

# Viewpoint Discrimination

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## Table of Contents

I. The Semantics of Suppression .....	105
A. Viewpoint Neutrality.....	105
B. Rules About Content .....	110
C. Political, Controversial, and Religious Speech .....	115
II. Sex, Vulgarity, and Offensiveness .....	122
III. Government Benefits and Property .....	136
IV. Government Speech .....	150
V. Public Education: The <i>Pico</i> Paradox .....	159
Conclusion .....	168

## Introduction

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”<sup>1</sup> With these words, Jus-

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1. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

tice Jackson, writing for the Supreme Court over fifty years ago in *West Virginia State Board of Education v. Barnette*,<sup>2</sup> poignantly stated a reigning principle of First Amendment jurisprudence. Later Supreme Court decisions have phrased the idea less metaphorically, but equally forcefully, in terms condemning government action that casts a “pall of orthodoxy”<sup>3</sup> or “aim[s] at the suppression of dangerous ideas.”<sup>4</sup>

This constitutional prohibition against “viewpoint discrimination,” and the jurisprudential pursuit of its converse, “viewpoint neutrality,” arise from the most basic values underlying the First Amendment. These values include the right to think, believe, and speak freely, the fostering of intellectual and spiritual growth, and the free exchange of ideas necessary to a properly functioning democracy.<sup>5</sup> Government action that suppresses or burdens speech on the basis of its viewpoint threatens all of these values by skewing public debate, retarding democratic change, depriving people of ideas and artistic experiences that could contribute to their growth, and otherwise constricting human liberty.<sup>6</sup>

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2. *Id.*

3. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

4. *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (quoting *Cammarrano v. United States*, 358 U.S. 498, 513 (1959); *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

5. *See, e.g.*, C. EDWIN BAKER, *FREE SPEECH AND HUMAN LIBERTY* (1989) (positing that the First Amendment’s primary purpose is advancement of human liberty); THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970) (“[Free expression] carries beyond the political realm. It embraces the right to participate in the building of the whole culture, and includes freedom of expression in religion, literature, art, science, and all of the areas of human learning and knowledge . . . .”); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960); STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* (1990); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-22, at 785-89 (1978) (“[T]he Constitution’s most majestic guarantee” (free speech) cannot be understood “in purely instrumental or purposive terms.”); Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245; Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1271-72 (1995); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Geoffrey R. Stone, *The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 100-04 (1978); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 676-94 (1991) (defining First Amendment values to include pursuit of truth, proper functioning of a democracy, fulfillment of human potential, self-expression, tolerance, and encouragement of dissent).

6. *See, e.g.*, *Turner Broad. Sys. Inc. v. FCC*, 114 S. Ct. 2445, 2458 (1994); *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991); *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring) (“[Viewpoint-based regulation is] censorship in a most odious form . . . .”); *Kingsley Int’l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 688 (1954)

But if identifying the importance of viewpoint neutrality is relatively easy, it is not always so simple to define exactly what it means or to specify how it should apply in the myriad contexts in which government interacts with its citizens. And the Supreme Court, despite its inspiring rhetoric on the subject, has not been a model of clarity.

First, the Court's First Amendment decisions have ricocheted between a focused emphasis on viewpoint discrimination as the ultimate First Amendment evil, and broader condemnations of "content discrimination."<sup>7</sup> Content is a spacious concept that embraces whole subjects of discourse regardless of the "viewpoint" expressed. Although in general, regulations that discriminate on the basis of content require greater judicial scrutiny than so-called "content-neutral" regulations that merely control the "time, place, and manner" of speech,<sup>8</sup> the Court has recognized that government edicts based on the "content" of citizen speech are often permissible.<sup>9</sup>

Second, the Court has further confused the matter by sometimes using the terms "content" and "viewpoint" interchangeably.<sup>10</sup> It has justified this interchangeable use by explaining that prohibitions against content and viewpoint discrimination flow from the same concern—government attempts to control public debate and suppress disfavored ideas.<sup>11</sup> In doing so, however, the Court has failed to acknowledge that not all content discrimination has these purposes or effects.

Alternatively, the Court has said that what it really looks for in content discrimination cases is how close the discrimination involved comes to being viewpoint-based.<sup>12</sup> This formulation does little to explain the Court's invalidation of content-based speech regulations having little or no viewpoint bias, including, for example, the exclu-

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(banning film because it advocates unconventional idea "str[ikes] at the very heart of constitutionally protected liberty").

7. See *infra* Part I.A-B.

8. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

9. See *infra* Part I.B; see, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

10. See *infra* text accompanying notes 58-62, 79-85; see, e.g., *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1989).

11. See *infra* Part I.A.; see, e.g., *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984); *Ward*, 491 U.S. at 791.

12. See, e.g., *Ward*, 491 U.S. at 791.

sion of whole categories of speech from traditional public fora, or burdensome regulation of speech by criminals about their crimes.<sup>13</sup>

On the other hand, the Supreme Court's linking of "content" and "viewpoint" has had its positive side. The Court has recognized, for example, that government discrimination against broad categories of expression such as "political," "controversial," or "offensive" speech, is often a guise for disagreement with the ideas expressed, or is so close in spirit to viewpoint discrimination that the same strict First Amendment review should apply.<sup>14</sup> Yet the Supreme Court and some lower courts have often failed to classify burdens imposed on "political," "controversial," or "offensive" speech as viewpoint-based, that is, "aimed at the suppression of dangerous ideas."<sup>15</sup> As a result, some courts have permitted discrimination in the terms of access to certain government property or benefits—for example, restrictions on art display space in government buildings, where the space in question was found by reviewing courts to be appropriately limited to "nonpolitical," "noncontroversial," or "nonoffensive" speech.<sup>16</sup>

By contrast, two recent Supreme Court decisions, *Lamb's Chapel v. Center Moriches Union Free School District*<sup>17</sup> and *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>18</sup> established that discrimination against "religious" expression is viewpoint-based, and therefore invalid. In *Rosenberger*, the Court explained that public debate is "complex and multi-faceted"<sup>19</sup> and that discrimination against

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13. See, e.g., *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Mosley*, 408 U.S. at 92; *Carey v. Brown*, 447 U.S. 455 (1980).

14. See *infra* text accompanying notes 81-82, 90-101, 110-23. As the Court has often remarked, "political" or "controversial political" speech stands at the "highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey*, 447 U.S. at 467); see also *McIntyre v. Ohio Elections Comm'n*, 115 S.Ct. 1511, 1519 (1995); *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Carey*, 447 U.S. at 467; *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

15. *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983); see, e.g., *Consolidated Edison Co. v. Public Utilities Comm'n*, 447 U.S. 530, 537-38 (1980) (assuming that ban on utility bill inserts regarding "controversial issues of public policy" was content- but not viewpoint-based); see also *infra* text accompanying notes 81-83, 241-57. Cases in which discrimination against "political" or "controversial" speech has been permitted include *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985); and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

16. See *infra* text accompanying notes 221-44.

17. 508 U.S. 384 (1993); see *infra* text accompanying notes 110-11.

18. 115 S. Ct. 2510 (1995); see *infra* text accompanying notes 112-19.

19. *Rosenberger*, 115 S. Ct. at 2518.

whole categories of ideas (e.g., religious ones) can “skew” that debate in “multiple ways.”<sup>20</sup> This crucial perception applies equally to categories of ideas labeled by officials as “controversial,” “political,” or “offensive.” After *Rosenberger*, discrimination against such “controversial,” “political,” or “offensive” ideas should be understood as viewpoint-based.

The Supreme Court also has thus far failed to see discrimination against sex-related speech as viewpoint-based. In fact, sex-related speech has generally received even less solicitous treatment than other “controversial” or “offensive” subjects. Indeed, despite the oft-trumpeted rule against content discrimination in government regulation of speech, sexually explicit speech that is found to be “offensive” by some local community, if also deemed to appeal to the “prurient interest” and to lack “serious value,” receives no First Amendment protection at all and may be prosecuted under obscenity laws.<sup>21</sup> Yet the very justification for this “obscenity” exception to the First Amendment is itself viewpoint-based because it is justified by moral objections to the ideas or messages that sexual speech is said to convey.<sup>22</sup>

The concept of viewpoint neutrality in First Amendment jurisprudence has thus been confusing in both definition and application, and has been selectively applied in many contexts. As a result, courts have often failed to recognize censorship of dissenting or discomfiting viewpoints, and have permitted government to “suppress dangerous ideas” in precisely the manner most threatening to First Amendment values.

Part I of this Article traces the history and application of the viewpoint discrimination doctrine, and the simultaneous development of Supreme Court precedent addressing the broader category of content discrimination. It also contrasts cases invalidating restrictions on religious speech as viewpoint-based with others where the Court has treated restrictions on “political,” “controversial,” or “offensive” speech as viewpoint-neutral.

Part II analyzes the particularly hostile way in which speech on the important subject of human sexuality has been relegated to a highly diluted form of First Amendment protection. Since *Miller v.*

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20. *Id.*

21. See *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957); *infra* Part II.

22. See *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 58, 63 (1973); *infra* text accompanying notes 140-47.

*California*<sup>23</sup> was decided in 1973, sexual speech, even if not obscene, has been subject to a variety of burdensome restrictions. It has also, ironically, become more fundamentally a part of public discourse. Yet courts still do not generally understand sexual speech as political, or its suppression as an impermissible assault on “dangerous” ideas.

Part III reviews and critiques the way in which courts have handled viewpoint discrimination claims in the contexts of public and nonpublic fora, government subsidies, and other benefits. Here, the rule of viewpoint neutrality is amply justified by the dangers inherent in permitting the state to suppress critical and dissenting ideas through manipulation of its myriad benefit programs. But what of claims that certain government properties or grant monies are simply inappropriate vehicles for communicating “political,” “controversial,” or “offensive” (including sexual) points of view? Courts have shown considerable confusion here, and have sometimes permitted disfavored treatment for the type of expression that most needs constitutional protection.

Part IV evaluates the concept and status of “government speech.” Presumably, a presidential press conference may express the political viewpoint of the administration in power and exclude all others from its podium. Does the same apply, however, to artworks owned by the government, or to government-owned and operated museums, libraries, and broadcast stations? Viewpoint neutrality is not irrelevant in the realm of “government speech,” but plainly the principle should not apply the same way that it does in situations where the government imposes criminal or civil penalties, or facilitates the speech of citizens.

Part V explores the hybrid sphere of public education, where government interests (such as inculcating “civic values”) often clash with the First Amendment principles of diversity, openness, and intellectual inquiry. The complications wrought in the rule of viewpoint neutrality by this tension between the government’s power to inculcate civic values and the constitutional ban on the suppression of disfavored ideas might aptly be called the “*Pico* paradox,” after the Supreme Court’s 1982 attempt to resolve it in the context of public school libraries.<sup>24</sup>

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23. 413 U.S. 15 (1973) (rejecting arguments that there is no constitutional basis for an obscenity exception to the First Amendment).

24. See *Board of Educ. v. Pico*, 457 U.S. 853 (1982); *infra* text accompanying notes 346-62.

The Article concludes that in all these areas viewpoint neutrality must remain a critical principle, but that the concept has been defined too narrowly. To be fully responsive to underlying First Amendment values,<sup>25</sup> viewpoint neutrality must be understood to condemn, at least presumptively, government actions that discriminate against speech deemed “political,” “controversial,” or “offensive,” including expression or information on the subject of sex.

## I. The Semantics of Suppression

### A. Viewpoint Neutrality

The Supreme Court’s special concern for viewpoint neutrality can be traced at least to *Hague v. CIO*,<sup>26</sup> where it struck down an ordinance governing the issuance of permits to speak on public streets. The Court noted that the broad discretion granted city officials under the law could, “as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs.”<sup>27</sup> The Court stated the point more explicitly four years later in *West Virginia State Board of Education v. Barnette*,<sup>28</sup> which invalidated a public school compulsory flag salute because it impermissibly “prescribe[d] what shall be orthodox” in the realm of politics, conscience, and ideas.<sup>29</sup>

Even at the height of McCarthyism in the 1950s, when the Court acquiesced in many executive and legislative initiatives to suppress speech or punish speakers based on a perceived “subversive” viewpoint,<sup>30</sup> the Court paid obeisance to the viewpoint neutrality principle it had announced in *Barnette*. Thus, although the Court in *American Communications Ass’n v. Douds*<sup>31</sup> upheld the notorious federal law requiring labor union officers to take a noncommunist oath, it simultaneously announced its disapproval of laws “frankly aimed at the suppression of dangerous ideas.”<sup>32</sup> The majority asserted that the

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25. See *supra* text accompanying notes 5-6.

26. 307 U.S. 496 (1939).

27. *Id.* at 516.

28. 319 U.S. 624 (1943), *rev’g* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

29. See *supra* text accompanying notes 1-2.

30. See cases cited *infra* note 47; see, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Lawson & Trumbo v. United States*, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950); *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 918 (1951).

31. 339 U.S. 382 (1950).

32. *Id.* at 402. For its condemnation of laws “aimed at the suppression of dangerous ideas,” the Court cited its World War I Espionage Act cases, for example, *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); and *Debs*

noncommunist oath was simply not such a law.<sup>33</sup> Justice Jackson, the author of *Barnette*, not surprisingly dissented on this point.<sup>34</sup>

The year after *Douids*, the Court in *Niemotko v. Maryland*<sup>35</sup> reversed convictions against Jehovah's Witnesses for disorderly conduct based on their use of a public park for Bible talks without a permit. The municipality's permit requirement was unwritten and standardless. Emphasizing, as in *Hague*, the potential for viewpoint discrimination inherent in governmental policies so rich in uncabined discretion, the Court held the city's requirement unconstitutional,<sup>36</sup> and noted that the rule against viewpoint discrimination was grounded in Equal Protection as well as First Amendment principles.<sup>37</sup>

*Douids'* condemnation of laws "frankly aimed at the suppression of dangerous ideas" also drove the result in *Speiser v. Randall*,<sup>38</sup> which struck down a California law requiring a loyalty oath as a qualifying condition for a veterans' tax exemption. Building on the pronouncement in *Douids* that free speech is abridged when government conditions a benefit on the "restraint of [the] exercise" of speech,<sup>39</sup> the

*v. United States*, 249 U.S. 211 (1919), see *Douids*, 339 U.S. at 395 n.9, 402 n.16, as well as the memorable early Holmes and Brandeis opinions asserting that in the First Amendment "marketplace of ideas," offensive, unpopular, and even subversive viewpoints must be protected, see *id.* at 394-95 (citing, e.g., *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

33. Justice Vinson's opinion for the Court recognized the danger of imposing "unconstitutional conditions" on government benefits (in that case, government recognition of labor unions and regulation of labor disputes), but disposed of the danger in circular fashion by explaining that the noncommunist oath was not "frankly aimed at the suppression of dangerous ideas . . . but only against the combinations of those affiliations or beliefs with occupancy of a position of great power over the economy of the country." *Douids*, 339 U.S. at 402-04 (citations and footnotes omitted).

34. See *id.* at 422, 443. Jackson actually agreed with the majority that the noncommunist oath was constitutional, but he objected to the broader requirement of disavowing any belief in forcible overthrow of the government. He pointed out that the United States won its freedom in a revolutionary war that was certainly forcible: "The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all. . . . Thought control is a copyright of totalitarianism, and we have no claim to it." *Id.* at 439-40, 442. Justices Frankfurter and Black also dissented. *Id.* at 415, 445.

35. 340 U.S. 268 (1951).

36. See *id.* at 271-73. Viewpoint discrimination was no mere possibility: the applicants had been questioned about their "alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to unencumbered use of the public parks." *Id.* at 272. The Court concluded "that the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views." *Id.*

37. See *id.* at 272.

38. 357 U.S. 513, 516 (1958).

39. *Id.* at 519. On the development of the "unconstitutional conditions" doctrine, see, for example, *Perry v. Sindermann*, 408 U.S. 593 (1972); Kathleen Sullivan, *Unconstitutional*



*Speiser* Court said that denying a government benefit like a tax exemption because a citizen engaged in certain speech would “necessarily . . . force individuals into political silence,” and “is ‘frankly aimed at the suppression of dangerous ideas.’”<sup>40</sup>

*Cammarano v. United States*<sup>41</sup> reiterated *Speiser*’s rule that denying government benefits to citizens because of their speech amounts to an “unconstitutional condition.” The policy at issue in *Cammarano*, however—disallowance of a business expense tax deduction for lobbying activities—was not such a condition. The Court determined that the policy was speaker-based, not viewpoint-based, that is, not “aimed at the suppression of dangerous ideas.”<sup>42</sup> Congress may constitutionally decide not to subsidize whole types of speech like lobbying.<sup>43</sup> The Court reiterated this distinction between “unconstitutional conditions” and legitimate limits on subsidy programs in another challenge to denial of a tax benefit in *Regan v. Taxation with Representation*,<sup>44</sup> noting that “the case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ‘[aim] at the suppression of dangerous ideas.’”<sup>45</sup>

Unconstitutional conditions and viewpoint discrimination doctrine converged again in *Keyishian v. Board of Regents*.<sup>46</sup> Despite questionable precedents in the 1950s that had permitted punishment of public employees or licensees because of their political viewpoints,<sup>47</sup> the Court in *Keyishian* invalidated a New York law that man-

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*Conditions*, 102 HARV. L. REV. 1413 (1989); and William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). See *infra* text accompanying notes 195-99.

40. *Speiser*, 357 U.S. at 519 (quoting *American Communications Ass’n v. Douds*, 339 U.S. 382, 402 (1950)). This viewpoint bias was not enough in itself to invalidate the law in *Speiser*, since the California Supreme Court had narrowed it to deny exemptions only to claimants “who engage in speech which may be criminally punished” under state or federal antismob laws. *Id.* at 519. The *Speiser* Court instead invalidated the loyalty oath law because it lacked adequate procedural safeguards: “Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.” *Id.* at 526.

41. 358 U.S. 498 (1959).

42. *Id.* at 513.

43. See *id.*

44. 461 U.S. 540 (1983).

45. *Id.* at 548 (quoting *Cammarano*, 358 U.S. at 513; *Speiser*, 357 U.S. at 519)). The Court accepted in both *Cammarano* and *Taxation with Representation* that tax benefits were a form of subsidy. See also *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (“[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints . . .”).

46. 385 U.S. 589 (1967).

47. See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959); *Lerner v. Casey*, 357 U.S. 468 (1958); *Beilan v. Board of Pub. Educ.*, 357 U.S. 399 (1958); *Barsky v. Board of*

dated employment termination for any "treasonable or seditious utterance," and required loyalty checks for public school and university teachers.<sup>48</sup> *Keyishian* was decided on vagueness and overbreadth grounds, but Justice Brennan's majority opinion contains a passionate defense of academic freedom, including the memorable and subsequently much-quoted thought that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."<sup>49</sup>

Following its now well-established viewpoint neutrality principle, the Court in more recent years has continued to invalidate licensing and other benefit schemes that give government officials opportunities for discriminatory decision-making.<sup>50</sup> Conversely, it has upheld regulations that cabin decision-maker discretion and thus do not have "the potential for becoming a means of suppressing a particular point of view."<sup>51</sup>

The Court has also invalidated viewpoint-based criminal laws, noting, for example, in its 1989 and 1990 flag desecration cases, that the government's desire to preserve the national symbol was "implicated only when a person's treatment of the flag communicates a *message* to others that is inconsistent with [certain asserted patriotic] ideals."<sup>52</sup> Similarly, in *R.A.V. v. City of St. Paul*,<sup>53</sup> the Court invali-

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Regents, 347 U.S. 442 (1954); *Adler v. Board of Educ.*, 342 U.S. 485 (1952); *Garner v. Board of Pub. Works*, 341 U.S. 716 (1951).

48. 385 U.S. at 592-96.

49. *Id.* at 603. This was because "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

50. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133-36 (1992) (allowing county administrator to adjust parade permit fee based on amount of expected hostility to speech has potential for discrimination against disfavored views); *City of Lakewood v. Plain Dealer Publ'g*, 486 U.S. 750, 759 (1988) ("[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers . . .").

51. *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 649 (1981); *see also City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (upholding content- and viewpoint-neutral restriction on posting of flyers on public utility poles; "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others").

52. *United States v. Eichman*, 496 U.S. 310, 316 (1990) (emphasis added); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) (striking down flag desecration law; "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Schacht v. United States*, 398 U.S. 58, 62-63 (1970) (holding that law permitting wearing of military uniform in theatrical production only "if the portrayal does not tend to discredit" armed forces violated First Amendment because individ-

dated a hate speech law that had been construed narrowly to ban only constitutionally unprotected “fighting words”<sup>54</sup> because the law singled out for punishment those fighting words that “communicate messages of racial, gender, or religious intolerance.”<sup>55</sup> *R.A.V.* teaches that categorizing some speech as constitutionally unprotected (e.g., fighting words, threats, obscenity) is a judicially sanctioned form of content discrimination; yet even within such categories, government cannot target disfavored messages.<sup>56</sup>

The Supreme Court has thus made plain that the viewpoint neutrality principle applies regardless of whether a government action is direct suppression, “forced speech,” as in *Barnette*,<sup>57</sup> or manipulation of benefit and subsidy programs. And it has applied the principle regardless of the medium being regulated. For example, in the 1994 *Turner Broadcasting* case involving “must-carry” requirements for transmission of network programming via cable television, Justice Kennedy, for the Court, explained:

At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.<sup>58</sup>

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ual cannot be punished “for speaking out against the role of our Army and our country in Vietnam”).

53. 505 U.S. 377 (1992).

54. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stating that “fighting words” are not protected by the First Amendment because they are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”); *infra* text accompanying note 125 (describing use of *Chaplinsky* to justify obscenity exception to First Amendment).

55. 505 U.S. at 394 (emphasis added).

56. See *id.* at 388; see also 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1513 n.20 (1996) (Stevens, Kennedy, Thomas, and Ginsberg, JJ., plurality opinion) (reaffirming this point in *R.A.V.* and rejecting “the greater power includes the lesser” rationale in the context of regulating speech); *infra* note 147.

57. See *supra* text accompanying notes 1-2; *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974) (striking down newspaper right-of-reply statute because it was both content- and viewpoint-based); *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2465 (1994) (stating that statute in *Tornillo* “conferred benefits to speakers based on viewpoint”).

58. 114 S. Ct. at 2458. *Turner Broadcasting* held that the “must carry” provisions were neither content- nor viewpoint-based, and therefore rejected the cable industry’s argument that the strict scrutiny standard of *Tornillo*, see *supra* note 57; *infra* note 105, should apply. Four Justices in *Turner Broadcasting*, however, viewed the must-carry requirement as content-based because it advanced “diversity” and favored local news and public affairs pro-

As Justice Kennedy continued, however, he engaged in a bit of linguistic imprecision that is all too common in this area of the law by merging the concepts of viewpoint and content: "Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."<sup>59</sup>

## B. Rules About Content

As Justice Kennedy's statement in *Turner Broadcasting* suggests, the Supreme Court has sometimes been imprecise in distinguishing between viewpoint and the more generic concept of content. Indeed, while solidifying the viewpoint neutrality principle, the Court was also developing a parallel line of precedent condemning not just viewpoint-based but content-based discrimination by government.<sup>60</sup> In *Police Department v. Mosley*,<sup>61</sup> the case most frequently cited for this proposition, the Court struck down an ordinance that prohibited all picketing next to schools, except picketing relating to labor disputes, and announced in sweeping terms: "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>62</sup>

However, depending on the context, government constantly, and often appropriately, makes decisions that favor some types of speech over others, based on their subject matter or content. The examples are legion: art exhibits on particular themes; research grants for particular projects; merit-based selection decisions by public libraries, broadcast stations, or arts and humanities endowments; tax exemptions for "educational" or "charitable" groups; other tax benefits of the type upheld in *Cammarano*,<sup>63</sup> "limited public for[a]" that are legitimately "reserv[ed] . . . for certain groups or for the discussion of certain topics";<sup>64</sup> and "academic judgments as to how best to allocate

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gramming. See 114 S. Ct. at 2476-77 (O'Connor, Scalia, Ginsburg, and Thomas, JJ., concurring in part and dissenting in part).

59. *Turner Broad.*, 114 S. Ct. at 2459.

60. For scholarly discussion of content discrimination, including the Supreme Court's inconsistencies in articulating and applying the doctrine, see Post, *supra* note 5; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Stone, *supra* note 5; and Williams, *supra* note 5.

61. 408 U.S. 92 (1972).

62. *Id.* at 95.

63. See *supra* text accompanying notes 41-43.

64. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2516-17 (1995) (citing *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)); see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

scarce resources,”<sup>65</sup> including public school and college curricula.<sup>66</sup> Indeed, the constitutional distinction between “commercial” and “political” speech, and the First Amendment exceptions for categories of speech like libel, perjury, extortion, threats, false advertising, or fighting words, are all explicitly content-based.<sup>67</sup> As Justice Stevens observed, the much-vaunted *Mosley* quote, although “often cited as a proposition of law . . . is perhaps more accurately described as a goal or an ideal, for the Court’s decisions do, in actuality, tolerate quite a bit of content-based regulation.”<sup>68</sup>

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65. *Rosenberger*, 115 S. Ct. at 2518 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

66. See, e.g., *Widmar*, 454 U.S. at 278-80 (Stevens, J., concurring) (indicating that public university may legitimately engage in some types of content discrimination, for example, favoring rehearsal of *Hamlet* to Mickey Mouse cartoons for priority access to meeting space, but it may not discriminate based on “its agreement or disagreement with the viewpoint of a particular speaker”); *Avins v. Rutgers*, 385 F.2d 151, 153-54 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) (holding that aspiring scholar has no right to publication in state-funded law review; “the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment”); *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992) (finding merit-based arts grants—unlike criteria such as “decency”—present no First Amendment problem), *aff’d*, No. 92-56028, 1996 U.S. App. LEXIS 28837 (9th Cir. Nov. 5, 1996); *cf.* *Trustees of Leland Stanford, Jr. Univ. v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991) (holding scientific research grants may be based on government decisions about what type of research deserves support, but not subjected to unconstitutional conditions).

This is not to say that content-based judgments about intellectual or artistic merit are never colored by ideological, that is, viewpoint-based, attitudes and assumptions. But at least the argument that decisions ostensibly founded on merit are really viewpoint-based is a testable hypothesis in any given case. “Pretext” is a fact that courts are equipped to identify; and although ideology may sometimes be difficult to separate from “neutral” standards of merit, it is imprecise to say that there can never be a distinction. Librarians, for example, tend to make very different professional judgments about book selection when they are not under pressure from highly politicized school boards or other public officials than when they are. American Library Association standards help avoid politicization and keep the focus on professional judgment, as do evaluations of books by teachers and others professionally trained to assess the quality and educational appropriateness of possible library selections. See, e.g., American Library Association, *Library Bill of Rights* (adopted June 18, 1948; amended Feb. 2, 1961, June 27, 1967, and Jan. 23, 1980) (providing, *inter alia*, that “all libraries are forums for information and ideas”; “[m]aterials should not be excluded because of the origin, background, or views of those contributing to their creation”).

67. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 416-26, 430 (1992) (Stevens, J., concurring), for Justice Stevens’s extensive discussion of this point: “[W]e have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious . . . .” *Cf.* *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2047 (1994) (O’Connor, J., concurring) (noting criticism of content discrimination doctrine).

68. Justice John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1304 (1993). Stevens cited the following examples: the content-based ban on political speech within 100 feet of polling places, upheld in *Burson v. Freeman*, 504 U.S. 191 (1992), see

Consider, in particular, the “nonpublic forum” cases of *Perry Education Ass’n v. Perry Local Educators’ Ass’n*<sup>69</sup> and *Cornelius v. NAACP Legal Defense and Educational Fund*.<sup>70</sup> Since *Hague v. CIO*,<sup>71</sup> the public forum concept has been a staple of First Amendment doctrine, but it was not until *Perry* and *Cornelius* that the Court developed its three-tiered approach, evaluating speech restrictions in public places based upon whether the forum involved is a traditional public forum, a designated public forum, or a nonpublic forum.<sup>72</sup> Where a forum is nonpublic,<sup>73</sup> the government may restrict access based on content if “the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>74</sup> In *Cornelius*, the Court elaborated:

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral. . . . Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . the government violates the First

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*infra* text accompanying notes 76-78; the “gag rule” prohibiting discussion of abortion in federally funded clinics, upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991); distinctions made by courts about the content of alleged defamatory statements in, for example, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); and “countless decisions” made by public university administrators about the content of educational materials. See Justice Stevens, *supra* at 1305.

69. 460 U.S. 37 (1983).

70. 473 U.S. 788 (1985).

71. 307 U.S. 496 (1939); see *supra* text accompanying notes 26-27.

72. See *Perry*, 460 U.S. at 45-46; *Cornelius*, 473 U.S. at 799-806; see also *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995), where the court stated that:

[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of the limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.

*id.* at 2517; *United States v. Kokinda*, 497 U.S. 720, 726-30 (1990) (plurality opinion) (holding reasonable content-based restrictions on speech in nonpublic fora are constitutional provided they are viewpoint-neutral). For criticism of the rigidities of public forum analysis, see G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949; Daniel Farber & John Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); and John V. Snyder, Note, *Forum over Substance: Cornelius v. NAACP Legal Defense and Educational Fund*, 35 CATH. U. L. REV. 307 (1985).

73. See *Perry*, 460 U.S. at 45-46. The school’s internal mail system in *Perry* and the federal employee charity drive in *Cornelius* were found to be nonpublic fora.

74. *Id.* at 46.

Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.<sup>75</sup>

Thus, despite the superficial appeal of the Supreme Court's sweeping language in *Mosley*, it cannot be understood to condemn all government restrictions on expression based on subject matter or content. Such restrictions are not allowed in traditional public fora like sidewalks—the venue involved in *Mosley*—but they are allowed in numerous other contexts.

The 1992 decision in *Burson v. Freeman*<sup>76</sup> nicely illustrates this distinction. The Court upheld a content-based but viewpoint-neutral ban on political campaigning within 100 feet of a polling place. Context—the time and place of the speech in question—combined with the state's compelling interest in assuring the right to vote freely and the integrity of the election process, were held to justify the ban.<sup>77</sup> Whether or not one agrees that the government had a compelling interest in *Burson*, the content-based law obviously would have been unconstitutional had it prohibited some but not all campaign speech based on the viewpoint expressed.<sup>78</sup> Arguably, strict scrutiny was an unduly harsh standard to apply to the nonpartisan content-based regulation in *Burson*, although strict scrutiny, if not per se invalidation, would have applied to viewpoint discrimination in such circumstances.

Yet, the line of cases flowing from *Mosley* that broadly condemn content discrimination has continued. In *Carey v. Brown*,<sup>79</sup> the Court reaffirmed the *Mosley* language, using the terms “message,” “content,” and “subject matter” interchangeably,<sup>80</sup> even though the dis-

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75. 473 U.S. at 806 (citations omitted). *Cornelius* upheld exclusion of political and legal advocacy organizations from a federal charity drive because, according to the Court, the discrimination was based merely on subject matter and speaker, not viewpoint—even though one justification for the exclusion was to avoid controversy. *Id.* at 808. The *Cornelius* Court did, however, recognize the ease with which content restrictions can be pretexts for the suppression of ideas, especially when the discrimination is against “controversial” speech: “[T]he purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers.” *Id.* at 812.

76. 504 U.S. 191 (1992).

77. *See id.* at 199-206; *see also* *Hevesi v. Metropolitan Trans. Auth.*, 827 F. Supp. 1069, 1072 (S.D.N.Y. 1993) (finding that government had compelling interest in content-based exclusion of all political candidate campaign ads).

78. For example, a law permitting signs favoring incumbent candidates but banning signs criticizing them or favoring their challengers would be blatantly and impermissibly viewpoint-based.

79. 447 U.S. 455 (1980) (striking down a statute that prohibited all picketing of residences excepting labor picketing).

80. *Id.* at 459-63; *see also* *Longo v. United States Postal Serv.*, 953 F.2d 790, 796 (2d Cir. 1991) (“The term ‘content’ embodies several related, yet different concepts. . . . The

crimination there, as in *Mosley*, was by subject matter and not viewpoint. Likewise, *Carey*'s companion case, *Consolidated Edison Co. v. Public Service Commission*,<sup>81</sup> found restrictions on speech involving "controversial issues of public policy" to be content- and not viewpoint-based, but nonetheless struck them down. In highly generalized language, the Court unhelpfully fused the two concepts: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."<sup>82</sup> This proposition has great rhetorical appeal, but does not account for the many situations where government may legitimately limit the "permissible subjects for debate," for example, university classrooms, or school board meetings, where different viewpoints must be allowed but certainly the subject matter can be limited to the items on the agenda.<sup>83</sup>

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distinction between content and viewpoint . . . is occasionally blurred . . .") (citing *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 295 (1984) (holding regulation was content-neutral because not applied on grounds of disagreement with message presented) and *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 135 (1981) (holding regulation prohibiting unstamped mail was content-neutral because "not directed at the content of the message appellees seek to convey")), *vacated and remanded*, 506 U.S. 802, *adhered to*, 983 F.2d 9 (2d Cir. 1992), *and cert. denied*, 509 U.S. 904 (1993); *Leathers v. Medlock*, 499 U.S. 439, 447-48 (1991) (upholding content-neutral tax that singled out cable television medium but reiterating that "differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. . . . [T]he fear is censorship. . . . [A] tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech").

81. 447 U.S. 530 (1980).

82. *Id.* at 538; *see infra* text accompanying notes 90-92. The order arose from an environmental group's attempt to gain access to billing envelopes for an antinuclear power message to counter the utility's mailing of material extolling the glories of nuclear energy. The commission evidently decided that enforced silence on all sides was the best policy. The Supreme Court disagreed: "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 537 (citing *Mosley*, 408 U.S. at 95).

83. *See, e.g.*, *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-55 (1983). For cases in which the Court has relied on the broad *Mosley* language, *see Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987), invalidating a state tax that singled out magazines with certain subject matter and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (1983), invalidating a tax that not only singled out the press for special burdens but discriminated against a small number of magazines based on size. The D.C. Circuit has pointed out that underinclusive laws like those in *Ragland* and *Minneapolis Star*, that "single[ ] out some conduct for adverse treatment, and leave[ ] untouched conduct that seems indistinguishable in terms of the law's ostensible purpose" are "bound to raise a suspicion that the law's true target is the message" of the disfavored speakers. *News America Publ'g, Inc. v. FCC*, 844 F.2d 800, 805 (D.C. Cir. 1988).



Similarly, *Simon & Schuster v. Members of the New York State Crime Victims Board*<sup>84</sup> voided a statute that singled out stories of past crimes for burdensome regulation, reaffirming *Mosley* and noting that not only viewpoint but also content discrimination is constitutionally suspect.<sup>85</sup> The Court did not explain why content discrimination in contexts like *Simon & Schuster* is condemned, while in other contexts like *Perry* and *Cornelius* it is permitted.

Undoubtedly, the difference has to do in part with the fact that *Perry* and *Cornelius* involved government property that had not been opened as public fora for citizen speech, while the restrictions in *Mosley* and *Carey* applied to public fora, and in *Simon & Schuster* to speech generated privately. Yet these differences are more factual than analytical. They do not explain why content-neutral restrictions on speech should not also be condemned when targeted to public fora or private property.<sup>86</sup> If the truly compelling First Amendment principle is viewpoint neutrality, is there really need for a separate content neutrality rule that is so rife with exceptions and so often articulated in fuzzy language that merges the two concepts? At the very least, the content discrimination doctrine might be less necessary to protect underlying First Amendment values if viewpoint discrimination were properly understood to include the categories of “political,” “controversial,” or “offensive” ideas.

### C. Political, Controversial, and Religious Speech

Returning to the *Burson v. Freeman* hypothetical discussed above: it surely would have been as unconstitutional to ban only “controversial” campaign signs within 100 feet of a polling place as it would have been to ban only signs favoring a particular viewpoint. Not only would such a restriction give undue discretion to government officials to decide what is “controversial” in the highly charged context of a political campaign, it would almost by definition discriminate against nonmainstream candidates and ideas. The example helps illus-

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84. 502 U.S. 105 (1991).

85. *Id.* at 117 (quoting *Minneapolis Star & Tribune Co.*, 460 U.S. at 592).

86. Indeed, cases and commentators have recognized the dangers in content-neutral restrictions that are overbroad. *See, e.g.*, *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995) (striking down ban on federal employees’ receipt of honoraria for speeches or articles); *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (treating municipal ban on private property signs as content-neutral but striking it down nonetheless); Post, *supra* note 5 (critiquing content-neutrality doctrine as arid, incoherent, and ungrounded in social realities); Williams, *supra* note 5 (criticizing application of lower scrutiny to content-neutral regulations that may have effect of suppressing speech).

trate why categorizing speech as “political,” “controversial,” or “offensive” is usually a proxy for suppressing the ideas presented.

Yet the Supreme Court indicated in several cases before *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>87</sup> that it did not understand discrimination against “controversial” or “political” speech to be viewpoint-based. The 1974 decision in *Lehman v. City of Shaker Heights*<sup>88</sup> perhaps set the tone for this line of cases. *Lehman* upheld a ban on political advertising on city buses because, according to the four-judge plurality, the advertising space was not a public forum, busriders were a “captive audience,” city managers reasonably limited the space to “innocuous and less controversial commercial and service oriented advertising,” and the policy was not “arbitrary, capricious or invidious.”<sup>89</sup>

In *Consolidated Edison v. Public Service Commission*,<sup>90</sup> by contrast, the Court at least addressed the viewpoint discrimination concerns raised by an agency ban on “public policy” inserts in utility bill mailings. The Court accepted the Commission’s argument that the content-based ban did “not favor either side of a political controversy,”<sup>91</sup> but invalidated it nonetheless as an unconstitutional restriction on “permissible subjects for public debate.”<sup>92</sup> The Court thus appeared to recognize that suppressing “political” or “controversial”

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87. 115 S. Ct. 2510 (1995); see *infra* text accompanying notes 112-19.

88. 418 U.S. 298 (1974).

89. *Id.* at 304, 303. Justice Douglas’s concurrence relied primarily on the “captive audience” theory. *Id.* at 306, 307. Justice Brennan’s dissent, joined by Justices Stewart, Marshall, and Powell, argued that to “sanction the city’s preference for bland commercialism and noncontroversial public service messages over ‘uninhibited, robust, and wide-open’ debate on public issues, would reverse the traditional priorities of the First Amendment.” *Id.* at 315 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The dissent understood the ban as viewpoint-based even though discriminating “among entire classes of ideas,” and demonstrated how it would operate to allow product advertisements but squelch anti-product messages, for example, pleas for environmental protection. *Id.* at 316-17.

90. 447 U.S. 530 (1980); see *supra* text accompanying notes 81-82.

91. *Consolidated Edison*, 447 U.S. at 537.

92. *Id.* at 538. The Court distinguished *Lehman*, 418 U.S. 298, and *Greer v. Spock*, 424 U.S. 828 (1976), which upheld a military base ban on partisan political speech as “narrow exceptions to the general prohibition against subject-matter distinctions,” justified because in those circumstances political speech “would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.” *Consolidated Edison*, 447 U.S. at 539. Justice Stevens, concurring in *Consolidated Edison*, argued that a subject matter ban on politically controversial speech is unconstitutional per se, because it is such an obvious vehicle for skewing public debate. *Id.* at 545-48. Justice Stevens saw no real distinction between content and viewpoint discrimination in the context of potentially controversial speech. *Id.* at 546; see also Stone, *supra* note 5, at 90-92 (criticizing *Lehman* for its result orientation and failure to reconcile *Mosley*).

speech is, in both purpose and effect, very like viewpoint discrimination. Yet, in *Cornelius* (five years later), the Court not only tolerated excluding a category of “controversial” speech from a nonpublic forum, it approved the exclusion precisely because it seemed “reasonably” designed to avoid the appearance of political favoritism.<sup>93</sup>

The problem of categorizing “controversial” or “political” speech arose again in *FCC v. League of Women Voters*,<sup>94</sup> where the Court invalidated a ban on “editorializing” by broadcasters that received public funds. The FCC and the Court interpreted the ban to suppress opinions about “controversial issues of public importance.”<sup>95</sup> The Supreme Court’s decision again rested only on content discrimination, although the Court quoted the language from *Consolidated Edison* linking suppression of speech on “controversial issues of public policy” with viewpoint restrictions.<sup>96</sup> Moreover, the ban on editorializing targeted controversial *political* speech, which the Court emphasized has always rested on the “highest rung of the hierarchy of First Amendment values,”<sup>97</sup> and is “indispensable to the discovery and spread of political truth.”<sup>98</sup> Yet the Court backed off from equating “controversial” or “political” with “viewpoint-based,” returning instead to the statement in *Consolidated Edison* that the First Amendment extended to restrictions on discussion of an entire topic<sup>99</sup>—an unhelpful point analytically since precisely such restrictions were upheld in *Perry* and *Cornelius* in the context of nonpublic fora, while in *Taxation with Representation*<sup>100</sup> discrimination in subsidy programs

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93. See *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 809 (1985); *supra* text accompanying notes 69-75; see also *Lehman*, 418 U.S. at 303-04 (stating that potentially controversial nature of political ads justified exclusion from city buses).

94. 468 U.S. 364 (1984).

95. *Id.* at 381 (quoting *Accuracy in Media, Inc.*, 45 F.C.C. 2d 297, 302 (1973)).

96. *Id.* at 383-84; see *supra* text accompanying notes 81-82. In *FCC v. League of Women Voters*, only the public broadcasting stations themselves were prohibited from expressing their views through editorials; they were free to carry programs on controversial subjects airing the views of others. *Id.* at 383-84. Thus, the Court found that even if some of the interests asserted by the government in support of the ban were “sufficiently substantial” to justify the restriction on speech, the restriction was “not crafted with sufficient precision to remedy those dangers.” *Id.* at 398-99.

97. *Id.* at 381 (quoting *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982), and *Carey v. Brown*, 447 U.S. 455, 467 (1980) (Brandeis, J., concurring)).

98. *Id.* at 383 (quoting *Carey*, 447 U.S. at 483, and *Whitney v. California*, 247 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

99. See *id.* at 384.

100. 461 U.S. 540 (1983).

against certain types of speech activity (viz. lobbying) was also upheld.<sup>101</sup>

*League of Women Voters* may have maintained the “content/viewpoint” distinction and kept discrimination against “controversial” or “political” speech on the “content” side of the line, but it did so in a way that blurred the boundaries even more than in *Consolidated Edison*, and it certainly implied that where “controversial” or “political” expression is suppressed, the policy in question is automatically suspect, and an exacting type of First Amendment scrutiny must follow. In a sense, “controversial” or “political” speech now seemed to occupy a borderland between explicit suppression of specific ideas and types of content discrimination deemed to be relatively untroubling as a First Amendment matter—for example, subject matter restrictions on access to nonpublic fora, or merit-based curriculum decisions in public universities.

But if *League of Women Voters* seemed to weaken the boundaries, the Court in *Boos v. Barry*<sup>102</sup> four years later resurrected the content/viewpoint distinction in an almost Jesuitical way. Although the Court struck down a regulation that prohibited signs bringing a foreign government “into public disrepute” within 500 feet of that government’s embassy, Justice O’Connor, speaking for a plurality, said the law was viewpoint-neutral since it did not ban specific ideas.<sup>103</sup> Rather, it neutrally banned *any* view critical of a particular government.<sup>104</sup>

This is a crabbed definition of viewpoint, to say the least. Allowing affirmative and uncritical opinions to be expressed, but not

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101. See *id.*; *supra* text accompanying notes 41-45. The Court in *League of Women Voters* distinguished *Taxation with Representation* on the ground that some of the broadcasters involved in *League of Women Voters* received as little as 1% of their income from government funds but were still barred from editorializing, thereby placing the case in the “unconstitutional conditions” rather than the subsidy category. See *League of Women Voters*, 468 U.S. at 399-401; *supra* note 33; text accompanying notes 38-49. This distinction, however, only demonstrated that the Court analyzes limits on subsidy programs differently from unconstitutional conditions, that is, relinquishments of rights imposed as conditions of government benefits. It does not explain why content discrimination is acceptable in one context and not in another.

102. 485 U.S. 312 (1988).

103. See *id.* at 319.

104. See *id.* Justices Brennan and Marshall did not join in this portion of Justice O’Connor’s opinion for reasons unrelated to the content/viewpoint distinction. See *id.* at 334-39 (taking issue with Court’s earlier holding in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), that explicitly content-based laws can nevertheless sometimes be deemed content-neutral if aimed at the “secondary effects” of speech—there, alleged crime and other social ills associated with adult entertainment).

negative or critical ones, appears to be classic viewpoint discrimination, even in its narrowest sense. As Justice O'Connor acknowledged, dissenting views on matters of international politics are precisely the type of speech that is ordinarily recognized as within the core of First Amendment concern.<sup>105</sup> Moreover, acquiescence in the ideological objections of others to controversial political opinions—whether those others be politicians, community leaders, or foreign governments—is simply a more subtle form of viewpoint discrimination, and is thus not an acceptable justification for suppressing speech.<sup>106</sup> But content discrimination was enough to invalidate the regulation in *Boos*, given that the ban silenced “public discussion of an entire topic,”<sup>107</sup> and that the censored speech would take place in the “traditional public fora”

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105. See *Boos*, 485 U.S. at 318; see also *League of Women Voters*, 468 U.S. at 381-82; cases cited *supra* note 14. Compare *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), where the Court found viewpoint discrimination in analogous circumstances: a requirement that utilities allow opposing points of view on political issues in their billing envelopes. In both *Boos* and *Pacific Gas*, the government mandate was not explicitly viewpoint-based but was triggered by reference to a viewpoint expressed by others—in *Boos* a foreign government; in *Pacific Gas* a private utility. Yet in *Pacific Gas* the Court made the mental leap that eluded it in *Boos*, observing that, as in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the private speaker’s “expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the [private speaker] disagreed, to use the [private speaker’s] facilities to spread their own message. . . . [B]y forcing the [private speaker] to disseminate opponents’ views, the statute penalized the [private speaker’s] own expression,” *Pacific Gas & Elec. Co.*, 475 U.S. at 10.

106. Acquiescence in the viewpoint discrimination of others is outside the scope of this Article. Suffice it to note that several courts have observed that illegitimate purpose and adverse effect on speech are present when acquiescence is at work just as when government decisionmakers are themselves hostile toward the expression in question. See, e.g., *Gay & Lesbian Students v. Gohn*, 850 F.2d 361, 367 (8th Cir. 1988) (holding that homophobic political pressure from legislators was not a justification for denying funding to student group); *Brown v. Board of Regents*, 640 F. Supp. 674, 679 (D. Neb. 1986) (cancelling of film *Hail Mary* because of complaints from religious community and fear of controversy); *Dean v. Timpson Indep. Sch. Dist.*, 486 F. Supp. 302, 308 (E.D. Tex. 1979) (firing teacher because of majoritarian pressure and desire to avoid controversy); *Wilson v. Chancellor*, 418 F. Supp. 1358, 1364 (D. Ore. 1976) (banning communist speaker “in order to placate angry residents and taxpayers”); *DiBona v. Matthews*, 220 Cal. App. 3d 1329, 1344, *cert. denied*, 498 U.S. 998 (1990) (cancelling of theatrical production because of political pressure); Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint Discrimination*, 9 HARV. J.L. & P. POL’Y 461, 466 (1986) (arguing that speech restrictions triggered by “hostile audience” have “distinct viewpoint-differential effects” and thus “should be tested by standards of viewpoint based review”); cf. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (holding community bias against mentally retarded not an acceptable justification for discrimination); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding societal racism not an acceptable justification for discrimination); *Buchanan v. Warley*, 245 U.S. 60 (1917) (stating that racial segregation cannot be sustained upon the grounds of societal acceptance).

107. 485 U.S. at 319 (quoting *Consolidated Edison v. Public Serv. Comm’n*, 447 U.S. 530, 537 (1980)).

of streets and sidewalks.<sup>108</sup> Because removing an entire *subject matter* from public discussion is not content-neutral, the regulation failed under classic public forum analysis.<sup>109</sup>

The Supreme Court took a markedly more expansive approach to viewpoint five years later in *Lamb's Chapel v. Center Moriches Union Free School District*.<sup>110</sup> In *Lamb's Chapel*, the Court held that a school district's refusal to permit the showing of a film with a religious perspective on child rearing and family values during nonschool hours was impermissibly viewpoint-based where secular groups were allowed to use school premises during these same hours to address the same subject matter.<sup>111</sup> The *Lamb's Chapel* majority did not seem concerned that there are countless differing, even opposing, "religious" perspectives on family life; the views of some religions on child rearing, birth control, divorce, or premarital sex are undoubtedly closer to those of many secular groups than to those of other religions. Ignoring its much more niggardly construction of viewpoint in *Boos*, the *Lamb's Chapel* Court expanded the concept of viewpoint to embrace broad "perspectives" such as religion.

Any thought that *Lamb's Chapel* might be an aberration was put to rest two years later in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>112</sup> which struck down, as impermissibly viewpoint-based, a state university rule excluding religious publications from eligibility for student activity funds. Merging its *Mosley*<sup>113</sup> line of precedents with language in cases like *Perry* and *Cornelius* that applies the principle of viewpoint neutrality to government benefits and subsidies, the Court said that "[v]iewpoint discrimination is . . . an

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108. *Id.* at 318 (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

109. *See id.* at 318-19, 321-22. The *Boos* Court rejected the government's attempted argument by analogy to the adult zoning case of *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), that the regulation was legitimately directed to the perceived adverse "secondary effects" of critical speech in proximity to foreign embassies. Listener reaction to speech, as the Court pointed out, is not the type of adverse effect it said could legitimately be regulated in *Renton*—that is, an effect *unrelated* to content. *Boos*, 485 U.S. at 320-21; *see also* *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (finding possibility of public disorder not a secondary effect within the meaning of *Renton* because it depends on public's reaction to content of speech).

110. 508 U.S. 384 (1993).

111. *See id.* at 390-91. Justice White wrote the majority opinion; Justices Kennedy and Scalia (joined by Thomas) filed concurrences, primarily to articulate their own views on the district's Establishment Clause defense. None addressed the expansion of the concept of viewpoint.

112. 115 S. Ct. 2510 (1995).

113. *See supra* text accompanying notes 61-62, 79-85.

egregious form of content discrimination,” and is not a permissible basis for disfavoring speech.<sup>114</sup>

In *Rosenberger*, as in *Lamb’s Chapel*, it was the plaintiffs’ religious viewpoint, not simply religious “content,” as the University argued, that drove the exclusion.<sup>115</sup> The Court acknowledged that “the distinction is not a precise one,” and indeed, that “[i]t is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought.”<sup>116</sup> Nevertheless, the University’s exclusion was viewpoint-based because it permitted funding of publications that approached the subject matter of religion from secular perspectives, but “select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints.”<sup>117</sup>

The five-justice majority in *Rosenberger* rejected the dissenters’ *Boos*-based argument that the University guidelines were viewpoint-neutral because they discriminated against “an entire class of viewpoints.”<sup>118</sup> Public debate, observed the majority, is not “bipolar”: “[T]he complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. . . . The dissent’s declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.”<sup>119</sup>

This insight is critical to the theory of viewpoint discrimination. And it applies equally to “political” or “controversial” speech as it does to religious speech. Multiple voices are silenced; “the debate is skewed in multiple ways” when those expounding “political” or “controversial” ideas are denied government benefits such as tax exemp-

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114. *Rosenberger*, 115 S. Ct. at 2516. The majority distinguished *Rust v. Sullivan*, 500 U.S. 173 (1991), upholding a restriction on discussion of abortion in family planning clinics that received federal funds, on the ground that in *Rust* the ban was not applied to “a program to encourage private speech,” but instead governed only private speakers used by the government “to transmit specific information pertaining to its own program.” *Rosenberger*, 115 S. Ct. at 2519; see *infra* Part IV (discussing government speech).

115. See *Rosenberger*, 115 S. Ct. at 2517.

116. *Id.*

117. *Id.*

118. *Id.* at 2518.

119. *Id.* The Court disposed of some amici’s argument that the Establishment Clause prohibits direct government funding of religion in part by pointing out that the University’s check went to the printer of the student publication, not the student group itself, *id.* at 2524—a dubious distinction. The University had abandoned reliance on the Establishment Clause even though it was the basis for the Fourth Circuit’s decision upholding the funding disqualification. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 18 F.3d 269 (4th Cir. 1994), *rev’d*, 115 S. Ct. 2510 (1995).

tions, access to government property, and the opportunity to compete for grants and subsidies. As Justice Brennan pointed out, dissenting in *Lehman v. City of Shaker Heights*,<sup>120</sup> discrimination does not become “any less odious” when it is “among entire classes of ideas, rather than among points of view within a particular class.”<sup>121</sup>

The Court has repeatedly recognized that controversial political viewpoints are “the essence of First Amendment expression.”<sup>122</sup> The viewpoint neutrality rule is designed precisely to protect this “essence” by preventing government suppression of controversial or otherwise disfavored ideas. That purpose is ill-served, as the *Lamb’s Chapel* and *Rosenberger* Courts recognized, if government may accomplish its goal by suppressing an entire category of viewpoints—be they religious, “political,” “controversial,” or “offensive.” Speech that is controversial, that “induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger,”<sup>123</sup> is precisely the speech most in need of constitutional protection. *Rosenberger*, which refused to permit government to “skew” public debate by disadvantaging whole categories of ideas, compels the conclusion that restrictions on speech deemed “political,” “offensive,” or “controversial,” must be understood as viewpoint-based.

## II. Sex, Vulgarity, and Offensiveness

Of all the types of speech historically deemed “controversial” or “offensive” in American society, speech about sex has frequently been at or near the top of the list. Second-class constitutional citizenship for sexual speech officially began in 1957 when the Supreme Court ruled in *Roth v. United States*<sup>124</sup> that although sex is a “great and mysterious motive force in human life,” so that most art, literature, and other expression on the subject is protected by the First Amendment, there is nevertheless a subcategory of sex-related speech, so-called obscenity, that may be prohibited because it is “utterly without redeeming social importance” and “no essential part of any exposition of

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120. 418 U.S. 298 (1974); see *supra* text accompanying notes 88-89.

121. *Lehman*, 418 U.S. at 316 (Brennan, J., dissenting); see also *The Supreme Court, 1994 Term—Leading Cases*, 109 HARV. L. REV. 111, 215 (1995) (positing that after *Rosenberger*, bans on “political” or “race-related” speech must be seen as viewpoint-based).

122. *McIntyre v. Ohio Elections Comm’n*, 115 S. Ct. 1511, 1519 (1995); see cases cited *supra* note 14; see also, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984); *Consolidated Edison v. Public Serv. Comm’n*, 447 U.S. 530, 538 (1980); *Id.* at 545-48 (Stevens, J., concurring); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

123. *Johnson*, 491 U.S. at 408-09 (quoting *Terminiello*, 337 U.S. at 4).

124. 354 U.S. 476 (1957).



ideas.”<sup>125</sup> Although “redeeming social importance” is a strange value judgment to repose in courts and other government agencies, at least *Roth* established that *most* speech about sex is constitutionally protected.

In *Miller v. California*,<sup>126</sup> sixteen years after *Roth*, the Court modified its definition of obscenity<sup>127</sup> but reiterated that a line exists that separates “obscenity” from constitutionally protected speech about sex.<sup>128</sup> The Court now, however, articulated a test for locating that “dim and uncertain” line,<sup>129</sup> that turned in part on “offensiveness”<sup>130</sup>—a content- if not viewpoint-based concept that the Court has otherwise insisted is *not* a permissible basis for restricting speech.<sup>131</sup>

Despite challenges, such as those raised by the defendant in *Miller*, the Court has adhered to its pronouncement in *Roth* that some sexual expression lacks constitutional protection because it is “no essential part of any exposition of ideas.”<sup>132</sup> Indeed, even sexual speech

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125. *Id.* at 484, 485 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). The origin of this language in *Chaplinsky* was Professor Zechariah Chafee, Jr, FREEDOM OF SPEECH 170 (1920). See David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 54 n.40 (1992). Rabban points out that before the 1920s, many free speech advocates had a more expansive view of what the First Amendment protected (including, decidedly, speech about sex) than did Chafee, the early ACLU, or other champions of a more narrowly “political” concept.

126. 413 U.S. 15 (1973).

127. The familiar *Miller* three-part test for obscenity requires the government to prove that the material, taken as a whole, appeals to a prurient interest in sex; that the material depicts or describes specific sexual conduct, as defined by applicable state law, in a manner that is patently offensive as measured by contemporary community standards; and that the material, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24; see also *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-05 (1985) (clarifying that “prurient” means morbid or shameful, not healthy, interest in sex).

128. See *Miller*, 413 U.S. at 24, 27, 35, 36 (limiting obscenity to “hard core” pornographic materials; the “public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain”). In some communities, of course, even hard core pornography may not be “patently offensive.” See, e.g., *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 136-37 (2d Cir. 1983).

129. The line is “dim and uncertain,” as the Court had admitted ten years before in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

130. See *supra* note 127. The “patent offensiveness” prong of the obscenity test was introduced in *Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413, 418 (1966).

131. See *supra* note 52; *infra* text accompanying notes 149-52. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citing thirteen Supreme Court precedents in support of the proposition that government “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

132. Justice Brennan, dissenting in a companion case to *Miller*, admitted that he had been wrong sixteen years earlier in his opinion for the Court in *Roth* to think that a coherent line could be drawn between obscenity and constitutionally protected expression with sexual content. Joined by Justices Stewart and Marshall, Brennan urged the invalidation of

that clearly contains ideas has lost protection since *Miller*. Judicially approved censorship of sexually oriented expression, for example, now includes the FCC's regulation of programming it deems "indecent" on radio and television,<sup>133</sup> removal of classic, raunchy literary works from school curricula,<sup>134</sup> and punishment of students for sexual innuendos delivered at school assemblies.<sup>135</sup> It also encompasses nude entertainment, at least if not presented in upscale artistic ve-

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all obscenity laws that applied to consenting adults largely on grounds of incurable vagueness. See *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 84 (1973). Justice Brennan admitted that:

[A]fter 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level . . . . Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we 'know it when [we] see it,' *Jacobellis v. Ohio*, . . . we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

*Id.* (citations omitted).

133. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), cert. denied, 116 S. Ct. 701 (1996) [hereinafter ACT III]; *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 503 U.S. 914 (1992); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Compare *Sable Communications v. FCC*, 492 U.S. 115 (1989), which held that "indecent" is protected by First Amendment and cannot be banned outright in telephone communications, with *Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992), and *Information Providers Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991), which approved "indecent" regulation of commercial telephone services to restrict access by minors. "Indecency" is defined by the FCC as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." ACT III, *supra* at 657; *Pacifica*, 438 U.S. at 732. In 1992, Congress used this "indecent" definition as a standard for censoring expression on public and leased access cable television channels. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996) (upholding one and striking down two sections of the 1992 cable television indecency law). In February 1996 Congress imported the indecency standard into legislation to criminalize online computer display of "indecent" speech in a manner "available" to minors; four months later, a three-judge federal court preliminarily enjoined enforcement of the law, ruling that it impermissibly censored valuable online communications. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa.) (three-judge court), *probable juris. noted*, 65 U.S.L.W. 3414 (U.S. Dec. 6, 1996); see also *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y.) (three-judge court), *juris. statement filed* (Oct. 15, 1996).

134. See *Virgil v. School Bd.*, 862 F.2d 1517 (11th Cir. 1989); *infra* text accompanying notes 174-78.

135. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *infra* text accompanying notes 167-71, 363-66.

nues,<sup>136</sup> and burdensome zoning regulation of adult book and video stores.<sup>137</sup> Despite the emphasis in *Roth* on the importance of protecting ideas and information about sexuality, that “great and mysterious motive force,” and the Court’s reiteration in *Sable Communications v. Federal Communications Commission*<sup>138</sup> that nonobscene speech about sex is protected by the First Amendment, the Court has nevertheless, as a practical matter, relegated sexual speech in many contexts to a lesser constitutional status, even if the speech has significant literary or other value and comes nowhere close to the obscenity line.<sup>139</sup>

The justification for this shrinking of constitutional protection for speech about sex is more an attitude than a theory. The attitude was most memorably expressed by Justice Stevens’s plurality opinion in an adult zoning case, *Young v. American Mini Theatres*.<sup>140</sup> “[F]ew of us,” wrote Stevens, “would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”<sup>141</sup> Chief Justice Burger conveyed the same judicial attitude in somewhat less catchy prose in *Paris Adult Theatre v. Slaton*.<sup>142</sup> The state has a compelling interest in “order and morality,”<sup>143</sup> said Burger, and specifically in

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136. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (describing nude bar-room-type dancing as only “marginally” protected by the First Amendment). One court pre-*Barnes* held nude dancing to be entirely without First Amendment protection, *Walker v. City of Kansas City*, 911 F.2d 80, 85 (8th Cir. 1990); others held the opposite, for example, *Miller v. City of South Bend*, 904 F.2d 1081, 1085 (7th Cir. 1990) (en banc), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560. But cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12 (1975) (prohibiting drive-in theaters from exhibiting films containing nudity is unconstitutionally overbroad and content-based).

137. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *Renton* was premised on the unusual proposition that regulations specifically targeting adult entertainment are not content-based if they are aimed at controlling the materials’ alleged “secondary effects”: crime, prostitution, and urban blight. *Id.* at 47-51; see *supra* note 109. Similar regulations had been upheld in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), but the *Young* decision was more candid than *Renton* because it did not pretend that such zoning was content-neutral; it simply asserted that the discrimination was justified by the government’s interest in avoiding the asserted adverse effects of adult entertainment. *Id.* at 63-73. Justice Powell, concurring in *Young*, proposed the “secondary effects” test later used in *Renton*; see 427 U.S. at 73-84.

138. 492 U.S. 115, 126 (1989) (“Sexual expression which is indecent but not obscene is protected by the First Amendment . . .”).

139. See *supra* notes 133-37.

140. 427 U.S. 50 (1976).

141. *Id.* at 70.

142. 413 U.S. 49 (1973).

143. *Id.* at 61.

quality of life and the total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself. . . .

The sum of experience . . . affords ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.<sup>144</sup>

The notion inherent in Chief Justice Burger's argument, that speech may be prohibited based on subjective judgments about sexual morality, "community welfare," and "development of the human personality," without even empirical evidence of harm, may seem oddly out of whack with the Court's frequent pronouncements against laws "aimed at the suppression of dangerous ideas."<sup>145</sup> Certainly, the notion that pornography, or "crass commercial exploitation" of sexuality, is debasing or harms the institution of marriage is a value judgment in the profoundest sense, embodying ideas about sex, marriage, family, and community that one would think the First Amendment entitles citizens to question, challenge, and reject.<sup>146</sup> Chief Justice Burger's peroration in *Slaton* itself demonstrates that, despite the Court's protestations that obscenity is "no essential part of any exposition of ideas," the obscenity exception to the First Amendment has everything to do with government suppression of ideas about sex that it does not like. In other words, the justification for obscenity law is a "court-approved system of values."<sup>147</sup>

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144. *Id.* at 58, 63. The Court noted but did not rely upon opinions of some experts that pornography "may induce antisocial conduct by the average person." *Id.* at 58 n.8.

145. *Speiser v. Randall*, 357 U.S. 513, 519 (1958); *see supra* text accompanying notes 32, 38-40.

146. As Justice Brennan noted in his *Slaton* dissent, "'explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times, these materials also appear to serve to increase and facilitate constructive communication about sexual matters within [a] marriage.'" 413 U.S. at 108 n.26 (quoting REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53 (1970)) (emphasis added).

147. P. Heath Brookwell, *Grappling with Miller v. California: The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131, 138 (1993-94).

The Supreme Court has recognized that viewpoint bias may creep into obscenity or indecency enforcement. Thus, Justice Stevens in his plurality opinion in *Pacifica*, 438 U.S. 726 (1978), upholding the FCC's ban on the broadcast during all but late-night hours of certain "filthy words" that the agency deemed "indecent," opined that the bawdy words in the comic monologue at issue in the case were "no essential part of any exposition of ideas," and were only censored by the FCC because of their shock value, not because of

The Court's failure to see its value-laden condemnation of "obscenity" as viewpoint-based<sup>148</sup> is especially troubling in light of *Miller v. California*'s incorporation of "patent offensiveness" in the test for determining constitutional status. "Offensiveness" is not a permissible standard for government regulation of any other category of speech.<sup>149</sup> As the Court recognized in both *Cohen v. California*<sup>150</sup> and *Hustler Magazine v. Falwell*,<sup>151</sup> offensive, outrageous, scabrous, sexually loaded speech often has deep political implications:

[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon

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their "political content," *id.* at 746. Justice Stevens even conceded that the monologue presented a "point of view; it attempts to show that the words it uses are 'harmless' and that our attitudes toward them are 'essentially silly.'" *Id.* at 746 n.22. However, Justice Stevens insisted that the FCC did not punish the broadcaster for this reason. *See id.*

Likewise, as the Supreme Court explained in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), striking down a hate speech law that discriminated against racist and other pernicious viewpoints, even within an unprotected category of speech like fighting words or obscenity, government may not single out for punishment only disfavored messages. *See supra* text accompanying notes 53-56. An obscenity law, for example, may not punish only material that promotes the idea of nonprocreative sex, purely for pleasure, while exempting equally explicit material with the message that only procreative sex is acceptable. *See R.A.V.*, 505 U.S. at 388 (citing *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991)). The Court in *R.A.V.* did not explain why this distinction is viewpoint-based while a distinction between sex that sends a message of "crass commercial exploitation" and sex that promotes "family values" is not.

148. Two U.S. courts have perceived that suppression of sexual or "indecent" content amounts to viewpoint discrimination. *See Finley v. National Endowment for the Arts*, No. 92-56028, 1996 U.S. App. LEXIS 28837, at \*3, \*25-31 (9th Cir. Nov. 5, 1996) (holding requirement that arts funding agency "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public" in awarding grants is impermissibly viewpoint-based (quoting 20 U.S.C. § 954(d)(1))); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 814 (D.D.C. 1986) (holding that decision by Librarian of Congress to bow to congressional threats and stop subsidizing translation of *Playboy* magazine into braille based on the magazine's "sexual orientation" was viewpoint-based); *cf. Lakeland Lounge v. City of Jackson*, 973 F.2d 1255, 1257 (5th Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993) (finding adult zoning restrictions were not based on distaste for message communicated); *Craft v. Hodel*, 683 F. Supp. 289, 292 (D. Mass. 1988) ("[P]ublic nudity does not convey any specific message; at most it is a medium by which a variety of messages may be conveyed . . .").

149. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56-57 (1988); *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60, 71 (1983); *Cohen v. California*, 403 U.S. 15, 21-26 (1971); *Terminiello v. Chicago*, 337 U.S. 1, 4, 8 (1949); *Penthouse Int'l, Ltd. v. Koch*, 599 F. Supp. 1338, 1350 (S.D.N.Y. 1984) (holding that denial of access to subway advertising public forum display space based on "offensive" content of magazine violated First Amendment; "[i]t is precisely this speech for which the protection of the First Amendment was intended").

150. 403 U.S. 15, 24-26 (1971).

151. 485 U.S. 46, 55 (1988).

seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.<sup>152</sup>

The problem is magnified in the context of the “indecent” ban on radio and television, where the FCC uses a “patent offensiveness” standard, without even the “prurient interest” and “serious value” elements of the *Miller* definition to cabin its freewheeling application.<sup>153</sup>

Apart from the problematic incorporation of an “offensiveness” test in obscenity and indecency law, the notion that sexual speech—even hardcore pornography—lacks any “exposition of ideas” reflects a curiously narrow and cerebral approach to the concept of expression. As a number of scholars have observed, ideas are not always expressed in neatly articulated judicial, scholarly, or journalistic prose; the intellectual, intuitive, and emotional components of the cognitive process cannot be easily separated.<sup>154</sup> Readers’ and viewers’ re-

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152. *Cohen*, 403 U.S. at 26; see also *Di Bona v. Matthews*, 220 Cal. App. 3d 1329, 1348, cert. denied, 498 U.S. 998 (1990) (quoting this passage in *Cohen*); *Miller v. California*, 413 U.S. 15, 44-45 (Douglas, J., dissenting):

The idea that the First Amendment permits government to ban publications that are “offensive” to some people puts an ominous gloss on freedom of the press. . . . The First Amendment was not fashioned as a vehicle for dispensing tranquilizers to the people. Its prime function was to keep debate open to “offensive” as well as “staid” people. . . . The use of the standard “offensive” gives authority to government that cuts the very vitals out of the First Amendment.

David Cole, *Playing by Pornography’s Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 142 (1994) (explaining that ordinarily the “offensive” character of expression entitles it to greater, not lesser, constitutional solicitude).

153. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); cases cited *supra* note 133; *ACT III*, *supra* note 133, at 677-82 (Edwards, J., dissenting); John Crigler & William Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329 (1989) (criticizing FCC indecency regulation); Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49 (1992-93) (analyzing various meanings of “indecent” and tracing inconsistency of FCC enforcement).

154. See Paul Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 DUKE L.J. 420, 423-24 (“Cognitive capacities include visual and other sorts of sensory perception, along with linguistic ways of understanding. . . . All perception and thought aid in our comprehension of the world; the notion that some of these are ‘non-cognitive’ because they are not ‘intellectual’ is almost an incoherent distinction.”); Cole, *supra* note 152, at 126:

[T]he argument that sexual speech is “noncognitive” because it is designed to produce a physical effect is predicated on an impoverished view of sexuality. The argument implies that at base, sex is purely physical. But sex cannot be stripped of its expressive elements: “Sexuality is as much about words, images, ritual and fantasy as it is about the body: the way we think about sex fashions the way we live it.”

(quoting JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS, AND MODERN SEXUALITIES* 3 (1985)); Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1586-94 (1988) (contesting view that pornography can be likened to a sex aid with no expressive or cognitive content); Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy and the First*

sponses to pornography, as to other highly charged ideas and images, do involve mental processing.

Furthermore, the First Amendment embraces creative expression, both lowbrow and high;<sup>155</sup> it embraces musical expression despite its absence of words.<sup>156</sup> Musical ideas, visual ideas, and sensual and sexual ideas are all within the “freedom of speech,” regardless of a pundit’s ability to articulate or deconstruct their “message.” Judge Easterbrook made this point in *American Booksellers Ass’n v. Hudnut*,<sup>157</sup> observing that not only pornography, but “almost all cultural stimuli provoke unconscious responses.”<sup>158</sup>

Numerous other ideas are found in speech about sex, whether or not it approaches the legal boundaries of obscenity. As Gianni Servodidio has observed, many artists “use pornographic images as a filter through which [to] . . . convey cathartic and painful emotions.”<sup>159</sup>

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*Amendment*, 76 CAL. L. REV. 297, 328 (1988) (“It is hard to understand how pornography can communicate attitudes of disrespect toward women if it is entirely devoid of propositional, emotive, and artistic content . . .”). *But see* Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979) (describing pornography as merely a sexual aid essentially without expressive content); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807-08 (1993) (“Many forms of pornography are not an appeal to the exchange of ideas, political or otherwise; they operate as masturbatory aids and do not qualify for top-tier First Amendment protection. . .”).

155. *See, e.g.*, *Winters v. New York*, 333 U.S. 507, 510 (1948) (describing the line between “informing” and “entertaining” as “too elusive” to be a basis for constitutional distinction); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected . . .”).

156. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment . . .”); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338, 2345 (1995) (“[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll . . .”) (citations omitted).

157. 771 F.2d 323 (7th Cir.), *aff’d mem.*, 475 U.S. 1001 (1985); *see infra* text accompanying notes 190-92.

158. *Hudnut*, 771 F.2d at 330.

159. Gianni P. Servodidio, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment*, 67 TUL. L. REV. 1231, 1257-58 (1993) (giving as examples René Magritte’s painting *Le Viol*, which equates a woman’s face with her sexual organs; Egon Schiele’s “grim, anatomically studied portraits of his young subjects”; performance artist Karen Finley’s “deconstruct[ions of] conventional morality through actions designed to degrade and offend”; and Vladimir Nabokov’s “confront[ation of] the societal taboos of incest and prepubescent sexuality” in *Lolita*).

Professor Lynn Hunt has demonstrated that until the nineteenth century, pornographic material was deeply, subversively political, “linked to freethinking and heresy, to science and natural philosophy, and to attacks on absolutist political authority.” Lynn Hunt, *Introduction to THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS*

Justice Brennan has noted that there are "ideas" both explicit and implicit in pornography, among them the idea that anonymous or promiscuous sex is legitimate and pleasurable: "[T]he speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions . . . have a potent viewpoint-differential impact."<sup>160</sup>

Beyond these expressive aspects of pornography itself, the suppression of sexually transgressive ideas and images has historically been driven by ideology. The United States' first comprehensive federal obscenity law, the Comstock Act of 1873, targeted not only sex and nudity as subjects, but also the *ideas* of contraception, non-procreative sex, free love, and anarchism.<sup>161</sup> The same urge to suppress can be observed today when safer sex and contraceptive information is conveyed explicitly, particularly to teen and gay audiences, and particularly when it might be interpreted to encourage sexual conduct.<sup>162</sup> As David Cole writes:

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OF MODERNITY 1500-1800, at 9, 11 (Lynn Hunt ed., 1993). Hunt notes that even the 1986 Meese Commission on Pornography acknowledged that sexually explicit and arousing literature was originally censored in the name of religion and politics, not decency. *See id.* at 11-12. In the eighteenth century, Enlightenment philosophers embraced pornography because of their understanding that "sexual appetite was natural; repression of sexual appetite was artificial and pointless; and the passions might have a beneficial influence in making humans happy in this world." *Id.* at 34.

160. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 56 n.1 (1973) (Brennan, J., dissenting) (quoting Stone, *supra* note 5, at 111-12). Stone adds: "In our society, the very presence of sexual explicitness in speech seems ideologically significant, without regard to whatever other messages might be intended. To treat such restrictions as viewpoint-neutral seems simply to ignore reality." Stone, *supra* note 5, at 112. *See also* Mark Yudof, *Library Book Selections and the Public School: The Quest for the Archimedean Point*, 59 IND. L.J. 527, 563 (1984) (questioning why excluding sexually oriented books is "not as much of an imposition of values" as excluding "a feminist, religious, or civil rights point of view"); *Barnes v. Glen Theatre*, 501 U.S. 560, 570, 571 (1991) (plurality opinion) (acknowledging that nude dancing conveys "erotic message" but asserting that nudity ban "simply makes the message slightly less graphic").

161. *See, e.g.*, NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* 225-28 (1995); ELLEN CHESLER, *WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA* (1992); MARJORIE HEINS, *SEX, SIN, AND BLASPHEMY: A GUIDE TO AMERICA'S CENSORSHIP WARS* 137-64 (1993); Rabban, *supra* note 125, at 55-70; Feminist Anti-Censorship Task Force Amicus Curiae Brief, *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir.), *aff'd mem.*, 475 U.S. 1001 (1985), *reprinted in* 21 U. MICH. J.L. REFORM. 69 (Fall 1987-Winter 1988).

162. *See, e.g.*, *AIDS Action Comm. v. Massachusetts Bay Trans. Auth.*, 42 F.3d 1, 12 (1st Cir. 1994) (noting censorship of "sexual humor addressed to men's bodies" while conventional display of female flesh is not considered controversial; *see infra* text accompanying notes 262-67); *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278, 280, 296 (S.D.N.Y.



[T]he political significance of sexual expression is revealed every day. Sexuality and its expression have become heated political issues in virtually every arena, from local school board disputes over sex education, to state anti-gay legislative efforts, to conservative and feminist attempts to regulate pornography, to attacks on artists who use sexual themes in their work, to debates over “family values” in national presidential campaigns.<sup>163</sup>

Second-class constitutional status for sexual or “vulgar” speech has been particularly striking in public education cases. In the 1960s and 1970s courts sometimes invalidated school curriculum choices and library censorship decisions predicated on objections to “vulgar” content.<sup>164</sup> However, by the 1980s the Supreme Court was approving such decisions on the ground that school officials could reasonably conclude that sex and vulgarity are simply taboo subjects or styles for the young. For example, in *Board of Education v. Pico*,<sup>165</sup> a case gen-

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1992) (striking down condition of government grant for safer sex education that prohibited any materials that were “offensive to a majority of the intended audience”).

A striking instance of the viewpoint-driven use of obscenity laws occurred in 1994 in Cincinnati, Ohio, when police brought charges against the city’s only gay and lesbian bookstore, the Pink Pyramid, for renting the film *Salò* by the noted Italian director Pier Paolo Pasolini. The police had sent an undercover vice squad officer into the store precisely to find “sexually oriented” videos that might be prosecuted. “[T]he first selections were evidently not explicit enough, so he returned, asking for something ‘stronger’ and ‘more graphic’[; o]n this second occasion, a clerk rented him *Salò*,” a grueling political allegory that treats sexual sadism as a metaphor for fascism. *How Prosecutors Are Using Obscenity Laws to Stifle Dissent*, ARTS CENSORSHIP PROJ. NEWSLETTER (ACLU/Arts Censorship Proj. Newsletter, New York, N.Y.), Summer/Fall 1995, at 1. At the time of the arrests, the city was about to go to trial in federal court to defend an anti-gay rights referendum that the voters had passed in 1993, voiding that portion of the city’s human rights ordinance that barred discrimination based on sexual orientation. *See id*; *Equality Found. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2519 (1996). Eventually, a plea bargain to one count of “pandering” was negotiated and the remaining charges against the store were dropped. Kristen Delguzzi, *Pyramid Case Settled*, CINCINNATI ENQUIRER, Aug. 3, 1996, at AO1.

Cincinnati was also the town that prosecuted a museum and its director for obscenity in connection with an exhibit by Robert Mapplethorpe that included some homoerotic photographs. *See Contemporary Arts Ctr. v. Ney*, 735 F. Supp. 743 (S.D. Ohio 1990). The defendants were eventually acquitted. *See Isabel Wilkerson, Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, § 1, at 1.

163. *See Cole, supra* note 152, at 122-23 (citations omitted); *see also, e.g.*, PLEASURE AND DANGER (Carole S. Vance ed., 1984); POWERS OF DESIRE: THE POLITICS OF SEXUALITY (Ann Snitow et al. eds., 1983); F.A.C.T. BOOK COMMITTEE, CAUGHT LOOKING: FEMINISM, PORNOGRAPHY, AND CENSORSHIP (1992). In 1994 the New Museum of Contemporary Art in New York City presented a “Bad Girls” exhibit that highlighted the politics of female sexuality as a theme in contemporary art.

164. *See, e.g.*, *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577 (6th Cir. 1976); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978); *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679 (D. Me. 1982).

165. 457 U.S. 853 (1982); *see infra* text accompanying notes 346-62.

erally considered a First Amendment victory, the Supreme Court announced that viewpoint discrimination in decisions regarding removal of school library books would be unconstitutional, but noted, on the other hand, that the plaintiffs had “implicitly concede[d] that an unconstitutional motivation would *not* be demonstrated if it were shown that [defendants] had decided to remove the books at issue because [they] were pervasively vulgar.”<sup>166</sup>

Four years later in *Bethel School District v. Fraser*,<sup>167</sup> the Court rejected a student’s First Amendment challenge to punishment he received for making a sophomoric speech laced with phallic metaphor at a school-sponsored assembly. Chief Justice Burger’s opinion for the Court approved broad public school authority to censor “vulgar” expression in the interests of teaching the value of “civil[ity],”<sup>168</sup> and specifically noted that “the penalties imposed in this case were unrelated to any political viewpoint.”<sup>169</sup> The opinion expressed outrage at Fraser’s crude innuendos, and special concern for the tender sensibilities of female students: “The pervasive sexual innuendo in Fraser’s speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students.”<sup>170</sup> Chief Justice Burger cited no basis for his assumption that teenage girls, as a class, are offended and harmed by phallic jokes.<sup>171</sup>

Suppression of sexual or “vulgar” ideas in public education advanced another step with *Hazelwood School District v. Kuhlmeier*,<sup>172</sup> which granted administrators broad power to control student speech in the curriculum context, defining curriculum broadly to include school-sponsored publications if connected to an academic class.<sup>173</sup> It was in reliance on *Hazelwood* that the Eleventh Circuit in *Virgil v.*

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166. *Id.* at 871 (plurality opinion).

167. 478 U.S. 675, 685 (1986).

168. *Id.* at 681-83.

169. *Id.* at 685.

170. *Id.* at 683. Justice Burger added: “The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.” *Id.* No authority was cited for the assertion that sexual innuendo “could well be seriously damaging” to young people.

171. As Justice Stevens pointed out, Matthew Fraser “was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime.” *Id.* at 692 (Stevens, J., dissenting).

172. 484 U.S. 260 (1988); see *infra* text accompanying notes 364-68.

173. *Hazelwood*, 484 U.S. at 271.

*School Board*<sup>174</sup> reluctantly upheld a school board's power to remove an anthology containing two literary classics<sup>175</sup> from an upper-level literature course because of "legitimate pedagogical concerns" about the sexual and vulgar content in both works.<sup>176</sup> The court of appeals "seriously question[ed] how young persons just below the age of majority can be harmed by these masterpieces of Western literature,"<sup>177</sup> but said that under *Hazelwood*, the removal was not unconstitutional.<sup>178</sup>

*Fraser* and *Hazelwood* were decisions about public officials' control over school-sponsored activities, but in 1992 the Ninth Circuit interpreted them to broaden school authorities' power to censor even independent speech by students, if it was deemed "vulgar."<sup>179</sup> In 1969, *Tinker v. Des Moines Independent Community School District*<sup>180</sup> had held that administrators could not censor independent student speech unless it created a specific likelihood of "material interruption" of the school environment.<sup>181</sup> But in *Chandler v. McMinnville School District*,<sup>182</sup> the Ninth Circuit read the Supreme Court's more recent decision in *Fraser* to permit the punishment of "vulgar" independent student speech, regardless of whether any disruption ensued or was likely.<sup>183</sup>

Student plaintiffs in a 1993 dress code case vigorously challenged *Chandler's* broad interpretation of *Fraser*. In *Pyle v. South Hadley*

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174. 862 F.2d 1517 (11th Cir. 1989).

175. *Id.* at 1519 (describing the works as "English translations of *Lysistrata*, written by the Greek dramatist Aristophanes in approximately 411 B.C., and *The Miller's Tale*, written by the English poet Geoffrey Chaucer around 1380-1390 A.D.").

176. *Id.* at 1521-23. The record contained evidence of viewpoint discrimination—objections to "promotion of women's lib" (presumably *Lysistrata*), and references to using "God's name . . . in vain," *id.* at 1522 n.6, but the court deemed the plaintiffs to have stipulated away the viewpoint discrimination issue, *see id.* at 1522, 1523 n.7; *see also* CLAUDIA JOHNSON, STIFLED LAUGHTER (1994) (relating one plaintiff's story of the *Virgil* case).

177. 862 F.2d at 1525.

178. *See also* *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994) (rejecting First Amendment challenge to school district's decision to bar volunteer instructor from classrooms because he had used sexually inappropriate materials).

179. *See Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992).

180. 393 U.S. 503 (1969).

181. *Id.* at 511.

182. 978 F.2d 524 (9th Cir. 1992).

183. *Id.* at 527. Because the student speech in *Chandler* (buttons supporting a teachers' strike and using the word "scab") was not vulgar in the court's view, *Tinker*, not *Fraser*, applied, and the principal's order to remove the buttons was held unconstitutional. *See also*, *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990).

*School Committee*,<sup>184</sup> a district court struck down a viewpoint-based portion of a school's dress code prohibiting message clothing that "harasses, intimidates, or demeans an individual or group of individuals because of sex, color, race, religion, handicap, national origin or sexual orientation."<sup>185</sup> Relying on *Chandler*, however, the district court upheld part of the policy that banned "vulgar" or "profane" language or images.<sup>186</sup> The court was persuaded that *Fraser* permitted administrators this latitude. Plaintiffs, on appeal, argued that *Fraser*'s permissive standard for censorship of students' "vulgar" speech only applied to school-sponsored activities.<sup>187</sup> They also argued that standards such as "vulgarity" are impermissibly vague and viewpoint-based, reflecting patriarchal attitudes and prejudice against words used by society's less elite classes:

[T]he court should recognize that most vulgarity censorship is neither benign nor apolitical. Indeed, much of what passes for "refined," as opposed to "vulgar," language turns out on closer

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184. 824 F. Supp. 7 (D. Mass. 1993) (denying preliminary injunction), 861 F. Supp. 157 (D. Mass. 1994) (granting final judgment), 55 F.3d 20 (1st Cir. 1995) (certifying questions to Massachusetts Supreme Judicial Court), 423 Mass. 283 (1996).

185. *Pyle*, 861 F. Supp. at 162, 170-71 (quoting Memorandum from Paul R. Raymond, Interim Principal, South Hadley High School, to Students, Faculty, Staff and Parents (April 29, 1993)).

186. *See id.* at 170. The T-shirt that started the controversy bore a legend reading "Coed Naked Band. Do It To The Rhythm." *Id.* at 158. In their subsequent attempts to discern the meaning of the dress code, the plaintiffs wore shirts that said, "Coed Naked Civil Liberties. Do it to the Amendments" (not permitted); and "Coed Naked Gerbils. Some People Will Censor Anything" (permitted). *Id.* at 162-63; *see also* Broussard v. School Bd., 801 F. Supp. 1526 (E.D. Va. 1992) (upholding suspension for wearing New Kids on the Block T-shirt saying "Drugs Suck" because "suck" might have sexual connotation or be considered vulgar and offensive).

Some courts have upheld school dress codes not only where directed at assertedly vulgar words or ideas, but also where administrators dislike particular non-"vulgar" messages. *See, e.g.,* Baxter v. Vigo County Sch. Corp., 26 F.3d 728 (7th Cir. 1994) (upholding ban on T-shirts with messages objecting to grades, racial bias, and certain school policies); Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459 (C.D. Cal. 1993) (upholding ban on clothing identifying sports teams); McIntyre v. Bethel Sch., 804 F. Supp. 1415 (W.D. Okla. 1992) (upholding ban on clothing advertising alcohol); Gano v. School Dist. No. 411, 674 F. Supp. 796 (D. Idaho 1987) (upholding ban on T-shirt depicting administrators intoxicated).

187. *Hazelwood* had explicitly limited *Fraser* to vulgar speech in the context of school-sponsored events such as "an official school assembly" because "the school was entitled to 'disassociate itself' from the speech in a manner that would demonstrate to others that such vulgarity is 'wholly inconsistent with the "fundamental values" of a public school education.'" *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685-86 (1986)); *see also Fraser*, 478 U.S. at 688-89 (Brennan, J., concurring) ("Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty.").

examination to be laced with upper-class contempt for lower-class modes of expression, and with disdain for "peasants" and disfavored racial or ethnic groups. . . .

Indeed, there is no more virulent form of viewpoint discrimination than vulgarity censorship intended to protect the so-called "weaker sex," for it has the effect (and often the purpose) of confining women to domestic roles and in linguistic ghettos that have historically deprived them of economic and intellectual opportunities. "Good taste" has little to do with taste, but much to do with enforcing stereotypic sex roles, including preventing females from being sexually forward, or from considering human sexuality humorous.<sup>188</sup>

The relevance of these observations to Chief Justice Burger's opinion for the Court in *Fraser*<sup>189</sup> is evident.

Paternalistic concern for female sensibilities is in fact a familiar viewpoint-based aspect of censorship in the sexual realm. The ruminations of Chief Justice Burger in *Fraser* are but one example. Another is found in the efforts of antipornography activists Catharine MacKinnon and Andrea Dworkin to outlaw sexual speech that they consider degrading to women. Here, in contrast to obscenity and indecency law generally, the courts have not had trouble discerning viewpoint discrimination. In *American Booksellers Ass'n v. Hudnut*,<sup>190</sup> the Supreme Court affirmed without opinion a circuit court ruling that the "MacKinnon/Dworkin" model antipornography ordinance, as enacted by the City of Indianapolis, was unconstitutionally viewpoint-based because it singled out for suppression sexual material with a message "subordinating" to women. Judge Easterbrook explained for the Seventh Circuit: "The state may not ordain preferred viewpoints in this way. . . . Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us."<sup>191</sup>

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188. Brief for Plaintiffs-Appellants on a Question Certified from the U.S. Court of Appeals for the First Circuit at 32-34, *Pyle v. South Hadley Sch. Comm.*, 423 Mass. 283 (1996). Without reaching these issues, the Massachusetts Supreme Judicial Court held that a state student free speech law prohibited administrators from banning the T-shirts unless they could meet the *Tinker* likelihood-of-disruption standard. See *Pyle*, 423 Mass. at 286-87; see also *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 533 (9th Cir. 1992) (Goodwin, J., concurring) (objecting to "mischievous notion that there exists a subclass of words that are 'inherently disruptive.' . . . The invention of such a category would invite future courts and litigants to circumvent the *Tinker* analysis. I doubt that it would be either workable or desirable for judges to construct a list of words that one cannot say in school.").

189. See *supra* text accompanying notes 167-71.

190. 771 F.2d 323 (7th Cir.), *aff'd mem.*, 475 U.S. 1001 (1985).

191. *Id.* at 325, 330. The Indianapolis ordinance was also unconstitutional because it targeted expression with serious literary, artistic, or other value, in violation of *Miller*. *Id.* at 325, 331; see also Stone, *supra* note 106, at 461 (commenting on *Hudnut*).

Judge Easterbrook's point is well-taken, but it reaches beyond the MacKinnon/Dworkin type of ordinance. The First Amendment does not allow the government to dictate "which thoughts are good for us," whether it be in the guise of "feminist" antipornography laws, indecency laws that turn on notions of "patent offensiveness," or obscenity laws of the type upheld in *Miller* and *Slaton* because of the lascivious, family-undermining, personality-distorting, and generally immoral thoughts that the Court felt pornography inspires. As Professor MacKinnon herself pointed out: "Why aren't obscenity and child pornography laws viewpoint laws? Obscenity, as Justice Brennan pointed out, . . . expresses a viewpoint: sexual mores should be more relaxed. . . . When do you see a viewpoint as a viewpoint? When you don't agree with it. When is a viewpoint not a viewpoint? When it's yours."<sup>192</sup>

### III. Government Benefits and Property

Application of the viewpoint neutrality principle is particularly important in the realm of government benefits and property, where so much citizen speech takes place. Government officials' and courts' notions of what is appropriate in subsidy programs or in granting access to a particular public space often determine, as a practical matter, what citizen speech will be allowed at all.<sup>193</sup> Because government benefit and subsidy programs are so pervasive, discrimination in these areas—whether against an explicitly identified viewpoint, or more generally against speech that is deemed "political," "controversial," or "offensive"—is likely to have grave ramifications for the health of the First Amendment. If the government were able to control speech in programs for which it provides some support, "the result would be an invitation to government censorship wherever public funds flow," and "an enormous threat to the First Amendment rights of American citizens and to a free society."<sup>194</sup>

As the Supreme Court explained in early cases like *Doubs* and *Speiser*,<sup>195</sup> depriving individuals of government benefits because of their exercise of free speech establishes an "unconstitutional condi-

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192. CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 212 (1987).

193. As one district court perceived: "[F]ew large-scale endeavors are today not supported, directly or indirectly, by government funds." *Trustees of Leland Stanford, Jr. Univ. v. Sullivan*, 773 F. Supp. 472, 478 (D.D.C. 1991) (striking down medical research grant requirement that recipients not discuss their preliminary findings).

194. *Id.*

195. *See supra* text accompanying notes 31-40.

tion.”<sup>196</sup> Access to even nonpublic fora and nonentitlement programs cannot be conditioned on the viewpoint of citizens’ speech.<sup>197</sup> The Supreme Court in *Rosenberger*<sup>198</sup> reaffirmed the rule as applied to subsidy programs and distinguished *Rust v. Sullivan*, which had caused considerable consternation about the fate of viewpoint neutrality in the funding context, as a case concerned only with the government’s speech.<sup>199</sup>

Thus, courts have generally invalidated viewpoint-based restrictions or overly vague standards that limit access to government property or benefits. One Ninth Circuit decision, for example, invalidated an official preference for “proper community values” or “family entertainment” in the terms of private access to public facilities.<sup>200</sup> An-

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196. See *supra* text accompanying notes 31-40.

197. See *supra* text accompanying notes 41-49; *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[E]ven though a person has no ‘right’ to a valuable governmental benefit . . . , [government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”). For representative applications of this principle, see *Gay and Lesbian Students Ass’n v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988), invalidating a public university’s denial of student activity funding to a gay group on viewpoint discrimination grounds; *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1031 (2d Cir. 1985), finding officials’ decisions to deny prisoners access to a report on facility conditions was impermissibly based on views in the report; and *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028, 1036, 1040-41 (E.D.N.Y. 1993), holding that a refusal to allow attorneys to interview imprisoned refugees was unconstitutional because the refusal was based “solely on the content of what they had to say and the viewpoint they would express.”

198. 115 S. Ct. 2510, 2519 (1995) (citing *Cammarano v. United States*, 358 U.S. 498 (1959); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983)); see *supra* text accompanying notes 112-19.

199. See *Rosenberger*, 115 S. Ct. at 2518-19.

200. *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 568, 573-77 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) (invalidating City’s refusal to permit rock ‘n’ roll concerts at municipal amphitheater in part because of some officials’ objections to rock groups’ “particular ideology or way of life,” and in part because officials’ stated preference was “guided only by subjective, amorphous standards,” leading to “the unbridled discretion over expression that is condemned by the First Amendment”); see also *Finley v. National Endowment for the Arts*, No. 92-56028, 1996 U.S. App. LEXIS 28837, \*2, \*14-23, \*25-31 (9th Cir. Nov. 5, 1996) (holding that “decency” and “respect” requirements for federal arts funding were unconstitutionally vague and viewpoint-based); *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893 (D.C. Cir. 1984) (removing art poster criticizing Reagan Administration from public forum display space violated First Amendment); *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548 (M.D. Ala.), *appeal pending*, 96-6143 (11th Cir. 1996) (banning public university funding for any group “that promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws” unconstitutionally discriminates based on viewpoint); *Amato v. Wilentz*, 753 F. Supp. 543, 557 (D.N.J. 1990), *vacated on other grounds*, 952 F.2d 742 (3d Cir. 1991) (finding viewpoint discrimination in Chief Justice’s refusal to permit use of a county courthouse for filming *The Bonfire of the Vanities* because the film might “erod[e] . . . the confidence of blacks and other minorities in the judicial system”).

other court said a decision to close down a public access cable television channel would be viewpoint-based if motivated by hostility to the racist message of a particular access programmer.<sup>201</sup>

But the answers to the First Amendment questions raised by restrictions on public facilities are rarely simple. May a public library, for example, that selects and discards books on the basis of literary value or level of community interest also remove them because of their political, sexual, moral, or religious viewpoint? What about a school library? What terms are acceptable for government grants to artists, scholars, and scientific researchers? If the history of World War II is a permissible content limitation on an academic research grant, may the government also require that the resulting book or monograph emphasize the crimes of Hitler? De-emphasize Franklin Delano Roosevelt's refusal to bomb the rail lines to Auschwitz? What guidelines, other than subject matter and artistic merit, are permissible for an art exhibit at a public building that is not deemed to have opened itself as a "designated public forum" for art? No sexual explicitness? Nothing "controversial"? Nothing insulting to religious or ethnic groups?

A controversy that arose in Fairfax County, Virginia in 1994 illustrated these dilemmas. The Fairfax County Arts Council's guidelines for use of exhibit space in the county government building provided that "[n]udes, weaponry, drug paraphernalia, and works which reflect violence, religious scenes, political expression or unpatriotic subjects" were not "acceptable subject matters."<sup>202</sup> As a result, in April 1994, an administrator removed two innocuous artworks from display: one depicted an adobe church, the other a man wearing a yarmulke and reading from a prayer book. In the wake of embarrassing publicity, the Arts Council undertook to revise its policy, but its new proposed guidelines only exacerbated the First Amendment problems of content and viewpoint discrimination. Now, in addition to nudity and drug paraphernalia, "illegal acts of violence, works proselytizing or ridiculing a specific religion, partisan political expression or seditious subject matter" would be excluded.<sup>203</sup> The proposed changes were presumably intended to narrow overly broad bans, but had the para-

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201. See *Missouri Knights of the Ku Klux Klan v. Kansas City*, 723 F. Supp. 1347, 1353 (W.D. Mo. 1989).

202. Form Letter of Agreement from the Fairfax County Council of the Arts, Government Center Exhibitions (on file with the American Civil Liberties Union Arts Censorship Project).

203. See Na'ama Batya Lewin, *Arts Council Bars Religion*, WASH. JEWISH NEWS, Apr. 21, 1994; Letter from the American Civil Liberties Union and the American Jewish Con-



doxical result of making them more clearly viewpoint-based. For example, the religious exclusion was now limited to “proselytizing or ridiculing.”<sup>204</sup> It is not a sufficient defense of these guidelines that a private museum could, in the exercise of *its* First Amendment rights, establish viewpoint-based exclusions, because the government, unlike private entities, is bound by the Constitution when it opens up a display area for citizens’ speech.

In response to a complaint from the American Civil Liberties Union (“ACLU”) and the American Jewish Congress (“AJC”), meticulously explaining the content and viewpoint discrimination problems with the policy,<sup>205</sup> an attorney for the Arts Council responded that legal niceties were really beside the point; the county had no obligation to open its space for art, and preferred to avoid anything “controversial.”<sup>206</sup> He warned that any challenge to the guidelines “might well jeopardize the entire program of exhibits at the Government Center.”<sup>207</sup>

If this response failed to grapple with the constitutional perplexities, it at least had the virtue of candor. The author was no doubt correct that some government officials would terminate exhibit programs if not permitted to have content- and viewpoint-based restrictions. Indeed, in response to the ACLU and AJC’s further suggestion that uncensored exhibits would be politically feasible if county officials and the public were educated about the fact that citizen speech on public property did not imply government endorsement of the ideas and images conveyed, the Arts Council attorney suggested that the ACLU and AJC were “being naive to the politics of Fairfax County.”<sup>208</sup> He continued, “[t]here are many conservative voters . . . whom supervisors would prefer not to offend by opening up the government center to literally all art. . . . This truly is a political issue.”<sup>209</sup>

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gress to the Fairfax County Arts Council (June 1, 1994) (on file with the American Civil Liberties Union Arts Censorship Project).

204. See *supra* text accompanying note 203.

205. See Letter from the American Civil Liberties Union and the American Jewish Congress to the Fairfax County Arts Council, *supra* note 203.

206. Letter from Douglas J. Sanderson to the American Civil Liberties Union and the American Jewish Congress (June 10, 1994) (on file with American Civil Liberties Union Arts Censorship Project).

207. *Id.*

208. Letter from Douglas J. Sanderson to Kent Willis, Director of the American Civil Liberties Union of Virginia (July 22, 1994) (on file with the American Civil Liberties Union Arts Censorship Project).

209. *Id.* In the spring of 1995, according to the Arts Council’s attorney, the county officials were nonetheless persuaded that the guidelines were unnecessary, and they were

If the Fairfax County situation was paradigmatic, numerous other controversies over art exhibits have tested the limits of both content neutrality requirements for public fora and viewpoint neutrality requirements for nonpublic fora. In 1992, for example, New York artist Robin Bellospirito was invited to contribute to an art exhibit in the community room at the Manhasset, New York public library; she was later disinvited, however, because her works depicted human nudes in violation of an alleged, but unwritten, library policy.<sup>210</sup> The images were semi-abstract, murky, and nonsexual, but were discernibly nudes.<sup>211</sup> A federal court ruled that the library had created a limited public forum in its community room for art, and that therefore the disinvitation, being content-based, violated Bellospirito's First Amendment rights.<sup>212</sup>

The court's public forum conclusion was dubious on the facts presented, since the library had reserved to itself, or its delegated curator, substantial authority to make selections based on content, including artistic merit.<sup>213</sup> The real question in *Bellospirito* was whether "nudity" as a content-based exclusion was permissible, as clearly "merit" was.

The "nudity" exclusion could have been seen as viewpoint-based—that is, driven by moral and ideological judgments and not by any legitimate aesthetic concerns.<sup>214</sup> A finding of viewpoint discrimination, however, would have undermined the rest of the *Bellospirito* court's analysis. For although the nudity in question here was "relatively innocuous,"<sup>215</sup> the court hastened to add that the library *could* have legitimately prohibited not only unprotected obscenity but con-

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subsequently abandoned. Telephone Interview with Douglas J. Sanderson, Attorney, Fairfax County Arts Council (Oct. 12, 1995).

210. *Bellospirito v. Manhasset Pub. Library*, Civ. No. 93-CV-4484 (E.D.N.Y. July 31, 1994) (memorandum and order).

211. *See id.*

212. *See id.* at 13-15.

213. The court relied for its public forum analysis on *Lamb's Chapel v. Center Moriches*, 508 U.S. 384 (1993), *see supra* text accompanying notes 110-11, and *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1261 (3d Cir. 1992). But *Lamb's Chapel* involved the very different setting of first come-first served access to a public school facility, and *Kreimer* found a library was a public forum for purposes of access by individuals, not selection of artworks (or books). *See also* *Brown v. Louisiana*, 383 U.S. 131 (1966) (holding that a library is public forum for purposes of access to reading rooms).

214. *See* *Finley v. National Endowment for the Arts*, No. 92-56028, 1996 U.S. App. LEXIS 28837 (9th Cir. Nov. 5, 1996); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986); *supra* note 148.

215. *Bellospirito*, slip op. at 17.

stitutionally protected “sexually explicit” art.<sup>216</sup> This was, the court said, because “sexually explicit” speech “does not enjoy comprehensive First Amendment protection and ‘the State may legitimately use the content of [such] materials as the basis for placing them in a different classification’ from other speech.”<sup>217</sup> The court’s conclusion here was questionable, if the community room did indeed have limited public forum status, unless one accepts the proposition that sexually explicit, but not obscene speech, has such limited First Amendment protection that it can be excluded from public fora.<sup>218</sup> A more coherent analysis, and one more sensitive to First Amendment principles protecting controversial and potentially offensive speech, might have posited that the community room was not a public forum, but that the revocation of the invitation to *Bellospirito* was “unreasonable,”<sup>219</sup> whereas a ban on highly graphic sexual material would be “reasonable” in view of the forum’s nature and purposes.<sup>220</sup>

A case with a result dramatically less favorable to controversial art than *Bellospirito* was *Claudio v. United States*,<sup>221</sup> in which a North Carolina federal court upheld the revocation of a permit to display a painting pursuant to the Public Buildings Cooperative Use Act.<sup>222</sup> This statute was explicitly designed to open appropriate federal prop-

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216. *Id.*

217. *Id.* at 18 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70-71 (1976)).

218. *See supra* text accompanying notes 132-41 (describing lenient scrutiny often given to regulation of nonobscene sexually oriented speech or entertainment).

219. *See Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 806 (1985) (stating that restrictions in nonpublic forum must be reasonable as well as viewpoint-neutral); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983); *supra* text accompanying notes 69-75. Alternatively, the court might have determined the case did not turn on the nature of the forum.

220. In a similar case in Austin, Texas, a federal magistrate whose recommendations the district court adopted found that the city had created a public forum for art in its municipal building, and thus acted unconstitutionally when it barred exhibition of a classic male nude on the ground that some viewers might be offended. *See Swim v. City of Austin*, Civ. No. A-93-CA-648-JRN (W.D. Tex. July 17, 1995) (interim report and recommendation), *rev’d*, No. 96-50160 (5th Cir. Dec. 18, 1996). Although terming the case “extremely difficult,” the court rejected the city’s arguments that it was entitled to remove the artwork because of fears that it would “cause controversy,” or because the city had “a compelling state interest in regulating the exposure of minors to sensitive material.” *Id.*, slip op. at 11-13 (relying on *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)). The Fifth Circuit reversed, finding that no probable forum had been established.

221. 836 F. Supp. 1219 (E.D.N.C. 1993) (granting qualified immunity to individual defendants); 836 F. Supp. 1231 (E.D.N.C. 1993) (granting summary judgment), *aff’d mem.*, 28 F.3d 1208 (4th Cir. 1994).

222. *See* 40 U.S.C. §§ 490, 601a, 606, 611, 612a (1986); *see also* 41 C.F.R. §§ 101-20.401-.403 (1986) (Federal Property Management Regulations).

erty to expressive activities on a content-neutral, first come-first served basis. The reasons given for the removal were that the painting was “political” and “controversial.”<sup>223</sup> The district court found that no public forum had been created, despite the clear terms of the federal statute, and that no viewpoint discrimination, but only permissible content discrimination, had occurred.<sup>224</sup>

The district court judge in *Claudio* evidently disliked the painting as much as the governmental officials who removed it, for his decision described the work as “a visual horror” that was “vulgar and inappropriate.”<sup>225</sup> There was little doubt that gut judgments that the piece was inappropriate for the lobby of a federal building drove both the public forum and viewpoint discrimination rulings.<sup>226</sup>

In 1995, the Second Circuit also refused to find viewpoint bias in the revocation of a permit to show a politically controversial, but not sexual, work at a particularly prominent location in New York City’s Pennsylvania Station—a large, illuminated billboard known as the

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223. *Claudio*, 836 F. Supp. at 1222. Entitled *Sex, Laws & Coathangers*, Claudio’s painting featured a large semi-nude woman and a three-dimensional replica of a bloody fetus. *See id.*

224. *See id.* The court ignored not only arguments that such terms as “political” and “controversial” betrayed a desire to suppress unpalatable ideas, but explicit evidence of viewpoint bias: one witness testified that the painting had been removed because it might have offended North Carolina Senator Jesse Helms. *See* Deposition of Peter Leonard, *Claudio v. United States*, 836 F. Supp. 1230 (E.D.N.C. 1993), (No. 92-495-Civ-5-F); Record App. at 756, 765-67, 824-25 (on file with the American Civil Liberties Union Arts Censorship Project).

225. *Claudio*, 836 F. Supp. at 1232, 1236.

226. *See also* *Serra v. General Servs. Admin.*, 847 F.2d 1045, 1051 (2d Cir. 1988) (upholding removal of sculptor Richard Serra’s *Tilted Arc* from public plaza because of its “unsuitable physical characteristics” and “unfavorable assessment of its aesthetic appeal,” and because there was no evidence of an “impermissible condemnation of political viewpoint”); *Piarowski v. Illinois Community College*, 759 F.2d 625, 628 (7th Cir.) (upholding public college’s removal of racially and sexually provocative stained glass windows done in the style of Aubrey Beardsley to less visible exhibit space because original space was not a public forum, because the work had no particular social or political message that college officials wished to suppress, and because original location gave officials legitimate reason to worry about offending passers-by, especially since this was a community “in which Aubrey Beardsley is not a household word”), *cert. denied*, 474 U.S. 1007 (1985); *Advocates for the Arts v. Thomson*, 532 F.2d 792, 798 & n.8 (1st Cir. 1976) (rejecting constitutional challenge to arts agency’s decision not to fund literary magazine containing vulgar language and imagery); *Close v. Lederle*, 424 F.2d 988, 990 (1st Cir.) (finding that visual art, removed from college exhibit space, had only “minimal” First Amendment protection), *cert. denied*, 400 U.S. 903 (1970); *Sefick v. City of Chicago*, 485 F. Supp. 644 (N.D. Ill. 1979) (holding that the removal of sculpture from public forum for political reasons violated First Amendment).

“Spectacular.”<sup>227</sup> The district court had ruled that the asserted policy of the Amtrak officials who managed Penn Station, of prohibiting any “noncommercial” ads, was applied in an impermissibly viewpoint-discriminatory manner.<sup>228</sup> The policy was also potentially “void because of discrimination based on viewpoint,” since it gave Amtrak discretion to refuse any advertising “involving ‘views which could result in dissension . . . , complaints or controversy with its patrons or the public.’”<sup>229</sup>

After a reversal on “state action” grounds,<sup>230</sup> and another reversal and remand by the Supreme Court,<sup>231</sup> the Second Circuit reached the First Amendment issue.<sup>232</sup> It disagreed with the district judge on every substantive point.<sup>233</sup> The court of appeals first upheld the revocation of Lebron’s permit based on Amtrak’s “undisputed practice with respect to the Spectacular” of limiting displays to “purely commercial advertising.”<sup>234</sup> The Second Circuit said such a policy was reasonable and viewpoint-neutral under the Supreme Court’s 1974 decision in *Lehman v. City of Shaker Heights*.<sup>235</sup>

Amtrak’s position as a government controlled and financed public facility, used daily by thousands of people, made it highly advisable to avoid the criticism and the embarrassments of allowing any display seeming to favor any political view. This was particularly so with respect to the Spectacular in view of its uniqueness and size.<sup>236</sup>

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227. *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2537 (1996). The satirical work graphically deplored the Coors Beer Company’s support of the Nicaraguan Contras.

228. *See Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993 (S.D.N.Y.), *rev’d on other grounds*, 12 F.3d 388 (2d Cir. 1993), *rev’d on other grounds*, 115 S. Ct. 961, *decision on remand*, 69 F.3d 650 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2537 (1996).

229. *Lebron*, 811 F. Supp. at 1004. According to one official, the policy banned “divisive, controversial, or objectionable matter.” *Id.* Elsewhere in Penn Station, Amtrak had permitted political and public service displays, including ads for the New York Department of the Environment, a foundation for muscular dystrophy, and the Worldwide Church of God’s magazine, *The Plain Truth*, which was replete with political commentary. *Id.* at 1003-04. The district court also thought the policy unacceptably vague. *Id.* at 1001-03.

230. *See Lebron*, 12 F.3d 388 (2d Cir. 1993), *rev’d*, 115 S. Ct. 961 (1995).

231. *See Lebron*, 115 S. Ct. 961 (1995).

232. *See Lebron*, 69 F.3d 650.

233. *See id.*

234. *Id.* at 656.

235. 418 U.S. 298 (1974); *see supra* text accompanying notes 88-89.

236. *Lebron*, 69 F.3d at 658.

The court then ruled that Lebron lacked standing to challenge the vagueness or inconsistent application of the policy with respect to other Penn Station display spaces.<sup>237</sup>

The *Lebron* court made no mention of *Rosenberger* and dismissed the plaintiff's viewpoint discrimination argument based on *Lamb's Chapel* in a footnote.<sup>238</sup> Nor did the court reference the recognition in such cases as *Consolidated Edison*<sup>239</sup> and *League of Women Voters*<sup>240</sup> of the dangers of restricting "political" or "controversial" expression.<sup>241</sup> Judge Newman's dissent protested:

Wholly apart from the absence of a clear, understandable, and understood policy, Lebron might be correct that, to the extent that the defendant's policy purports to bar political ads, it is a viewpoint-based discrimination that violates the First Amendment. . . . As Lebron contends, the defendants are willing to display an ad urging the public to buy Coor's beer but are unwilling to display his ad urging the public not to do so. He makes a substantial argument that viewpoint-based discrimination is occurring when government allows an ad promoting the sale of a product, but purports to prohibit an ad opposing a product because of the views of its manufacturer.<sup>242</sup>

Although Lebron's image was not sexually graphic, one suspects that in addition to its solicitude for Amtrak's desire to avoid controversy, the court of appeals was concerned about the implications of forcing Amtrak to accept *any* advertising, no matter how "offensive," for the large and conspicuous Spectacular. The power of the particular medium to communicate with a large audience in this case seems to have driven a result that further marginalized speech deemed unpopular, provocative, or unusual. Further, the Second Circuit's reliance on *Lehman* ignored the more recent precedent of *Rosenberger*,<sup>243</sup> with its frank recognition that public debate is not "bipolar" and that the silencing of "multiple voices"<sup>244</sup> is a form of viewpoint discrimination.

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237. *See id.* at 659-60.

238. *See id.* at 659 n.4. *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995), and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), held discrimination against "religious speech" to be viewpoint-based. *See supra* text accompanying notes 110-19.

239. 447 U.S. 530 (1980); *see supra* text accompanying notes 81-82, 90-92.

240. 468 U.S. 364 (1984); *see supra* text accompanying notes 94-101.

241. *See supra* text accompanying notes 90-101.

242. *Lebron*, 69 F.3d at 662-63 (Newman, J., dissenting) (citation omitted).

243. *See supra* text accompanying notes 112-19.

244. *Rosenberger*, 115 S. Ct. at 2518.

In contrast to *Lebron*, *Lehman* was not controlling in *Southwest Africa/Namibia Trade & Cultural Council v. United States*,<sup>245</sup> which challenged the FAA's refusal to permit an advertisement in federally owned airports because "it was political in nature and thus perceived to be inconsistent with the government's interests in maintaining a purely commercial and public service advertising medium."<sup>246</sup> The court found that the advertising display areas at the airports involved were designated public fora, so that even content discrimination was prohibited.<sup>247</sup> But the court also pointed out that banning certain subjects from public discussion, while perhaps not presenting "the same dangers as more specific, viewpoint-based prohibitions," does have a "cost[ ] in First Amendment terms [that] should not be understated."<sup>248</sup> In particular, a subject matter ban on "political" ads "implicates one of the central purposes of the First Amendment: 'uninhibited, robust, and wide-open' debate on matters of public affairs."<sup>249</sup> Moreover, the FAA's policy "implicate[d] a second, related concern—that [because the line between 'political' and 'commercial' speech is sometimes hazy,] the [FAA's] policy operates in part to screen out only controversial, but not noncontroversial, political messages."<sup>250</sup> The ban thus had the potential "to operate as a *sub rosa* penalty on presenting political viewpoints in 'controversial,' as opposed to more benign 'commercial' forms."<sup>251</sup>

The Ninth Circuit made the same point in *Bullfrog Films, Inc. v. Wick*,<sup>252</sup> which struck down United States Information Agency ("USIA") regulations establishing eligibility criteria for certification of "educational, scientific and cultural" audio-visual materials on First Amendment and vagueness grounds.<sup>253</sup> The Agency's rules excluded "religious, economic, or political propaganda" as well as materials that "may lend [themselves] to misinterpretation, misrepresentation of the United States or other countries, their peoples or institutions, or which appear to have as their purpose or effect to attack or discredit economic, religious, or political views or practices."<sup>254</sup> The films denied certification under these regulations dealt with environmental

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245. 708 F.2d 760 (D.C. Cir. 1983).

246. *Id.* at 761.

247. *See id.* at 763-68.

248. *Id.* at 768.

249. *Id.* at 769 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

250. *Id.*

251. *Id.*

252. 847 F.2d 502 (9th Cir. 1988).

253. *Id.*

254. *Id.* at 505 (quoting 22 C.F.R. § 502.6(b)(5)).

and political issues, such as the U.S. involvement in Nicaragua, in a manner evidently displeasing to the Agency.

While expressing doubt that the USIA's regulations were indeed viewpoint-neutral, as the agency asserted,<sup>255</sup> the court in *Bullfrog* found it sufficient to invalidate the regulations as content-based, citing, inter alia, *Consolidated Edison*, *Mosley*, and *League of Women Voters*.<sup>256</sup> "Regulations based on the political or controversial subject matter of speech are particularly invidious," said the court, "for they restrict public debate in that area most privileged by the First Amendment."<sup>257</sup>

In contrast to *Bullfrog*, the Eleventh Circuit in *Ethredge v. Hail*<sup>258</sup> ruled that a military base rule against bumper stickers "or other similar paraphernalia" that "embarrass or disparage" the Commander-in-Chief of the United States was viewpoint-neutral.<sup>259</sup> The court reasoned that not all signs criticizing the President would necessarily "embarrass or disparage" him, while some signs praising the President might well prove embarrassing—if, for example, they contained profane language.<sup>260</sup> In its eagerness to allow what it perceived to be an appropriately broad authority to censor speech at military facilities, the circuit court ignored, among other things, the Supreme Court's explanation in its flag desecration cases of why terms like "disparage" or "desecrate" are inevitably viewpoint-based.<sup>261</sup>

Cases like *Ethredge* and *Bullfrog* demonstrate how the concepts of content and viewpoint can be manipulated to reach what seem like appropriate results. In *Ethredge* the court turned intellectual somer-

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255. See *id.* at 509.

256. *Id.* at 509-11; see *supra* text accompanying notes 61-62, 81-82, 90-101. In contrast to the Supreme Court's contorted discussion of the issue in *Boos*, see *supra* text accompanying notes 102-09, the Ninth Circuit pointed out that a policy discriminating against *all* messages was not viewpoint-neutral because its effect was to "disapprove materials that criticize and approve those that accept the prevailing state of affairs on a given topic." *Id.* at 510 n.11.

257. *Id.* at 511.

258. 56 F.3d 1324 (11th Cir. 1995).

259. *Id.*

260. *Id.* at 1328.

261. See *United States v. Eichman*, 496 U.S. 310, 316 (1990); *Texas v. Johnson*, 491 U.S. 397, 410-18 (1989). But see *Brown v. Palmer*, 915 F.2d 1435, 1444-45 (10th Cir. 1990) (finding exclusion of pacifist leaflets from military base open house to be viewpoint-neutral because Air Force barred all "organized dissemination of material advocating political or ideological positions"), *aff'd on rehearing*, 944 F.2d 732 (10th Cir. 1991); *infra* text accompanying note 285. Compare *Bryant v. Secretary of the Army*, 862 F. Supp. 574 (D.D.C. 1994), which held that a rule banning writings "not in consonance with policies of the Department of the Army," in "personal commentary" section of military publications, was unconstitutionally viewpoint-based.



saults to avoid finding viewpoint discrimination and thus be able to uphold the military's policy. In *Bullfrog*, the court shied away from finding viewpoint discrimination in regulations that plainly discriminated based on the message that a particular film conveyed. Instead, it invalidated the regulations as content-based even though some types of content discrimination (e.g., restriction to neutrally defined "educational" films) would likely be permissible under a certification scheme like the USIA's.

If the *Ethredge* court blinked at clearly viewpoint discriminatory language on the face of a general policy, in order to focus on specific examples of how the policy *might* allow "non disparaging" criticism of the President, courts in two other cases delved beneath the generality of an ostensibly viewpoint-neutral policy to find likely discrimination in its application. The first, *AIDS Action Committee v. Massachusetts Bay Transportation Authority*,<sup>262</sup> found that a rule prohibiting sexually "graphic" advertisements (including innuendo and double entendre) was applied in a manner that "gave rise to an [unrebutted] appearance of viewpoint discrimination."<sup>263</sup> The Massachusetts Bay Transportation Authority ("MBTA") had accepted heterosexually suggestive ads for the film *Fatal Instinct* on its transit spaces, but rejected equally coy, and considerably less graphic, homosexually oriented safer sex posters.<sup>264</sup> In reaching its conclusion, the court refused to address the question at the level of specificity urged by the agency—that is, whether it was attempting to suppress the message that condoms are effective in the fight against AIDS. Instead, the court said that, as in *R.A.V. v. St. Paul*,<sup>265</sup> where only fighting words with certain viewpoints were punished, the MBTA's refusal to run the AIDS ads while allowing the *Fatal Instinct* ads "constitute[d] content discrimination which gives rise to an appearance of viewpoint discrimination."<sup>266</sup> The court insightfully opined that the AIDS ads may have been screened more carefully because of the perception that they would engender controversy; although

[t]he *Fatal Instinct* ads [were] more overtly sexual and more blatantly exploitative, . . . they represent[ed] the *conventional* exploitation of women's bodies for commercial advertising. The

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262. 42 F.3d 1 (1st Cir. 1994).

263. *Id.* at 7, 9-12.

264. *See id.*

265. 505 U.S. 377 (1992); *see supra* text accompanying notes 53-56.

266. *AIDS Action Comm.*, 42 F.3d at 11. The court also found the MBTA's policy to be "scarcely coherent" and thus likely to "invite[ ] the very discrimination that occurred in this case." *Id.* at 12.

condom ads, by contrast, represent[ed] sexual humor addressed to men's bodies and—because of the connection to AIDS—[were] also capable of provoking homophobic reactions from the public, and did.<sup>267</sup>

In the second case, *Air Line Pilots Ass'n v. Department of Aviation*,<sup>268</sup> the court strongly suggested that officials' refusal to permit union ads critical of an airline to be displayed at O'Hare International Airport was not just content- but viewpoint-based.<sup>269</sup> The city claimed its ban on "political" ads was justified by a concern with not alienating the "commercial interests" that use O'Hare.<sup>270</sup> The court found this argument "troubling" because its "degree of specificity" betrayed viewpoint concerns; that is, "[o]nly by reference to message viewpoint (i.e., criticism of a major airline) is the City's objection apparent."<sup>271</sup> As in *R.A.V.*, such selectivity "can 'create . . . the possibility that the city is seeking to handicap the expression of particular ideas.'"<sup>272</sup> The analogy to *Boos v. Barry*<sup>273</sup> is apparent, but the Seventh Circuit was more sensitive than the Supreme Court in *Boos* in discerning why discrimination grounded in fear of controversy or acquiescence to the demands or opinions of others is quintessentially viewpoint-based.<sup>274</sup>

In *Air Line Pilots*, the Seventh Circuit remanded the issue of whether the display cases at the airport were a designated public forum, and offered guidance to the district court on the viewpoint discrimination question, should it be reached.<sup>275</sup> The court criticized as "cursory" and "problematic" the district court's conclusion that the ban on "political" ads was merely content-based.<sup>276</sup> The "appropriate focus for a viewpoint inquiry," said the court of appeals, is not the "exaggerated level of generality" represented by the ban on political ads, but "whether the proposed speech dealt with a subject that was

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267. *Id.* at 12.

268. 45 F.3d 1144 (7th Cir. 1995).

269. *Id.* at 1157.

270. *Id.*

271. *Id.* The court made these comments in response to the city's argument that its selectivity in assigning display spaces defeated plaintiffs' claim that the spaces constituted a "public forum."

272. *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992)).

273. *See supra* text accompanying notes 102-09.

274. *See supra* note 106 (discussing acquiescence in viewpoint-discriminatory pressures of others).

275. *Air Line Pilots*, 45 F.3d at 1158. If the display cases were a public forum, of course, even the city's acknowledged content discrimination would have been unconstitutional. *Id.* at 1151-58.

276. *Id.* at 1159.

'otherwise permissible' in a given forum."<sup>277</sup> As in *Lamb's Chapel*, the important point was not that the government excluded all "religious" speech but that it banned religious perspectives on an otherwise permitted subject.<sup>278</sup> "A view labelled as 'political' (presumably because it is controversial or challenges the status quo) may nevertheless exist in opposition to a view that has otherwise been included in a forum."<sup>279</sup> Thus, broad categorical bans may have little to do with the viewpoint inquiry in specific cases.<sup>280</sup>

The *Air Line Pilots* and *AIDS Action Committee* cases add needed sophistication to the rule of viewpoint neutrality. Although the courts did not say that all bans on "political," "controversial," or "sexually graphic" speech are viewpoint-based, their focus on what actually transpired in a given forum and whether the effect of the government's action was to block access to disfavored messages, helps courts and litigators promote the underlying purpose of the viewpoint neutrality rule—the free exchange of "controversial" and "offensive" ideas. Moreover, the idea in *Air Line Pilots* and *Southwest Africa* that bans on political speech potentially act "as a *sub rosa* penalty on presenting political viewpoints in 'controversial,' as opposed to more benign 'commercial' forms,"<sup>281</sup> is critical to understanding how disfavored ideas actually are suppressed under the guise of viewpoint neutrality. As one district court put it:

[T]he very terms "political" or "nonpartisan" are themselves insusceptible of principled application. Far too frequently the mantle of nonpartisanship is thrown over the shoulders of those who have been successful in obtaining political and economic power . . . , while the pejorative of "political" is reserved for those who have been less successful . . . . More obliquely (although no less perniciously), the appellation of nonpartisan is often affixed to ideas and values whose very emptiness of political content may itself be considered an expression of political

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277. *Id.* (quoting *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993)).

278. *Id.*

279. *Id.* (citing *AIDS Action Comm. v. Massachusetts Bay Trans. Auth.*, 42 F.3d 10 (1st Cir. 1990)).

280. In addition to the appearance of viewpoint discrimination, the Seventh Circuit opined that a ban on political ads was not "reasonable," a requirement under *Perry* and *Cornelius* for even nonpublic forums. *AirLine Pilots*, 45 F.3d at 1158-59 (citing *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Multimedia Pub. v. Greenville-Spartanburg Airport*, 991 F.2d 154, 159 (4th Cir. 1993)).

281. *Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 769 (D.C. Cir. 1983); see *supra* text accompanying notes 245-51, 268-80.

position. What is "political" and what is "nonpartisan" must of necessity . . . lie in the eyes of the beholder.<sup>282</sup>

#### IV. Government Speech

Although viewpoint neutrality is critically important where the government operates benefit or subsidy programs, or permits speech by citizens on public property, its application to "government speech" is more limited. To function, government must be able to express its ideas and exhort its constituents. Whether operating a museum, holding a press conference, or urging the electorate to tighten its belt in the face of economic realities, government may favor some viewpoints and ideas over others. In these situations, government has not opened a forum of any kind for citizen expression.

Thus, for example, decisions to exclude the Nazi viewpoint from the Holocaust Museum, to confine a government-commissioned memorial sculpture to only patriotic sentiments, or to develop a revisionist historical viewpoint in an exhibit about the atom bomb,<sup>283</sup> are not unconstitutional because the government in power is speaking, and there is no pretense that a forum has been created for diverse ideas, or indeed for any speech by citizens.<sup>284</sup> The primary remedy for misguided decisions or distorted judgments in these situations may be the

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282. *Lawrence Univ. Bicentennial Comm'n v. City of Appleton*, 400 F. Supp. 1319, 1326 (E.D. Wis. 1976) (holding that refusal to rent high school gymnasium for speech by Communist Party member based on policy against use of school facilities for religious or political activities unless nonpartisan or nondenominational was unconstitutionally content-based).

283. Note that the First Amendment analysis may change where political pressures are brought to bear against the original conception of the government curators; *see infra* text accompanying notes 306-13.

284. *See generally* MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS—POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983). *See also* Laurence Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 244 (1978) ("Nor can an acceptable free speech theory demand that government be an ideological eunuch; the theory must be subtle enough to distinguish government as *editor* from government as *speaker*."); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 86 ("The government selects what information to develop in government studies, to foster with government research grants, and to publicize in government publications. . . . The Surgeon General advances the view that smoking is bad. The Defense Department promotes enlistment, while other government agencies sometimes advocate conservation."); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression. . . . As Professor Thomas Emerson has written, 'The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.'") (citation omitted) (quoting THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 700 (1970)).

democratic process of throwing out the current regime and electing another. As the Tenth Circuit said in upholding the exclusion of certain political groups from an Air Force base open house:

[W]e would be reluctant to base a finding of viewpoint discrimination on the military's failure to permit plaintiffs to express their opposition to any messages allegedly conveyed by *the military itself*. . . . Government speech would be unduly chilled if any individual or group with views contrary to those of the government were entitled to access to non-public governmental fora for rebuttal.<sup>285</sup>

Alas, or fortunately, life is not always so simple, even in the sphere of government speech. The First Amendment applies whenever government acts; *how* the First Amendment applies is the question to be answered in every case. Additionally, statutes creating instrumentalities of government speech may themselves restrain wholesale propagandizing or suppression of opposing views.<sup>286</sup> Thus, as in other contexts, application of viewpoint neutrality to "government speech" requires an inquiry into the type of expression and forum involved and the First Amendment values at stake.

The purest type of government speech includes propaganda, press conferences, press releases, exhibits or symbols expressing the government's views, agency reports on an array of issues from forest fires to child abuse, and statements of opinion or exhortation by gov-

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285. *Brown v. Palmer*, 915 F.2d 1435, 1445 (10th Cir. 1990), *aff'd on reh'g*, 944 F.2d 732 (10th Cir. 1991).

286. *See, e.g.*, 20 U.S.C. § 41 (1996) (stating purpose of Smithsonian Institution is "the increase and diffusion of knowledge among men"); *id.* § 76(j)(a) (mandating that John F. Kennedy Center for the Performing Arts shall "strive to ensure" that its programs "meet the highest level of excellence and reflect the cultural diversity of the United States"); 22 U.S.C. § 1461-1 (stating that mission of United States Information Agency is to "further the national interest by improving United States relations with other countries and peoples through the *broadest possible sharing of ideas*, information, and educational and cultural activities") (emphasis added); 22 U.S.C. § 1463 (1990) (mandating that Voice of America be a "consistently reliable and authoritative source of news" which is "accurate, objective, and comprehensive"); *Gartner v. United States Info. Agency*, 726 F. Supp. 1183, 1186 (S.D. Iowa 1989) ("Congress restricted the USIA's activities to the foreign sphere in order to prevent the agency from propagandizing the American public."); *Crowley v. Smithsonian Inst.*, 636 F.2d 738, 741-44 (D.C. Cir. 1980) (rejecting challenge by religious fundamentalist to Smithsonian exhibit on evolution; exhibit did not go beyond the museum's statutory purposes of scientific research and education, and did not impermissibly endorse "religion" of secular humanism); *see also* Larry Rohter, *With Voice of Cuban-Americans, a Would-Be Successor to Castro*, N.Y. TIMES, May 8, 1995, at A1 (describing political turmoil within Radio Martí and apparent violations of statutory and regulatory fairness guidelines for both content of broadcasts and treatment of staff).

ernment officials.<sup>287</sup> Government speech outlets like the United States Information Agency are probably in this category. Thus, as the Supreme Court said in *Rust v. Sullivan*,<sup>288</sup> “[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”<sup>289</sup>

Similarly, in *NAACP v. Hunt*,<sup>290</sup> the Eleventh Circuit rejected a civil rights organization’s constitutional challenge to the practice of flying the Confederate flag over the state capitol.<sup>291</sup> The Court explained that decisions like *Mosley* were simply not relevant to this case of government, rather than citizen, speech: “[T]he state may reserve the dome for its own communicative purposes as long as that reservation is reasonable and is not an effort to suppress expression because the public officials oppose the speaker’s view.”<sup>292</sup> Here, the court relied on the nonpublic forum analysis of *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,<sup>293</sup> even though it is probably more accurate to describe the situation in *Hunt* as involving no forum at all for citizen speech. The court was closer to the mark analytically when it said that “[g]overnment communication is legitimate as long as the government does not abridge an individual’s ‘First Amendment right to avoid becoming the courier for [its] message.’”<sup>294</sup>

*Hunt* thus raises the question of when government exhortation crosses the line to threats, intimidation, or coercion of citizen speech. In *Bantam Books, Inc. v. Sullivan*,<sup>295</sup> the Court held unconstitutional an informal censorship scheme in which a state commission sent letters urging booksellers to drop titles that the commission considered

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287. Some of these examples come from Mark G. Yudof, *supra* note 284, at 40; *see also* Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); Linda L. Berger, Note, *Government-Owned Media: The Government as Speaker and Censor*, 35 CASE W. RES. L. REV. 707 (1985).

288. 500 U.S. 173 (1991).

289. *Id.* at 194 (citing 22 U.S.C. § 4411(b) (1994)); *see also* *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2519 (1995) (“[T]he government [in *Rust*] did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”).

290. 891 F.2d 1555 (11th Cir. 1990).

291. *Id.*

292. *Id.* at 1566.

293. 460 U.S. 37, 46 (1983); *see supra* text accompanying notes 69-74.

294. *Hunt*, 891 F.2d at 1566 (quoting *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)).

295. 372 U.S. 58 (1963).

harmful and implicitly threatened criminal prosecution if they did not “cooperate.”<sup>296</sup> In *Penthouse International, Ltd. v. Meese*,<sup>297</sup> by contrast, the D.C. Circuit distinguished *Bantam Books* and held that the Meese Commission on Pornography’s letters advising convenience stores that they would be listed as purveyors of pornography unless they stopped carrying such titles as *Playboy* and *Penthouse*, did not violate clearly established law.<sup>298</sup> That is, the court in *Penthouse* did not think that the government speech at issue amounted to unlawful threats or coercion.<sup>299</sup> Short of such threats or coercion, government officials are free to opine and exhort the citizenry on a range of issues, from water pollution to drug abuse to nuclear disarmament to pornography, without providing equal time to opposing views.

Government-commissioned artworks and exhibits in publicly owned museums are similar to forms of government speech that take place in non-fora. They are not designed for the exchange of views, or indeed as subsidies or benefits for which rules of viewpoint neutrality are appropriate.<sup>300</sup> Thus, in *Serra v. United States General Service Administration*,<sup>301</sup> the Second Circuit rejected artist Richard Serra’s chal-

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296. *Id.*

297. 939 F.2d 1011 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 950 (1992).

298. *Id.*

299. *See id.* at 1014-16. The decision was only about the defendants’ “qualified immunity” from damages liability, but the Court’s language suggested that it thought no constitutional rights had been violated; *see also* *Meese v. Keene*, 481 U.S. 465, 484 (1987) (finding Congress’s “neutral and evenhanded” use of the term “political propaganda” to describe films that must be labeled as such for purposes of the Foreign Agents Registration Act did not violate constitutional rights of filmmakers. The Court had “no occasion here to decide the permissible scope of Congress’ ‘right to speak.’” *Id.* Nor did it indicate whether the First Amendment rights of the film’s exhibitors would have been burdened if the Court had understood the term “propaganda” to be pejorative.); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 134 (7th Cir. 1987) (Easterbrook, J., dissenting) (“[G]overnment may encourage what it may not compel. . . . [I]t may denounce what it may not forbid.”); *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986):

We know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech’s content. . . . A rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family; to make war on Hitler’s Germany, but not to denounce Nazism.

300. This is not to say that a public museum could not devote space to an exhibit whose content and ideas would be free of the government’s curatorial control. When a museum like the Smithsonian chooses to permit such a show, it has created a nonpublic forum and the usual rules of reasonableness and viewpoint neutrality should apply. *See supra* text accompanying notes 69-75.

301. 847 F.2d 1045 (2d Cir. 1988).

lenge to the removal of his government-owned and commissioned sculpture, *Tilted Arc*, from its intended exhibition spot at the federal courthouse plaza in Manhattan.<sup>302</sup> The court of appeals explained:

[T]he First Amendment has only limited application in a case like the present one where the artistic expression belongs to the Government rather than a private individual. . . . “[N]othing in [the First Amendment] precludes the government from controlling its own expression or that of its agents.” . . . Consequently, the Government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen. . . . Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA . . . .<sup>303</sup>

Having resolved the issue in this apparently straightforward manner, the *Serra* court then threw a theoretical monkey wrench into the analysis by suggesting that “there are conceivably situations in which the Government’s exercise of its discretion in this regard could violate the First Amendment rights of the public,” and that “it is . . . possible that the Government’s broad discretion to dispose of its property could be exercised in an impermissibly repressive partisan or political manner.”<sup>304</sup> For these propositions, the court relied on the Supreme Court’s 1982 school library case, *Board of Education v. Pico*.<sup>305</sup>

Yet it is prudent to leave room, as the *Serra* court did, for the possible application of viewpoint neutrality principles to some instances of government speech. As in the public school situation,<sup>306</sup> there is a significant distinction between legitimately inculcating values or commissioning art with a particular message, on the one hand, and responding to outside ideological pressures to censor or restrict government-sponsored art or educational materials on the other.

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302. *Id.* The reasons for removal were the work’s large, awkward size, which interfered with pedestrian use of the plaza, as well as complaints about roosting pigeons, safety, and lack of aesthetic appeal, including the development of rust which the artist described as “a golden amber patina.” *Id.* at 1047; *see supra* note 226.

303. *Id.* at 1048-49 (quoting *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. at 139 (Stewart, J., concurring)); *see also* *Silvette v. Art Comm’n*, 413 F. Supp. 1342, 1346 (E.D. Va. 1976) (rejecting claim by disappointed artist that state laws governing gifts of artwork violated his First Amendment rights—laws simply “delineate the means by which the Commonwealth may acquire works of art by purchase or otherwise,” and involve “artistic judgment”). *But see* Barbara Hoffman, *Law for Art’s Sake in the Public Realm*, 16 COLUM.-VLA J.L. & ARTS 39, 70 (1991) (taking issue with *Serra* decision for not recognizing censorship potential where government “is not simply another property owner [and] when the property in question is public art”).

304. *Serra*, 847 F.2d at 1049, 1050.

305. *See id.* at 1049 (citing *Board of Educ. v. Pico*, 457 U.S. 853 (1982)); *see infra* text accompanying notes 346-55.

306. *See infra* discussion in Part V.



Likewise, the government's power, through its own speech, to indoctrinate and "manufacture consent" is sufficiently overpowering that room should be left for First Amendment claims when outside political interference distorts professional, educational, or curatorial judgments, and results in censorship.<sup>307</sup>

One dramatic example of this phenomenon was the 1994 controversy that erupted over the National Air and Space Museum's exhibit commemorating the fiftieth anniversary of the bombing of Hiroshima and Nagasaki.<sup>308</sup> The show, as planned by the museum's curators with the assistance of professional historians, detailed President Truman's decision to drop the two bombs, and raised questions about the military necessity of doing so. The exhibit's less-than-unquestioning approach to Truman's decision incensed a number of veterans groups and members of Congress. The resulting political pressures eventually led to cancellation of virtually the entire show.<sup>309</sup> As the Second Circuit said in *Serra*, government decisions about its own speech generally do not raise First Amendment concerns.<sup>310</sup> However, it is also true, as the American Association of University Professors pointed out:

[I]f the Smithsonian's curators and administrators cannot exercise their professional judgment about what to display and how, then the way is open for outside groups to determine what are objectionable or unobjectionable exhibitions. Cancellation of an exhibition because some find it offensive increases the probability that suppression will become an acceptable response to controversial displays.<sup>311</sup>

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307. Professor Yudof explains that some level of viewpoint neutrality in the public school context is advisable because schools are "perhaps the government's most pervasive and important exercise in communication[.]" with consequent potential for manufacturing consent, indoctrinating, and controlling access to ideas. YUDOF, *supra* note 284, at 211. Yudof argues that even where government is exercising an editorial function, ideological overreaching should be limited by delegation to experts, such as teachers, museum directors, and editors. *Id.* at 243.

308. See MARTIN HARWITT, AN EXHIBIT DENIED—LOBBYING THE HISTORY OF ENOLA GAY (1996); Eugene L. Meyer, *No Peace for Enola Gay*, WASH. POST, Oct. 21, 1994, at C2; Eric Schmitt, *80 Lawmakers Demand Ouster of Director of Air Museum*, N.Y. TIMES, Jan. 26, 1995, at A6; Karen De Witt, *U.S. Exhibit on 1945 B-29 Is in Jeopardy*, N.Y. TIMES, Jan. 28, 1995, §1, at 8; Karen DeWitt, *Smithsonian Scales Back Exhibit of B-29 in Atomic Bomb Attack*, N.Y. TIMES, Jan. 31, 1995, at A1.

309. See *supra* note 308; see also Ian Buruma, *The War over the Bomb*, N.Y. REV. BOOKS, Sept. 21, 1995, at 26; *The Smithsonian Institution and the Enola Gay Exhibit*, ACADEME, July-Aug. 1995, at 56 [hereinafter *Enola Gay Exhibit*]; Barton J. Bernstein, *Hiroshima, Rewritten*, N.Y. TIMES, Jan. 31, 1995, at A21; John Kifner, *Hiroshima: A Controversy that Refused to Die*, N.Y. TIMES, Jan. 31, 1995, at A16.

310. See *Serra*, 847 F.2d at 1048-49.

311. *Enola Gay Exhibit*, *supra* note 309, at 56.

That is, the robust exchange of controversial ideas so essential to democracy and human freedom suffers regardless of whether the veterans' and other political pressures are brought to bear against a government museum or a private one. And although government-created exhibits, which constitute government speech, are very different from art or other citizen expression that is simply government-funded or assisted,<sup>312</sup> the First Amendment concern with protecting "controversial" and "offensive" viewpoints is not necessarily irrelevant in the context of government speech.<sup>313</sup>

Another form of government speech, related to but also markedly different from officially sponsored artworks or exhibits, is government-owned broadcasting stations.<sup>314</sup> A number of cases have addressed the First Amendment implications of viewpoint discrimination in this context. Analytically, these stations are generally not fora of any type, yet they may act in ways that violate the First Amendment.

A leading case is *Muir v. Alabama Educational Television Commission*,<sup>315</sup> an en banc decision in two consolidated actions that upheld the cancellation of broadcasts of the controversial documentary *Death of a Princess*.<sup>316</sup> The broadcasts were cancelled in response to political pressure from Saudi Arabia and from local residents "express[ing] fear for the personal safety and well-being of [American]

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312. That is, government funding or other assistance is usually intended to foster citizen speech, and does not imply government endorsement of the views expressed; see *supra* Part III.

313. By 1995, closing government exhibits because of political pressure had become almost routine. See, e.g., Irvin Molotsky, *Freud Show Delayed Amid Criticism*, N.Y. TIMES, Dec. 6, 1995, at A18; Dinitia Smith, *Ideas & Trends: Freud May be Dead, but His Critics Still Kick*, N.Y. TIMES, Dec. 10, 1995, § 4 (Week in Review), at 14; Julia M. Klein, *Postponement of Freud Exhibit Raises Questions About Censorship*, DALLAS MORNING NEWS, Dec. 25, 1995, at 16A (postponing of Library of Congress exhibit on Sigmund Freud under pressure from anti-Freudians); Karen DeWitt, *After Protests, Library of Congress Closes Exhibit on Slavery*, N.Y. TIMES, Dec. 21, 1995, at A21 (relating objections voiced by African-American library staff).

314. Not to be confused with nonprofit radio or television stations that simply receive public funding via the Corporation for Public Broadcasting ("CPB"), and that are guaranteed editorial freedom in the CPB statute. See 47 U.S.C. § 396(a)(3), (5) (1991) (stating that purposes of Public Broadcasting Act of 1967 include "the expansion and development of public telecommunications and of diversity in its programming, [which] depend on freedom, imagination, and initiative on both local and national levels," and responsiveness to "the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services").

315. 688 F.2d 1033 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983).

316. *Id.*

citizens working in the Middle East if the program was shown.”<sup>317</sup> The en banc court produced six separate opinions, but a majority agreed that there was no First Amendment violation.<sup>318</sup> Judge Hill’s plurality opinion rejected both public and nonpublic forum analysis:

We are not convinced that editorial decisions of public television stations owned and operated by the state must, or should, be viewed in the same manner and subjected to the same restrictions as state regulatory activity affecting speech in other areas. . . . [T]he First Amendment does not prohibit the government, itself, from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial control over its own medium of expression.<sup>319</sup>

Thus, according to Judge Hill, viewpoint discrimination by government broadcasters, or acquiescence in outside ideological pressures, is permissible. “In exercising their editorial discretion state officials will unavoidably make programming decisions which can be characterized as ‘politically motivated.’”<sup>320</sup> Judge Hill, rejecting a proposed analogy to the Supreme Court’s application of viewpoint neutrality to library book removal in *Pico*, did not see a material difference between affirmative programming choices and decisions to cancel shows because of their political content.<sup>321</sup>

The dissenters in *Muir*, by contrast, generally followed the reasoning of the *Pico* plurality and earlier education censorship cases,<sup>322</sup> distinguishing between legitimate affirmative programming decisions and illegitimate viewpoint-based suppression of already-scheduled shows.<sup>323</sup> Judge Reavley would not have gone as far as some of the other dissenters because he felt that government-operated television stations should have the authority to make editorial decisions even based upon political content, so long as they are not based “upon

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317. *Id.* at 1036. *See supra* note 106 (regarding application of viewpoint neutrality principles to decisions acquiescing in the ideological pressures of others).

318. *See Muir*, 688 F.2d at 1033.

319. *Id.* at 1043-44.

320. *Id.* at 1044.

321. *Id.* at 1044-45; *see infra* text accompanying notes 346-55.

322. *See, e.g.,* *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir.), *aff’d as modified en banc*, 489 F.2d 225 (5th Cir. 1973), *and cert. denied*, 416 U.S. 995 (1974); *Brooks v. Auburn Univ.*, 412 F.2d 1171 (5th Cir. 1969); *Muir*, 688 F.2d at 1055-59 (Johnson et al., JJ., dissenting).

323. *See Muir*, 688 F.2d at 1053-60 (Johnson, Hatchett, Anderson, Tate, and Clark, JJ., dissenting) (Kravitch, JJ., dissenting).

viewpoint alone, . . . entirely aside from any opinion as to program value or effect.”<sup>324</sup>

Other cases involving government broadcasting have used non-public forum analysis to uphold editorial decisions that are not clearly viewpoint-based.<sup>325</sup> On the other hand, one court held that a government radio station’s censorship of its employees’ broadcasts was viewpoint-based and unconstitutional; the university-owned station had opened itself to speech by volunteers and thus created a nonpublic forum in which general editorial decisions were legitimate but viewpoint discrimination was not.<sup>326</sup>

The bottom line seems to be that government-owned broadcast stations have editorial discretion similar to that enjoyed by the private media, but that, as in the public education context,<sup>327</sup> the discretion is not boundless. First Amendment viewpoint neutrality may be required in some circumstances, at least when the station has become a nonpublic forum or even a limited public forum for speech by citizens, and certainly when it is run by a public university in a manner similar to other student activities.<sup>328</sup>

As in other contexts, how First Amendment principles should apply to government speech depends in large part on the purposes and functions of the forum or activity involved. The First Amendment rights of the public are never irrelevant, even if the government is speaking. Because so many different activities might be considered

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324. *Id.* at 1060 (Reavley, J., dissenting). Similarly, a concurrence by Judges Rubin, Politz, Randall, and Williams distinguished between the First Amendment requirements when “the state is conducting an activity that functions as a marketplace of ideas,” and when “the state’s activity is devoted to a specific function rather than general news dissemination or free exposition of ideas.” *Id.* at 1050.

325. *See* *Forbes v. Arkansas Educ. Television*, 22 F.3d 1423 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1962 (1995) (holding that a minor political candidate has no right of access to government-owned station to participate in election debate); *Chandler v. Georgia Pub. Telecomm. Comm’n*, 917 F.2d 486, 489 (11th Cir. 1990) (adverting to nonpublic forum analysis by noting that restriction was “content-based” but “not viewpoint restrictive”); *Schneider v. Indian River Comm. College Found.*, 875 F.2d 1537 (11th Cir. 1989) (finding that a radio station owned by a public university did not violate First Amendment rights of employees who were fired for refusing to comply with editorial directive prohibiting reporting on certain subjects).

326. *See* *Aldrich v. Knab*, 858 F.Supp. 1480, 1492-94 (W.D. Wash. 1994). *Aldrich* distinguished *Schneider*, *see supra* note 325, because the ban in *Aldrich* on on-air criticism of the station or the university was viewpoint-based. *Cf.* *Bryant v. Secretary of the Army*, 862 F. Supp. 574, 580-81, 585 (D.D.C. 1994) (letters to editor column in military publication is not “government speech,” but is a nonpublic forum in which viewpoint discrimination is impermissible).

327. *See infra* Part V.

328. *Cf.*, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972).

government speech, including educational curriculum, museum exhibits, broadcasting, and even public library choices, the values underlying viewpoint neutrality should in some circumstances limit the government's ability to skew the debate and suppress disfavored ideas or information.

## V. Public Education: The *Pico* Paradox

Public education presents a paradoxical situation: it is government speech for some purposes, yet also a quintessential forum for intellectual growth, exploration, exposure to unconventional ideas, and tolerance of dissenting views. School boards have the largely discretionary authority to mold curriculum in order to "inculcat[e] fundamental values,"<sup>329</sup> yet students "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."<sup>330</sup> Public education is too important to abandon to political conformism or doctrinaire ideology that would "strangle the free mind at its source,"<sup>331</sup> even though it is undoubtedly, for some purposes, a vehicle for government speech.

The tension between these two competing visions and roles of public education is reflected in the case law. Before *Pico*, some courts invalidated school censorship decisions without sharply distinguishing between content and viewpoint discrimination.<sup>332</sup> Others made the

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329. *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

330. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969) (invalidating principal's suspension of students for refusing to remove black armbands protesting U.S. government's involvement in Vietnam). Because there was no evidence in *Tinker* that the students' expressive conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *id.* at 509, the principal's order violated the First Amendment. The case involved government officials' attempt to censor independent speech by students, not school-sponsored curriculum or library choices.

331. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). As Mark Yudof has written, free speech and thought are important in schools precisely because public education is "perhaps the government's most pervasive and important exercise in communication," with vast power to determine what information and ideas will be available to the young. YUDOF, *supra* note 284, at 211.

332. *See, e.g., Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (invalidating removal of Joseph Heller's *Catch 22* and Kurt Vonnegut's *Cat's Cradle* from school library because board members found them "distasteful"); *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679 (D. Me. 1982) (invalidating removal of anthology of writings by Vietnam veterans based on "objectionable language"); *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1139 (N.D. Miss. 1980) (striking down rejection of Mississippi history text on both First Amendment and Equal Protection grounds; two officials thought the book treated race in too controversial a manner); *Dean v. Timpson Ind. Sch. Dist.*, 486 F. Supp. 302, 308 (E.D. Tex. 1979) (invalidating teacher firing based on use of magazine survey which of-

distinction, leaving only a narrow window for First Amendment claims, or appeared to reject judicial intervention entirely.<sup>333</sup> A representative case was *Cary v. Board of Education*,<sup>334</sup> where teachers unsuccessfully challenged a school board's deletion of ten books from a list of 1,285 recommended for elective language arts courses.<sup>335</sup> The Tenth Circuit, in upholding the deletions, distinguished between legitimate decisions to ban books based on the board members' "personal views" and decisions designed to "promote a particular religious viewpoint" or based on a "systematic effort . . . to exclude any particular type of thinking or book," which would be constitutionally improper.<sup>336</sup>

Two years later, *Seyfried v. Walton*<sup>337</sup> followed a different analytical route to the same judicially deferential goal. A school superintendent stopped rehearsals for a student production of the play *Pippin* after a parent complained that the play mocked religion. The Third Circuit found that the superintendent's decision was actually based on the work's "sexual content."<sup>338</sup> The court found no First Amendment violation because the superintendent's decision did not involve "student newspapers or other 'non-program related expressions of student

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fended "the dominant views or beliefs" of the community); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D. N.H. 1979) (invalidating removal of *Ms.* magazine from school library); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978) (invalidating removal of poetry anthology considered vulgar from school library); *Parducci v. Rutland*, 316 F. Supp. 352, 353-54 (M.D. Ala. 1970) (applying *Tinker* "substantial disruption" standard to invalidate teacher firing for use of Kurt Vonnegut story which administrators viewed as "literary garbage" with whose "philosophy" they disagreed).

333. See, e.g., *President's Council, Dist. 25 v. Community Sch. Bd. No. 25*, 457 F.2d 289, 292 (2d Cir.), cert. denied, 409 U.S. 998 (1972) (rejecting challenge to library book removal on grounds, *inter alia*, that school library is adjunct to curriculum); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d at 579-82 (holding that with respect to curriculum, as opposed to library, decisions, school boards have broad authority; record did not disclose arbitrary or capricious decisionmaking even though it reflected board's animosity to some books based on their content).

334. 598 F.2d 535 (10th Cir. 1979).

335. *Id.*

336. *Id.* at 538, 544. Similarly, in *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980), the Seventh Circuit agreed with a district court's dismissal of a curriculum censorship case but gave the plaintiffs an opportunity to replead and allege partisan viewpoint discrimination. The court said school boards may select instructional materials "that will best transmit the basic values of the community," but may not "impos[e] 'a pall of orthodoxy' on the offerings of the classroom," *id.* at 1305-06 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967)). Attempting further elucidation of this cloudy distinction, the court said that student plaintiffs "must cross a relatively high threshold" in pleading First Amendment curriculum censorship claims. *Id.* at 1306.

337. 668 F.2d 214 (3d Cir. 1981).

338. *Id.* at 215-16.

opinion,"<sup>339</sup> and because the school had an "important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program."<sup>340</sup> Seemingly, the court saw no risk of imposing a "pall of orthodoxy" provided that student expression independent of the curriculum was not infringed upon.<sup>341</sup>

Judge Rosenn wrote separately in *Seyfried* "to emphasize that [school authorities'] discretion is not unfettered and that courts have a duty to vindicate the complementary constitutional rights of students to express and to hear more than one point of view."<sup>342</sup> He noted the "inherent tension between these two essential functions, on the one hand exposing young minds to the clash of ideologies in the free marketplace of ideas, and on the other hand the need to provide our youth with a solid foundation of basic, moral values."<sup>343</sup> Resolving the tension, said Judge Rosenn, should involve an assessment of the administrators' motivations in light of the nature of the material censored, particularly if the content is sexual, and the "intellectual and emotional development of the students."<sup>344</sup> Here, because the superintendent's objection to *Pippin* was based not on its ideas but on its "explicit sexual overtones," Judge Rosenn saw no danger of "ideological indoctrination," and thus no First Amendment problem.<sup>345</sup>

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339. *Id.* at 216 (quoting district court decision, *Seyfried*, 512 F. Supp. 235, 238-39 (D. Del. 1981)).

340. *Id.* at 216.

341. Compare *Bowman v. Bethel-Tate Board of Education*, 610 F. Supp. 577, 579 (S.D. Ohio 1985), which enjoined a school board from halting production of an elementary school play, where the activity was extracurricular, and the board's vote "was prompted by its disagreement with" the play's ideas. Cf. *Bell v. U-32 Bd. of Educ.*, 630 F. Supp. 939, 943 (D. Vt. 1986) (reaching opposite result because there was no evidence of viewpoint discrimination; school authorities have power to censor vulgarity or sexual content); see also *Wilson v. Chancellor*, 418 F. Supp. 1358, 1366-67 (D. Or. 1976) (finding ban on "political" speakers was content-based, in violation of Equal Protection principles, and was applied in viewpoint-discriminatory fashion, in violation of First Amendment); *DiBona v. Matthews*, 220 Cal. App. 3d 1329, cert. denied, 498 U.S. 998 (1990) (reversing summary judgment for college administrators; material facts regarding motive for cancelling play were at issue); *McCarthy v. Fletcher*, 207 Cal. App. 3d 130, 139-47 (1989) (reversing dismissal of challenge to removal of novels *Grendel* and *100 Years of Solitude* from school curriculum; removal would be unconstitutional if viewpoint-based).

342. *Seyfried*, 668 F.2d at 217 (Rosenn, J., concurring).

343. *Id.* at 219.

344. *Id.* at 220, 219.

345. *Id.* at 220. See also *Pratt v. Independent School District No. 831*, 670 F.2d 771 (8th Cir. 1982), which applied the same viewpoint neutrality standard, but reached an opposite conclusion from *Seyfried* with respect to the removal of a film version of Shirley Jackson's short story *The Lottery* from high school and junior high literature courses. Evidence showed that "[o]pponents of 'The Lottery' focused primarily on the purported religious and ideological impact of the films," that "the objections of the board's majority had 'reli-

This judicial deference with a relatively narrow exception for “ideological indoctrination” represented the general state of affairs when *Pico* arrived at the Supreme Court. The facts in *Pico* were typical of school censorship scenarios: the school board had removed ten books from its high school and junior high libraries on the grounds that they were “anti-American, anti-Christian, anti-Semitic, and just plain filthy.”<sup>346</sup> A district court dismissed the students’ First Amendment challenge but the Second Circuit reversed, ruling that genuine issues of material fact regarding the board’s motives remained for trial.<sup>347</sup> The Supreme Court affirmed, with four of the five justices in the majority addressing the merits of the viewpoint discrimination issue.<sup>348</sup>

Justice Brennan’s plurality opinion, after acknowledging the “broad discretion” of school boards “in the management of school affairs,”<sup>349</sup> articulated the First Amendment limits: school boards and administrators may not exercise their discretion “in a narrowly partisan or political manner” because “[o]ur Constitution does not permit the official suppression of *ideas*.”<sup>350</sup> Thus, “[i]f petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners’ decision, then petitioners have exercised their discretion in violation of the Constitution.”<sup>351</sup>

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gious overtones’ and that the films had been eliminated because of their ‘ideological content.’” *Id.* at 776-77.

346. Board of Educ. v *Pico*, 457 U.S. 853, 857 (1982).

347. See *Pico v. Board of Educ.*, 638 F.2d 404, 415-19 (2d Cir. 1980), *aff’d*, 457 U.S. 853 (1982).

348. See *Pico*, 457 U.S. 853.

349. *Id.* at 863.

350. *Id.* at 870-71.

351. *Id.* at 871 (footnote omitted). Brennan said such viewpoint suppression would amount to the “officially prescribed orthodoxy unequivocally condemned in *Barnette*,” see *supra* text accompanying notes 1-2, 28, but Brennan seemed to assume that “an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove those books at issue because the books were pervasively vulgar.” *Pico*, 457 U.S. at 871; see *supra* text accompanying notes 165-66. Justice Blackmun, concurring, agreed with the Brennan plurality on the crucial importance of motivation in school as in other censorship cases: “[O]ur precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.” *Pico*, 457 U.S. at 878-79. Justice White concurred because he thought there were disputed issues of fact regarding the “reason or reasons underlying the . . . removal of the books”; reaching the First Amendment issues was not necessary, he said, because after trial the district court might find that the books were “removed for their vulgarity, [and] there may be no appeal.” *Id.* at 883. The necessary implication is that at least some reasons (but not including vulgarity) would be unconstitutional.



Although the four dissenters in *Pico* bitterly contested the majority decision, three of them did not dispute that at some point, viewpoint neutrality standards *would* apply to school library decisions. Justice Rehnquist “cheerfully concede[d]”:

If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students. . . . The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration.<sup>352</sup>

Rehnquist’s dissent was based on his perception that “[i]n *this case* the facts taken most favorably to respondents suggest that nothing of this sort happened.”<sup>353</sup> He read the record to indicate that the books were removed for profanity and vulgarity, not because of their political ideas.<sup>354</sup>

Thus, the various opinions in *Pico* differed more about the state of the record and the scope of the concept of viewpoint discrimination than about the proposition that the First Amendment proscription against suppressing disfavored ideas does indeed apply to public schools. Evidently Justice Rehnquist thought that the removal of books because of perceived anti-Americanism or animosity to particular religious or racial groups would not be viewpoint-based, but that removal of all books favoring a particular political party or with particular ideas about racial politics would be. It is difficult to discern what principle underlies this distinction, unless it be simply a desire to limit federal court intervention in school matters to only the most extreme scenarios.<sup>355</sup>

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352. *Pico*, 457 U.S. at 907 (Rehnquist, Powell, and Burger, JJ., dissenting) (referring to examples given in majority opinion at 870-71).

353. *Id.*

354. *See id.*

355. *See, e.g., id.* at 885 (Burger, C.J., dissenting) (warning that the plurality’s standard would bring Court “perilously close to becoming a ‘super censor’ of school board library decisions”; question is whether “local schools are to be administered by elected school boards, or by federal judges and teenage pupils”). Post-*Pico* cases have maintained the distinction between illegitimate indoctrination and “educational suitability” as enunciated by the *Pico* plurality. *See Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995) (rejecting school board’s argument that *Pico* had no binding effect and should be disregarded, but not reaching question of whether board members’ professed fears that students might endanger themselves by imitating “hexes” described in censored book about voodoo traditions was essentially viewpoint discrimination). The district court in *Campbell* had ruled that removing the book because of fear of imitation amounted to suppression of dangerous ideas. *See also Delcarpio v. St. Tammany Parish Sch. Bd.*, 865 F. Supp. 350, 361 (E.D. La. 1994); *Case v. Unified Sch. Dist. No. 233*, 895 F. Supp. 1463, 1468-

*Pico* left unclear precisely how to draw the line between unconstitutional suppression of ideas and legitimate “educational suitability” concerns, especially given the plurality’s favorable treatment of *Ambach v. Norwick*.<sup>356</sup> *Ambach* upheld the State of New York’s requirement of citizen status for public school teachers, partially on the theory that citizens are more likely than aliens to teach students patriotism and respect for American institutions.<sup>357</sup> The *Ambach* Court described public schools glowingly as “vehicles for ‘inculcating fundamental values necessary to the maintenance of a democratic political system.’”<sup>358</sup> *Ambach* thus hardly suggests that viewpoint neutrality is necessary or even desirable in the sphere of public education. As Chief Justice Burger wrote in his *Pico* dissent:

How are “fundamental values” to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum[?] In order to fulfill its function, an elected school board *must* express its views on the subjects which are taught to its students.<sup>359</sup>

The tension between the Court’s recognition in both *Ambach* and *Pico* of the important inculcative nature of public education on the one hand, and of the constitutional dangers of allowing school officials to impose a “pall of orthodoxy” and suppress “dangerous ideas” on the other hand, may aptly be dubbed the “*Pico* paradox.”<sup>360</sup> This tension is heightened where library censorship is at issue, since—as the *Pico* plurality pointed out—a library is uniquely a place where “a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum.”<sup>361</sup> A li-

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69 (D. Kan. 1995) (rejecting argument to disregard *Pico*; removal of gay-themed novel because of opposition to the views it expressed would be unconstitutional). After trial, the court in *Case* found a First Amendment violation because the school board members had removed the book based on their strongly held views that homosexuality was evil, sick, and sinful; see 908 F. Supp. 864, 870-71, 875 (D. Kan. 1995).

356. 441 U.S. 68 (1979), cited in *Pico*, 457 U.S. at 864.

357. See *id.*

358. *Pico*, 457 U.S. at 864 (quoting *Ambach*, 441 U.S. at 76-77).

359. *Id.* at 889 (Burger, C.J., dissenting) (quoting *Ambach*, 441 U.S. at 77). Justice Burger uses “content” and “views” interchangeably in this passage, but the context makes clear that it is viewpoint bias, at least in the sense of “inculcation of values,” that he is defending.

360. Professor Stanley Ingber describes it less charitably as “judicial schizophrenia.” Stanley Ingber, *Socialization, Indoctrination, or the ‘Pall of Orthodoxy’: Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 47.

361. *Pico*, 457 U.S. at 868-69 (quoting *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978)).

brary is less a forum for “inculcation of values” than a repository of ideas where “the regime of voluntary inquiry . . . holds sway.”<sup>362</sup>

The Supreme Court’s post-*Pico* school censorship decisions, *Bethel School District v. Fraser*<sup>363</sup> and *Hazelwood School District v. Kuhlmeier*,<sup>364</sup> do little to resolve the *Pico* paradox. *Fraser*, which upheld the discipline of a student who used sexual innuendo at a school assembly, sanctimoniously invoked school boards’ power to teach youngsters “the shared values of a civilized social order.”<sup>365</sup> The Court did, however, emphasize that the case would have been different if the school had punished Fraser for his “political viewpoint.”<sup>366</sup>

*Hazelwood* gave school authorities broad power to censor student speech in curriculum-related, school-sponsored activities as long as their decisions were based on “legitimate pedagogical concerns.”<sup>367</sup> Such concerns included the authorities’ desire to avoid association of the school with “any position other than neutrality on matters of political controversy.”<sup>368</sup> Neither case suggested that a desire to suppress disfavored ideas would constitute a “legitimate pedagogical concern,” even in the curriculum context, and indeed *Fraser* suggested the opposite.<sup>369</sup> Courts both before and after *Hazelwood* have applied the *Pico* principle—that ideologically inspired suppression of particular viewpoints is *not* educationally legitimate—to the school library, the classroom, and extracurricular activities.<sup>370</sup>

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362. *Id.* at 864, 869.

363. 478 U.S. 675 (1986); *see supra* text accompanying notes 167-71.

364. 484 U.S. 260 (1988); *see supra* text accompanying notes 172-78.

365. *Fraser*, 478 U.S. at 683.

366. *Id.* at 685.

367. *Hazelwood*, 484 U.S. at 273. The concerns that led to censorship of the student newspaper in *Hazelwood* were legitimate, according to the Court, because they involved the privacy of female students who had been interviewed for an article on teenage pregnancy, as well as parents who had not had an opportunity to respond to an article on divorce. The articles also had “references to sexual activity and birth control” that might be “inappropriate for some of the younger students.” *Id.* at 263.

368. *Id.* How this language in *Hazelwood* squares with the Court’s recognition in *League of Women Voters* and *Consolidated Edison*, *see supra* text accompanying notes 90-99, of the extraordinary importance of protecting controversial political speech is not clear, especially since public school classrooms are “peculiarly the ‘marketplace of ideas,’” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), and students are not simply “closed-circuit recipients of only that which the State chooses to communicate,” *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969).

369. *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

370. *See Brody v. Spang*, 957 F.2d 1108, 1118 (3d Cir. 1992) (interpreting *Hazelwood* as holding that “reasonable, non-viewpoint-based restrictions were acceptable”) (emphasis added); *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989) (stating that *Hazelwood* did not eliminate the requirement of viewpoint neutrality); *McCarthy v. Fletcher*, 207 Cal. App. 3d 130, 145-47 (1989) (stating that under *Hazelwood*, curriculum decisions “cannot be

Can the *Pico* paradox be resolved? Judge Newman in his Second Circuit *Pico* concurrence offered one possible resolution: "It is one thing to teach, to urge the correctness of a point of view. But it is quite another to take any action that condemns an idea, that places it beyond the pale of free discussion and scrutiny."<sup>371</sup> The First Amendment "condemns 'indoctrination' in the sense of endeavoring to insist that one set of values must be accepted by the students."<sup>372</sup>

Under this view, there is a distinction between the "inculcation of values" through curriculum and library *choices* and "indoctrination," which includes not only decisions to *remove or ban* materials with particular ideas, but also instruction imposed in so wooden a fashion that virtually no room is left for independent thought.<sup>373</sup> School boards and administrators in this scenario thus have the authority to choose texts and syllabi that generally reflect their political and social values, but they cannot seek to purge the classroom, or a fortiori the library, of all opposing ideas or conversations.

*Johnson v. Stuart* exemplifies this distinction.<sup>374</sup> In *Johnson*, the plaintiffs chose not to challenge a curriculum guideline requiring that texts "stress the services of those who achieved our national independence."<sup>375</sup> Instead, they concentrated their fire on a portion of the

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motivated by an intent to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion'") (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)); *see also Johnson v. Stuart*, 702 F.2d 193 (9th Cir. 1983) (finding that students had standing to challenge ideological curriculum guidelines); *Pratt v. Independent Sch. Dist.*, 670 F.2d 771, 776-77 (8th Cir. 1982); *Zykan v. Warsaw Community Sch. Corp.*, 631 F.2d 1300, 1305-06 (7th Cir. 1980); *Cary v. Board of Educ.*, 598 F.2d 535, 538, 544 (10th Cir. 1979).

371. *Pico v. Board of Educ.*, 638 F.2d 404, 432-33 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982) (footnote omitted) (Newman, J., concurring).

372. *Id.* at 433 n.1 (quoting *James v. Board of Educ.*, 461 F.2d 566, 573 (2d Cir. 1972)); *see also Gregory A. Clarick, Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 719 (1990) ("[T]he allowed value inculcation occurs partly when teachers present competing viewpoints in the classroom. . . . Although the *Ambach* Court did not explicitly name the 'civic virtues' which it regarded 'all teachers having the obligation to promote,' appreciation and toleration of diverse viewpoints lie at their core."); Ingber, *supra* note 360, at 82-93 (suggesting structural remedies as a means of resolving tension between legitimate inculcation of values and illegitimate suppression of ideas).

373. As Judge Kennedy of the Sixth Circuit observed, government has a compelling interest in teaching students "how to think critically about complex and controversial subjects and to develop their own ideas and make judgments about these subjects." *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987) (rejecting parents' free exercise challenge to curricular materials), *cert. denied*, 484 U.S. 1066 (1988) (Kennedy J., concurring).

374. 702 F.2d 193 (9th Cir. 1983).

375. *Id.* at 194.

state education law that banned any text that “speaks slightly of the founders of the republic.”<sup>376</sup> Although the Ninth Circuit’s decision concerned only standing,<sup>377</sup> it implicitly assumed that the plaintiffs had stated a viable viewpoint discrimination claim.<sup>378</sup>

Ideological manipulation of the educational process not only threatens intellectual and academic freedom but contradicts the fundamental purpose of education: the “wide exposure to that robust exchange of ideas” on which the “Nation’s future depends.”<sup>379</sup> Thus, despite the element of government speech present in curriculum decisions, public schools are a critical forum for the exchange of ideas, the nurturing of the human intellect, and the development of thinking citizens capable of making democratic choices. There are few if any aspects of American life where viewpoint neutrality principles are more crucial.

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376. *Id.*

377. The district court in *Johnson* had dismissed all plaintiffs for lack of standing and ripeness; the Ninth Circuit affirmed as to the teachers, 702 F.2d at 195, but ruled that students did have standing based on their right of “free access to information in the continuing process of their education,” *id.* at 197. On remand in *Johnson*, the district court enjoined the State Board of Education and Textbook Commission from enforcing the portion of the statute banning books that “belittle or undervalue” the republic’s founders, because the law “acts to contract the available field of knowledge and casts a pall of orthodoxy over the curriculum.” *Johnson v. Stuart*, Civ. No. 78-770 (D. Ore. 1984) (transcript of proceedings before Judge James M. Burns, July 21, 1984, at 4).

378. Despite the result in *Johnson*, ideologically driven state and local public education guidelines proliferate. In 1994, the Lake County, Florida school district not only forbade teachers to say anything critical of the United States, it mandated instruction on the superiority of U.S. society to any other. *See PEOPLE FOR THE AMERICAN WAY, ATTACKS ON THE FREEDOM TO LEARN 73* (1993-1994 Report). The local teachers’ association filed suit, but an election that year shifted the balance of power on the school board, the guidelines were rescinded, and the case consequently dropped. Telephone Interview with Gail Murray, Lake County Education Association, Oct. 14, 1995.

In August 1995, the Merrimack, New Hampshire school board voted to prohibit “any program or activity that has either the purpose or effect of encouraging or supporting homosexuality as a positive lifestyle alternative.” *Walker v. Merrimack Sch. Dist.*, No. C-96-87-SD (D.N.H. filed Feb. 15, 1996). “Program or activity” included “instructional materials, instruction, counseling, or other services on school grounds, or referral of a pupil to an organization that affirms a homosexual lifestyle.” *Id.* In February 1996, a coalition of civil liberties and gay rights groups, with the Merrimack Teachers’ Association, filed suit on behalf of parents, students, and teachers, challenging the policy on First Amendment and vagueness grounds. *Id.* As in Lake County, an election later that year led to rescission of the policy, and the suit was dismissed.

379. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

## Conclusion

Viewpoint neutrality is perhaps the single most important value underlying the First Amendment. As the Supreme Court has ruled, it governs the constitutionality not only of criminal laws and other direct forms of government regulation of speech, but also the provision of government subsidies and other benefits, including access to public and nonpublic fora for citizens' expression. It even applies to some government speech, particularly where the government is speaking in its role as educator: setting school curriculum, choosing library books, and selecting instructors for public schools and universities.

Defining viewpoint discrimination, however, is not simple. Some courts that have wrestled with the problem have ignored the forest for the trees, refining the relevant inquiry so narrowly that the essentially ideological and repressive function of the restriction in question is ignored.<sup>380</sup> Other courts have looked beyond government officials' asserted reasons for suppression, discerning viewpoint bias where it may not appear on the surface of an articulated policy.<sup>381</sup> In a critical passage in *Rosenberger*,<sup>382</sup> the Supreme Court recognized that discrimination against speech because of its religious perspective is viewpoint-based because public discussion is "complex and multifaceted," and silencing whole categories of ideas "skew[s] the debate in multiple ways."<sup>383</sup> This insight applies fully to "controversial," "offensive," and "political" speech which, as the Court has sometimes appeared to recognize, are essentially viewpoint-based categories.<sup>384</sup> It certainly weakens the too-literal, bipolar construction of viewpoint neutrality that some courts have employed without taking into account the First Amendment value in a multifaceted exchange of ideas.

Terms like "controversial," "political," or "offensive" are culturally and ideologically constructed; what speech falls inside or outside such categories is almost always defined according to the values and attitudes of the decisionmaker.<sup>385</sup> The Supreme Court's failure to rec-

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380. See *supra* text accompanying notes 221-44, 258-61; see, e.g., *Ethredge v. Hail*, 56 F.3d 1324 (11th Cir. 1995); *Claudio v. United States*, 836 F. Supp. 1219, 1230 (E.D.N.C. 1993), *aff'd without opinion*, 28 F.3d 1208 (4th Cir. 1994); *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2537 (1996).

381. See *supra* text accompanying notes 262-280; see, e.g., *AIDS Action Comm. v. Massachusetts Bay Trans. Auth.*, 42 F.3d 1 (1st Cir. 1994); *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144 (7th Cir. 1995).

382. See *supra* text accompanying notes 112-19.

383. 115 S. Ct. at 2518.

384. See *supra* Part I.C.

385. See *Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 769 (D.C. Cir. 1983) (excluding "political" speech operates to screen out controversial

ognize this point in *Cornelius v. NAACP Legal Defense and Educational Fund*<sup>386</sup> produced a dubious result that permitted officials to exclude viewpoints that *they* perceived as “controversial” from an important government benefit. Likewise, in the context of public schools, avoidance of “controversy” is inconsistent with the very purpose of education, which is “to foster . . . habits of open-mindedness and critical inquiry.”<sup>387</sup> Thus, the Supreme Court’s approval in *Hazelwood*<sup>388</sup> of the exclusion of “controversial” articles from a school-sponsored student newspaper was profoundly antithetical to free speech values even if, as the Court ruled, school officials plainly may exercise significant control over publications produced as part of the curriculum.

Finally, the courts must recognize that discrimination against alleged “obscenity” or “indecenty” (i.e., against the sexual content of speech) is fundamentally viewpoint-based.<sup>389</sup> This is surely the most difficult and controversial proposition put forward in this Article, simply because the notion that sex is not an appropriate subject matter for public discussion and display is so deeply ingrained in our society. But until speech about sex, like other “controversial” or “offensive” expression, is relieved of its second-class constitutional status, viewpoint neutrality in government decisionmaking will remain an unfulfilled promise.

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but not bland messages); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir. 1988) (excluding “political” or “controversial” subject matter restricts public debate); *AIDS Action Comm.*, 42 F.3d at 12 (using ban on sexually graphic ads to censor controversial but not conventional sexual ideas); *Air Line Pilots*, 45 F.3d at 1159 (noting that views labelled “political” are usually those that challenge the status quo); *Wilson v. Chancellor*, 418 F. Supp. 1358, 1366 n.11 (1976) (“[T]he word ‘political’ itself connotes different things to different people . . .”).

386. 473 U.S. 788 (1985); see *supra* note 75 and accompanying text.

387. *Wieman v. Updegraff*, 344 U.S. 183, 186 (1952); see also *Ingber*, *supra* note 360, at 24 (“An education which respects autonomy—a liberal education—would expose students to controversy . . .”).

388. 484 U.S. 260 (1988); see *supra* text accompanying notes 172-73, 364-68.

389. See *supra* Part II.