A Thousand Words: Pollara v. Seymour and the Trend to Under-Value and Under-Protect Political Art

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INTRODUCTION

Courts agree to varying degrees that the First Amendment protects different categorical topics (political, commercial, indecent) of speech. However, the category of artistic expression provokes controversy and debate over how much First Amendment protection it should receive, perhaps in part because it fits within each of the basic categories. For example, political art is also political speech, which receives the highest First Amendment protection. However, Pollara v. Seymour illustrates that political art has not found its place among First Amendment standards and is viewed as something less than core, political speech. This Second Circuit opinion is the most recent step in a growing trend in legislation and subsequent statutory interpretation that treats political art as requiring a lower level of First Amendment protection. This trend refuses to acknowledge that political art is political speech and therefore fails to grant the requisite full First Amendment protection. A danger exists that

1. See infra Section I(B)(i) regarding general First Amendment standards.
2. Hamilton, Art Speech, 49 VAND. L. REV. 73, 75 (1996). First Amendment jurisprudence “only tangentially acknowledges the force of art” illustrating that American society has drastically undervalued the liberty enforcing power of art. Id.
3. For the purposes of the paper “political art” will be defined simply as art with clearly understood political content. “Political” will be loosely construed as any subject that relates to political, social, and economic reality or study.
5. Hamilton, supra note 2, at 78. “First amendment jurisprudence should reflect art’s integral role in preserving the constitutional balance between the governed and the governing. The existing jurisprudence falls far short of this goal.” Hamilton, supra note 2, at 78.
courts will adopt this standard, exposing to attack a powerful and essential contributor to the marketplace of ideas.6

This article will show that first, political art is political speech and should be protected as such, and second, that Pollara is the most recent step in a trend that, ironically, treats political art as something less than political speech. Section I briefly describes the communicative power of political art. It also discusses general First Amendment standards and the prevailing theories for how to apply the First Amendment to categories of artistic expression. Importantly, both theories conclude that political art should receive the fullest protection. The trend, illustrated by a brief discussion of NEA v. Finley and a more detailed look at Pollara, is also exposed in Section I. These cases show that both legislation and statutory interpretation have resulted in political art receiving less protection than political speech. Section II analyzes the trend, showing that the court could have decided Pollara on other grounds. Section III forecasts the impact Pollara could have on political art if its low standard of protection is adopted across the country. Finally, Section IV suggests ways in which the trend may be reversed.

I. BACKGROUND

A. The Power of Political Art

Political art is an invaluable contributor to the marketplace of ideas serving an “integral role in preserving the constitutional balance between the governed and governing.”7 Eloquenty describing such age-old themes as leadership, war, hope, reform, vision and oppression in both intensely empathetic and bitterly controversial ways, political art generates political and moral debate.8 Political art’s democratic power is demonstrated by its

6. See infra Section I(A) regarding the power of political art to communicate.
7. Hamilton, supra note 5 and accompanying text.
ability to inspire change. This revolutionary quality can be measured both in art's unique communicative potential and in historical examples of art-inspired revolution.

1. The Power of Political Art to Communicate

Political art, unlike other forms of communication such as the written and spoken word, has the unique potential for subtle and profound reaction and understanding across cultures, languages, and historical periods. Judge Robert Carter of the U.S. Court of Appeals for the Second Circuit articulated this notion in Bery v. City of New York:

Visual art is as wide ranging in its depiction of ideas, concepts and emotions as a book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. Indeed, written language is far more constricting because of its many variants – English, Japanese, Arabic, Hebrew, Wolof, Guarani, etc. – among and within each group and because some within each language group are illiterate and cannot comprehend their own written language. The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language battleground on which American society fights its most intensely political and deeply personal wars. Because art by its very nature stimulates both intellectual and emotional responses, it is uniquely suited to generate powerful, often conflicting reactions in both artist and viewer. Increasingly, our most profound cultural tensions surface when people contest the meaning and value of artistic expression." Id. See generally Renee Linton, The Artistic Voice: Is It in Danger of Being Silenced?, 32 CAL. W. L. REV. 195, 195 (1995). "Good art moves your emotions or makes you think. We should be ever thankful that we have artists among us who can make us cry, scream, or wonder. Disliked art and art with disliked subjects can be as powerful as liked art, sometimes more powerful. It deserves both our attention and our protection." Id.

9. Id. at 76. "Art is essential to a representative democracy because it can be subversive."
group to both the educated and the illiterate. As the Supreme Court reminded us, visual images are "a primitive but effective way of communicating ideas... a short cut from mind to mind." 10

Standing in front of a work of art, one does not merely receive a message but rather experiences a message. 11 This visceral communication, rich with both concept and emotion, can, in a simple and profound moment, touch the viewer's intellect and heart. Thomas Nast, the father of American political cartoons, understood the communicative simplicity and power of images. 12 Nast created and published cartoons unveiling and commenting on the deep corruption of Tammany Hall, the infamous political ring that ran New York City in the late 1800's, and its leader, Boss Tweed. 13 Irritated at his eroding power base, of Nast's drawings

10. See infra Section I(B)(ii) regarding Bery v. City of New York, 97 F. 3d 689, 695 (2d Cir. 1996).

11. Art's subversive quality lies in its ability to inspire the viewer to imagine and experience alternate realities. The experience of art has two effects on the viewer: the recognition of one's pre-existing worldview and a distancing, removal from this worldview. This process functions to allow viewers to experience many different worldviews without commitment. Hamilton, supra note 2, at 87-88. "Through the imagination, art evinces what purely didactic art cannot – the "sensation" of an experience never had, a world never seen." Id. at 87.

12. MORTON KELLER, THE ART AND POLITICS OF THOMAS NAST 3-4 (Oxford University Press 1968). "The artist as social commentator has awesome weapons – wit, symbolism, animalism – to direct at men and institutions... The distortions of great caricature, the transferences wrought by animal symbolism, the use of satiric humor, are among the most potent devices by which one man can strike at another. They touch upon deep fears of and belief in the power to wreak harm upon an adversary by representation, by distortion, by imagery." Id.

13. The Tammany Hall ring, consisting of a few top dogs and many underling rings, positioned one of their own in every area of New York city politics. Having the run of the courts, the mayoral seat, the legislature and city counsel position, "Boss" Tweed, Sweeny, Connelly, and Hall ran a simple con, which emptied the city's coffers and filled their own pockets. The con was structured as follows: anyone with a claim against the city was told to multiply their claim by sometimes as much as 100 percent. Tammany insiders would
Boss Tweed remarked, "[t]hose damned pictures; I don't care so much what the papers write about me — my constituents can't read, but damn it, they can see pictures!"14

2. Political Art Inspires Change

Political artists change their political landscape by challenging the status quo.15 Given visual art's communicative power, "history is replete with examples of where art threatened entrenched power structures and in doing so secured a measure of freedom."16 A couple of examples illustrate this power.

The pro-proletariat message of Mexican muralists such as Diego Rivera, José Clemente Orozco, and David Alfaro Siqueiros had an enormous impact on leftist politics in America in the 1920's and 1930's.17 Rivera, upon receiving a commission from Nelson Rockefeller for a mural in Rockefeller Center, proceeded to create an unflattering portrait of the patron himself as a robber baron.18 In so doing, Rivera brought to light Rockefeller's theretofore oppressionist politics.19 In 1934, before the mural was completed, and in an attempt to protect his reputation, Rockefeller had the mural destroyed.20 This high profile event established in the

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14. Id.
15. Id. at 76. See also discussion, supra note 10 (art allows people to experience alternate realities, therefore exposing and destabilizing the status quo).
16. Bigelow, supra note 13, at 96.
18. Id. at 51.
19. Id.
20. Id.
American mind a nexus between Mexican art and the radical leftist politics of the Depression era, pressuring conservatives during the New Deal reforms.21

Similarly, Pablo Picasso’s *Guernica* so accurately and powerfully conveyed the ravages and despair of war that it became influential rhetoric in multiple anti-war movements.22 Painted originally to commemorate the obliteration of a town during the Spanish Civil War, it was first exhibited in the Spanish Pavillion at the Paris Exposition.23 It subsequently toured European cities in support of the anti-fascist movement.24 Later, it became a source of controversy during the Vietnam War, yet again as rhetoric for peace.25 Today, it still holds influential power in its image: a tapestry replica of *Guernica* hangs in the foyer of the United Nations. In February 2003, before Colin Powell was to speak about the war in Iraq, the tapestry was furtively covered with a blue cloth because some felt that it seemed inappropriate for Powell to speak about war in the company of such a painting.26

The ability of political art to challenge the status quo is also demonstrated by the fear it inspires in those who wish things to remain unchanged.27 Governments, afraid of political art’s power to communicate revolutionary ideas, have, throughout history, repressed dissident art.28

21. *Id.*


24. *Id.*


26. *Id.*


28. “Because of its destabilizing character, art traditionally has been the
Sure of art’s emotional and cognitive influence, Marxist states found it necessary to control political art. Similarly, after the French Revolution, “artists were forced under political and economic pressure, to follow the official line of the assembly. Forced to choose sides, many artists left the country.” Most recently, the Bush Administration demonstrated its fear of dissenting political art through its actions in Iraq. While the Baghdad Museum was being looted, the overworked and understaffed US Army deployed troops to destroy the famous mosaic of Former President George Bush, Sr., who lead the first war against Iraq. The mosaic, which was installed on the floor of Baghdad’s most posh hotel, was intended to serve as a doormat for the international and American diplomats that frequented the hotel. The Government’s swift choice to destroy the mosaic demonstrates its recognition of the mural’s power to communicate anti-American sentiments.

B. First Amendment Standards

Despite art’s unique ability to communicate, courts still debate where it fits into the First Amendment. While the two main theories on how art is protected are in conflict, a consensus does emerge: Political art, as a sub-category, is political speech and should be protected as such. Analyzing these theories of art and the First Amendment in light of established First Amendment standards shows that political art should receive the highest protection.

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29. Id.
32. Id.
1. General First Amendment Standards

First Amendment jurisprudence has divided expression into two groups: protected and unprotected speech. The five designated areas of unprotected expression are obscenity, fraudulent misrepresentation, defamation, advocacy of imminent lawless behavior, and fighting words – everything else is considered protected expression. 33

Several categories of protected expression have been delineated including indecent speech, commercial speech, and political speech. However, not all protected speech is equal – courts designate certain categories of speech to be of lower value and therefore receive something less than the fullest protection of the First Amendment. 34

Indecent speech is sexually explicit but has not deigned to the level of obscenity. 35 While never categorically labeling indecent speech as low-value, courts balance the burden on the speech with the relevant state interests. 36 Using this test, the courts have upheld


35. Id. at 1091.

36. Id. at 1092. In Young v. American Mini Theaters, the Court upheld part of a Detroit ordinance that dispersed adult movie theaters and bookstores by prohibiting them from being within 1000 feet of any other “regulated use” (bars, pool halls, hotels, etc.). The ordinance only applied adult movie theaters and not to theaters showing other types of movies. In his plurality opinion, Justice
several less than total restrictions on indecent speech. 37 Thus, indecent speech is implicitly of lower value than political speech.

Non-commercial speech has been differentiated from commercial speech, which generally is expression that advertises a product or proposes a commercial transaction. 38 Commercial speech is the only category of expression explicitly given a lower level protection. 39

Political speech is considered the core category of protected speech. 40 The First Amendment is considered essential to preserving democracy, protecting those who wish to criticize the government and dissent from majority politics. 41 Therefore, political expression receives the full protection of the First Amendment.

2. *First Amendment Protection of Art Speech*

While generally accepted as protected, the degree of artistic expression's First Amendment protection is less settled. 42

Stevens found that the indecent speech at issue was of lower value than that of core, political speech. Young v. American Mini Theaters, 427 U.S. 50, 52 (1976). "It is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate..." *Id.* at 70.

37. SULLIVAN, supra note 34, at 1061-62.
38. SULLIVAN, supra note 34, at 1121.
39. SULLIVAN, supra note 34, at 1121.
    The First Amendment has surely been valued as essential to the preservation of a political democracy in this country; thus, even the pamphleteer espousing political sedition has been shielded from government suppression...It is no doubt true that the central purpose of the First Amendment was to protect the free discussion of government affairs.

*Id.*

41. *Id.*
42. Hamilton, supra note 2, at 101. "Although the Supreme Court has recognized, since at least 1952, that art should receive some first amendment protection, it has yet to provide a theory to undergird the assertion, or to make clear how much protection art ought to receive." *See infra* Section 1.B.ii
Traditionally, the First Amendment bases its protection on the content of clearly understood ideas. The root of the debate about art’s First Amendment standard concerns whether art contains both discursive and nondiscursive works. That is, some artworks have a clear message or idea and others do not. For example, *Washington Crossing the Delaware* by Emanuel Leutze is a clear historical account of a brave General Washington and his band of ragged men crossing the frigid river. In contrast Mark Rothko’s *No. 2, 1951*, which has floating color fields that meld together sublimely, does not communicate a clear idea. Rothko’s painting, with no identifiable message, appears to have no objective content to protect, or at least protect to the fullest degree. Because the current structure of the First Amendment is based on the content of what is expressed, the courts and scholars have struggled to establish a theory that can incorporate, in a meaningful way, artistic expression by Mr. Leutze and Mr. Rothko into the First Amendment at the same time.

regarding two circuit court cases, *Bery v. New York* and *Close v. Lederle* which consider whether artworks are protected by the First Amendment but use two very different analyses which are discussed further in this section.


44. Hamilton delineates this notion of discursive and nondiscursive. Discursive works communicate a clear and understandable idea or message. The content (i.e. the idea or message) can be separated from the medium (i.e. the paint and canvas or bronze). Nondiscursive works, on the other hand, have what Hamilton refers to as “extrarational” elements and do not communicate an obvious idea. The emotive, expressive part of these works cannot be easily separated from the thing itself. Hamilton, *supra* note 2, at 103, 106-07.


46. Mark Rothko, *No. 2* (*No. 7* and *No. 2*), 1951 (alternatively dated to 1950), Collection of Mrs. Paul Mellon, Upperville, Virginia. An image of this painting and others as well as a history of Mark Rothko’s career is available at http://www.nga.gov/exhibitions/rothwel.htm (last visited July 30, 2004).

47. Many works of art have discursive content, and therefore the First Amendment undeniably protects those works. However, this method of basing protection on the discursive content forces courts to look for such content in every work of art. This case-by-case analysis causes courts to wrestle with what
There are two main theories that offer methods for how and to what extent the First Amendment should be applied to art. The first theory, which, for simplicity's sake, will be called the Categorical Theory, reasons that the current categorical framework of First Amendment jurisprudence should be applied to artistic expression. The medium and content should be pulled apart and the content analyzed separately as if it were any other form of speech. After determining which category (unprotected, indecent, commercial or political) of expression the content fits into, the appropriate level of protection is then applied. This process requires a case-by-case evaluation of each work of art.

In *Close v. Lederle*, the First Circuit utilized the Categorical Theory of applying the First Amendment to artworks when the plaintiff's artwork was removed from an exhibition. The plaintiff, an art instructor, was asked by his employer, a university, to exhibit some of his artwork. Though scheduled to last twenty-four days, after just five the university removed the exhibit from public view due to the controversy it inspired. The plaintiff

48. Christina A. Mathes, *Bery v. New York: Do Artists Have A First Amendment Right To Sell And Display Art in Public Places?* 5 VILL. SPORTS & ENT. L.J. 103, 109-10 (1998). Explaining that the courts have previously recognized that "there are varying degrees of speech which should receive different levels of protection, depending on the subject matter." *Id.* at 110.

49. "The Court tends to measure art by its similarities to ordinary speech, rather than by its distinctive structural function that cannot be reduced to the terms of ordinary communication." Hamilton, *supra* note 2, at 108.

50. "By basing art's protection on its discursive content, however, these theories compel the courts to find such content in every work of art and force them to struggle with artworks whose communicative essence is nondiscursive and nonrational." Hamilton, *supra* note 2, at 108-09.

51. "There are degrees of speech" and the degree of protection depends on the subject matter. *Close v. Lederle*, 424 F.2d 988, 990 (1st Cir. 1970).

52. *Id.* at 989.

53. The plaintiff's paintings inspired controversy due to their edgy content. Several of the works contained nudes, in which both female and male genitalia were described in "clinical detail." One of the paintings was of a skeleton whose only flesh consisted of such genitalia. Several of the titles were also
claimed this was a violation of his constitutional rights. The court found that there was "no suggestion, unless in its cheap titles, that plaintiff's art was seeking to express political or social thought." It therefore found the "plaintiff's constitutional interest minimal" and held that the artist's First Amendment rights were not infringed. Thus, separating the content from the medium allows art that communicates political ideas to receive full protection but, correspondingly, art that communicates lesser ideas receives lesser protection.

Under the second theory, which will be called the Democratic Theory, all art should be afforded the highest level of protection. The Democratic Theory is founded not on the traditional First Amendment framework relied upon by the Categorical Theory, but rather on recognizing art's unique and highly valuable ability to communicate both discursively as well as nondiscursively. The traditional framework of the First Amendment bases protection on the content of the expression and thus leaves little room for irrational or noncognitive artistic expression. This group argues controversial including, "I'm only 12 and already my mother's lover wants me" and "I am the only virgin in my school." These paintings were displayed in a hallway that was used by the public, and as the court noted, children. Id. at 990.

54. Id.
55. Id.
56. Id.
57. "To realize art's full contribution to the First Amendment's task of shoring up counterweights to government, the doctrine must elevate art's value to the pinnacle of first amendment protection as it recognizes art's extrarational value." Hamilton, supra note 2, at 110.
58. Hamilton notes that:

The Court should consciously elevate art to the top of the First Amendment's pyramid of protection, alongside political speech. There will be times when it is political speech, but even when it is not, it furthers the constitutional goal of placing parameters around government. The Court should reject attempts to fit art into the existing speech paradigms, which devalue its distinctive challenge capacities.

Hamilton, supra note 2, at 110.
59. "The marketplace of ideas theory of the first amendment does not properly account for the noncognitive aspects of artistic expression." Nahmod,
that rather than the content, the expression's ability to encourage democracy and challenge the status quo should be determinative of its First Amendment protection level. Using the Democratic Theory, art, like political speech, philosophy, and religion receives the fullest protection.

The Second Circuit recognized this theory in *Bery v. New York.* At issue was the General Vendors Law of New York that required a license for those who wished to sell goods or services in public spaces. Those who sold books, newspapers and other written matter were exempt from the licensing requirement. The plaintiffs, artists who were restricted from selling their artwork in public without a license, argued that the law violated their First Amendment rights. The District Court, applying the Categorical Theory held that the art in question was "decorative" and "apolitical" and therefore deserved only limited First Amendment protection in the absence of government censorship. Due to the fact that there was no censorship and no animus towards the artists, it considered the statute to be content-neutral, requiring only minimal scrutiny.

The Second Circuit reversed the District Court, holding that parsing artistic expression into categories such as "apolitical" demonstrated a "myopic vision...[that] fundamentally misperceives the essence of visual communication and artistic expression." The court articulated a view in line with the Democratic Theory, recognizing the difficulty of drawing a line

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60. "Rather than fitting all other types of first amendment interests into the existing rational speech paradigm, the democratic propensities of the particular expression should be identified in light of the First Amendment's challenge functions." Hamilton, *supra* note 2, at 111.
63. *Id.* at 692.
64. *Id.*
65. *Id.* at 693.
66. *Id.*
67. *Id.*
68. *Bery,* 97 F.3d at 695.
between discursive art and nondiscursive art.\(^6\) Due to this broad range of artistic expression, the court found that all artistic expression must be fully protected by the First Amendment.\(^7\) The court held the ordinance violated the plaintiff’s First Amendment rights.\(^7\)

For the purposes of protecting political art, either the Categorical Theory or the Democratic Theory will suffice. The proposed theories, one dividing art into categories receiving varying levels of protection and one granting art as a category full protection, both share a common theme: political art, like political speech, should receive the highest level of First Amendment protection.\(^7\)

The next sections of this article will show that while it should receive full protection, there is a growing trend to treat political art as something less than political speech. Consequently political art is not receiving the appropriate full First Amendment protection.

C. The Trend: Political Art Receives Less Protection than Political Speech

Political artists have employed the National Endowment for the Arts and the Visual Artist Rights Act to protect their artistic expression. These statutes were created to protect and promote the arts. As discussed above, political art is capable of communicating political ideas and therefore should receive the same high-level First Amendment protection as political speech. However, these statutes have been ironically construed to give political art a lesser protection.

\(^{69}\) “Written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories. . . Visual artwork is as much an embodiment of the artist’s expression as is a written text, and the two cannot always be readily distinguished.” \(\textit{Id.}\)

\(^{70}\) \(\textit{Id.}\) at 696.

\(^{71}\) \(\textit{Id.}\) at 698.

\(^{72}\) \textit{See} discussion, \textit{supra} notes 34-36 (explaining how artistic expression should be parsed into categories and given varying levels of protection). \textit{See} discussion, \textit{supra} note 43 (explaining the Democratic Theory’s view that all artistic expression should be given full First Amendment protection).
I. National Endowment for the Arts

The National Endowment for the Arts ("NEA") is a program that distributes Government grants to selected artists in the hope of promoting and encouraging the arts. "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." The statute automatically disqualifies any art found to be obscene, but, otherwise, the "decency and respect" clause is the agency's only guide when selecting the grant recipients. This clause provides

73. National Endowment for the Arts 20 U.S.C.S. § 954 (c) states -
Program of contracts, grants-in-aid, or loans to groups and individuals for projects and productions; traditionally underrepresented recipients of financial assistance. The Chairperson, with the advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts.


74. 20 U.S.C.S. § 954 (d)(1) states -
Application for payment; regulations and procedures. No payment shall be made under this section except upon application therefore which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure 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.


75. 20 U.S.C.S. § 954 (d)(2) states -
Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this Act from the National Endowment for the Arts.
the NEA with an enormous amount of leeway to determine what is decent and respectful.76

In National Endowment for the Arts v. Finley, the Supreme Court decided a facial challenge to the NEA.77 Four artists who allegedly were denied NEA funding due to the political content of their artwork argued that, “the criteria in Section 954(d)(1) are sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination.”78 The Court held that Section 954(d)(1) did not, on its face, infringe on First Amendment rights because it merely added further subjectivity to an already subjective process. Since the statute instructs the government to simply take “decency and respect” into consideration, the Court found that it is not obvious that the clause will be used for viewpoint discrimination.79 In coming to this conclusion, the Court recognized that, in the area of subsidies, the Government may use criteria that would otherwise be impermissible were direct regulation at issue.80 The Court stated that “artists may conform their speech to what they believe to be the decision-making criteria in order to acquire funding. But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.”81

In his dissenting opinion, Justice Souter argued that section 954(d)(1) should be struck down since the “decency and respect” clause was overbroad and had the potential to “chill artistic production and display.”82 He explained that when determining whether a provision violates the First Amendment, the Court asks whether the government is regulating the speech because it disagrees with its message.83 Souter argued that the “decency and

76. Linton, supra note 5, at 213.
78. Id. at 583.
79. Id. at 582.
80. Id. at 587.
81. Id. at 589.
82. Id. at 622 (J. Souter, dissenting).
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respect” proviso is meant to deny funding to artists whose work contains an offensive message. The clause’s author stated that the bill “adds to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account.”

While the Court upheld the NEA’s criteria for distributing funding in Finley, there is evidence that the intended purpose and effect of the “decency and respect” clause was to give the agency the power to deny funding to art that conveys an offensive or marginalized viewpoint. The debates in the Congressional Record, which often centered on homosexual themes in art, leave “little doubt that the purpose of the Decency Clause was to deny funding to artistic works dealing with specific subjects that particular members of Congress opposed.”

2. Visual Artist Rights Act

Another example of legislation intended to protect artists is the Visual Artist Rights Act (“VARA”). VARA is a federal law

84. Id.
85. Id. at 604 (J. Souter, dissenting).
86. Linton, supra note 5, at 213-14.
88. 17 USC § 106A(a)(1)(A) and (B) state in relevant part:
Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art shall have the right – (A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion,
incorporating the moral rights doctrine into American law. Moral rights are premised on the notion that artists retain certain rights in their artworks that do not stem from contract or copyright law. These rights acknowledge that the artwork remains intimately born from the artist's personality and expression even after its sale to a third party. The two moral rights incorporated into VARA are the right of integrity and the right of attribution.

Prior to the enactment of VARA, many states passed moral rights statutes that varied in policy and purpose. The New York

mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right –

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or other modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.


89. GERSTENBLITH, ART AND THE LAW 85 (Carolina Academic Press forthcoming). Moral rights, or droit moral, such as the rights of integrity, attribution, disclosure, and resale royalty first gained acceptance in Europe during the French Revolution. The rights of integrity and attribution were incorporated into the Berne Convention for the Protection of Literary and Artistic Works of 1886. However, common law countries such as the United States and the United Kingdom have been reluctant to accept rights that survive even after the sale of property. Id.

90. Id.

91. Unlike copyrights or other property rights, moral rights are so personal that they are considered unwaivable and unalienable and therefore would last at least as long as the artist's lifetime. Id.

92. Id. The right of integrity gives an artist the right to prevent the destruction or mutilation of their artwork. The right of attribution, which is not specifically at issue in this note, gives an artist the right to "have his or her name removed if the work becomes mutilated and no longer represents the author's original creation. Id.

93. GERSTENBLITH, supra note 89, at 97.
The New York statute was enacted to protect the artist’s rights in their work; however, a violation of the statute does not occur until the artist’s reputation has been injured. Thus, the statute does not give the absolute right to enjoin the mutilation or modification of a work – it only prohibits the exhibition of such altered or distorted works when such display would injure the reputation of the artist. The California statute, unlike the New York statute, exists primarily to protect and preserve significant works of art for the public benefit.

In 1990, in an effort to conform to the Berne Convention, the United States passed VARA, granting artists qualified rights of integrity and attribution. The rights given as well as the policies and purposes behind them were a synthesis of the pre-existing New York and California moral rights statutes. VARA takes from New York the qualified right of attribution and the right of integrity – the right to stop any “intentional distortion, mutilation or other modification of that work” only occurs if it “would be prejudicial to [the artist’s] honor or reputation.” VARA gives to

94. See GERSTENBLITH, supra note 89, at 97.
95. See GERSTENBLITH, supra note 89, at 97.
96. See GERSTENBLITH, supra note 89, at 97.
97. See GERSTENBLITH, supra note 89, at 97.

Independent of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

See GERSTENBLITH, supra note 89, at 108.
99. See GERSTENBLITH, supra note 89, at 108.
100. 17 USCS § 106A(3)(A) (2004). Note that this section of VARA does not allow artists to prevent the destruction of their artworks. The policy behind this section is to protect the artist’s reputation stemming from their intended expression. The rationale is that the destruction of an artwork is not injurious to an artist’s reputation because it is not displayed in public where other’s could
creators of "work of recognized stature" a broader right of integrity that allows them to prevent the work's destruction.\textsuperscript{101} Borrowed from the California statute, Congress' intent is to preserve important works for the public benefit.\textsuperscript{102}

The Statute further limits the scope of moral rights by applying the statute only to "works of visual art" and then strictly defining what this category includes. Most relevant for this paper is this limiting clause which excludes from a "work of visual art...any merchandising item or advertising, promotional, descriptive, covering or packaging material or container."\textsuperscript{103}

In\textit{ Pollara v. Seymour}, the Second Circuit held that the appellant was not protected by VARA when the banner he created was taken down and ripped into several pieces.\textsuperscript{104} The appellant's banner was created for the Gideon Coalition, "a non-profit group that provides legal services to the poor."\textsuperscript{105} The banner, consisting of a visual depiction of people of all ages and races waiting in long lines in front of doors titled "Public Defender," "Legal Aid," and get a false impression of the artist's intent. GERSTENBLITH, supra note 89, at 97.

101. 17 U.S.C. 106A(3)(B) states - [The author of a work of visual art shall have the right — ] (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right. \textit{Id.}

102. GERSTENBLITH, supra note 89, at 108.

103. 17 USCS § 101 in relevant part (emphasis added) states - A "work of visual art" does not include - (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any \textit{merchandising item or advertising, promotional, descriptive, covering or packaging material or container}; (iii) any portion or part of any item described in clause (i) or (ii); any work made for hire; any work not subject to copyright protection under this title. 17 USCS § 101 (2004).


105. \textit{Id.} at 266.
“Prisoners Legal Services,” was made to hang above an information table in the government office plaza during the Gideon Collation’s Lobbying Day. Due to a permit problem, the banner was taken down in the middle of the night and in the process ripped into three pieces and piled in the corner of an office.

The court stated that VARA does not protect artwork that “advertises” or “promotes” regardless of its artistic merit or value. The appellant argued that the banner had a political message that was non-commercial and therefore not the sort of commercial advertising that Congress intended to exclude. Despite the plain meaning of the statutory text and legislative history, the court held that “promoting” has broader application than commercial advertising. Concluding that the banner’s purpose was to promote “in word and picture a lobbying message,” the court held that the banner was not protected by VARA.

A concurring opinion affirming for different reasons, found that the majority’s reading of VARA was overbroad. The

106. Id.
107. Id. at 267.
108. Id. at 269.
109. Id. at 270.
110. When read in context, the clause contains a series of adjectives (advertising, promotional, descriptive), which describe four alternatives (covering material, packaging material, covering container or packaging container). Thus, the language of the statute does indicate that anything that promotes is ineligible for protection under VARA but rather certain promotional covering and packaging materials and containers.
111. When referring to this section of the Act, legislators spoke only of marketing and advertising materials and never went so far as to suggest that this section would exclude any artwork that promotes a message. See 135 Cong Rec E 2199 (extension of remarks June 20, 1989) (statement of Rep. Kastenmeier) “[VARA] specifically excludes reproductions...merchandising and advertising materials” (statement of Rep. Markey) “This bill explicitly excludes from coverage any motion picture, video...poster, periodical, book, electronic publication, advertising item, or any work made for hire.” These statements are available at http://thomas.loc.gov (last visited Oct. 4, 2004).
112. Pollara, 344 F.3d at 270.
113. Id.
114. Id. at 271 (Glessen, J., concurring).
concurrence argued that under the majority’s reasoning, “a painting commissioned to promote the Olympics, or a sculpture commissioned to promote AIDS awareness, could never receive protection under VARA.” Contrary to the majority, the promotional purpose of the banner should only be one factor in determining whether the work was “merely promotional material.”

Two statutes passed to protect art and artists, the NEA and VARA, have both been interpreted to potentially exclude political art from their protection. While these statutes afford rights and protections such as government funding and the enjoining of any intentional distortion or mutilation to many artists, both statutes have been interpreted to leave little legal recourse for political artists. This low level of protection given to political art is at odds with the First Amendment theories that argue political art is political speech and therefore deserves the same high-level protection.

II. THE NEXT STEP: AN ANALYSIS OF POLLARA

The Second Circuit wrongly decided Pollara v. Seymour and in doing so took another step past NEA v. Finley in establishing a contradictory and illogical First Amendment standard for political art. The court could have decided Pollara on other grounds, such as determining that the banner was not a work of recognized stature and therefore not eligible for protection against destruction under section 106A(3)(B) of the Act, or alternatively, that the removing and ripping of the banner in Pollara was not injurious to the plaintiff’s reputation under section 106(3)(A).

First, the court could have found that Pollara was not eligible for protection under §106A(3)(B). This section applies only to

115. Id. (Glesson, J., concurring).
116. Id. at 272 (Glesson, J., concurring) (emphasis added).
117. Finley, 524 U.S. at 604; Pollara, 344 F.3d at 272.
118. See discussion, supra Section II.B.ii.
119. See discussion, supra notes 99 and 100.
creators of works of recognized stature. Since the work was new and had only been on display for a matter of hours, it would be very unlikely that Pollara could meet her burden of proving the banner was of recognized stature.

Second, the court could have also found that Pollara was not eligible for protection under Section 106(3)(A). This section only provides protection against mutilation or modification that would be deleterious to the artist’s reputation. Whether or not the artist’s reputation is at risk has previously rested on whether the mutilated or modified work is displayed publicly so that viewers may mistakenly assume that the altered work is as the artist intended. In Pollara, the ripped banner was not replaced in the plaza but rather piled in a corner. Thus, the Second Circuit could have held the artist’s work did not fit within either provision of VARA and therefore was not eligible for protection.

Instead of deciding the case on the grounds stated above, the court went to great lengths to interpret the meaning of the statutory exemption of “any merchandising item or advertising, promotional, descriptive, covering or packaging material or container.” Honing in on the adjective “promotional” and changing it to the verb “promotes,” the Second Circuit ignored the

120. See supra note 100.
121. Martin v. City of Indianapolis, 192 F.3d 608, 612. (7th Cir. 1999). The test for whether a work of recognized stature requires (1) that the visual art is question has “stature,” i.e. is viewed as meritorious, and (2) that this stature is “recognized” by art experts, other members of the artistic community, or by some cross-section of society. While the court stated that it is likely that an expert witness will be required to meet this burden, insinuating that the burden is a substantial one, it ultimately found that a handful of newspaper clippings and letters were sufficient to demonstrate that plaintiff’s artwork was of recognized stature. Id. at 612-13. It is unlikely that Pollara could even meet this low standard.
122. See discussion, supra note 99.
123. See discussion, supra note 96.
124. Pollara, 344 F.3d at 267.
125. See discussion, supra note 85, at (A)(ii). See also Pollara, supra note 103, at 269-71.
plain meaning of the statutory text\textsuperscript{126} and legislative history\textsuperscript{127} to arrive at a startlingly broad interpretation: VARA does not protect any artwork that promotes a cause or idea.\textsuperscript{128} While this interpretation surely encompasses commercial advertising and marketing designs its over-breadth reaches to pull in political art as well.\textsuperscript{129} In other words, according to the Second Circuit, VARA does not protect political art.

The result is that artwork containing apolitical subject matter or even indecent subject matter will be eligible for VARA protection while political art may not. This conclusion contradicts the one principle that the First Amendment theories of artistic expression have in common: that political art should receive the highest protection – the same protection as political speech.\textsuperscript{130}

III. THE IMPACT OF THE TREND ON POLITICAL ART

The trend to view political art as something less than political speech renders political art’s level of First Amendment protection ambiguous. Without full First Amendment protection, political art, an extremely powerful and democratic voice is exposed to attack. That the Second Circuit went from \textit{Bery}, the case elevating all art to the highest protection, to \textit{Pollara}, the case that apparently denies moral rights to political artists, illustrates how vulnerable political art is. This vulnerability is enhanced during times of political anxiety – the government becomes fearful of those promoting unfavorable messages.\textsuperscript{131} The last three years has been one of these times.

In the months and years following September 11, 2001, the United States government has been distrustful of criticism of its

\begin{itemize}
  \item \textsuperscript{126} See supra note 110.
  \item \textsuperscript{127} See supra note 111.
  \item \textsuperscript{128} See also \textit{Pollara}, 344 F.3d at 270. “Drawings and paintings are protected, but only if they do not advertise or promote.” \textit{Id}.
  \item \textsuperscript{129} \textit{Pollara}, 344 F.3d at 271 (Glesson, J., concurring).
  \item \textsuperscript{130} See discussion, supra Section I.A.ii.
  \item \textsuperscript{131} See discussion, supra Section I.B.ii regarding \textit{Bery} v. \textit{New York} and Section I.C.ii containing an analysis of \textit{Pollara} v. \textit{Seymour}.
\end{itemize}
agenda. In early December, 2001 only months after the World Trade Center attacks, Attorney General John Ashcroft made a statement in front of the Senate Judiciary Committee to critics of the Bush Administration’s tactics in investigating terrorism. He stated:

To those that who pit Americans against immigrants and citizens against noncitizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends.

In this statement Ashcroft calls into question the patriotism of those that dissent. The accusation of aiding terrorists practically criminalizes criticism or at the very least threatens a moral stain on those who question the Government’s policies. More recently, in the summer of 2003, as President Bush attempted to align political support for military action in Iraq, he warned members of the UN Security Council: “You are either with us or against us.” Two years after Ashcroft’s statement, the call for political conformity continues.

As further evidence of this anxiety, Attorney General Ashcroft has ordered the FBI to follow up every tip that contains information threatening to national security. This has resulted in “the FBI and Secret Service...harassing artists and activists”

133. Id.
136. Kris Axtman, Political Dissent Can Bring Federal Agents to Door, THE CHRISTIAN SCIENCE MONITOR, Jan. 8, 2002, at 1 (quoting Jill Spillman, an FBI agent assigned to the Justice Department). “Remarks made toward the president in an antagonistic way are checked out by the Secret Service.”
through surprise visits from federal agents. In December of 2001, two FBI agents visited the Art Car Museum in Houston, Texas. Arriving before the Museum was to open, the agents informed Donna Huanca, the docent, that they had received several reports of “anti-American” activity at the Museum. The Museum was opening “‘Secret Wars,’ an exhibit on US covert operations and government secrets.” For an hour the agents examined the artwork, sneering, scoffing and questioning Huanca about where the artists were from, who funded the museum, and whether her mother knew she worked at “a place like this.” While the FBI deemed the exhibit “not dangerous” after the visit, the Museum felt the visit was “intimidating and unnecessary.” Huanca said she “was definitely pale. It was scary because I was alone, and they were really big guys.”

Countless other critics and dissidents, including famous artists such as Tim Robbins, Susan Sarandon, Janeane Garofalo, Sean Penn and the music group The Dixie Chicks, have lost jobs, have been subject to boycott, or have been called unpatriotic, anti-American, or un-American for speaking out against the government.

143. Rothschild, *supra* note 137, at 18. Barry Reigngold, a resident of San Francisco, had a similarly intimidating experience when he awoke from a nap to find two FBI agents at his door. While he initially had no idea why the FBI would be interested in him, the agents explained that they knew what gym he worked out at and that he had been making remarks critical of the President there. One of the people from the gym had reported him to the government. Mr. Reigngold ended the conversation when the FBI agents informed him that he was entitled to his freedom of speech. The agents, however, notified him that they would still have to make a report. Mr. Reigngold was left feeling “shaken up” and nervous after the surprise visit. Axtman, *supra* note 136, at 1.
During a time of such political nervousness it is important that the First Amendment adequately protect expression that helps keep the government in check, maintaining the balance and accountability between the people and their leaders. Unfortunately, Pollara sets another precedent that political art does not receive the same amount of protection as political speech. If this notion were adopted, the free expression and dissemination of political art, an established mechanism for challenge and change would be at risk of becoming one of this era's casualties.

IV. CONCLUSION

Political art reaches both hearts and minds, and as Ashcroft warns, "diminishes our resolve" to rush, without conversations, into decisions of enormous consequence. Because of this, it is important that political art receive the full protection of the First Amendment. Political art can be elevated to its rightful place within political speech through common law and legislative action. First, the courts must take up the challenge of providing a clear articulation of art's First Amendment standard and boldly acknowledge that political art is political speech. Second, the legislature must be more careful in its drafting. The rights delivered must be clear and the restrictions placed must be sharply delineated so as to avoid statutory interpretations that devalue political art.

Brooke Davidson

INTERNATIONAL, Apr. 21, 2003. See also Rothschild, supra note 136, at 18.
145. See discussion, supra note 7.
146. See discussion, supra note 132.