

Investing in Arts Education to Advance California’s Creative Industry

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* University of San Diego School of Law, J.D. 2011; University of Wisconsin-Eau Claire, B.A. English and Education, 1999. I would like to honor Professors Frank Kemerer and Scott Himmelstein of the University of San Diego for creating a highly rewarding course in the Law & Politics of Educational Policy Development. I would also like to thank my wife, Suzanne, for her love and support, and for providing me the enchiladas that fueled this writing process. Finally, I would like to thank my mother and father, Rhonda and Marvin Whitman, for encouraging me and my brother, David, to explore and heighten our creativity and our own arts education and arts-centered pursuits. As with all education, creativity begins in the home.

I. Introduction

Given that creativity has emerged as the single most important source of economic growth, the best route to continued prosperity is by investing in our stock of creativity in all its forms, across the board. This entails more than just pumping up R&D spending or improving education, though both are important. It requires increasing investments in the multidimensional and varied forms of creativity—arts, music, culture, design and related fields—because all are linked and flourish together.¹

In the current era of perennial budget cuts to education, arts education programs seem to be the first on the chopping block.² Although the general public supports arts education programs and opposes their elimination from the education system, and despite the abundant research showing the value of the arts to students and society, arts education is a diminishing presence in schools.³ Perhaps this is because of the growing focus nationally on standardized testing in the areas of reading, math, and science.⁴

California's students fare poorly on standardized tests that assess basic skills, and

¹ RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* 320 (Basic Books 2004) (2002).

² See JESSICA HOFFMAN DAVIS, *WHY OUR SCHOOLS NEED THE ARTS* 1 (2008) (“[W]hen it comes to making hard decisions about what gets featured in or eliminated from daily learning, the arts are the first thing to crash to the cutting room floor.”). This is also true for federal funding. See U.S. DEP’T OF EDUC., *FY 2011 ED BUDGET SUMMARY, PROGRAMS PROPOSED FOR CONSOLIDATION OR ELIMINATION* (2011), available at <http://www2.ed.gov/about/overview/budget/budget11/summary/edlite-section4.html> (proposing a cut of \$40 million to an Arts in Education program involving the Kennedy Center for the Performing Arts that promotes arts education and professional development for arts educators). *But see* Americans for the Arts, 2011 Americans for the Arts News, *FY11 Budget and Its NEA Appropriations*, ARTSUSA.ORG, Apr. 12, 2011, http://artsusa.org/news/afta_news/2011.asp (stating that the Arts in Education account had been restored from \$0 million to \$25 million). Budget cuts to arts education are so prominent that arts advocates claim victory when their advocacy results in merely *lessening* the amount of funding eliminated opposed to actually *preventing* cuts. See, e.g., *FY11 Budget, supra* (finding the 7.5 percent (\$12 million) cut from the National Endowment for the Arts in the 2011 budget “heartening”); Stephen Kinzer, *Many State Arts Councils Make Their Case and Survive Budget Cuts*, N.Y. TIMES, Jan. 8, 2004, available at <http://www.nytimes.com/2004/01/08/arts/many-state-arts-councils-make-their-case-and-survive-budget-cuts.html?src=pm> (stating that it was “remarkable” that arts councils could secure “less painful cuts” instead of suffering greater program losses).

³ STEVEN THOMPSON, ANDREW SUN & LINDA BEATTIE, *CAL. STATE ASSEM. OFF. OF RES., ARTS EDUCATION IN CALIFORNIA: THRIVING OR SURVIVING?* 3 (1989).

⁴ See *infra* notes 49–52 and accompanying text.

policymakers typically do not consider the arts when trying to remedy this problem.⁵ Or maybe California’s system of education finance is to blame.⁶ The economy itself and the economic crises of the past ten years are other likely causes,⁷ but research indicates that the arts have been suffering for some time—long before 9/11 and the more recent U.S. financial meltdown.⁸ Regardless of the reasons, arts advocates are finding their work more challenging as the economy and student achievement continue to dwindle.⁹

Conversely, the research indicates a positive correlation between arts education and student achievement.¹⁰ Students who participate in arts courses tend to fare better in their other subjects and perform better academically as a whole. Students who have access to the arts enhance creativity and develop critical thinking and problem solving

⁵ Poor student achievement is a serious concern in California. SUSANNA LOEB, ANTHONY BRYK & ERIC HANUSHEK, INST. FOR RES. ON EDUC. POL’Y & PRAC., GETTING DOWN TO FACTS: SCHOOL FINANCE AND GOVERNANCE IN CALIFORNIA 1 (2007). On the 2005 National Assessment of Education Progress (“NAEP”), California students scored 7th lowest in eighth grade math out of 50 states and the District of Columbia, 3rd lowest in reading, and 2nd lowest in science—only ahead of Mississippi. *Id.* at 1–2.

⁶ See *infra* notes 62–63 and accompanying text. Some researchers argue that California’s system of school finance is a primary cause of California’s low student achievement. See, e.g., LOEB, *supra* note 5, at 1–8.

⁷ See Alyson Klien, *Recession’s Toll on Education Budgets Proves Both Widespread and Uneven*, 30 EDUC. WK. 16, 16–19 (2011) (discussing the impact of the recession of 2007–2009 on state and local education budgets). California has been hit hard recently by the foreclosure crisis in the housing market. See *id.* Other historical events also seem to have intensified budget cuts, including the terrorist attacks of September 11, 2001. See Greg Dimitriadis, Emily Cole & Adrienne Costello, *The Social Field(s) of Arts Education Today: Living Vulnerability in Neo-liberal Times*, 30 DISCOURSE: STUD. IN THE CULTURAL POL. OF EDUC. 361, 362–63 (“[T]his landscape has been radically reconstituted as a result of two key, interconnected events—the passage of the No Child Left Behind legislation in 2000 and the sharp shift in public resources in 2001 following the attacks [of] 9/11.”).

⁸ John Kratus, Professor of Music Education at Michigan State University, posits that “during times of fiscal uncertainty, the arts in education is perceived as less valuable than other, more pragmatic subjects that provide skills directly related to the workforce.” John Kratus, *Music Education at the Tipping Point*, MUSIC EDUCATORS J., Nov. 2007, at 44. However, the data show that even after an upturn in the economy after 9/11, enrollment in California music classes did not improve. See *id.*

⁹ See SUSAN J. BODILLY, CATHERINE H. AUGUSTINE & LAURA ZAKARAS, RAND EDUC., REVITALIZING ARTS EDUCATION THROUGH COMMUNITY-WIDE COORDINATION 4 (2008). Some advocates have even resorted to litigation strategies as a means of combating policymakers who are reluctant to compromise. See John W. Richmond, *The Litigation Engine: Influence and Control of K-12 Arts Education Policy*, 95 ARTS EDUC. POL’Y REV. 31, 31–37 (1994). However, this can backfire, as the enormous expense of litigation may cause schools to siphon funds from the same arts education programs the advocates are attempting to promote. See *id.*

¹⁰ See *infra* Part III.A.

skills. The arts can even encourage civic engagement, promote cultural awareness and sensitivity, and help at-risk students find passion in school and their lives overall.

Of particular significance to California’s current budget crisis, arts education has the potential to help improve the economy.¹¹ Today’s economy is a *creative economy*—requiring the types of skills developed through arts education within business and the workplace. Successful companies have leaders and employees who utilize creativity, who think critically, who respect diverse viewpoints, and who collaborate effectively. The arts also help create and revive vibrant business communities, attracting new businesses and creating jobs. California’s creative industry—one of the largest in the world—can certainly benefit from effective arts education programs in public schools.

Therefore, to increase student educational achievement and to strengthen California’s creative industries, California policymakers should mandate effective and accountable arts education programs within the K-12 public school system and invest sufficient funding to ensure educational and economic success.¹²

This paper analyzes both the current and ideal role of arts education in California within the context of law and policy. Part II discusses the current role of arts education in California—its funding, its history, and its legal framework. Part III outlines the numerous benefits arts education can provide to the individual and society. The section focuses on three key areas: student achievement, cognitive and social skills, and economic growth. Part IV analyzes the federal and state laws surrounding arts funding

¹¹ See *infra* Part III.C.

¹² The general public supports this viewpoint. A 2005 Harris Poll concluded that 79% of Americans “agree incorporating the arts into education is the first step in adding back what’s missing in public education today.” SANDRA S. RUPPERT, NAT’L ASSEM. OF STATE ARTS AGENCIES (“NASAA”), CRITICAL EVIDENCE: HOW THE ARTS BENEFIT STUDENT ACHIEVEMENT 5 (2006), available at <http://www.nasaa-arts.org/Research/Key-Topics/Arts-Education/critical-evidence.pdf>.

and instruction, including their underlying policy rationales. Part V proposes a course of action to more effectively fund and instruct the arts in California modeled on policy and practice. Part VI concludes that in the midst of educational and financial struggles, it is essential for California to invest in its known strengths in order to flourish within a culturally diverse, economically successful, and highly competitive global community.

I. Arts Education in California: Its Funding and Legal Framework

A. A New Definition of the Arts and Arts Education

The No Child Left Behind Act of 2001 (“NCLB”), George W. Bush’s education agenda signed into law in 2002, includes the arts as a core academic subject area but does not define “arts.”¹³ States therefore retain the power to provide their own definitions.

The California Education Code lists “the arts” as a subject that shall be taught in grades Kindergarten through twelve.¹⁴ Originally labeling the arts as “fine arts,”¹⁵ the Education Code has since been amended and now refers to “visual and performing arts,” defining the subject to include four disciplines: dance, music, theater, and visual arts.¹⁶ The pedagogical emphasis within the arts is on developing “aesthetic appreciation and the skills of creative expression.”¹⁷ California’s legal definition is standard in that it lists the four disciplines generally associated with arts education.¹⁸ Although the California

Education Code precisely defines “the arts,” the general definition has necessarily

¹³ See 20 U.S.C. §§ 1401(4), 7801(11) (2010). See generally No Child Left Behind Act of 2001 (“NCLB”), Pub. L. No. 107-110, 115 Stat. 1425 (2002). NCLB as it currently stands is an updated version of the 1965 Elementary and Secondary Education Act (“ESEA”). Anne C. Grey, *No Child Left Behind in Art Education Policy: A Review of Key Recommendations for Arts Language Revisions*, 111 ARTS EDUC. POL’Y REV. 8, 9 (2010).

¹⁴ See CAL. EDUC. CODE §§ 51210(e), 51220(g) (West 2011).

¹⁵ See KATRINA R. WOODWORTH ET AL., SRI INT’L CTR. FOR EDUC. POL’Y, AN UNFINISHED CANVAS: ARTS EDUCATION IN CALIFORNIA: TAKING STOCK OF POLICIES AND PRACTICES 9 n.5 (2007).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See NANCY CARR & DON DOYLE, CAL. DEPT. OF EDUC., DESIGNING EFFECTIVE PROFESSIONAL DEVELOPMENT FOR TEACHERS OF THE VISUAL AND PERFORMING ARTS 3 (2006), available at <http://www.static.kern.org/gems/beta3/ArtsProfDevelop2.pdf>.

expanded to align to the changing world. Generally, each of the four content disciplines has “sub-domains.”¹⁹ The arts, therefore, may include traditional areas such as drawing and painting, and contemporary ideas such as filmmaking and digital imagery.²⁰

“Arts education” carries different connotations as well. Although the arts are a core academic area under federal and state law, the actual implementation of the arts in the curriculum may vary among schools. In her book *Why Our Schools Need the Arts*, Jessica Hoffman Davis suggests nine examples of how the arts may exist in education.²¹ She labels these examples Arts Based, Arts Integrated, Arts Infused, Arts Included, Arts Expanded, Arts Professional, Arts Extras, Aesthetic Education, and Arts Cultura.²² The examples acknowledge that the arts can exist as individual subjects within traditional classroom settings, expand beyond the classroom into the community, or work to provide insight into student cultures and worldviews. These delivery methods may also vary among grade levels.²³ For the purposes of this paper, arts education refers to traditional arts classes within a traditional public school system, although the paper refers to varying models of arts in education.

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See* DAVIS, *supra* note 2, at 14–23. Jessica Hoffman Davis is a cognitive psychologist and arts education advocate and was the founding director of the Arts in Education Program at Harvard University’s Graduate School of Education. *See generally* Jessica Hoffman Davis Bio, <http://jessicahoffmandavis.com/bio> (last visited Apr. 3, 2011) (providing the author’s general background in education and arts advocacy).

²² *See* DAVIS, *supra* note 2, at 14–23.

²³ *See* WOODWORTH, *supra* note 15, at 25 (explaining recommended California policy for arts education delivery methods at the elementary, middle, and high school levels).

B. Arts Education Funding in California

Historically, California schools have not utilized arts education at an optimal level.²⁴ According to a 2007 study conducted by Stanford University’s Center for Education Policy, “California historically has done little to develop, implement, and sustain comprehensive arts programs that provide all students with access to and opportunities in the arts.”²⁵ A 1989 research study conducted by the California State Assembly reported that 80 percent of secondary level students received no arts instruction at all.²⁶ Students are not required to take a visual and performing arts course in high school because they can choose to take one in foreign language instead.²⁷ The adoption of the Visual and Performing Arts (“VAPA”) standards has not helped because the standards are not mandatory.²⁸ Therefore, the arts continue to be delivered unevenly across California school districts.²⁹ A 2007 report from the Center for Education Policy

²⁴ This is also true for schools outside of California. See BODILLY, *supra* note 9, at xii (“Because of the pervasive neglect of arts education in the kindergarten through grade 12 (K-12) public school system, most children are given only a smattering of arts instruction, and some are given none at all.”).

²⁵ Woodworth, *supra* note 15, at 1.

²⁶ CAL. DEPT. OF EDUC., STRENGTHENING THE ARTS IN CALIFORNIA SCHOOLS: A DESIGN FOR THE FUTURE 13 (1990) (citing THOMPSON, *supra* note 3, at 2). The study indicated that California Senate Bill 813, known as the Hughes-Hart Education Reform Act of 1983, and which eventually led to the requirement of one year of instruction in the arts *or* foreign languages, did not significantly improve arts access. See STRENGTHENING, *supra*, at 14–16; THOMPSON, *supra* note 3, at 2, 46–47. In fact, six years later, California schools had fewer arts teachers and showed even less attention to the arts than before Senate Bill 813 was implemented, resulting in a “deleterious effect on student access to arts education and training.” THOMPSON, *supra* note 3, at 2. See also CAL. EDUC. CODE § 51225.3(a)(1)(E) (West 2011) (requiring one year of instruction in either the arts or foreign languages).

²⁷ See CAL. EDUC. CODE § 51225.3(a)(1)(E) (West 2011). See also Cal. Dept. of Educ., Graduation Requirements, <http://www.cde.ca.gov/ci/gs/hs/hsgrtable.asp> (last visited Apr. 3, 2011) (listing state-mandated requirements for high school graduation and admission requirements for the University of California and California State University systems). Many advocates argue that *both* the arts and foreign language are essential to a high-quality, comprehensive education. See, e.g., Lynne Munson, *What Students Really Need to Learn*, EDUC. LEADERSHIP, Mar. 2011, at 12, 12–14 (claiming the necessity of arts and foreign language courses to emulate successful, well-rounded education programs of other countries).

²⁸ STRENGTHENING, *supra* note 26, at 17. See also CAL. EDUC. CODE § 60605.1(b) (West 2011) (“The content standards are intended to provide a framework for programs that a school may offer in the instruction of visual or performing arts. Nothing in this section shall be construed to require a school to follow the content standards.”).

²⁹ CAL. ALLIANCE FOR ARTS EDUC., QUALITY, EQUITY, AND ACCESS: A STATUS REPORT ON ARTS EDUCATION IN CALIFORNIA PUBLIC SCHOOLS GRADES PRE-K THROUGH 12 4 (2005), *available at*

showed that 29 percent of California schools did not offer any sequential, standards-based course in an arts discipline.³⁰ Even when schools do offer arts courses, participation rates are low.³¹ The California Alliance for Arts Education stresses that “competing priorities and limited discretionary funding” have led to California’s low arts participation rates.³²

California’s disadvantaged and at-risk youth have even less opportunity for participation in arts education.³³ Schools with higher achieving students generally have vibrant arts education programs while the arts programs in schools with lower-performing students struggle to survive.³⁴ The Center for Education Policy suggests several factors for this disparity, “including competing demands on instructional time and insufficient funds.”³⁵ Most saliently, high-stakes testing seems to negatively impact arts education programs because schools tend to focus instructional time on tested subject

http://www.artsed411.org/advocate/docs/CAAllianceforArtsEd_AccountabilityArtsEd_2008.pdf. See also THOMPSON, *supra* note 3, at 54 (finding that despite efforts to improve arts education, arts education programs have “remained static and uneven”).

³⁰ WOODWORTH, *supra* note 15, at 14.

³¹ *Id.* (stating that “in 2005-06, most California students did not participate in *any* standards-aligned instruction in each of the four arts disciplines”).

³² Cal. Alliance for Arts Educ., Arts Education in Historical Context, <http://www.artsed411.org/educate/status.aspx> (last visited Apr. 3, 2011).

³³ According to the California Alliance for Arts Education, a 2001 Los Angeles Arts Commission study of 82 school districts in Los Angeles and a 2005 study of the Oakland Unified School District both indicated that lower performing students were “much less likely to have access to music and other arts programs” than their “wealthier or higher achieving peers.” QUALITY, *supra* note 29, at 4–5. Black and Latino students especially have enjoyed fewer arts opportunities. *Id.* See also NICK RABKIN & E.C. HEDBERG, NAT’L ENDOWMENT FOR THE ARTS (“NEA”), ARTS EDUCATION IN AMERICA: WHAT THE DECLINES MEAN FOR ARTS PARTICIPATION (2011), available at <http://www.nea.gov/research/2008-SPPA-ArtsLearning.pdf> (finding that only 26% of 18-year-old African Americans and 28% of Hispanics received any arts education in 2008); Audrey Amrein-Beardsley, *Twilight in the Valley of the Sun: Nonprofit Arts and Culture Programs in Arizona’s Public Schools Post-No Child Left Behind*, 110 ARTS EDUC. POL’Y REV. 9, 11 (2009) (stating that “arts programs in high-needs schools are sparse and superficial at best”).

³⁴ THOMPSON, *supra* note 3, at 44 (“[I]n schools where students perform above average academically, they also receive a richer dose of visual and performing arts courses.”). See also *id.* at 54 (finding that high-achieving students have access to arts programs that are “a substantive part of the educational program” while low-achieving students have arts programs that are “languishing”).

³⁵ WOODWORTH, *supra* note 15, at 29.

areas, such as language arts and mathematics.³⁶ Students in higher-poverty schools generally have lower standardized test scores,³⁷ which leads to an even larger focus on non-arts subjects.³⁸ This might explain why low-poverty schools include arts education in school goals and missions statements at a higher rate than high-poverty schools.³⁹ The disparity between disadvantaged students and those with more privilege is significant because evidence indicates that the arts may have an even greater positive impact on at-risk students.⁴⁰ Even more important in the context of California, California's disadvantaged student population is comparatively high.⁴¹ Ironically, it is the at-risk child at whom measures like No Child Left Behind are primarily targeted.⁴²

³⁶ *Id.*

³⁷ See ERIC LARSEN & MARGARET WESTON, PUB. POL'Y INST. OF CAL., CALIFORNIA EDUCATION: PLANNING FOR A BETTER FUTURE 1 (2011), available at http://ppic.org/content/pubs/report/R_111ELR.pdf (“On average, students whose parents have low education levels and low-income, African American, Latino, and [ELL] students begin school less prepared. These groups score lower on standardized tests that begin in second grade, and the achievement gaps persist.”).

³⁸ WOODWORTH, *supra* note 15, at 29.

³⁹ *Id.* at 18–19. “Including the arts in school mission statements or improvement plans signals a more purposeful approach to the arts.” *Id.* at 18. Approximately half of California's schools include arts education goals within their mission statements. *Id.* However, while 57% of low-poverty schools report arts-inclusive programs, only 35% of high-poverty schools report the same. *Id.*

⁴⁰ See, e.g., QUALITY, *supra* note 29, at 2 (stating that arts participation is an “extremely effective way to engage” high priority students and prevent dropouts); Dimitriadis, *supra* note 7, at 362 (noting that the arts can appeal to young people in a different way than typical curricula and get students “hooked” on academics). One response to the lack of arts education access for at-risk students is the implementation of community arts centers devoted to educating disadvantaged youth. See Davis, *supra* note 2, at 25–28. According to Davis, “Researchers studying [community arts centers] have found that the arts in these settings offer younger children and teens authentic entrepreneurial encounters, opportunities for work that they see having an impact, and the chance to meet high expectations and experience deep engagement.” *Id.* at 27. Davis argues that the types of skills, lessons, and values taught in these centers—“engagement, authenticity, collaboration, mattering and personal potential”—must also exist within public schools. See *id.* at 28. One way of accomplishing this is through public magnet schools. See Dia Penning, *Reimagine Learning: Building a District on Arts Education*, 6 TEACHING ARTIST J. 279, 279–89 (2008) (describing the role of the San Francisco School of the Arts as a public magnet school ensuring arts-centered instruction to students throughout the city of San Francisco). See also THOMPSON, *supra* note 3, at 50–51 (listing several California magnet schools and community organizations that offer “excellent programs in arts education”).

⁴¹ While less than 10% of students nationally are English Language Learners (“ELL”), California ELLs account for 25% of the student population. LARSEN, *supra* note 37, at 2. Forty-two percent of students nationally qualify for free or reduced-price meals; in California, half of all students qualify. *Id.*

⁴² See QUALITY, *supra* note 29, at 14 (“The very students NCLB is most aimed at helping—those who are low-income, minority and academically vulnerable—are the ones studies consistently show stand the most to gain from regular arts instruction.”) (quoting Kristen Loschert, *Curtain Call*, NEA TODAY, Nov. 2004).

A major reason that California's arts education programs are diminishing is because of their lack of funding.⁴³ This aligns to California's economy overall, which is in great despair.⁴⁴ Budget cuts to education occur simultaneously with budget cuts to all types of government-funded institutions, and public services in general have suffered tremendous cuts since 2008.⁴⁵ Moreover, although education budget cuts in general are the norm in contemporary California, arts programs in particular are atop the list when it comes to choosing what school programs to trim or eliminate altogether.⁴⁶ Some findings have revealed great disparity between arts and non-arts funding.⁴⁷ A 2001 Los Angeles County Arts Commission study found that most of the 82 school districts in Los Angeles County "dedicated less than 1 percent of their total budget to arts education."⁴⁸

⁴³ This is true for California education programs in general; between 2007-2008 and 2010-2011, the state's contribution to K-12 education decreased by 13 percent. LARSEN, *supra* note 37, at 2. California's Legislative Analyst's Office has stated that K-12 funds will be lower in 2011-2012 because the temporary tax increases of 2009-2010 will expire. *Id.*

⁴⁴ California "faces a \$25.4 billion budget gap in a general fund of \$84.6 billion." Hailey Persinger, *School Music, Arts Programs on Chopping Block*, SAN DIEGO UNION-TRIB., Mar. 6, 2011, available at <http://www.signonsandiego.com/news/2011/mar/06/unifieds-music-arts-programs-chopping-block>. See also Klien, *supra* note 7.

⁴⁵ Thirty-four states and the District of Columbia have cut K-12 or early education since 2008. Klien, *supra* note 7. Last year, "California lawmakers had to resolve a \$19 billion deficit in a fiscal 2011 budget of \$82 billion." *Id.* See also Mike Ivey, *Arts Funding to Take Major Hit*, CAPITAL TIMES, Mar. 2, 2011, available at http://host.madison.com/ct/business/biz_beat/article_496eaf8c-44fe-11e0-a413-001cc4c03286.html (reporting that Governor Scott Walker of Wisconsin plans to slash Wisconsin's arts funding from \$2.4 million to \$759,000, while also eliminating the arts agency necessary to receive federal funding from the NEA). President Obama is currently urging the U.S. Congress to introduce a new education law by the fall of 2011, and he has simultaneously encouraged states to refrain from cutting education budgets. See *Obama Asks Congress for Education Bill by Sept.*, S.F. CHRON., Mar. 14, 2011, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2011/03/14/state/n030207D06.DTL>. During his nationwide visits to U.S. schools in March 2011, Obama stated, "We cannot cut education. We can't cut the things that will make America more competitive." *Id.* Nevertheless, the White House is considering massive cuts to federal arts education programs. See PROGRAMS, *supra* note 3.

⁴⁶ See Richmond, *supra* note 9, at n.44 (noting that the arts "are often among the most vulnerable curricular areas when budgets are strained and resources are scarce"). See also WOODWORTH, *supra* note 15, at 12 ("Arts education in California has traditionally been subject to fluctuations in state resources, creating a boom-bust cycle for arts programs and arts education funding.").

⁴⁷ See QUALITY, *supra* note 29, at 13-14 (providing examples of how California students have less exposure to the arts because of a growing focus on non-arts subjects).

⁴⁸ *Id.* at 13.

A number of other reasons exist as to why the arts are so easily eliminated from California schools. First, arts advocates often blame budget cuts to the arts on federal policies that have stemmed from the 1983 publication of *A Nation at Risk*.⁴⁹ Those policies have stressed the need for greater achievement in specific subject areas, such as reading, language arts, math, and science.⁵⁰ NCLB is the current target for arts advocates.⁵¹ The research supports arts advocates' claims: Accountability measures and high-stakes testing focused on non-arts subject areas cause schools and policymakers to place greater emphasis on the tested areas and spend less money on arts education.⁵²

Even before *A Nation at Risk*, California's policymakers inadequately funded the arts.⁵³ For example, within the 1970 Ryan Act, the California legislature eliminated an art or music requirement for individuals attaining elementary teaching certificates.⁵⁴ In 2004, this requirement was reenacted by the state legislature; elementary teacher education programs now must require arts methods coursework.⁵⁵ Because of this thirty-four-year training gap, as well as a lack of concern about complying with post-secondary institutions' admission requirements, elementary and middle school arts programs are more likely to suffer cuts.⁵⁶ A lack of quality arts teachers⁵⁷ has forced California

⁴⁹ According to a report from the California State Assembly Office of Research, 1983 was also the year that reform of public education in California became a priority through passage of the Hughes-Hart Education Reform Act. See THOMPSON, *supra* note 3, at 46.

⁵⁰ See WOODWORTH, *supra* note 15, at 29.

⁵¹ See, e.g., BODILLY, *supra* note 9, at xi.

⁵² See Dimitriadis, *supra* note 7, at 361 (stating that arts educators in one qualitative study felt a "deep-bodied sense of 'vulnerability'" as a result of continually shrinking resources after 9/11).

⁵³ WOODWORTH, *supra* note 15, at 7.

⁵⁴ QUALITY, *supra* note 29, at 13.

⁵⁵ Historical Context, *supra* note 32. This was a response to California's adoption of the Visual and Performing Arts ("VAPA") standards. *Id.*

⁵⁶ QUALITY, *supra* note 29, at 13. San Diego Unified School District ("SDUSD") is an example of a school system that may potentially impose budget cuts on its visual and performing arts curriculum that will effectively eliminate all elementary music programs. See Persinger, *supra* note 44 (reporting that SDUSD's visual and performing arts curriculum faces a \$2.8 million cut from its \$3 million budget). If these cuts occur, only one school at SDUSD, the Crown Pointe Junior Music Academy, which does not rely

schools to rely on “independent teaching artists, parent volunteers, and educators from state and local arts organizations” to attempt to fill the gap.⁵⁸ The California Department of Education has reported that “there are 8,305 full-time credentialed teachers of the arts, teaching 1,462,297 students in discipline-specific arts classes, representing only 23 [percent] of the State’s 6.3 million students.”⁵⁹ This problem is growing because budget cuts within arts programs result in fewer credentialed teachers,⁶⁰ and secondary level arts programs struggle when their students have no prior arts exposure.⁶¹ Finally, arts advocates place blame on Proposition 13—a 1978 amendment to the California Constitution that, among other things, limited taxes for real estate.⁶² Some studies have

on visual and performing arts funding, will retain its music program. *Id.* SDUSD is the second largest school district in California, with an enrollment of approximately 132,000 students. SDUSD, About SDUSD, <http://www.sandi.net/20451072095932967/site/default.asp> (last visited Apr. 7, 2011).

⁵⁷ CARR, *supra* note 18, at 3. (“Teachers at the elementary level have no prior knowledge of the arts obtained from pre-service multiple subjects credential programs or from their elementary and secondary school experiences as a student.”).

⁵⁸ Historical Context, *supra* note 32.

⁵⁹ *See id.*

⁶⁰ According to John Kratus, a “rapid, dramatic change” in California’s funding of music education programs led to a cumulative, catastrophic effect on music programs in general. *See* Kratus, *supra* note 8, at 43. From 1999-2004, the number of credentialed music teachers fell by 26.7%, a loss of 1,053 total teachers. *Id.* During this time span, “the percentage of all California public school students involved in music education courses fell by 50 percent,” a loss of 512,366 total students. *Id.* This occurred during a period of an overall growth of 5.8 percent in California’s student population. *Id.* Conversely, in classical Western education, the study of music enjoyed an elevated status, along with the classical subjects of philosophy, mathematics, and Latin. *See* Liora Bresler, *Research: A Foundation for Arts Education Advocacy*, in *THE NEW HANDBOOK OF RESEARCH ON MUSIC TEACHING AND LEARNING: A PROJECT OF THE MUSIC EDUCATORS NATIONAL CONFERENCE 1066*, 1066 (Richard Colwell et al., eds. 2002). California arts education programs, in general, have seen a decline in enrollment for many years. *See, e.g.*, STRENGTHENING, *supra* note 26, at 17 (noting a 13.5 percent decline in arts education programs in grades 7-12 in 1982-83 and 1986-87).

⁶¹ *See* Liane Brouillette, *How the Arts Help Children to Create Healthy Social Scripts: Exploring the Perceptions of Elementary Teachers*, 111 ARTS EDUC. POL’Y REV. 16, 21 (2010) (“When students arrive in middle and high school with little arts experience or interest, secondary arts programs inevitably struggle.”).

⁶² *See* Diane R. Gehling, *An Investigation of the Impact on Proposition 13 on California Fine Arts Education Including a Case Study of One School’s Program* (Apr. 10, 2001) (unpublished M.A. thesis, St. Thomas University) (on file with University of St. Thomas Department of Music) (concluding that “fine arts enrollment dropped dramatically after the passage of Proposition 13” and that the reduction in arts programs did not align with research suggesting positive impacts of arts education on student achievement).

concluded that after the passage of Proposition 13, California experienced a decrease in fine arts enrollment because of a reduction in local revenues for public education.⁶³

C. California Arts Education: Law and Policy

Despite many negative impacts on arts education in California, the state has experienced some promising steps toward implementing more effective arts education policies.⁶⁴ First, a majority of California's general public supports arts education funding.⁶⁵ This reflects the public's pro-arts viewpoint across the nation.⁶⁶ California

⁶³ See, e.g., *id.* But see David Savage, *The Unanticipated Impact of Proposition 13*, EDUC. LEADERSHIP, Jan. 1982, at 250, 251 (suggesting that decreasing student enrollment resulted in the loss of state aid).

⁶⁴ QUALITY, *supra* note 29, at 7 (listing arts education bills and funding initiatives since 1970).

⁶⁵ According to a study of 2,504 California adults released in 2010, 62% of Californians "believe there is not enough state funding going to their public schools." MARK BALDASSARE, PPIC, PPIC STATEWIDE SURVEY: CALIFORNIANS & EDUCATION 3 (2010), available at http://www.ppic.org/content/pubs/survey/S_410MBS.pdf. However, Californians are split on how willing they are to actually pay higher taxes to maintain current levels of education funding. See *id.* at 6 (49% willing; 47% unwilling). Moreover, only 10% of respondents believe that education is the most important issue facing contemporary California. See *id.* at 7 ("Jobs, economy" was first at 55%; "state budget, deficit, taxes" was second at 13%). Of course, some people are adamantly opposed to public education funding. See, e.g., Mari Payton, *Education in the Hands of Taxpayers?* NBC SAN DIEGO, Oct. 14, 2010, available at <http://www.nbcsandiego.com/news/local/Education-in-the-Hands-of-Taxpayers--98389519.html> (describing anti-union activist's opposition to Proposition J—a proposed 2010 parcel tax to fund SDUSD—because of lack of faith in fiscal responsibility of the school board). According to the parcel tax measure's proponents and SDUSD officials, Proposition J would have saved school arts programs. See *SDUSD Official Stresses Importance of Proposition J*, 10NEWS.COM, Oct. 12, 2010, available at <http://www.10news.com/news/25370545/detail.html>. However, the vote failed to receive the 2/3 supermajority vote necessary to pass. *SDUSD Parcel Tax, Measure J (November 2010)*, BALLOTPEDIA.ORG, [http://ballotpedia.org/wiki/index.php/San_Diego_Unified_School_District_parcel_tax,_Measure_J_\(November_2010\)](http://ballotpedia.org/wiki/index.php/San_Diego_Unified_School_District_parcel_tax,_Measure_J_(November_2010)) (last visited Apr. 3, 2011). Now, SDUSD faces tremendous cuts to its arts education programs. See Persinger, *supra* note 44.

⁶⁶ A June 2005 Harris Poll stated that 93 percent of Americans believe that "the arts are vital to providing a well-rounded education for children." Kratus, *supra* note 8, at 44. 54% of the same respondents rated the importance of arts education a 10 on a scale of 1 to 10. See *id.* A January 2011 poll conducted by the *American School Board Journal* found that 91 percent of responders said "the arts deserve full funding—or at least funding commensurate with core subjects like math and science—despite the ongoing budget crisis." *The Arts Are Necessary*, AM. SCH. BD. J., Jan. 2011, at 14. An older study, conducted by the National Research Center for the Arts in 1987, found that 91 percent of the general public felt that children should "be exposed to theater, music, dance, exhibitions of paintings and sculpture, and similar cultural events." THOMPSON, *supra* note 3, at 52. A majority of parents and non-parents stated that "arts-related courses should be made part of the regular curriculum," and 75% of respondents "felt that such art courses should come out of the regular school budget." *Id.* at 53. Seventy-two percent said they were willing to pay more taxes in order to see these improvements to arts education. *Id.* Not only does the public support the arts in great numbers, but it participates in the arts as well. See Jacqueline Trescott, *NEA Reports New Habits Lead to Broader Participation in the Arts*, WASH. POST, Feb. 24, 2011, available at http://voices/washingtonpost.com/arts-post/2011/02/nea_reports_new_habits_lead_to.html (reporting on a 2008 NEA survey that concluded almost 75% of Americans participate in the arts, including by using electronic media, attending festivals and performances at nontraditional locations such as historic sites, and creating their own

policymakers have echoed this support by legislating pro-arts measures. For example, in 1976, the state legislature created the California Arts Council (“CAC”), which helps support arts education through government grants.⁶⁷ The CAC’s Arts Education Mission Statement ensures that “at least 50% of the [CAC’s] program funds support arts in education.”⁶⁸ The CAC also works conjunctively with the federal government’s National Endowment for the Arts, matching federal grants to nonprofit arts organizations.⁶⁹

California has also enacted several statutes that promote and support arts education.⁷⁰ The 1990s experienced an upswing in arts initiatives.⁷¹ For example, in 1999, the University of California and California State University systems adopted an arts-related admissions requirement. Entering California university students must now complete an approved, year-long, sequential course in dance, music, theatre, or visual arts

art). See also NEA, AUDIENCE 2.0: HOW TECHNOLOGY INFLUENCES ARTS PARTICIPATION 10 (2010), available at <http://www.nea.gov/research/new-media-report/New-Media-Report.pdf> (“Over half of all U.S. adults (53%, or 118 million) participate in the arts through electronic and digital media.”).

⁶⁷ THOMPSON, *supra* note 3, at 49. The California Arts Council’s (“CAC”) underlying rationale, organizational structure, and duties are listed under California Government Code sections 8750 through 8756. See Dixon-Zenovich-Maddy California Arts Act of 1975, CAL. GOVT. CODE §§ 8750–56 (West 2011). Section 8753 of the Government Code states that the council shall (among other duties) “[e]ncourage artistic awareness, participation and expression”; “[h]elp independent local groups develop their own art programs”; “[p]romote the employment of artists and those skilled in crafts in both the public and private sector”; and “[e]nlist the aid of all state agencies in the task of ensuring the fullest expression of our artistic potential.” *Id.* § 8753(a)–(e). In 1963, the California legislature created the CAC’s precursor, the California Arts Commission, which had served similar goals. See Arthur G. Svenson, *The Administrator in the Administration of State Arts Agencies*, 14 J. OF AESTHETIC EDUC. 35, 35 (1980). See also *infra* Part IV.A–B (discussing funding of the arts in the U.S. and in California).

⁶⁸ NASAA, General Information Grant Programs: California, <http://www.nasaa-arts.org/Research/Key-Topics/Arts-Education/Arts-Education-Profiles/California.pdf> (last visited Apr. 3, 2011). CAC’s “Strategic Plan” has since been revised but continues to ensure the 50% allocation to arts education funding. See CAC, Strategic Plan 2010: A Direction for Three to Five Years, <http://www.cac.ca.gov/aboutus/files/StrategicPlan2009-10.v2.pdf> (last visited June 29, 2011).

⁶⁹ See *infra* notes 155–156 and accompanying text.

⁷⁰ See generally CAAE, Policies & Guidelines, <http://www.artsed411.org/educate/policies.aspx> (listing California and federal arts education policies and mandates).

⁷¹ WOODWORTH, *supra* note 15, at 7. In 1992, California issued an arts license plate, with proceeds used to support arts education programs sponsored by the California Arts Council. See *infra* notes 185–186 and accompanying text.

that is aligned with California state standards.⁷² Similarly, students transferring to University of California schools must have taken at least one arts course to satisfy general education requirements.⁷³ After the state legislature funded the arts at record-breaking lows in 2005,⁷⁴ in 2006, former Governor Arnold Schwarzenegger and the California legislature increased funds for arts education programs.⁷⁵ Nevertheless, according to a 2010 poll of California residents, Governor Schwarzenegger’s approval rating for handling K-12 education overall was at 16 percent and the California legislature’s rating was at 15 percent.⁷⁶ The California legislature has also implemented Arts & Music Block Grants to support standards-aligned arts instruction in grades K-12.⁷⁷ However, because the California Education Code now authorizes complete flexibility of the use of these funds, schools may use this funding for non-arts purposes.⁷⁸ The future of the California

⁷² See CAL. CODE REGS. tit. 5, §§ 40753, 40601(o) (West 2011). See also WOODWORTH, *supra* note 15, at 9; Univ. of Cal., University of California—a-g Guide, <http://www.ucop.edu/a-gGuide/ag/a-g/vpa/html> (last visited Apr. 3, 2011) (listing University of California visual and performing arts requirements and answering frequently asked questions).

⁷³ See Univ. of Cal., Regulations of the Academic Senate, <http://www.universityofcalifornia.edu/senate/manual/rpart2.html> (last visited Apr. 3, 2011). Students must take a total of three courses in Arts & Humanities, at least one of which must be a non-performance/non-studio arts course. See *id.*

⁷⁴ In 2005, California funded the arts at a rate that amounted to 3 cents per resident. See *infra* note 156.

⁷⁵ WOODWORTH, *supra* note 15, at 1. Perhaps Governor Schwarzenegger’s willingness to approve pro-arts bills arose from his personal connection to the arts. In both 2006 and 2008, Schwarzenegger declared the month of March “California Arts Education Month.” See CA.gov, Office of Governor Jerry Brown—Newsroom, March 2008 Declared “California Arts Education Month”, <http://gov.ca.gov/news.php?id=8976> (last visited Apr. 3, 2011); CA.gov, Office of Governor Jerry Brown—Newsroom, Governor Schwarzenegger Proclaims March 2006 “California Arts Education Month”, <http://gov.ca.gov/news.php?id=575> (last visited Apr. 3, 2011). Both proclamations espoused arts education for fostering valuable critical thinking skills and stated that arts education is vital to a well-rounded education. See also Lynne Munson, *Schwarzenegger Vetoes Curriculum-Narrowing Bill*, COMMON CORE NEWS, Oct. 4, 2010, <http://commoncore.org/pressrelease-08.php> (reporting that in October 2010, former Governor Schwarzenegger vetoed a bill “that would have effectively eliminated the arts and foreign language graduation requirement from California high schools” by substituting “career tech” courses).

⁷⁶ BALDASSARE, *supra* note 65, at 27.

⁷⁷ QUALITY, *supra* note 29, at 7.

⁷⁸ CAL. EDUC. CODE § 42605 (West 2011). See also Cal. Dept. of Educ., Ltr-10: Consolidated Payment #4—Categorical Programs, <http://www.cde.ca.gov/fg/aa/ca/consol10apptltr4.asp> (last visited Apr. 3, 2011) (stating in a letter from State Superintendent of Public Instruction Jack O’Connell that funds within the Arts and Music Block Grant may be used for “any educational purpose.”).

state government's attitude toward the arts is hard to predict as people are unsure about whether Governor Jerry Brown will truly commit to supporting arts education.⁷⁹

II. The Value and Necessity of Arts Education

Historically, the U.S. has undervalued and marginalized arts education.⁸⁰ Just as Puritans and other early Protestants viewed the arts as frivolous and nonessential to a democratic government, so do today's policymakers.⁸¹ However, researchers and thinkers have uncovered an abundance of evidence showing that arts education is necessary to attain individual and societal success.⁸² Three areas in which arts education

⁷⁹ One month before California's 2008 gubernatorial election, a consortium of arts advocates calling itself "Arts in the California Governor's Race" reported that Jerry Brown's website had just two mentions of the arts, while Republican contender Meg Whitman's had none. Christopher Knight, *Arts in the California Governor's Race*, L.A. TIMES, Oct. 12, 2010, available at <http://latimesblogs.latimes.com/culturemonster/2010/10/arts-in-the-california-governors-race.html>. Brown's website cited past accomplishments of placing artists on the CAC in the 1970s and founding the Oakland School for the Arts, an arts-based high school, in 2001. See *id.* Students from this same Oakland arts school performed at Brown's January 2011 inauguration. Wyatt Buchanan, *Jerry Brown Takes Governor's Reins Again*, S.F. CHRON., Jan. 4, 2011, available at http://articles.sfgate.com/2011-01-04/news/26357949_1_jerry-brown-budget-plan-anne-gust-brown. But see Bruce W. Davis, *Have You Heard the News?*, ARTSCOUNCIL.ORG, Jan. 20, 2011, <http://www.artscouncil.org/blogpage/detail/5> (remaining hopeful that Governor Brown, who originally signed the CAC into law, will continue funding the arts based on his past record of support). Whatever Governor Brown actually does while in office, a significant majority (74%) of Californians believe that improving education should be a "high priority" during his term. See BALDASSARE, *supra* note 65, at 4.

⁸⁰ Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 74 (1996) ("Under the Puritan tradition, art has been treated as a fillip to the good life—enjoyable, but inessential."). Throughout history, the public school system has marginalized arts education. See *id.* at 75–76. See also HOWARD GARDNER, ART EDUCATION AND HUMAN DEVELOPMENT 34 (1990) (stating that in the 1800s, arts education was confined to "affluent circles" and not "ordinary . . . scholastic settings"). Arts education has been viewed as merely part of the affective human experience, rather than a scholastic subject. See *id.* at 34–35. The U.S. is not necessarily alone in its attitudes toward arts education. See, e.g., Betty Hanley, *Policy Issues in Arts Assessment in Canada: "Let's Get Real"*, 105 ARTS EDUC. POL'Y REV. 33, 33 (2003) (stating that despite awareness of the many benefits of arts education, Canadian provinces have "generally marginalized" the arts).

⁸¹ Hamilton, *supra* note 80, at 74–75 ("By regarding art as mere entertainment, the [American culture] has underestimated its instrumental, liberty-reinforcing role in a representative democracy."). Today's arts education programs have often been denounced as unproductive and irrelevant. GARDNER, *supra* note 80, at x, 35. See also STRENGTHENING, *supra* note 26, at 13 (noting that school districts target arts education for budget cuts "because of the lingering reputation of the arts as an enjoyable but nonessential subject area"). Despite massive budget cuts to the arts, the public recognition of arts education benefits provides hope for the subject's future. See RUPPERT, *supra* note 12, at 1 ("As a nation, we are close to reaching a collective understanding that all students benefit from the opportunity to learn about and experience the arts."). However, "our rhetoric is out of sync with the reality." *Id.*

⁸² See, e.g., Hamilton, *supra* note 80, at 86 (arguing that art is "crucial to the health of a representative democracy"); RUPPERT, *supra* note 12, at 1 ("Study of the arts in its many forms—whether as a stand-alone subject or integrated into the school curriculum—is increasingly accepted as an essential part of achieving

demonstrates considerable value are 1) its positive impact on student educational achievement, 2) its ability to harness thinking skills, creativity, and social skills that benefit society, and 3) its significant contribution to business and the economy.⁸³

A. Arts Education Positively Impacts Student Achievement

A positive correlation exists between arts education and student achievement.⁸⁴

First, students who participate in arts courses tend to fare better academically in their non-arts courses than those who do not have exposure to the arts.⁸⁵ Research studies often discuss a transfer of learning between specific arts subjects and specific non-arts subjects—student learning in one context increases performance in another.⁸⁶ It is well-

success in school, work and life.”). *See also* STRENGTHENING, *supra* note 26, at 7–8 (answering the question “Why teach the arts?” by organizing the benefits of arts education into practical, intellectual, critical, and aesthetic dimensions). New Horizons for Learning, an educational research center at the John Hopkins University School of Education, provides an extensive list of arts education research and resources on its website. *See* New Horizons for Learning, Arts in Education, http://www.newhorizons.org/strategies/arts/front_arts.htm (last visited Apr. 3, 2011). *See generally* Sch. of Educ. at John Hopkins Univ., About New Horizons for Learning, <http://education.jhu.edu/newhorizons/about-new-horizons-for-learning/index.html> (last visited Apr. 3, 2011) (describing background history of center).

⁸³ The ways in which arts education contributes within and beyond the classroom are too numerous to fully articulate in this paper. For an accessible and thorough overview, *see generally* DAVIS, *supra* note 2 (explaining ten outcomes of arts education, describing the state of arts education as a whole, and providing resources and insights to assist arts education advocacy); ELLIOT W. EISNER, *THE ARTS AND THE CREATION OF MIND* 25–45 (2002) (describing the varied “aims and content” of arts education). The California Alliance for Arts Education claims that a well-taught arts curriculum benefits “all areas of learning,” including cultural understanding, readiness for learning and creative thinking, cognitive outcomes, emotional intelligence and expression, social interaction and collaboration, and preparation for the workforce and life-long learning. *See* QUALITY, *supra* note 29, at 4.

⁸⁴ Cognitive scientists continue to find support for the causal link between arts education and learning, and consequently denounce the thought that the best students are merely “drawn to the arts.” *See, e.g.*, Michael S. Gazzaniga, *Arts and Cognition: Findings Hint at Relationships*, in *THE DANA CONSORTIUM REP. ON ARTS & COGNITION, LEARNING, ARTS, AND THE BRAIN* v–viii (Carolyn Asbury & Barbara Rich eds., 2004), available at http://www.dana.org/uploadedFiles/News_and_Publications/Special_Publications/Learning,%20Arts%20and%20the%20Brain_ArtsAndCognition_Compl.pdf (summarizing findings from a number of studies showing positive cognitive impacts resulting from exposure to various forms of arts education). *See generally* RUPPERT, *supra* note 12, at 1–20. The source summarizes how arts education benefits student achievement by recognizing that learning in the arts is “academic, basic, and comprehensive . . . simple as A-B-C.” *Id.* at 10.

⁸⁵ Dimitriadis, *supra* note 7, at 368. This is the case in California as well. *See* THOMPSON, *supra* note 3, at 44 (stating relationship between rich arts curriculum and above average student achievement). *See also* Amrein-Beardsley, *supra* note 33, at 10 (providing a laundry list of citations supporting how the arts benefit learning within non-arts content areas).

⁸⁶ “More than 65 distinct relationships between the arts and academic and social outcomes are documented.” RUPPERT, *supra* note 12, at 10. Critical Links, a research compendium, has identified six

documented, for example, that music transfers to mathematics and spatial reasoning skills⁸⁷ and theater transfers to reading comprehension and linguistic skills.⁸⁸ Though some arts advocates are hesitant to argue for arts inclusion solely based on the arts' impact on other subject areas,⁸⁹ research concludes that the arts can increase student achievement throughout the school.⁹⁰ Second, some studies even indicate that arts

categories of benefits associated with arts education and student achievement. *See id.* (citing Richard J. Deasy, *Don't Axe the Arts!*, 82 NAT'L ASS'N OF ELEMENTARY SCH. PRINCIPALS (2003)). They are 1) Reading and Language Skills, 2) Mathematics Skills, 3) Thinking Skills, 4) Social Skills, 5) Motivation to Learn, and 6) Positive School Environment. RUPPERT, *supra*, at 10

⁸⁷ *See, e.g.*, Larry Scripp, *An Overview of Research on Music and Learning*, in CRITICAL LINKS: LEARNING IN THE ARTS AND STUDENT ACADEMIC AND SOCIAL DEVELOPMENT 132, 135 (Richard J. Deasy, ed. 2002), available at <http://www.eric.ed.gov/PDFS/ED466413.pdf> (claiming that “fundamental concepts indigenous both to music and math classrooms can become the cornerstone of the music-infused interdisciplinary curriculum”). *See also* James S. Catterall, *The Arts and the Transfer of Learning*, in CRITICAL LINKS: LEARNING IN THE ARTS AND STUDENT ACADEMIC AND SOCIAL DEVELOPMENT 151, 155 (Richard J. Deasy, ed. 2002), available at <http://www.eric.ed.gov/PDFS/ED466413.pdf> (“Nowhere in the spectrum of arts learning effects on cognitive functioning are impacts more clear” than in the comparison between music and spatial reasoning.). *See generally* CRITICAL LINKS, *supra* (collecting research studies of music education's impact on other subject areas and learning in general).

⁸⁸ *See, e.g.*, CRITICAL LINKS, *supra* note 87, at 20–65. A 2002 study conducted by UCLA researchers offered a list of 14 “guarantees” of drama education—outcomes that were essentially inevitable through drama instruction. *See* James S. Catterall, *Research on Drama and Theater in Education*, in CRITICAL LINKS: LEARNING IN THE ARTS AND STUDENT ACADEMIC AND SOCIAL DEVELOPMENT 58, 62 (Richard J. Deasy, ed. 2002), available at <http://www.eric.ed.gov/PDFS/ED466413.pdf>. The guarantees included “[o]pening doors to curriculum areas students might fear to venture into, including science, mathematics, and literature”; “[d]eveloping tolerance for a variety of personalities and ideas”; and “[i]ncreasing students' vocabularies and helping students develop finer control of rhetoric through interactions with others.” *Id.* Although researchers are sometimes hesitant to draw too bold of conclusions without more extensive studies, they continue to recognize a learning transfer between arts and non-arts subjects. *See generally* CRITICAL LINKS, *supra*. The arts not only positively benefit traditional subject areas; integrating the arts into a curriculum can help assist other subjects as well. *See, e.g.*, Brenda Pavill, *Fostering Creativity in Nursing Students: A Blending of Nursing and the Arts*, 25 HOLISTIC NURSING PRAC. 17, 17–25 (2011) (describing how incorporating arts into a university nursing program can help develop creativity to elicit a more holistic view of clients).

⁸⁹ Arts educators are in a conundrum—they can either promote the arts as valuable in itself or justify the presence of the arts through its impact on other subjects. *See* Janice Ross, *Arts Education in the Information Age: A New Place for Somatic Wisdom*, 101 ARTS EDUC. POL'Y REV. 27, 31 (2000) (“We need to be vigilant that the arts are not used and valued primarily for their non-art attributes.”). *See also* DAVIS, *supra* note 2, at 2–3 (“Have our efforts to fit arts learning into the changing aspirations of mainstream education slowed us down in our quest to find out what is unique and important about learning in the arts?”). Davis fears that teaching arts only through integration and not independently will lead to a dissolution of arts in schools and a continued perception of the arts as “soft, undirected, and dispensable rather than strong, focused, and essential.” *Id.* at 6. Another concern is that a focus on the benefits of the arts on non-arts subject areas is too dependent on the research, which can be dangerous if new findings arise or alternative conclusions strengthen. *See* EISNER, *supra* note 83, at 39.

⁹⁰ Eisner writes, “[S]ociety's receptivity to the aims of a field of study is closely related to the extent to which its members believe a field will promote the realization of what it values.” EISNER, *supra* note 83, at 38. With standardized testing and tested subjects such as reading, language arts, and math highly valued, it

education programs can help students raise their scores on standardized tests. A 2000 study of the impact of arts education on SAT scores revealed that students who took arts classes had higher math, verbal, and composite SAT scores than students who did not.⁹¹ The researchers were hesitant to make causal claims for the arts, but subsequent research has garnered similar results.⁹² Finally, arts education keeps students engaged in school.⁹³ The arts can be a refreshing outlet within a school focused on student test scores.⁹⁴ A UCLA study of 25,000 middle and high school students revealed that students who were involved in the arts watched fewer hours of television, participated more in community service, and were generally less *bored* with their education.⁹⁵

The arts are necessary to ensure a holistic, well-rounded education. Cognitive scientists have recognized that to comprehend information and master skills, a learner must have a considerable amount of background knowledge to more easily make connections between ideas.⁹⁶ Students who receive a well-rounded education, including

seems that, at least at this point on the educational pendulum, arts advocates and educators would be wise to acknowledge the link between arts and non-arts learning.

⁹¹ See CRITICAL LINKS, *supra* note 87, at 96. The study revealed that there was a positive correlation between the number of arts classes that students took and the SAT scores. *Id.* Acting courses had the strongest correlation with verbal SAT scores, and acting and music courses had the strongest correlation with math scores. *Id.* See also Simone Sebastian, *After-school Arts Education Gives Lower East Side Students a Lift Academically*, N.Y. TIMES, Dec. 27, 2010, available at http://www.nytimes.com/2010/12/28/nyregion/28neediest.html?_r=1 (describing how a struggling reader increased her reading skills through participation in an after-school musical theater program). Former California Governor Arnold Schwarzenegger acknowledged the correlation between the arts and SAT scores when proclaiming March 2006 “California Arts Education Month.” See Governor Schwarzenegger, *supra* note 75.

⁹² According to the 2005 data for the SAT, students with four or more years of arts courses outperformed students who had one half-year or less of arts courses by 58 points on the verbal section and 38 points on the math section. RUPPERT, *supra* note 12, at 9. *But See* EISNER, *supra* note 83, at 38–39 (stating that “more courses in *any* field are positively associated with higher SAT scores”) (emphasis added).

⁹³ See *infra* note 103 and accompanying text (describing the ability of the arts to engage at-risk students).

⁹⁴ See Dimitriadis, *supra* note 7, at 369 (“[T]he arts can be one of the very few spaces of respite for youth in an age of high-stakes testing and hyper-accountability.”).

⁹⁵ RUPPERT, *supra* note 12, at 8.

⁹⁶ Munson, *supra* note 27, at 13; COMMON CORE, WHY WE’RE BEHIND: WHAT TOP NATIONS TEACH THEIR STUDENTS BUT WE DON’T vi–vii (2009), available at http://commoncore.org/_docs/CCreport_whybehind.pdf. See also Mariale Hardiman, *Connecting Brain*

instruction in the arts, enjoy more academic success than those who endure more narrowly focused educational experiences.⁹⁷ This is true throughout the world: The countries that boast the highest student scores on international assessments have compulsory education systems that offer comprehensive instruction in a variety of subjects.⁹⁸ Knowing this, the current “back to basics” movement in the U.S. that emphasizes study in subjects such as mathematics, language arts, reading, and science, combined with the elimination of arts programs from schools, seems highly misguided.⁹⁹ This is especially true in the contemporary, competitive global society in which we live.¹⁰⁰ Getting rid of school arts programs as a means of eliminating “unnecessary” content is essentially throwing out the baby with the bath water.¹⁰¹

Research with Dimensions of Learning, 59 EDUC. LEADERSHIP 52, 52–55 (2001) (claiming that arts connections to other subject areas enhance cognitive learning and higher-order thinking).

⁹⁷ See, e.g., Bresler, *supra* note 60, at 1074 (citing a research study showing that students in grades four through eight who had “rich in-school arts programs” were more likely to exhibit higher “creative, cognitive, and personal competencies needed for academic success”).

⁹⁸ Munson, *supra* note 27, at 12. A 2009-2010 study by nonprofit research organization Common Core showed that the nine countries that scored highest on the Program for International Student Assessment (“PISA”) all required some form of arts education in their curriculums. See COMMON CORE, *supra* note 96, at 1, 6, 10, 17, 35, 39, 56, 66, 73 (The list is as follows: Finland—visual arts, music, and craft; Hong Kong—arts; South Korea—music, fine arts; Canada—the arts; Japan—music, art; New Zealand—the arts; Australia—the arts; Netherlands—creative expression, including music, drawing, and handicrafts; Switzerland—drawing and design, music, handicrafts). Examples of international student arts standards include the following: Fourth graders in Hong Kong “visit an artist’s studio, study Picasso’s *Guernica*, and analyze the works of modernist sculptor Henry Moore”; and eighth graders in Ontario, Canada “create musical compositions, conduct a group of musicians, and know musical terms in Italian.” *Id.* at 12–13.

⁹⁹ Common Core believes that the “intense focus on reading and math skills” brought on by NCLB has “dumbed down the curriculum.” COMMON CORE, *supra* note 96, at 13. The organization argues for a holistic liberal arts curriculum with increased arts standards, which would encourage states to build arts programs rather than make them “the first on the chopping block when times are tough.” *Id.* According to Common Core, “[The U.S. is] the only leading industrialized nation that considers the mastery of basic skills to be the goal of K-12 education.” *Id.* at vi. Because of the “urgency” to compete in our global society, the U.S. would be well-advised to ensure a strong, liberal arts education for its young people.

¹⁰⁰ See *id.* at 13 (“With the world growing ‘flatter’ by the day, the urgency of ensuring that our students are prepared to compete in the global economy is clear.”). See also Amrein-Beardsley, *supra* note 33, at 9 (“[P]olicymakers continue to overlook the fact that to be globally competitive, students need rich opportunities to learn more than the core subjects.”).

¹⁰¹ See COMMON CORE, *supra* note 96, at 14 (“[E]ven in tested subjects there is the danger that schools may respond to accountability pressures by adopting a narrow emphasis on skills rather than content that may ultimately undermine student performance across the board.”).

The arts may have an even greater impact on students who are disadvantaged, low-achieving, or at-risk.¹⁰² The arts classroom environment itself may help encourage youth to succeed in school.¹⁰³ One study indicated that at-risk students enrolled in school arts programs were more likely to earn academic achievement honors and set goals of continuing their education past high school.¹⁰⁴ Community arts centers recognize this impact and work to engage reluctant learners and potential dropouts.¹⁰⁵ As inner-city school arts programs diminish, artists and community members create centers for arts education not only to raise student achievement but also to “save lives.”¹⁰⁶ Arts advocates quickly point out that private centers are not substitutes for public school arts programs because the centers are available only to those who are aware of them and choose to attend.¹⁰⁷ Conversely, public school has the ability to reach all students—especially those who know the least about the arts and who would benefit the most.¹⁰⁸

¹⁰² See Penning, *supra* note 40, at 79–89.

¹⁰³ See Ross, *supra* note 89, at 30 (noting the arts classroom’s encouragement of free expression and the role of patient and caring arts instructors has benefited low-income and at-risk students and has led to an increase in arts offerings to economically and socially marginalized students). See also RUPPERT, *supra* note 12, at 14 (describing a study that determined that the arts, which provides an environment that offers constructive acceptance and encourages risk-taking, motivated at-risk students to stay in school).

¹⁰⁴ See Rob Grumich, *Tapping the Magic of Musical Theater for Exceptional Children*, EXCEPTIONAL PARENT, Mar. 2008, at 46.

¹⁰⁵ See also Bresler, *supra* note 60, at 1074 (stating that students in arts-enriched schools are more likely “to think of themselves as competent in academics”). The study clarified that it was exposure to arts, and not factors such as high socioeconomic status, that determined academic benefits of the arts. See *id.*

¹⁰⁶ See DAVIS, *supra* note 2, at 26–28, 41–42 (describing the value of urban arts centers to students who would otherwise be making self-destructive decisions and developing dangerous habits). Although highly beneficial, the out-of-school programs, like traditional arts education programs, are suffering from cuts to funding. See, e.g., Sebastian, *supra* note 91 (reporting that enrollment in an after-school arts program continues to drop because government grants have been cut).

¹⁰⁷ DAVIS, *supra* note 2, at 42. Another point is that although some of these programs are free or provide scholarships, most require “a financial commitment from . . . parents and additional parental support.” RABKIN, *supra* note 33, at 20. See also Tina Beveridge, *No Child Left Behind and Fine Arts Classes*, 111 ARTS EDUC. POL’Y REV. 4, 6 (2010) (“Public school may be the only place where at-risk students can access the arts without having to pay for them.”).

¹⁰⁸ DAVIS, *supra* note 2, at 42 (advocating schools as the best environments to ensure that the essential benefits of the arts impact individuals and society). Davis points to arts-based charter, pilot, and private schools as “clear evidence of what the arts can do when they are given space and time.” *Id.* at 103. The author concludes, “Don’t forget that better schools include the arts, that the arts make schools better, and that children who have arts education do better in school.” *Id.*

B. Arts Education Fosters Critical Thinking, Creativity, and Social Skills

The arts foster a variety of cognitive skills and social skills that benefit the individual and society.¹⁰⁹ First, students in arts courses adopt and refine their critical thinking and problem solving skills.¹¹⁰ By participating in the arts, students become better observers and are keener at decoding all types of verbal and nonverbal texts.¹¹¹ These skills are necessary to achieve social progress and maintain a stable, efficient economic system.¹¹² Second, because of the arts' inherent encouragement of free expression and creation, arts students enhance their creativity.¹¹³ Creativity is a valuable trait for an individual's personal life experience as well as a valuable attribute within the

¹⁰⁹ Philosopher and education reformer John Dewey suggested that the arts are “refined and intensified forms of experience” connected to societal experience. See Dimitriadis, *supra* note 7, at 368. The application of fine arts learning outside of the classroom results in “socially serviceable” and valuable products. JOHN DEWEY, *DEMOCRACY AND EDUCATION* 237 (MacMillan 1966) (1916). Thus, the arts “are not only intrinsically and directly enjoyable, but they serve a purpose beyond themselves. . . . They are emphatic expressions of that which makes any education worthwhile.” *Id.* at 238. See also EISNER, *supra* note 83, at 25–45.

¹¹⁰ One study has found that students who participated in dance scored higher on assessments of creative thinking abilities such as fluency, originality, and abstract thought. See RUPPERT, *supra* note 12, at 13. See also Bresler, *supra* note 60, at 1077 (“[E]ffective arts instruction . . . encourages the development of unique individual strategies and multiple solutions to problems.”).

¹¹¹ In a study of 9 and 10 year olds, students who were trained to observe and analyze visual art improved skills of drawing inferences that transferred to applying reasoning to images in science. See RUPPERT, *supra* note 12, at 13. The ability to keenly observe one's environment is particularly important within the media-saturated society in which today's students live. Students who are able to decode images and analyze them critically can transform their individual behavior from resembling a passive consumer to an active producer. See Pia Guerrero, *Media Arts and Elementary-age Children: Creating Active Producers from Passive Consumers*, 37 *AFTERIMAGE* 49, 49–50 (2009). A vibrant arts education program, therefore, provides necessary training for tomorrow's voters, thinkers, and leaders.

¹¹² The ability to analyze an image is a power, and currently “those who manage the media control a disproportionate amount of power.” EISNER, *supra* note 83, at 28. Recognizing the influence of visual texts and decoding their latent meanings are necessary skills to become a wise consumer, an active citizen, and a self-reliant human being. The arts help prevent individuals from mindlessly falling prey to political messages and commercial advertisements. The arts, therefore, can be an avenue to instilling positive social progress and maintaining a stable and more efficient economic system. See also 20 U.S.C. § 951(4) (2010) (“Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants.”).

¹¹³ EISNER, *supra* note 83, at 4–5, 10 (discussing how imagination encourages experimentation and rehearsal, which are essential to cultural development). Eisner writes, “A culture populated by a people whose imagination is impoverished has a static future.” *Id.* at 5. See also *id.* at 14–15 (describing how a watercolorist must use perception, imagination, judgment, and technical skills to create a work of art).

work force.¹¹⁴ Third, the arts help students develop social skills, including the ability to collaborate effectively, empathize, and socially interact.¹¹⁵ Moreover, the arts allow individuals to explore their inner selves¹¹⁶ while also developing multicultural awareness and sensitivity.¹¹⁷ Some researchers have even suggested that arts education encourages civic engagement.¹¹⁸ Overall, critical thinking, creativity, and social skills are so important to societal and economic progress that government officials have suggested holding schools accountable for teaching them.¹¹⁹

¹¹⁴ See *infra* notes 122–128 and accompanying text.

¹¹⁵ Studies indicate that *all* students can develop these types of social skills, but the arts’ impact on the social skills of educationally or economically disadvantaged youth is crucial for their personal and academic success. See RUPPERT, *supra* note 12, at 14. See also Brouillette, *supra* note 61, at 16–24 (describing how drama, an imagination-inducing activity, aids students’ social-emotional development).

¹¹⁶ Herbert Zipper, former Director for Special Projects for the University of Southern California’s School of Performing Arts, explained this concept at a 1986 hearing in front of the California Assembly Subcommittee on Arts and Athletics:

As we need science to relate ourselves to the forces of ultra-reality, we need the arts to become aware of the inner life. For the arts can give us visions of truth apart from ourselves in our relation to others that we can find by no other means and in no other way. The arts can tell us what science cannot tell us. The arts can make us aware of our emotional capacities of what we are, why we are, why we hope and suffer and love and die. And they tell us this in the only language that can express these truths: the language of affect and emotion. Science is the art of knowing. Art is the science of feeling.

The Economic Impact of the Arts in California: Hearing Before the Cal. Assem. Subcomm. on Arts & Athletics, 94 (1986) (statement of Herbert Zipper, Director for Special Projects, USC School of Performing Arts).

¹¹⁷ In *Why Our Schools Need the Arts*, Davis explains that the arts provide ways for children to shape and communicate four types of cultures: 1) an individual’s culture or personal worldview; 2) the cultures of communities such as families, schools, and neighborhoods; 3) the Cultures of nationalities and ethnicities “defined by geographical, political, or religious frameworks”; and 4) the Culture of humankind—the connection we all share as human beings. See DAVIS, *supra* note 2, at 22–23. A respect for diversity is also a crucial trait of a vibrant creative economy because an open and inclusive society tends to harness creative capabilities and accept new ideas that stimulate economic growth. See RICHARD FLORIDA, *THE FLIGHT OF THE CREATIVE CLASS: THE NEW GLOBAL COMPETITION FOR TALENT* 38–41 (2007).

¹¹⁸ See Hamilton, *supra* note 80, at 78 (“[A]rts education in the public schools serves important constitutional ends and therefore should be a high priority.”). The author argues that because the arts “construct paths out of repression,” the arts should be used as a vehicle to denounce tyranny and honor the First Amendment. See *id.* at 77–78. See generally Daniel Reid, Note, *An American Vision of Federal Arts Subsidies: Why and How the U.S. Government Should Support Artistic Expression*, 21 *Yale J.L. & Human.* 361, 361–418 (2009) (arguing that by fostering a deeper understanding of people within a pluralistic society, the arts can improve government as a whole)

¹¹⁹ As President Obama has stressed the continued importance of assessing reading, math, and science proficiency, he has also proposed measuring critical thinking, creativity, and collaboration. See Obama, *supra* note 45. Similarly, Massachusetts Governor Deval Patrick has proposed “formation of a creativity index to measure creativity in [Massachusetts] public schools.” John M. Eger, *Creativity Can Be an*

C. Arts Education Is Essential in a Creative Economy

Of particular significance to California's current budget crisis, arts education benefits the economy by contributing to the creative industry.¹²⁰ The arts help develop future artists, an occupation that represents 1.4 percent of the U.S. labor force—more than “the legal profession, medical doctors or agricultural workers.”¹²¹ Additionally, the skills students learn within their arts courses are the skills necessary for general success in the globally competitive, contemporary workplace.¹²² This is because the value of today's workers rest in their *creative capital*—human capital in the form of creative ideas.¹²³ In *The Rise of the Creative Class*, Richard Florida describes employers'

Economic Engine, SAN DIEGO UNION-TRIB., Dec. 31, 2010, available at

<http://www.signonsandiego.com/news/2010/dec/31/creativity-can-be-an-economic-engine>.

¹²⁰ See California Arts Advocates, *The Arts Can Play a Fundamental Role in California's Economy*, http://www.californiaartsadvocates.org/The_arts_can_play_a_fundamental_role_in_California.pdf (last visited Apr. 4, 2011) (providing statistics, data, and quotes to support the positive correlation between the arts and California's economy) (citing NEA, *ARTISTS IN THE WORKFORCE 1990-2005* (2008), available at <http://www.nea.gov/research/ArtistsInWorkforce.pdf>). See also Florida, *supra* note 117, at 253-58 (discussing the ideal education of people in the creative age). Florida advocates a comprehensive, arts-inclusive curriculum so that creative industry can flourish. See *id.*

¹²¹ See California Arts Advocates, *supra* note 120. The nearly 2 million artists included designers (39%); performing artists (17%); fine artists, art directors, and animators (11%); architects (10%); writers and authors (9%); photographers (7%); and producers and directors (7%). See *ARTISTS IN THE WORKFORCE*, *supra* note 120, at 5. Professional artists often credit K-12 arts education for providing training for their adult careers. See, e.g., Eileen Weiser, *Assessing the Value of Arts Education*, 17 *TEACHING MUSIC* 16, 16 (2010) (stating that had the author not been exposed to arts in her early schooling, she would not be a classical pianist today).

¹²² See EISNER, *supra* note 83, at 33-35 (describing the pragmatic benefit of arts education within a competitive world). See also Steve Nivin & David Plettner, *Arts, Culture, and Economic Development*, 8 *ECON. DEV. J.* 31, 32 (2009) (explaining that today's companies must hire individuals trained in the arts because innovative products must be designed to be aesthetically pleasing to meet consumer demands). See also *The Economic Impact of the Arts in California: Hearing Before the Cal. Assem. Subcomm. on Arts & Athletics*, 7 (1986) (statement of Tony Radich, Senior Project Manager for the Arts, Tourism and Culture Resources Committee of the National Conference of State Legislatures) (“[T]he arts feed and create economic development by developing creative individuals who have special skills.”).

¹²³ Florida explains that this new type of human capital is properly called *creative capital*. See FLORIDA, *supra* note 117, at 32. Instead of basing individuals' potential on their education level, today's employers place emphasis on the “ability to create new ideas, new technologies, new business models, new cultural forms, and whole new industries.” *Id.* See also Peter Coy, *The Creative Economy*, *BUSINESSWEEK*, Aug. 28, 2000, available at http://www.businessweek.com/2000/00_35/b3696002.htm?scriptFramed (acknowledging that today's intellectual properties are employees' ideas rather than tangible items). When Massachusetts Senator Stanley Rosenberg introduced a bill to measure creativity in public schools, his rationale was that instead of seeking people with basic job skills, employers now seek creative individuals “who can generate new ideas and new ways of solving problems.” Eger, *supra* note 119.

increasing dependence on creativity and critical thinking skills as an inevitable occurrence in the Information Age.¹²⁴ Leaders and employees of today’s most successful businesses exhibit the types of skills that school arts courses help develop.¹²⁵ The most profitable and productive companies succeed by utilizing creative problem solving techniques and practicing effective collaboration.¹²⁶ The growth of the internet and online media has expanded opportunities for the creative sector.¹²⁷ Sufficiently funded arts education programs, therefore, are essential within this new economic system.¹²⁸

¹²⁴ Florida formulates that *knowledge* and *information* “are the tools and materials of creativity” and *innovation* is the product. FLORIDA, *supra* note 1, at 4. He lists *individuality*, *meritocracy*, and *diversity and openness* as the primary creative class values. *See id.* at 77–80.

¹²⁵ *See* NAT’L GOVERNOR’S ASS’N, ARTS & THE ECONOMY: USING ARTS AND CULTURE TO STIMULATE STATE ECONOMIC DEVELOPMENT 5–6 (2009), available at <http://www.nga.org/Files/pdf/0901artsandconomy.pdf> (providing data to show how government investment in creativity can fuel a creative industry and create a competitive edge to bring economic prosperity). Some educational programs have recognized the link between creativity and the economy. *See, e.g.*, Doug Risner, *Dance Education Matters: Rebuilding Postsecondary Dance Education for Twenty-first Century Relevance and Resonance*, 111 ARTS EDUC. POL’Y REV. 123, 123–35 (2010) (describing how college dance programs have broadened training to provide practical skills that will help dance majors create and manage private dance studios).

¹²⁶ Continued participation in the arts throughout a person’s lifetime bears a strong correlation to “generating patents and new companies.” Michele Root-Bernstein & Robert Root-Bernstein, *Artsmarts: Why Cutting Arts Funding Is Not a Good Idea*, PSYCHOL. TODAY, Feb. 14, 2011, available at <http://www.psychologytoday.com/blog/imagine/201102/artsmarts-why-cutting-arts-funding-is-not-good-idea>. CEOs of large companies purposely search for people with arts backgrounds for scientist and engineer positions because of their level of creative capital. *See id.* Helge W. Wehmeier, President and CEO of Bayer Corporation, is a CEO who sees a real connection between the arts and science:

A good well-rounded education must include the study of both the arts and the sciences. As a company we explore the synergies between arts and science. Of all subjects, the arts and sciences are closest and most interrelated. They offer complementary ways of understanding the same object or event. . . . They also teach critical thinking, creativity and curiosity—skills that make for an educated and innovative work force.

Id. With abundant art displayed within the workspaces and aesthetically pleasing work environments in general, the creative industry’s workplaces themselves honor the arts. FLORIDA, *supra* note 1 at 122–27.

¹²⁷ *See, e.g.*, JAMES FLANIGAN, SMILE SOUTHERN CALIFORNIA: YOU’RE THE CENTER OF THE UNIVERSE 133–36 (2009) (describing how video games and virtual online worlds have become multi-billion dollar industries in California). An increase in online media also allows more opportunity in arts education. *See* Hamilton, *supra* note 80, at 119 (“As more artworks become available through online services, the opportunities for creative arts education increase.”).

¹²⁸ One way California works to connect arts education with creative industry is through the state’s 71 Career Technical Education Partnership Academies. *See generally* JOE LANDON & DANA POWELL RUSSELL, CAAE, BOTH/AND: UNDERSTANDING THE VITAL LINK BETWEEN BOTH THE ARTS AND CAREER TECHNICAL EDUCATION IN CALIFORNIA PUBLIC SCHOOLS (2010), available at http://www.artsed411.org/educate/docs/WhitePaper2010_singles.pdf (describing how the arts work together with career technical education to develop skills such as problem solving and critical thinking).

California’s creative industry has been a bastion of the state economy for many years.¹²⁹ Its obvious arts connection is the entertainment industry, which is the third largest business sector in the state.¹³⁰ In 2009, the entertainment industry in Southern California alone employed more than 300,000 people—a conservative estimate according to the Los Angeles County Economic Development Corporation.¹³¹ Nonprofit arts organizations also contribute to the economy, generating approximately \$5.4 billion and employing 66,000 full-time and 95,000 part-time workers each year.¹³² According to the

¹²⁹ In its early years, California’s motion picture industry was the fifth-largest industry in the U.S. See CHARLES F. ADAMS, CALIFORNIA IN THE YEAR 2000: A LOOK INTO THE FUTURE OF THE GOLDEN STATE AS IT APPROACHES THE MILLENNIUM 200 (1992). One of the most influential figures in California’s creative industry was Walt Disney, who exemplified the type of innovation and creativity learned through participation in the arts. See FLANIGAN, *supra* note 127, at 142. Although Disney passed away in 1966, The Walt Disney Company continues to enjoy extraordinary success—much of it because of the company’s willingness to innovatively adapt to changes in technology and globalization. See *id.* at 142–43.

¹³⁰ See CAL. EDUC. CODE § 8950 (West 2011) (“The Legislature finds and declares that the arts and entertainment industries constitute the third largest business sector in the state, and it is within the interests of the people of the state to preserve [the industries’] artistic and economic benefits.”). This declaration was promulgated as part of the establishment of the California State Summer School for the Arts. See *id.* Hollywood—the entertainment industry’s iconic hub—contributes to “tourism, artistic endeavor, technical brilliance, and . . . deal making.” FLANIGAN, *supra* note 129, at 132. Billions of dollars in revenue stream from the movie industry. In 2007, foreign exports of movie and video products totaled over \$10.4 billion in sales. California Arts Advocates, Creative Industries in California Generate More Than \$20 Billion Dollars in Economic Impact, <http://www.caarts.org/2010/09/16/creative-industries-generate-more-than-20-billion-dollars-in-economic-impact-campaign-to-inform-2010-governor%E2%80%99s-race-launches> (last visited Apr. 4, 2011). In 2008, “Art galleries, individual artists, writers, and performers in California earned over \$12 billion . . . while photography, music, book, and record store sales totaled over \$3.2 billion.” *Id.*

¹³¹ FLANIGAN, *supra* note 129, at 132. The estimate was labeled conservative because it did not include indirect employees, such as “legions of lawyers, consultants, financiers, and individuals in other trades serving the industry.” *Id.* Southern California has recently emerged as a major focus of venture and private equity capital because of its entertainment industry connection. *Id.* at 135.

¹³² See also Sean Belk, *East Village Arts District Reborn by Renovations*, LONG BEACH BUS. J., Mar. 15, 2011, available at http://www.lbbj.com/manage/uploads/lbbj_pdfs/EastVillageArtsDistrictReborn_pg1_031511.pdf (reporting how investment in the arts in Long Beach helped revitalize an area of the city). The nonprofit arts sector also returned \$300 million in state and local taxes. See CAL. ARTS ADVOCATES, CALIFORNIA ARTS COUNCIL FUNDING (2008), available at http://www.californiaartsadvocates.org/Tapping_New_State_Funding_Sources_-_CAA_Handout.pdf. See also AMERICANS FOR THE ARTS, ARTS & ECONOMIC PROSPERITY III: THE ECONOMIC IMPACT OF NONPROFIT ARTS AND CULTURE ORGANIZATIONS AND THEIR AUDIENCES 1 (2009), available at http://www.artsusa.org/pdf/information_services/research/services/economic_impact/aepiii/national_report.pdf (reporting in a 2009 study that a \$4 billion government investment in the arts nationally returned \$30 billion in government revenue); California Arts Advocates, *supra* note 120 (“[T]he nonprofit arts and culture industry generates over \$166 billion in economic activity annually, supports over 5.7 million full-time jobs, and returns over \$12 billion in federal income taxes annually.”) (citing NAT’L CONF. OF MAYORS, STRONG CITIES, STRONG FAMILIES FOR A STRONG AMERICA: MAYORS’ 10-POINT PLAN (2008), available at http://www.usmayors.org/pressreleases/documents/10-PointPlan_1107.pdf).

California Arts Council, “California has over 100,000 arts-related businesses employing more than a half million Californians.”¹³³ Californians themselves contribute to creative industries as both producers and participants.¹³⁴ Research shows a positive correlation between arts education and arts participation.¹³⁵ The creative industry also consists of other types of businesses that are not necessarily arts-based but require the types of skills inherent within arts education.¹³⁶ Along with arts-centered occupations, the “creative class” includes those working in computer and mathematical fields, engineers, educators, attorneys, and scientists.¹³⁷ California’s diverse population and employment sectors offer

¹³³ California Arts Council, Letter to California Congress Regarding NEA Elimination, <http://www.cac.ca.gov/files/ltrCongress2re-NEA-Jan-2011.pdf> (last visited Apr. 4, 2011). *See also* California Arts Advocates, *supra* note 120 (“California is home to 110,840 arts-related businesses that employ 438,912 people); California Arts Advocates, The Creative Industries in California, http://www.californiaartsadvocates.org/CA_2009_Creative_Industries_Report.pdf (last visited Apr. 4, 2011) (showing visual representation of arts-centric businesses in California). There are 686,076 businesses in the U.S. involved in the creation or distribution of the arts that employ 2.8 million people. *Id.*

¹³⁴ The term *participants* here refers to *consumers* of art. *See* ECONOMIC PROSPERITY, *supra* note 132, at 15 (discussing how arts audiences not only consume the art itself but also are more likely to contribute to the economy by generating related commerce for local businesses). Examples of related expenditures include transportation, meals/refreshments, and lodging. *See id.* According to one study, nonprofit arts and culture performance attendees spend an average of \$27.79 per person above the cost of admission. *Id.* *See also* A. GARY ANDERSON CTR. FOR ECON. RES., THE ECONOMIC IMPACT OF THE NONPROFIT ARTS ON ORANGE COUNTY 2 (2010), available at <http://library.constantcontact.com/download/get/file/1102237885473-1302/2010+Economic+Impact+of+the+Nonprofit+Arts+on+OC.pdf> (finding in a 2010 study of 26 nonprofit arts organizations in Orange County, California that audience members spent \$86.6 million over and above admission revenues). *See generally* ECONOMIC PROSPERITY, *supra* at 1–13 (providing data to illustrate the revenue generated through vibrant nonprofit arts industries across the U.S.).

¹³⁵ *See* RABKIN, *supra* note 33, at 19–20 (reporting that students in a study who had more arts education were the higher consumers of various forms of arts). Although recognizing the correlation, the researchers were hesitant to conclude a causal relationship between arts education and participation. *See id.* at 20. *See also* Hamilton, *supra* note 80, at 119 (“A richer arts education should lead to more appreciation of art and therefore more private funding and a more vital artistic culture.”); Trescott, *supra* note 66 (reporting from the results of a 2008 NEA survey that 81% of respondents who engaged in creative writing were also avid readers and 80% of adults who attended dance performances were more likely to create their own art). The NEA survey also concluded that 75% of Americans participate in the arts. *See id.*

¹³⁶ *See, e.g.,* *Economic Impact*, *supra* note 122, at 7–8 (claiming that the arts fuel the tourism industry and provide the creative source for business-related activities such as “advertising, product packaging, product design, and the commercial industry”). *See also* California Arts Advocates, *supra* note 133 (stating that the tourism industry is California’s 4th largest employer).

¹³⁷ Florida describes the creative class as having two major sub-components: a Super-Creative Core and creative professionals. *See* FLORIDA, *supra* note 117, at 328. The Super-Creative Core consists of occupations in the fields of computers and mathematics; architecture and engineering; life, physical, and social science; education, training, and library; and arts, design, entertainment, sports, and media. *See id.* Creative professionals are composed of management occupations, business and financial operations

a multitude of creative class opportunities.¹³⁸ The greater Los Angeles area employs more artists than any other metropolitan area in the U.S.¹³⁹ California's creative sector in Los Angeles County consists of "nearly 1 million direct and indirect jobs."¹⁴⁰ The skills learned through arts education contribute to all of California's creative class careers.¹⁴¹

The arts are also integral to vibrant business communities, attracting businesses to regions and consequently creating jobs.¹⁴² Additionally, new arts organizations help rebuild and rejuvenate neighborhoods.¹⁴³ The California Arts Council works to support arts programs and thus contributes to these economic improvements.¹⁴⁴ However, with schools focusing increasingly less on arts instruction, students do not have the

occupations, legal occupations, healthcare practitioners and technical occupations, and high-end sales and sales management. *See id.*

¹³⁸ California's major metropolitan areas of San Francisco, Sacramento, San Diego, and Los Angeles are all highly ranked according to Florida's Creativity Index, which factors in the number of creativity-focused jobs, the level of tolerance to diverse groups, and the amount of technological innovation. *See* FLORIDA, *supra* note 1, at 355. According to a 2008 report from the NEA, San Francisco, Los Angeles, Santa Cruz, Santa Barbara, and San Luis Obispo are five of the top cities in the U.S. that have high artist concentrations. *See* California Arts Advocates, *supra* note 121. The report stated that Los Angeles employed 140,620 artists, while San Francisco employed 35,670. *See id.* *See generally* ARTISTS IN THE WORKFORCE, *supra* note 121 (providing an abundance of data revealing California's working artists according to employment categories, demographics, and geographic locations).

¹³⁹ *See* California Arts Advocates, *supra* note 121.

¹⁴⁰ LANDON, *supra* note 128, at 15.

¹⁴¹ Former Governor Arnold Schwarzenegger recognized how arts education impacts the economy in declaring March 2008 "California Arts Education Month." *See* March 2008, *supra* note 75 ("Our state has a rich history of visual and performing arts with world renowned museums and active arts programs in every community. To ensure that we continue to allow the arts to flourish in California, it is our responsibility to introduce children to its important values."). Arts education is also essential to the state economy when considering its positive impact on student achievement, which itself has positive economic outcomes. *See* LOEB, *supra* note 5, at 2.

¹⁴² *See, e.g.,* Belk, *supra* note 132 (reporting how the creation of Long Beach's downtown arts district revitalized the city and attracted business owners and prospective investors). *See also* FLORIDA, *supra* note 1, at 55 ("[S]upporting lifestyle and cultural institutions like a cutting-edge music scene or vibrant artistic community . . . helps to attract and stimulate those who create in business and technology.").

¹⁴³ *See* Amrein-Beardsley, *supra* note 33, at 14 ("Communities in which arts and culture are a significant part of the infrastructure reap the benefits of economic growth by luring businesses and jobs as well as attracting tourists."). *See also* Reeve Hamilton, *Texas Study Stresses Economic Progress Through Art*, TEX. TRIB., Jan. 30, 2011, available at <http://www.texastribune.org/texas-economy/economy/texas-study-stresses-economic-progress-through-art> (reporting how the arts have aided business centers in Texas cities).

¹⁴⁴ The California Arts Council ("CAC") works to fulfill its goal of "giving the arts their rightful place in the lives of the California people." ADAMS, *supra* note 129, at 202. The CAC develops artistic talents, helps raise public awareness of the arts, and develops school arts programs. *See id.* This type of urban development also helps increase public support to fund arts education in schools. *See* Amrein-Beardsley, *supra* note 33, at 14.

opportunity to develop the necessary skills to contribute productively to the state economy.¹⁴⁵ California’s creative industry has already seen millions of dollars disappear through outsourced jobs within the film industry.¹⁴⁶ Arts education can be the answer to California’s educational and economic problems, as long as the state invests in arts education programs that effectively meet the needs of the creative industry.¹⁴⁷

¹⁴⁵ As budget cuts increase, so does arts advocates’ frustration at policymakers who refuse to acknowledge the benefits of arts education to the creative industry. See, e.g., Lisa Newton, *The State of the State of California’s Funding for the Arts*, TRAVELIN’ LOCAL, May 30, 2009, <http://www.travelinlocal.com/the-state-of-the-state-of-californias-funding-for-the-arts> (“It’s just plain wrong that California’s priorities lie elsewhere than investing into the arts which has been proven to attract and keep the knowledge management class.”). Florida notes that the failure to fund California students’ public education in areas that contribute to creative industry has led to California businesses importing talent rather than employing homegrown citizens. See FLORIDA, *supra* note 1, at 258. But see ECONOMIC PROSPERITY, *supra* note 132 at 26 (providing hope to arts advocates by claiming that as the support for positive economic benefits of the arts has strengthened through sound research methods and reputable economic analysis, legislators are now more likely to accept the data and change policy).

¹⁴⁶ See Greg Elmer & Mike Gasher, *Catching up to Runaway Productions*, in CONTRACTING OUT HOLLYWOOD: RUNAWAY PRODUCTIONS AND FOREIGN LOCATION SHOOTING 1–2 (Greg Elmer & Mike Gasher eds., 2005) (discussing how “runaway production” and the increase of filming outside of California has resulted in exported profits and jobs). Before he was Governor, Arnold Schwarzenegger reportedly took an \$8.5 million pay cut “to prevent the production of the \$170 million U.S. feature *Terminator 3: Rise of the Machines* from shooting in Vancouver. *Id.* at 3–4. U.S. film exports have greatly exceeded domestic earnings since the mid-1980s. See *id.* at 15. Some authors suggest that this exportation of capital and jobs has increased competition in other markets. See, e.g., *id.*

¹⁴⁷ Some arts education advocates prefer not to argue that arts education has economic benefits because they are afraid arts education programs, by adapting to the commercial sector, will suffer a loss of quality. See, e.g., DAVIS, *supra* note 2, at 39–40. These advocates consider commercial enterprises such as the entertainment industry to be “light, commercial, and amusing art as opposed to challenging, educational, artistic expression.” *Id.* at 39. They believe teaching skills that transfer directly to areas such as video games, popular music, and television media “dumb down” the arts curriculum. See Scripp, *supra* note 87, at 132 (discussing how music educators have sometimes refused to acknowledge “extra-musical” benefits and prefer to teach music as a means of studying music itself); DAVIS, *supra* note 2, at 39–40. See also FLORIDA, *supra* note 117, at 14 (suggesting that considering ways of expanding the field of “popular rock music” is an important arts consideration and a means of increasing the U.S.’s “soft power”). Other advocates value the connections between the arts and popular culture as a way to motivate reluctant learners. See DAVIS, *supra* note 2, at 40. Overall, to win the fight within California’s current economic conditions, arts education advocates would be better off compromising—especially considering the hesitancy of taxpayers to support impractical public spending. See DAVIS, *supra* note 2, at 39 (“[A]nyone who pays taxes must be persuaded that there is significant return to be had on an investment in the arts in education.”). Arts education courses may not even have to change much to adapt to the creativity-based economy—art classes already teach the types of skills necessary for the workplace. Although an art classroom may not directly correspond to a particular commercial industry, the “skill sets” that students learn will. See EISNER, *supra* note 83, at 34. See generally, FLORIDA, *supra* note 1, at 318–20 (advocating for a major policy shift in government funding from funding physical capital of “dubious economic value” to all forms of creative capital, including “the arts and cultural creativity broadly”).

III. Legal Issues Surrounding Arts Education Funding

A. Federal Funding of the Arts

The National Endowment of the Arts (“NEA”), created in 1965, is the largest and most influential federally funded arts agency.¹⁴⁸ Congress established the NEA because it believed the federal government had a duty to encourage “freedom of thought, imagination, and inquiry” and provide “material conditions facilitating the release of . . . creative talent.”¹⁴⁹ The NEA does this by providing grants to individual artists, arts organizations, and communities throughout the U.S., partnering with “state arts agencies, local leaders, other federal agencies, and the philanthropic sector.”¹⁵⁰ The NEA receives funding recommendations from the National Council on the Arts—a Presidentially appointed committee that includes 14 citizen advisors.¹⁵¹ As part of its mission, the NEA

¹⁴⁸ NEA, NEA: About Us, <http://www.nea.gov/about/index.html> (last visited Apr. 4, 2011). The NEA budget for the 2010 fiscal year was \$167.5 million. NEA, NEA: At a Glance, <http://nea.gov/about/AtAGlance.html> (last visited Apr. 4, 2011). In 2011, it will be \$155 million. *See FY11 Budget, supra* note 2. To date, the NEA has awarded over \$4 billion to state and local arts programs. *See id.* For the congressional debates leading to the establishment of the NEA, *see* National Foundation on the Arts and the Humanities, Debates on S. 1483, 89th Cong., 1st Sess., in 111 CONG. REC. 13103, 13107–11 (June 10, 1965). Early federal government funding of artists occurred during the Great Depression through the Works Progress Administration. *See generally* Lawrence D. Mankin, *Federal Arts Patronage in the New Deal*, in AMERICA’S COMMITMENT TO CULTURE: GOVERNMENT AND THE ARTS 77–94 (Kevin V. Mulcahy & Margaret Jane Wyszomirski eds., 1995) (summarizing WPA programs for artists). The primary purpose of the funding was to stimulate the economy, rather than to merely acknowledge appreciation of art. *See* Julie Van Camp, California State University-Long Beach, Freedom of Expression at the NEA: Government Support, <http://www.csulb.edu/~jvancamp/freedom2.html> (last visited Apr. 13, 2011). Similarly, the Comprehensive Employment and Training Act in the 1970s sought to provide employment to artists. *See id.* (citing Steven C. Dubin, BUREAUCRATIZING THE MUSE: PUBLIC FUNDS AND THE CULTURAL WORKER (1987)). *See also* Hamilton, *supra* note 80, at 113–15 (describing early 1900s federal funding of the arts).

¹⁴⁹ 20 U.S.C. § 951(5) (2010). The NEA’s “Declaration of Findings and Purposes” articulates the federal government’s view of the arts and arts education as necessary aspects of an advanced civilization. *See id.* § 951. The declaration stresses the importance of placing the arts on equal terms with science and technology by giving this branch of scholarly and cultural activity “full value and support.” *Id.* § 951(3). Overall, the NEA’s Declaration of Findings and Purposes refreshingly supports further promotion and growth of arts education. *See id.* § 951.

¹⁵⁰ For a list of the NEA’s annual reports dating back to 1965, *see* NEA, NEA Annual Reports, <http://www.nea.gov/about/09Annual/index.php> (last visited Apr. 4, 2011).

¹⁵¹ *See* 20 U.S.C. § 955 (2010). *See also* NEA, National Council on the Arts, http://www.nea.gov/about/NCA/About_NCA.html (last visited Apr. 4, 2011) (describing historical background and listing current members). The NCA’s initial members, appointed by President Lyndon B.

encourages arts education by specifically funding arts education programs.¹⁵² In the 2009 fiscal year, NEA provided 34 grants totaling over \$1 million to California arts education programs through its “Learning in the Arts” endowment.¹⁵³ To qualify for grants, states must themselves have an arts agency that matches any federal money received.¹⁵⁴ California meets this requirement by having the California Arts Council and funding the arts at a minimum level.¹⁵⁵ However, since 2003, when California cut funding for the arts by 94 percent, California’s per capita arts funding has been “dead last” compared to the rest of the nation, currently spending about 12 cents per person per year on the arts.¹⁵⁶

Johnson, included jazz legend Duke Ellington; actors Gregory Peck, Sidney Poitier, and Charlton Heston; dancer Agnes de Mille; authors Harper Lee and John Steinbeck; sculptor David Smith; and musical theater composers Leonard Bernstein and Richard Rodgers. *See id.*

¹⁵² *See* NEA v. Finley, 524 U.S. 569, 573 (1998) (quoting 20 U.S.C. § 954(c)(1)–(10)); NEA: At a Glance, *supra* note 148. *See also* NEA, FY 2009 Arts Education Grants, <http://www.nea.gov/grants/recent/disciplines/Artsed/09artsed.php?CAT=Learning%20in%20the%20Arts&TABLE=1> (last visited Apr. 4, 2011) (listing arts education grants for 2009).

¹⁵³ This funding amounted to \$1,026,000. *See* FY 2009 Arts Education Grants, *supra* note 152. The recipients, nonprofit arts organizations throughout the state that provide education programs within and outside of California schools, included organizations such as California Institute of the Arts (Valencia), Los Angeles Opera Company, Los Cenzontles Mexican Arts Center (San Pablo), Playwrights Project (San Diego), San Francisco Art Institute, and Youth Radio (Oakland). *See id.* The NEA also funded California artists and educators who participated on panels at arts education conferences. NEA, FY 2009 Grants Panelists, <http://www.nea.gov/grants/recent/disciplines/Artsed/09panelists.html> (last visited Apr. 4, 2011). In 2010, the NEA provided \$11 million in funding to California arts organizations. *See* Letter, *supra* note 133. Federal funding for the arts overall accounts for approximately 10% of total arts funding. Richard Murphy, *Music (and the Allied Arts): A Sound Investment Indeed*, 70 ILL. MUSIC EDUCATOR 36, 36 (2009). Although the federal government provided additional economic stimulus funds to arts organizations in 2009, its distribution in California was not equitable. *See* James Hebert, *NEA Chairman Gets an Earful on City Tour*, SAN DIEGO UNION-TRIB., Mar. 14, 2010, available at <http://www.signonsandiego.com/news/2010/mar/14/nea-chairman-gets-an-earful-on-city-tour> (stating that San Diego received two grants totaling \$75,000 while San Francisco received thirty-seven grants totaling \$1.4 million).

¹⁵⁴ Ivey, *supra* note 45.

¹⁵⁵ For the 2011-2012 fiscal year, California’s proposed budget for the CAC is \$5,366,000. *See* Cal. Governor’s Budget, California Arts Council, available at <http://www.ebudget.ca.gov/pdf/GovernorsBudget/8000/8260.pdf>. Of this total, \$1.062 million comes from the General Fund, \$2.831 million comes from local assistance funding through an arts license plate program, \$1.276 comes from federal money, and the remaining \$197,000 comes from Reimbursements. *See id.* According to the CAC’s mission, “The arts spark the engine of Creative California, and [the CAC’s] goal is to ensure that they are available for every Californian.” California Arts Council, About the CAC, <http://www.cac.ca.gov/aboutus/aboutus.php> (last visited Apr. 4, 2011).

¹⁵⁶ *See* CALIFORNIA ARTS COUNCIL FUNDING, *supra* note 132. Over 300 organizations depend on CAC funding, but California “ranks dead last in the nation in spending per capita, the result of years of budget cuts.” Darrell Smith, *California License Plates to Support the Arts Are Now Tax-deductible*, SACRAMENTO BEE, May 18, 2010, available at <http://www.sacbee.com/2010/05/18/2757566/plates-x-yx-y-yxy-x-yx-yyx->

Although the NEA continues to fund arts programs, Congress has restricted its funding abilities.¹⁵⁷ In the 1998 case *National Endowment for the Arts v. Finley*, the Supreme Court considered whether a Congressional statute requiring the NEA to take “into consideration general standards of decency” when approving grant applications was constitutional.¹⁵⁸ A group of artists and arts organizations who had been denied grants claimed that the restriction violated their First Amendment rights based on viewpoint discrimination and was unconstitutionally vague.¹⁵⁹ Justice O’Connor, writing for the majority, held that the statute was constitutional because it “aimed at reforming procedures rather than precluding speech” and was not “a tool for invidious viewpoint discrimination.”¹⁶⁰ Because of the NEA’s connection to arts education, the Court cited precedents that held that “educational suitability” restrictions on public school expression

xxy.html. To put this in perspective, California spends about 12 cents per person per year on the arts. *Id.* In 2005, this rate reached a low of 3 cents. Advance the Arts, Answering the Million Dollar Question: Why Support the Arts?, <http://advancethearts.org/2008/06/06/answering-the-million-dollar-question> (last visited Apr. 4, 2011). The current rates for Massachusetts and New York are \$2 and \$2.50 respectively. See Smith, *supra*. See also *How the Arts Are Funded Outside the UK*, BBC News, Oct. 20, 2010, <http://www.bbc.co.uk/news/entertainment-arts-11569883> (stating that California’s arts funding is the lowest per capita in the U.S., although the state hosts the J. Paul Getty Museum—one of the wealthiest art galleries in the world). To put this into further perspective, in 2009, Californians paid about \$4,910 per capita in total state and local taxes. The Tax Foundation, Tax Research Areas—California, <http://www.taxfoundation.org/research/topic/15.html> (last visited Apr. 14, 2011).

¹⁵⁷ See Sarah F. Warren, Note, *Art: To Fund or Not to Fund? That Is Still the Question*, 19 CARDOZO ARTS & ENT. L.J. 149, 155 (2001) (citing Department of the Interior and Related Agencies Appropriations Act, Pub.L. 105-83, 111 Stat. 1600 (1998)); *Finley*, 524 U.S. at 574 (stating that in 1998, Congress restricted federal funding for individual artists by confining grants primarily to state agencies and “constraining subgranting”). The NEA’s enabling statute originally allowed broad funding discretion. See 20 U.S.C. § 953(b). Funding considerations under section 953(b) currently include “artistic and cultural significance, giving emphasis to American creativity and cultural diversity,” “professional excellence,” and encouraging “public knowledge, education, understanding, and appreciation of the arts.” *Finley*, 524 U.S. at 573.

¹⁵⁸ See *Finley*, 524 U.S. at 569–623. See also 20 U.S.C. § 954(d)(1). For a background of the controversy over the NEA leading up to Congress’s enactment of the statute, see generally Warren, *supra* note 157.

¹⁵⁹ See *Finley*, 524 U.S. at 577–78. The four individual respondents were all denied their grants before Congress enacted the statute, and they amended their complaint after it was enacted. *Id.* at 577. At the time they amended their complaint, the individual plaintiffs had been joined by the National Association of Artists’ Organizations. *Id.*

¹⁶⁰ *Id.* at 582. The Court also pointed out that the statute “admonishes the NEA [from] merely tak[ing] ‘decency and respect’ into consideration.” *Id.*

were constitutional.¹⁶¹ The Court held that the statute was not unconstitutionally vague because the NEA acts as a “patron rather than as [a] sovereign.”¹⁶² The Court noted that if the statute were declared vague, then the NEA, which already based funding decisions on “artistic excellence,” could be declared vague as well.¹⁶³ Justice Scalia, joined by Justice Thomas, concurred with the majority but believed that the NEA has the power to refuse funding based merely on an objectionable artistic viewpoint.¹⁶⁴ In the lone dissent, Justice Souter wrote that the statute was an unconstitutional exercise of viewpoint discrimination.¹⁶⁵ *Finley*’s holding suggests that although the NEA is constitutional, the U.S. Constitution does not obligate Congress to provide funding for the arts.¹⁶⁶

The NEA has experienced only a small number of formal complaints regarding misapplied funds,¹⁶⁷ but the NEA continues to spark political controversy.¹⁶⁸

¹⁶¹ *Id.* at 584 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Bd. of Ed., Island Trees Union Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982)). “Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.” *Fraser*, 478 U.S. at 683.

¹⁶² *Finley*, 524 U.S. at 589.

¹⁶³ *Id.* The Court explained that the statute “merely adds some imprecise considerations to an already subjective selection process.” *Id.* at 590. *See also* 20 U.S.C. § 954(d)(1) (“[A]rtistic 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.”).

¹⁶⁴ *See Finley*, 524 U.S. at 590–600 (Scalia, J., concurring).

¹⁶⁵ *See id.* at 600–23 (Souter, J., dissenting). *See also* Renee Linton, *The Artistic Voice: Is It in Danger of Being Silenced?*, 32 CAL. W. L. REV. 195, 223 (1995) (“[I]f the government wishes to continue to provide funding for the NEA, content controls cannot survive. To thrive and fulfill the promise of the First Amendment, the art funded by the NEA must evolve free from personal and political prejudices.”).

¹⁶⁶ *Id.* at 584. The majority opinion in *Finley* cited an Independent Commission of constitutional law scholars’ 1990 report that concluded “there is no constitutional obligation to provide arts funding” while also cautioning Congress about content-based funding restrictions. *Id.* at 575–76 (citing INDEP. COMM’N, REPORT TO CONGRESS ON THE NATIONAL ENDOWMENT FOR THE ARTS 83–91 (Sept. 1990). *But see* *Advocates for the Arts v. Thomson*, 532 F.2d 792, 795 (1st Cir. 1976) (“The decision to withhold support is unavoidably based in some part on the ‘subject matter’ or ‘content’ of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants.”).

¹⁶⁷ *Finley*, 524 U.S. at 574.

¹⁶⁸ *See* Harvard Law School, *Government and the Arts*, http://www.law.harvard.edu/faculty/martin/art_law/public_art.htm (last visited Apr. 4, 2011) (listing cases, publications, and other resources with opposing viewpoints of government funding for the arts).

Conservatives have traditionally sought to eliminate the NEA.¹⁶⁹ The Heritage Foundation has published a document describing “ten good reasons” why the NEA should not exist.¹⁷⁰ One reason is that the NEA funds art that some consider obscene.¹⁷¹ Similar concerns over controversial pieces of NEA-funded art led to the tighter government restrictions at issue in *Finley*.¹⁷² Supporters argue that free expression is integral to high-quality art, and a democratic government prospers under unrestrained creativity and ideas.¹⁷³ NEA abolitionists also believe that arts funding should occur through private donors.¹⁷⁴ In difficult economic times, this argument attracts support

¹⁶⁹ See, e.g., Ivey, *supra* note 45 (reporting that Wisconsin Governor Scott Walker’s budget includes plans to cut the state arts agency by 68%—dropping it from \$2.4 million in 2011 to \$759,000 in 2012).

¹⁷⁰ See THE HERITAGE FOUND., TEN GOOD REASONS TO ELIMINATE FUNDING FOR THE NATIONAL ENDOWMENT FOR THE ARTS (1997), available at <http://www.heritage.org/research/reports/1997/04/bg1110-ten-good-reasons-to-eliminate-funding-for-the-nea>. The document summarizes the reasons: 1) The arts will have more than enough support without the NEA; 2) The NEA is welfare for cultural elitists; 3) The NEA discourages charitable gifts to the arts; 4) The NEA lowers the quality of American art; 5) The NEA will continue to fund pornography; 6) The NEA promotes politically correct art; 7) The NEA wastes resources; 8) The NEA is beyond reform; 9) Abolishing the NEA will prove to the American public that Congress is willing to eliminate wasteful spending; and 10) Funding the NEA disturbs the U.S. tradition of limited government. See *id.* Some critics argue that federal funding of the arts is unconstitutional. See, e.g., Warren, *supra* note 157, at 172–78 (analogizing the arts to religion to argue that government funding of specific types of art violates the Establishment Clause). But see *Thomson*, 532 F.2d at 795 (stating in dicta that a claim that public funding of the arts is unconstitutional under the First Amendment would be undercut by Supreme Court precedent holding that public funding of political campaigns “furthers, not abridges, pertinent First Amendment values”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).

¹⁷¹ See HERITAGE, *supra* note 170 (listing examples of “obscene” art). The Heritage Foundation’s publication was written before *Finley* was ultimately decided and in the midst of ongoing debate about public funding of art that some members of the public deemed offensive. See *id.* See also Warren, *supra* note 157, at 149–81 (discussing controversy that led to Congress’s renewed interest in the NEA).

¹⁷² See *Finley*, 524 U.S. at 574 (stating that two provocative works in particular—Robert Mapplethorpe’s “The Perfect Moment” and Andres Serrano’s “Piss Christ” sparked the controversy).

¹⁷³ But see Hamilton, *supra* note 80, at 112–13 (arguing that although a direct democracy may benefit from public-funded art to hold government accountable, a representative democracy like the U.S. has more potential for tyranny through art subsidization); Elizabeth Megeen Ray, Comment, “I May Not Know Art, But I Know What I’ll Pay For”: The Government’s Role in Arts Funding Following *National Endowment for the Arts v. Finley*, 2 U. PA. J. CONST. L. 497, 497 (2000) (“At best, government funding of the arts creates an uneasy and precarious alliance. At worst, government involvement in the arts poses a danger of censorship so great that some are tempted to analogize Congress’s imposing conditions on the [NEA] awarding of grants to Hitler’s effect on developing art in Weimar Germany.”).

¹⁷⁴ One argument is that because NEA funding is low compared to that received by private donors, the arts will survive without the NEA, just like it did before the NEA was created. See HERITAGE, *supra* note 170.

among taxpayers.¹⁷⁵ NEA supporters stress that the government should fund the arts and arts education because it is socially beneficial and necessary within the public sector.¹⁷⁶ Additionally, history and research have shown that private donors have not adequately funded the arts—even before the creation of the NEA.¹⁷⁷ Some Conservatives even argue that government control over what types of art is funded increases the threat of tyranny.¹⁷⁸ Justice O’Connor refuted this claim in *Finley*, stating that because the NEA is an independent agency, the consequences of artists conforming to the NEA to acquire funding “are not constitutionally severe.”¹⁷⁹ Conservatives are not the only ones opposed

¹⁷⁵ See JOHN FROHNMAYER, LEAVING TOWN ALIVE: CONFESSIONS OF AN ARTS WARRIOR 45 (1993) (stating that U.S. Congressman Dana Rohrabacher (R-CA) believes “that the government shouldn’t support art in the first place . . . that we simply cannot afford art in an era of fiscal austerity and that art isn’t the government’s business”). This is also true for those who would prefer arts funding through private donations and tax incentives. See, e.g., Warren, *supra* note 157, at 175–76. See also John K. Dokko, *Does the NEA Crowd Out Private Charitable Contributions to the Arts?*, 62 NAT’L TAX J. 57, 57–75 (questioning whether the NEA itself decreases private donations through tax breaks). For examples of allowable federal tax deductions that support the arts, see *infra* note 183.

¹⁷⁶ See *supra* notes 107–108 and accompanying text.

¹⁷⁷ Studies that show an increase in private funding after a decrease in public funding is causally inconclusive because arts organizations typically increase their fundraising efforts after budget cuts. See Dokko, *supra* note 175, at 58. A study found that after a 40 percent reduction to the NEA after the Republican victory in the 1994 election, private charitable contributions to arts organizations “increased by 50 to 60 cents for every dollar decrease in government grants”. See *id.* The author concluded, however, that the findings that government subsidies displace private donations “should be taken with a grain of salt” because arts organizations tend to increase their fundraising efforts as a result of cuts to public funding. See *id.* See also Amrein-Beardsley, *supra* note 33, at 15 (stating that the corporate sector provides the least funding for education programs). The author suggests that arts education organizations should suggest business-oriented incentives for potential donors, along with data that shows “inputs, outputs, and cost-benefits” to facilitate an arts/business partnership. *Id.* at 14–15. It is probably wise to look at pre-NEA state arts agencies to assess whether private donations are sufficient to fund the arts: According to some researchers, state arts agencies were created because of the private marketplace’s failure to fund the arts. See, e.g., Svenson, *supra* note 67, at 35 (stating that the two reasons for the creation of pre-NEA state arts agencies were “failure of the marketplace to sustain the production of art without gross red-ink imbalances between income and expenditures and areal concentrations of artistic activity which limited the access of many state residents to first-rate works of art and live performances”).

¹⁷⁸ See Warren, *supra* note 157, at 177 (“Governmental arts funding inherently runs the risk of advancing the art that it funds, and inhibiting that which it does not.”). See also Hamilton, *supra* note 80 (arguing that government control over arts funding encourages artists to adjust their creative expression in order to receive subsidies). Although the author is opposed to the NEA, she concludes that “art plays an important and distinctive instrumental role in the calibration of governmental and private liberty.” *Id.* at 121.

¹⁷⁹ *Finley*, 524 U.S. at 589.

to the NEA—some artists claim that government-funded art lowers artistic quality.¹⁸⁰

Strong arguments for NEA supporters arise from the NEA’s Declaration of Findings and Purposes, which lists several benefits of the arts to individuals and society.¹⁸¹ The fight over the NEA is perennial, and its funding is likewise unpredictable each year.¹⁸²

Besides the NEA, other laws subsidize and support the arts and arts education either directly or indirectly. One example is the U.S. Tax Code, which provides tax incentives for charitable contributions.¹⁸³ California also allows charitable contributions

¹⁸⁰ See, e.g., Hilton Kramer, *Criticism Endowed: Reflections on a Debacle*, NEW CRITERION, Nov. 1983, at 1–5. Anti-NEA advocates have often used artists’ statements to argue for the elimination of the NEA. See e.g., HERITAGE, *supra* note 170 (quoting Ralph Waldo Emerson: “Beauty will not come at the call of the legislature . . . It will come, as always, unannounced, and spring up between the feet of brave and earnest men.”). Some critics believe that a bohemian “starving artist” creates the best art. See, e.g., Reuven Brenner, *Culture by Committee*, WALL ST. J., Feb. 27, 1997 (“Bureaucratic culture is not genuine culture . . . It was the unsubsidized writers, painters and musicians—imprisoned in their homes if they were lucky, in asylums or in gulags if they weren’t—who created lasting culture.”).

¹⁸¹ See 20 U.S.C. § 951 (2010). See also *supra* Part III.

¹⁸² See, e.g., Mike Boehm, *\$40 Million for Arts Education Threatened in Federal Budget Fight*, L.A. TIMES, Mar. 3, 2011, available at <http://latimesblogs.latimes.com/culturemonster/2011/03/obama-arts-federal-budget.html> (“[President Obama] has pegged the National Endowment for the Arts for a 13% cut in 2011-12, while a large group of congressional Republicans has targeted the NEA for elimination.”); Mike Boehm, *House Republicans Unveil Plan to End Federal Arts and Humanities Agencies and Aid to Public Broadcasting*, L.A. TIMES, Jan. 20, 2011, available at <http://latimesblogs.latimes.com/culturemonster/2011/01/congress-republicans-nea-neh/comments/page/2> (reporting that congressional Republicans are calling for the elimination of the NEA and the National Endowment for the Humanities). The elimination proposal is part of the Spending Reduction Act of 2011, issued by a Republican Study Committee. See Jim Jordan, Republican Study Committee, Spending Reduction Act of 2011, http://rsc.jordan.house.gov/UploadedFiles/Spending_Reduction_Act--TWOPAGER.pdf. NEA Chairman Rocco Landesman has a more optimistic view, stating during a tour of San Diego’s arts organizations that President Obama is a supporter of the NEA and has maintained funding levels. See Hebert, *supra* note 153. Of course, the key to contemporary federal policymaking is how all members of Congress—including Democrats and Republicans—work together to compromise. See *Obama: U.S. Economy Cannot Afford Shutdown*, MSNBC.COM, Apr. 5, 2011, <http://www.msnbc.com/id/42433320/ns/politics-capitol-hill/?GT1=43001> (describing how Republicans are calling for additional billions of dollars in cuts on top of Obama’s budget proposal, while Democrats claim the cuts are “harmful” and reflect a conservative “social policy agenda”). In the fiscal year 2011 federal budget, the NEA was cut by \$12.5 billion, which arts advocates felt was a “heartening” victory. See *FY11 Budget*, *supra* note 2.

¹⁸³ See 26 U.S.C. § 170 (2010) (allowing charitable deductions for donations to qualified organizations). See also *id.* § 74(b) (excluding from gross income prizes awarded for religious, charitable, scientific, educational, artistic, literary, or civic achievement if given to charity); *Id.* § 274(I) (allowing deduction for full premium of tickets purchased for charity event). But see Elizabeth Blair, *Charitable Deduction Limit: Bad for Art Nonprofits?*, NPR.ORG, Feb. 17, 2011, available at <http://www.npr.org/2011/02/17/133810779/charitable-deduction-limit-bad-for-art-nonprofits> (questioning whether President Obama’s plan to limit charitable deductions for the wealthy may harm nonprofit arts organizations). Although opponents of this plan claim that nonprofit charitable organizations will suffer by limiting donations from the wealthiest

to the arts. Senate Bill 1076, approved in 2010 and now existing in Article 19, commencing with Section 18891 of the California Revenue and Taxation Code, allows individuals to make contributions to the California Arts Council directly on their tax returns.¹⁸⁴ Additionally, in a joint project between the CAC and the California Department of Motor Vehicles, Californians can purchase “arts license plates” that transfer approximately \$34.60 of the initial purchase and \$40 for the renewal to the CAC.¹⁸⁵ About 60% of the CAC’s budget comes from the arts plates—which have been issued since 1994 and are fully tax deductible.¹⁸⁶ Finally, other federal statutes exist that, although they may not directly provide funds, provide support and legal protections to artists.¹⁸⁷ Federal arts-related statutes include the Architectural Works Copyright Protection Act, the Visual Artists Rights Act, and the National Film Preservation Act.¹⁸⁸

Americans, former President Ronald Reagan’s similar plan in the 1980s resulted in donation levels staying approximately the same. *See id.*

¹⁸⁴ CAL REV. & TAX. CODE §§ 18891–94 (West 2011).

¹⁸⁵ California Arts Council, One Million Plates for the Arts, <http://www.cac.ca.gov/licenseplate/index.php> (follow “history” hyperlink) (last visited Apr. 5, 2011).

¹⁸⁶ In a current fundraising drive on its website, the CAC hopes that one million Californians purchase arts plates, which would raise \$40 million. *See* CAC, One Million Plates for the Arts, <http://www.cac.ca.gov/licenseplate/index.php> (last visited Apr. 5, 2011). The CAC claims that this result would place California near the top of state arts funding rather than dead last. *See id.*

¹⁸⁷ One example of a federal statute that allows arts funding is Title I of the Elementary and Secondary Education Act of 1965 (“Title I”). *See* TIT. I OF THE ESEA, 20 U.S.C. §§ 6301–39, 6571–78 (2011). According to its Statement of Purpose, Title I works to improve the academic achievement of disadvantaged students by ensuring “that all children have a fair, equal, and significant opportunity to obtain a high-quality education.” *See id.* § 6301. The funds help provide additional instructional time, professional development, parent involvement opportunities, and other strategies to raise student achievement and strengthen core academic programs. *See id.* Although Secretary of Education Arne Duncan has stated that Title I funds can be used for arts education, districts and schools have received conflicting messages from the state and local levels regarding proper allocation of these funds to arts programs. *See* Title I and Arts Education, Arts for LA, <http://www.artsforla.org/sites/default/files/TitleIFundsandArtsEducation.pdf>. *See generally* Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENGLAND L. REV. 63 (1993) (describing 24 federal laws that support and protect aspects of the arts and cultural heritage). The author divides these laws into five categories: 1) Protection of Historical Sites and Monuments, 2) Preservation of Sunken Treasures, 3) Conservation and Repatriation of Native American Artifacts, 4) Support and Protection for the Arts, and 5) Preservation of International Treasures. *See id.*

¹⁸⁸ *See id.* at 65. *See also* National Film Preservation Act of 1992, Pub. L. No. 102-307, § 202, 106 Stat. 267; Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701, 703, 104 Stat. 5128,

B. California's Funding of the Arts and Arts Education

Although several California laws support arts education,¹⁸⁹ one law that would lend significant support to arts education has not yet been passed.¹⁹⁰ California Assembly Bill 1777 (“AB 1777”), known as the Creative Industries and Community Economic Revitalization Act of 2010, was suspended in the Assembly Appropriations Committee in November 2010.¹⁹¹ If enacted, AB 1777 would have created a “Creative Industries and Community Economic Revitalization Fund,” which would receive approximately 20% of the revenue from retail taxes associated with the sales, use, consumption, and storage of works of art and similar items.¹⁹² According to AB 1777, the CAC would have the authority to disperse monies from the fund to a variety of municipalities and nonprofit organizations (including arts organizations) to support California’s creative industry.¹⁹³ The estimated revenue intake was approximately \$24 million.¹⁹⁴ Proponents claimed that this would have moved California’s last-place public investment in the arts to the national median.¹⁹⁵ Section One of the Bill explained the underlying rationale—to encourage and

5133 (1990); Visual Artists Rights Act, Pub. L. No. 101-650, § 603(a), 104 Stat. 5128 (1990); National Film Preservation Act of 1988, Pub. L. No. 100-446, § 1, 102 Stat. 1782.

¹⁸⁹ See *supra* Part II.C.

¹⁹⁰ See Assem. 1777, 2010 Leg., 2009-10 Sess. (Cal. 2010). For a full text version of AB 1777, see Cal. Assem., Assembly Bill No. 1777, http://www.californiaartsadvocates.org/docs/ab_1777_bill_20100209_introduced.pdf. See also CAC, AB1777, <http://www.californiaartsadvocates.org/AB1777.html> (providing fact sheets, full text, and letters of support).

¹⁹¹ See Cal. Assem., AB 1777 Assembly Bill—Status, http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1751-1800/ab_1777_bill_20101130_status.html (last visited Apr. 5, 2011). Despite considerable support from arts advocates, three similar bills in the past three years met the same result. These bills all died in the Assembly Appropriations Committee. See Cal. Assem., AB 1777 Assembly Bill—Bill Analysis, http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_17511800/ab_1777_cfa_20100427_155128_asm_comm.html (last visited Apr. 5, 2011). See also Newton, *supra* note 145 (explaining that the current economic climate, the anti-tax movement, and recent voter disapproval of funding initiatives stalled AB 700, the 2009 version of the bill).

¹⁹² See Assem. 1777, 2010 Leg., 2009-10 Sess. (Cal. 2010).

¹⁹³ See *id.*

¹⁹⁴ See Bill Analysis, *supra* note 191.

¹⁹⁵ See, e.g., The Arts Forum, Act Now: Re-fund Arts in CA, <http://www.theatrebayarea.org/artsforum> (last visited Apr. 5, 2011) (claiming that AB 700, the 2009 version of the bill with verbatim language, would

invest in California’s creative industry to strengthen the state economy.¹⁹⁶ The opening declaration states, “Every dollar in state support for the arts leverages . . . [\$7] in earned and contributed revenue.”¹⁹⁷ The declaration also lists twelve ways in which investing in the arts and the creative economy can revitalize neighborhoods and encourage economic growth.¹⁹⁸ Although never implemented, AB 1777 resembles the type of investment necessary to support a successful and productive creative economy.¹⁹⁹

C. Arts Education Standards and Assessments

Although federal education law and policy in theory advocate the importance of arts education,²⁰⁰ the arts are in practice forgotten within today’s Accountability

raise the public investment of the arts to \$1 per California resident). *See also* Bill Analysis, *supra* note 191 (stating that California has funded the arts at 3 cents per capita for the past seven years).

¹⁹⁶ *See* Assem. 1777, 2010 Leg., 2009-10 Sess. (Cal. 2010).

¹⁹⁷ *Id.* *See also* ECONOMIC PROSPERITY, *supra* note 132, at 1 (stating the same proposition).

¹⁹⁸ *See* Assem. 1777, 2010 Leg., 2009-10 Sess. (Cal. 2010). The Bill stated that “An investment in the arts and the creative economy industries can revitalize a neighborhood or area by” stimulating the economy; engaging residents; drawing tourists; providing a sense of community; serving as a gathering place; encouraging creativity; strengthening community partnerships; promoting the arts and supporting artists; developing a positive image for the area; enhancing property values; capitalizing on local cultural, economic, and social assets; and creating jobs. *Id.* AB 1777 made the same claim that researchers have made: The arts are good for business. *See, e.g.,* ECONOMIC PROSPERITY, *supra* note 132, at 1 (“[C]ommunities that invest in the arts reap the additional benefits of jobs, economic growth, and a quality of life that positions those communities to compete in our 21st century creative economy.”).

¹⁹⁹ *See supra* Part III.C. The primary opponent of AB 1777 was the California Tax Reform Association (“CTRA”), which considered the bill to be an “inflexible earmark for the Arts Council” and an example of “ballot-box budgeting, which is a step in the wrong direction for the financial health of California.” Bill Analysis, *supra* note 191, at 2. The CTRA has suggested ten tax reform proposals that would allegedly generate \$20 billion in additional revenue for California. *See* CTRA, SHARING THE BURDEN OF ECONOMIC RECOVERY: 10 TAX POLICIES FOR \$20 BILLION (2010), available at http://www.caltaxreform.org/pdf_ppt/sharing_the_burden.pdf. CTRA’s recommendations include enacting an oil severance tax (\$1.2 billion gain), eliminating “secret corporate tax loopholes” (\$1.7-2 billion gain), increasing tax rates for top 1% of income earners (\$4 billion gain), and increasing tobacco and alcohol taxes (\$2.4 billion gain). *See id.*

²⁰⁰ One example of government-stated support is U.S. Secretary of Education Arne Duncan’s comments regarding the arts in 2010: “The arts can no longer be treated as a frill. . . . Arts education is essential to stimulating the creativity and innovation that will prove critical for young Americans competing in a global economy.” Eger, *supra* note 119. This attitude aligns to the U.S. Department of Education’s 2010 call for a more arts-inclusive curriculum and new assessments of higher-order thinking skills. *See* RABKIN, *supra* note 33, at 21 (citing U.S. DEPT. OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/index.html>). One year later, Duncan uttered similar comments, urging state governors in a letter to avoid “short-sighted cost-cutting” and refrain from “eliminating instruction in the arts.” Educ. Theatre Ass’n, Duncan Speaks Up on Behalf of Arts Education, <http://schooltheatre.org/news/advocacy-news/2011-03-10/duncan-speaks-behalf-arts-education>. *See also* Press Release, U.S. Dept. of Educ.,

Movement.²⁰¹ Contemporary public education typically translates to high-stakes standardized testing, with the goal of raising student achievement by mandating proficiency in specific standards and skills.²⁰² No Child Left Behind encourages testing in a variety of essential, core academic subjects and includes the arts within this group.²⁰³ Although no definition of “arts” exists in NCLB, the National Assessment of Educational Progress (“NAEP”), the national standardized test of core academic subjects, has separate assessments for dance, music, theater, and visual arts.²⁰⁴ A major problem in arts

Department of Education Provides Promising Practices for Productivity, Flexibility 2–3 (Mar. 3, 2011), available at <http://www.ed.gov/news/press-releases/department-education-provides-promising-practices-productivity-flexibility> (follow “Guidance on Productivity” hyperlink). In 2007, Presidential candidate Mike Huckabee stated that “the arts are not extraneous, they’re not expendable and they’re not extracurricular.” Grey, *supra* note 13, at 11. One wonders, of course, how likely all of these political statements will actually turn into positive change for arts education. However, arts supporters find these types of statements—especially those from *currently elected* public officials—promising for the future of arts advocacy. See, e.g., Murphy, *supra* note 153, at 36 (finding Duncan’s letter “encouraging” while remaining hesitant to predict a change to NCLB’s “teach to the test” culture in education).

²⁰¹ See Amrein-Beardsley, *supra* note 33, at 10 (“The arts have never been adopted in schools as equal partners with core curriculum subjects . . . and their displacement has become worse since the passage of NCLB.”). A survey of elementary school principals revealed that “instructional time for tested subjects in 75% of [surveyed] schools had increased and instructional time for the arts had decreased” during the era of high-stakes testing. Beveridge, *supra* note 107, at 5.

²⁰² In California, this process involves standardized assessments such as the National Assessment for Educational Progress (“NAEP”) and the California Standards Tests (“CSTs”). See Nat’l Ctr. For Educ. Stat., NAEP—Overview, <http://nces.ed.gov/nationsreportcard/about/> (last visited Apr. 5, 2011); Cal. Dept. of Educ., California Assessment System-Student Testing, <http://www.cde.ca.gov/ta/tg/sa/caassessment.asp> (last visited Apr. 5, 2011). The arts are assessed on the NAEP. See Amrein-Beardsley, *supra* note 33, at 10. Conversely, the arts are *not* tested on the CSTs. See California Assessment System, *supra*. Quantitative research is the primary tool to assess student achievement, but qualitative research methods can help understand educational policy and outcomes also. See EISNER, *supra* note 83, at 210–11 (“Narratives, films, video, theater, even poems and collages can be used to deepen one’s understanding of aspects of educational practice and its consequences.”).

²⁰³ See 20 U.S.C. §§ 1401, 7801 (2010). Arts supporters consider the fact that the arts is one of ten “core academic subjects” a success because it brings the subject on equal footing with others and qualifies arts instruction for federal grants and other support. See, e.g., Arts Educ. P’ship, Arts Education and the ESEA, http://www.artsusa.org/networks/arts_education/arts_education_o15.asp (last visited Apr. 5, 2011) (claiming that the “core academic subject” designation is a “success”). See also Grey, *supra* note 13, at 10–11 (stating that because NCLB encouraged arts supporters, arts education is now more in the public eye). For a list of fourteen example federal programs and funds from which the arts can benefit, see WOODWORTH, *supra* note 15, at 6. See generally ARTS EDUC. P’SHIP, NO SUBJECT LEFT BEHIND: A GUIDE TO ARTS EDUCATION OPPORTUNITIES IN THE 2001 NCLB ACT (2005) (explaining the NCLB, providing resources, and listing grant opportunities in the context of arts education).

²⁰⁴ See NO SUBJECT LEFT BEHIND, *supra* note 203, at 7. Although the NAEP has assessments for the arts, their purpose is merely to determine the extent that states are incorporating arts subjects’ voluntary national standards for political reasons. See Hanley, *supra* note 80, at 34 (citing Richard Colwell, *The 1997 Assessment in Music: Red Flags in the Sunset*, 100 ARTS EDUC. POL’Y REV. 33, 33–39 (1999)).

education is that the Accountability Movement has emphasized subjects such as math, reading, language arts, and science over the arts.²⁰⁵ Arts advocates blame the emphasis on non-arts subjects for the lack of funding and elimination of arts education from public schools.²⁰⁶ Many call for arts standards *and* assessments in order to ensure the arts' continued presence in schools.²⁰⁷ Others believe that the arts do not comport to traditional standardized tests because of the arts' performance-oriented nature.²⁰⁸ On the other hand, many arts advocates value the Accountability Movement and see it as a means of establishing equal treatment among the content areas.²⁰⁹ NCLB will likely continue to be reauthorized, with some reforms,²¹⁰ because of its bipartisan support.²¹¹

²⁰⁵ “Here at the start of the 21st century, art education continues to be practiced in the thrall of a scientific paradigm that misunderstands the greater potential of the arts in education, often imposing a ceiling ill-fitted for arts praxis, arts-based research, or arts pedagogy.” James Haywood Rolling, Jr., *Circumventing the Imposed Ceiling: Art Education as Resistance Narrative*, 17 *QUALITATIVE INQUIRY* 99, 99 (2011). The overemphasis on non-arts subjects has worked to marginalize arts education from the system. *See supra* note 80 and accompanying text. *See also* Beveridge, *supra* note 107, at 6 (arguing that if schools marginalize nontested subjects, only the most affluent members of society will have access to a “comprehensive and well-rounded” education and the achievement gap will widen). For a discussion of the marginalization of the arts in schools overseas, *see generally* I.B. Kashim & O.S. Adelabu, *The Current Emphasis on Science and Technology in Nigeria: Dilemmas for Art Education*, 43 *LEONARDO* 269, 269–75 (2010) (advocating a renewed respect for Nigerian indigenous art within an age of science and technology).

²⁰⁶ *See supra* text accompanying notes 43–63.

²⁰⁷ *But see* DAVIS, *supra* note 2, at 7 (“The value of the arts in education is clear and non-negotiable and must withstand rather than respond to differing tides and winds.”).

²⁰⁸ *Id.* at 35 (“Numerical scoring as a summary of students’ overall performance in the arts is conspicuously wrong headed.”). Davis’s belief that traditional standardized test forms are not beneficial extends to other subjects as well. *See id.* As an alternative, she argues for holistic assessment of student performance and portfolio assessments. *See id.* *See also* Beveridge, *supra* note 107, at 6 (“If NCLB is to succeed in its original publicized purpose, which was to close the achievement gap in education, we must not focus on high-stakes testing as our sole measurement of success.”).

²⁰⁹ *See, e.g.,* DAVIS, *supra* note 2, at 89 (explaining how arts advocates take pride in federal policies’ recognition of the arts because it elevates the arts to an “essential” subject equal among others). However, some argue that the arts plays a vital role outside the arena of standardized testing. *See, e.g.,* Dimitriadis, *supra* note 7, at 369 (“[T]he arts can be one of the very few spaces of respite for youth in an age of high stakes testing and hyper-accountability.”).

²¹⁰ In March 2011, President Obama insisted that NCLB be reformed. *See* Becky Brittain, *Obama Calls for Congress to Pass Education Reforms*, CNN.COM, Mar. 14, 2011, http://articles.cnn.com/2011-03-14/politics/no.child.left.behind_1_education-funding-education-secretary-arne-duncan-reforms?s=pm:politics. He also called for assessing “critical thinking, creativity, and collaboration,” which, if accomplished, may help revitalize arts education programs. *See Obama, supra* note 45.

²¹¹ Beveridge, *supra* note 107, at 5–6.

California also has arts standards, but its failure to assess them has marginalized arts education.²¹² Although not officially adopted until the 21st century, California arts standards began to surface in the 1980s.²¹³ In 2000, former California Governor Gray Davis signed Senate Bill 1390, which called for content standards in the arts.²¹⁴ In 2001, the California Board of Education (“the Board”) adopted Visual and Performing Arts (“VAPA”) standards for music, visual arts, theatre, and dance.²¹⁵ The content standards are divided into five strands: artistic perception; creative expression; historical and cultural context; aesthetic valuing; and connections, relationships, and applications.²¹⁶ In 2004, the Board developed the *VAPA Framework* to provide guidance for educators who are establishing standards-based instructional arts programs.²¹⁷ The *VAPA Framework* suggests that standards-based arts instruction requires specific instructional strategies:

Curriculum based on the content standards requires active learning through the study, practice, creation, or performance of works of art. It also requires reading about the arts and artists; researching the arts from the past and present; writing about the arts and artists to reflect one’s own observations, experiences, and ideas about the arts; and participating in arts criticism based on reliable information and clear criteria.²¹⁸

²¹² See *supra* text accompanying notes 24–42.

²¹³ See generally STRENGTHENING, *supra* note 26, at 13–18 (providing historical overview).

²¹⁴ See CAL. EDUC. CODE § 60605.1 (West 2011). The statute required the State Board of Education to adopt content standards for the area of visual and performing arts, but it expressly states that schools need not follow the standards nor assess students in these subject areas. See *id.* § 60605.1(b)–(c).

²¹⁵ See *id.* § 60605.1. For the full text of the VAPA standards, see CAL. DEPT. OF EDUC., VAPA CONTENT STANDARDS FOR CALIFORNIA PUBLIC SCHOOLS: PREKINDERGARTEN THROUGH GRADE TWELVE (2001), available at <http://www.cde.ca.gov/be/st/ss/documents/vpastandards.pdf>. The “Guiding Principles” of the standards include 1) Learning through active practice, rehearsal, and creation or performance of works in the arts; 2) Reading about the arts and artists; 3) Researching, writing, and communicating about the arts; 4) Reflecting on the arts in thoughtful essay or journal writing on one’s observations, feelings, and ideas about the arts; and 5) Participating in arts criticism on the basis of observation, knowledge, and criteria. See *id.* at x. Another goal is making connections across subject areas. See *id.* The standards dictate, “All students should participate in dance, music, theatre, and the visual arts as performers and creators” *Id.* at xi.

²¹⁶ QUALITY, *supra* note 29, at 11.

²¹⁷ The Framework identified four components of “intellectual growth” that the arts standards were intended to encourage: 1) aesthetic perception, 2) creative expression, 3) arts heritage, and 4) aesthetic valuing. See STRENGTHENING, *supra* note 26, at 14.

²¹⁸ See CAL. DEPT. OF EDUC., VISUAL AND PERFORMING ARTS FRAMEWORK FOR CALIFORNIA PUBLIC SCHOOLS: KINDERGARTEN THROUGH GRADE TWELVE 2 (2004), available at <http://www.cde.ca.gov/ci/cr/cf/documents/vpafamewrk.pdf>.

California also has adopted career technical education standards in the arts, media and entertainment industry sector.²¹⁹ Furthermore, the University of California and California State University systems have instilled arts-inclusive admission requirements, collaborating extensively with career-technical educators to ensure that graduating high school students are proficient in visual and performing arts.²²⁰ Although these measures suggest that California values the arts as a core subject, the fact that assessments and standards are not mandatory has caused harm to arts education.²²¹ Districts exercise discretion to place greater emphasis on non-arts subject areas as schools adjust their curricula to match content on standardized tests.²²² This results in uneven delivery of arts education throughout the state and the elimination of arts programs from schools.²²³

Despite the intent to give California students access to all four arts disciplines, during the

²¹⁹ QUALITY, *supra* note 29, at 4.

²²⁰ See *supra* note 72. According to its Annual Update Letter, the University of California (“UC”) lists “ongoing collaborations” with career-technical educators as one of its three most critical items related to its course review requirements for high school course offerings approved for university admission. UC, The a-g Requirements: Annual Update Letter, http://www.ucop.edu/a-gGuide/ag/a-g/update_letter.html (last visited Apr. 7, 2011). Since 2000-2001, the UC and California State University systems have approved over 6,900 course offerings. *Id.* Of these, many have been in arts-related subject areas, including “animation, architectural design, graphic design, interior design, [and] video design/production.” See UC, Design Course Resources, <http://www.ucop.edu/a-gGuide/ag/design> (last visited Apr. 7, 2011). To gain course approval, a course generally must offer all five component strands of the VAPA standards at a level of proficiency. See, e.g., UC, Design Courses: General Expectations, <http://www.ucop.edu/a-gGuide/ag/design/genexpect.html> (last visited Apr. 7, 2011) (listing general expectations for design courses). The UC also lists more specific expectations for arts courses as well, all of which align to the VAPA standards. UC, (f) Visual and Performing Arts, <http://www.ucop.edu/a-gGuide/ag/a-g/vpa.html> (last visited Apr. 7, 2011). California’s public universities, some of the best in the world, have definitely recognized the value of the arts in ensuring students’ successful postsecondary pursuits.

²²¹ See *supra* text accompanying notes 24–42. Other states have used NCLB as a means of strengthening student achievement and improving schools through arts integration. See RUPPERT, *supra* note 12, at 6. For examples of other states’ arts education policies, see QUALITY, *supra* note 29, at 20–23. But see WOODWORTH, *supra* note 15, at 10 (claiming that nine states require arts assessments in some form but only Kentucky includes the arts on statewide assessments).

²²² According to a 2007 survey conducted by the Center on Education Policy, 84% of school districts reported changing “their elementary-level reading curriculum to match content on standardized tests.” See *Numbers of Note*, 68 EDUC. LEADERSHIP 9, 9 (2011) (citing CTR. ON EDUC. POL’Y, CHOICES, CHANGES, AND CHALLENGES: CURRICULUM AND INSTRUCTION IN THE NCLB ERA (2007)).

²²³ See QUALITY, *supra* note 29, at 4 (stating that without an arts assessment and an accountability system in place, “arts instruction is subject to the political will and budgetary constraints” of California school districts). Teachers of arts courses substantially vary in their familiarity with and use of the VAPA standards. WOODWORTH, *supra* note 15, at 16–17.

2005-2006 school year, 89% of schools did not offer sequential, standards-based courses of study in all four disciplines, and 29% did not offer an arts course at all.²²⁴

IV. Proposed Course of Action to Invest in Arts Education

A. California’s Arts Standards and Assessments Must Be Mandatory

First, the California Education Code should require schools to teach and assess arts standards to ensure thriving arts education programs.²²⁵ The arts are necessary subjects within the public school system.²²⁶ They positively impact student achievement, and they help foster cognitive and social skills.²²⁷ In turn, they serve the practical function of developing creative capital.²²⁸ Teaching and assessing arts standards helps ensure the growth and expansion of arts education because the arts will be on equal terms with traditionally assessed subjects.²²⁹ Therefore, they will less likely be eliminated from school districts, which will maintain the type of well-rounded, arts-inclusive curricula successful nations and states exhibit.²³⁰ This benefits the individual learner and society.²³¹ California must amend section 60605.1 of its Education Code to make arts standards a requirement.²³² Moreover, to ensure that *all* students can be proficient in the

²²⁴ WOODWORTH, *supra* note 15, at 13–14.

²²⁵ *See supra* note 214.

²²⁶ *See supra* Part III.

²²⁷ *See supra* Part III.A–B.

²²⁸ *See supra* notes 120–128 and accompanying text.

²²⁹ *See supra* Part IV.C.

²³⁰ *See supra* notes 98–100 and accompanying text. For an example of Hong Kong’s arts standards, *see* COMMON CORE, *supra* note 96, at 7–9. Australia’s new national curriculum requires arts standards for dance, drama, media arts, music, and visual arts. *See Art for All*, 68 EDUC. LEADERSHIP 9, 9 (2011). The standards consist of three strands: “*generating*, which deals with the creative impulse; *realizing*, which deals with how artists use instruments, materials, and media to create art forms; and *responding*, which involves aesthetic appreciation.” *Id.* Each student receives 140 hours of instruction for each art form in this curriculum. *Id.*

²³¹ *See supra* Part III.

²³² The statute currently provides, “The content standards are intended to provide a framework for programs that a school *may offer* in the instruction of visual or performing arts. *Nothing in this section shall be construed to require* a school to follow the content standards.” CAL. EDUC. CODE § 60605.1(b) (West 2011) (emphasis added). This language must change from discretionary to mandatory to ensure the full benefits of successful arts education programs.

arts and to prepare students for post-secondary education, California must amend section 51225.3 of the Education Code to require at least one full year of the arts.²³³

Second, California must assess its arts standards with a goal of helping students achieve proficiency in the arts.²³⁴ The arts can be assessed.²³⁵ They *are* being assessed.²³⁶ Arts educators and arts advocates possess practical ideas that have already worked regarding methods of assessing the arts, and assessment resources are readily available.²³⁷ California must ensure that its teachers and policymakers understand that

²³³ The statute currently requires for high school graduation “[o]ne course in visual or performing arts *or* foreign language.” CAL. EDUC. CODE § 51225.3(a)(1)(E) (West 2011) (emphasis added). The statute should require one year of visual or performing arts *and* one year of foreign language. Although the focus of this paper is not foreign language education, foreign languages, like the arts, are necessary to a well-rounded education—the type of education necessary within a successful, globally competitive economy. *See supra* notes 98–100 and accompanying text.

²³⁴ *See* QUALITY, *supra* note 29, at 3 (recommending that “[e]very pre K-12 standards-based arts course and program shall include appropriate, formative and summative student assessments, and a statewide arts assessment shall be administered at the 4th and 8th grade levels”). For examples of other states’ arts education policies, *see* QUALITY, *supra* note 29, at 20–23.

²³⁵ A common reaction to the idea of arts standards is that the arts do not fit easily into assessments because the assessments attempt to define and measure creativity—a seemingly difficult task. *See* Eger, *supra* note 119. Some of the difficulties include “establishing a useful operational definition, understanding the implications of differences among tests and test administration procedures, and understanding the relationship of creativity to other human abilities.” Barbara Kerr & Camea Gagliardi, *Measuring Creativity in Research and Practice*, in POSITIVE PSYCHOLOGICAL ASSESSMENT: A HANDBOOK OF MODELS AND MEASURES 155–69 (2003), available at <http://www.scribd.com/doc/20955095/Measuring-Creativity>. Even teachers of the arts sometimes have difficulty finding common assessments because some view the arts as “instinctive” or “individual.” *See* Dimitriadis, *supra* note 7, at 376–77.

²³⁶ *See, e.g.*, JEAN YAN & SANDRA RIEDER, WESTAT, MARYLAND ASSESSMENT OF FINE ARTS EDUCATION: STATE-OF-THE-ART IN LARGE-SCALE FINE ARTS ASSESSMENTS 9–20 (2001), available at <http://www.aep-arts.org/files/evaluation/WestatLiteratureReviewFinal.doc> (describing the policies of nine states that currently have mandatory arts assessment policies in place: Illinois, Kentucky, Maine, Minnesota, Missouri, New Jersey, New York, Oklahoma, and Washington). For an example of a California school that has maintained a strong arts education program within a high-stakes testing environment, *see generally* Kathie R. Kratochvil, *The Survival of Arts Education in the NCLB Era: A Case Study of One K-8th Grade Arts-Focused Charter School in a California Program Improvement School District* (2009) (unpublished Ed.D. dissertation, University of California, Santa Cruz), available at PROQUEST, File No. 3367731.

²³⁷ *See, e.g.*, NAEP, ARTS EDUCATION FRAMEWORK PROJECT (2008), available at <http://www.nagb.org/publications/frameworks/arts-framework08.pdf>; Arts Educ. P’ship, Evaluation & Assessment, <http://www.aep-arts.org/resources/index.htm> (last visited Apr. 6, 2011) (providing example assessments and suggested frameworks). Arts assessment does not often fit well within traditional testing formats, but the assessment can still be objective. *See, e.g.*, VIOLA SPOLIN, IMPROVISATION FOR THE THEATER 26–28 (Northwestern University Press 1999) (1963). Viola Spolin, whose son Paul Sills founded Chicago’s Second City Theatre, adapted an evaluation process for improvisational theater—a seemingly difficult performance art to assess. *See id.* Her technique was objectively based, finding it a necessity for teacher-directors to assess whether students had *solved* particular performance *problems* on stage. *See id.* Although her approach is objective, it does not destroy the art, as the teacher-director must act as audience

assessment of the arts includes creative, nontraditional methods—holistic, performance-based approaches.²³⁸ For example, the U.S. Department of Education’s 2008 *Arts Education Assessment Framework* suggests assessments that blend performance-based tasks with traditional multiple-choice items, employ short and extended written responses, allow students to respond to works of art and produce their own, and are as authentic as time and resources permit.²³⁹ California can learn from the arts and assess non-arts subjects in nontraditional ways also, just as successful school systems in the U.S. and overseas currently do.²⁴⁰ To ensure arts assessment, the State Board of Education must collaborate with teachers, artists, and creative industry leaders to design effective testing methods.²⁴¹ California must require these methods along with other statewide tests and hold students, teachers, and schools accountable for attaining proficiency.²⁴² To do this, it is necessary to revise section 60605.1 of the California Education Code to make assessment of arts standards mandatory, rather than discretionary.²⁴³

member when assessing performance. *See id.* at 28 (“The teacher-director must become the audience together with the student-actors in the deepest sense of the word for Evaluation to be meaningful.”).

²³⁸ *See* DAVIS, *supra* note 2, at 35. Although some aspects of the arts may be assessed using traditional testing mechanisms, for the most part, the arts must have non-traditional tests that reflect the complexity of the subjects overall. *See, e.g.,* Beveridge, *supra* note 107, at 6 (“Simply adding music and other arts to the testing schedule is not an effective move. We cannot use a checklist of technical skills to define who is learning music and who is not.”).

²³⁹ *See* ARTS EDUCATION FRAMEWORK PROJECT, *supra* note 237, at 23.

²⁴⁰ *See* DAVIS, *supra* note 2, at 35 (stating that holistic-style arts assessments “can be applied in any subject” and performance-based assessments are beneficial because they integrate knowledge and skills).

²⁴¹ Both collaboration and well-organized plans are necessary for success even in the initial stages of arts promotion. For example, it is important immediately to gain state leaders’ support. *See generally* SANDRA S. RUPPERT & ANDREW L. NELSON, ARTS EDUC. P’SHIP, FROM ANECDOTE TO EVIDENCE: ASSESSING THE STATUS AND CONDITION OF ARTS EDUCATION AT THE STATE LEVEL (2006), available at <http://aep-arts.org/files/publications/From%20Anecdote%20to%20Evidence.pdf> (providing a general framework for arts and education advocates to strengthen arts programs and incorporate mandatory school arts standards).

²⁴² *See* RABKIN, *supra* note 33, at 21 (stating that education policy will likely only favor the arts if the arts are assessed just like other subjects).

²⁴³ The statute currently provides, “*Nothing in this section shall be construed as mandating assessment of pupils in visual or performing arts.*” CAL. EDUC. CODE § 60605.1(c) (West 2011) (emphasis added). To achieve the full benefits of arts education, the legislature must substitute the discretionary language for mandatory language. Additionally, the legislature may want to add further instructions regarding the types of assessments and accountability measures required.

Finally, as policymakers and taxpayers must be willing to invest in public arts education, arts instructors must be willing to adapt to today's creative economy. This means that as society changes, so must the arts.²⁴⁴ The definition of "the arts" in arts classrooms must change to allow exploration of ideas such as graphic design, digital music, modern dance, and contemporary theatre.²⁴⁵ However, "the arts" will always have an important traditional element because the arts help us discover not only what the future holds but where we have been in the past. Today's arts classroom must be culturally competent—allowing students to discover themselves, as well as the cultural communities to which they belong.²⁴⁶ Overall, by mandating assessment and instruction of the arts in public schools and by redefining the arts to link directly to California's creative industry, arts education programs can be more practically and legally secure.²⁴⁷

²⁴⁴ This is not to say that traditional art forms and traditional arts instruction are not valuable. *See, e.g.,* Grey, *supra* note 13, at 13 ("Arts education curricula should draw from the wisdom of both traditional and contemporary theories of arts pedagogy.").

²⁴⁵ *See, e.g.,* NAT'L EDUC. TASK FORCE, SUMMARY OF ESEA REAUTHORIZATION MEETING ON ARTS EDUCATION 4 (2010), available at http://natedtaskforce.org/Resources_files/ESEA%20Meeting%20Art%20Ed%20Summary.pdf (proposing a new NCLB definition for the arts: "creative activities and products of the theater, the visual arts, dance, music *and multimedia combinations of the above*"). The National Education Task Force has also suggested that the arts include standards involving interpretation of messages within mass media. *See* Grey, *supra* note 13, at 13. *See also supra* note 220 (discussing the UC's emphasis on career technical education and approval of arts courses as a way to expand the arts).

²⁴⁶ According to the National Education Task Force's 2009 recommendations for NCLB reauthorization, the arts must "include the examination of social justice and ethical questions posed by artworks throughout history and across world cultures" in order "to create a civically engaged and ethical citizenry." *See* Grey, *supra* note 13, at 13.

²⁴⁷ Although this paper does not focus on potential litigation opportunities for ensuring the arts in schools, mandating arts instruction and assessment may help individuals enforce students' rights to arts education in the courts. For example, mandated standards and assessments might help enforce the presence of arts education as a student's fundamental education right. The California Constitution provides that a "general diffusion of knowledge and intelligence" is "essential to the preservation of the rights and liberties of the people." CAL. CONST. art. IX, § 1. Moreover, the state legislature must "provide for a system of common schools by which a free school shall be kept up and supported in each district." CAL. CONST. art. IX, § 5. Additionally, "From all state revenues there shall first be set apart the moneys to be applied by the State for support of the public school system." CAL. CONST. art. XVI, § 8. These three clauses, considered together, imply that education in California is a fundamental right. FRANK KEMERER & PETER SANSOM, CALIFORNIA SCHOOL LAW 5 (2d ed. 2009). If education in general is a fundamental right, and an integral component of education is instruction and assessment in the arts, then instruction and assessment in the arts may be a fundamental right also.

B. California Must Fully Fund Arts Education

To help reinvigorate California's economy, California must invest first and foremost in education and simultaneously fund the arts within public schools.²⁴⁸ California can no longer afford to export its creative industries and creative capital.²⁴⁹ Developing future *creative class* leaders and thinkers requires a financial investment and public sacrifice.²⁵⁰ Moreover, California's legislators must find ways of investing tax revenue responsibly.²⁵¹ One way of accomplishing this is to pass the type of legislation proposed in AB 1777, which would have diverted approximately \$24 million per year into California's creative industries.²⁵² Nonprofit arts organizations and cultural organizations provide services to California's children that are priceless.²⁵³ Considering the cultural diversity in our state, these organizations can help promote true collaboration, creativity, critical thinking, and cultural sensitivity—essential traits of the *creative class*.²⁵⁴ And the sacrifice is small, as AB 1777 would divert already earned revenue to

²⁴⁸ Although this paper suggests two specific funding possibilities, many opportunities exist. *See, e.g.*, California Arts Advocates, *supra* note 120 (listing three ways to stimulate California's economy through public investment in the arts: 1) AB 1777; 2) Budget trailer bills that incorporate components of AB 1777; and 3) "Incorporating an arts component in legislation that addresses infrastructure, public works, 21st Century workforce training programs, youth at risk programs, education programs, before and after-school programs, health programs, transportation, prison re-entry programs, foster care outreach programs, literacy programs, homeless children education programs and community redevelopment programs").

²⁴⁹ *See* FLORIDA, *supra* note 1, at 258.

²⁵⁰ *See id.* at 318–20.

²⁵¹ As every efficient government should, California should always spend responsibly. Fiscal responsibility is of even greater importance within California's current economic climate. *See* Newton, *supra* note 145. For an exhaustive report of the impact of the arts on the creative industry and suggestions for how states can fund the creative industry through the arts, *see generally* ARTS & THE ECONOMY, *supra* note 125.

²⁵² *See* Bill Analysis, *supra* note 191.

²⁵³ Many of these organizations supported AB 700—the prior, verbatim version of AB 1777. *See* California Arts Advocates, Legislation AB700: The Creative Industries & Community Economic Revitalization Act of 2010, <http://www.californiaartsadvocates.org/AB700.html> (last visited Apr. 6, 2011) (listing organizations and individuals who supported the bill).

²⁵⁴ To ensure thriving nonprofit arts organizations in California, Californians must also support the NEA. Californians' *general* support of this federal program is insufficient, but by supporting organizations that advocate for the NEA by lobbying federal policymakers, and by encouraging federal lawmakers to exercise their votes in favor of the arts, California residents can make a positive difference themselves.

the arts—there is no added burden on taxpayers, and because the taxes impact retail arts markets, arts capital works to recycle itself.²⁵⁵

A more ambitious goal, and one that will require arts advocates and supporters to inform and teach voters about the myriad of positive outcomes associated with strongly funded arts education programs, is to enact an amendment to the California Constitution that funds the arts and arts education. This will take considerable discussion, collaboration, and compromise, but one potential model is Minnesota’s Clean Water, Land and Legacy Amendment (“the Minnesota Amendment”).²⁵⁶ This constitutional amendment, approved by 56% of Minnesota voters in 2008,²⁵⁷ will generate approximately \$7.5 billion in a 25-year period²⁵⁸ to four distinct funds: Outdoor Heritage, Clean Water, Parks and Trails, and Arts and Cultural Heritage.²⁵⁹ The Minnesota Amendment, which raises the state sales tax rate 0.375%, guarantees almost 20% of the revenue for arts and cultural organizations—approximately \$54 million per year as a supplement to already existing funding.²⁶⁰

²⁵⁵ If a policy such as implementing AB 1777 is not feasible, then other systems of tax revenue, like those proposed by CTRA, would undoubtedly have the ability to aid the arts and arts education and increase investment in California’s creative industry. See CTRA, *supra* note 199. Perhaps implementing a bill like AB 1777 is more of a temporary fix, with more serious investments more likely in the future.

²⁵⁶ See MINN. amend. XII, § 15. According to Minnesota Citizens for the Arts (“MCA”), a Minnesota arts advocacy organization focused on lobbying efforts in the Minnesota State Legislature and the U.S. Congress, “The Clean Water, Land and Legacy Amendment was the largest arts and culture amendment in American history.” MCA, Amendment Funds, <http://www.mncitizensforthearts.org/news/amendment-funds> (last visited Apr. 6, 2011). See also MCA, About MCA, <http://www.mncitizensforthearts.org/home/aboutmca> (last visited Apr. 6, 2011) (listing MCA’s accomplishments and goals).

²⁵⁷ Minnesota approved the amendment 56% to 39%. See Amendment Funds, *supra* note 256.

²⁵⁸ *Id.*

²⁵⁹ Revenue is deposited among the four separate funds as follows: Outdoor Heritage Fund (33%), Clean Water Fund (33%), Parks and Trails Fund (14.25%), Arts and Cultural Heritage (19.75%). See MINN. H.R. FISCAL ANALYSIS DEPT., 2008 CONSTITUTIONAL AMENDMENT AUTHORIZED—SALES TAX INCREASE PROPOSED FOR NATURAL RESOURCE AND CULTURAL HERITAGE PURPOSES 2 (2008), available at <http://www.house.leg.state.mn.us/fiscal/files/ib2008Salestaxamend.pdf>.

²⁶⁰ *Id.* The \$54 billion figure comes from the 2008 Minnesota Department of Revenue estimate. See *id.*

California can learn much from the Minnesota Amendment.²⁶¹ First, the Amendment required considerable time and effort of Minnesota’s citizens, who established coalitions to realize their vision.²⁶² The arts community partnered with the sportsmen and conservation communities to invest resources and build support.²⁶³ This type of partnering within the creative industry is essential to achieve a successful, robust economy and enjoy a sustainable future.²⁶⁴ California’s strong creative industry possesses extensive partnership opportunities.²⁶⁵ Besides working together with cultural organizations, California’s arts organizations must reach out to business, science, and technology.²⁶⁶ California must build coalitions to lobby for funding creativity, and each industry must find a way to contribute to the ultimate economic goals.²⁶⁷ Fortunately, section 33500 of the California Education Code already encourages this type of collaboration between education and industry.²⁶⁸ Moreover, recently passed 2011 Senate Bill 789 has called for a committee of creative industry leaders and arts education experts

²⁶¹ California is no stranger to laws originating in Minnesota. In 1992, California became the second state to allow charter schools—modeling its Charter Schools Act after Minnesota’s Act implemented one year earlier. See Gary K. Hart & Sue Burr, *The Story of California’s Charter School Legislation*, PHI DELTA KAPPAN, Sept. 1996, at 37–40 (discussing background history of Charter Schools Act legislation).

²⁶² See Amendment Funds, *supra* note 256. MCA has partnered with Conservation Minnesota and Explore Minnesota—blending the arts, the environment, and tourism. See *id.* One program on which the three groups have collaborated is “Live the Legacy,” which provides travel opportunities to different Minnesota destinations on a bi-weekly basis. See *id.* Besides conducting press tours to highlight this program, the partnership has concerted some of its efforts into “counteract[ing] bad and inaccurate press.” *Id.*

²⁶³ *Id.*

²⁶⁴ See FLORIDA, *supra* note 1, at 320 (stating that investing in *all* forms of the creative industry would “increase wealth and incomes substantially and generate jobs for people across the classes”).

²⁶⁵ See *supra* text accompanying notes 129–147.

²⁶⁶ Because of the lobbying power of groups in the business, science, and technology sectors, it is of utmost importance that arts organizations join forces with them. Arts advocates must first work at creating strong coalitions and then collaborate to achieve end goals. See Amrein-Beardsley, *supra* note 33, at 14–15.

²⁶⁷ California Arts Advocates, which gained recent momentum in its advocacy surrounding AB 700, AB 1777, and the 2008 gubernatorial race, lists lobbying as one of its key functions. See California Arts Advocates, <http://www.californiaartsadvocates.org/index.html> (last visited Apr. 6, 2011).

²⁶⁸ See CAL. EDUC. CODE § 33500 (West 2011). The statute acknowledges there is continuing need of “new or improved educational ideas, practices, and techniques in solving critical educational problems” in California schools. See *id.* California education must work to “foster innovation and create change . . . based on research and proven need.” *Id.* The statute’s purpose is “to bring purposeful change and experimentation to schools throughout the state, through the use of all available resources of the state.” *Id.*

to design an index that measures how schools impact the creative economy.²⁶⁹ Perhaps this is the next major step toward a creativity-focused education system.

Second, California can learn from the structure of the Minnesota Amendment. 50% of the Arts and Cultural Heritage Fund goes specifically to arts organizations resembling the CAC.²⁷⁰ This money is used to fund all types of arts programs, including arts education.²⁷¹ Finally, California need not enact an identical amendment, nor should it. California, with its vibrant and economically beneficial arts scene, can ensure that its amendment sufficiently emphasizes the arts and arts education. As 66% of Minnesota's fund goes to Minnesota's creative industry strengths (water and wildlife),²⁷² California's fund should allot a significant percentage to the arts—its creative industry strength.²⁷³

Overall, California must generally adopt a sense of pride and respect for its accomplishments and potential in the arts and fully fund arts education in public schools

²⁶⁹ 2011 California Senate Bill 789 (“SB 789”), which would create an Advisory Committee on Creative and Innovative Education, clearly embodies section 33500’s intent and may be the next major step toward a creativity-based school system. *See* Cal. Senate, SB 789 Senate Bill—Bill Analysis, http://leginfo.ca.gov/pub/11-12/bill/sen/sb_0751-0800/sb_789_cfa_20110405_115913_sen_comm.html (last visited Apr. 12, 2011). SB 789 is sponsored by California Alliance for Arts Education and calls for a committee of “individuals that are experts or have experience in innovation in the fields of business, science, technology, mathematics, engineering, and arts education” to develop a Creative and Innovative Education Index by 2013 to measure how schools contribute to the creative economy. *See id.* Although the bill’s history suggests that it will likely be passed, future funding to increase creativity instruction is a main hindrance. *See id.* (“The fiscal constraints under which schools are likely to operate over the next several years could potentially result in reductions to the very programs and courses that may be included in the ratings that a CIE Index would produce.”). However, if the vast amount of research and data has any indication, investing money in arts education will be responsible and necessary for the state economy overall.

²⁷⁰ *See* Amendment Funds, *supra* note 256. MCA lobbies the Minnesota Legislature each year to ensure that Minnesota arts programs receive 50% of the Arts and Cultural Heritage Fund. *Id.*

²⁷¹ *Id.*

²⁷² *See id.*

²⁷³ Of course, the practicality is that to attain an amendment like Minnesota’s, California’s arts organizations must form partnerships with powerful allies to influence the state government and the general public—and within an economic crisis, this is not an easy task. It would be helpful—and perhaps necessary—to focus on the economic benefits of an arts-inclusive amendment to the state of California. The link to California’s creative industry is the potential ticket to reaching the ultimate goal.

to foster future economic and social growth.²⁷⁴ Californians need to use their own skills in critical thinking, creativity, and problem solving to determine a vision for the future.²⁷⁵ As individuals, and within communities large and small, Californians must promote arts education as a central focus of educational and economic progress.²⁷⁶

V. Conclusion

It is essential for California to invest in its known strengths in order to flourish within a culturally diverse, economically successful, and highly competitive global community. Therefore, California should find fiscally responsible ways to fully fund arts education. With risk comes reward, and fortunately the benefits of arts education on individuals, society, and the economy have been validated by research and experience. Despite the current economic climate, California's creative industry is still a major economic force. But to maintain and expand this industry, California must effectuate its own creative capital—its thinkers, creators, communicators, and problem solvers. Its well-rounded students. Its artists.

²⁷⁴ See FLORIDA, *supra* note 1, at 320 (stating that instead of “pour[ing] countless billions into . . . projects of dubious economic value” regions would enjoy a far greater payback by channeling “only a fraction of such funds into creative capital, for example . . . by investing in the arts and cultural creativity broadly”).

²⁷⁵ Californians must invest in arts education to foster the skills of California students so that these students can eventually contribute to California's creative economy. Cultivating homegrown creative talent decreases importation of creative capital, which is crucial to the financial success of the state.

²⁷⁶ See Florida, *supra* note 1, at 318 (“Virtually every citizen has a stake in the nation's long-term economic strength.”). If California does not fully invest in arts education, it cannot fully invest in its creative industry, and because of the need for creativity in today's workplace, California's economy will weaken. This will lead to lost job opportunities and an inability to maintain long-term competitiveness in the global market. *See id.* (“[I]f we do not keep finding more robust ways of [cultivating creativity], others will.”).