IDENTITIES, SEXUALITIES, AND THE POSTMODERN SUBJECT: AN ANALYSIS OF ARTISTIC FUNDING BY THE NATIONAL ENDOWMENT FOR THE ARTS

CARL F. STYCHIN*

I. INTRODUCTION

During the past four years, the National Endowment for the Arts ("NEA") has become the center of a struggle over the control of artistic representation in the United States. Numerous attempts have been made to condition the receipt of grants to artists on assurances that works of art do not depict the "obscene." Some of these political interventions have been successful, and the contestation over the issue continues. Without question, the debate largely has focused upon the funding of artistic works that present lesbian and gay images. Grants have been denied to artists whose works depict a gay identity, and even when grants have been approved, the storm of controversy has not dissipated. Not surprisingly, this environment of content-based control of artistic funding has given rise to questioning the constitutionality of explicit congressional restrictions and their application by the Endowment. In this Article, I will argue that the constitutional analysis of this issue has been less than robust given the limits of our discourse of equality and expression. I also will present an alternative approach which draws upon a number of theoretical strands—postmodernism, poststructuralism, and critical film and literary theory—to argue that the restrictions on arts funding amount to a fundamental violation of constitutional values because, when successful, they deny some citizens the right to articulate a political identity. I will pursue this argument in Part II by presenting a brief review of the attempts to use the law to restrict the scope of artistic expression of NEA grant recipients. In Part III, I will analyze postmodern theories of the subject and their role in the cultural conditions of postmodernity; in this way I hope to provide a theoretical founda-

* Lecturer, Department of Law, University of Keele, Staffordshire (United Kingdom); B.A. 1985, University of Alberta, Canada; LL.B. (honors) 1988, University of Toronto, Canada; LL.M. 1992, Columbia University School of Law. An earlier version of this article was written in partial fulfillment of the requirements of the degree of Master of Laws at Columbia University. The author thanks Kent Greenawalt for his comments and Rosemary Coombe for her encouragement and support.

tion for understanding how identities are formed and expressed in the cultural environment of late twentieth century America. Next, in Part IV, I will focus on the importance of constructing new forms of the political subject through cultural production and consumption. This analysis of discourse theory will be explored using a vision of equality that emphasizes the dialogic—the fundamental right to participate in a conversation in an ongoing attempt to define and contest identity through dialogue. After establishing this theoretical groundwork, in Part V I will turn to an example of particular relevance to the NEA—the formation and articulation of a gay identity within our cultural environment. Particular cultural practices will be explored to establish that restrictions on arts funding limiting the articulation of a gay identity are a denial of both the right to political expression and the dialogically based right to the equal protection of the laws. Moreover, such restrictions are "unenforceable" because they misconceive the role of culture and the diverse meanings of a representation. The uncontrollability of representations, in terms of their meaning to cultural consumers, ensures that any representation may become the basis for the forging of a new and potentially subversive political identity. Restrictions, then, are objectionable both because they are contrary to our notion of constitutional values and, moreover, because they are impossible to enforce effectively due to the unpredictability of the ways in which a cultural artifact will be deployed.[1]

II. THE NEA AND THE LIMITS TO REPRESENTATION

Recent political intervention in the National Endowment for the Arts has become well known and continues to raise controversy.[2] Some background on the disbursement of grant money

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[1] This article does not aspire to provide an argument that could be translated into constitutional law in the courts at this historical moment. Rather, my goal is to challenge our existing theoretical conceptions of constitutional norms of expression and equal protection in order to critically reexamine the recent controversy in arts funding.

[2] For an analysis of the legal issues raised by content restrictions on artistic works which are funded by the National Endowment for the Arts ("NEA"), see generally, Stephen J. Rohde, *Art of the State: Congressional Censorship of the National Endowment for the Arts*, 12 HASTINGS COMM. & ENT. L.J. 353 (1990); MaryEllen Kresse, Comment, *Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe Controversy"?*, 39 BUFF. L. REV. 231 (1991); Nancy Ravitz, Note, *A Proposal to Curb Congressional Interference with the National Endowment for the Arts*, 9 CARDOZO ARTS & ENT. L.J. 475 (1991); Kim M. Shipley, Note, *The Politicization of Art: The National Endowment for the Arts, The First Amendment, and Senator Helms*, 40 EMORY L.J. 241 (1991); Note, *Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969 (1990); Julie Ann Alagna, Note, *1991 Legislation, Reports and Debates Over Federally Funded Art: Arts Community Left with an "Indecent" Compromise*, 48 WASH. & LEE L. REV. 1545 (1991); Robert M. O'Neil, *Artists, Grants and Rights: The NEA Controversy Revisited*, 9 N.Y.L. SCH. J. HUM. RTS. 85 (1991); Paul N. Rechenberg, Note, *Losing the Battle on Obscenity, But Can We Win the War?: The National*

provides the starting point for analysis. On October 23, 1989, Congress added, as a condition for the appropriation of funding to the NEA, section 304 of the Department of the Interior and Related Agencies Appropriation Act of 1990, which provided in part that

> [n]one of the funds authorized to be appropriated for the National Endowment for the Arts . . . may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts . . . may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.[3]

This restriction on grants for fiscal year 1990 was a clear departure from the long established policy of independence in funding decisions.[4] The events that preceded the enactment of the provision included the cancellation of the NEA-sponsored exhibit of Robert Mapplethorpe's work at the Corcoran Gallery in Washington, D.C.[5] Mapplethorpe's art, which frequently depicted gay male themes, including his controversial photographs of African-American men, led Senator Jesse Helms (R-NC), the sponsor of many political interventions, to describe the exhibit as "'vulgar,' 'sick,' and 'unspeakable.'"[6]

The reaction by the NEA to this legislative move was prompt. To enforce the legal restriction, the Endowment inserted a paragraph in the acceptance statement to be signed by grant recipients. In accepting NEA funding, recipients certified that no federal

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Endowment for the Arts' Fight Against Funding Obscene Artistic Works, 57 MO. L. REV. 299 (1992); Pamela Weinstock, Note, *The National Endowment for the Arts Funding Controversy and the Miller Test: A Plea for the Reunification of Art and Society*, 72 B.U. L. REV. 803 (1992); Stephen N. Sher, *The Identical Treatment of Obscene and Indecent Speech: The 1991 NEA Appropriations Act*, 67 CHI.-KENT L. REV. 1107 (1991); Donald W. Hawthorne, *Subversive Subsidization: How NEA Art Funding Abridges Private Speech*, 40 KAN. L. REV. 437 (1992).

[3] Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989). Also included in the Interior Department's 1990 appropriations bill was a provision for the establishment of a commission "to review the National Endowment for the Arts grant-making procedures, including those of its panel system, to determine whether there should be standards for grant making other than 'substantial artistic and cultural significance'. . . ." *Id.* at 742. The Independent Commission Report advised against requiring grant recipients to certify that they would not use NEA funds for purposes which the NEA "may consider" obscene. *See* The Independent Commission, *A Report to Congress on the National Endowment for the Arts* (September 1990).

[4] For a discussion of the history and role of the NEA, see Shipley, *supra* note 2; *Standards for Federal Funding of the Arts: Free Expression and Political Control*, *supra* note 2.

[5] The artist Andres Serrano also was singled out for criticism. The recipient of NEA funding for his *Piss Christ*, a cibachrome showing a plastic crucifix submerged in urine, he drew the ire of conservative critics of the NEA.

[6] Shipley, *supra* note 2, at 242 (footnote omitted).

funds would be used to promote material that could be deemed obscene, including, but not limited to the various categories of representation prohibited by Congress.

In May 1990, subsequent to the enacting of the congressional amendment, then Chairperson of the NEA John Frohnmayer overturned the recommendations of the NEA's theater review panel and denied funding to four performance artists (the "NEA Four") whose work could be characterized as sexually explicit.[7] The artists all focused, to some extent, on issues of sexuality—including a lesbian or gay identity and the threat of AIDS. In November 1990, Congress again included a content-based restriction with its appropriation of funds to the Endowment. The standard of "obscenity" once again was deployed by legislators, but the language of the provision removed some of the vagueness of the previous year's restriction by eliminating the prohibition on "homoeroticism."

> **(d) Application for payment; regulations and procedures**
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> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
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> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
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> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment for the Arts.[8]

Under this statutory framework, the determination of "obscenity" was not left solely to the NEA since it had been subject to judicial

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[7] The grant making process commences with consideration by panels of administrators and artists. 20 U.S.C. § 959(a) (Supp. 1993). They make recommendations to the National Council on the Arts, a body appointed by the President with the advice and consent of the Senate. 20 U.S.C. § 955(b) (Supp. 1993). The Council's recommendations then are made to the NEA chairperson who can overturn those recommendations. 20 U.S.C. § 955(f) (Supp. 1993).

[8] 20 U.S.C. § 954 (Supp. 1993).

consideration.[9] The Endowment, nonetheless, was charged with ensuring that funding decisions were consistent with "'general standards of decency.'"[10]

The controversy over content-based restrictions on NEA funding then moved to the judicial arena. In *Bella Lewitzky Dance Foundation v. Frohnmayer*,[11] the court held that requiring grant recipients to certify that funds would not be used to produce obscenity was unconstitutional. The court found that the certification requirement was vague and created a "chilling effect" on first amendment speech rights of potential grant recipients. The court reasoned that there was no question of the government's right to place conditions on the award of federal funding, but that such obscenity provisions could not be unduly vague.

> The chilling effect on these two plaintiffs arising from the NEA's vague certification requirement is unmistakably clear. The creative expression of the plaintiff Dance Foundation would necessarily be tempered were it to sign the certification and then take seriously its pledge not to promote, disseminate, or produce anything that the NEA in its judgment might find obscene. Similarly, in compiling works for inclusion in the various exhibits for which it obtained NEA grants, the plaintiff Museum would have to continually moderate its selection decisions with a view toward steering clear of what might strike the NEA as obscene. The Court finds that because the certification requirement includes unconstitutionally vague provisions, it also violates grantees First Amendment rights by causing a chilling effect on their artistic expression.[12]

Subsequently, the NEA dropped the certification requirement that grant recipients were asked to sign. In its place the NEA included a notice "stating that the arts endowment intends to enforce the anti-obscenity stipulation mandated by Congress 'after a grantee has been convicted of violating a criminal obscenity or child pornography statute and all appeal rights have been exhausted.'"[13]

Once again, in the period leading up to the 1992 Appropriations Bill, threats of new content-based restrictions on NEA fund-

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9 *See* Ravitz, *supra* note 2, at 477 n.19.

10 William H. Honan, *Judge Overrules Decency Statute For Arts Grants*, N.Y. TIMES, June 10, 1992, at A1, C17. However, in December 1990, the National Council on the Arts "adopted a guideline instructing grant-making panel members to disregard the decency standard on the grounds that 'by virtue of your backgrounds and diversity you represent general standards of decency.'" *Id.*

11 754 F. Supp. 774 (C.D. Cal. 1991).

12 *Id.* at 783.

13 William H. Honan, *Arts Agency Voids Pledge on Obscenity*, N.Y. TIMES, Feb. 21, 1991, at C14.

ing arose. Senator Jesse Helms proposed a provision forbidding NEA grants that would be used "to promote, disseminate or produce materials that depict or describe, in a patently offensive way, sexual or excretory activities or organs."[14] Although the Senate and the House of Representatives originally supported the provision by a substantial margin, congressional opponents of the restriction succeeded in negotiating its removal from the Appropriations Bill in exchange for an agreement "to preserve low grazing fees on Federal land in 16 states."[15] The Senate subsequently voted by a margin of 73 to 25 to withdraw its earlier support of the Helms amendment.[16]

During the same period, Chairperson Frohnmayer increasingly drew the ire of conservative critics of the NEA. In November 1991, he approved grant awards to two performance artists, Tim Miller and Holly Hughes, whose funding had been cancelled the previous year.[17] In early 1992, the Endowment's support for a New York literary journal, *The Portable Lower East Side*, publications of which included *Queer City* and *Live Sex Acts*, spurred conservative organizations to send excerpts to members of Congress.[18] In the midst of Frohnmayer's support for the independence of funding decisions by the NEA, and in the climate of a presidential election campaign, he was forced to resign effective May 1, 1992.[19]

The administration elevated Deputy Chairperson Anne-Imelda Radice to the position of acting chair of the NEA in May 1992. That appointment exacerbated the funding controversy. A few days after assuming office, Radice vetoed two grants recommended by the advisory panel for works that might be described as "sexually explicit": an art exhibit at the List Visual Arts Center at the Massachusetts Institute of Technology and a video and photography exhibit at the Anderson Gallery of the Virginia Commonwealth University.[20] Despite the strong recommendation of funding for both exhibits by the National Council for the Arts, Ra-

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14 *Congressional Negotiators Reject Curb on Arts Grants*, N.Y. TIMES, Oct. 18, 1991, at C4.

15 *Id.*

16 *Restrictions on Grants Defeated*, N.Y. TIMES, Nov. 1, 1991, at C11.

17 William H. Honan, *Endowment Gives Grants to 2 Artists Rejected Last Year*, N.Y. TIMES, Nov. 6, 1991, at C19.

18 William H. Honan, *Head of Endowment for the Arts is Forced From His Post by Bush*, N.Y. TIMES, Feb. 22, 1992, at A1, A18.

19 *See id.* "Pressure on President Bush to cast off Mr. Frohnmayer was also applied by members of Congress and conservative groups aroused in recent weeks by the endowment's support of two publications with a particularly strong sexual content." *Id.*

20 The MIT exhibition, entitled "Corporal Politics," included "examples of 'violence, castration, sexual fetishism and ultimate loss.'" William H. Honan, *Arts Chief Vetoes 2 Approved Grants*, N.Y. TIMES, May 13, 1992, at C13. The Anderson Gallery exhibition, called "Anonymity and Identity," included one work by photographer Annette Messager entitled

dice justified her decision on the basis of artistic merit alone.[21] On May 15, 1992, the seven-member Endowment sculpture panel announced the suspension of their grant meeting in protest of Radice's overturning of the grant recommendations. Furthermore, on May 20, 1992, the panel considering funding for solo theater arts resigned in protest. Four other panels completed grant recommendations, but two of them criticized Radice's actions.[22] In July 1992, the acting chairperson approved, without exception, all grants recommended by her advisory council, including a project involving Tim Miller of the "NEA Four."[23] In November 1992, during the final weeks of the Bush Administration, the Endowment refused to award grants to three lesbian and gay film festivals on the basis of artistic merit.[24] Finally, with the change in administration, Ms. Radice announced her resignation from the Endowment,[25] ending for the time being a controversial period in its history.

This history of political action—both formal and informal—demonstrates the ongoing nature of the controversy. The issue of content-based restrictions on representation has plagued the NEA. Moreover, the constitutional status of restrictions on funding is far from clear. Although the district court in *Bella Lewitzky* struck down the conditions that a grant recipient was required to accept before receiving funding, it based its decision solely on vagueness grounds. As for the more general issue of legal restrictions of content, the constitutional issues have not led to easy answers. On the one hand, it is widely accepted that "[g]eneral prohibitions against the imposition of content or viewpoint restrictions on expression

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"My Wishes," which included "more than 100 tiny photographs of faces, lips, hair and, in one case, a penis." *Id.*

21 *See* Diane Haithman, *NEA Peer Panel Suspends Work*, L.A. TIMES, May 16, 1992, at F1.

> Both the MIT and Anderson Gallery grants had received peer panel and council recommendations for $10,000 each. . . . The MIT grant was approved 6-4 by the peer panel and approved 11-1, with one abstention, by the National Council. (The Anderson Gallery was approved without a roll call vote.) . . .
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> . . . Radice denied the grants, saying they "did not measure up" to standards of artistic excellence.

Honan, *supra* note 20, at C13. However, Radice had testified previously before a congressional subcommittee that "in the present climate she might be forced to veto grant recommendations for artworks in which the sexual content predominated." *Id.*

22 William H. Honan, *Endowment Head Draws Protests and Praise*, N.Y. TIMES, June 8, 1992, at C11.

23 *See* William H. Honan, *Endowment Approves 1,167 U.S. Arts Grants*, N.Y. TIMES, July 2, 1992, at C13.

24 *See U.S. Arts Endowment Rejects Grants for Gay Film Festivals*, N.Y. TIMES, Nov. 21, 1992, at 7.

25 *See* William H. Honan, *Acting Chiefs Named at 2 U.S. Endowments*, N.Y. TIMES, Jan. 22, 1993, at C3.

are of limited application in the realm of federal subsidization."[26] Because an applicant lacks an expectancy interest or entitlement to federal funding, the government is free to withhold subsidization without infringing upon the individual's first amendment rights.[27] This argument directly applies to congressional content-based restrictions on NEA grant making.

> When speech is directly subsidized, it is afforded less protection from government discrimination than other forms of speech. The discrimination may be couched in the subsidy's terms or conditions, as in the [1990] Amendment's vague disbursement criteria. Regardless of how it is characterized, the applicant is not protected from government discrimination in the grant-making process because he has no legitimate claim of right to the public funds. Accordingly, governmental preference in awarding grants is given wide discretion. When public subsidies for the arts are involved, the first amendment apparently does not guarantee that artistic expression will remain unaffected by government involvement.[28]

However, the Supreme Court also has recognized that governmental benefits cannot be subject to unconstitutional conditions.[29] This doctrine has particular relevance in the NEA context where the refusal to subsidize is tied to the constitutional right of free expression.[30] Thus, in regard to the 1990 Amendment, one commentator has concluded that "the congressional imposition of content restrictions on NEA grant making procedures has shifted discretionary government funding decisions to an impermissible purpose and result . . . ."[31]

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26 Kresse, *supra* note 2, at 268.

27 *Id.*

28 Shipley, *supra* note 2, at 270-71 (footnotes omitted). *See also* Kresse, *supra* note 2, at 268. "The Supreme Court has consistently held that because there is no entitlement to federal funds, a decision not to subsidize does not in itself violate the rejected individual's right of free expression." *Id.* (footnote omitted).

29 *See generally* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989). Sullivan concludes from the caselaw that "the doctrine of unconstitutional conditions is riven with inconsistencies." *Id.* at 1416. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976) (finding that government may not condition jobs or tax exemptions on political conformity); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (government may not condition unemployment compensation on agreement to accept work on recipient's sabbath day); FCC v. League of Women Voters, 468 U.S. 364 (1984) (government may not condition subsidies to public broadcasting stations on agreement not to engage in editorializing). *Contra, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (subsidy of child birth expenses excluding abortion does not infringe reproductive rights); Rust v. Sullivan, 111 S. Ct. 1759 (1991) (limitations on recipients of Title X funds for family planning services to engage in abortion-related activities does not violate first amendment free speech rights).

30 *See* Kresse, *supra* note 2, at 269.

31 *Id.* at 270. See also Rohde, *supra* note 2, wherein the arguments are raised that the 1990 NEA restrictions "unconstitutionally deny a government benefit on the basis of the

These constitutional issues returned to the judicial arena, this time centering on the "decency" clause enacted in November 1990.[32] In *Finley v. NEA*,[33] four performance artists (Karen Finley, John Fleck, Holly Hughes, and Tim Miller) denied funding in May 1990 raised declaratory and injunctive claims; the court held that the requirement that artistic excellence and merit be determined in light of "general standards of decency" was void for vagueness under the Fifth Amendment and overbroad pursuant to the First Amendment. Judge Tashima found the words "decency" and "respect" to be "inherently subjective" and "contentless."[34] As a consequence, the *Finley* court found the Supreme Court's reasoning in *Grayned v. City of Rockford*[35] directly applicable.

> (1) [The decency clause] creates a trap for the unwary applicant who may engage in expression she or he believes to comport with the standard, only to learn upon receiving notice that her or his grant has been withdrawn or a new application denied because she or he has offended someone's subjective understanding of the standard; (2) panelists, the Council, and the Chairperson are given no guidance in administering the standard; each apparently is expected to draw on her or his own personal views of decency or some ephemeral "general American standard of decency;" and (3) it necessarily causes the imposition of self-censorship wider than the line drawn by the statute because the line is, in effect, imperceptible.[36]

Thus, the decency clause was held to be inconsistent with the due process requirement of the Fifth Amendment.

As for its analysis under the First Amendment, the court considered whether the "protected First Amendment interest in artistic expression funded by the government"[37] warranted "government neutrality" in the public subsidization of art. Accepting the analogy to academic and journalistic expression, Judge Tashima reasoned that artistic expression "is at the core of a democratic society's cultural and political vitality."[38] As in its funding to public universities, government's criteria is limited to "professional

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content of protected speech," "constitute an impermissible prior restraint and guarantee none of the required procedural safeguards," "are unconstitutionally vague," and "constitute an unconstitutional bill of attainder." *Id.*

32 *See id.* and accompanying text.

33 795 F. Supp. 1457 (C.D. Cal. 1992).

34 *Id.* at 1471.

35 408 U.S. 104, 108-09 (1972).

36 *Finley*, 795 F. Supp. at 1472, (citing *Grayned*, 408 U.S. at 108-09).

37 *Id.* at 1472-73.

38 *Id.* at 1473.

evaluations of . . . merit."[39] That determination of excellence does not encompass considerations of decency. "[T]he fact that the exercise of professional judgment is inescapable in arts funding does not mean that the government has free rein to impose whatever content restrictions it chooses . . . . The right of artists to challenge conventional wisdom and values is a cornerstone of artistic and academic freedom. . . ."[40] Having determined that government funding of the arts is subject to the First Amendment, the court readily concluded that the decency clause suffered from overbreadth as its sweep extended beyond the obscene to include protected speech.[41] Consequently, the clause on its face violated the First Amendment.

The judgment of the district court in *Finley*, like that in *Bella Lewitzky*, is encouraging for its support of artistic expression and, specifically, for its invalidation of specific congressional interventions in arts funding. A more general and foundational question that raises issues of constitutional dimension, however, remains beyond the constitutional discourse as it has been framed by the courts. As made apparent by the earlier discussion of the history of the NEA controversy, the continuing focus of attention primarily rests upon the artistic representation of lesbian and gay identities in NEA-funded works.[42] Furthermore, the issue of funding not only turns on restrictions passed into law, but also depends heavily upon

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[39] *Id.* at 1475.

[40] *Id.*

[41] *Id.* at 1475-76.

[42] This was most apparent in the drafting of the 1990 Amendment.

> The spirit of the Amendment calls for a policing of NEA disbursements to ensure that distribution of funds does not promote the creation of art that might violate these guidelines — guidelines that clearly target art dealing with homosexual themes. . . . [T]he Amendment and its supporters have targeted artists dealing with gay and lesbian issues. As commentators have noted, the Amendment is aimed at "homoeroticism," yet nowhere does it mention "heteroeroticism." There is mention of portrayals of "individuals engaged in sex acts," but that is entirely different from erotica. "Sadomasochism" and the "sexual exploitation of children" can be either heterosexual or homosexual, but both are extreme behaviors outside the scope of accepted societal norms. By placing the term "homoeroticism" next to these extreme behaviors, the Amendment's authors state their claim emphatically: while only extreme heterosexual depictions are prohibited, *all* homosexual depictions are barred. The subliminal connotations of the Amendment's phrasing are naive, if not grotesque—they perpetuate the myth that homosexuals "recruit" young persons to a deviant lifestyle.

Shipley, *supra* note 2, at 259-60 (footnotes omitted). *See also* Carole S. Vance, *Misunderstanding Obscenity*, ART IN AMERICA, May 1990, at 49. "[W]hen the sexual laundry list is attached to the word 'obscenity,' many carelessly read the phrase to mean that any depiction of sadomasochism or homoeroticism is in itself obscene. . . . Indeed, the list targets not just homosexual sex but the even broader category of homoeroticism, thus constituting an attack on all gay and lesbian images." *Id.* at 51.

how the law is administered by the NEA and its chairperson. Following both the resignation of Chairperson Frohnmayer in the face of continuing pressure from conservative forces and the leadership of acting Chairperson Radice, the future of NEA funding for artists who deal with gay representation was far from certain. Moreover, it is not yet clear how the Clinton Administration will approach the issue, although the recent appointment of Jane Alexander as Chairperson may well indicate a sharp departure. Finally, as the NEA chairperson makes the final decision as to artistic merit, her subjective evaluation will be difficult for any court to review.

In the remainder of this Article, I will analyze how the attempt to erase gay artistic representation through a denial of funding violates constitutional norms, which have not been easily articulated within our current legal discourse. I will seek to expand our notions of expression, equality, and their relationship by formulating a theoretical framework in an attempt to rethink both the immediate legal question and the more expansive issues of constitutional theory and interpretation.

A. *The Legal Subject as Bearer of Rights*

In order to engage in the reconception of the rights of equality and expression, it is necessary not only to understand the content of the rights but to examine how rights are held by their subject and, more fundamentally, to analyze how the subject itself is constructed. The universality and, indeed, the coherence of the subject increasingly have come under scrutiny in the glare of postmodernism and poststructural analysis. The postmodern focus on the demise of the universal narrative has meant that one of the targets for decentering has been the narrative of the rational and coherent social subject.[43] The individual subject is rendered inex-

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[43] *See* AFTER PHILOSOPHY: END OR TRANSFORMATION? (Kenneth Baynes, et al., eds., 1987).

> For our purposes it is the specification of modern Western culture as fundamentally rationalist and subjectivist that provides the key point of contrast; for postmodernism in philosophy typically centers on a critique of the modern ideas of reason and the rational subject. It is above all "the project of the Enlightenment" that has to be deconstructed, the autonomous epistemological and moral subject that has to be decentered; the nostalgia for unity, totality, and foundations that has to be overcome; and the tyranny of representational thought and universal truth that has to be defeated.

Id. at 68. Also see Pierre Schlag, *Normative and Nowhere to Go,* for an application of postmodern conceptions of the subject to legal analysis. 43 STAN. L. REV. 167 (1990). "Postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self—the knowing sort of self produced by Enlightenment epistemology and featured so often as the dominant self-image of the professional academic. For

tricable from discourse, "a post through which various kinds of messages pass,"[44] which leaves her a mere "nodal point" for the ever-shifting play of dissonant language games.[45] With the postmodern rejection of all projects claiming to be universal, the unity of the subject is deconstructed and revealed as plural, fragmentary, and contingent.[46]

Moreover, the searching deconstruction of the subject has revealed that the universal, rational subject of Enlightenment thought demanded exclusions from its category as the means for its own constitution as a universal. "[T]he philosophical and historical creation of a devalued 'Other' was the necessary precondition for the creation of the transcendental rational subject outside of time and space, the subject who is the speaker in Enlightenment philosophy."[47] Indeed, feminists long have argued that the definition of the subject as universal has been inextricably tied to its identification as exclusively male, leaving "woman" necessarily defined by her absence—by her "otherness." The discursively constructed "I" is male as a direct result of the exclusion of the female gender from its borders.

> [T]he constitution of "masculinity" as a concept depends concretely, at a certain moment, on the mediation of its defining characteristics through its Other, "femininity". . . . [T]his mo-

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postmodernism, this humanist individual subject is a construction of texts, discourses, and institutions." *Id.* at 173 (footnote omitted). Schlag argues that the Enlightenment subject is foundational in legal analysis both for rule of law and critical thinkers.

> The apparent radicalism of critical legal thought does not stem from a new conceptualization of the subject, but rather from a reversal of the valences in the same old rule-of-law depiction of subject-object relations. Whereas the rule-of-law thinkers radically separate and distinguish subject and object, seeking to restrain and constrain the legal subject by means of 'objective law,' critical legal thinkers adopt the mirror image and strive to accomplish exactly the reverse.

Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1697 (1991) (footnote omitted).

44 JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 15 (Geoff Bennington & Brian Massumi, trans. 1984).

45 *See id.*

46 *See generally* Michel Foucault, *What is an Author?*, *in* THE FOUCAULT READER 101 (Paul Rabinow, ed. 1984).

47 Nancy Hartsock, *Foucault on Power: A Theory for Women?*, *in* FEMINISM/POSTMODERNISM 157, 160 (Linda J. Nicholson, ed. 1990). *See also* Iris Marion Young, *The Ideal of Community and the Politics of Difference*, *in* FEMINISM/POSTMODERNISM, *supra*, at 300, 301. "Deconstruction . . . shows that a desire for unity or wholeness in discourse generates borders, dichotomies, and exclusions." *Id.* at 301. Young draws an analogy between the deconstruction of the subject and the characteristics of community and its power of exclusion, asserting that "[t]he ideal of community presumes subjects can understand one another as they understand themselves. It thus denies the difference between subjects. The desire for community relies on the same desire for social wholeness and identification that underlies racism and ethnic chauvinism on the one hand and political sectarianism on the other." *Id.* at 302. For a more expansive explanation of this ideal of community, see generally IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

> ment is the moment of constitution of subjects *qua* subjects in and through the multigendered flux of the social field of dynamic intersubjectivity. *The gender of the I is not established a priori or in the singular; gender identity only maintains itself by virtue of its marking by its nonidentical other.*[48]

The recognition of the constructed status of subjecthood, and how its constitution as a universal has been achieved by the relegation of some to the status of "other," has forced poststructuralist thinkers to determine the status of the now deconstructed subject. If the unity and singularity of the subject is revealed as illusory, the question then becomes how we conceive of a post-Enlightenment notion of identity, or whether identity itself is a universal that must be deconstructed. This appears increasingly to be the postmodern project—a reconstitution of identity and subjecthood apart from a modernist, universal conception. In other words, a decentering of the subject does not mean that the subject ceases to have any coherent meaning. The ontological status of the body itself grounds subjectivity in a way that is difficult to imagine transcending.

> To deny the unity and stability of identity is one thing. The epistemological fantasy of *becoming* multiplicity—the dream of limitless multiple embodiments, allowing one to dance from place to place and self to self—is another. . . . If the body is a metaphor for our locatedness in space and time and thus for the finitude of human perception and knowledge, then the postmodern body is no body at all.[49]

Thus, the rejection of the universal need not mean the rejection of all coherence for the subject. Not only does the body itself suggest some limits to the dissolution of subjecthood (if only through a firmly entrenched metaphor), but the ability to conceive of a decentering of one's "self" demands that there remain a grounded subject making use of the discursive space of "multiplicity" and identity fragmentation.[50]

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[48] Drucilla Cornell & Adam Thurschwell, *Feminism, Negativity, Intersubjectivity, in* FEMINISM AS CRITIQUE 143, 158 (Seyla Benhabib & Drucilla Cornell, eds. 1987) (emphasis added).

[49] Susan Bordo, *Feminism, Postmodernism, and Gender-Scepticism, in* FEMINISM/POSTMODERNISM, *supra* note 47, at 133, 145. But, for a critique of the metaphor of the body as container, see Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self,* REPRESENTATIONS, Spring 1990, at 162.

[50] This point has been cogently developed by psychoanalyst Jane Flax in JANE FLAX, THINKING FRAGMENTS: PSYCHOANALYSIS, FEMINISM, & POSTMODERNISM IN THE CONTEMPORARY WEST (1990).

> Postmodernists seem to confuse two different and logically distinct concepts of the self: a "unitary" and a "core" one. . . . Those who celebrate or call for a "decentered" self seem self-deceptively naive and unaware of the basic cohesion within themselves that makes the fragmentation of experiences something

Moreover, as a political matter, it is not surprising that feminist theory has generated an examination of limits to the dissolution of the subject. For women, who have been denied the position of speaking subject, the rejection of the universal appears to leave little opportunity for overdue claims grounded in the singularity of the subject position.[51] If the nodal point of subjecthood is "unpacked" and revealed as multifaceted, contradictory, and both subjected to and complicit in relationships of power, the question arises whether the singularity required to pursue legal claims will be undermined.[52]

This skepticism, as to whether the dissolution of the subject will hinder claims that we have associated traditionally with the universal subject of rights, demands a response. In fact, postmodernists increasingly have focused their attention on how a postmodern understanding of identity, agency, and a localized, situated subject provides a political (and metaphorical) basis for securing rights. In other words, an understanding of subjecthood can be relocated rather than rejected. To begin with, the postmodern deconstruction of subjecthood has revealed the subject not only as socially constructed but also as a product of discourse.[53] This discovery, however, need not mean that the status of

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> other than a terrifying slide into psychosis. . . . Only when a core self begins to cohere can one enter into or use the transitional space in which the differences and boundaries between self and other, inner and outer, and reality and illusion are bracketed or elided. Postmodernist texts themselves belong in and use this space. It is grandiose and misleading to claim that no other space exists or that this one alone is sufficient.

Id. at 218-19.

[51] *See* Jennifer Wicke, *Postmodern Identity and the Legal Subject*, 62 U. COLO. L. REV. 455, 462 (1991) ("to efface or erase the legal subject, however much predicated on an illusory unity, singularity, intentionality, would be an enormous political loss").

[52] Seyla Benhabib takes this point to its logical conclusion. *See* Seyla Benhabib, *Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics and Utopia in Critical Theory*, 11 CARDOZO L. REV. 1435 (1990).

> We must begin to probe the implications of the postmodernist project not just in aesthetics but in ethics as well. Postmodernism gestures its solidarity with the other, with the "différend," with "women, children, fools, and primitives," whose discourse has never matched the grand narrative of the modern masters. Yet can there be an ethic of solidarity without a self that can feel compassion and act out of principle? Can there be a struggle for justice without the possibility of justifying power by reason? What is justice if not the rational exercise of power?

Id. at 1439 (footnote omitted).

[53] *See Foucault, supra note 46, at 118.*

> [T]hese questions will be raised: How, under what conditions, and in what forms can something like a subject appear in the order of discourse? What place can it occupy in each type of discourse, what functions can it assume, and by obeying what rules? In short, it is a matter of depriving the subject (or its substitute) of its role as originator, and of analyzing the subject as a variable and complex function of discourse.

Id.

the subject is reduced to nothing more than the intersection of various language games (to use Lyotard's formulation). Subjects are constructed by discourse, and as subjects we actively and creatively participate in our self-definition through discourse.[54] This realization demands that our understanding of subjecthood transcend the binary between liberal, universal conceptions and the poststructuralist dissolution of all notions of a grounded subjectivity. Rather, we must recognize individual activity in "self" definition and interpretation.

> Clearly the liberal image of the subject characterized by an unmediated individual consciousness or will cannot contain the complexities, ambiguities, and paradoxical realities of subjective experience, but neither can a poststructuralist image of subjectivity as merely the *locus* or *incident* at which a multiplicity of discourses intersect.[55]

It is the potential for interpretive activity that provides the grounding for a conception of agency apart from traditional notions of the subject. As a starting point, this understanding depends upon an appreciation of the necessarily incomplete delineation of the boundaries of any discourse through which an identity is imposed upon the subject.[56] This incomplete suturing of a discourse of the universal subject allows for intervention, resistance, and subversion of the terms of the system. The active role of the agent, through her creative intervention and resistance, ultimately determines how she is socially constructed.[57]

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[54] *See* Rosemary J. Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69, 82 (1989).

[55] *Id.* at 83.

[56] This point draws upon a wealth of scholarship which has been succinctly summarized by Richard Thomas. Richard M. Thomas, *Milton and Mass Culture: Toward a Postmodernist Theory of Tolerance*, 62 U. COLO. L. REV. 525 (1991).

> Postmodernist writers also describe a process by which discourse tends to overrun the rational boundaries that limit and stabilize meaning, thus producing a surplus of meaning that overflows and undermines the categories and boundaries by which reason operates. Laclau and Mouffe, drawing upon the earlier work of Derrida, Foucault, and other poststructuralists, have expanded upon this idea to describe the organization of society itself as a social "discourse" whose boundaries are only partially fixed and are subject to the subversive overflow of certain "surplus" social forces or elements that are only partially articulated by the prevailing culture.

Id. at 544 (citing ERNESTO LACLAU & CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY 111 (1985)).

[57] *See* Susan Hekman, *Reconstituting the Subject: Feminism, Modernism, and Postmodernism*, HYPATIA, Summer 1991, at 44, 59.

> [T]he result of the forces that create subjectivity is not a seamless whole. There are gaps and ambiguities within the interstices of language that prevent a uniform determination of subjectivity. . . . Subjects are constituted by multiple and sometimes contradictory discourses. Individual subjects resist, mutate, and re-

From this theoretical standpoint, the possibility exists for active intervention by the marginal subject, historically defined as the "other" against which the universal subject is constituted, in the very structure that creates the appearance of the universal. The power of the "universal" metanarrative operates through a matrix of constraints by which "the subjection of localized, fragmented knowledges . . . is a necessary condition for appearance of the 'totalizing' discourses of authority."[58] However, if discourse is never actually totalized for the subject that is defined by an absence, discursive resistance remains possible. Thus, an identity can be forged within the very discourse through which one's subjectivity has been denied articulation.[59] This potential for resistance also suggests that a measure of commonality may be found between a feminist and a postmodern conception of subjecthood.

> [E]lements of the postmodern critique address the ethical issue that feminism raises: the need to retain agency. They thus posit a subject that is capable of resistance and political action. This conception of the subject is articulated not by retaining a Cartesian concept of agency but by emphasizing that subjects who are subjected to multiple discursive influences create modes of resistance to those discourses out of the elements of the very discourses that shape them. While the dialectical conception of the subject rests on a definition of agency that is imported from the Cartesian subject as a given, the postmoderns attempt to formulate concepts of resistance and creativity apart from Cartesian concepts.[60]

The capacity for resistance can be linked to a political agenda that focuses on the formation of identities denied by the universal discourse of subjecthood. The destabilization of the universal subject position through practices of resistance opens up a realm of cultural space for the establishment of identities that have been silenced. Thus, attempts to problematize the norm become a precondition for articulating difference.[61] Moreover, by operating

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vise these discourses from within them; resistance does not require recourse to the modernist notion of an "inner world" untainted by discursive forces.

Id. (footnote omitted).

58 FLAX, *supra* note 50, at 41.

59 *See* Steven Winter, *Foreword: On Building Houses*, 69 TEX. L. REV. 1595 (1991). "The constitutive action in which the self is already situated is also the field of social interaction in which the self is always implicated." *Id.* at 1607.

60 Hekman, *supra* note 57, at 51.

61 For example, Scott Lash discusses the decentering of subjectivity in terms of cultural practices which undermine the binary of gender.

> The deliberate ambiguity in gender and sexual preference built into images problematizes reality and the normative in a sense not dissimilar to the way that

within the dominant discourse, subjects that have been historically denied participation can appropriate and redeploy the terms of the dominant discourse. It is this cultural phenomenon of discursive appropriation—a parasitic redeployment of the excess of discursive meaning—that amounts to the cultural practice of postmodern theory.

> That [postmodernism] has achieved such diverse cultural currency as a term thereby demonstrates what has been seen as one of postmodernism's most provocative lessons; that terms are by no means guaranteed their meanings, and that these meanings can be appropriated and redefined for different purposes, different contexts, and, more important, different causes. In fact, this politics of appropriation, for so long exclusively the discursive preserve of the colonizer, has more recently been crucial to groups on the social margin, who have preferred, under certain circumstances, to struggle for recognition and legitimacy on established "metropolitan" political ground . . . .[62]

By operating within and utilizing the terms of the dominant discourse in subversive fashion, new identities are shaped—subjectivities that emerge in an oppositional relationship to the universal.

The cultural conditions of postmodernity do not give rise only to isolated acts of resistance by individual agents. Resistance also occurs within "a shared material and discursive history,"[63] which results in shared identities articulated in liberationist terms.[64] Attempts at articulation also can provide the means for rethinking the liberal tension between individual and community. On the one hand, to the extent that cultural interventions in a discourse

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> surrealism and pop art . . . operate. The effect is a much more ambivalent and less fixed positioning of subjectivity. If subjectivity is less fixed, then space is left for the construction of identities, and collective identities, which deviate from the norm. . . . That is, space is left for difference.

Scott Lash, *Discourse or Figure? Postmodernism as a 'Regime of Signification,'* 5 THEORY, CULTURE & SOCIETY 311, 334 (1988) (citation omitted). I take this argument up in greater detail *infra*, part V.B, in an analysis of specific cultural practices.

62 Andrew Ross, *Introduction*, *in* UNIVERSAL ABANDON: THE POLITICS OF POSTMODERNISM, vii, xi (Andrew Ross, ed. 1988).

63 *Id.* at xii.

64 This process has been described in dialectic terms; *see* R. Radhakrishnan, *The Changing Subject and the Politics of Theory*, DIFFERENCES 2.2, 1990, at 126.

> [T]he poststructuralist subject represents the "return of the repressed": it stands for all those themes, possibilities, and emergences that have been repressed by a tradition that has been naturalized in the name of "identity," "continuity," "stability'" and subject-oriented epistemologies. . . . [T]he poststructuralist subject seeks to celebrate life through ceaseless anomie. But this of course is not the whole story: for there is a place for continuity and a place for discontinuity, a place for consolidation and a place for destabilization, a place for identity and a place for difference.

Id. at 147-48.

are understood as emerging from a shared history—and therefore a shared identity—the narrative of identity itself may come to be shared and authored collectively.[65] On the other hand, the logic of postmodernism also demands a recognition of specificity—"that each of us is located at, indeed is, the intersection of various specific discourses and structures, and that we each possess knowledges produced in that location."[66] The focus, then, cannot be on abstract notions of difference and of collective difference alone. Rather, a refutation of the universal subject equally requires an understanding of the specificity of agency—that an agent is unique ("individual") because of a particular location within a structure of hierarchies. A decentering of the universal subject opens up cultural space not only for the recognition of "difference," which, by definition, still prioritizes the universal, but also leads to articulation of an individuality that can be defined in terms that respect membership in collective subjectivities and also recognize the uniqueness of any location. The individual subject thus is defined in terms of membership in communities, but also provides a unique "intersectional" vantage point.

III. Subjecthood and the Cultural Conditions of Postmodernity

In the previous section I argued that alternative subjectivities can be articulated and identities forged through acts of resistance to the dominant discourse of the universal subject. It is necessary, though, to ground this argument in an understanding of how such an articulation of subjecthood can occur. In other words, what are the cultural conditions that give rise to the formation of a political identity in contradistinction to the universal subject position? To reiterate, the narrative of the universal rational subject was the product of discourse. The effect of the discourse was the emergence of "centralizing principles," such as the universal subject,

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[65] This point has been made by Fredric Jameson. *See* Anders Stephanson, *Regarding Postmodernism — A Conversation with Fredric Jameson, in* Universal Abandon, *supra*, note 62 at 3.

> I always insist on a third possibility beyond the old bourgeois ego and the schizophrenic subject of our organization society today: a *collective subject*, decentered but not schizophrenic. . . . It is a storytelling which is neither personal in the modernist sense, nor depersonalized in the pathological sense of the schizophrenic text. It is decentered, since the stories you tell there as an individual subject don't belong to you; you don't control them the way the master subject of modernism would. But you don't just suffer them in the schizophrenic isolation of the first-world subject of today.

Id. at 21.

[66] Shane Phelan, *Specificity: Beyond Equality and Difference*, Differences 3.1, 1991, at 128, 137.

and the task of postmodern analysis is to uncover what the center has rendered marginal.[67] The postmodern redemption of the peripheral is possible because, as Foucault described, power also gives rise to

> mobile and transitory points of resistance, producing cleavages in a society that shift about, fracturing unities and effecting regroupings .... [J]ust as the network of power relations ends by forming a dense web that passes through apparatuses and institutions, *without being exactly localized in them, so too the* swarm of points of resistance traverses social stratifications and individual unities.[68]

Increasingly, the postmodern analysis has turned to how a subversive fragmentation of the unities of discourse is to be realized in late twentieth century western society. That analysis has focused on the cultural conditions of postmodernity and the specific cultural practices through which alternative subjectivities may be constructed. Culture becomes the focus of attention as its potential as a site for a politics of resistance emerges from the role of the subject as cultural consumer.

> When describing postmodernity, theorists point to the dramatic restructuring of capitalism in the postwar period, the development of a multinational global economy, the displacement of production relations to off-shore and third world locations, and the consolidation of corporate controlled mass communications systems and electronic media and information technologies. These processes, they argue, have created consumer oriented societies in the Western world characterized by an immense proliferation of cultural signs and signifiers divorced from traditional fields of reference that were rooted in local so-

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67 *See* STEVEN CONNOR, POSTMODERNIST CULTURE 228 (1989).

68 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 96 (R. Hurley, trans. 1980). This point has been developed by Rosemary Coombe.

> Because discourses, no matter how authoritative, by their very nature lack fixity, they invite such underminings. This is not to deny that authoritative discourses are maintained, supported, and enforced by nondiscursive practices, including the use of physical force; it is, however, to suggest that changes, even major transformations, may be generated by the rhetorical practices of social *agents who penetrate, dissimulate, and reorder the structures of discursive* space in their quotidian quests to construe the world in a manner that conforms to their perceived interests.
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> In many cases, the hegemonic discourse formulated by the dominant class to justify its own rule, provides, in its ambiguities and contradictions, much of the raw material from which the most effective critique of that rule can be derived and sustained. And given the discursive constitution of subjectivity, the most compelling and socially galvanizing of critiques are likely to be constructed from such materials.

Coombe, *supra* note 54, at 97-98 (footnotes omitted).

cial communities and traditions.[69]

Not surprisingly, the inundation of the individual with cultural signs opens up a new terrain for the formation of an identity forged from resistance to, and through the subversion of, those very signs.[70] This understanding of culture is a distinctly postmodern one, for it demands the rejection of a universal notion of cultural meaning located in the cultural producer. It requires a deprivileging of universal cultural meanings and a recognition of local, particularized, and contradictory cultural configurations.[71]

Thus, in the cultural environment of postmodernity, a modernist cultural tradition, which has allowed only articulation from the universal standpoint, comes under scrutiny. Cultural practices reveal how points of resistance to a dominant discourse come to be articulated.

> Contemporary postmodernist theory has turned increasingly . . . to popular cultural practice for its models of cultural plurality and resistance. . . . [O]ne of the most important themes in this form of work has been the experience of marginalized or excluded ethnic groups, and theorists have drawn increasingly on postmodern categories and concepts to evoke and understand

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69 Rosemary J. Coombe, *Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy*, 26 NEW ENG. L. REV. 1221, 1247 (1992). *See also* MIKE FEATHERSTONE, CONSUMER CULTURE AND POSTMODERNISM 62-63 (1991).

> To understand postmodernism then, we need to approach it on a number of levels. Firstly, it involves changes in the artistic intellectual and academic fields manifest in the competitive struggles in particular fields over the canon. Secondly, it involves changes in the broader cultural sphere in terms of the modes of production, circulation, and dissemination of symbolic goods which can be understood in terms of changes in the power-balances and interdependencies between groups and class fractions on inter- and intra-societal levels. Thirdly, it involves changes in the everyday practices and experiences of different groups who as a result of the first and second set of changes start to use regimes of signification in different ways and develop new means of orientation and identity structures. In many ways postmodernism stands as a sign for contemporary cultural change and should direct our attention to the interrelationship between the above areas of 'levels' of culture and the necessary reflexivity which entails the inclusion of the academic intellectuals as socially interested parties in the process.

Id.

70 *See* Rosemary J. Coombe, *Beyond Modernity's Meanings: Engaging the Postmodern in Cultural Anthropology*, CULTURE, XI (1-2), 1991, at 111. "If we become aware of politics and economics through representations and images disseminated through a mass media that proffers them as consumer choices, politics becomes a matter of signification. Political communities must increasingly be forged and to be forged they must first be imagined . . . ." *Id.* at 116.

71 *See id.* at 113. "Culture needs to be understood as an activity of struggle rather than a thing, as conflictual signifying practices rather than integrated systems of meaning. In other words, a hermeneutic anthropology must explore the signifying practices that construct, maintain, and transform multiple hegemonies." *Id.*

this experience . . . .[72]

The task, however, is not simply one of "articulating the margins, or what has been projected as marginal" and appropriating those "regimes of images that seem designed to silence those whom they embody in representation."[73] The postmodern project also fundamentally seeks to overcome the binary relation of universal and marginal subject—a binary in which the very recognition of one's historic silencing "is implicitly to accept and to internalize the condition of marginality."[74] Within the cultural circumstances that we face, the goal becomes the elucidation of how the cultural universal never fully expels the marginal. Rather, the margins continue to reside within the center despite the constant attempts to silence, erase, and reduce them to the "other."[75]

The method by which dominant cultural productions are utilized as a means for cultural resistance is "decoding." Through cultural consumption by historically marginalized subjects, the marginal, which resides within the universal meaning of a cultural production, can be uncovered or decoded. Through decoding, the meaning of a message, as it is received by a consumer, becomes uncontainable from the standpoint of production, a phenomenon described by Jean Baudrillard in a now famous passage.

> [T]he mass does not at all constitute a passive receiving structure for media messages, whether they be political, cultural or advertising. Microgroups and individuals, far from taking their cue from a uniform and imposed decoding, decode messages in their own way. They intercept them (through leaders) and transpose them (second level), contrasting the dominant code with their own particular sub-codes, finally recycling everything passing into their own cycle . . . . [I]t is a way of redirecting, of absorbing, of victoriously salvaging the material diffused by the dominant culture. . . . [I]n the case of the media, traditional resistance consists of reinterpreting messages according to the

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72 CONNOR, *supra* note 67, at 192.

73 *Id.* at 232.

74 *Id.* at 233.

75 *See id.* at 234. "[Postmodernists] show [the discursive centers'] existential dependence upon the forms of the Other that they expel beyond their boundaries of rationality. . . . [Postmodernism] brings the margins into the centre in order to question the very map-making which projects the centre and margins as such — by suggesting that the margins inhabit the centres which expel them from consciousness." *Id.* This phenomenon of "over-determination" is discussed *infra.* Connor goes on to suggest that postmodern theorists themselves must respect the rights of historically marginalized groups to articulate their identities — to "manage the margins." *Id.* at 236. To do otherwise is to risk the replication of a binary between center and margin, with the center inhabited by a theory that has expelled postmodern cultural practices to a position of marginality.

group's own code and for its own ends.[76]

The practice of decoding ensures that a nonuniversal, particular, local, resistant subject can come to be defined through her cultural consumption. Consumption thus is not a passive process, but in itself is a form of cultural production.

> The received view of aesthetics suggests that the aesthetic effect is internal to the text, and a universal property of its form. This places the creative impulse squarely on the material productions of the 'creative' artist, with the reception or consumption of art wholly determined by its aesthetic form, palely reflecting what is timelessly coded within the text. Against this we want to rehabilitate consumption, creative consumption, to see creative potentials in it for itself, rather than see it as the dying fall of the usual triplet: production, reproduction, reception. . . . Viewers, listeners and readers do their own symbolic work on a text and create their own relationships to technical means of reproduction and transfer.[77]

The implications of this postmodern understanding of cultural consumption are considerable. The constitution of the resistant subject depends upon the ability to formulate cultural meanings from the materials that are available and can be appropriated from the dominant culture. Through this cultural appropriation the subject receives "an education about the 'self' and its relation to the world and to others in it."[78] Moreover, cultural appropriation operates not only as a means for the development of an alternative subjectivity on an individual level, it also opens up cultural space for the formation of collective identities. It allows subjectivities to be articulated that have been historically denied that capacity. Indeed, how images are consumed, appropriated,

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[76] JEAN BAUDRILLARD, IN THE SHADOW OF THE SILENT MAJORITIES OR, THE END OF THE SOCIAL AND OTHER ESSAYS 42-43 (P. Foss, et al., trans., 1983).

[77] PAUL WILLIS, COMMON CULTURE 20 (1990). Thus, there is the possibility for divergence between what is intended by the "original" cultural "producer" and what is "received" by the cultural "consumer": "*[I]nformal cultural production shows us that* mismatches between what is intended and what is taken are not only commonplace and inevitable, they are also important sources of creativity for informal symbolic work and symbolic creativity." *Id.* at 140. Indeed, the uncertainty and potential instability of cultural consumption may decenter the discursive structure itself.

> Only if we deny the creative activity of the interpreting social actor and insist on seeing structure as a static, monolithic straitjacket that, so to speak, descends from above is it necessary to see constraint as determinacy. People, whose very being is constituted by them, differentially employ these categorical systems (and not necessarily consciously) to deal with material and social realities (which are apprehended in terms of them) and, in so doing, they modify, expand, reformulate, and sometimes put the categories at risk.

Coombe, *supra* note 54, at 92.

[78] WILLIS, *supra* note 77, at 136.

and redeployed depends upon the unique vantage point of the subject located at the conjunction of the matrices of power relationships.

> One important source and resource for this 'making,' the 'aboutness' of symbolic work, derives from the historical and social backgrounds of 'consumers.' They are formed through their specific memberships of different class, gender, race, geographical and age groups. They exercise their own symbolic work, utilizing inherited cultural resources and predispositions as well as performing active work on the symbolic resources supplied by cultural commodities and media, in understanding the possibilities and limits of their social roots.[79]

The decoding and appropriation of cultural images, then, can become an act of discursive resistance to the positioning of the universal speaking subject, creating the possibilities of "oppositional independent or alternative symbolizations of the self."[80]

The implications of a postmodern approach to cultural consumption for a theory of identity are significant. The postmodern view suggests an ongoing struggle, both through the encoding and decoding of texts, to utilize culture for the purposes of individual and collective self-definition.[81] This conception also implies that culture is political in its role as a forum for the deployment of images that can be reworked for a variety of political ends. The interplay of culture and identity—how culture forms the self and how culture may be subversively utilized for the definition of one's self—becomes a thoroughly political matter with no predetermined outcome. Instead, the process is an ongoing struggle for

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79 *Id.* at 137.

80 *Id.* at 139.

81 *See* Lawrence Grossberg, *Putting the Pop Back into Postmodernism*, *in* UNIVERSAL ABANDON, *supra* note 62, at 167.

> The notion of articulation abandons critical theories built upon models of communication, of the difference between encoding (production) and decoding (consumption), a difference that divides interpretation into the search for intended or preferred meanings and received or effective meanings. Articulation rejects the assumption that the two moments are, even analytically, separable, as if each were completed or completable. Instead, it describes the ongoing struggle to produce the text by inserting it into a network of "naturalized" relations. Encoding is a continuous force (e.g., producers continue to make statements), and decoding is already active in the efforts to encode. One cannot separate the materiality of a text from its appropriation, nor can one separate structures from practices. . . .
>
> . . . If peoples' lives are never merely determined by the dominant position, and if their subordination is always complex and active, understanding culture requires us to look at how practices are actively inserted at particular sites of everyday life and at how particular articulations empower and disempower their audiences.

Id. at 169-70.

identity, which itself is a product of culture or, more accurately, the outcome of a contestation over the meaning of cultural artifacts.[82]

IV. From Culture to Politics: The Articulation of a Political Subjectivity

I have argued that cultural consumption is a means by which a subject resistant to a dominant discourse can be constructed. I also have suggested that this process of identity formation is a politically charged one—a continuing ideological struggle over the meaning of any cultural representation. In this section, the focus shifts from an analysis of culture to a focus on politics, although, of course, the two are intertwined. I will examine the implications of a postmodern analysis of the subject, particularly as the analysis touches upon our understanding of the "rights" that traditionally have been perceived to be essential to our understanding of identity and the capacity to define one's "self." Finally, I will argue that this analysis of the political nature of subjecthood demands a rethinking of the rights of equality and free speech, such that the two become linked to form a right of "dialogic equality." The focus of attention thus shifts to an agent's right to articulate a political identity unencumbered by discursive restriction.

This reconstitution of the subject outside of the constraints of a modernist, totalizing system of thought is a project that has been undertaken by Ernesto Laclau and Chantal Mouffe.[83] Their inquiry is closely related to postmodern theories of cultural consumption; in fact, it provides much of the theoretical foundation for an analysis of the cultural conditions of postmodernity. Laclau and Mouffe argue in favor of a "proliferation of political spaces"[84] (such as the terrain of culture) through which new subjectivities can be formed through appropriation: "The struggles of the working-class, of women, gays, marginal populations, third-world masses, must result in the construction of their own reappropriations of tradition through their specific genealogical efforts."[85]

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[82] This point has been elaborated upon by Diana Fuss in her discussion of anti-essentialism and feminism. *See* Diana Fuss, *Reading Like a Feminist*, DIFFERENCES, 1.2, 1989, at 77. Fuss argues that if identity itself is deconstructed, then what may be left as the holdout of essentialism is politics itself. "Anti-essentialists are willing to displace 'identity,' 'self,' 'experience,' and virtually every other self-evident category *except* politics. To the extent that it is difficult to imagine a *non-political* feminism, politics emerges as feminism's essence." *Id.* at 90.

[83] *See generally* LACLAU & MOUFFE, *supra* note 56.

[84] Chantal Mouffe, *Radical Democracy: Modern or Postmodern?*, *in* UNIVERSAL ABANDON, *supra* note 62, at 31, 43.

[85] Ernesto Laclau, *Politics and the Limits of Modernity*, *in* UNIVERSAL ABANDON, *supra* note 62, at 63, 78.

Their focus, however, is on the politics of the subject. To this end, they examine the discontinuities and fragmentary nature of political struggle.

> [D]uring the last few decades we have witnessed the constant emergence of new forms of political subjectivity cutting across the categories of the social and economic structure. The concept of 'hegemony' will emerge precisely in a context dominated by the experience of fragmentation and by the indeterminacy of the articulations between different struggles and subject positions.[86]

The multiplicity of subject positions cannot be understood solely in traditional Marxist "relations of production" terms. The unitary working class subject is replaced by a pluralist conception in which categories of subjecthood are contingent and constructed. If the subject occupies a plurality of positions,

> there is also a possibility that contradictory and mutually neutralizing subject positions will arise. In that case, more than ever, democratic advance will necessitate a proliferation of political initiatives in different social areas . . . [and] the meaning of each initiative comes to depend upon its relation with the others.[87]

Not only is subjecthood pluralistic, it also is fragmented and multiple—that is, a point of intersection for a variety of subject positions. Indeed, multiplicity has deeply political implications in terms of how the positions come to be articulated through discourse. "[I]t is indispensable to develop a theory of the subject as a decentered, detotalized agent, a subject constructed at the point of intersection of a multiplicity of subject-positions between which there exists no a priori or necessary relation and whose articulation is the result of hegemonic practices."[88] Thus, only through the conditions of political struggle can identities establish themselves in any particular configuration. Moreover, Laclau and Mouffe argue that the political system never achieves a total closure that prevents the development of new and politically resistant identities

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86 LACLAU & MOUFFE, *supra* note 56, at 13.

87 *Id.* at 36.

88 Mouffe, *supra* note 84, at 35. The role of the subject in the theoretical framework developed by Laclau and Mouffe has been described by ANTHONY WOODIWISS, SOCIAL THEORY AFTER POSTMODERNISM 73 (1990). "[The subject is] a presence within the discourses of production and the other sets of positions, as a potentially critical source of support for or resistance to particular efforts at signifying or other practices, and as the maker or breaker of signifying or other chains." *Id.*

that may come to be articulated in the social arena.[89]

The partial and unfixed nature of subjecthood clearly has implications for a progressive political project. The collective will of class politics must be abandoned in favor of a continual struggle aimed at the establishment of a precarious and constructed unity amongst the constantly emerging partial identities of social subjects.

> [T]here are no privileged points for the unleashing of a socialist political practice; this hinges upon a 'collective will' that is laboriously constructed from a number of dissimilar points. . . . The political meaning of a local community movement, of an ecological struggle, of a sexual minority movement, is not given from the beginning: it crucially depends upon its hegemonic articulation with other struggles and demands.[90]

This approach claims to be completely anti-essentialist in its articulation of "the precarious character of every identity and the impossibility of fixing the sense of the 'elements' in any ultimate literality."[91] At the same time, articulation to some extent organizes and constitutes social relations "as a means for refusing the acceptability of any pre-existing notion of the social totality."[92]

Identities never manage to be constituted fully. This is due to "overdetermination," which refers to "the presence of some objects in the others [which] prevents any of their identities from being fixed. . . . [T]he presence of some in the others hinders the suturing of the identity of any of them."[93] Subjecthood must be partially

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89 *See generally* Laclau, *supra* note 85.

> [I]f we accept the relational character of all identity, the ideal conditions of closure for a system are never achieved and therefore all identity is more or less a floating signifer. This lack of closure modifies the nature and importance of political argument in two important senses. In the first place, if an ultimate ground is posited, political argument would consist in *discovering* the action of a reality external to the argument itself. If, however, there is no ultimate ground, political argument increases in importance because, through the conviction that it can contribute, it itself *constricts*, to a certain extent, the social reality. Society can then be understood as a vast argumentative texture through which people construct their own reality.

Id. at 78-79.

90 LACLAU & MOUFFE, *supra* note 56, at 87.

91 *Id.* at 96.

92 WOODIWISS, *supra* note 88, at 65.

93 LACLAU & MOUFFE, *supra* note 56, at 104. The logic of overdetermination provides the means by which Laclau and Mouffe avoid replacing a totalizing discourse of the universal subject with a totalizing discourse of the particular subject. Instead, through overdetermination, the dichotomy of universal and particular is itself transcended. *See* Fred R. Dallmayr, *Hegemony and Democracy: On Laclau and Mouffe*, STRATEGIES, Fall 1988, at 29.

> While critical of the pretense of "universal" principles or discourses, the authors [Laclau and Mouffe] do not simply opt for particularism—which would only entail a new kind of self-enclosure or a "monadic" essentialism. As they

fixed and not completely dispersed, because otherwise any understanding of the differences and contradictions of identity would be impossible. "Even in order to differ, to subvert meaning, there has to be *a* meaning."[94] These privileged points of partial meaning become the "nodal points" of identity, and articulation is the means by which the nodal points are socially constructed.[95]

The logic of overdetermination and the contingency and political character of subject positions provides the basis for a theory of radical, pluralist politics that depends upon the articulation of hitherto unspoken subjectivities. If the social subject is a "meeting point for a multiplicity of articulatory practices, many of them antagonistic,"[96] and if there is nothing inevitable about any particular social struggle or why it emerges at a historical moment, then it is only through the possibility of articulation of a subjecthood that a democratic discourse can develop.[97] That discourse can facilitate the emergence of new, collective, political subjectivities claiming "rights." The concept of the subject and of rights thus becomes infused with new meaning. Rather than representing a universal conception that denies status to marginal social identities, subjecthood articulates multiple and diverse oppressed identities.[98]

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indicate, a mere dismantling of totality readily conjures up the peril of "a new *form of fixity*," *namely, on the level of "decentered subject positions."* For this reason, a "logic of detotalization" cannot simply affirm "the *separation* of different struggles and demands," just as "articulation" cannot purely be conceived as "the linkage of dissimilar and fully constituted elements." Through a strategy of disaggregation we are in danger of moving "from an essentialism of the totality to an essentialism of the elements" or of replacing "Spinoza with Leibniz." The means for overcoming this danger is provided by the logic of "overdetermination." For, we read, if the sense of every identity is overdetermined, then "far from there being an essentialist *totalization*, or a no less essentialist *separation* among objects, the presence of some objects in the others prevents any of their identities from being fixed. Objects appear articulated not like pieces in a clockwork mechanism, but because the presence of some in the others hinders the suturing of the identity of any of them."

Id. at 41.

94 LACLAU & MOUFFE, *supra* note 56, at 112.

95 *See id.* at 113. "*The practice of articulation, therefore, consists in the construction of nodal points which partially fix meaning; and the partial character of this fixation proceeds from the openness of the social, a result, in its turn, of the constant overflowing of every discourse by the infinitude of the field of discursivity.*" *Id.*

96 *Id.* at 138.

97 *See* Mouffe, *supra* note 84, at 41. "What we need is a hegemony of democratic values, and this requires a multiplication of democratic practices, institutionalizing them into ever more diverse social relations, so that a multiplicity of subject-positions can be formed through a democratic matrix." *Id.*

98 *See* Bradley J. Macdonald, *Towards a Redemption of Politics: An Introduction to the Political Theory of Ernesto Laclau*, STRATEGIES, Fall 1988, at 1.

Laclau argued that postmodernity might best be seen in terms of the continual withering away of the "social," and the concurrent expansion of the realm of political strategies and argumentation. . . . Where Laclau offers us a dimension generally lacking in these earlier discussions of postmodernity is in his por-

That articulation can form the basis of an ambitious political program.

> Renunciation of the category of subject as a unitary, transparent and sutured entity opens the way to the recognition of the specificity of the antagonisms constituted on the basis of different subject positions, and, hence, the possibility of the deepening of a pluralist and democratic conception. The critique of the category of unified subject, and the recognition of the discursive dispersion within which every subject position is constituted, therefore involve something more than the enunciation of a general theoretical position: they are the *sine qua non* for thinking the multiplicity out of which antagonisms emerge in societies in which the democratic revoution [sic] has crossed a certain threshold. . . . Only if it is accepted that the subject positions cannot be led back to a positive and unitary founding principle — only then can pluralism be considered radical.[99]

This focus on the multiplicity of subjectivities fosters claims to rights which cannot be understood as emanating from the universal position. Such claims, of course, are linked to the postmodern emphasis on the particular, the local, and the contingent.

> The new rights that are being claimed today are the expression of differences whose importance is only now being asserted, and they are no longer rights that can be universalized. Radical democracy demands that we acknowledge difference—the particular, the multiple, the heterogeneous—in effect, everything that had been excluded by the concept of Man in the abstract.[100]

The subjects of rights multiply in number and are limited only to the extent that the space of the political is discursively constrained. By not attempting to fix the meaning of subjecthood as a unified and coherent category, new identities are forever appearing, creating the possibility of new egalitarian movements. This necessarily enhances a pluralist democracy, for each struggle is given meaning only to the extent that it forms alliances outside of itself.[101]

> trayal of the concrete political possibilities this situation affords. For with the destruction of the social, and the proliferation of the logic of equivalence, there develops a multiplicity of nodal points for hegemonic politics. . . . For Laclau . . . the death of the "social" that postmodernity signifies means the growth of democratic struggles in increasingly wider arenas of human life.

Id. at 8 (footnote omitted).

99 LACLAU & MOUFFE, *supra* note 56, at 166-67.

100 Mouffe, *supra* note 84, at 36.

101 *See* Young, *supra* note 47, at 320. "[T]he concept of social relations that embody openness to unassimilated otherness with justice and appreciation needs to be developed. Radical politics, moreover, must develop discourse and institutions for bringing differently identified groups together without suppressing or subsuming the differences." *Id.*

In the end, Laclau and Mouffe do provide a way out of the precarious relationship between postmodernism and subjecthood. A universal concept of subjecthood is abandoned, but in its place remains an identity—both individual and collective—which represents a continuing tension between coherence and fragmentation. A partial fixity must exist at any moment to give any intelligible meaning to an identity, and through articulation that identity can be utilized in democratic struggles. The language of rights remains the discourse of those struggles but it is a local situated use of language that is anchored in a history of domination for the partially constituted subject. History thus becomes the means by which an oppositional identity is constructed. It provides the subject with the ability to make intelligible claims using the language of rights. The focus, though, has shifted from the universal to the specific—a specific history of the denial of subjectivity for which reparation is sought through a claim to rights.

To reiterate, the destabilization of the universal subject position and the emergence of new resistant political subjecthoods is realized through the articulation of identities within dominant culture. The formation of an identity depends upon the ability to articulate a subjecthood and to forge connections through that articulation. This relationship—of identity, politics, culture, and how the ability to express one's subjecthood connects all three—also provides insights into our understanding of freedom of expression. It explains, moreover, how speech inextricably links itself to the constitutional value of equality. This tie has been developed through the concept of a dialogic right. As theorists of the postmodern era have come to recognize, "[t]he de-centering of the subject does not spell its demise, but 'renders subjectivity thoroughly communicative.'"[102] Laclau and Mouffe argue that the emergence of new subject positions depends upon the ability to engage in a dialogue in which "peoples [are] continually articulating new social identities from discursive resources."[103] Consequently, the optimal condition for the forging of identity is the opening of the political and cultural terrain to that dialogue.

> Democratic politics is essentially a dialogic process whereby social identities are continually emergent in political articulation. A radical and plural democracy must maintain optimal conditions for encouraging such articulations.

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[102] Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1860 (1991).

[103] Rosemary J. Coombe, *The Celebrity Image and Cultural Identity: Publicity Rights and the Subaltern Politics of Gender*, DISCOURSE, Summer 1992, at 59, 79.

> Articulations of identity are possible only in conditions of polysemy, symbolic ambiguity, and a surplus of meaning, where the necessary cultural resources for contesting meaning and asserting identity are freely accessible.[104]

Although speech rights traditionally have been founded in part upon individual and collective self-fulfillment,[105] in our current cultural climate it becomes necessary to appreciate fully the far reaching political implications of dialogue—dialogue which surpasses our traditional notions of "political speech." If the formation of an identity is a product of discourse, then free access to the discursive space provides the means by which new, plural, and political subjectivities can arise. This, in turn, facilitates a conception of our "selves," our communities, and the relationship of a pluralistic self to a variety of communities.[106] The benefits of dialogue flow to all of the participants in the conversation, as relations of equivalence between participants come to be constructed.[107]

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104 *Id.*

105 *See, e.g.*, PAUL CHEVIGNY, MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY (1988). "The chief justifications for freedom of expression in modern political philosophy are perhaps four: an argument from the self-fulfillment of the individual, an argument from the autonomy of the individual, an argument based on 'free trade in ideas,' and an argument from the requirements of democracy." *Id.* at 4. *See also* Coombe, *supra* note 69, at 1271-72. "[O]ne of the chief historical justifications for freedom of expression in modern political philosophy is an argument based upon the self-fulfillment of the individual, now understood to include the fulfillment of the aspirations of social groups in furtherance of collective self-determination." *Id.* (footnote omitted).

106 The symbolic resources available for communicative activity shape our ways of knowing even as we use them to express identity and aspiration. We create social realities discursively, through systems of signification we deploy in activities that are simultaneously a politics and a poetics. Recognizing this means acknowledging that dialogue — discursive social interactions and the opportunities for imaginative meaning-making they yield — is paramount to human life and crucial to historical change. Speech is not a means to an end of self-expression or an instrument to convey information, but the marrow both of social life and its potential for transformation. Dialogue or critical conversation is the activity wherein people create their selves and their communities; their texts and contexts. Postmodern legal scholars, therefore, assert the central importance of dialogue in social life and insist that principles of dialogue should serve as "a powerful regulative ideal" that gives "practical orientation to our lives." The interactive conditions for dialogue should be fostered to give tangible meaning to democracy. . . . [T]he conditions for the maximum participation of all people in the ongoing negotiation of the social good must be promoted.

Coombe, *supra* note 69, at 1276 (footnotes omitted).

107 The dialogical right of freedom of expression . . . may be viewed as an aspect of freedom of association more than an aspect of the freedom of the autonomous individual to speak his mind. Because discourse is conducted through systems that are social creations, it depends upon the circumstances of society, such as pictures to look at, texts to read, and other persons to whom to talk and listen. The benefits of discourse are shared by those, whether they are groups or individuals, who participate in the dialogue, either by expressing their opinions or by taking account of other ideas, and all participants have a strong interest in gaining access to the dialogue.

Indeed, dialogism not only "speaks" to our understanding of free expression, but also sheds light upon our conception of equality. A dialogic view of the subject and of equality demands a "symmetric reciprocity between participants,"[108] in which a decentered subjectivity is rendered communicative. Communication in a dialogue, though, demands both a conception of the self as a speaking agent and a sense of the community in which one engages in conversation and through which the self is continually reshaped and redefined.

> Once the formative process of the *I* is rightly understood, the Kantian view of the autonomous will is exposed as an abstraction from ethical relationships. The free will is no longer regarded as a law unto itself, as a sovereign subject. Self-awareness is instead understood as a delicate interactive achievement. The experience of self-awareness, of *being an I*, is in no way denied. Neither, however, is the tension between the *I* and the community denied. The dialectical conception of the relation between the self and its community permits us to escape the contradictions in the liberal notion of constitutive subjectivity without throwing the subject overboard, and enables us to envision a new relationship between the individual and the collective . . . .[109]

A reconception of the dichotomy between individual and community through dialogue also can be the means by which universality ceases to operate as an exclusionary device in constituting the subject.

> Understood in the context of dialogism as a regulative ideal, universality appears in a new light. It comes to mean that each of us is to be recognized as a participant in the conversation; each voice is to count and no one is to be silenced in the name of a substantive universal that denounces what is different as not being really human.[110]

This focus on equality of access to the dialogue informs the very

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CHEVIGNY, *supra* note 105, at 78.

108 Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 298 (1985). For an extended explanation of the meaning and implications of dialogic equality, see DRUCILLA CORNELL, THE PHILOSOPHY OF THE LIMIT (1992).

109 Cornell, *supra* note 108, at 362-63. *See also* Gregory S. Alexander, *Talking About Difference: Meanings and Metaphors of Individuality*, 11 CARDOZO L. REV. 1355, 1369 (1990). "[T]he dialogue metaphor communicates the idea of the self as capable of being transformed through open-ended and direct dialogue with others. The understanding of the transformative self is what distinguishes dialogue from other communicative social visions, such as negotiation and bargaining." *Id.* at 1369.

110 Cornell, *supra* note 108, at 368.

principle of dialogism—an equality (or sameness) in terms of access, but a right of access that arises from the uniqueness (specificity) of each agent who, in turn, makes her contribution to the dialogue valuable.[111] Finally, the goal of the dialogic process can be expressed in terms of a "commitment to universality"—the "real possibility that generalizeable [sic] interests will emerge in the course of that conversation. Understood in this way, universality is a commitment to a yet-to-be realized actuality rather than to an established reality."[112] While the modernist focus on universality has not been abandoned, it comes to be infused with many of the elements of postmodern thought. A universal right of dialogic access arises from the differences and the particularity of agents. Thus, it is not the universality of the subject position from which a right emerges, but the specificity of subjecthood that demands a right to express one's agency.

However, given the history by which access to the dialogue has been denied to some—to those who have not been allowed to articulate an identity—the traditional right of free expression has been far from universal. Dialogic equality demands more than an unencumbered liberty to speak. Rather, the conditions for dialogue must be conducive to the manipulation, reworking, and redeployment of the signs and symbols by which our culture permeates our lives.[113] The expressive right, then, has a positive connotation in that it demands that the subject have access to the cultural tools by which a meaningful contribution to the dialogue can be made. In other words, identity formation demands the ability to reconfigure,

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111 *See Id.*

> In a similar manner, sameness and difference can be understood as two components of a dialogical relationship. For the conversation to go on, the other must be understood simultaneously as equal and as different. To assimilate the other is to end the conversation. But if one rejects sameness, one denies the other the status of participant. Then too will the conversation cease. Nor is sameness defined here as a composite of identifiable properties shared by individuals. We are the same qua subjects in that we are different *I*s. We are the same in that we are *I*s but we are *I*s because we are different. This dynamic of sameness and difference preserves singularity. The denial of either sameness or difference ends in the same result: the reinstatement of a monological relationship to the other.

Id. at 369.

112 *Id.* at 378.

113 *See* Coombe, *supra* note 69, at 1279.

> Democratic dialogue will require more than equal access to the forums and channels of communication . . . . The social systems of signification through which a dialogic democracy constitutes itself must be available, not merely to convey information—an unduly reductivist understanding of human communication—but to express identity, community, and social aspiration in the service of imagining and constructing alternative social universes.

Id.

in a unique manner, the signs of dominant culture. In so doing, the ways in which we conceive of culture, the subject, and the community all may be radically altered such that the dialogic contributions of all subjects come to have meaning for all "others."

V. Culture, Politics, and the Forging of a Gay Subject

Having examined the postmodern critique of the universal rational subject and the role of culture in the politics of oppositional subjectivities, I now move beyond abstract theoretical explanations and return to the issue of the funding of artistic representation through the NEA. The climate of censorship, both formal through legal restrictions and informal through the determination of artistic merit, denies a right to articulate an identity, a right that must be fundamental to our understanding of the Constitution. Specifically, it silences the formation and articulation of a gay identity. In developing this thesis, I will draw directly upon the framework that I have developed to this point—the postmodern fragmentation of a universal subject, the discursive nature of all identity concepts, the role of culture in the creation of oppositional and resistant subject positions, the ongoing political struggle over control of the discourse of subjecthood, and the right to articulate radical alternative subjectivities.

Cultural theorists are only beginning to examine how a gay identity is a cultural and political identity forged from a marginalized experience of subjecthood.[114] That history of erasure, and the tenuous development of an oppositional identity, has been analyzed in terms of the binary of "inside" and "outside."[115] Within the dominant discourse of subjecthood, the establishment of a universal sexual subject was dependent first upon the denial of sexual subjectivity to lesbians and gay men. The instability of a universal heterosexual subjecthood also required that a negative subjecthood of the outsider be attached to the image of the homosexual.

> To protect against the recognition of the lack within the self, the self erects and defends its borders against an other which is made to represent or to become that selfsame lack. But borders are notoriously unstable, and sexual identities rarely se-

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114 *See* Teresa de Lauretis, *Queer Theory: Lesbian and Gay Sexualities*, Differences, 3.2, 1991, at iii. "[M]ale and female homosexualities — in their current sexual-political articulations of gay and lesbian sexualities, in North America — may be reconceptualized as social and cultural forms in their own right, albeit emergent ones and thus still fuzzily defined, undercoded, or discursively dependent on more established forms." *Id.*

115 *See* Diana Fuss, *Inside/Out*, *in* Inside/Out 1 (Diana Fuss, ed. 1991).

> cure. . . . Those inhabiting the inside . . . can only comprehend the outside through the incorporation of a negative image. This process of negative interiorization involves turning homosexuality inside out, exposing not the homosexual's abjected insides but the homosexual as the abject, as the contaminated and expurgated insides of the heterosexual subject.[116]

However, that discourse of insider and outsider, like all discursive devices, has the built-in ambiguities through which it can be redeployed in an oppositional strategy. For gay men and lesbians, the language of "out" and "in" is not only the means by which subjecthood has been denied; it also provides the tools with which an oppositional identity can be constructed. Indeed, the term "out" has a multiplicity of significations, demonstrating the ambiguities of identity and the relationship of a dominant discourse of exclusion to a resistant counter-discourse that itself operates from inside.

> "Out" cannot help but to carry a double valence for gay and lesbian subjects. On the one hand, it conjures up the exteriority of the negative—the devalued or outlawed term in the hetero/homo binary. On the other hand, it suggests the process of coming out—a movement into a metaphysics of presence, speech, and cultural visibility. The preposition "out" always supports this double sense of invisibility (to put out) and visibility (to bring out), often exceeding even this simple tension in the confused entanglement generated by a host of other active associations.
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> To be out, in common gay parlance, is precisely to be no longer out; to be out is to be finally outside of exteriority and all the exclusions and deprivations such outsiderhood imposes. Or, put another way, to be out is really to be in—inside the realm of the visible, the speakable, the culturally intelligible. But things are still not so clear, for to come out can also work not to situate one on the inside but to jettison one from it. The recent practice of "outing," of exposing well-known public figures as closet homosexuals is (among other things) an attempt to demonstrate that there have been outsiders on the inside all along. To "out" an insider, if it has any effect at all, can as easily precipitate that figure's fall from power and privilege as it can facilitate the rise of other gays and lesbians to positions of influence and authority. Because of the infinitely permeable and shifting boundaries between insides and outsides, the political risks or effects of outing are always incalculable.[117]

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116 *Id.* at 3.
117 *Id.* at 4.

The strategy, for those of us who seek to undermine the universality of the (hetero)sexual subject, must continue to be resistance to and subversion of its rhetorical privileging. One means of resistance is the appropriation of the binary of inside/outside. That challenge necessarily is an ongoing one, for resistance itself can reinforce the centrality of the universal, which in turn is resistant to attempts at destabilization.

> Homosexuality, read as a transgression against heterosexuality, succeeds not in undermining the authoritative position of heterosexuality so much as reconfirming heterosexuality's centrality precisely as that which must be resisted. As inescapable as such a logic might be, it does not diminish the importance of deconstruction in addressing the admittedly stubborn and entrenched hetero/homo hierarchy. That hierarchical oppositions always *tend toward* reestablishing themselves does not mean that they can never be invaded, interfered with, and critically impaired. What it does mean is that we must be vigilant in working against such a tendency: what is called for is nothing less than an insistent and intrepid disorganization of the very structures which provide the inescapable logic.[118]

Acts of resistance are made through the use of language, which also is one of the means through which cultural identities are forged and maintained.[119] Thus, language not only acts as a point of resistance to dominant culture, it can provide a means for forging a collective and liberatory identity.

However, the articulation of identity—the sharing through a discursive space of a subcultural language—is, in the case of a gay subject, always a practice threatened by the intervention of a dominant heterosexist culture. The threats that emanate from the at-

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[118] *Id.* at 6. Fuss points out, however, that the capacity for an oppositional subject to redeploy the language of inside/out depends upon a relatively privileged positioning as both within and outside the binary.

> The problem, of course, with the inside/outside rhetoric, if it remains undeconstructed, is that such polemics disguise the fact that most of us are both inside and outside at the same time. Any misplaced nostalgia for or romanticization of the outside as a privileged site of radicality immediately gives us away, for in order to idealize the outside we must already be, to some degree, comfortably entrenched on the inside. We really only have the leisure to idealize the subversive potential of the power of the marginal when our place of enunciation is quite central.

Id. at 5 (footnote omitted).

[119] *See* Cindy Patton, *Safe Sex and the Pornographic Vernacular, in* How Do I Look? 31 (Bad Object-Choices ed. 1991). "Every culture—and subgroups within every culture—has public and private sexual languages, with strong rules concerning the appropriateness of speaking such languages 'out of bounds.' . . . Sexual languages vary dramatically and are important in some cultures—gay culture, for example—and unimportant in others." *Id.* at 45.

tempt at closure of the discourse to the articulation of a gay identity have a material reality that impacts directly upon the subject. Indeed, the monitoring by dominant culture of the speech of sexual subcultures is pervasive. "[S]exuality is . . . chiefly regulated through the policing of speech and gesture—from psychiatry's attempts to elicit the hidden psychic language of deviant sexuality to the queer-bashing that results from a 'reading' of a victim as 'homosexual.'"[120] The inside/outside binary thus takes on an extraordinary importance in a consideration of the articulation of a gay identity. Language must be encoded within a community (available only to "insiders") as a means of individual and collective "self" protection. It becomes crucially important that the outsider is not privy to the meanings of the text.

> [P]eople from certain subgroups become afraid to speak their native tongue when their "texts"—a red hanky, a turn of phrase or cut of suit, a pamphlet, a book—thought private, suddenly come under scrutiny and become public, rendering the private language and symbols of the subculture vulnerable to unanticipated readings by someone with greater social power.[121]

However, the dichotomy of inside and out, while it may facilitate a communal identity through a discourse that might be "read" only by insiders, also might be rephrased as the metaphor of the closet. To the extent that the policing of discourse in dominant culture forces us to cling to private language, liberation at best will be partial and survivalist. Indeed, the consequences of a denial of public discourse—of a place in the dialogue—are potentially fatal, not only for the subculture, but for the subject himself.

> Silence=Death can be read as a post-AIDS revision of a motto popular among gay militants not long ago—"Out of the closets and into the streets"—and as such it similarly implies that language, discourse, public manifestations are necessary weapons of defense in a contemporary strategy of gay survival. For if we assert that Silence=Death, then one corollary to this theorem in the geometry that governs the relationship among discourse, defense, and disease must be that Discourse=Defense, that language, articulation, the intervention of voice, is salutary, vivifying, since discourse can defend us against the death that must result from the continuation of our silence.[122]

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120 *Id.* at 47.

121 *Id.*

122 Lee Edelman, *The Plague of Discourse: Politics, Literary Theory, and AIDS*, 88.1 S. ATLANTIC Q. 301, 304-05 (1989).

The erasure of a gay identity from the dominant discourse is understandable because of its threat to the naturalness of the universal heterosexual subject. If "homosexuality" is allowed to speak openly, then the universal and univocal heterosexual subject loses a modicum of its priority. From the perspective of the dominant culture, the result of the articulation of a gay identity comes to be the temptation and seductive power (a metaphorical, cultural seduction) of an alternative speakable sexual identity.

> Of course, heterosexual culture in the West has long interpreted homosexuality as a threat to the security or integrity of heterosexual identity. In our dauntingly inconsistent mythology of homosexuality, "the love that dared not speak its name" was long known as the crime "inter Christianos non nominandum," and it was so designated not only because it was seen as lurid, shameful, and repellent, but also, and contradictorally, because it was, and is, conceived of as being potentially so attractive that even to speak about it is to risk the possibility of tempting some innocent into a fate too horrible—and too seductive—to imagine.[123]

The threat from the articulation of a gay identity—an effect which may explain the recent history of NEA restrictions—is one that must be understood in cultural terms. As Simon Watney has suggested, "we are witnessing an increasing acknowledgment of the role that culture plays in the construction of sexual identities, and it is the field of cultural production that is ever more subject to frank political interventions . . . ."[124] The cultural basis of identity,

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[123] *Id.* at 309-10. This erasure of the representation of gay identity from dominant culture is readily apparent in analyses of mass media images. As has been observed, because of its generalized absence from the dominant discourse, any exception merely emphasizes the point. *See* Nadine L. McGann, *A Kiss is Not a Kiss: An Interview With John Greyson*, AFTERIMAGE, January 1992, at 10.

> What I want to highlight is that because we don't exist in representation, the exception proves the rule: think of the tame gay kiss on *thirtysomething* that lost them advertising contracts. We have to acknowledge that because those representations don't really exist in the dominant media, when they appear they're always extra-shocking, extra-filmic. As soon as you have a same-sex kiss on screen it fragments and disrupts the narrative as much as any postmodern strategy. Gay desire is constitutionally disruptive to any narrative.

Id. at 11.

[124] Simon Watney, *School's Out*, *in* INSIDE/OUT, *supra* note 115, at 387, 388. Watney's analysis focuses on the provisions of the British *Local Government Act 1988*, 1988, ch.9 (Eng.), which prohibits the promotion by local authorities of homosexuality by teaching or publishing material.

> 28—(1) the following subsection shall be inserted after section 2 of the Local Government Act 1986 (prohibition of political publicity)—
>
> **"Prohibition on promoting homosexuality by teaching or by publishing material**
>
> 2A.—(1) A local authority shall not—
>
> (a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;

and specifically of a sexual identity, means that only an erasure (and a condemnation) within the dominant discourse will ensure that the universality of the heterosexual subject position is secure. Thus, dominant culture attempts to foreclose participation in the dialogue in order to prevent the threat to sexual and discursive stability of an alternative subjectivity.

> The unconscious logic . . . runs that homosexuality can only exist as a result of the seduction of minors by predatory older perverts. This seduction may, however, be indirect, and effected via *cultural* means. In other words, there is a clear recognition that sexual identities are culturally grounded, and an acknowledgment that gay identity does not follow automatically from homosexual desire or practice. Something else is needed—the active presence of a confident, articulate lesbian and gay culture that clothes homosexual desire in a stable, collective *social* identity. . . .
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> . . . What in effect is acknowledged is the *pedagogic value* of gay culture in developing and sustaining gay identities. In all of this, it is the imagined vulnerability of heterosexuality that is most significant, together with the assumed power of homosexual pleasure to corrode the "natural" order of social and sexual relations.[125]

The attempt to close off access to the discourse in order to prevent a loss of dialogic control by the dominant culture can be explained by the threat posed by a gay cultural subjectivity to the coherence of the universal modernist subject. The gay subject underscores the culturally constructed status of subjecthood—that sexual subjecthood in particular is a matter of performance. As Richard Dyer has explained, the gay experience largely has been one in which subjecthood consists of a multitude of different performances—a fragmented (postmodern) experience.

> [F]or us performance is an everyday issue, whether in terms of passing as straight, signaling gayness in coming out, worrying which of these turns to do, unsure what any of that has to do with what one "is." . . . All authorship and all sexual identities are performances, done with greater or less facility, always problematic in relation to any self separable from the realization of self in the discursive modes available.[126]

(b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship."

Id. at 60.

125 Watney, *supra* note 115, at 392.

126 Richard Dyer, *Believing in Fairies: The Author and the Homosexual*, *in* INSIDE/OUT, *supra* note 115, at 185, 188.

For example, the gay male experience not only reveals the constructed status of subjecthood as a product of discourse, it also underscores the socially constructed status of masculinity as the universal subject position. The gay male subject is culturally situated in a specific location: in one sense he shares the privileged site of maleness in the definition of the universal subject. However, as part of a marginal sexual subculture, his subjectivity is polyvalent and can operate in a resistant fashion.

> If we allow other male experiences — in particular male homosexuality — to ground and contour narrative expression, the specificity of these bodily experiences would be foregrounded in their oppositional relationship to the hegemonic definitions of masculinity and to the hierarchized binarisms of sexual difference. The gay male-based narrative would yield other forms of subjectivity, as well as an alternatively eroticized body within the psychosexual politics of postmodern culture.[127]

This fragmenting of the identity of the gay subject through performative multiplicitous roles mirrors the general postmodern fragmentation of all identity concepts and the appearance of multiple subjectivities through articulation (as described by Laclau and Mouffe). Thus, the gay subject is a misnomer, for the subject is in a continual state of oscillation between dispersion and coalescence.[128] However, unlike with other identity concepts, the ability of the gay subject to undermine the universality of the construct of sexuality is unique. As the gay subject reveals sexual orientation as having "potential for rearrangement, ambiguity, and representational doubleness,"[129] the naturalness of sexuality begins to unravel.

It is at this point that the threat posed by the gay subject as a social and cultural identity becomes clear. To the extent that identity is "self" generated by lesbians and gay men through dialogue

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127 Earl Jackson, Jr., *Scandalous Subjects: Robert Gluck's Embodied Narratives*, DIFFERENCES, 3.2, 1991, at 112, 121.

128 "[A]ny 'movement' which predicates itself on an 'identity' dooms itself to fragmentation in so far as it preempts the possibility of being moved by and/or beyond the (somatic) differences presupposed in the very 'identity' that it defines." Ed Cohen, *Who are "We"? Gay Identity as Political E(motion), in* INSIDE/OUT, *supra* note 115, at 71, 85. Of course, any analysis of gay identity must be sensitive to the multiplicities of identities of oppression and domination experienced by many subjects. *See* Jennifer Terry, *Theorizing Deviant Historiography*, DIFFERENCES, 3.2, 1991, at 55. "The idea of a coherent, full identity which is marked only by homosexuality is unsettled by the cultural production of lesbians and gay men of color, whose work enacts the multiplicities and contradictions of living at the intersection of many different marginal subjectivities." *Id.* at 69.

129 Eve Kosofsky Sedgwick, *Across Gender, Across Sexuality: Willa Cather and Others*, 88.1 S. ATLANTIC Q. 53, 56 (1989).

and cultural representation, the unboundedness of sexuality becomes apparent, and an anti-essentialist account becomes possible. State censorship, such as the NEA restrictions or the British local government controls on the "promotion" of homosexuality, is an attempt to restore the appearance of a sexual essence through the creation of a bounded category—a defined "other" of "the homosexual." These regulations demonstrate the dominant culture's desire to prevent the disintegration of sexual identity concepts and to close off the dialogue to prevent the infinite varieties of sexualities from emerging.

> Unlike people of color, lesbians and gay men cannot immediately be recruited to constitute a visible, immediate definition of Otherness in relation to which Heterosexuality can be positively contrasted. It is therefore imperative that the cultural iconography of "the homosexual" has precedence over any representations that might reveal the actual diversity and complexity of sexual choice. Hence the traditionalists' obsession with the *representation* of family life, and their violent iconoclasm in relation to images that contravene their codes of "acceptable" gender imagery.[130]

This rationale provides a convincing explanation of the recent history of NEA restrictions on "homoerotic" representation in state-funded artistic expression. It is not, in fact, the sexual expression which is particularly offensive to Senator Helms. Rather, "the cultural acceptability of gay identity"[131] threatens to undermine the universality of the heterosexual subject and to open up a new terrain of multiplicitous subjects, thereby further revealing the contingency of sexuality and the unbounded "nature" of its categories.

A. *Gay Identity and the Deconstruction of Gender*

Not only does the construction of a gay identity undermine the universality of the sexual subject, it also challenges the naturalness of gendered identity as it has been culturally constructed. In this section, I will explore how the cultural representation of a gay identity challenges received notions of gender and draws into question a coherent and unified gender identity. This exploration provides a means of further understanding the motivations behind attempts at cultural erasure, as the coherence of gender comes to

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[130] Watney, *supra* note 115, at 394-95.
[131] *Id.* at 400.

depend upon the removal of any intervention that exposes its constructedness.

In exploring these issues, I utilize extensively the work of Judith Butler, who has brilliantly engaged in a postmodern analysis of gender, sexuality, and identity. Butler deconstructs all totalizing identity concepts by which an "I" is constituted. The subject necessarily is partial; "its *specificity* can only be demarcated by exclusions that return to disrupt its claim to coherence."[132] The subject thus must be continually reconstituted through repetition which, in turn, exposes its unstable, discursive status. Butler makes this argument with reference to lesbian subjectivity.

> [I]t is through the repeated play of this sexuality that the "I" is insistently reconstituted as a lesbian "I"; paradoxically, it is precisely the *repetition* of that play that establishes as well the *instability* of the very category that it constitutes. For if the "I" is a site of repetition, that is, if the "I" only achieves the semblance of identity through a certain repetition of itself, then the I is always displaced by the very repetition that sustains it. . . . [T]here is always the question of what differentiates from each other the moments of identity that are repeated. . . . [T]he repetition, and the failure to repeat, produce a string of performances that constitute and contest the coherence of that "I."[133]

The instability of subjecthood ensures that a gay identity challenges received notions of gender. The strategy advocated by Butler draws upon the theoretical foundations formulated by Laclau and Mouffe and demands the "opening up" of all identity concepts, including those of gay and lesbian identities, to recognize identity as an ongoing site of political contestation.

> If the rendering visible of lesbian/gay identity now presupposes a set of exclusions, then perhaps part of what is necessarily excluded is *the future uses of the sign.* There is a political necessity to use some sign now, and we do, but how to use it in such a way that its futural significations are not *foreclosed?* How to use the sign and avow its temporal contingency at once?
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> In avowing the sign's strategic provisionality (rather than its strategic essentialism), that identity can become a site of contest and revision, indeed, take on a future set of significations that those of us who use it now may not be able to foresee. It is in the safeguarding of the future of the political signifiers—preserving the signifier as a site of rearticulation—that Laclau and

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[132] Judith Butler, *Imitation and Gender Insubordination, in* INSIDE/OUT, *supra* note 115, at 13, 15.

[133] *Id.* at 18.

Mouffe discern its democratic promise.[134]

By deconstructing gay identities, the boundedness of the category of "other" begins to disintegrate. The overdetermination of that identity brings to the forefront what had previously been concealed, namely, that the "other" is itself a derivation or a copy of the constructed universal.[135] Once the boundaries of the otherness of homosexuality unravel, the naturalness of gender is undermined. In fact, Butler argues that both gender and sex are culturally produced mechanisms for social control.

> Gender ought not to be conceived merely as the cultural inscription of meaning on a pregiven sex (a juridical conception); gender must also designate the very apparatus of production whereby the sexes themselves are established. . . . This production of sex *as* the prediscursive ought to be understood as the effect of the apparatus of cultural construction designated by *gender*.[136]

Thus, not only is sex a discursive function, but its appearance as prior to culture itself is constructed. Gender analysis, with its binary structure, provides the built-in limitations and constraints upon the discourse.[137] Only by freeing these identity concepts to the play of signifiers can the subject be fully understood.

For example, Butler argues that the representation of sexual minorities may undermine the gendered subject because it brings into question the coherence of sexual subjectivity. If subjectivity or personhood is tied to maleness, it also is tied to received notions of gender. A person is a subject because that person is gendered. To the extent that, for example, lesbians and gays exhibit behavior that does not conform to how gender has been understood in the dominant culture, the concepts of gender and the subject begin to unravel.

Inasmuch as "identity" is assured through the stabilizing con-

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134 *Id.* at 19.

135 *See id.* "[T]he political problem is not to establish the specificity of lesbian sexuality over and against its derivativeness, but to turn the homophobic construction of the bad copy against the framework that privileges heterosexuality as origin, and so 'derive' the former from the latter." *Id.* at 17.

136 JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 7 (1990). For a discussion of gender transgression in the context of NEA funding restrictions, see Lynda Hart, *Karen Finley's Dirty Work: Censorship, Homophobia, and the NEA*, GENDERS, Fall 1992, at 1.

137 *See* BUTLER, *supra* note 136. "[T]he boundaries of [gender] analysis suggest the limits of a discursively conditioned experience. These limits are always set within the terms of a hegemonic cultural discourse predicated on binary structures that appear as the language of universal rationality. Constraint is thus built into what that language constitutes as the imaginable domain of gender." *Id.* at 9.

> cepts of sex, gender, and sexuality, the very notion of "the person" is called into question by the cultural emergence of those "incoherent" or "discontinuous" gendered beings who appear to be persons but who fail to conform to the gendered norms of cultural intelligibility by which persons are defined.[138]

This failure to abide by the rules of gender brings into the public arena a challenge to the binary of male and female.[139] Gender thereby ceases to be recognizable as a cultural inscription on a prior essential set. In its place, the concept of gender becomes understandable only as performative.

> [W]ithin the inherited discourse of the metaphysics of substance, gender proves to be performative—that is, constituting the identity it is purported to be. . . . There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very "expressions" that are said to be its results.[140]

Once gender is deconstructed and reduced to performative acts, then those acts can be evaluated for their potential to interrupt and fragment the social construction. To the extent that a performance reveals the artificiality of gender identity, it necessarily undermines hierarchical gendered arrangements.[141] This deconstructive power is uniquely possible in a gay context because, although located at the margins of dominant sexual culture, gay culture is "positioned in subversive or resignificatory relationships to heterosexual cultural configurations."[142] That is, it has the po-

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138 *Id.* at 17. However, for an interesting account of the importance of a stable gendered identity for transsexuals, see Marjorie Garber, *Spare Parts: The Surgical Construction of Gender*, DIFFERENCES, 1.3, 1989, at 137.

> The transsexual body is not an absolute insignia of anything. Yet it makes the referent ("man" or "woman") seem knowable. Paradoxically, it is to transsexuals *and transvestites that we need to look if we want to understand what gender* categories mean. For transsexuals and transvestites are *more* concerned with maleness and femaleness than persons who are neither transvestite nor transsexual. They are emphatically not interested in "unisex" or "androgyny" as erotic styles, but rather in gender-marked and gender-coded identity structures.

Id. at 156-57.

139 *See* BUTLER, *supra* note 136. "If the notion of an abiding substance is a fictive construction produced through the compulsory ordering of attributes into coherent gender sequences, then it seems that gender as substance, the viability of *man* and *woman* as nouns, is called into question by the dissonant play of attributes that fail to conform to sequential or causal models of intelligibility." *Id.* at 24.

140 *Id.* at 24-25.

141 *See id.* at 28. "[T]he disruptions of this coherence through the inadvertent reemergence of the repressed reveal not only that 'identity' is constructed, but that the prohibition that constructs identity is inefficacious . . . ." *Id.* For a discussion of the impact of gender deconstruction, see Cornell & Thurschwell, *supra* note 48, at 161. "The deconstruction of gender categorization . . . affirms multiplicity and the 'concrete singular,' and at the same time opens up the possibility of communicative freedom in which the Other is not there as limit but as supportive relation, the 'ground' of my own being." *Id.*

142 BUTLER, *supra* note 136, at 121.

tential to resignify through a parody of gender categories. Thus, gay cultural representations reveal that homosexuality may be a copy of the dominant sexual and gender paradigm and that gender, far from being the original that is copied, is itself performatively constituted—a copy for which there is no original. Butler makes this point through the example of the drag performance.

> [T]here is no original or primary gender that drag imitates, but *gender is a kind of imitation for which there is no original*; in fact, it is a kind of imitation that produces the very notion of the original as an *effect* and consequence of the imitation itself. . . . [T]he "reality" of heterosexual identities is performatively constituted through an imitation that sets itself up as the origin and the ground of all imitations. . . . [I]n its efforts to naturalize itself as the original, heterosexuality must be understood as a compulsive and compulsory repetition that can only produce the *effect* of its own originality; in other words, compulsory heterosexual identities, those ontologically consolidated phantasms of "man" and "woman," are theatrically produced effects that posture as grounds, origins, the normative measure of the real.[143]

The logical stopping point of the Butler critique is a model in which gendered subjectivity no longer is naturalized as it comes to be revealed as an effect rather than "being," and the appearance of a coherent gender is revealed as constructed.[144]

Thus, the proliferation of gay representations has deeply subversive potential not only in destabilizing a universal sexual subjecthood, but also in problematizing the universality of a gendered subjecthood. The strategy, then, for achieving a radical pluralist sex/gender system becomes the proliferation of images. This results in a loss of control of the future use of the signs, in order to destabilize and undermine both gender categories and the constraints on our conceptions of gender and sexuality that have been

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143 Butler, *supra* note 132, at 21. As Butler argues, imitations of gender "expose the fundamental dependency of 'the origin' on that which it claims to produce as its secondary effect." *Id.* at 22.

144 *See id.*

> There is no volitional subject behind the mime who decides, as it were, which gender it will be today. On the contrary, the very possibility of becoming a viable subject requires that a certain gender mime be already underway. The "being" of the subject is no more self-identical than the "being" of any gender; in fact, coherent gender, achieved through an apparent repetition of the same, produces as *its effect* the illusion of a prior and volitional subject. In this sense, gender is not a performance that a prior subject elects to do, but gender is *performative* in the sense that it constitutes as an effect the very subject it appears to express.

Id. at 24.

imposed within the dominant discourse.[145]

B. *Gay Identity, Camp Sensibility, and State Censorship*

To this point, I have attempted to develop a theoretical framework through which to understand the politics of cultural production and consumption and to examine political implications of representations of gay identities within the dominant culture. In this section, I will move beyond a discussion of postmodern theory in relation to culture and consider actual cultural practices, the conditions under which subcultural representations emerge, and how an oppositional discourse develops despite attempts at erasure by the dominant culture.[146] Specifically, I will explore the implications of one such representational strategy, "gay camp," with reference to the current climate of artistic, cultural, and discursive censorship. The cultural conditions under which a camp sensibility developed provide insights into how a subculture can come to articulate an identity through a language spoken within the dominant discourse, but accessible only to those familiar with the "decoding" necessary to comprehend the articulation. Moreover, the emergence of the gay identity through camp speaks to the theoretical incoherence and futility of attempts to restrain the emergence of a subcultural language. Indeed, the prohibition itself proves to be the means by which the subcultural practices emerge in the gaps left within the dominant discourse.

Camp is both a mode of cultural production and of cultural consumption. In the period prior to the Gay Liberation Movement beginning in the late 1960s, camp was one means by which a gay male subcultural identity was forged. On the consumption side, gay men redeployed the images propagated by dominant popular culture in order to establish an identity.[147] In particular,

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145 *See* Judith Butler, *The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess*, DIFFERENCES, 2.2, 1990, at 105. "In other words, it is important to risk losing control of the ways in which the categories of women and homosexuality are represented, even in legal terms, to safeguard the uncontrollability of the signified." *Id.* at 121.

146 I share the views of Mike Featherstone on the importance of examining specific cultural practices in understanding postmodernity.

> [I]f we are to attempt to make sense of the emergence of postmodernism and the changes taking place in the culture of contemporary western societies we need to . . . investigate specific social and cultural processes and the dynamics of the production of particular funds of knowledge. In effect we must relinquish the attractions of a postmodern sociology and work towards a sociological account of postmodernism.

Mike Featherstone, *In Pursuit of the Postmodern: An Introduction*, 5 THEORY, CULTURE & SOCIETY 195, 205 (1988).

147 For a discussion of theories of cultural consumption, see *supra* Part IV. In this section, I rely upon the analysis of Andrew Ross. *See* ANDREW ROSS, NO RESPECT: INTELLECTUALS AND POPULAR CULTURE (1989). Ross summarizes theories of cultural consumption as

Hollywood female star images, usually of a bygone era, were appropriated by gay men as a means of identifying with the "star."[148] Thus, the cultural meaning intended on the production side within dominant culture was not necessarily that received by the reader. Rather, new unintended meaning was created through consumption as a way for the gay man to establish his subjecthood through cultural symbols.

> Dominant or preferred interpretations at one encoding level, however, may be opposed or undermined by variant encodings at another narrative level *and* by diffused receptions. The history of film, for example, shows us that gay men a generation ago identified with "strong" female *film noir* stars such as Bette Davis and Joan Crawford, who were tough fighters and sexually free agents up against tough odds (including their "bad girl" reputations and cynical piety) . . . .[149]

This identification across genders and sexualities has had important cultural implications for our conception of the universal subject. Through the choice of an apparently differently located subject with whom to identify, the camp subject articulated something about the specificity of his own cultural location and, in so doing, set in motion the development of a particular subcultural *identity*.

> For a particular gay or lesbian subject, then, to choose a figure in a different position with whom to identify even partially always has the potential of being revelatory in *some* way about *some* aspect of the positioning of the subject her- or himself: not through a vague invocation of the commonality of all people of all genders and sexualities, though that may also be at work, but through the complex and conflictual specificities of what different positionings may have in common . . . .[150]

Moreover, cross-gender identification through camp has implications for the destabilization of gender boundaries and the natural-

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follows: "More radical theories of 'creative consumption' would later come to be posed as a way of explaining how people actually express their resistance, symbolically or otherwise, to everyday domination, by redefining the meanings of mass-produced objects and discourses in ways that go against the 'dominant' messages in the text." *Id.* at 53 (footnote omitted).

148 See Ross' definition of camp: "The camp effect, then, is created not simply by a change in the mode of cultural production, but rather when the products (stars, in this case) of a much earlier mode of production, which has lost its power to dominate cultural meanings, become available, in the present, for redefinition according to contemporary codes of taste." *Id.* at 139.

149 John R. Leo, *The Familialism of "Man" in American Television Melodrama*, 88.1 S. ATLANTIC Q. 31, 46 (1989).

150 Sedgwick, *supra* note 129, at 61.

ness and coherence of a gendered subjecthood. Camp "assist[s] in destabilizing what appears most permanent in the social order—distinctions between the sexes"[151]—and provides a "comment upon the relation between nature and artifice in the presentation of the gendered self."[152] Indeed, camp is the practice of Butler's theory of gender as performative, for the imitation of a star's qualities reveals that the star herself was engaged in a gender "masquerade" with no underlying "original."

> [T]he significance of particular film stars lies in their various challenges to the assumed naturalness of gender roles. Each of these stars presents a different way, at different historical times, of living with the "masquerade" of femininity. Each demonstrates . . . why there is no "authentic" femininity, why there are only representations of femininity, socially redefined from moment to moment. So too, the "masculine" woman, as opposed to the androgyne, represents to men what is unreal about masculinity, in a way similar to the effect of actors whose masculinity is overdone and quickly dated . . . . If camp has a politics, then it is one that proposes working with and through existing definitions and representations, and in this respect, it is opposed to the search for alternative, utopian, or essentialist identities which lay behind many of the countercultural and sexual liberation movements.[153]

Through camp, then, the universal gendered subject begins to unravel, as masculinity and femininity are redeployed in a subversive relationship to the construction of gender.[154] Furthermore, gay

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151 Leo, *supra* note 149, at 46.

152 Coombe, *supra* note 102, at 1876-77 (footnote omitted).

153 Ross, *supra* note 147, at 161 (footnote omitted).

154 However, not all theorists share this interpretation of the gender subversive potential of gay camp. For an alternative and critical approach, see Carole-Anne Tyler, *Boys Will be Girls: The Politics of Gay Drag*, *in* INSIDE/OUT, *supra* note 115, at 32. Tyler argues that the political implications of camp are ambiguous.

> It is this very insistence on irony and parody as the difference between the camp or mimic and the man or woman who plays gender straight (in the masquerade or parade)—the anti-essentialist strength of both theories—which also ultimately proves to be their undoing, pointing to an essentialism which inheres in their anti-essentialism, deconstructing by rendering indistinct their significant (signifying) distinctions. . . . [I]f all identities are alienated and fictional, then the distinction between parody, mimicry, or camp, and imitation, masquerade, or playing it straight is no longer self-evident. What makes the one credible and the other incredible when both are fictions? The answer, it seems, are the author's intentions: parody is legible in the drama of gender performance if someone meant to script it, intending it to be there. Any potential in-difference or confusion of the two is eliminated by a focus in the theories on production rather than reception or perception. Sometimes, however, one is ironic without having intended it, and sometimes despite one's best intentions, no one gets the joke.

Id. at 53-54.

camp exemplifies how an identity can come to be formed through cultural consumption and the redeployment of images, despite the attempt at erasure of that identity in the dominant cultural discourse. For lesbians and gays, it was (and remains) precisely because of the "lack of inherited cultural capital,"[155] the denial of "the possibility of 'masculine' and 'feminine' positions of spectatorship, and exclu[sion] by conventional representations of male-as-hero or narrative agent and female-as-image or object"[156] that the subculture is forced to express identity in a parasitic relation to the production of images in dominant culture. Thus, attempts at foreclosure of the development of an identity through cultural representation are impossible because of the uncontrollability of cultural images and the manner in which they are used.

Indeed, it is through the asymmetric relationship of encoding and decoding that prohibition and state censorship can be utilized as a means to foster identity. This can occur not only at the consumption level, but also through production itself. An interesting example of this phenomenon is in the role of a gay camp sensibility in British theater. The London West End theater was subject to strict censorship by the lord chamberlain prior to the late 1960s: "Until 1968 plays could not be performed on the public stage in England without a license from a state official, the lord chamberlain . . . ."[157] State censorship was vigorously deployed to foreclose the explicit emergence of any fragments of a gay identity or indeed, any mention of "homosexuality."[158] Alan Sinfield has documented, however, that the attempt at erasure of identity through representational prohibition was unsuccessful. Rather, it was the theater that proved to be a central site for the formation of a gay sensibility. As Sinfield points out, using a Foucaultian analysis, the very fact of prohibition served to produce a presence.

> By keeping homosexuality out of sight the lord chamberlain was acknowledging its likely presence; further, he helped to make theater a place where sexuality lurked in forbidden forms, the more insidiously because concealed. "Homosexuality is rife in the theatrical profession," accused the *Sunday Pictorial* in its 1952 series "Evil Men."[159]

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155 ROSS, *supra* note 147, at 146.

156 *Id.* at 157.

157 Alan Sinfield, *Private Lives/Public Theater: Noël Coward and the Politics of Homosexual Representation*, 36 REPRESENTATIONS 43, 44 (1991).

158 *See id.* "[U]ntil 1958 all mention of homosexuality was specifically forbidden." *Id.*

159 Alan Sinfield, *Closet Dramas: Homosexual Representation and Class in Postwar British Theater*, 9 GENDERS 112, 115 (1990).

First, the theater became a subcultural meeting place for the gay male (white and middle/upper class) cultural consumer. The theater also was a profession to which gay men were drawn (which reinforced the "performative" aspects of the gay identity). Given the presence of gay men in the two central locations for cultural propagation—production and consumption of representations—it is hardly surprising that the prohibition fostered the formation of an identity. Sinfield uses the work of Nöel Coward as an example of the use of theater as a site of cultural contestation and the emergence of a camp sensibility. The irony of the outright prohibition of the mention of homosexuality by the lord chamberlain, of course, was that Coward's texts make it obvious that "[t]he one unspeakable vice is so strikingly absent that it leaps into . . . prominence."[160] Sinfield argues that this prominence was apparent to the subcultural "insider" within the theatrical community,[161] for whom "traces of homosexuality in the plays were heard and appreciated distinctively . . . ."[162] Thus, within a Coward play, cultural decoding was assisted by the playwright who included a subversive encoding within the script: "The selectively audible structure of the secret . . . allowed Coward to plant the cues for a subordinate decoding system within play texts that in the main are close to the dominant. . . . [T]his facilitated the formation of a discreet subculture."[163] For example, a reading of the play *Private Lives* discloses the selective use of the term "gay" in ways that easily lend themselves to double entendre.

Instead of foreclosing a gay identity, the prohibition provided the forum in which a gay identity (and, the redeployment of the term "gay") could be developed. Rigorously enforced censorship was the cultural precondition for a subcultural appropriation of

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160 *Id.* at 116.

161 *See* Sinfield, *supra* note 157.

> It is not a matter of deciding that this or that character is "really," "underneath," homosexual; to say that would be to override the ambiguity which at the time was crucial. During those decades of discretion we should not imagine homosexuality as *there*, fully formed but obscured by the closet, like a statue shrouded under a sheet ready for exhibition. The closet (as discreet homosexuality was named when it came under scrutiny in the 1960s) did not obscure homosexuality; in the form that dominated for the first two thirds of the century, it *created* it. . . . The task for a cultural-materialist criticism is to retrace the *processes* of representation and decoding, and the social determinants that construct such processes. Furthermore, how Coward's plays were heard cannot be decided (in the still customary manner of literary criticism) just by looking carefully at the text. We have to consider who hears and within what framework of understanding.

Id. at 48.

162 *Id.* at 49.

163 *Id.* at 54.

the dominant cultural texts and was an important historical moment in the development of a gay liberationist movement. While Coward and camp style would become passé in the era of liberation, Sinfield argues that the camp sensibility proved an important site as a precursor to the emergence of the cultural conditions under which a radical gay subjecthood could be forged.[164] This exemplifies the theoretical difficulties in state attempts to foreclose articulation of new political subjectivities. Coward's plays and, more generally, a camp sensibility, demonstrate the contingency of the meaning of any representation and also show how the meaning of a statement can exceed its literality. Effective state control of such a discourse is soon undermined by the uncontrollability of a statement's meaning as it is received subculturally by the cultural consumer.

C. *Identity, Censorship, and a Proliferation of Subjectivities*

I have attempted to demonstrate that cultural representation serves as a field for political contest over the definition of the subject through the continual antagonism of dominant and oppositional discourses. I also have presented an example of an oppositional identity formation—a gay identity secured through the cultural phenomenon of camp—which demonstrates how a subversive identity can be forged within dominant culture. Moreover, the explicit exercise of state power to govern the contours of the discourse proved to be futile, as the prohibition served to create an encoded language in which a subcultural community conversed.

This model provides the basis for a legal critique of the diversion of NEA funding from artistic endeavors that depict a gay identity. The attempts by Senator Helms and his supporters to limit NEA funding (along with the NEA's definition of "artistic merit") are aimed, not at the sexually explicit, but instead at controlling

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164 A camp sensibility proved, in many ways, appropriable for a radical sexual politics; language and style such as Coward helped to put into circulation were adapted for other contexts and other purposes, often in direct opposition to his discreet and elitist assumptions. By enhancing the scope of theater as a site where contest for a homosexual presence might occur, Coward was enabling larger possibilities than he intended. After all, the word that was selected initially to collocate with *liberation* was *gay*, and its use still infuriates reactionaries. . . . Like camp style generally, it came to signify not secrecy but acknowledgement of the demand and ironic refusal of it, and so became available for a new, more dissident phase of gay culture. Discretion eventually deconstructed itself.

Id. at 60.

the cultural definition of "homosexuality." It is an attempt to manage a discourse through which an identity may be defined.

> Helms not only extends those legal precedents that categorize homosexuality as obscenity, but, rather, authorizes and orchestrates through those legal statutes a restriction of the very terms by which homosexuality is culturally defined. . . . It is not merely that Helms characterizes homosexuality unfairly, but that he constructs homosexuality itself through a set of exclusions that call to be politically interrogated.[165]

Thus, it is the terms through which an identity is created that are sought to be controlled. However, the attempt may lead to unexpected outcomes because of the unmanageability of the formation of the subject. Moreover, this cultural control is further undermined by the important role of fantasy.[166] The deployment of prohibitions on representation cannot restrict identity formation through fantasy. Rather, prohibition serves to eroticize a subjectivity, which renders far more complicated the relationship of a prohibition to a representation. For example, in the case of Robert Mapplethorpe's photographs, the work's erotic appeal stems at least in part from the very fact of its subversiveness in relation to the prohibitions within the dominant culture.

> Prohibitions work both to generate and to restrict the thematics of fantasy. In its production, fantasy is as much conditioned as constrained by the prohibitions that appear to arrive only after fantasy has started to play itself out in the field of "representations." In this sense, Mapplethorpe's production anticipates the prohibition that will be visited upon it; and that anticipation of disapprobation is in part what generates the representations themselves. . . . *Helms operates as the precondition of* Mapplethorpe's enterprise, and Mapplethorpe attempts to subvert that generative prohibition by, as it were, becoming the exemplary fulfillment of its constitutive sexual wish. . . . The text encodes and presupposes precisely the prohibition which will later impose itself as if it were externally related to the text itself.[167]

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165 Butler, *supra* note 145, at 118. Butler makes this point in relation to the 1988 Helms amendment's use of the term "homoerotic" and its inherent ambiguities. "'[H]omoeroticism' is, I take it, a term that concedes the indeterminate status of this sexuality, for it is not simply the acts that qualify as homosexual under the law, but the ethos, the spreading power of this sexuality, which must also be rooted out." *Id.* at 116.

166 "There is, then, strictly speaking, no subject who has a fantasy, but only fantasy as the scene of the subject's fragmentation and dissimulation; fantasy enacts a splitting or fragmentation or, perhaps better put, a multiplication or proliferation of identifications that puts the very locatability of identity into question." *Id.* at 110.

167 *Id.* at 115. "[T]he categories of identity instate or bring into 'the real' the very phenomenon that they claim to name only after the fact. This is not a simple performative,

It is precisely because "prohibitions of the erotic are always at the same time, and despite themselves, the eroticization of prohibition"[168] that prohibition serves to undermine any NEA content-based restriction on the disbursement of funds for cultural production. The means by which images are consumed and identities formed ensures that the relationship between prohibition and production will be a complex and uncontrollable one.[169]

Attempts to restrict NEA funds for the creation of gay representational works are objectionable not only because of the unpredictability of their effect, but also because an attempt to restrict the terms under which a political identity is formed is deeply violative of a dialogic right of the subject. The forging of a politically charged subjectivity largely depends on the production and consumption of cultural representations. Restricting access to and deployment of our cultural resources is an attempt to inhibit the formation of an individual and collective identity and thus is violative of a positive right of self-definition. The discriminatory withholding of funds based solely upon a sexual and political identity thus becomes an infringement not only of a right to free speech but also of a right to equal protection. In this context, those rights only can be secured by a "deregulation" of representations, thereby ensuring a loss of control of how our culture is utilized by all subjects in the attempt to forge new and hitherto unimagined subjectivities.

> [I]t is in the very proliferation and deregulation of . . . representations—in the production of a chaotic multiplicity of representations—that the authority and prevalence of the reductive and violent imagery produced by Jesse Helms and other pornographic industries will lose their monopoly on the ontological indicator, the power to define and restrict the terms of political identity.[170]

Through the proliferation of images, the possibilities for the redeployment of culture through its appropriation are enhanced, and this is the means by which the limits imposed by dominant culture on identity formation will be challenged.

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but one which operates through exclusionary operations that come back to haunt the very claim of representability that it seeks to make." *Id.* at 121.

168 *Id.* at 111.

169 *See id.* "The effort to limit representations of homoeroticism within the federally funded art world — an effort to censor the phantasmatic — always and only leads to its production; and the effort to produce and regulate it in politically sanctioned forms ends up effecting certain forms of exclusion that return, like insistent ghosts, to undermine those very efforts." *Id.* at 108.

170 *Id.* at 121.

Although a prohibition may contribute to how an identity is subculturally forged, restriction remains objectionable in terms of how discursive control is effected and how it forces the articulation of an identity in a private encoded fashion. Just as camp became a cultural phenomenon that existed under conditions of explicit state censorship, new sexual identities might well emerge under restrictions on NEA funding. A right to one's identity, however, also demands the ability to articulate a subjecthood in the public sphere. This, of course, is the difference between the survivalist use of camp and the discourse of gay liberation in the post-Stonewall era.[171] As Sinfield recognized, Coward's plays were useful as a "subordinate, negotiated discourse within a dominant discourse,"[172] but the language of Gay Liberation is a "radical, oppositional" discourse that can be publicly read as a text within dominant culture.[173]

Thus, I argue that a rejection of the universal subject can facilitate the deployment of the language of rights, but it becomes a localized use of the terminology which is anchored in an appeal to the specificity of a subject's location. As Andrew Ross has formulated this claim, it is a right of the "liberatory imagination,"[174] a recognition of the political nature of claims that emerge from an oppositional standpoint.

> Unlike the liberal imagination, which exercises and defends autonomous rights and privileges already achieved and possessed, the liberatory imagination is *pragmatically* linked to the doctrine of "positive liberty," which entails the fresh creation of legal duties to ensure that individuals will have the means that they require in order to pursue liberty and equality. . . . Such claims, actions, and rights, etc., invariably do not arise out of liberalism's recognition of the *universal* rights of individuals. Instead, they spring from expressions of difference, from the differentiated needs and interests of individuals and groups who make up the full spectrum of democratic movements today.[175]

A liberatory right thus demands access to the dialogue and the right to have claims to identity "remain in the realm of public visibility."[176] Through a situated application of the rights of speech

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171 For an examination of the impact of the Stonewall Riot in New York City in 1969 on the gay liberation movement and its aftermath, see JOHN D'EMILIO, *After Stonewall*, *in* MAKING TROUBLE 234-74 (1992).

172 Sinfield, *supra* note 157, at 49.

173 *Id.*

174 ROSS, *supra* note 147, at 177.

175 *Id.*

176 *Id.* at 189.

and equality, the offensiveness of content-based restriction on artistic funding becomes more apparent. The restrictions are understandable as a violation of a right to speech, but it is a right to political speech made by a legal subject defined by an oppositional location. The terrain of the sexual has been appropriated for an ongoing political struggle, and the state has attempted to silence the expression of a sexual and political subjectivity—a sexual politics. Ultimately, restrictions on representation are aimed at foreclosing the proliferation of subject positions and a postmodern fragmentation of identity.

VI. Conclusion

Little can be offered by way of conclusion to an analysis of what no doubt will remain a central site for the contestation of identities in the years to come. The recent history of political and legal turmoil over arts funding is an attempt to seize control of the meaning of artistic representations through a legislative and administrative foreclosure of the scope of funded expression. In so doing, new identities are denied participation in a political and cultural discourse. From the perspective of rights, the project is to rethink our ideals of free expression and equal protection in order to recognize fully the constitutional offensiveness of the denial of a positive right to the unencumbered articulation of an identity. At the same time, an examination of the nature of representation and cultural consumption reveals that attempts to foreclose that articulation ultimately may be less than successful as identities come to be formed subculturally through the deployment of the available cultural tools. That, in turn, suggests that the restrictions on artistic representation in some sense are legally unenforceable given the uncontrollability of the meaning of a representation. However, the fact that new identities may come to be articulated in a private sphere, despite legal restriction, serves to highlight why representational censorship violates our constitutional rights. At issue is a right to participate in the public sphere for the purposes of expression, and the current climate undoubtedly chills public "political" speech. In relegating some to express their identities only in private, dialogue is limited, and equality of access to the dialogue is denied. The challenge is to reformulate our legal discourse to capture the political and cultural implications of attempts at state control of representation and identity.