PUBLIC ENTERPRISE AND THE PUBLIC FORUM: A COMMENT ON *SOUTHEASTERN PROMOTIONS, LTD. V. CONRAD*

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The City of Chattanooga operates a municipal theater. When the producers of the rock musical "Hair" sought a six-day engagement for their production in this theater, the theater's directors turned down their application.[1] These city officials concluded that "Hair" portrayed nudity and obscenity, and thus that its performance was not in the best interest of the community.[2] The producers then went to the federal district court, asking for an order requiring the directors of the theater to let the production be shown. The court denied relief, on the basis of an advisory jury's finding that "Hair" was obscene; the Sixth Ciruit affirmed.[3] The Supreme Court reversed in *Southeastern Promotions, Ltd. v. Conrad*,[4] holding that the producers had been subjected to a system of prior restraint that lacked the procedural safeguards demanded by the first amendment.

The conclusion of the *Conrad* majority that the city theater was a "public forum" was sound. Yet, as Justice Rehnquist argued in dissent, the case was more difficult than the majority made it out to be. As he saw the case, "the apparent effect of the Court's decision is to tell the managers of municipal auditoriums that they may exer-

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[Author's note] I am grateful to my colleagues Leon Letwin and Melville B. Nimmer for our conversations on this subject.

It is a real pleasure to join the *Journal* in honoring Bob Wills on his thirty years of teaching. In the days when my office was just a couple of doors down the corridor from Bob's, I used to marvel at his ability to think about the application to law of such arcana as Boolean algebra. Of course he is never evangelical about those things, but the sight of him sitting there and puzzling away can be disconcerting to someone who spends his working hours hacking around various legal undergrowths on the borderlands of politics. What is most impressive is that all this cool discipline of mind is contained in the same package with a warm and humane personality. A gentler or more amiable colleague is beyond my imagining. I am pleased to take part in this salute, and to wish Bob well as he goes on with that puzzling.

[1] The theater in question was privately owned, but was leased by the city. It was under the direction of the directors of the Chattanooga Municipal Auditorium, a city owned facility.

[2] There was no conflicting engagement in the theater for this time.

[3] The lower court decisions are reported at 341 F. Supp. 465 (E.D. Tenn. 1972), and 486 F.2d 894 (6th Cir. 1973).

[4] 420 U.S. 546 (1975).

cise no selective role whatsoever in deciding what performances may be booked."[5] Justice Rehnquist went on to ask:

> May an opera house limit its productions to operas, or must it also show rock musicals? May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first-come first-served basis? . . .
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> Is the Court actually saying that unless the city of Chattanooga could criminally punish a person for staging a performance in a theater which he owned, it may not deny a lease to that same person in order for him to stage that performance in a theater owned by the city?[6]

The *Conrad* majority answered these questions with silence.

What are the first amendment obligations of the government as proprietor? The issue has arisen in several diverse factual contexts in the past few years, and it is fair to say that the Supreme Court has not made any serious effort to sort out the issues, let alone suggest how those issues should be resolved. This article aims at identifying the questions to be asked in bringing the first amendment to bear on government in its proprietary role. The *Conrad* case will serve to focus discussion, but first it will be helpful to go back over the paths that have led to the present doctrinal confusion.

I. THE PERCEPTION OF CONTENT REGULATION IN THE PUBLIC FORUM AS AN ALL OR NOTHING PROPOSITION

One of the Warren Court's most important contributions to first amendment doctrine was the concept of the public forum.[7] By the end of the 1960's, a consensus had been reached on the importance of protecting the freedom of expression in streets and parks and other similar public places. There was even a consensus about the nature of the issues that divided the Court in this doctrinal area. Thus even the most zealous defenders of the public forum idea agreed that it was not infinitely expandable to all governmental institutions and activities. Justice Douglas, writing in dissent in 1966, noted:

> There may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary pur-

[5] 420 U.S. at 571-72.

[6] 420 U.S. at 572-73.

[7] There were, of course, earlier decisions looking toward this doctrine, but the idea crystallized during the Warren era. Perhaps the critical event was the publication of Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

> poses of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. . . . And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put.[8]

Two limitations are accepted in this passage: (1) some places simply are not public forums, and (2) even in some places that are public forums, expression can be regulated to the extent necessary to permit those places' primary functions to be carried on.

It was the second of these limitations that had preoccupied the Supreme Court in the earliest cases involving streets and parks.[9] Once the public forum idea was firmly rooted in the first amendment, however, it was natural that the Court would be pressed to add other places to the list of appropriate public forums. In these latter cases, the first limitation noted by Justice Douglas was the focus of debate. Should the grounds of a jail, or a privately owned shopping center, be considered a public forum?[10]

This emphasis on the first of Justice Douglas' questions (is this a public forum?) seemingly has caused some of the Justices to lose sight of the second question (assuming it is a public forum, what limits on expression are constitutionally permissible?)[11]—or at least to limit application of the second question to regulations of "time, place, and manner." Speech content, on the other hand, has been seen as subject to regulation to the same degree in every public forum, whatever its special characteristics may be. In this view, once a place is categorized as a public forum, government can regulate speech content only when it is inciting, obscene, etc.[12] This approach has

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[8] Adderley v. Florida, 385 U.S. 39, 54 (1966).

[9] *E.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941); Kovacs v. Cooper, 336 U.S. 77 (1949).

[10] *See* Adderley v. Florida, 385 U.S. 39 (1966) (jail grounds); Hudgens v. NLRB, 96 S. Ct. 1029 (1976), *overruling* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (shopping center); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (shopping center).

[11] Justice Black, dissenting in Brown v. Louisiana, 383 U.S. 131, 151 (1966) focused his attention on the first question, arguing that a public library was not a public forum. The rather tortured plurality opinion of Justice Fortas seems designed to avoid this issue. Neither opinion addresses the question of whether, assuming that the library is in some sense a public forum, there are not some regulations it may constitutionally impose on the exercise of first amendment freedoms. The state had not, in fact, devised regulations specifically to protect the quiet of libraries; as Justice Brennan pointed out in concurrence, the statute used in this case was unconstitutionally overbroad. 383 U.S. at 143.

[12] See the definitional standards set out in Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement); Miller v. California, 413 U.S. 15 (1973) (obscenity).

been anything but speech protective in result. For if the problem of content regulation in the public forum is perceived as an all or nothing question, not surprisingly some Justices will opt for nothing. Two recent cases are illustrative.

In the first case, the Democratic National Committee claimed a constitutional right to buy television advertising time, even though the broadcaster did not want to accept political advertising. The Supreme Court denied this claim[13] over the dissent of Justices Brennan and Marshall; there were five opinions expressing the separate views of the seven majority Justices. Chief Justice Burger and Justices Stewart and Rehnquist concluded that the conduct of a licensed broadcaster did not amount to governmental action, and thus was not subject to the Constitution's commands. In a separate opinion, Justice Stewart added these comments:

> To hold that broadcaster action is governmental action would . . . simply strip broadcasters of their own First Amendment rights. They would be obligated to grant the demands of all citizens to be heard over the air, subject only to reasonable regulations as to "time, place, and manner." . . . If, as the dissent today would have it, the proper analogy is to public forums—that is, if broadcasters are Government for First Amendment purposes—then broadcasters are inevitably drawn to the position of common carriers. For this is precisely the status of Government with respect to public forums—a status mandated by the First Amendment.
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> . . . . .
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> . . . Were the Government really operating the electronic press, it would . . . be *prevented* by the First Amendment from selection of broadcast content and the exercise of editorial judgment.[14]

To escape the conclusion that all television is an electronic Hyde Park Corner, three Justices thus took refuge in an extraordinarily narrow reading of "state action" doctrine[15]—a reading they could have avoided by recognizing that the public forum concept is not an

[13] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[14] 412 U.S. at 139-40, 143 (emphasis in original). Justice Douglas made some similar assumptions in his concurrence, without deciding the question of governmental action. 312 U.S. at 149-50. Compare Justice Douglas' inconsistent comment in his concurrence in Lehman v. City of Shaker Heights, 418 U.S. 298, 306 (1974): "The First Amendment . . . draws no distinction between press privately owned, and press owned otherwise."

[15] I have criticized this conclusion in Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 45 (1975).

"on/off" switch for content regulation any more than it is for "time, place and manner" regulation. Even if government were the broadcaster, it would be appropriate, in Justice Douglas' 1966 words, "to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put."[16]

The second case in which the regulation of speech content in the public forum was viewed as an all or nothing question was *Lehman v. City of Shaker Heights*.[17] A political candidate asserted a constitutional claim to place his advertising in city owned transit vehicles, alongside the commercial advertising that was being displayed. In rejecting the candidate's claim, the plurality opinion sounded a theme which is now familiar:

> Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.[18]

To escape this phantom of the all-devouring public forum, the plurality Justices devised yet another untenable ground:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. . . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. . . .
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> . . . This decision is little different from deciding to impose a 10-, 25-, or 35-cent fare. . . .
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> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. . . .[19]

The result of the *Lehman* plurality's all or nothing reasoning was appalling. Since they concluded that treating the transit vehicles as a public forum would turn government enterprise in general into Hyde

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[16] Adderley v. Florida, 385 U.S. 39 (1966).
[17] 418 U.S. 298 (1974).
[18] 418 U.S. at 304.
[19] 418 U.S. at 303-04.

Park Corner, they decided that the vehicles could not be characterized as a public forum. To support this conclusion, they virtually read government enterprises out of the coverage of the first amendment, in a curious inversion of the now discredited commercial speech "exception."[20] As a result, they upheld the most blatant sort of content discrimination by the city.[21]

If in *Lehman* the plurality Justices had not followed the all or nothing approach to content regulation in the public forum, they could have held the content discrimination unconstitutional without even reaching the question of whether or not the first amendment requires the city to provide advertising space in its transit vehicles.[22] Equally importantly, they would not have set loose the pernicious idea that the government in its proprietary capacity is, for first amendment purposes, somehow not really the government.

II. *Conrad*'s UNANSWERED QUESTIONS

The most important result of the *Conrad* decision is its rejection of the *Lehman* plurality's notion that government's first amendment obligations are diminished when it is "engaged in commerce." A municipal theater is a "commercial venture" no less than a bus line. What no doubt distinguished the two cases for Justice Blackmun—who wrote both the *Lehman* plurality opinion and the *Conrad* opinion—was that in *Conrad* the city was operating a "meeting hall" that had been established partly for the purpose of serving as a public forum.[23] Nonetheless, *Conrad* does make clear what should have been clear when the Court decided *Lehman*: that government gains no immunity from the Constitution's commands when it acts as the proprietor of an enterprise.

Having concluded that Chattanooga's city theater was a public forum, and presumably accepting the all or nothing view of content regulation in a public forum, the *Conrad* majority evidently saw looming before it an awkward question: is "Hair" obscene? If the musical were not obscene, the all or nothing view would require the theater officials to allow it to be produced. It is most unlikely, despite

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[20] See the criticism in Karst, *supra* note 15, at 34.

[21] *Cf.* Police Dep't v. Mosley, 408 U.S. 92 (1972).

[22] This question is not an easy one. *See* Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233; Note, *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 149-56 (1974); Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975).

[23] *See* text at note 43 *infra*.

the district court's conclusion and Justice White's dissent, that "Hair" could be held obscene under the currently prevailing constitutional tests.[24] Yet it had received intensive and widespread publicity for its use of nudity, shock language and the like, and it is easy to see how some of the Justices might be uncomfortable in holding that "Hair" was protected by the first amendment. A solution to this dilemma was found when the Court rested its decision on the procedural guarantees required by the Constitution in cases of prior censorship. If Chattanooga proposed to reject "Hair" on the ground that it was obscene, said the Court, the city must provide a screening procedure that met the test of *Freedman v. Maryland*.[25]

The city officials, however, were not merely asserting the power to bar the performance of an obscene show. They were claiming the right to control the content of performances at the city theater in the interest of good taste. Obviously, such a claim is doomed to failure when it is tested against the all or nothing view of content regulation in a public forum. It would be unthinkable, for example, for a city to deny a soapbox orator access to Hyde Park Corner on the ground of bad taste, or because the orator's intended speech did not fit in with the city's plans to devote Hyde Park Corner to a month-long soapbox symposium on park management. If it seems wrong to apply the same standard to a municipal theater, the incongruity lies not in calling the theater a public forum but in the assumption that all public forums are alike.

The starting point for analysis is the principle, forgotten in *Lehman* but rediscovered in *Conrad*, that any governmental action restricting first amendment freedoms must be justified by its necessity to further a compelling governmental interest. Because this is a balancing principle, it is appropriate to look at the weights on each side

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[24] *Compare* Miller v. California, 413 U.S. 15 (1973), *with* Jenkins v. Georgia, 418 U.S. 153 (1974).

[25] 380 U.S. 51 (1965). In the *Conrad* opinion, the Court summarized the *Freedman* requirements as follows:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured. 420 U.S. at 560.

It is not obvious that much will be gained by remanding the *Conrad* case for compliance with this test. There has already been a judicial determination that "Hair" is obscene. While another lower court might reach a different conclusion, and the theater authorities might not appeal such a decision, the likelihood is that the Supreme Court has merely delayed deciding the question it avoided in *Conrad*.

of the balance in a given case. Suppose a public high school publishes a brochure containing a schedule of classes, and refuses to accept advertising or any other message addressed to the students, apart from the schedule itself. This policy is a plain case of content regulation by the government as publisher; yet it surely raises no first amendment problem. Why not? It merely restates the conclusion to say that the brochure is not a public forum. Surely the point is that any speech interest is *outweighed* by the governmental interest in the efficiency and convenience of the school operation.[26]

"May an opera house limit its productions to operas . . .?"[27] Intuitively, most of us would answer affirmatively. Why? It only begs the question to say that the opera house, though city operated, is not a public forum. We define the boundaries of the public forum, including streets and excluding opera houses, with certain purposes or interests in mind. These constitutional interests are none the worse for being legislative in nature. If a municipal opera house is not a public forum, the reason is that we think it *justifiable* to restrict this place in order to promote the various values associated with opera. But if the opera house were the only meeting hall in town, or if it should reject "The Threepenny Opera" as being infected with Brecht's communism, would we not reach a different conclusion?

Little is lost in saying that the school's brochure and the opera house are not public forums. A minor danger in this doctrinal approach is that it may reinforce the all or nothing view of content regulation in public forums, and thus obscure the basic principle that the first amendment applies to any governmental activity, public forum or not. Concededly, however, there will not be much cost if we wrap our conclusions in these two cases in definitional packaging.

More difficult questions are raised when we move beyond such specialized governmental institutions to cases like *Conrad* itself. Should the artistic director of a city theater have discretion to reject a play on the ground that it is dramatically weak, or in bad taste? Should the editor of a public school newspaper have discretion to reject a guest editorial because it is badly written? Both the city theater and the school paper are open to a wide range of expressive uses; to read them out of the category of the public forum would carry grave danger. Yet if they are assimilated to the public forum cate-

[26] The weight of administrative convenience is not always so great in the constitutional balance. *See, e.g.*, Shapiro v. Thompson, 384 U.S. 618 (1969).

[27] Justice Rehnquist's question, 420 U.S. at 572-73.

gory, are they necessarily converted into Hyde Park Corners? Or may some forms of content regulation be justified, even in a public forum, when they are necessary to protect "the other interests inhering in the uses to which the public property is normally put."[28]

Any such discretionary power over speech content carries an enormous risk of abuse. The *Conrad* case itself illustrates the problem. Was "Hair" rejected because of its nudity, simulated sex and use of taboo words, or because its basic messages—opposition to the Vietnam War and to the draft, approval of deviant life styles, and rejection of conventional sexual mores—were offensive to Chattanooga's leading citizens? It is this same concern about the danger of content discrimination that has produced the rule that any law requiring a license for first amendment expression must specify clear and valid standards to govern the licensing officials.[29] The presumptive unconstitutionality of content discrimination[30] results from the weights assigned to both sides of the constitutional balance. The first amendment interest in access to an audience is especially strong when other viewpoints are being presented to that audience. Correspondingly, government normally has no legitimate interest in presenting one point of view on an issue while excluding others.[31]

Other governmental interests in content regulation, however, may be both legitimate and weighty. In his illuminating exploration of the first amendment problems presented by government operation of press and broadcasting media,[32] Professor William Canby suggests one possible approach to the question of whether government can constitutionally control the content of its own communications medium:

> The court must . . . determine whether the medium is one in which the state *necessarily* exercises an editorial function. . . . [N]othing in the nature of an auditorium or school plant requires the exercise of editorial judgment over the entire facility . . . . The advertising section of a school newspaper or a state university law review is . . . more effective when open and unrestricted, but the editorial, news, and articles columns of these publications are not. As long as alter-

[28] Adderley v. Florida, 385 U.S. 39, 54 (1966) (Douglas, J., dissenting).

[29] *E.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Kunz v. New York, 340 U.S. 290 (1951).

[30] Police Dep't v. Mosley, 408 U.S. 92 (1972).

[31] *See* Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEXAS L. REV. 1123, 1127-29 (1974).

[32] *Id.*

> native methods of expression are available, a right of access should be denied where the government enterprise cannot truly exist without the exercise of editorial discretion.[33]

This analysis, too, addresses both sides of the constitutional balance. Let us look at both of these aspects of the problem.

To say that editorial control over the content of a newspaper is a necessary function is to make an implicit statement about what a newspaper is, or should be. Nearly everyone would agree that a newspaper without an editor would not be much of a paper. But it is less clear that a government operated newspaper could not exist without an editor. Even if space in such a paper were limited, the government might limit its function to such ministerial acts as placing contributed articles in the paper on a first-come, first-served basis, enforcing a length limit of 1000 words, etc. These would be "Robert's Rules" regulations, analogous to the sort of limits that are regularly upheld in public forum cases.

If we agree, however, that this hypothetical publication would be not so much a newspaper as a printed bulletin board, and if we conclude that an editorial function is necessary to carry on a "real" school newspaper,[34] then the constitutional choice must be made between allowing discretionary editorial control over newspaper content and not having a school newspaper at all. In other words, the necessity remarked by Professor Canby becomes a constitutional justification because we *prefer* a school newspaper over the first amendment claim of those who want unlimited access to the paper's pages. To carry this labored analysis to its doctrinal conclusion, the governmental interest in this case is the interest in having a "real" newspaper rather than a bulletin board, and Professor Canby regards this interest as compelling—as who would not?

In no sense does this conclusion mean that a public school's newspaper is to be excluded from the public forum category. It means only that "the other interests inhering in the uses to which the public property is normally put"[35] *outweigh* the speech interests of those claiming access to the newspaper's space, just as the interest in tranquility would justify forbidding the use of loudspeakers in residential neighborhoods after midnight, or the interest in traffic flow would

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[33] *Id.* at 1133-34.

[34] This surely is Professor Canby's point; he suggests that the enterprise cannot "truly exist" without an editor. Note 33 *supra.*

[35] Adderley v. Florida, 385 U.S. 39 (1966).

justify a flat prohibition on parades in the Holland Tunnel.

The other part of Professor Canby's analysis emphasizes the relevance of the availability of other means of expression.[36] In the school newspaper context, it is precisely the paper's near monopoly that makes crucial its recognition as a public forum. The school paper case is quite unlike the case of the state university law review in this respect; normally a school newspaper is the only significant print medium focusing on the school community. Thus there is a sound reason for limiting the editor's discretion to present a one-sided view of issues. The point is not that the first amendment commands a school-imposed "fairness doctrine" for school newspapers,[37] but that it may command some rule of guaranteed access to the newspapers' pages for those opposing the editors' views.[37.1] Nothing in the Supreme Court's recent treatment of media access claims is inconsistent with such a view.[38] Once again, the most serious constitutional concern is the threat of government-enforced content discrimination.

Can any constitutional doctrine be devised to permit the editor to exercise the discretion that is necessary to the operation of a "real" newspaper and at the same time prevent the exclusion of views from a government newspaper merely because the editor does not share those views? One solution might be found in a constitutional principle that tolerated editorial discretion so long as it were lodged in someone who could be counted on to use professional (rather than personal) standards in exercising it.[39] In a given case, where it could be

[36] *See also* Stone, *supra* note 22, at 255-56. *Cf.* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (leafleteers denied a forum in privately owned shopping center partly because their message could be conveyed equally conveniently elsewhere). In *Conrad* itself, however, the Court commented: "whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence." 420 U.S. at 556, citing Schneider v. State, 308 U.S. 147, 163 (1939). Such citations are now standard thrusts and parries for brief writers in public forum cases. The availability of an alternative means of communication surely is relevant in the constitutional balance, but not necessarily controlling.

[37] *See* Canby, *supra* note 31, at 1145-48, rejecting such a requirement.

[37.1] The current practice of some state university newspapers of rejecting advertising by the Gallo winery, on the ground that the company has been charged with unfair practices under California law, seems quite vulnerable to constitutional attack. Certainly there is no refuge in any "commercial speech exception" to the first amendment. Not even the *Lehman* plurality opinion would authorize the city bus lines to accept some commercial advertising and reject other advertising because it was offered by persons whose politics were objectionable to the transit managers.

[38] Both Columbia Broadcasting Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), and Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) dealt with media access claims against *privately* owned communications media.

[39] I am indebted to Leon Letwin for this perspective. The dangers of improper content

shown that an editor had abused this discretion by excluding opposing views—say, by printing only guest editorials which favored a new constitution for student government, and refusing space to opponents—a court should feel no hesitation in intervening to guarantee access to the opponents, in the name of the first amendment's equality principle.[40] But the refusal of the school newspaper editor to print a cartoon because of its bad taste (as the editor sees it), or to print an article that is badly written (similarly, as evaluated in the editor's discretion), should not raise a first amendment problem. That these two areas blur together at their edges should not disqualify a court from deciding where a particular editorial action falls. Courts regularly make similar judgments in cases in which teachers and other public employees allege that they have been fired or otherwise penalized for their political views.[41]

Professor Canby's example of the public auditorium brings us closer to the problem of the *Conrad* case. It is true, as he remarks, that nothing in the nature of an auditorium makes an "editorial" function necessary to its operation. A public meeting hall that serves a broad range of purposes—say, from concerts to boxing—should be the constitutional equivalent of a street or a park. Content regulation, in other words, should be limited to those types of speech that are constitutionally punishable. It appears that the city theater in *Conrad* was just such a place. The 1924 document that served as the theater's charter had spoken of "clean, healthful entertainment,"[42] but there was no showing by the city that the theater had ever given this phrase any meaning beyond the limits imposed by the state's criminal law. Chattanooga had not established an opera house, or a children's theater, but a city theater. The same 1924 document stated the city's purpose to make the theater

discrimination would not disappear in such a case; no doubt a city theater's governing board could find an artistic director whose political views matched their own, and whose professional judgment might be influenced by those views. This is to say that difficult cases will arise under any rule that accords "some constitutional recognition," as Justice Rehnquist urged, to "that element of [a city theater] which is 'theater' . . . along with that element of it which is 'municipal.'" 420 U.S. at 573-74. In Tilton v. Richardson, 403 U.S. 672 (1971), one ground expressed for upholding federal grants to sectarian colleges for erecting buildings was that "college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines." 403 U.S. at 686.

[40] See the discussion of this principle in Karst, *supra* note 15.

[41] *See generally* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841.

[42] 420 U.S. at 549 n.4.

> the community center of Chattanooga; where civic, educational, religious, patriotic and charitable organizations and associations may have a common meeting place to discuss and further the upbuilding and general welfare of the city and surrounding territory.[43]

Making allowances for half a century's growth of first amendment doctrine, this is a fair definition of a public forum in its most generous conception.

In any case, the decision to exclude "Hair" from Chattanooga's theater was not made by an artistic director on the basis of professional standards of good and bad theater. It was made by the theater's governing board, none of whom had either seen the production or read the script, on the stated ground that to allow the musical to be produced would not be "in the best interest of the community."[44] Neither a statutory standard nor the general standards of a profession informed this administrative decision. Plainly, on any view of the public forum, Chattanooga's action failed the test of the first amendment.

If Chattanooga wants to be the proprietor of a concert hall or a repertory playhouse, as many cities are, it can do so without turning these halls into general purpose municipal auditoriums that are commanded by the first amendment to avoid content regulation.[45] But these places, too, will be public forums. Discretionary content regulation will be permissible, so long as it is limited to the purpose of assuring that the concert hall is devoted to high-quality concerts[46] and the playhouse devoted to good theater. But when government is the proprietor of any forum, it is constitutionally permitted to regulate speech content only to the degree necessary to further such a compelling state interest. The silence of the *Conrad* opinion on these issues should not obscure the fact that the *Conrad* decision, offers us a chance to get back on the right path.

III. EPILOGUE: THE ARMY AND DR. SPOCK

We have seen that the *Conrad* opinion did little to dispel the all

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[43] *Id.*

[44] 420 U.S. at 548, 549.

[45] Assuming always that there are other halls where people can express themselves. *See* text and note 36 *supra.*

[46] By referring to "high-quality concerts" I do not, of course, mean to exclude the possibility that a public concert hall might occasionally be used for performances of kindergarten choruses, etc., without losing its status as a concert hall whose offerings are subject to the professional judgment of an artistic director.

or nothing view of the public forum. The tenacity of that view and its capacity to undermine first amendment protections were again demonstrated in *Greer v. Spock*,[47] decided just one year after *Conrad*. Dr. Benjamin Spock, a candidate for President in 1972, and others sought to speak at Fort Dix, a giant Army base in New Jersey devoted mainly to basic training. When the base commander denied this request the would-be speakers successfully sought injunctive relief in federal court.[48] Spock and the others held their rally on the base just before the election; and later the federal court issued a permanent injunction forbidding the Army authorities from interfering with political activity in those areas of Fort Dix that were freely open to the general public.[49] The Supreme Court reversed the judgment below, in an opinion whose reasoning is depressingly familiar.

The Court first asserted that Spock was claiming that the public areas of Fort Dix were a public forum.[50] It then assumed that the validation of such a claim implied an unlimited right to propagate one's views in those areas, and concluded that no area of Fort Dix was a public forum because the fort's main purpose was the training of soldiers. Since Spock and his associates had "no generalized constitutional right to make political speeches" at Fort Dix,[51] the Court was not disturbed by the fact that other outside speakers had regularly been allowed to speak on the base.[52] The parallel to the *Lehman* plurality opinion is obvious, although the *Spock* opinion does not reinforce *Lehman* by citing it.

Throughout the majority opinion in *Spock* the assumption is that the public areas of Fort Dix must be either extensions of Hyde Park Corner or subject to regulation of speech content by the base commander whenever he determines that a particular speech will not be "supportive on the military mission" of the base.[53] Once again,

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[47] 96 S. Ct. 1211 (1976).

[48] The district court first denied a preliminary injunction, but the Third Circuit reversed. 469 F.2d 1047 (1972).

[49] The Third Circuit affirmed this order. 502 F.2d 953 (1974).

[50] Much of the argument in this case was addressed to the question of the degree to which the Army had opened certain portions of Fort Dix to the public. The Third Circuit relied heavily on Flower v. United States, 407 U.S. 197 (1972), which had treated a street in an open portion of another Army base as the equivalent of any other public street. 469 F.2d at 1053-54. In *Spock*, the Court distinguished *Flower* as a case in which the military authorities had simply abandoned any control over the street. 96 S. Ct. at 1217.

[51] 96 S. Ct. at 1217.

[52] These included "a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, [and] a rock musical concert . . . ." *Id.*, n. 10.

[53] *Id.*

the Court set for itself an all or nothing choice, and opted for nothing—as in *Lehman*, in the face of a thoughtful dissent by Justice Brennan.[54]

Suppose, however, that the Court had not assumed that its task in *Spock* was merely to assign Fort Dix to the proper category (public forum or not). Suppose, instead, that the Court had agreed with Justice Brennan that any regulation of speech content must be justified as necessary to achieve a compelling governmental interest. Would such an exacting judicial scrutiny produce a different result in *Spock* itself?

Among the Justices who joined the *Spock* majority, only Justice Powell addressed the question of justification. In his concurring opinion, he sought to spell out justifications for the military's regulation of speech content at Fort Dix. Justice Powell recognized, in other words, that the Court could not solve all its difficulties with a definition:

> [I]t is not sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than use as a "public forum," or even that the primary business to be carried on in the area may be disturbed by the unpopular viewpoint expressed. . . . Our inquiry must be more carefully addressed to the intrusion on the specific activity involved and to the degree of infringement on the First Amendment rights of the private parties. Some basic incompatibility must be discerned between the communication and the primary activity of an area.[55]

The "basic incompatibility" language is another way of saying that the control of speech content must be necessary to achieve a compelling governmental interest. That Justice Powell intended to make this point is evident in his remark that "our decisions properly emphasize that any significant restriction of First Amendment freedoms carries a heavy burden of justification."[56]

For Justice Powell, justification was to be found in the public's interest in maintaining the political neutrality of the Army—both in reality and appearance. Even Justice Brennan in dissent conceded that this interest was not only legitimate but weighty. But where Justice Powell focused on the dangers that political campaigning on

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[54] 96 S. Ct. at 1223. Here, as in *Lehman*, Justice Marshall joined in Justice Brennan's dissent.

[55] 96 S. Ct. at 1220.

[56] *Id.*

Army bases might lead to partisan appeals aimed specifically at a "military vote," or might suggest to soldiers and civilians alike that the military authorities supported one or another candidate, Justice Brennan saw a greater danger in upholding the Fort Dix commander's order:

> If there is any risk of partisan involvement, real or apparent, it derives from the exercise of a choice, in this case the Fort commander's choice to exclude [Spock and the others], while, for example, inviting speakers in furtherance of the Fort's religious program."[57]

Justice Brennan argued further that isolating the military for views opposed to those of the military establishment—such as opposition to the Vietnam war, for example[58]—"erodes neutrality and invites the danger that neutrality seeks to avoid."[59]

Neither side of this debate scores a clear-cut victory. While on balance Justice Brennan's argument is to me more persuasive, Justice Powell's striking of a different balance is far from outrageous. What *is* outrageous is the *Spock* majority's unwillingness to engage in any serious inquiry into the constitutionally required justification. The Fort Dix commander's action is not scrutinized strictly; indeed, it is not really scrutinized at all. It was enough for the majority that the commander had concluded that campaign speeches would not be supportive of the military mission. No wonder that Justice Marshall, in briefly noting his dissent, commented on the majority's "unblinking deference"[60] to the military authorities; when the eyes are kept closed, one does not blink at anything.

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[57] 96 S. Ct. at 1232.

[58] Justice Brennan quoted this extract from the trial record in *Spock*; the witness is an officer representing the Fort Dix commander:

> Q: I see. Well, doesn't the war with Vietnam deal with your mission?
> A: Oh, yes.
> Q: Well, . . . isn't it true that the content of what a proposed visitor intends to say is the basis for whether he is allowed to come on or not? If, for instance, he says "I intend to urge the soldiers not to use drugs," . . . [or if] he is going to inform them of some management principle that they are not aware of —
> A: That would further our mission, yes.
> Q: But if they are to speak against the war in Vietnam —
> A: That certainly wouldn't forward our mission, would it?
> Q: So the content of what they are to say, that is the basis of whether or not they are approved?
> A: Yes, to a great extent.

96 S. Ct. at 1232 n.16.

[59] 96 S. Ct. at 1233.

[60] 96 S. Ct. at 1235.

Even if we accept Justice Brennan's view of the *Spock* case, there may be some messages that the Army can constitutionally forbid, in the public areas of Fort Dix as well as in the Army's own classrooms. For example, wartime suppression of enemy propaganda aimed at causing desertion seems justifiable, whether or not one calls the fort's public areas a public forum. And even in peacetime, the fort theater should be able to produce *Oklahoma!* without offering the stage to Dr. Spock at intermission. But if those restrictions are valid, the reason is neither that the first amendment reaches only to Hyde Park nor that a government enterprise like the Army is immune from the first amendment's commands. The only constitutionally acceptable reason, as both Justice Brennan and Justice Powell recognized in *Spock*, is that the regulation of speech content is necessary to serve a governmental interest of compelling importance.