developed in the first chapter, which stated a national theater must receive significant and direct funding from the federal government in a manner such that, while the amounts might be renegotiated every year, the fact that it will receive funding is assumed. More important, however, is the fact that the United States has already tried operating a national theater that received only indirect government subsidies, and, as the previous chapter shows, it was, in comparison to the national theater institutions in other countries and to other non-national American theaters, a colossal failure. Throughout its entire tenure, the American National Theater and Academy, which was designated as “nonprofit and without capital stock”<sup>198</sup> at its founding, struggled with numerous financial difficulties that could have been significantly lessened had they received more direct support from the federal government.

In short, the ANTA fell prey to one of the downfalls of relying solely on indirect subsidies to support the arts – that the charitable donation tax deduction encourages people who are already giving large amounts of money to give even larger amounts of money, but does very little to encourage the giving of a donation in the first place, especially when the sum of money in question is small, and the individual donor in question does not have a high enough marginal tax rate that the deduction will add up to a significant amount. For an organization with a primary

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<sup>198</sup> *An Act to Incorporate the American National Theatre and Academy*, Public Law 74-199, *U.S. Statutes at Large* 49 (1935), 458.

goal of working with underserved populations<sup>199</sup> who may not have a lot of disposable income to donate, it is easy to see how this strategy – which selects very strongly for organizations that appeal to wealthy donors – might not work in such a situation. Thus, it is likely that a national theater would require much more direct financial involvement – and, by extension, possible speech regulations – from the government, and would therefore not fit into this public forum domain of free speech law.

At the other extreme of the subsidized speech spectrum would be speech that is generally recognized as the government’s own. In the same way that private speech in the public domain is protected by the First Amendment, so too can the government itself participate as a speaker. And, according to the Court’s decisions in *Pleasant Grove City, Utah v. Summum* (2009), “the Free Speech Clause restricts government regulation of private speech; it does not regulate government speech,”<sup>200</sup> as long as the government is not “calculated to drive ‘certain ideas or viewpoints from the marketplace.’”<sup>201</sup> In *Summum*, the Court decided that government-chosen monuments in a government-owned park “are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”<sup>202</sup> Similarly, the majority opinion in *Johanns v. Livestock Marketing Association* (2005), which

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<sup>199</sup> According to the NEA, “the term ‘underserved population’ means a population of individuals, including urban minorities, who have historically been outside the purview of arts and humanities programs due to factors such as a high incidence of income below the poverty line or to geographic isolation.” (*Consolidated Appropriations Act, 2014*, 337.)

<sup>200</sup> *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125, 1131 (2009).

<sup>201</sup> *NEA v. Finley*, 587.

<sup>202</sup> *Pleasant Grove City v. Summum*, 1134.

focuses primarily on the question of compelled subsidy of government speech, affirms the existence of a right of the government to speak in its own name, stating directly that “the challenged advertising is government speech,”<sup>203</sup> and that even though the government employed a non-government entity to write and produce the advertisements in question, “the message of the promotional campaigns is effectively controlled by the Federal Government itself.”<sup>204</sup> Thus, the right of the government to speak in its own voice, even, as in *Johanns*, through a hired third-party medium, is affirmed.

In addition, the Court has also ruled that when the government is clearly speaking, it is allowed to adopt and promote specific viewpoints in ways that might not be permissible if they did not fall under the umbrella of government speech. For example, in *Rosenberger v. Rector and Visitors of University of Virginia* (1995), the Court stated that “when the State is the speaker, it may make content-based choices.”<sup>205</sup> Similarly, in *Board of Regents of the University of Wisconsin System v. Southworth* (2000), the Court stated that “it is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens,”<sup>206</sup> and that it therefore “seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its

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<sup>203</sup> *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 556 (2005).

<sup>204</sup> *Id.* at 560.

<sup>205</sup> *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995).

<sup>206</sup> *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000).

own policies.”<sup>207</sup> In these instances, the type of government money involved tends away from the traditional definition of the term “subsidy,” and more towards the paying of contractors and employees or the purchasing of speech and speech-related objects. Thus, when the government is speaking or is paying others to speak a message in its stead, the speakers are hired rather than subsidized, and the speech remains the government’s own.

Just as it is unlikely that a national theater subsidized and operated by the federal government would fall within the public domain and therefore be free from almost all speech-related government influence, so too is it unlikely that such an organization would fall within the domain of direct government speech. Here, though, the issue at hand has less to do with financial feasibility and more to do with the desired goals of creating such an organization. Looking back at the fears expressed by members of the arts and theater communities that, in founding the NEA, the government might in some way exert undue influence over the type of art chosen to be funded or the artists receiving funding, I find it doubtful that a national theater created to act solely as a mouthpiece of the government would be accepted by the arts and theater communities as deserving of the “national” title. Nor, in my opinion, would a national theater whose work was thus construed as the voice of the government – or, in other words, as blatant theatrical propaganda – be in any way worth the time, effort, and money that would go into its founding. While such a national theater might be accepted or even welcome by Congress, it would be become

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<sup>207</sup> *Id.* at 229.

a theater of the government rather than a theater of the people, and as such, would likely fail at being (or even seeming) truly “national.”

As such, it is highly improbable that a national theater of the sort I propose would fall under either the rules generally applied to subsidized speech located within the public domain, or the rules (or lack thereof) regulating the government speaking in its own voice. Therefore, it is necessary to look at the other (less clearly demarcated) realms of subsidized speech that fall between these two extremes, in the hopes of finding one that would better fit a government-subsidized national theater.

### **Other Types of Government Regulation of Subsidized Speech**

In trying to separate out other levels of First Amendment protection for subsidized speech, I find it useful to look at the specific types of subsidies involved, as the way in which subsidies are allocated can change the amount of governmental involvement in specific acts of speech, and by extension, the level of regulation permissible.

One easy place to start is with the National Endowment for the Arts, which allocates money to grant applicants only after an extremely lengthy and rigorous review process. Those looking to receive funding submit an application, which is then reviewed by a panel comprised of individuals knowledgeable about the artistic discipline undertaken by the applicant. The membership of these panels changes regularly, often according to the needs of the particular application. The panel makes a recommendation about whether or not to grant funds to the project in question, and NEA staff then attempts to reconcile the recommendation with the existing budget for

the type of grant in question. Those applications that pass the first stage of review are then presented to the National Council on the Arts, consisting of eighteen members of the arts world – scholars, administrators, patrons, and artists themselves who have been appointed by the president and confirmed by the Senate for six-year term – as well as six sitting members of Congress, who serve two year terms as non-voting members. This Council, which only meets three times a year, makes a second recommendation to the NEA chairman (also appointed by the president and confirmed by the Senate), who reviews the projects that have passed the Council’s level of review, and makes a final decision on all grant allocations.<sup>208</sup> Thus, a grant application must pass three levels of review by three different groups of people before being approved.

It is also worth noting that the applications themselves ask for very detailed information about the type of project, the intended goals and methods of reaching said goals, the intended audience and beneficiaries, the financial state of the organization or individual applying for the grant, the specific uses for the money requested, and the key people involved in the project.<sup>209</sup> Thus, projects must be fully planned before grant applications are sent in. Also, according to the initial National Foundation on the Arts and the Humanities Act of 1965 and its subsequent amendments, if “the

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<sup>208</sup> “How the United States Funds the Arts,” *National Endowment for the Arts*, November 2012, accessed on 20 March 2014, available at <http://arts.gov/sites/default/files/how-the-us-funds-the-arts.pdf>, 3-4.

<sup>209</sup> “How to Prepare and Submit an Application,” *National Endowment for the Arts*, accessed on 20 March 2014, available at <http://arts.gov/grants-organizations/art-works/theater-musical-theater/how-to-prepare-and-submit-an-application>; “NEA Grant Application Form,” *National Endowment for the Arts*, 6 January 2014, accessed on 20 March 2014, available at <http://arts.gov/sites/default/files/nea-grant-application-form-rev2.pdf>.

Chairman, after reasonable notice and opportunity for a hearing, finds that... a group is not complying substantially with the provisions”<sup>210</sup> of the Act, or that “any funds granted to a group or State agency... have been diverted from the purposes for which they were allotted or paid,”<sup>211</sup> the NEA is authorized to remove funding from that group “until there is no longer any default or failure to comply... or, if compliance or correction is impossible, until such group or agency repays or arranges the repayment of the Federal funds which have been improperly diverted or expended.”<sup>212</sup> In order to assure this compliance, the NEA requires its grant recipients to submit a Progress Report when the funds spent reach two-thirds of the total amount requested, and to submit a Final Descriptive Report and a Final Financial Report within 90 days of the end of the funded project.<sup>213</sup>

In essence, all of this means that the government is placed in the position of being able to control exactly what gets funded, how it gets funded, and, by extension, what is created using its money. The Arts Council and the Chairman are directed by the NEA’s governing legislation to evaluate these projects on the basis of “artistic excellence and artistic merit... taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public,”<sup>214</sup> but the

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<sup>210</sup> *National Foundation on the Arts and Humanities Act of 1965*, 848.

<sup>211</sup> *Id.* at 848.

<sup>212</sup> *Id.* at 848.

<sup>213</sup> “General Terms & Conditions for Grants and Cooperative Agreements to Organizations,” *National Endowment for the Arts*, December 2012, accessed on 06 April 2014, available at < <http://arts.gov/sites/default/files/GTC.pdf>>, 12.

<sup>214</sup> *Department of the Interior and Related Agencies Appropriations Act of 1991*, Public Law 101-512, *U.S. Statutes at Large* 104 (1990), 1963.

vagueness of that standard allows for a great deal of freedom. Similarly, although “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”<sup>215</sup> once a project is funded, the stipulations in the initial Act allowing the government to remove funding from projects that do not exactly adhere to how they were described in their applications give the government a great deal of control over what specific instances of artistic speech it funds.

While this process might make a good deal of sense from an administrative standpoint, the vague and subjective nature of the criteria for evaluation of grant proposals seems to leave open the possibility for content- and viewpoint-based decisions that might run afoul of the First Amendment. As mentioned in the previous chapter, this was the argument presented by the respondents in *NEA v. Finley* – that the so-called decency clause led to impermissible viewpoint discrimination and was void for vagueness. The members of the 8-to-1 majority in favor of upholding the decency clause as constitutional disagreed on whether it did actually lead to viewpoint discrimination – Justice O’Connor, in her majority opinion, did not address the issue directly, other than by acknowledging in passing that “content-based considerations... are a consequence of the nature of arts funding,”<sup>216</sup> while Justice Scalia, in his concurring opinion, stated very clearly that the facts of the case

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<sup>215</sup> *National Foundation on the Arts and Humanities Act of 1965*, 846.

<sup>216</sup> *NEA v. Finley*, 585.

“unquestionably constitute[d] viewpoint discrimination.”<sup>217</sup> In the end, however, this question was made mostly redundant by the rest of the opinion, which focused on very different issues. Thus, the essential inquiry in *Finley* focused much more on whether or not these instances of vagueness and potential discrimination were permissible when the government was deciding which projects and programs to subsidize.

Like the conditions presented in both the direct government speech and public forum doctrines, this raises questions about the role of the government, as well as the speech rules applicable to the various situations. According to Justice Souter in his dissent in *Finley*, the role of government as “government-as-speaker”<sup>218</sup> can roughly equate to that of “government-as-buyer.”<sup>219</sup> Post, on the other hand, refers to this same act as “state participation in the marketplace of ideas,”<sup>220</sup> where viewpoint and content judgments are a natural part of the discourse. However, Souter helpfully points out that “the Government freely admits... that it neither speaks through the expression subsidized by the NEA, nor buys anything for itself with its NEA grants,”<sup>221</sup> so it is clear that NEA funding does not fall within these categories. On the other hand, when the state interferes with the speech of private citizens – a context in which viewpoint and content discrimination are generally prohibited – it is, in the

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<sup>217</sup> *National Endowment for the Arts v. Finley*, 524 U.S. 569, 593 (1998) (Scalia and Thomas, J.J., concurring).

<sup>218</sup> *National Endowment for the Arts v. Finley*, 524 U.S. 569, 611 (1998) (Souter, J., dissenting).

<sup>219</sup> *Id.* at 611.

<sup>220</sup> Post, 153.

<sup>221</sup> *NEA v. Finley* (Souter, J., dissenting), 611.

words of Souter, taking on the role of “government-as-regulator-of-private-speech.”<sup>222</sup> According to the decision in *Finley*, though, in setting rules by which the NEA can choose which projects to fund, “the Government is acting as patron rather than as sovereign,”<sup>223</sup> thus conceptualizing government-as-patron as a separate class of speech.

Given this, the *Finley* decision hinged on the idea, first presented in *Rust*, that when the government is acting as a patron, there is a difference between regulating the internal workings of a government-funded organization, and regulating the speech received by members of the public. After noting that “even in the provision of subsidies, the Government may not ‘ai[m] at the suppression of dangerous ideas,’”<sup>224</sup> that “if a subsidy were ‘manipulated’ to have a ‘coercive effect,’ then relief could be appropriate,”<sup>225</sup> and that, “as the NEA itself concedes, a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive ‘certain ideas or viewpoints from the marketplace,’”<sup>226</sup> the Court determined that “the ‘decency and respect’ criteria do not silence speakers by expressly ‘threaten[ing] censorship of ideas.’”<sup>227</sup> Rather, in

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<sup>222</sup> *Id.* at 612.

<sup>223</sup> *NEA v. Finley.*, 589.

<sup>224</sup> *Id.* at 587.

<sup>225</sup> *Id.* at 587.

<sup>226</sup> *Id.* at 587.

<sup>227</sup> *Id.* at 583.

“admonish[ing] the NEA merely to take ‘decency and respect’ into consideration..., the legislation was aimed at reforming procedures rather than precluding speech.”<sup>228</sup>

In his article, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” law professor Meir Dan-Cohen suggests that, as the title implies, such a distinction might be thought of in terms of “decision rules” and “conduct rules” respectively. In other words, a conduct rule is “directed at the general public and provides guidelines for conduct,”<sup>229</sup> while a decision rule “is directed at... officials and provides guidelines for their decisions.”<sup>230</sup> As a thought experiment to explain this distinction, he introduces the idea of “acoustic separation” by imagining a world where the general public and the officials who make decisions for the members of the general public are placed in separate “acoustically sealed chamber[s].”<sup>231</sup> The members of the public would not hear internal directives to officials being given and vice versa – and thus, any law can be categorized based on the sealed chamber to which addressed.

While Dan-Cohen readily admits in the rest of the article that laws in the real world do not actually divide so cleanly, the distinction can still be useful when applied to the facts of *Finley*, as Post does in his “Subsidized Speech” article. Writing after the US Court of Appeals for the Ninth Circuit decided in favor of *Finley* and the others in 1996 in *Finley v. NEA* but *before* the Supreme Court reversed that ruling in

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<sup>228</sup> *Id.* at 582.

<sup>229</sup> Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” *Harvard Law Review* 97:3 (1984), 630.

<sup>230</sup> *Id.* at 630.

<sup>231</sup> *Id.* at 630.

1998, he raises the question of whether the decency clause should be characterized as “a conduct rule directly regulating public discourse or instead as a decision rule directing NEA officials to intervene in public discourse to achieve a distinct objective.”<sup>232</sup> He adds that that “it is noteworthy that the court in *Finley [v. NEA (1996)]* does not explore this question. It instead merely assumes that because artistic expression is part of public discourse, the decency clause ought to be regarded as equivalent to the regulation of public discourse.”<sup>233</sup> Reading the Supreme Court’s later decision, however, it is clear that they have adopted the decency clause as a textbook example of a decision rule, therefore categorizing it as permissible. As in *Red Lion Broadcasting Co. v. Federal Communications Commission (1969)*, which held that a decision-rule “fairness doctrine”<sup>234</sup> requiring public radio broadcasters to give equal airtime to all qualified candidates running for public office was constitutional because, among other reasons, “the right of the viewers and listeners” to hear all sides of a story was “paramount” over the “right of the broadcasters” to decide what they cover,<sup>235</sup> the decency clause, as a decision rule directed at internal government employees rather than as a conduct rule intending to limit the speech or conduct of the general population of grant applications, was similarly permissible.<sup>236</sup>

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<sup>232</sup> Post, 180.

<sup>233</sup> Post, 180.

<sup>234</sup> *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367, 369 (1969).

<sup>235</sup> *Id.* at 390.

<sup>236</sup> It is worth noting that while *Red Lion* is still technically good law in the eyes of the Supreme Court, the FCC has since removed the Fairness Doctrine of its own according, having decided that “the intrusion by government into the content of programming

Thus, such decision rules allow the government, while financially patronizing what would otherwise be considered public discourse, to place requirements on that discourse in ways that would be impermissible were that patronage removed.

So how might this apply to a potential government-funded national theater?

The idea of the government as a patron setting decision rules rather than conduct rules fits better than the idea of the government acting as an uninvolved (and uninvited) regulator in a pure realm of public discourse, or of the government taking on the role of speaker and using the national theater as a third-party mouthpiece. However, the match is not perfect. It is one thing to determine that the government can set specific rules and stipulations that would guide the leaders of a national theater towards the production of particular types of shows, but it is an entirely different thing to actually come up with suitable rules. In the case of the NEA, this is possible due to the high level of control provided by the application review process, and the fact that the decision rules in question can actually be applied directly *to a decision* whether or not to fund a particular project.

In a national theater context, however, the review process, if it existed at all (see Chapter 5 for my thoughts on how an American national theater might function), would not be so easily regulated. One of my key requirements for an American national theater is that, like the other national theaters surveyed in the first chapter, it

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occasioned by the enforcement of the fairness doctrine restricts the journalistic freedom of broadcasters and actually inhibits the presentation of controversial issues of public concern to the detriment of the public and the degradation of the editorial prerogative of the broadcast journalist.” (John Shu, “Fairness Doctrine,” *The Federalist Society for Law and Public Policy Studies*, 13 April 2009, accessed on 20 March 2014, available at <<https://www.fed-soc.org/publications/detail/fairness-doctrine>>.)

receive funding, not in the form of NEA or NEA-like grants, but through a direct appropriation from Congress, to better protect against fluctuations in the political climate as regards the funding of the arts and to make possible the implementation of longer-term projects and strategies than one-time grants might allow. This means that, unlike NEA grant recipients, the national theater would have the discretion to use its funds as it so chose, without the continuation of those funds being dependent on some criteria as evaluated by a National Arts Council or similar body. In other words, a national theater would not be on level of an NEA grant recipient, but on the level of the NEA itself, as an independent institution chartered and at least partially funded by Congress through an appropriation to be included in the general budget passed with each year. Although Congress would surely set various rules and stipulations regarding the use of appropriated funds, their enforcement would be complicated in a way not considered in *NEA v. Finley*. Thus, it is necessary to look beyond the government-as-patron domain for a more applicable realm of subsidized speech.

Another category of government speech involvement to consider arises when the government acts in a more managerial role. According to Post, who coined the concept, “within managerial domains, the state organizes its resources so as to achieve specified ends. The constitutional value of managerial domains is that of instrumental rationality, a value that conceptualizes persons as means to an end rather than as autonomous agents. Within managerial domains, therefore, ends may be imposed upon persons.”<sup>237</sup> In other words, this means that “the state must be able to regulate speech within managerial domains so as to achieve explicit governmental

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<sup>237</sup> Post, 164.

objectives.”<sup>238</sup> In supporting this theory, Post gives the example of *Rosenberger*, which essentially ruled that, in his words, “a public university is... a managerial domain dedicated to the achievement of education, and... [therefore] public universities routinely regulate the speech of faculty and students in ways required by that mission.”<sup>239</sup> When combined with the *Rust* standard that “the Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way” and that “in so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other,”<sup>240</sup> this essentially means that within the managerial domain the government has very broad powers to control the speech of those it manages.

Although this appears fairly straightforward, it would seem that different users of the government-as-manager theory each apply it differently – a problem that only gets more confusing when placed in context with the related ideas of government as regulator of public discourse, government as speaker, and government as patron. For example, Josh Paul Davis and Joshua D. Rosenberg, in their article “The Inherent Structure of Free Speech Law: Government as Patron or Regulator in the Student Speech Cases,” very strongly conflate the managerial domain with the government

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<sup>238</sup> Post, 164.

<sup>239</sup> Post, 165.

<sup>240</sup> *Rust v. Sullivan*, 193.

acting as employer,<sup>241</sup> and the role of the government as speaker with the role of the government as patron.<sup>242</sup> On the other hand, in his dissent in *Finley*, Souter very adamantly finds the idea of government-as-patron problematic because it is distinctly *not* the government speaking, stating that it “falls embarrassingly on the wrong side of the line between government-as-buyer or -speaker and government-as-regulator-of-private-speech.”<sup>243</sup> Making things even more complicated, Post, who published his relevant writing before *NEA v. Finley* was decided, does not even consider the domain of government-as-patron (which was essentially invented by the *Finley* decision), but unlike Davis and Rosenberg and certainly unlike Souter, groups situations that might now be considered patronage (such as NEA decisions) under the managerial domain.<sup>244</sup> Thus, for the purposes of clearing up any confusion, I will define these realms of subsidized speech as the following:

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<sup>241</sup> Josh Paul Davis and Joshua D. Rosenberg, “The Inherent Structure of Free Speech Law: Government as Patron or Regulator in the Student Speech Cases,” *University of San Francisco School of Law*, accessed on 20 March 2014, available at <<http://ssrn.com/abstract=1350625>>, 17-19.

While I cannot entirely refute the claim that employees of agencies under the managerial domain might be required, in some circumstances, to “act as government employees” rather than “as citizens” and therefore qualify for a higher level of government speech regulation (see *Garcetti v. Ceballos*, 547 US 410, 422 (2006)), there is still an important distinction between the managerial domain and the domain of government as employer. In the latter, the government can impose speech restrictions directly on individual persons in its employ, whereas in the former, the government imposes restrictions, not on individuals, but on institutions. This means that while the government can control the overarching rules governing an institution’s existence, it cannot regulate the speech of individual employees in the absence of an established statutory rule specifically allowing such interventions.

<sup>242</sup> *Id.* at 12-16, 22.

<sup>243</sup> *NEA v. Finley* (Souter, J., dissenting), 612.

<sup>244</sup> Post, 176-184.

Speech can be considered part of the *public discourse*, and therefore entitled to full First Amendment protection, when the government provides an indirect subsidy. These often take the form of allowing the use of government property or resources for speech-related activity, as with the public forum doctrine or the tax deductions on charitable donations.

Speech falls under the domain of government *patronage* when the government, in the form of a grant that is either given or not given according to some internal directive aimed at the allocators of the grant, gives money to a private individual or organization to engage in speech that, in the absence of such patronage, would otherwise be considered free public discourse protected by the First Amendment. Thus, while the government cannot control the *way* the money is spent once it is granted, it can place very specific content and viewpoint restrictions on the conditions in which the grant can be given in the first place, thus allowing a similar degree of control in a more permissible and less visible manner.

The *managerial* domain is very similar to that of patronized speech, the primary difference being that the recipients of the subsidies are not, strictly speaking, private players, but are rather institutions owned or operated by the government. This means that money flows directly from the government to the institution without an intermediary level of review (such as the NEA grant application process), thus taking away the choice to give or not give a grant. Any stipulations or rules about the use of money must therefore be included in the organization's founding legislation, or in the yearly bills that renew its appropriations. Thus, the government has a much stronger hand in the organization and rules of the institution, but a much weaker hand in

determining the specifics of how the institution spends its money on a daily basis. To further illustrate the distinction between the managerial domain and the domain of patronage, one can think of the NEA itself as falling within a managerial domain, but NEA grant recipients as being patronized by the government.

Lastly, *government speech* occurs when the government uses its power to put forth a message in a way that makes it clear that the views expressed are the government's own, thus allowing it to engage in the same kind of viewpoint and content judgments as would any other private speaker. To that end, it can choose to display any given monument over any other monument or can commission an advertising firm to disseminate an approved message without needing to give opposing voices equal funding and platforms of distribution. When the government speaks, it essentially has free reign to say whatever it likes and to defend whatever views it deems most appropriate, as long as in doing so, it does not attempt to "drive 'certain ideas or viewpoints from the marketplace.'"<sup>245</sup>

Amongst these four categories, I would argue that, for the reasons stated above, a national theater created and maintained by the government would be best categorized as within the managerial domain. By that set of rules, Congress would be allowed, without running afoul of the First Amendment, to maintain a degree of control over the content (and by extension, views) expressed by the national theater insofar as that control could be communicated through legislation. However, it would not be able to immediately and directly withdraw funding from specific projects or censor specific productions. Thus, the independence of the national theater from the

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<sup>245</sup> *Id.* at 587.

government would be maintained, while Congress would still be allowed some say in the overarching goals.

It is worth noting that, along with the NEA, there are a number of other arts organizations that fit or have fit this model. The Federal Theatre Project was one such model, in that it received subsidies directly from the government to be spent at its own discretion, according to laws set in advance. In many ways, though, the FTP provides a cautionary tale of the dangers of relying on this form of funding and oversight. Since the stipulations agreed upon at the FTP's founding generally had more to do with how money was spent as regards to work relief than it did with artistic and content requirements, the government did not leave itself very much room for negotiation when it found itself uncomfortable with some of the shows that were being produced. That said, the idea of spending money as related to the freedom of speech did not really come up in First Amendment jurisprudence until *Buckley v. Valeo* in the mid 1970s, and the government speech doctrine, which encompasses the precedents surrounding this way of categorizing and thinking about the First Amendment implications of subsidized speech, was not really codified until *Rust v. Sullivan* in the early 1990s, so it is difficult to speculate how the FTP would have been regulated had it been founded now, in a post-*Rust*, post-*Finley* world.

Another example would be the Kennedy Center for the Performing Arts, which is run as a separate institution on a yearly appropriation given to it by Congress and which, as mentioned in the previous chapter, was founded and (later) subsidized

to “present classical and contemporary music, opera, drama, dance, and poetry.”<sup>246</sup> However, as Post points out, “these criteria for the allocation of subsidies exclude political and academic speech.”<sup>247</sup> This exclusion is entirely permissible within the managerial domain, as it can very easily be categorized as a decision rule, and so the Kennedy Center is entirely free to refuse any such projects under the justification that it was merely working to achieve a stated government objective.

However, the Kennedy Center illustrates another potential problem with placing a national theater within the managerial domain. In excluding political and academic speech, Congress very easily removed from the equation most things that might be construed as controversial. Whereas such a stipulation might similarly save the imaginary national theater from controversy, it would also make it very difficult to justify in the eyes of the theater community. According to the adage most famously presented by theater artist and scholar Augusto Boal in his seminal book, *Theatre of the Oppressed*, “all theater is political,”<sup>248</sup> and so attempting to separate politics out of a theater organization charged with representing a highly distinctive and diverse nation would be impossible. This does not mean that all theater is, to use Bezanson’s term, propositional (“communicat[ing] intended messages or meanings to an audience”<sup>249</sup>) in terms of content, as not all theater needs to have an “intended

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<sup>246</sup> *Department of the Interior and Related Agencies Appropriations Act of 1991*, Public Law 101-512, *U.S. Statutes at Large* 104 (1990), 1963.

*National Culture Center Act*, 1699.

<sup>247</sup> Post, 179.

<sup>248</sup> Augusto Boal, *Theatre of the Oppressed*, trans. Charles A. & Maria-Odilia Leal McBride (New York: Theatre Communications Group, 1985), iv.

<sup>249</sup> Bezanson, 1596.

message,” but rather that it stands to be provocative in a way that might almost be considered propositional by virtue of the form. The act of doing theater – or, in other words, of getting up in front of a room of people and presenting a story through a lens framed by the political and social contexts of both the interior world of the show and the exterior world of the audience – is and always will be inherently a political act. Thus, such a stipulation could never be applied to an American national theater.

This in turn brings up the third problem raised by the second chapter – that of how to make a national theater that would be acceptable to Congress, to the arts and theater communities, and to the American citizenry at large, while still somehow maintaining some semblance of a “national” status. To answer this question, it is necessary to at least touch on an even more difficult one – what, in this context, does it mean to be “American”?

# Chapter Four:

## National Identity and National Theaters

### States and Nations

The question of American national identity – of what it means to be an American, historically and in today’s world – is a large enough question to fill three more theses and a book or two besides. In the interest of narrowing the problem at hand, it can be useful to define the term “nation” itself. Although many of us are inclined to equate “nation” with “country,” in the context of identity, the idea of “nations” takes on a more specific meaning.

Firstly, it is important to distinguish the concept of a “nation” from the concept of the “state,” because in the context of searching for a national identity, the terms cease to be interchangeable. Thus, I will draw on Ernst Gellner’s definition from his book, *Nations and Nationalism*, that “the ‘state’ is [the] institution or set of institutions specifically concerned with the enforcement of order,”<sup>250</sup> among other things, and on Montserrat Guibernau’s definition, as stated in her book, *The Identity of Nations*, that a state is “a political institution granting rights and imposing duties on its members.”<sup>251</sup> Taking these together, one can arrive at Jen Harvie’s definition from her book, *Staging the UK*, that simply, “a state is a political authority that asserts

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<sup>250</sup> Ernst Gellner, *Nations and Nationalism* (Ithaca: Cornell University Press, 1983), 4.

<sup>251</sup> Montserrat Guibernau, *The Identity of Nations* (Cambridge: Polity Press, 2007), 7.

power.”<sup>252</sup> Typically this implies some form of territorial boundary, outside of which the legitimate political authority of the state does not reach.

The nation, on the other hand, is slightly different. According to preeminent nationalism scholar Benedict Anderson, a nation can be defined as “an imagined political community – and imagined as both inherently limited and sovereign.”<sup>253</sup> He goes on to explain, very famously, that “it is *imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion,”<sup>254</sup> it is “imagined as *limited* because even the largest of them, encompassing perhaps a billion living human beings, has finite, if elastic, boundaries, beyond which lie other nations. No nation imagines itself coterminous with mankind,”<sup>255</sup> it is “imagined as *sovereign* because... nations dream of being free, and, if under God, directly so,”<sup>256</sup> and it is “imagined as a *community*, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship.”<sup>257</sup> For Gellner, it is this mutual comradeship that is important, and to that end, he offers a definition of his own, stating that

two men are of the same nation if and only if they *recognize* each other as belonging to the same nation... A mere category of persons (say, occupants of a given territory, or speakers of a given language, for example) becomes a nation if and when the members of the category firmly recognize certain

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<sup>252</sup> Jen Harvie, *Staging the UK* (Manchester: Manchester University Press, 2005), 2.

<sup>253</sup> Benedict Anderson, *Imagined Communities* (London: Verso, 1983), 6.

<sup>254</sup> *Id.* at 6.

<sup>255</sup> *Id.* at 7.

<sup>256</sup> *Id.* at 7.

<sup>257</sup> *Id.* at 7.

mutual rights and duties to each other in virtue of their shared membership of it. It is their recognition of each other as fellows of this kind which turns them into a nation, and not the other shared attributes, whatever they might be, which separate that category from non-members.<sup>258</sup>

He also posits that “two men are of the same nation if and only if they share the same culture, where culture in turn means a system of ideas and signs and associations and ways behaving and communicating.”<sup>259</sup> These two sentiments together are echoed in Guibernau’s conception of a nation as a “cultural community”<sup>260</sup> and in Harvie’s definition of a nation as a “*sense* that people share a culture.”<sup>261</sup> While some theorists see this sense as, in the words of Anderson, purely “horizontal,”<sup>262</sup> others add a temporal dimension as well. To that end, Guibernau includes within this shared culture a “collective memory... [that] emphasizes continuity over time,”<sup>263</sup> and introduces the idea that “the experience of sharing the present and a sense of mission, including a common project for the future, crucially reinforces the sentimental bond uniting fellow nationals.”<sup>264</sup> Thus, by this conception, “the *sense* that people share a culture”<sup>265</sup> can be joined by the *sense* that people share a history as well.

Thus, while states and nations certainly interact, they are not always identical, and do not always share the same geographical boundaries. Occasionally they do – this is the dream of the “nation-state,” in which the political leadership of the state

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<sup>258</sup> Gellner, 7.

<sup>259</sup> *Id.* at 7.

<sup>260</sup> Guibernau, 7.

<sup>261</sup> Harvie, 2.

<sup>262</sup> Anderson, 7.

<sup>263</sup> Guibernau, 173.

<sup>264</sup> *Id.* at 174.

<sup>265</sup> Harvie, 2.

“base[s] its legitimacy upon the idea that it represents the nation.”<sup>266</sup> However, it is also entirely possible to imagine a nation without a state – such as Jewish culture, which recognizes itself as a single nation despite being spread out across the globe. Similarly, one can also imagine a state with multiple nations contained within its political sphere and geographical – as in any state that, like the modern United States, does not aggressively pursue an agenda of assimilation of the immigrants that pass its borders. Because of this distinction, one can define citizenship as membership in a state, and national identity – “the collective sentiment based upon the belief of belonging to the same nation and of sharing most of the attributes that make it distinct from other nations”<sup>267</sup> – as the equivalent marker of membership in a nation.

In thinking about the United States, it is readily apparent that the 50 individual states and associated territories are, together, a single political state that asserts and imposes duties, grants rights, and exerts political authority over its citizens. It is also apparent that those citizens imagine themselves as a single nation, as evidenced by, among other things, the proliferation of “Proud to be an American!” bumper stickers, songs, and campaign advertisements. This can also be seen in the survival of our volunteer military, which is made up of individuals choosing to risk their lives for a community of people they will never personally know, and, if the temporal dimension is added, the past and future versions of the same community. However, since “citizenship is separated from every sort of particularism [and] the state is nationally, ethnically, racially, and religiously neutral,” at least in theory, the United States

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<sup>266</sup> Guibernau, 61.

<sup>267</sup> *Id.* at 11.

leaves open the possibility for citizens – members of “America-the-state” – to choose not to identify with America-the-nation. Similarly, it is possible that some of those individuals who identify with the American nation are not citizens – one need only look at the testimonies and articles surrounding the DREAM (Development, Relief, and Education for Alien Minors) Act for proof of that. Yet in spite of all of this, those who identify as American are still likely to recognize each other and themselves as belonging to the same nation-state. Thus, any institution that, like a national theater, would aspire to be truly national in the United States must be prepared to face the question of how and why this seemingly unlikely act of recognition and self-definition happens. While the question may not necessarily need to be answered, it is only by asking it that a national theater could achieve the goal of representing the United States, not just as the citizenry of a state or as a group of political subjects, but as the unique and diverse nation that it is.

### **What is the American National Identity?**

As with all such questions, the virtual impossibility of finding an answer does not stop scholars and academicians from trying to develop one anyway. Thus, in surveying American national identity theory, there are two generalizations that stand out. The first is that the United States is, variously, “a nation of immigrants,”<sup>268</sup> a “nation of nationalities,”<sup>269</sup> and a “union of otherwise unrelated ‘natives.’”<sup>270</sup> By this

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<sup>268</sup> Samuel P. Huntington, *Who Are We? The Challenges to American’s National Identity* (New York: Simon & Schuster, 2004), 37.

<sup>269</sup> Michael Walzer, *What It Means to Be an American* (New York: Marsilio Publishers Corp., 1992), 12.

reckoning, to be American is to be something else as well. Michael Walzer, a great supporter of cultural pluralism, sees support for this idea in the Great Seal of the United States, which reads *E pluribus unum*, and which, to him, can be understood to mean “not only *From many, one*, but also *Within one, many*.”<sup>271</sup> The second generalization is that the United States is “defined by and united by [its] commitment to the political principles of liberty, equality, democracy, individualism, human rights, the rule of law, and private property.”<sup>272</sup> Supporters of this definition of American identity, which stems largely from the 1918 document called the “American’s Creed,”<sup>273</sup> also assert that “we are the only modern nation founded on an idea,”<sup>274</sup> and that, unlike other nations that have “ethnic and ethno-cultural identities,” Americans have a “‘civic’ national identity... [that] is said to be more liberal, more

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<sup>270</sup> *Id.* at 26.

<sup>271</sup> *Id.* at 62.

<sup>272</sup> Huntington, 46.

<sup>273</sup> Having made it through 20 years of education in the US without learning that such a statement of American identity and principles existed, I will include the full text here. The Creed, as written by John Tyler Page and passed by the House of Representatives in 1918, reads: “I believe in the United States of America as a government of the people, by the people, for the people; whose just powers are derived from the consent of the governed; a democracy in a republic, a sovereign nation of many sovereign states; a perfect union, one and inseparable; established upon those principles of freedom, equality, justice, and humanity for which American patriots sacrificed their lives and fortunes. I therefore believe it is my duty to my country to love it, to support its constitution; to obey its laws; to respect its flag; and to defend it against all enemies.” (“The American’s Creed,” *Publications.USA.gov*, accessed on 6 April 2014, available at < <http://publications.usa.gov/epublications/ourflag/creed.htm>>).

For an equivalent text proclaiming loyalty and political allegiance to America-the-*state*, see the text of the Naturalization Oath of Allegiance to the United States (“Naturalization Oath of Allegiance to the United States,” *U.S. Citizenship and Immigration Services*, 4 September 2012, accessed on 8 April 2014, available at < <http://www.uscis.gov/us-citizenship/naturalization-test/naturalization-oath-allegiance-united-states-America>>).

<sup>274</sup> Mary E. Stuckey, *Defining Americans: The Presidency and National Identity* (Lawrence, KA: The University Press of Kansas, 2004), 12.

principled, more civilized than those tribally defined societies.”<sup>275</sup> Drawing on a similar idea based on a different text, Gary Jacobsohn mentions in his book, *Constitutional Identity*, that it has become “commonplace”<sup>276</sup> to view the Constitution “as the embodiment of the political ideas that provide definition to the nation [and are] constitutive of the [American] society.”<sup>277</sup>

These two definitions together arrive at the idea that the United States is a “political nation of cultural nationalities”<sup>278</sup> – a community that imagines itself to be united by political principles, rather than by physical or geographical traits. However, this definition of American identity is problematic in that, unlike citizenship, it can technically apply to anyone in the world. As Mary E. Stuckey points out in her book, *Defining Americans: The Presidency and National Identity*, “to admit universal equality is to erase the boundaries that define [the American] national community. If all men are truly created equal... then they are all also created at least potentially American, an interpretation that then renders the concept ‘American’ ambiguous if not meaningless.”<sup>279</sup> This, of course, violates Anderson’s stipulation that nations must be limited and *not* “coterminous with mankind,”<sup>280</sup> and renders it rather less useful in identifying the traits that might be represented by a specifically *American* national theater. Before accepting this definition as fact, then, I think it is useful to look at

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<sup>275</sup> Huntington, 47.

<sup>276</sup> Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge, MA: Harvard University Press, 2010), 206.

<sup>277</sup> Jacobsohn, 206.

<sup>278</sup> Walzer, 9.

<sup>279</sup> Stuckey, 13.

<sup>280</sup> Anderson, 7.

some of the other standard markers of national identity, and see if they can be applied, at least in part, to the United States. In his book, *Who Are We? The Challenges to America's National Identity*, Samuel P. Huntington conveniently breaks the concept of national identities in general down into its component parts. Thus, “national identity usually but not always includes a territorial element and may also include one or more ascriptive (race, ethnicity), cultural (religion, language), and political elements.”<sup>281</sup>

As far as the territorial aspects go, Americans, at least according to Huntington, have, for a nation in possession of its own political state, very little attachment to place. Throughout our whole history, Americans have generally not “linked themselves as a people to an particular national site as the unique embodiment of their identity... nor have Americans to the same extent as other peoples identified themselves with the overall territory they inhabit.”<sup>282</sup> To Huntington, this is indicative of “the extent to which Americans identify their country not with place but with political ideas and institutions.”<sup>283</sup> It is worth noting, however, that this description only addresses “national sites” and the “overall territory” and not geographic identities on a subnational (local) level. While Americans may not tend to identify with the territorial United States as a whole, local geographical identities are still very strong. This can be seen, for example, in the fact that in the past quarter century, Alabama, Georgia, Florida, Louisiana, Mississippi, Texas, and Virginia have

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<sup>281</sup> Huntington, 30.

<sup>282</sup> *Id.* at 50-51.

<sup>283</sup> *Id.* at 51.

all issued proclamations or passed pieces of legislation declaring the month of April to be Confederate History Month, citing it, in the words of one Georgia state senator, as “no different... from Black History Month,”<sup>284</sup> even while “the mention of the Confederacy is a painful reminder of the atrocities of slavery”<sup>285</sup> for many Americans in other parts of the country. Thus, one can see, within the political-ideology-based national identity Huntington describes, a more localized, sub-national identification with place that varies in form in different areas of the country.

A corresponding trend can be seen in the ascriptive, cultural, and political domains. Huntington describes an America that “[feels] very passionate about race and ethnicity,”<sup>286</sup> and historically, this is undoubtedly true – as Guibernau points out, “for a long time, being ‘white’ was considered as a prerequisite for being truly American.”<sup>287</sup> Similarly, according to Huntington, in spite of the fact that Americans like to think of themselves as a diverse nation of immigrants, “it seems probable that at no time in American history has a majority of Americans favored the expansion of immigration,”<sup>288</sup> especially when the immigrants in question were non-white. These pieces of evidence, then, seem to challenge the idea that there is no singular American racial or ethnic identity. However, Huntington also makes the point that the salience

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<sup>284</sup> Dahleen Glanton, “Southerners Share Confederate History,” *Chicago Tribune*, 22 March 2009, accessed on 6 April 2014, available at <[http://articles.chicagotribune.com/2009-03-22/news/0903210133\\_1\\_confederate-flag-confederate-history-month-sons-of-confederate-veterans](http://articles.chicagotribune.com/2009-03-22/news/0903210133_1_confederate-flag-confederate-history-month-sons-of-confederate-veterans)>.

<sup>285</sup> *Id.*

<sup>286</sup> Huntington, 53.

<sup>287</sup> Guibernau, 120.

<sup>288</sup> Huntington, 329.

of race and ethnicity in the overall identity of the United States is fading in the face of a more multicultural outlook. His book largely defends the idea that the values voiced by the American's Creed are inherently Anglo-Protestant in nature, and he sees the rise of multiculturalism<sup>289</sup> and a general trend towards a bilingual culture (due to increased influence of the Hispanic community) as a threat to this ideal. This is mitigated somewhat by the fact that, as Guibernau points out, the United States has not adopted a completely multicultural outlook, but instead tends towards what she calls "laissez-fair multiculturalism... [in which] ethnic communities are accepted but the state does not take upon itself the task of ensuring social justice or supporting ethnic diversity."<sup>290</sup> Still, even this less affirmative conception of multiculturalism lends to the creation of further subnational identities. Just as an overarching territorial identity has been replaced (if it ever existed in the first place) by a much more localized territorial identity, so too has a seemingly singular racial and ethnic definition of "American national identity" been replaced with increasingly numerous and salient sub-national identities.

Huntington and Guibernau present these points alongside the beliefs that this trend is indicative of the weakening of a previously existing singular national identity. However, in the context of attempting to form a truly "national" national theater, I do not see the increased salience and influence of these subnational groups (or nations, in the Andersonian sense) as in any way problematic, and instead agree with Jacobsohn,

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<sup>289</sup> Multiculturalism can be defined as the idea that "immigrants should be granted equal rights in all spheres of society, without being expected to give up their diversity, although usually within an expectation of conformity to certain key values." (Guibernau, 67)

<sup>290</sup> *Id.* at 67.

who states that “to anoint one ideal over another... is an arbitrary intrusion into a constitution process which, properly conceived, should not be identified with a specific... agenda.”<sup>291</sup> To that end, I view these different identities as indicators of the form such an institution must take. While in the past the situation may have been different, any truly national American national theater must now take into account the existence of these groups, and seek to serve them as co-equal parts of the American nation rather than ignoring their unique identities and cultural differences and attempting to homogenize what it means to be a self-identified member of the United States. In this way, a national theater would be in a position to truly respect and represent a nation that is united by a political ideology of equality and liberty, but very diverse in terms of the form and salience of almost all other characteristics. Thus, perhaps Walzer is right when he posits that “America has no singular national destiny – and to be ‘American’ is, finally, to know that and to be more or less content with it.”<sup>292</sup>

### **National Identity Through the Lens of American Federalism**

While these somewhat lofty and idealistic conceptions of what it means to be American have a good deal of appeal in a theoretical sense, one can see how grouping so many sub-national identities under a single artistic institution might prove exceedingly challenging. However, there is a precedent for such undertakings, as evidenced by none other than the American system of government itself. Whether the

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<sup>291</sup> Jacobsohn, 104.

<sup>292</sup> Walzer, 49.

idealistic national identity or the institutional makeup of the country came first is debatable, but either way, one can find a surprisingly functional solution to this problem in the unique system of American federalism.

As Americans come to see themselves as increasingly defined and united by their ideals, institutions, and systems of government, it is interesting to note that the idea of federalism itself – that the government can and should respect local differences while still being able to act on a national level – has become an integral part of that national identity. Thus, it is no surprise that in *Younger v. Harris* (1971), Justice Black identified “Our Federalism”<sup>293</sup> as “[occupying] a highly important place in our Nation's history and its future.”<sup>294</sup> In somewhat less complimentary terms, Edward L. Rubin and Malcom Feeley refer to federalism as “America’s neurosis”<sup>295</sup> While they ultimately go on to denounce American federalism as failing to achieve its goals of respecting various local needs while still operating effectively on a national level, they still note that “it is part of our collective psychology, and we proclaim its virtues out of the universal desire for self-justification.”<sup>296</sup>

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<sup>293</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>294</sup> *Id.* at 45.

<sup>295</sup> Edward L. Rubin and Malcom Feeley, “Federalism: Some Notes on a National Neurosis,” *UCLA Law Review* 41 (1994): 908.

<sup>296</sup> *Id.* at 908. There is obviously a rich literature on the importance of federalism in American culture. For more information, see Daniel J. Elazar, *American Federalism: A View from the States* (New York: Thomas Y Crowell Company, 1966); Herbert J. Storing and Murray Dry, eds., *The Complete Anti-Federalist* (Chicago: The University of Chicago Press, 1981); Walter Bennett, *American Theories of Federalism* (Tuscaloosa: University of Alabama Press, 1964). For a different understanding of federalism as relates to the idea of American national identity, see Sotirios A. Barber, *The Fallacies of States’ Rights* (Cambridge, MA: Harvard University Press, 2013).

So how does this concept of federalism affect the definition (or lack thereof) of American national identity? Justice O'Connor provides a very neat justification for American federalism in her majority opinion in *Gregory v. Ashcroft* (1991), stating that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry."<sup>297</sup> For the question of national identity, it is this first tenet that is clearly the most important, in that it lays the groundwork for not only a "national" recognition of multiculturalism and heterogeneity amongst the American population, but also includes provisions whereby the government can and should support those various identities. Given that it is generally assumed within the field of identity theory that nation-states "[select] and... [impose] the culture and language of the dominant group within its territory and [seek] to create a single nation out of the various nations or parts of nations forming it,"<sup>298</sup> the United States government, in using federalism as a means of acknowledging that American society *is* heterogeneous, appears to come out in support of this kind of diverse national identity. Since this type of heterogeneous identity is exactly what a national theater should seek to acknowledge, perhaps federalism can suggest a convenient model for such an institution, to be formed under its purview.

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<sup>297</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

<sup>298</sup> Guibernau, 23.

However, federalism as a system of promoting sub-national identities does have two significant shortcomings that are important to address. The first has to do with federalism as a means of creating or allowing for variation between the states. Because of federalism, the argument goes, states are able to experiment with policies that might match the needs of one state's population better than a similar program as designed on a national level. As Justice Brandeis stated in his dissent in *New State Ice Co. v. Liebmann* (1932), "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>299</sup> Similarly, if the policy turns out to be a mistake, federalism will assist in containing that mistake to a small area, thus potentially preventing it from being implemented nationally.<sup>300</sup> However, Rubin and Feeley point out that, phrased a different way, this setup can actually be problematic for state citizens living under such a "mistake," because "federalism also increases the likelihood of such mistakes by insulating states, or localities within states, from the countervailing power of the federal government"<sup>301</sup> – a problem only increased when combined with the difficulties of objectively determining whether or not any given policy constitutes a mistake. Thus, if a state implements a policy that the federal government finds to be problematic or a "mistake" in a domain reserved for the states by the Constitution – here it should be noted that Rubin and Feeley assume that the federal government, more than the

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<sup>299</sup> *New State Ice Co. v. Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting).

<sup>300</sup> Rubin and Feeley, 919n67.

<sup>301</sup> *Id.* at 934n107.

individual state governments, generally acts on the wishes of the nation as a whole<sup>302</sup> – then the federal government will be powerless to change it or intercede on behalf of that state’s citizens. This possibility is somewhat lessened under a system of cooperative federalism than it might have been under the pervious system of dual federalism, but still, the risk remains.

The second shortcoming goes back to the idea of communities as “group[s] of people linked by a common bond that plays a central role in their existence”<sup>303</sup> and “determines who [they] are... the context in which [they] exist and which gives meaning to [their] actions”<sup>304</sup> One of the most oft-touted achievements of American federalism is its ability to foster these communities across the country, without imposing one community identity on everyone. However, since federalism is directed at federal-state interactions, it still encounters the problem that most state communities, like national communities, tend to be imaginary. In other words, state populations are still too large to function as single unified communities with single identities, thus rendering them little more than slightly smaller but equally diverse “nations,” each containing a wealth of sub-national groups with identities of their own.

For these two reasons, I think it is important to draw a distinction between a national theater that take places *within* the American federalist government, and one that would simply take its principles of decentralization and apply them to a new

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<sup>302</sup> *Id.* at 948-949.

<sup>303</sup> *Id.* at 936.

<sup>304</sup> *Id.* at 936.

institution. In my mind, the former case would imply a program that, not unlike the block grants programs<sup>305</sup> popularized by the Nixon administration in the early 1970s, called on the federal government to hand out sums of money to state governments for the establishment of individual state branches of a new American National Theater. In that instance, I believe that the two problems with American federalism as described above might prove highly detrimental to the success of the organization. Proponents of block grants programs view them as a means of “increas[ing] government efficiency and program effectiveness by redistributing power and accountability through decentralization and partial devolution of decision-making authority from the federal government to state and local governments.”<sup>306</sup> This could certainly apply to a national theater run on similar principles – in leaving the power to make decisions about national theater rules and programming up to individual state governments, a good deal of federal bureaucracy might be avoided, and at least in theory, state governments might succeed in responding individualistically to the people of each state in ways that a purely national body might not.

However, just as detractors from the block grants program argue that “the decentralized nature of block grants makes it difficult to measure block grant

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<sup>305</sup> According to a Congressional Research Service report on various types of federal grants to states, “Block grants are a form of grant-in-aid that the federal government uses to provide state and local governments a specified amount of funding to assist them in addressing broad purposes, such as community development, social services, public health, or law enforcement. Although legislation generally details the program’s parameters, state and local governments are typically provided greater flexibility in the use of the funds and are required to meet fewer administrative conditions than under categorical grants.” (Robert Jay Dilger and Eugene Boyd, “Block Grants: Perspectives and Controversies,” *Congressional Research Service*, 26 June 2013, accessed on 6 April 2014, available at < <https://www.fas.org/sgp/crs/misc/R40486.pdf>>, 1.)

<sup>306</sup> *Id.* at 1.

performance and to hold state and local government officials accountable for their decisions,”<sup>307</sup> so too might a national theater organization find it difficult to regulate the operations of individual state branches. This in turn opens the door to the problem, mentioned above, of “mistakes” made by state governments with regard to their individual national theater branches remaining isolated from federal intervention and assistance. This quandary might also run afoul of the federal government’s desire to control the speech put forth by the national theater, as Congress would have markedly less managerial oversight over organizations operated by individual state governments than it would over similar institutions that, like the Smithsonian, it chartered and ran directly. Therefore, I think a federalist block grant program, along with being potentially less effective, would also be a tougher sell to Congress.

Similarly, different state governments view the funding of the arts with varying levels of import and value – a fact which can be seen most readily by the huge variation in funds granted by state arts agencies to their respective constituents. In fiscal year 2012 ranged from approximately \$32.6 million (New York) and \$24.4 million (Minnesota) at the upper end to approximately \$730,000 (Idaho) and \$507,000 (Maine) at the lower end.<sup>308</sup> As such, leaving the formation and operation of a national theater up to the states might leave some areas of the country less well served than others. While the traditional federalism answer to that complaint would be that states should be free to choose for themselves whether they want a national

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<sup>307</sup> *Id.* at 2.

<sup>308</sup> “State Arts Agency Grant Making and Funding,” *National Assembly of State Arts Agencies*, August 2013, accessed on 6 April 2014, available at <[http://www.nasaa-arts.org/Research/Grant-Making/2013\\_grant\\_making\\_and\\_funding.pdf](http://www.nasaa-arts.org/Research/Grant-Making/2013_grant_making_and_funding.pdf)>, 5.

theater presence or not, I find that answer to be unacceptable in this particular instance. Especially in light of the fact that American national identity is so heavily drawn from our system's ability to accept the nation's differences, the only way a national theater can be truly national in the United States would be if it were made equally available to people in artistically well-served states like New York and Minnesota, and to people in Idaho and Maine. This does not mean that a national theater should impose the same national standard of *identity* on the citizens of all four states, but simply that members of all states should have the equal opportunity to see their individual, localized identities explored and staged by a national theater. If that involves increased levels of federal administrative involvement, which might in turn come with increased levels of federal oversight of content, that is a sacrifice I'm willing to make in the interest of ensuring equal (and individual) national theater access to people all around the country. Since there are other ways of addressing national identity on subnational levels, and, as Rubin and Feeley point out, "our ethnic and cultural differences do not correspond to geographic sections of the country,"<sup>309</sup> I do not believe organizing a national theater *within* the standing structure of American federalism is the best way to proceed.

On the other hand, there is great promise in the idea of a national theater that is chartered and operated by the federal (as opposed to individual state) government, but that takes federalism as its starting point. In other words, in order to operate effectively as a unified organization even while its branches were dispersed throughout the country, the national theater would need to be an institution separate

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<sup>309</sup> Rubin and Feeley, 945.

from the rest of the government, with its own internally “federalist” hierarchy and bureaucratic structure. In allowing the national branch to police regional interactions without being constrained by the checks placed on federal-state governments by the Constitution, this would help the national to avoid the “insulated mistake” problem discussed above. Similarly, by operating on a regional basis, such an organization would be able to better tailor its programming to the various subnational identities that exist all across the country but don’t necessarily conform to state borders. In this way, and potentially only in this way, do I think that the problem of representing the United States through theater could be solved.

### **One Last Case Study, and Some Final Thoughts on National Identity**

Looking at other national theaters, it is worth noting that very few adopt this decentralized style of organization. Following the definition I developed in my first chapter, a national theater must:

(a) be founded or remade by or with significant involvement from its nation’s government;

(b) receive significant and direct funding from the nation’s federal government in a manner such that, while the amounts might be renegotiated every year, the fact that it will receive funding is assumed; and

(c) have the stated goal of representing its nation through theater and/or of performing theater representative of its nation.

All three of the nations with archetypical national theaters (or national theater systems) I presented in order to form that definition – France, Austria, and the United

Kingdom – satisfy its requirements by having grand buildings in their respective nations’ capital cities, each with their own repertory companies. There are, of course, differences between the three – Austria and the United Kingdom each have one national theater apiece while France has five; the national theaters of France and Austria receive nearly all of their funding from their respective governments, while the United Kingdom receives subsidies from the government but earns back most of its running costs through donations and ticket sales; France and the UK fund their theaters directly via a Ministry of Culture or an Arts Council respectively, while Austria’s national theater is funded via a limited liability company, which is in turn funded by a holding company owned, operated, and funded by the Austrian government – but the general of model of “cultural institutions located in monumental buildings as symbols of national power”<sup>310</sup> remains the same.

It is similarly worth noting that, although the United States does not have and has never had a national theater that fits my definition, the Federal Theatre Project, (discussed in Chapter Two, above), our closest effort so far at such an institution, adopted a program somewhere in between the standard building-based centralized model and a truly decentralized organization. Most academic commentary on the Federal Theatre Project focuses (as I did) on its unique status in the history of American arts funding as a relief organization first, and an arts organization second. In this context, it is interesting that these goals led the FTP to base its operations, not

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<sup>310</sup> Peter Duelund, “The Impact of the New Nationalism and Identity Politics on Cultural Policy-Making in Europe and Beyond,” *CultureWatchEurope Think Piece*, accessed on 6 April 2014, available at <[http://www.coe.int/t/dg4/cultureheritage/cwe/CWE-TP-Duelund\\_en.pdf](http://www.coe.int/t/dg4/cultureheritage/cwe/CWE-TP-Duelund_en.pdf)>, 5.

out of single great theater building in a big city center, but out of five “great regional theatres”<sup>311</sup> in Boston (for the Northeast), Chicago (for the Midwest), Los Angeles (for the West), and New Orleans (for the South, although this one very quickly relocated to Atlanta). The fifth, New York, was deemed large enough (and containing enough unemployed theater workers on the relief rolls) to require its own center. Each of the four regional theaters (New York is generally not counted when discussing FTP regions) was charged with independently “develop[ing] locally relevant theatre and [serving] as a resource for the smaller cities and rural areas surrounding it.”<sup>312</sup> In fact, Flanagan herself stated that “the plan was based on that of the federal government itself: the general policy and program would be outlined in Washington, but the carrying out, with modifications dictated by local conditions, would rest with the states.”<sup>313</sup> While these regional centers were indeed involved in a good deal of coordination outside of their respective cities, within those cities, they each independently took on roles very similar to the European building-based model.

In recent years, the building-based model of national theater has come under attack by theater directors, critics, audiences, and scholars alike for inadequately representing their respective nations, to the point where theater scholar Dragan Klaić, in his essay “National Theatres Undermined by the Withering of the Nation-State,” posited that “the term National Theatre has become a rather arbitrary, almost

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<sup>311</sup> Flanagan, 21.

<sup>312</sup> Elizabeth A. Osborne, *Staging the People: Community and Identity in the Federal Theatre Project* (New York: Palgrave Macmillan, 2011), 5-6.

<sup>313</sup> Flanagan, 23.

meaningless label, an anachronistic, exhausted ideological construct.”<sup>314</sup> There is, however, one national theater that has eschewed a central building. Instead, it follows a much more decentralized approach to representing its nation, thus making it a better model for the United States than any of the aforementioned institutions. This national theater – the first of its kind in terms of organizational structure and bureaucratic layout – is the National Theatre of Scotland (NTS).

The NTS is still extremely new in comparison to other national theaters, in part because Scotland, a part of the United Kingdom, did not have its own Parliament until it formally devolved from the British government with the passing of the Scotland Act 1998. Within the year, the Federation of Scottish Theatres, which represented all professional theatres and theatre groups in Scotland, formally presented a plan for a national theatre to the new government. This in turn resulted in a report being issued by Scotland’s Education, Culture and Sports Committee, which officially designated funds towards a fledgling national theater. The Scottish Arts Council – which predated the devolution movement, having been founded in 1994 when the Arts Council of Great Britain was disbanded and restructured – was initially skeptical, fearing that the proposal might get in the way of subsidies given to preexisting theaters. However, once those fears were assuaged, they threw their support behind the initiative as well.<sup>315</sup> The new Scottish executive agreed to in theory fund such a company, and in 2000, the Education, Culture, and Sport

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<sup>314</sup> Dragan Klaic, “National Theatres Undermined by the Withering of the Nation-State,” in *National Theatres in a Changing Europe*, edited by S. E. Wilmer. (New York: Palgrave Macmillan, 2008), 220.

<sup>315</sup> Robert Leach, “The Short, Astonishing History of the National Theatre of Scotland,” *New Theatre Quarterly* vol. 23:02 (2007), 173.

Committee of the Scottish Parliament issued a report that, among other things, formally set aside further funds for the project.<sup>316</sup> In late 2003 and early 2004, a Board of Directors was announced and English theater practitioner Vicky Featherstone was appointed as Artistic Director and Chief Executive. In 2006, less than ten years after the formal founding of Scotland's parliament, the NTS opened for its inaugural season, producing an astonishing 28 shows in 62 different locations within its first year of operation.<sup>317</sup> Thus, it fits the first requirement – that it be founded by the government of the nation it seeks to represent.

In terms of funding, the NTS operates much more similarly to the Royal National Theater in London than to the national theaters of mainland Europe, receiving a modest subsidy from the Scottish government, and making up the rest of its running costs through ticket sales, donations, and royalties. For its first season, it was funded through the Scottish Arts Council, although in April of 2007, the NTS and other Scottish national companies (the Royal Scottish National Orchestra, the Scottish Chamber Orchestra, the Scottish Ballet, and the Scottish Opera) changed “to a direct funding relationship with the Scottish government.”<sup>318</sup> For the 2010-2011 season, these five bodies received £24.51 million in government subsidies (\$40.66

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<sup>316</sup> “Report on Inquiry into the National Arts Companies,” *Education, Culture and Sport Committee*, Session 1 (2000), accessed on 6 April 2014, available at <<http://archive.scottish.parliament.uk/business/committees/historic/education/reports-00/edr00-01-01.htm#sec4>>.

<sup>317</sup> “Funding Allocations of the National Companies,” *The Scottish Government*, accessed on 6 April 2014, available at <<http://www.scotland.gov.uk/Topics/ArtsCultureSport/arts/Archive/NationalCompanies>.

<sup>318</sup> *Id.*

million), of which £4.55 million (\$7.55 million) went to the NTS.<sup>319</sup> The companies also received an additional \$350,000 to assist with international touring,<sup>320</sup> which is a large part of Scotland’s national cultural institutions movement.<sup>321</sup> Interestingly, as a part of their funding agreements with the Scottish government, the five national companies must each “demonstrate that they have endeavoured to achieve a year-on-year increase in private sponsorship and other non-public income, together with a genuine corporate commitment to developing this avenue of funding and thereby reducing the proportion of the Company's income from the public purse,” although I cannot find any references to an ultimate goal of ending the program of public funding for national companies altogether. Thus, the NTS fits the second requirement of my definition of national theaters – continuous public funding – as well.

It is with regard to the third part of my definition – that national theaters must seek to represent their nations through theater, or must produce theater representative of their nations – that the NTS begins to distance itself from other national theaters. So far, the various theaters I have discussed have largely followed the second option and aimed to produce “representative” theater by celebrating their nations’ pasts, producing classics, and running various classical training programs. The NTS, however, takes a different interpretation, choosing not to answer or even directly ask the questions of what exactly defined the Scottish nation. Thus, the “National Theater

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<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> “Criteria for Attaining and Maintaining Status as a National Performing Company,” *The Scottish Government*, accessed on 6 April 2014, available at <<http://www.scotland.gov.uk/Topics/ArtsCultureSport/arts/Archive/NationalCompanies/Criteria>>.

of Scotland's Manifesto," as written by founding director Vicky Featherstone, states the organization's unique goals and means of achieving them as follows:

The National Theatre of Scotland has no building; there has been no great capital project involving architects and contractors. Instead, we are taking theatre all over Scotland, working with the existing venues, touring and creating work within the theatre community. We have no bricks-and-mortar institutionalism to counter, nor the security of a permanent home in which to develop. All our money and energy can be spent on creating the work. Our theatre will take place in the great buildings - Edinburgh's Royal Lyceum and Glasgow's Citizens - but also in site-specific locations, community halls and sports halls, car parks and forests.

As well as producing our own work, we will collaborate with the best companies and individuals working here already. We will travel all over Scotland taking work to school and communities, offering plays for adults, young adults and family theatre. We will be able to create large-scale work, music and spectacle. There will be opportunities for our great playwrights to write big, important plays and to do new versions of those which have not been seen in Scotland for many years. This will create parts for the great Scottish actors spread over the world and at home. We will tour internationally and bring international work into Scotland.

We have spent many hours debating the notion of a "national theatre" and the responsibility that entails. It is not, and should not be, a jingoistic, patriotic stab at defining a nation's identity through theatre. In fact, it should not be an opportunity to try to define anything. Instead, it is the chance to throw open the doors of possibility, to encourage boldness. I hope our programme goes some way to realising these ambitions. I hope we will make Scotland proud.<sup>322</sup>

Thus, the NTS, unlike the other national theaters, adamantly did not, in the words of Jen Harvie, try to "impose a uniform Scottish identity or theater practice, but instead [facilitated] the articulation of different groups; identities, experiences, and theatre practices, and, even, different groups' Scotlands."<sup>323</sup> This, to me, is the best

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<sup>322</sup> "The National Theatre of Scotland's Manifesto," *National Theatre of Scotland*, accessed on 6 April 2014, available at <[http://web.archive.org/web/20120305143121/http://www.nationaltheatrescotland.com/content/default.asp?page=s7\\_7](http://web.archive.org/web/20120305143121/http://www.nationaltheatrescotland.com/content/default.asp?page=s7_7)>.

<sup>323</sup> Harvie, 32.

embodiment of what I referred to above as representing an *entire* nation through theater, which it accomplished only by admitting that the task is, in a word, impossible. A single national identity cannot be defined by theater, just as, particularly in the United States, it cannot be singly defined with the intent of building a theater around that definition. However, in giving up the goal of crafting a definition of a preexisting identity, national theaters – and by extension, culture in general – can assist in the creation of such a nationally imagined communities.<sup>324</sup>

This hints at one last relationship between nation, culture, and national identity, one that is less prevalent amongst the social scientists studying the subject, but which has become a central tenet of the theory as viewed by national theater scholars. While Benedict Anderson champions print culture and newspapers as primary cultural uniting forces, these theorists (many of them already mentioned in this thesis) argue that “the assembly of actual material bodies in the theater is a more potent invocation of a nation”<sup>325</sup> than Anderson’s alternatives. In other words, theater, and in particular, national theaters, have the unique and powerful ability to imagine

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<sup>324</sup> It is worth noting, perhaps, that Scotland, as a part of the United Kingdom, is engaged in a federal system of its own. Just as Scotland, in devolving from the UK, asserted its right to formulate its own “local” identity as distinct from that imposed upon it by the British Parliament, so to did the NTS reject the centralized and top-down formulation of identity perpetuated by national theaters in countries less directly affected by a federalist tradition. While the specifics of UK federalism do not directly equate to the specifics of American federalism, this perhaps is indicative of the fact that any formulation of an American national must similarly acknowledge the pre-existing realities of American society by respecting our own federalist tradition. Thus, if the success of the NTS is any indication, this is one more piece of evidence in support of a similarly devolved American national theater.

<sup>325</sup> Janelle Reinelt, “The Role of National Theatres in an Age of Globalization,” in *National Theatres in a Changing Europe*, S. E. Wilmer, ed. (New York: Palgrave Macmillan, 2008), 220.229

national communities *without* defining them. Theater “pretends that a nation exists, at least for the duration of the theatre piece,” especially when “the assembled audience is addressed – or even implied – as a national citizenry.”<sup>326</sup> Turned the other way by the 18<sup>th</sup> century German poet and playwright Friedrich Schiller, “if [a country] could witness the birth of [its] own national theater, then [it] would truly become a nation.”<sup>327</sup>

To me, this way of thinking about national theaters as culture- and identity-creating is the best framework through which to view an American national theater. For a nation that has come to imagine itself as defined by political and ideological ideals while at the same time accepting the existence of sub-national “nations” that might eventually come to challenge those ideals, such a national theater might even be beneficial, in that it could, in the words of Janelle Reinelt, provide a “potential fruitful site for staging these anxieties” and for “tackl[ing] the question of who are the citizens to whom issues of nation are addressed.” One can see this philosophy under (Federal Theatre Project director) Hallie Flanagan’s statement that theater “is a necessity because in order to make democracy work the people must increasingly participate; they can’t participate unless they understand; and the theatre is one of the greatest mediums of understanding.”<sup>328</sup> While this idea of theater as an ideal means of

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<sup>326</sup> *Id.* at 228.

<sup>327</sup> Friedrich Schiller, “Theatre Considered as a Moral Institution,” trans. John Sigerson and John Chambless, *Schiller Institute*, accessed on 6 April 2014, available at <[http://www.schillerinstitute.org/transl/schil\\_theatremoral.html](http://www.schillerinstitute.org/transl/schil_theatremoral.html)>.

<sup>328</sup> Flanagan, 372.

national culture creation may be underutilized and glossed over, there is precedent, however hard to find, for such institutions in the United States.

However, in the US, where government entanglement in issues of identity (race, ethnicity, religion, and, increasingly, sexual orientation, among others) risks running afoul of the First and Fourteenth Amendments, I wonder if perhaps a national theater might be *too* fruitful in this regard. In her essay, “The Role of National Theatres in an Age of Globalization,” Reinalt touched upon this problem, writing that “when established National Theatres with lots of resources produce their repertory, they are in the position of claiming to speak for the nation, about the nation. They are players in the national game, whether they are a mouthpiece of the current government, or in radical opposition to it.”<sup>329</sup> Although Reinalt does not follow this line of reasoning, this assertion still begs the question of what happens if (or perhaps when) a national theater creates an identity that the state leaders do not like. In some ways, this is what happened to the Federal Theatre Project, which, in the words of Loren Kruger, was ultimately attacked by the House Un-American Activities Committee due to its “departure from affirmative culture”<sup>330</sup> and its “potential for staging a hybrid nationhood that might challenge the hegemony of the American state.”<sup>331</sup> In other words, while Flanagan wrote that “the greatest achievement of these public theatres was in their creation of an audience of many millions,” then perhaps the truly *national* nature of that audience – a culturally, ethnically, racially, and

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<sup>329</sup> Reinalt, 232.

<sup>330</sup> Loren Kruger, *The National Stage: Theatre and Cultural Legitimation in England, France, and America* (Chicago: The University of Chicago Press, 1992), 183.

<sup>331</sup> *Id.* at 184.

geographically diverse audience that recognized itself in the shows on the stage and the culture created by both the shows and the institutions that produced them – brought about its downfall as well.

While I have been able to find alternatives, solutions, or at the very least, theoretical workarounds to most of the other conceptual challenges to the formation of a national theater in the United States, to this one I have no immediate answer. With that in mind, then, it is time to put all of the other facts and solutions and definitions and thoughts together, and hopefully arrive at an otherwise workable model for an American National Theater.

# Chapter Five: An American National Theater

## Criteria

Over the course of this thesis, I have worked toward proposing criteria for the creation of an American national theater. These criteria fall into two groups. Those criteria in the first group are definitional – they must be satisfied if the proposed structure is to be considered a national theater as per my definition created in the first chapter. The criteria in the second group must be met for the proposal to be effective, worthwhile, and truly “national” in the eyes of the American government, arts and theater communities, and people. These two sets of criteria are as follows:

First, an American national theater must, like all national theaters, be founded by the government or remade with significant governmental involvement. In the United States, this would mean a public law passed by Congress and signed by the president. It is worth noting that Congress already did this once, when it incorporated the American National Theater and Academy in 1935. As I showed in Chapter 2, this organization has completely disappeared, thus proving the inefficacy of that particular charter. In light of this, however, Congress would have two options in creating a new American national theater – either it could pass new legislation remaking the ANTA, or it could create a new organization entirely. In the grand scheme of things, I am not convinced that it matters which options we choose.

Second, an American national theater must, like all national theaters, receive significant and direct funding from the federal government. Although that sum might

vary year to year, and although the inclusion of a sunset clause (discussed at the end of this chapter) in the chartering legislation is, in theory, permissible, the theater should not need to reapply for funding, nor should it need to live in fear of having its funding discontinued at any moment as a reactionary response to a single event. In chartering the national theater, Congress must provide the theater with enough funds to get started, and must be willing to step in to prevent the organization from going bankrupt if private funding does not come through as quickly or in as great quantities as the government might prefer. In thus receiving a guaranteed source of funding that is not solely dependent on box office receipts or an ability to fundraise, the national theater would be freer to experiment with content and theatrical form not yet a part of the American mainstream. Similarly, this would make it easier to keep ticket prices very low without risking financial ruin. It should be noted that under this requirement, government is not obligated to *fully* fund the national theater, as do the governments of mainland Europe, but can choose to provide as much or as little money as it deems necessary, while still fulfilling the other obligations. Neither is it required to give away funds without formal oversight. As with similarly funded institutions (such as the NEA, the Smithsonian, or the Kennedy Center), Congress would be within its rights to impose specific requirements on the use of funds, as long as those requirements were stated in the institution's chartering act, included as formal amendments to that act, or included in the yearly appropriations budget.

Third, an American national theater must, like all national theaters, seek to represent the nation through theater, or “do theater” representative of the nation. There are many different ways of accomplishing this goal, but all that is necessary to

satisfy the definition from Chapter One is that this goal be a key part the national theater's statement of intent. Whether or not the goal is achieved, it must at least be the primary purpose of the organization.

Moving on to the criteria necessary to develop a truly national institution in the United States – one that would be accepted by theater and artistic communities, the government, and the American people – an American national theater must not be forbidden from producing works that might be construed as “political.” For a nation that proudly identifies itself by its political ideas, forbidding those ideas to appear on any subsidized stage would be hugely limiting. Coupled with the idea that theater is inherently political due to its somewhat propositional (communicative) form and its ability to assist in the creation and subsequent imagining of communities centered around all sorts of identities and issues, it is clear that to be acceptable to the arts community, the national theater must be allowed to take risks of this nature. By leaving open the opportunity for topical productions, which in turn might encourage the kind of theatrical experimentation missing in the Broadway establishment, this could go a long way towards making the national theater acceptable to theater communities nationwide.

Conversely, an American national theater must similarly avoid falling into the realm of (likely propagandistic) government speech. While the government can certainly maintain some control over the content and viewpoints expressed by the national theater via specific stipulations and requirements included in the institution's legislative charter, it cannot dominate or control them completely. The national theater, though founded, funded, and managed by the federal government, must not

be construed as simply acting as the government's mouthpiece. In addition to proving the fears of government oversight expressed by many artists and arts advocates alike, this would also detract from the theater's overall reputation with theater and arts communities.

Lastly, in following the National Theatre of Scotland's example, I believe that a truly "national" national theater in the United States would require some form of tacit acknowledgement that there is no single definition of what it means to be American, beyond, perhaps, a commitment to liberty and justice for all, and a shared belief that it is acceptable to be American while still identifying, potentially more strongly, with other communities as well. An American national theater must be decentralized, with the ability to operate in a manner that is both regionally and culturally diverse. Additionally, it must be highly committed to working with culturally and artistically underserved populations, without, for logistical reasons, completely alienating the wealthy elites who traditionally patronize and participate in the arts.

Although these six criteria – three to satisfy generic national theater requirements and three specific to the United States – certainly seem like a tall order, it is possible to design an institution that would satisfy them, and stand up well to most of the challenges mentioned in previous chapters. Thus, it is finally time to address the question directly of what such an American national theater might look like.

## **A Proposal**

What the United States needs, at least in terms of organizational structure, is a national theater based on the combined models of the Federal Theatre Project of the 1930s and the National Theater of Scotland. Although the two are very different in their goals and organizational structure, together, they provide a model that would best meet the challenges brought about by the United States' unique speech and identity requirements.

To that end, I propose a national theater that adopts the FTP's "federal" structure, including the development of a national branch that could in turn oversee additional regional centers in major metropolitan areas around the country. This national branch, like the NEA or the Smithsonian, would have its main headquarters in Washington, D.C., and would be led by a board of trustees, chaired by a Director appointed by the president and confirmed by Congress. Drawing from those selected to sit on the Boards of the Smithsonian Institution, the Kennedy Center, and the National Council for the Arts, the national theater board might be made up of some combination of government officials and cabinet members, members of the American theater community, the directors of individual regional branches of the national theater, and three sitting members each of the Senate and the House of Representatives, appointed by their respective leadership to serve in a non-voting capacity. As the selection of these officials and representatives from the theater community would likely be highly political and would almost certainly involve major negotiations amongst the political and theatrical authorities of the day, it is impossible to propose specifics in the abstract. However, this board, once selected and

confirmed, would be responsible for all major decisions that would affect the institution as a whole, including those that involve liaising directly with Congress, or with touring and outreach outside the United States. While this board might have a degree of oversight over the financial policies of the regional branches and sub-branches, it would not be responsible for the day-to-day running of these organizations.

Moving down to the regional level, I would propose that the national theater follow at least in part the models of the FTP itself, which located its five regional centers in New York, Boston, Chicago, Los Angeles, and Atlanta, and the ANTA's Forty-Theater Circuit Plan, which, as mentioned in Chapter 2, involved the development of 40 touring houses to host productions developed in one of four "talent centers" located in New York, Chicago, San Francisco or Los Angeles, and a southwestern city, likely in Texas. For an American national theater, I would propose similar regional lines, designating centers that would cover the Northeast, the Southeast, the Midwest, the West, and the Southwest. However, unlike the FTP and the ANTA, I think it is important that this prototype national theater not locate its Northeast branch in New York City. The reasons for this are twofold – first, New York, as the de facto theater capital of the country, does not need help from a national theater as much as other cities might, and second, there is no reason to place the national theater in direct (financial and artistic) competition with the preexisting Broadway establishment, which is touted as New York City's most lucrative tourist draw, and which would likely feel threatened by the placement of a nationally funded theater organization right in its backyard. I would also advocate locating the Western

branch somewhere other than Los Angeles, where it might meet similar (although less pronounced) challenges from the film industry. Beyond those stipulations, the specific placement of regional branches would require much more detailed research on preexisting arts infrastructure, population size, local identity, levels of historical receptiveness and support for theater, and other factors, than can be contained within the scope of this thesis.

However, just as the overall organizational structure would be based on the model of the FTP, so too would the internal operations of each regional branch would be based on the National Theater of Scotland. As with the NTS, each of these regional centers would be responsible for coordinating outreach within its region, including but certainly not limited to creating and funding sub-branches in smaller cities and local communities, working with schools to develop educational programs, assisting in the building of local theater infrastructure, and the improvement of resources for preexisting community theaters. Each center would likewise be charged with finding and commissioning local artists to create new works, and then assisting in touring those works to places ranging from the largest performing arts centers, to the smallest community theaters and most unlikely site-specific and non-traditional locations.<sup>332</sup> Similarly, each center would be called upon by the national branches to assist in developing strategies to get traditionally underserved populations – be they ethnic, racial, or class-based communities – involved in the theater as both

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<sup>332</sup> Theater practitioners draw a distinction between “traditional” theatrical spaces – generally, a designated theater, where the performers and the audience are separated by some combination of clearly understood physical and “fourth wall” boundaries – and “non-traditional” theatrical spaces, which are generally understood to encompass anything else.

practitioners and audience members, both through programming choices and by ensuring the affordability of all national theater programs, classes, and performances. Following the NTS's example, it is important to note that the purpose of these regional branches would not be to define or develop a style of "Midwestern theater" as distinct from "Southeastern theater" in the search of one true style of "American theater" that could then be exported to other countries, but rather to assist in the sharing of resources equally around the country and in protecting traditionally underserved areas in the center of the country from being overshadowed by the more culturally rich coastal regions. To borrow from Jen Harvie's assessment of the NTS, the American national theater would aim to "function as a brand – attaching its name (as well as some finance and expertise) to existing theatre companies throughout the nation. It [would] aim to carry positive status, but also have the flexibility of a brand."<sup>333</sup>

In my opinion, these organizational requirements and regional goals should take the place of specific programming requirements, such as the Comédie-Française's stated goal of "preserving the classical [French] repertoire,"<sup>334</sup> the Burgtheater's "targeted promotion of cultural productions of Austrian origin,"<sup>335</sup> or the Kennedy Center's commitment to "present classical and contemporary music, opera, drama, dance, and poetry."<sup>336</sup> The reasons for this are twofold. First, as discussed in the previous chapter, there is not a single national identity for the United

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<sup>333</sup> Harvie, 33.

<sup>334</sup> Whitton, 155.

<sup>335</sup> "Bundestheaterorganisationsgesetz," 2.

<sup>336</sup> *National Culture Center Act*, 1699.

States as it currently stands. Thus, any specific focus on a classical repertoire (such that it is in the United States) would run the sizeable risk of alienating large swaths of the population who, prior to the move towards multiculturalism at the beginning of the 20<sup>th</sup> century, might not have been equally included in that identity. While this does not mean that classic American plays by great American playwrights must be categorically passed over or ignored in favor of newer works, it does mean that expanding this canon must be of equal if not greater importance than simply presenting the canon as is. Second, such a focus would have the potential to shut out newer productions on topical subjects that employ more experimental forms and techniques. In the United States, which has the reputation of producing predominately inoffensive, big-budget, commercial “McTheatre” with a “near-total disregard for geographical or cultural specificity,”<sup>337</sup> such a restriction – even if it was phrased as a positive mandate to celebrate classic Americana – would perpetuate this stereotype. Regardless of whether the goal of such a national theater is brand creation or national identity creation, a national theater of the United States must have a large amount of discretion to produce whatever work it deemed most effective in furthering the goals of representing and serving individual regions of the nation – and by extension, the nation as a whole – through theater, without being required to meet predetermined programming standards.

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<sup>337</sup> Dan Rebellato, “Playwriting and globalisation: Towards a site-unspecific theatre,” *Contemporary Theatre Review* vol. 16:1 (21 August 2006), 103. For a more general treatment of “McDonaldization” of contemporary culture, see George Ritzer, *The McDonaldization of Society* 6 (Thousand Oaks, CA: Pine Forge Press, 2011).

This freedom of programmatic self-determination would also ideally prohibit on the government from including in the national theater’s mission statement anything along the lines of the NEA’s decency clause, which ensured that all works funded conformed to “general standards of decency and respect for the diverse beliefs and values of the American public.”<sup>338</sup> One of the main reasons behind using a decentralized or “federal” organizational structure is that different communities (those defined by geography and those defined by other forms of identity alike) have different standards of what constitutes “decent” art, and imposing a national standard would, like national programming standards, detract from opportunities for regional variation. Standards of decency, like programming choices, should be left up to the regional coordinators and individual theater practitioners.

While this devolved and localized formulation may appear to be at odds with the national standards of protection conferred by the First Amendment, the variability of standards of decency and obscenity was actually affirmed by the Court in *Miller v. California*. Writing that “our Nation is simply too big and too diverse for this Court to reasonably expect that such standards [of obscenity] could be articulated for all 50 States in a single formulation,”<sup>339</sup> and that “it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City,”<sup>340</sup> the Court very adamantly states its belief that “to require a State to

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<sup>338</sup> *Department of the Interior and Related Agencies Appropriations Act of 1991*, 1991, 1963.

<sup>339</sup> *Miller v. California*, 30.

<sup>340</sup> *Id.* at 32.

structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility."<sup>341</sup> It is also worth noting that while *Miller* directly focuses on standards of obscenity rather than standards of obscenity rather than standards of decency, the two are interrelated enough that this distinction matters very little. In other words, since declaring something "obscene" inherently implies that it is not "decent," the *Miller* precedent still stands in this instance.

Along with its respect for regional identity variation and its "buildingless" nature, another one of the NTS's most important innovations was its emphasis on touring internationally, with the express goal of "show[ing] the world that Scotland is a modern, innovative country with a vibrant, diverse culture,"<sup>342</sup> and, "through international performance, rais[ing] Scotland's profile, attract[ing] artistic acclaim and stimulat[ing] pride."<sup>343</sup> This goal, however, is formulated to apply to a single NTS. Thus, in adapting it to the federal setup of my proposed American national theater, it is important to include, not just international touring, but also intra-regional and inter-regional touring as well. Thus, if intra-regional touring is, as mentioned above, the responsibility of each regional branch individually, then inter-regional touring (the "interstate commerce" of the arts world) and certainly international touring would be the responsibility of the national theater administration. Such a setup could thus have a number of benefits for the national theater, both within the United States, and internationally as well.

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<sup>341</sup> *Id.* at 30.

<sup>342</sup> "Criteria for Attaining and Maintaining Status as a National Performing Company."

<sup>343</sup> *Id.*

Internally, in addition to the administrative benefits of having a national organization act as a negotiator between various local and regional branches, such a setup would have the added benefit of creating a permissible means of exercising control over the speech promulgated by the national theater. While it remains important that local standards of decency be respected within local communities, the national branch would, according to this structure, maintain the discretion to choose to tour or not tour a production to places where such standards might be less welcome or appreciated. In this way, the national branch could control the way the national theater “brand” was perceived across the country. Similarly, this structure would allow for an “upward mobility” of sorts for local theater groups, in that they would potentially have the opportunity to bring a developed work first to their own regional center, and then potentially to others as well.

At this point, I should note that although I have tended to be skeptical of national theaters housing themselves in purpose-built theaters in central locations, I think that these touring-related benefits of the regional centers being based in theater buildings would outweigh the potential risks of the entire system becoming too city-centric. Especially if most of the programming in these locations came in on tour from other and smaller regions within the national theater system, this approach could actually contribute to a bottom-up strategy of culture-creation, rather than the necessarily top-down approach adopted by the city- and building-based national theaters of other countries. However, in the interest of preserving the national theater’s autonomy from the “mainstream” Broadway theater establishment with which previous national theater initiatives have been criticized for associating, I think

it important that these regional centers do *not* host national tours of Broadway shows or other big-budget commercial productions, but rather preserve that space for the use of internally developed projects. Once a nationwide national theater infrastructure was developed, the national theater organization as a whole would ideally be able to produce and tour enough productions to keep these spaces for the entire duration of their seasons. Until such time as that infrastructure could be set up, though, these regional centers could be used to develop works specifically commissioned by the national theater, to host touring shows from other countries' theaters and national theaters, to do outreach within their own cities, and for a whole variety of other purposes.

Externally, a focus on touring would allow for the strengthening of America's reputation and presence in the international theater community. This strikes me as an endeavor that Congress might be especially interested in supporting, if other instances of its willingness to fund the export of the American "brand" of media are any indication. For example, in the Omnibus Budget bill passed for fiscal year 2014, Congress appropriated approximately \$721 million "to enable the Broadcasting Board of Governors... to carry out international communication activities, and to make and supervise grants for radio and television broadcasting to the Middle East."<sup>344</sup> When compared to \$445 million for the Corporation for Public Broadcasting,<sup>345</sup> a Congressionally established private, non-profit corporation that "promotes the growth

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<sup>344</sup> *Consolidated Appropriations Act, 2014*, 467.

<sup>345</sup> *Id.* at 339.

and development of public media in communities throughout America,”<sup>346</sup> or \$146 million to the National Endowment for the Arts,<sup>347</sup> this sum of money definitely indicates the importance that Congress places on this sharing (or propagation) of American culture. Thus, I do not think that an added emphasis on international touring, in addition to “intra-national” touring, would be unwelcome or misplaced.

Of course, none of these plans would be possible without a substantial amount of capital. As mentioned in this and the preceding two chapters, I strongly believe that public funding for an American national theater must go directly from Congress to the organization itself, without passing through either state governments or a grant application process. To avoid the Congressional politics surrounding the appropriation of funds directed at specific areas of the country and to keep congressional oversight at a degree of removal from specific local uses of money, the majority of these funds should be granted directly to the national organization under the category of a general operations and outreach budget. The national organization would then in turn take responsibility for distributing those funds to the regional branches (perhaps in a form similar to a block grant with more oversight by the national branch, although not necessarily by the national government) and to its own nationwide initiatives. Along with this appropriation could come a mandate to attempt to fundraise, like the one present in NTS’s agreement with the Scottish government. Although I am wary of programs that, like the NEA, require their grant recipients to

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<sup>346</sup> “About CPB,” *CPB*, accessed on 6 April 2014, available at <<http://www.cpb.org/aboutcpb>>.

<sup>347</sup> *Consolidated Appropriations Act, 2014*, 331.

provide strict and predetermined levels of matching funds, due to the fact that a primary purpose of this American national theater would be to work with populations that might be completely unable to provide such funds, it is entirely fair to ask that the national theater prove that it has at least “endeavoured to achieve a year-on-year increase in private sponsorship and other non-public income.”<sup>348</sup>

Along with this funding would come, of course, a certain degree of Congressional oversight of the “speech” created by the national theater. The analysis of First Amendment concerns related to the spending of government money carried out in the third chapter placed the national theater under a “managerial” level of control, meaning that its main means of controlling the theater’s speech would be to place restrictions on the use of its funds at the national appropriations level. This could technically include anything from a categorical ban on topical theater or a categorical requirement that the theater only do productions affirming a set of ideals set out by the government (both of which would clearly violate my criteria as set out above), to a self-imposed statutory ban on Congressional involvement of any sort (which is exceedingly unlikely). Thus, any funding program must somehow include the means of striking a balance between the two, without resorting to the option used by the House Un-American Activities Committee in the case of the Federal Theatre Project, and simply defunding the entire project in order to close a small number of specific productions.

Although it does not solve the overarching issue of how much control Congress should give itself over the speech of the national theater, the question of

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<sup>348</sup> “Criteria for Attaining and Maintaining Status as a National Performing Company.”

how to decrease the risk of Congress suddenly deciding to shut it down does have one readily available solution – the inclusion of a sunset clause in the national theater’s founding legislation. Such a provision would “require a legislative vote on whether to extend or expire”<sup>349</sup> the national theater’s tenure beyond a certain “sunset date.” Similarly, as John E. Finn points out in his paper, “Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation,” this would allow “legislators to reassess public policy on a periodic basis,”<sup>350</sup> thus “promoting democratic oversight and accountability.”<sup>351</sup> In the case of a national theater, this could be beneficial because it would give the leaders of the theater time in which to establish themselves and their institution before facing hard Congressional evaluation, while at the same time giving Congress a means to close the national theater down if it did not approve of the messages, identities, and cultures being produced.

While a specific timeline is difficult to create in the abstract, I believe that an American national theater like the one I have described above should have at least five to seven years (and ideally more) before its sunset date arrived. This way, it would have enough time to establish itself and begin to enact its programs of outreach, touring, and infrastructure-building before coming up for evaluation. Similarly, the sunset clause employed could be phrased so that it assumed the

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<sup>349</sup> John E. Finn, “Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation,” *Columbia Journal of Transnational Law*, vol. 48:3 (2010), 445.

<sup>350</sup> Finn, 449.

<sup>351</sup> Finn, 447.

termination of the national theater unless its existence was reauthorized, or, conversely, so that it assumed the continuation of the theater unless Congress affirmatively acts to repeal it. Given the choice, I believe the latter, which would protect the national theater from termination by (purposeful or otherwise) Congressional neglect, would be better suited to this project. Thus, after five years (or whatever length of time the provision listed), Congress would be required to take legislative action to close (or defund, or otherwise change) the national theater. In the absence of such an act, however, the theater would be allowed to continue. In this way, the addition of a sunset clause sets up a system wherein Congress is required to allow the national theater a suitable trial period before deciding whether or not to terminate it, thereby satisfying the continuous funding requirement, while still leaving open a method for closing it down if the national theater does not sufficiently prove itself.

It is worth noting that under this sort of setup, Congress would essentially present the only authority able to directly challenge the existence of such an institution. While individuals would of course retain the right to bring specific suits against the national theater, should those individuals feel that it was impinging on his or her individual rights, said individuals would not have the standing to sue on the basis that a national theater is not a proper use of tax dollars. This is codified in what has, its establishment in *Frothingham v. Mellon* (1923), been known as the taxpayer standing doctrine. Thus, according to *Frothingham*, the Court ruled that taxpayers never have the right to “enjoin the execution of a federal appropriation act, on the

ground that it is invalid and will result in taxation for illegal purposes.”<sup>352</sup> This was later modified in *Flast v. Cohen* (1968), and the doctrine is now generally understood to mean that unless a taxpayer can “establish a logical link between that status and the type of legislative enactment attacked,”<sup>353</sup> and can “establish a nexus between that status and the precise nature of the constitutional infringement alleged”<sup>354</sup> the taxpayer does not have standing. In other words, “the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.”<sup>355</sup> In the specific instance of *Flast*, the Court ruled that because the Establishment Clause<sup>356</sup> presents a specific limitation on Congress’s taxing and spending power, the taxpayers in question could indeed sue because “[their] tax money [was] being extracted and spent in violation of specific constitutional protections against such abuses of legislative power”<sup>357</sup> In spite of leaving the door open for challenges to be brought under other Constitutional provisions specifically limiting Congress’s taxing and spending power, the Court has resisted all attempts to expand the taxpayer standing doctrine to include exceptions for non-Establishment Clause suits. Thus, this suggests that unless a taxpayer could prove that an American national theater directly violated

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<sup>352</sup> *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923).

<sup>353</sup> *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

<sup>354</sup> *Id.* at 102.

<sup>355</sup> *Id.* at 102-103.

<sup>356</sup> Congress shall make no law respecting an establishment of religion...” U.S. Constitution. Amendment I.

<sup>357</sup> *Flast v. Cohen*, 106.

the Establishment Clause, an attempt to sue the government on the grounds that such an organization was using government funds to put forth a disagreeable viewpoint would be very unlikely to succeed.

Thus, we return to the question of how much (or what kind of) control Congress should have over the art, speech, and, by extension, identities created and implied by an American national theater. Under the managerial categorization laid out above, the government *could* impose virtually any restrictions it so chose, with the only limitation being that those restrictions be codified in the theater's founding act, or added later as formal amendments. In this domain of speech, there is no automatic, built-in means of limiting government control. As such, one final problem remains in this national theater proposal: how, in the initial drawing up and chartering of an American national theater, could Congress be convinced not to impose the strongest restrictions available to it?

There are options, certainly, that might be able to answer these questions. For example, there is always the possibility, of preempting the situation that eventually led to the closing of the FTP (in which Congress, unable to censor individual productions, was forced to shut down the entire project to end 10% of the shows) by giving Congress, or at least the national theater's board of trustees, the power to directly close down productions that it deemed incompatible with the mission of the national theater. Perhaps even calling this policy by its rightful name – censorship – would discourage the government from availing itself of that right, in fear of the public relations nightmare it might cause. However, even if very specific protocols and requirements were established that dictated when, how, and why productions

could be censored, such a provision might run the risk of having a “chilling effect” on those working under the national theater’s purview. Similarly, I could imagine another option, in which the members of Congress appointed to the board of trustees would be allowed to vote on matters brought before it. While this doesn’t seem quite as odious as the last option – after all, it is not a given that six additional votes on the board would be able to make a difference, especially if they are at odds with the rest of the trustees – it does bring with it the threat that the national theater might become too closely tied to the partisan politics of the House and the Senate. Thus, I am wary of this second option as well.

There are other possibilities that could be considered in the event that Congress actively considered funding an American national theater. However, I am not convinced that a solution to this question of how much and what kind of control the government should have over a national theater can be found in the abstract, without an extensive process of discussion and negotiation between government officials and theater administrators and practitioners. It could even be that some of the choices I have rejected in this and previous chapters might become acceptable under certain circumstances. I do believe, though, that if given enough time and attention, this problem of government involvement could be solved and a compromise agreeable to all parties – governmental and theatrical alike – could be reached. And if (or when) that challenge is surmounted, I believe that a national theater like the one I have laid out above, might not be so far out of reach.

## **Will the Time Ever be Right?**

I believe an American national theater is not only desirable, but also possible. I likewise believe, strongly, that such an institution will not be created any time soon. Today's political climate is increasingly characterized by growing levels of partisanship in Congress and in the electorate. A large section of the political conversation is dominated by questions of legitimacy surrounding the creation of new government institutions and the appropriateness of old ones. Congress is willing to shut down the entire federal government, preferring to grandstand and take hardline positions rather than agreeing to compromise. In this climate, the idea of a national theater would likely be rejected outright without even making it to a full Congressional vote. While the American public, the federal government, and various other parties could stand to benefit from such an institution, I do not think the time is right for its creation.

That should not, however, be taken to mean that I think the time will never be right to a national theater in the United States. As I see it, two things would need to change in order for that to happen. The first would result if public opinion swung around to favor a level government institution-building not seen since President Lyndon B. Johnson's Great Society of the mid-1960s. While I would be the first to admit that (at least according to my own personal political beliefs and convictions) there are other institutions and programs that need funding much more urgently than we need a national theater, a public generally in favor of a bigger government would bode well for a national theater's chances of creation and survival.

While the second change seems at least theoretically more possible in today's political climate, it is also less likely to directly result in the success of a national theater initiative. In Chapter Four, I discussed the ways in which American national identity is losing importance, while at the same time sub-national identities are gaining in both salience and sway over American politics. Given this trend, I think it possible that at some point, those fearing this shift might come to see a national theater institution as a potential asset in the promotion a higher level of national identity cohesion. In this case, extra care must be taken to make sure that the national theater not impose a favored identity over all of the others – a task that might prove difficult to justify in the eyes of those who support a national theater for the sole purpose of doing just that.

Both of these circumstances – the political and the identity-based – are still a very long ways away from the current political and cultural trends in the country. I still believe, however, that a time may come when the political leaders in Washington, the members of the greater American theater community, and the people of the United States decide that a national theater is worth the time, effort, and political self-reflection necessary to create it. Thus, while there may still be challenges in its path, an American national theater – one that would truly deserve the title in a way that no other American institution has up to this point – is not only desirable, but also less impossible to achieve than it might initially seem.

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