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# DISTINGUISHING GOVERNMENT SUPPRESSION OF SPEECH FROM GOVERNMENT SUPPORT OF SPEECH

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## INTRODUCTION

It is occasionally argued that governmental limitations on support of speech—including the expression of groups that the government chooses to support with public funds, such as nonprofit organizations—should be the same as governmental limitations on forbidding speech, namely that content must be irrelevant. It is the thesis of this paper that approaching free speech in this manner ultimately would be destructive of free speech and that, in the long run, speech will be subject to greater limitations if it is rejected than if that congruity is maintained.

I start with the proposition that free trade in ideas should be absolute. As the Supreme Court put it in *Gertz v. Robert Welch, Inc.*[1]: "[T]here is no such thing as a false idea."[2] A corollary to this proposition is that no harm that comes from a false idea can count as harm. So, for example, if some commentator were to write, "Any law professor who thinks that free trade in ideas is constitutionally protected is a stupid jerk," the actual harm that commentator caused could not count as actionable harm.

I might read such inflammatory nonsense and be terribly offended. It might even cause me to lose sleep, eventually productivity, and ultimately health. Nevertheless, I could not sue because the

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1. 418 U.S. 323 (1974).

2. *Id.* at 339 (alteration added).

commentator would be entitled to express her own views, however horrible and distasteful I might find them.

Unfortunately, the Court has not always adhered to the above-stated proposition. It has carved out an area of sexually explicit speech that it calls obscenity, and it has refused to offer constitutional protection thereto.[3] To be sure, the Court partially defends its treatment of obscenity on the grounds that it is not ideological.[4] However, it could not be clearer that the strongest proponents of anti-obscenity legislation support it on the ground that the American citizenry should not be subject to the licentious ideas presented in this despicable material.

For this reason, I have argued elsewhere that the "obscenity is not speech" doctrine should be overruled.[5] For now, however, my concern is narrower. I fear that treating denial of government largess as substantially equivalent to prohibiting the speech will cause the Court to broaden, rather than to narrow, the category of obscenity.

Consider the examples most frequently cited. An artist named Andres Serrano immerses a cross in a bottle of urine and calls it *Piss Christ*. Another artist named Robert Mapplethorpe produces a series of homoerotic photographs. Both artists are awarded funding from the National Endowment for the Arts. Unsurprisingly, taxpayers are furious.[6] While these works of art[7] are and should be constitutionally

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3. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (defining three criteria that must be met in order for material to be designated as constitutionally unprotected obscenity); Roth v. United States, 354 U.S. 476 (1957) (clarifying the definition of obscenity and reaffirming that it does not receive First Amendment protection).

4. *Roth*, 354 U.S. at 484 ("All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").

5. Arnold Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS 21, 22 (2005) (arguing that case law that has arisen since *Miller* is capable of dealing with harm caused by sexually explicit speech because of its manner of dissemination and that *Miller* is both no longer useful in curbing social harms and "antithetical to sound First Amendment theory").

6. *See, e.g.*, Elizabeth Kastor, *Congress Bars Funding for 'Obscene' Art; Senate Vote Sends Measure to Bush*, WASH. POST, Oct. 8, 1989, at A21 (discussing the bill passed by Congress to limit funding of "obscene" art by the NEA).

protected, their entitlement to taxpayer support is quite another matter. Once they are supported, taxpayer protests reach a crescendo, and a call is made to ban the art.

Although these examples sound familiar to the readers of *National Endowment for the Arts v. Finley*[8]—in which legislation arising out of the Serrano/Mapplethorpe controversy was challenged as unconstitutional—the much earlier case of *Southeastern Promotions, Ltd. v. Conrad*[9] first created the issue confusion.

## I. CONRAD

The issue in *Conrad* was whether the City of Chattanooga was compelled to license the rock musical *Hair* to play in a city-owned auditorium that was maintained for "clean, healthful, entertainment."[10] The lower court had held that because *Hair* was obscene, Chattanooga was not required to license it.[11]

The Supreme Court reversed on the ground that the United States Court of Appeals for the Sixth Circuit had asked the wrong question. This was the good news. The bad news was that the Supreme Court's question was at least as wrong as the one asked by the lower court.

The Sixth Circuit's conclusion that *Hair* was obscene seems certainly wrong. This was a nationally prominent play that almost surely had serious literary, artistic, and political value.[12] Consequently, if obscenity were the standard, Chattanooga should have lost its case. But obscenity should not have been the question. Rather, the question should have been whether Chattanooga was free to reserve one of its theaters for

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7. Personally I have difficulty finding anything artistic (as opposed to insulting) in Serrano's work, but because I'm no art critic, for the purposes of this paper, I will assume that it really is art.

8. 524 U.S. 569 (1998).

9. 420 U.S. 546 (1975).

10. *Id.* at 549 n.4.

11. Se. Promotions, Ltd. v. Conrad, 486 F.2d 894, 894 (6th Cir. 1973).

12. I confess that I have not personally seen *Hair*, but based on the descriptions that I have read, it is highly unlikely that the play would be found obscene at the Supreme Court level. *Cf.* Jenkins v. Georgia, 418 U.S. 153 (1974) (holding that no jury could validly find the critically acclaimed movie *Carnal Knowledge* to be obscene).

clean, wholesome family entertainment and to reject *Hair* on the ground that it didn't meet those criteria.

In my view, the answer to the question that the Court should have asked is "yes." There is all the difference in the world between condemning a movie or play as "obscene"—thus precluding it from being shown anywhere in the city—and describing it as unwholesome and thus unfit to appear in a city auditorium reserved for wholesome entertainment.

Unfortunately, Justice Rehnquist[13] was the only Justice who actually understood the issue. The majority of Justices thought that the issue was whether Chattanooga provided for a hearing to determine obscenity in a prompt manner as required by *Freedman v. Maryland.*[14] Obviously, that question would have been relevant only if obscenity had been the sole basis for denying an invitation to Southeastern Promotions to present *Hair* in the municipal theater. The question could plausibly have been whether there was an expedited hearing to determine if *Hair* was clean, wholesome family entertainment—but that was neither what Southeastern Promotions wanted nor what it got.

*Conrad* is a classic example of the harm done by conflating government-suppression issues with government-support issues. Undoubtedly, the Sixth Circuit did not want to force Chattanooga to book an unwholesome production in its theater designed for wholesome productions, but the only way it could see to accomplish that goal was to declare *Hair* obscene. Thus, in order to preserve Chattanooga's wholesome theater, the Court gave Chattanooga the power to preclude even private theaters from showing the play. Courts need to be more sensitive than to render such overkill decisions. Clearly understanding the differences between freedom from suppression and freedom to be supported would surely help.

Fortunately, in *Arkansas Educational Television Commission v. Forbes,*[15] the Supreme Court recognized the distinction between

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13. As he then was; *Conrad*, 420 U.S. at 570 (Rehnquist, J., dissenting).

14. 380 U.S. 51, 58-59 (1965) (holding that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system" and defining two such safeguards).

15. 523 U.S. 666 (1998).

government support and government prohibition. *Forbes* involved an Arkansas public television station that wished to conduct a debate among viable candidates for a congressional seat. The station chose to include only the Republican and Democratic candidates for the seat, concluding that Forbes, the independent candidate, was not viable.

Forbes did not take too kindly to this snub and filed suit, claiming (not unlike Southeastern Promotions did two decades earlier) that he was denied access to a public forum. Fortunately, the Court ruled that although Forbes had an unbridled right to speak, he did not have a right to be included in the television station's debate. Rather, the state could use its own editorial judgment in deciding which candidates were viable, and it could limit the debate to the two that it considered viable.

It is certainly not clear that *Forbes* portends a rethinking of *Conrad*. *Conrad* was not even mentioned in the opinion, and the cases might well be distinguishable. Nevertheless, it is refreshing to hear the Court clearly articulate the principle that the standard that controls government prohibition does not also control Government support.

## II. FINLEY

In *National Endowment for the Arts v. Finley*,[16] the Court reviewed the Ninth Circuit's finding that section 954(d)(1) of the National Foundation on the Arts and Humanities Act of 1965 consisted of an impermissible viewpoint-based restriction and was unconstitutionally vague. The section at issue, which came into being after Congress amended the Act amid the controversy that was swirling around Serrano's and Mapplethorpe's NEA-supported projects,[17] requires the Endowment's Chairperson to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[18]

In the majority opinion, Justice O'Connor wrote that because section 954(d)(1) requires "the NEA only to take 'decency and respect'

16. 524 U.S. 569, 572-73 (1998).
17. *Id.* at 574-76.
18. *Id.* at 572 (alteration added).

into consideration and that the legislation was aimed at reforming procedures rather than precluding speech," the argument that the section would be used for invidious viewpoint discrimination lacked merit.[19] Noting that the section "merely adds some imprecise considerations to an already subjective selection process," the Court held that it was not facially impermissible.[20]

I probably agree with Justice Scalia, who, in concurrence, wrote that the NEA's suggested method of compliance with section 954(d)(1)—the selection of "diverse review panels" reflecting many "geographic and cultural perspectives"—was clearly inadequate.[21] The statute requires that decency be considered, but it is not clear to me how having diverse review panels would guarantee that decency would be considered, i.e. deemed relevant. More importantly, however, both Scalia and O'Connor, whose opinions taken together stand for the proposition that government support of speech is not to be governed by the same standards as government prohibition of speech, represent the majority of the Court.

In some ways the real question in *Finley* perhaps should have been whether the NEA is constitutional at all. It always makes its decisions based on content. How could it do so otherwise? Obviously, the First Amendment forbids such things if we're talking about regulation. For the reasons given thus far, I would allow content discrimination in regard to NEA awards.

Unfortunately, viewpoint discrimination might be inevitable. Suppose, for example, that I seek support for my absolutely brilliant satirical destruction of George W. Bush. Suppose further that most of the NEA's panel members are supporters of Bush. Can I sue when my brilliant satire gets passed over in favor of a much more pedestrian satire about Bill Clinton? I think not, but if my conclusion is correct, clearly the NEA can practice viewpoint discrimination unencumbered by the Constitution.

Assuming that the NEA is constitutional in the abstract, I believe that Scalia has to be right as a matter of constitutional law. The NEA by

19. *Id.* at 582.
20. *Id.* at 590.
21. *Id.* at 591 (Scalia, J., concurring)

its nature, as illustrated in the above paragraph, inherently engages in viewpoint discrimination even though it might not be aware of what it is doing. I do not believe that taking the next step of overtly supporting certain viewpoints is an unconstitutional one.[22]

## III. AMERICAN LIBRARY ASSOCIATION

*United States v. American Library Association, Inc.*, saw the Court examine whether provisions of the Children's Internet Protection Act[23] spurred public libraries to infringe upon their patrons' First Amendment rights.[24] Under the Act, a public library may not receive federal aid to provide Internet access to patrons unless it has a policy of online safety for minors that includes the use of an Internet block or filter to guard against access to "visual depictions" involving obscenity, child pornography, or other material that is "harmful to minors."[25] A collection of "libraries, library associations, library patrons, and Web site publishers" challenged the filtering stipulations' constitutionality.[26]

The Court decided that Congress legitimately could demand that the federal funds, which were supposed "to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes," be spent for such intended purposes.[27] Congress' imposed limitation was permissible also

22. *Cf.* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding a limitation on doctors receiving federal funding from discussing the abortion alternative with their patients). I do not believe that the statement in the text is or should be without limits. Funding only pro-Christian speech would probably violate the Establishment Clause. Funding only pro-Republican speech would probably violate the Equal Protection Clause. Funding only lawyers who don't make certain arguments on behalf of their clients would seem to violate the Sixth Amendment. *Cf.* Legal Serv. Corp. v. Velazquez, 531 U.S. 533 (2001) (holding that the funding condition limiting arguments legal services lawyers can make on behalf of their welfare clients violated the First Amendment).

23. Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000) (codified at 20 U.S.C. § 9134(f) (2000) and 47 U.S.C. § 254(h) (2000).

24. 539 U.S. 194 (2003).

25. *Id.* at 201.

26. *Id.*

27. *Id.* at 211.

because public libraries traditionally have kept pornographic material out of their other collections and because filtering software clearly assists the government's Internet assistance programs, the Court stated.[28]

On balance, I believe that this case was correctly decided. First, I agree with both the plurality's opinion[29] and Justice Stevens' dissent[30] that patrons do not have a First Amendment right to view anything they want at a library. Certainly, if I want one of my books[31] in the library, I have no right to make the librarian put it there. And, if I were a patron, I would have no right to have the librarian make it available to me.

The next question is whether public librarians as state actors have a First Amendment right to control the contents of their libraries. Obviously, the question to contemplate is: Do public libraries belong to the librarians, or do librarians merely serve as stewards over institutions that actually belong to the government? We don't have to resolve this question to conclude that *American Library Association* was correctly decided.

Assuming that librarians do have First Amendment rights, they can certainly choose to relinquish them in exchange for a bargain rate on materials. So, the question becomes: Can the federal government give a library a bargain rate on computer services (unavailable to the rank-and-file citizen) on the condition that the library block certain sites? The Court correctly concluded that "yes" was the appropriate answer to that question.

In analyzing this question, one should carefully note the congruity between the governmental largess and the limitation on use. For example, if the statute had stated, "Either you block Internet access or we will no longer help buy you books," it would have been a different case. Put differently, government purchases of compliance should be

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28. *Id.* at 212.

29. *Id.* at 204 ("Although [public libraries] seek to provide a wide array of information, their goal has never been to provide 'universal coverage.' Instead, public libraries seek to provide materials 'that would be of the greatest direct benefit or interest to the community.'" (alteration added) (citations omitted)).

30. *Id.* at 226 (Stevens, J., dissenting) ("[W]e have always assumed that libraries have discretion when making decisions regarding what to include in, and exclude from, their collections." (alteration added)).

31. ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL (4th ed. 2003).

directly related to the expenditure. In *American Library Association*, they were.

## CONCLUSION

It is the thesis of this essay that government should never be free to censor speech. It should, however, be free to get its money's worth out of expenditures it makes. Thus, if a city builds a civic center for a particular kind of entertainment, it should be able to limit the entertainment to that for which the center was built. Similarly, if it wishes to pay for developing certain types of artists, then only those types of artists need apply. Also, when it pays for computers or computer access in libraries, it should be able to limit access to such technology congruent with its purposes.

For the most part, the Court's decisions since the ill-starred *Conrad* case have gotten it right. Let us hope (but not hold our breath) that this translates into the eventual abolition of the obscenity doctrine.