

1999

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Recommended Citation

15 Touro L. Rev. 965 (1999)

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**“FINLEY, FORBES AND THE FIRST
AMENDMENT:
DOES HE WHO PAYS THE PIPER CALL THE
TUNE?”**

*Joel M. Gora**

Hon. Leon D. Lazer:

Our next speaker, Professor Joel Gora from Brooklyn Law School, has been a consistent participant at these seminars. He is a very valuable asset as well, since he is undoubtedly one of the leading authorities in the country on the First Amendment. In addition to being a professor at Brooklyn Law School, he was the former staff counsel to the American Civil Liberties Union and co-author of a book entitled *The Right to Protest*.¹ So without further ado, Professor Joel Gora.

Prof. Joel Gora:

Thank you, Judge Lazer. It is a pleasure to be back here again. Actually, last year I was on sabbatical and was not able to participate in the program. The Supreme Court, at least in terms of the First Amendment, also took a sabbatical because the fewest number of First Amendment cases were decided last year in my memory. The Supreme Court addressed the First Amendment in two cases last year and, in both of those cases, the First Amendment claimants essentially lost their case.² This is a reversal of the Court's normal batting average since First Amendment claimants have done rather well in the past. That will teach me to take a sabbatical!

These two cases, which I will discuss in some detail in a moment, had a common, but not unfamiliar, theme – that is, under

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¹ GORA ET AL., *THE RIGHT TO PROTEST* (Southern Illinois University Press, 1991).

² *Arkansas Educational Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

the First Amendment,³ does he who pays the piper get to call the tune? That issue, that aphorism, was present in both *Arkansas Educational Television Commission v. Forbes* and *National Endowment for the Arts v. Finley*. And the First Amendment answer was basically, and disappointingly, yes.

The first case, *Forbes*, involved the field of government-owned public television stations and concerned the broadcast of a political debate among candidates. The issue in that case, in simplistic terms, was when the government owns and controls the microphone, does it get to decide who gets to use it, i.e. what candidates will participate in a political debate and under what circumstances they will participate?⁴

The other case, *Finley*, is more controversial and politically divisive. *Finley* involved public funding of the arts.⁵ The issue, stated simply, is when the government is the patron of the arts, does it also get to call the tune, or does the First Amendment have something to say even when the government sponsors art?

This broad theme has been around for a long time - the difference, if any, between the government as regulator or prohibitor of speech on the one hand, versus the government as facilitator, subsidizer, supporter or patron of speech on the other hand. To what extent does First Amendment analysis differ when the government is operating, not in a regulatory or prohibitory role, but rather in what is occasionally called its proprietary capacity? Finally, the common thread running through both these cases is the core First Amendment rule against viewpoint discrimination which holds that the government may not be permitted to discriminate against ideas simply because it does not approve of those ideas.

The claim was made, or rather the issue was raised, in both *Finley* and *Forbes*, that the exclusion of the speaker from the government-sponsored forum had been based impermissibly on a disagreement with the speaker's viewpoint. In other words, was viewpoint discrimination present, and if so, is viewpoint discrimination permissible when the government is writing a check

³ U.S. CONST. amend I (stating in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

⁴ *Forbes*, 118 S. Ct. 1633.

⁵ *Finley*, 118 S. Ct. 2168.

to subsidize speech as opposed to writing a regulation to penalize it.

The final theme that links both *Finley* and *Forbes* is that the Court was aware of and very concerned with the practical consequences of a robust First Amendment rule in this area -- namely, would the government, if told that it had to conduct this patronage exercise consistent with normal, rigorous First Amendment standards, simply throw up its hands and say it did not want to be in the game at all. In both cases, as I will note in a moment, the Court was concerned with whether the government would retreat from funding the activity completely rather than be made to comply with normal or rigorous First Amendment rules. As a result, its doctrinal approach was far more instrumental than theoretical or categorical.

The Great Debate About Debates

Let me speak first of *Forbes*,⁶ the candidate debate case. This is a quadrennial and perennial issue -- namely, debates among candidates for office. We are all becoming familiar with the presidential debates. The issue in *Forbes* was who may participate in those political candidate debates when they are sponsored under government auspices?

The same issue came up in an interesting manner in *Perot v. Federal Election Commission*.⁷ The presidential debates between Senator Dole and President Clinton were scheduled on October 6, 1996, when Ross Perot asked to join the officially-sponsored debate between those presidential candidates.⁸ The Commission on Presidential Debates [hereinafter "CPD"], the sponsor of the debates,⁹ excluded Ross Perot on the grounds that he did not have a real chance of winning the election.¹⁰

My friend, Ira Glasser, the head of the ACLU, commented in response to the CPD's exclusion of Perot, that if the test were that

⁶ *Forbes*, 118 S. Ct. 1633.

⁷ 97 F.3d 553 (D.C. Cir. 1996), *cert. denied sub nom.*, *Hagelin v. Federal Election Comm'n*, 117 S. Ct. 1692 (1997).

⁸ *Id.* at 556-57.

⁹ *Id.* at 555.

¹⁰ *Id.* at 557.

candidates who did not have a good chance of winning could be left out, Senator Dole should have been excluded as well. That would have left us with only Bill Clinton debating himself, something he is all too good at doing.

The same issue came up in a less well-known setting in *Forbes*, when a candidate named Ralph Forbes - no kin to Steve - sought to join a debate among congressional candidates running for the Third Congressional District in Arkansas.¹¹ The debate was being sponsored by the Arkansas Education Television Commission [hereinafter "AETC"] a public television operation.¹²

The AETC was not a privately-owned "public broadcasting station" like Channel 13 or Channel 21 with which we in the New York area are familiar. Rather, it was a government-controlled broadcasting network and operation that ran five noncommercial educational-type television stations in the state of Arkansas.¹³ The program was under the sponsorship of a government agency.¹⁴ The government agency was engaged in First Amendment enterprises - namely, running television stations and broadcasting programs. When the AETC denied Forbes a place in the debate, the issue became the implications of the First Amendment on such a decision.¹⁵

Forbes went to court saying that his exclusion from that debate violated the First Amendment.¹⁶ He argued that he was a respectable candidate - he received two thousand signatures in order to be put on the ballot.¹⁷ Moreover, in previous years, he had run for Lieutenant Governor and received almost fifty percent of the vote.¹⁸ The court, however, categorized him in a pejorative and

¹¹ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1637-38 (1998).

¹² *Id.*

¹³ *Id.* at 1637.

¹⁴ *Id.*

¹⁵ *Id.* at 1638.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Transcript of Oral Argument, at *27, *Arkansas Educ. Television Comm'n*, 118 S. Ct. 1633 (1998) (No. 96-779), 1997 WL 664266 (noting that Forbes received 46.98 percent of the votes in the Republican Primary for Lieutenant Governor).

dismissive way as a “perennial candidate,” but I think he was, in many respects, a very serious candidate.

The AETC, at various times during the litigation, proffered different reasons for its decision to exclude Forbes from the debate. At one point, it claimed he was excluded because he was not a newsworthy candidate, or at least, it had determined he was not a newsworthy candidate.¹⁹ That excuse seemed to be a little viewpoint-oriented.

Later on in the litigation, the AETC claimed that Forbes was excluded because he did not have enough popular support.²⁰ Forbes challenged the exclusion in court.²¹ The District Court determined that just because the debate was on television, that did not make it a public forum. The jury found that Forbes was excluded, not because the AETC disagreed with his point of view, but rather, because it decided he was not a serious candidate.²²

The Court of Appeals reversed, finding that a public forum had been created basically open to all legally-qualified candidates.²³ The court noted that any such candidate should be allowed into the forum and the exclusion of such a candidate had to be given strict scrutiny.²⁴ Accordingly, the Court of Appeals ruled in favor of Forbes.²⁵ The AETC then appealed the decision to the Supreme Court,²⁶ which sets the stage for our issue.

In *Forbes*, the Supreme Court decided two basic issues. First, whether a candidates’ debate on a governmentally-owned and operated public television station is a public forum. Second,

¹⁹ *Forbes*, 118 S. Ct. at 1638. The AETC stated that “[it] had made a bona fide journalistic judgment that [their] viewers would be best served by limiting the debate to the candidates already invited.”

²⁰ *Id.* (noting Forbes was excluded because “he lacked any campaign organization, had not generated any appreciable voter support, and was not regarded as a serious candidate by the press covering the election.”).

²¹ *Id.*

²² *Id.* (noting “AETC’s decision to exclude Forbes had not been influenced by political pressure or disagreement with his views.”).

²³ *Forbes v. Arkansas Educ. Television Comm’n*, 93 F.3d 497, 504 (8th Cir. 1996), *rev’d*, 118 S. Ct. 1633 (1998).

²⁴ *Forbes*, 93 F.3d at 504-05 (noting that the AETC’s assessment of Forbes “political viability” was neither a “compelling nor [a] narrowly tailored” reason to exclude him from the debate).

²⁵ *Id.* at 504.

²⁶ *Arkansas Educ. Television Comm’n v. Forbes*, 117 S. Ct. 1243 (1997).

whether the people who run that enterprise can claim their own First Amendment editorial discretion as broadcast journalists to determine what is newsworthy and not have the courts intervene using the public forum doctrine.

The Court, in an opinion by Justice Anthony Kennedy, who in recent years has normally been the Court's most reliable First Amendment standard-bearer, ruled that public broadcasting is not a public forum, since the hallmark of a public forum is the concept of open access and viewpoint neutrality.²⁷ The Court continued emphatically stating that such a concept flies in the face of, and is "antithetical" to, the concept of journalism.²⁸ Public broadcasters are public, but they are also broadcasters and journalists.²⁹ The Court essentially held that, just as private broadcasters cannot be forced to open up their television stations, radio stations, or networks to points of view with which they disagree, or a point of view that someone claims is entitled to be aired, the same is true for government-owned broadcasting companies.³⁰ Putting together public television programming, like putting together a cable television network³¹ or putting together a parade³² are all activities protected by the First Amendment, according to the Court.

So in a sense, I guess that there was a victory for the notion that government public broadcasting facilities and networks are more

²⁷ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1639 (1998) (noting that in the context of television broadcasting, "[b]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.").

²⁸ *Id.*

²⁹ *Id.* (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973)) (explaining that "television broadcasters enjoy the 'widest journalistic freedom consistent with their public responsibilities.'").

³⁰ *Id.* at 1640 (holding "the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming.").

³¹ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994), *reh'g denied*, 512 U.S. 1278 (1994) (stating "[t]here can be no disagreement on an initial premise: cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.").

³² See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 564 (1995) (explaining "the selection of contingents to make a parade is entitled" to the protection of the First Amendment).

broadcasters than they are government. Public television is more television than public. Generally, the Court stated, there is no right of access, under the First Amendment, to get yourself or your views onto government-owned public stations.³³ Nor, the Court noted, did Congress provide so by writing any kind of statute granting a right of access, although the Court left open the question of whether such a statute might be acceptable under the First Amendment.³⁴

The Court's basic point was that the First Amendment does not require this type of access to a publicly-owned television station.³⁵ The question of whether Congress might, at some point in time, require such access was saved for another day.³⁶

Having basically answered the broad question by saying that public television is more a journalistic enterprise than a public forum, the Court then had to address the more specific issue in the case, namely, were candidate debates deemed to be an exception to the hands-off approach.³⁷ Here, the answer was yes, candidate debates *are* different and a rule of reasonable access may be required.³⁸

This other part of the Court's holding was that the rule of non-access really was different for candidate debates, because, in effect, candidate debates *are* a kind of a public forum.³⁹ The Court held off putting a precise label concerning the type of forum the debates were until it engaged in its public forum analysis, stating no more than that they were some type of exception to the previous discussion in the case.⁴⁰

The Court reiterated the basic rule: no public forum and therefore, no right of access to publicly-owned and controlled broadcasting facilities. But where candidate debates are

³³ *Forbes*, 118 S. Ct. at 1640.

³⁴ *Id.* (stating the "legislative imposition of neutral rules for access to public broadcasting" would not be barred by the First Amendment).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1640.

³⁸ *Id.*

³⁹ *Id.* at 1640-41 (noting candidate debates are some type of forum).

⁴⁰ *Id.* at 1640 (explaining "candidate debates present the narrow exception to the rule"). See also *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

concerned, the very nature of the debate, the fact that it is a place for candidates to set forth their viewpoints, necessitates that doors be left open for candidates to get their message out.⁴¹ Since candidate debates have become vital to the electoral process, neutrality is required.⁴² Public “broadcaster[s] cannot grant or deny access to [candidates] on the basis of” disagreement with their viewpoints.⁴³ Permitting broadcasters to do so would involve too great a risk of “skewing” the electoral debate.⁴⁴ So the question becomes - if this is some kind of a forum, what kind of a forum is it?⁴⁵

There are basically three choices under the taxonomy of the public forum doctrine.⁴⁶ One is a traditional, wide open public forum such as streets and parks.⁴⁷ The second choice is a designated public forum, an area which is not intrinsically designed for speech, but that the government sets aside for speech.⁴⁸ Public school classrooms used, after hours, for meetings of off-campus groups are an example of the designated public forum.⁴⁹ The third and final category is what is known as a non-

⁴¹ *Forbes*, 118 S. Ct. at 1640.

⁴² *Id.* (noting although not always “feasible for the broadcaster to allow unlimited access to a candidate debate . . . the requirement of neutrality remains.”).

⁴³ *Id.*

⁴⁴ *Id.* (quoting *Columbia*, 412 U.S. at 125 (internal citation omitted) (explaining that “[v]iewpoint discrimination in [the context of candidate debates] would present not a ‘[c]alculated ris[k],’ but an inevitability of skewing the electoral dialogue.”).

⁴⁵ *Id.* at 1640-41 (stating “[t]he special characteristics of candidate debates support the conclusion that the AETC debate was a forum of some type,” but now the question becomes “what type”).

⁴⁶ *Id.* at 1641 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (noting the “Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum.”).

⁴⁷ *Id.* (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (explaining that “[t]raditional public fora are defined by the objective characteristics of the property.”).

⁴⁸ *Id.* (stating “[d]esignated public fora . . . are created by purposeful governmental action.”). See also *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

⁴⁹ See *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993).

public forum -- a place where government, in effect, has opened its doors for some, but not all, people who meet certain minimal qualifications to speak.⁵⁰

The Court concluded that, of those three possibilities, a debate among candidates at a public broadcasting facility was a non-public forum.⁵¹ Such a forum would not be subject to the more open access rules of designated public fora, since the broadcasters are entitled to be selective concerning their choice of participants.⁵² As long as the broadcasters do not make their selection on the basis of viewpoint, and as long as the selection is based on reasonable, non-viewpoint based criteria, then the decision to exclude Mr. Forbes may be upheld on the grounds that it was not made based on a disagreement with his views or a lack of regard for his views, or a feeling that his views were controversial.⁵³ Rather, it was based on the more objective notion that his candidacy was not very viable.⁵⁴

If I had to pick one fault with the Court's decision, it would be the last point, since the contrary possible argument is that, in order to make sure that no viewpoint discrimination exists, one must insist upon a more objective standard to determine which candidates will be permitted to participate. The shifting standards that the AETC employed in *Forbes* really fly in the face of the notion of an objective standard.

One objective standard could be: anybody who is on the ballot. The concern with using that standard was, if all such debates had to include all who were on the ballot, the debates would become unruly and chaotic, a cacophony of sound.⁵⁵ Thus, faced with the choice of having to include all candidates or not having the debates

⁵⁰ *Forbes*, 118 S. Ct. at 1641 (citing *Krishna*, 505 U.S. at 678-79 (stating "[o]ther government properties are either nonpublic fora or not fora at all.")).

⁵¹ *Id.* at 1641-43.

⁵² *Id.* at 1642 (explaining "[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.").

⁵³ *Id.* at 1643-44 (further citation omitted) (finding *Forbes*' exclusion was "reasonable," not "based on 'objections or opposition to his views,'" but rather, "because he had generated no appreciable public interest.").

⁵⁴ *Id.* at 1638.

⁵⁵ *Id.* at 1643.

at all, government broadcasters would choose the latter course,⁵⁶ and, the Court feared, the First Amendment would be the poorer for the lack of debates.

It is easy to speculate that, because the Court was concerned with the practical consequence of a more robust First Amendment ruling, it decided to rule in favor of the broadcasters. As long as there was no hint of viewpoint censorship, the broadcasters could exclude candidates who seemed to not have much support.⁵⁷ But again, the notion of “much support” seems like an awfully subjective notion.

There was a dissent by Justice Stevens, Justice Ginsburg and Justice Souter which basically stated that this was not a broadcast case, it was a parade permit case.⁵⁸ Justice Stevens explained that, in this situation, you have the government deciding who gets to use this very important forum to speak.⁵⁹ The government, the dissent explained, is doing so without any clear, objective, prior announced standard.⁶⁰ This, the dissent states, is no different than a police chief denying someone a parade permit to march down Main Street for no other reason than they do not consider him a serious candidate, or other similar subjective criteria along the same line.⁶¹

⁵⁶ *Id.* (noting “[w]ere it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates’ views at all.”).

⁵⁷ *Id.* at 1644 (holding “AETC excluded Forbes because the voters lacked interest in his candidacy, not because AETC itself did,” and thus it “was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment.”).

⁵⁸ *Id.* at 1647-48 (Stevens, J., dissenting) (explaining “AETC’s control was comparable to that of a local government official authorized to issue permits to use public facilities for expressive activities.”).

⁵⁹ *Id.* at 1648 (Stevens, J., dissenting).

⁶⁰ *Id.* (Stevens, J., dissenting) (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (explaining “[t]here are no articulated standards,” no “objective factors” upon which the government might rely when making its decision).

⁶¹ *Id.* at 1649 (Stevens, J., dissenting). Justice Stevens then discussed *Forsyth County*, 505 U.S. 123. *Id.* at 1648. He explained:

Perhaps the discretion of the AETC staff in controlling access to the 1992 candidate debates was not quite as unbridled as that of the Forsyth County administrator.

The other concern of the dissenting Justices was that they viewed the AETC as more public than broadcasting.⁶² The dissent was concerned with the censorship potential inherent in allowing the government to be in the business of journalism.⁶³ If the government were allowed to be in the business of journalism with only a minimal amount of First Amendment scrutiny, the dissent stated, then, in the long run, freedom of discussion could be in danger, since the government might use its power for propaganda purposes.⁶⁴

The dissent felt that the exclusion of Mr. Forbes from the debate really dictated the outcome of the election.⁶⁵ If Forbes had participated and received a couple of thousand votes more resulting from his participation in the debate, the outcome between

Nevertheless, it was surely broad enough to raise the concerns that controlled our decision in that case. No written criteria cabined the discretion of the AETC staff. Their subjective judgment about a candidate's "viability" or "newsworthiness" allowed them wide latitude either to permit or to exclude a third participant in any debate. Moreover, in exercising that judgment they were free to rely on factors that arguably should favor inclusion as justifications for exclusion.

Id. (Stevens, J., dissenting) (further citation omitted).

⁶² *Id.* at 1646 (Stevens, J., dissenting) (noting the "Court seriously underestimates the importance of the difference between private and public ownership of broadcast facilities, despite the fact that Congress and this Court have repeatedly recognized that difference.").

⁶³ *Id.* (Stevens, J., dissenting) (quoting *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 505 (8th Cir. 1996) (explaining the "AETC staff members . . . 'were not ordinary journalists; they were employees of government.'").

⁶⁴ *Id.* (Stevens, J., dissenting). Justice Stevens stated:

Congress chose a system of private broadcasters licensed and regulated by the Government, partly because of our traditional respect for private enterprise, but more importantly because public ownership created unacceptable risks of governmental censorship and use of the media for propaganda.

Id. (Stevens, J., dissenting).

⁶⁵ *Id.* at 1645 (further citation omitted) (noting although AETC "may have correctly concluded that Forbes 'was not a serious candidate,' their decision to exclude him from the debate may have determined the outcome of the election.").

the two mainstream party candidates might have been very different.⁶⁶

So, to the dissenters, *Forbes* was really a case of government censorship. The dissent, while it would not have required that all candidates who were on the ballot be permitted to participate in all such debates, would have required a more objective standard of inclusion and exclusion than the majority was willing to require.

Therefore, the net effect was a victory for public broadcasters in the sense that public access principles basically do not apply. These principles do apply, however, in the limited context of candidate debates, but then only to be sure that government does not engage in viewpoint discrimination when it picks and chooses the debate participants. And that is a loss for the First Amendment. And it is a loss which has troubling implications for other electoral issues as well, most notably, the exclusion of third party and independent candidates from access to the ballot or participation in public campaign finance subsidies. Because of its concern that requiring more speech would result in less speech, the Court may have short-changed free speech.

The Eye of the Beholder

The other case I want to discuss, and I do it with a little trepidation since Professor Friedman wrote a brief in that case and knows more about it than I do, is *National Endowment for the Arts v. Finley*.⁶⁷ I think *Finley* is much more notorious, or at least the issue that the case dealt with is much more notorious. *Finley* involved government subsidization of the arts. Although there are attitudinal similarities between the *Finley* case and the *Forbes* case, there are methodological differences.

The *Forbes* case is sort of a classic case of categorization while the *Finley* opinion is a classic case of minimization. What do I mean by that? Well it is basically an opinion that minimizes the doctrinal dispute in its attempt to decide the case without really resolving the issues.

⁶⁶ *Id.*

⁶⁷ *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

The Court in *Forbes* was concerned about the different categories into which different kinds of speech and speakers could be placed. The result was a clear, though arguably too restrictive, set of guidelines to resolve both the general issues of the editorial discretion of public broadcasting stations and the specific question of candidate debates on public television. The message of the *Finley* case, by contrast, seemed to be that the challenged statute does not mean what it says, that neither government officials nor affected artists pay much attention to it anyway, and therefore, why worry about First Amendment concerns? But the problem is that the issues raised by the *Finley* statute on arts funding have a much broader application than the more focused question of candidate debates on public television, and therefore the failure of the Court to fashion clear guidelines in *Finley* may come back to haunt it. On the other hand, the resulting ambiguity, coupled with the Court's acknowledgement that even arts funding decisions by government are subject to some First Amendment controls, may have been the best result that the anti-censorship forces could achieve.

The statute in *Finley* was passed in response to some notorious episodes involving art that was funded under federal sponsorship.⁶⁸ One such episode was an exhibit of homoerotic photographs, taken by the late artist Robert Mapplethorpe, that were on display at the University of Pennsylvania under a grant from the National Endowment for the Arts.⁶⁹ At the same time, a provocative work of art involving a crucifix submerged in a jar of urine was also subsidized by National Endowment for the Arts' [hereinafter "NEA"] funds, and that particular subsidy gave rise to an enormous amount of political pressure as well.⁷⁰

In *Forbes*, had the government been forced to live with strict First Amendment rules when it set up a debate, it might not have

⁶⁸ *Id.* at 2172 (noting "[t]wo provocative works . . . led to congressional reevaluation of the NEA's funding priorities.").

⁶⁹ *Id.* (explaining that a \$30,000 dollar grant received from the NEA was used by the Institute of Contemporary Art at the University of Pennsylvania "to fund a 1989 retrospective of photographer Robert Mapplethorpe's work.").

⁷⁰ *Id.* Members of Congress "denounced artist Andres Serrano's work *Piss Christ*, a photograph of a crucifix immersed in urine." *Id.* The artist had received a "\$15,000 grant from the Southeast Center for Contemporary Art," an organization funded by the NEA. *Id.*

scheduled one. There was a similar problem in *Finley* concerning the government subsidization of the arts since, many felt, if the government could not pick and choose which artist would get its funding and which artist would get its patronage, then the government was not about to fund the arts at all. Indeed, one of the solutions proposed to this dilemma during the debate over the NEA statute was an effort to defund the NEA and not fund the arts at all.⁷¹

The statute that eventually emerged was a legislative compromise.⁷² The statute stated that, in determining or considering grants, or applications for grants under the statute, both artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.⁷³ That latter provision was added to the statute when it was amended,⁷⁴ and then was challenged by a number of artists who engage in provocative works and who were in danger of losing grants because their works did not fit the test.⁷⁵

The lower courts agreed that the statute meant what it said.⁷⁶ It was designed to discourage, if not disallow, art grants to people whose art did not show proper decency and respect.⁷⁷ Certainly, that was viewpoint discrimination with a vengeance, and even though it was a funding program, it was still subject to serious First Amendment restraint.⁷⁸

⁷¹ *Id.* at 2170-74.

⁷² *Id.* at 2173 (explaining that “[u]ltimately, Congress adopted . . . a bipartisan compromise between Members opposing any funding restrictions and those favoring some guidance to the agency.”).

⁷³ *Id.* (citing 20 U.S.C. § 954(d)(1) (1990)).

⁷⁴ See *supra* note 68 and accompanying text.

⁷⁵ *Id.* at 2164. The artists challenging the provision were Karen Finley, John Fleck, Holly Hughes, and Tim Miller. *Id.* They had applied for grants before the statute was amended. *Id.*

⁷⁶ *Id.* at 2174-75.

⁷⁷ *Id.*

⁷⁸ *Id.* at 2174 (quoting *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1476 (C.D. Cal. 1992), *rev'd*, 524 U.S. 569 (1998)) (stating “the First Amendment constrains the NEA’s grant-making process, and that because § 954(d)(1) ‘clearly reaches a substantial amount of protected speech,’ it is impermissibly overbroad on its face.”).

Well, the Supreme Court in an opinion by Justice O'Connor speaking for six Justices, including Justices Ginsburg and Stevens who had dissented in the *Forbes* opinion, essentially held that there was no harm, no foul.⁷⁹ This opinion was almost a type of judicial Jujitsu, since the claim that the statute was so vague and uncertain and therefore would have a chilling effect on artists, was used to deflect the claim that the statute would keep provocative art from being funded.

Essentially, the Court stated the statute did not mean what it said. The standards of decency and respect were viewed primarily as only hortatory considerations, not mandates, with the Court's expressing doubt that any one particular work of art would be denied funding because it failed to meet those standards.⁸⁰ So, for that reason, in essence, we do not have to even determine the tough issues of viewpoint discrimination because we are not sure the statute is engaged in a mission of viewpoint discrimination.⁸¹ Thus, the Court sustained the statute.⁸²

Some First Amendment advocates, maybe Professor Friedman included, would agree with that and say that the First Amendment did not suffer a big loss since the sting was taken out of the statute by saying it was hortatory, precatory and not regulatory. But certainly, on the other hand, it was not a very broad decision in favor of First Amendment claims saying that, even when the government is doling out its funds, First Amendment safeguards have to be honored. Well, two final thoughts and then I will sit down.

There was a concurrence written by Justices Scalia and Thomas.⁸³ It was the exact opposite, methodologically, of Justice O'Connor's opinion. It was a rootin', tootin', rip-snorting opinion which said two things. Number one, the statute means what it

⁷⁹ *Id.* at 2176 (noting that the statute "does not introduce considerations that . . . would effectively preclude or punish the expression of particular views," and thus, no "directed viewpoint discrimination" exists).

⁸⁰ *Id.* at 2176-77 (stating "we do not perceive a realistic danger that § 954(d)(1) will compromise First Amendment values.").

⁸¹ *Id.* at 2176.

⁸² *Id.* at 2180 (holding the statute "merely adds some imprecise considerations to an already subjective selection process" and "does not, on its face, impermissibly infringe on" First Amendment protections).

⁸³ *Id.* at 2180 (Scalia, J., concurring).

says.⁸⁴ It was precisely designed to disfavor and withhold funds from points of view that involved lack of decency or lack of respect for American values.⁸⁵ Number two, that it is perfectly constitutional.⁸⁶

The rationale behind the concurrence's statements was if you look at the text of the First Amendment, "Congress shall make no law . . . abridging the freedom of speech,"⁸⁷ abridging means prohibiting, putting in jail, or regulating -- it does not mean not funding.⁸⁸ So the concurrence's point of view was that funding decisions are almost never subject to First Amendment quarrels since they involve other than abridging freedom of speech.⁸⁹

There was only one dissent on the merits, and that was written by Justice Souter.⁹⁰ Justice Souter stated that the statute was intended to discourage art from being funded if it had a certain point of view, noting that even if such a point of view was obnoxious, it is protected by the First Amendment. Justice Souter explained that a government decision to penalize certain unpopular points of view by withholding funding for them would be just as subject to First Amendment scrutiny as decisions putting people in

⁸⁴ *Id.* (Scalia, J., concurring) (dramatically stating "THE STATUTE MEANS WHAT IT SAYS.").

⁸⁵ *Id.* at 2181-82 (Scalia, J., concurring). Justice Scalia explained that the statute "constitutes viewpoint discrimination," and that "it is perfectly clear that [it] was meant to disfavor -- that is, to discriminate against, unfavorable [artistic] productions." *Id.*

⁸⁶ *Id.* at 2182 (Scalia, J., concurring) (noting dramatically, in all capital letters, that "WHAT THE STATUTE SAYS IS CONSTITUTIONAL.").

⁸⁷ *Id.* at 2182 (Scalia, J., concurring) (citing U.S. CONST. amend I).

⁸⁸ *Id.* at 2184 (Scalia, J., concurring). Justice Scalia, in his concurrence explained:

The nub of the difference between me and the Court is that I regard the distinction between 'abridging' speech and funding it as a fundamental divide, on this side on which the First Amendment is inapplicable. The Court, by contrast, seems to believe that the First Amendment, despite its words, has some ineffable effect upon funding, imposing constraints of an indeterminate nature which it announces (without troubling to enunciate any particular test) are not violated by the quite different, emasculated statute that it imagines.

Id. (Scalia, J., concurring).

⁸⁹ See *supra* notes 80-85 and accompanying text.

⁹⁰ *Finley*, 118 S. Ct. at 2185 (Souter, J., dissenting).

jail for their art.⁹¹ Justice Souter noted that this was a classic case of viewpoint discrimination, albeit in the form of funding rather than prohibition, and thus, should be subject to First Amendment standards.⁹²

So there it is, a short and semi-sweet, First Amendment term. Despite their methodological differences, *Forbes* and *Finley* sound common themes. First the government was ceded broad authority to choose which speakers could use its public television facilities and could receive its artistic subsidies. Content-based distinctions and choices among speakers and speech seeking government patronage would be permissible, so long as they did not degenerate into viewpoint-based censorship of particular ideas. Second, the Court seemed animated by the pragmatic concern that if government were not allowed to make those choices where its microphone and its checkbook were involved, it would turn off that mike and close that checkbook, and political and artistic expression would be the poorer as a result of that choice. I would have rather held the government's feet to the First Amendment fire, to make *government* have to choose between forgoing programs it values and implementing those programs in a manner consistent with robust free speech rights. Let the First Amendment call the tune.

The Court's answer, however, to the question, does he who pays the piper get to call the tunes was, for the most part, yes, even under the First Amendment. However, when there is clear

⁹¹ *Id.* (Souter, J., dissenting) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (noting “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”)).

⁹² *Id.* at 2191 (Souter, J., dissenting). Justice Souter stated that “as long as Congress chooses to subsidize expressive endeavors at large, it has no business requiring the NEA to turn down funding applications of artists and exhibitors who devote their ‘freedom of thought, imagination, and inquiry’ to defying our tastes, our beliefs, or our values.” *Id.* (Souter, J., dissenting). Justice Souter continued, noting that Congress “may not use the NEA’s purse to ‘suppres[s] . . . dangerous ideas.’” *Id.* at 2191-92 (Souter, J., dissenting) (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (internal quotation omitted)).

evidence that the tune is being called for viewpoint censorship reasons, then the result may be otherwise. Thank you very much.