

1993

Freedom of Speech for Libraries and Librarians

Rodney A. Smolla

Repository Citation

Smolla, Rodney A., "Freedom of Speech for Libraries and Librarians" (1993). *Faculty Publications*. 871.
<https://scholarship.law.wm.edu/facpubs/871>

Copyright c 1993 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

Freedom of Speech for Libraries and Librarians*

Rodney A. Smolla**

Noting the recent bicentennial of the First Amendment to the United States Constitution, Professor Smolla considers the role of librarians in opposing censorship. He proposes a new principle of "professionalism" to establish the librarian's role, and discusses the principle in light of the Supreme Court's decision in Board of Education v. Pico.

The Promises and Perils of the Information Age

In 1991 we celebrated the 200th anniversary of the First Amendment. This is a propitious time to ponder the future of free speech and the capacity of librarians to influence that future. Librarians play a pivotal role in maintaining the free flow of information in American society. Librarians occupy professional positions that are strategically well placed to help guide the nation toward enlightened policies for the new information age. Librarians know as well as anyone in our society the awesome power and wonderful promise of new information technologies. Indeed, a major focus of the librarian's professional energy is the intelligent management of this new potential.

There are, however, some clouds inside this silver lining. The burgeoning information age places many new "quality of life" pressures on librarians, including the issues of privacy, quality, and censorship. It is worthwhile to attempt to sort through these pressures.

Privacy Pressures. Libraries are ideal forums for surveillance. Libraries can provide a revealing information "fingerprint" of a patron's politics, religious and ideological associations, aspirations, fantasies, or fetishes. Libraries may expect increasing pressure to invade the privacy of patrons at the behest of law enforcement and other government agencies.

* © Rodney A. Smolla, 1993.

** Arthur B. Hanson Professor of Law, and Director of the Institute of Bill of Rights Law, College of William and Mary, Marshall-Wythe School of Law, Williamsburg, Virginia. This is a revised version of a paper presented at the AALL Winter Institute, Williamsburg, Virginia, January 31, 1991. Portions of the article appear in a somewhat different form in the author's book, *Free Speech in an Open Society* (Alfred A. Knopf, 1992).

Quality Pressures. Every day librarians learn magnificent new ways of multiplying exponentially the quantity of information available to their patrons, and of multiplying the speed with which information may be retrieved, stored, or transmitted. This technical potential, however, does not necessarily ensure any improvement in the quality or social utility of the information being transmitted. The mere capacity to be informed and to communicate does not guarantee that humans will inform themselves well or communicate intelligently or wisely. Law librarians may well ask themselves, does the quality of justice improve with better law libraries? Are courts making decisions that are more just than in the primitive old days of manual shepardizing? Are law library patrons writing better briefs, memoranda, articles, or books now than they did before the computer age? Does the speed of thought increase with the speed of information, or is it, like the speed of light, a constant in our calculations about the impact of new communications technologies?

Librarians may be tempted to respond to these questions by simply dismissing them as silly or irrelevant. The “quality of thought,” it might be asserted, is outside the librarian’s jurisdiction; it is for the librarian to provide information and make it accessible, and for patrons to turn it into something constructive.

The management of new information, including decisions over what to have in library collections and how to make it accessible, *is* within the library’s jurisdiction, however, so it is perhaps useful to reflect on the intellectual process itself. It is useful for librarians to drive home to patrons the distinction between the seductive decadence of the information age—our awesome capacity to gather information quickly and in massive quantity—and the human constant that has not changed: the necessity of painstaking concentration and hard work if raw information is to be made into something of finished and enduring value.

Censorship Pressures. New communications technologies carry with them increased censorship pressures. Like art museums, libraries will be among the repositories of knowledge and culture in modern society that can expect to find themselves under increasing pressure to serve as society’s censors. In the new information age, librarians must guard against the censors and the spies both within and without, foreign and domestic.

I hope that librarians will first fight against the censors within and be forever on guard against that book banner in all of us. We are all prone to the natural human instinct to censor—to pronounce speech that is upsetting, disquieting, and offensive as taboo. Librarians, of course, cannot help but be discriminating in their management of libraries: that is what librarians do—make judgments as to what to include or exclude in a collection. But there is a difference between discriminating and

discrimination, between engaging in good faith professional judgments about the quality or utility of material vying for precious space and scarce dollars, and the exercise of judgments based upon political, religious, racial, ideological, or scientific bias. Librarians must be self-critical in decision making, strive to ferret out invidious motive, and struggle to achieve the highest level of dispassionate professional judgment of which they are capable.

In addition, librarians must have the courage to fight the censors without. Librarians must fight those who seek to destroy the critical role of the library as the free and open marketplace of ideas, turning it instead into an arbiter of conventional mainstream tastes and sensibilities. In law, no less than in politics or culture, one of the great functions of free expression is to toss speech bombs into the arena, breaking the windows of received wisdom and rattling the chandeliers of conformity.

The First Amendment and the “Professionalism Principle”

Librarians are entitled to ask whether the First Amendment provides them with useful ammunition in this battle. For privately owned libraries, it is clear that the First Amendment stands as a virtually absolute bar to government censorship. Other than banning books that are legally obscene, the government has little constitutional power to dictate to private libraries the content of their collections.

Unfortunately, First Amendment principles are still in a relatively primitive state of development with regard to the freedom of libraries funded with public money. I am disappointed that courts have not gone further in devising First Amendment doctrines that more fully protect the intellectual neutrality of libraries.

One of the best future hopes for combatting censorship in public libraries is the evolution of a theory I call the “professionalism principle.” Under this principle, decisions concerning the content of speech in institutions such as libraries or art galleries should be insulated from partisan political influence by committing them to the sound discretion of professionals in the field. These professionals judge the merits of a work from perspectives limited to the professional criteria that have evolved within their areas of expertise. While these judgments will never be perfectly “neutral,” and may well be influenced by political currents within a professional field, they do provide a measure of objectivity qualitatively better than that likely to come from political bodies.¹ Decisions over which

1. For example, in 1965, when Congress set out to create the National Endowment for the Arts and the National Endowment for the Humanities, it employed this principle to ensure that the Endowments would engage in the politically neutral pursuit of excellence and not be subject to partisan pressures.

arts projects to fund or which books belong on library shelves are best left to the judgment of professionals in the field, and not the micromanagement of legislatures.

This concept of independent professionalism may be prudent administrative practice and sound economics, but can it possibly be a principle of constitutional law? Is the precept that politicians should not try to be art critics, museum curators, or librarians merely a sensible management strategy, or could it, in some circumstances, actually be a requirement of the First Amendment?

When a suit is brought claiming that the legislature has interfered with the professional prerogative of a museum curator or library professional, it is fair to ask whether those professionals are even the "holders" of the First Amendment rights at issue. If the legislature employs the professional, how can the professional presume to possess a constitutional right to assert claims against the governmental employer to exhibit art works or library books against the employer's will? The individual artist or author has not been denied the right to expression, but has merely been told that the government chooses not to purchase or exhibit his or her work. To the extent that the public at large claims a right to receive ideas and information, anyone is free to purchase the book at the local bookstore, buy the painting, or see it at a private museum. Yet, the public would seem to have no claim to force the government to purchase or display the work. Whatever right the citizen has in this regard presumably is exercised at the ballot box.

At first blush then, the notion that the First Amendment might require that professionals be allowed to choose which paintings to display or library books to keep on shelves seems farfetched. These are, after all, public repositories of culture. Public librarians and museum curators do not own their collections; the collections are owned by the people, who presumably have the ultimate authority to make decisions concerning the contents of the collections through their duly elected representatives.

On closer examination, however, the professionalism principle is not farfetched at all. It is well established under existing doctrines that government is forbidden under the First Amendment from administering public programs in a manner that discriminates against unpopular viewpoints. This principle has on occasion been applied by courts to libraries. In *American Council of the Blind v. Boorstin*,² for example, the court held that it was unconstitutional for the Library of Congress, acting in apparent acquiescence to the wishes of Congress, to cease producing

2. 644 F. Supp. 811 (D. D.C. 1986).

copies of *Playboy* magazine in braille. The court found that the library had eliminated *Playboy* from its braille program solely because of the magazine's sexual orientation. "Although individuals have no right to a government subsidy or benefit," the court stated, "once one is conferred, as it is here through the allocation of funds for the program, the government cannot deny it on a basis that impinges on freedom of speech."³ To eliminate *Playboy* solely because of its sexual orientation, the court ruled, was "viewpoint discrimination," and therefore unconstitutional.

Unfortunately, despite examples such as *Boorstin*, it will often not be easy to find proof of a motive to censor. Library boards and other government agencies may often be clever enough to disguise their acts of censorship. My suggestion that courts should begin to recognize a "professionalism principle" is designed to create what might be thought of as "insulation material" between the legislature and free expression, helping to combat disguised censorship. There is always reason to be highly suspicious of interference by elective bodies in the details of content-based regulation of speech concerning governmental programs. More often than not, the real motivation will not be neutral, but will be aimed at skewing the general marketplace through the leverage of government funding. The professionalism principle recognizes this commonsense judgment of experience and instructs courts to scrutinize with heightened skepticism any attempt by the legislature to bypass the routine channels of professional discretion.

The closest the Supreme Court has come to recognizing this professionalism principle was the 1982 decision *Board of Education v. Pico*.⁴ In September 1975, several members of the Long Island Trees Board of Education attended a conference sponsored by Parents of New York United (PONYU), a politically conservative organization, where they obtained a list of books deemed "objectionable" by PONYU. The Board later discovered that its school libraries contained the following books from the "objectionable" list: *Slaughter House Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Go Ask Alice*, of anonymous authorship; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain't Nothin' But A Sandwich*, by Alice Childress; *Soul On Ice*, by Eldridge Cleaver; and *A Reader for Writers*, edited by Jerome Archer.

The Board had the books "unofficially" removed from the school library, contrary to the established policy, which required the superinten-

3. *Id.* at 815.

4. 457 U.S. 853 (1982).

dent to appoint a review committee upon receipt of a complaint about a book. When the Board's actions became publicized, it issued a press release characterizing the books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy"⁵ and stating that it "is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."⁶

A short time later, the Board appointed a book review committee to determine whether the books should be retained. The committee was to consider "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level."⁷ The committee recommended that five books be retained, two be removed, and one be made available upon parental approval. The Board rejected the committee's recommendation and returned only two books to the library—one without any restrictions and one with parental approval.⁸

A suit was brought by students challenging the Board's actions. The students alleged that the Board removed the books because certain passages "offended [Board members'] social, political and moral tastes and not because the books were lacking in educational value."⁹ The suit maintained that the Board's decision was based solely on the fact that the books appeared on the PONYU list. The Board, after all, did not attempt to review other books in the school libraries.¹⁰ The students conceded that if the Board's decision were based solely on "educational suitability," removal would be permissible and would not constitute an official suppression of ideas in violation of the First Amendment. It was precisely the Board's bypassing of normal professional channels, however, that gave the students powerful circumstantial evidence that the Board had not acted on neutral grounds. The Board argued that schools must be permitted unfettered discretion to transmit community values and that this included the right of the Board to make its own decisions concerning what was appropriate for the school libraries.

The Supreme Court's holding was announced in a plurality opinion by Justice Brennan.¹¹ Brennan emphasized that the Court's holding was a narrow one, limited to the *removal* of books from the school library, and

5. *Id.* at 857.

6. *Id.*

7. *Id.*

8. *Id.* at 858.

9. *Id.* at 858-59.

10. *Id.* at 874.

11. Justice Brennan's opinion was joined by Justices Marshall and Stevens, and in part by Justice Blackmun. Justice White voted with these four Justices to remand the case to further develop the factual record, but did not join in the First Amendment discussion of the plurality.

did not extend into the classroom or apply to the acquisition of books. The first question considered was whether the First Amendment imposes *any* limitations on the Board's discretion to remove library books. Brennan acknowledged that local school boards must be permitted to transmit community values through their curriculum, but also recognized that this discretion is subject to the "transcendent imperatives of the First Amendment."¹²

Justice Brennan reasoned that the First Amendment protects not only individual self-expression, but also the right to receive information and ideas.¹³ The right to receive inures in the right to send, for without both a listener and a speaker, freedom of expression is as empty as the sound of one hand clapping.

Brennan held that school officials do have significant authority to control the content of speech in schools, but this authority is not authoritarian; schools may not monopolize the marketplace. Quoting *Tinker v. Des Moines School District*, Brennan stated, "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . [S]chool officials cannot suppress 'expressions of feeling with which they do not wish to contend.'"¹⁴

Justice Brennan noted that students' First Amendment rights are "construed 'in light of the special characteristics of the school environment,'" but held that "the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students."¹⁵ If the Board intended to deny the students access to ideas with which the Board disagrees, then the removal of the books was unconstitutional. On the record before the Court, however, it was impossible to tell whether the School Board had been motivated by an illicit intent to suppress ideas, and so the Court remanded the case back to the lower courts for a trial on the School Board's motivation.

In a dissenting opinion, Chief Justice Burger pointed out that the students still had access to the removed books through the public library and private bookstores. While the government may not unreasonably obstruct the expression of ideas, he maintained, it is not required to be the conveyor of those ideas. The right to receive ideas does not create a right to have the ideas affirmatively provided by the government.¹⁶

12. 457 U.S. at 864.

13. *Id.* at 866-67.

14. *Id.* at 868 (*quoting* *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969), *quoting* *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

15. *Id.* at 868.

16. *Id.* at 886-88 (Burger, C.J., dissenting).

Burger also charged that although Justice Brennan specifically limited his decision to the *removal* of books, the distinction between removal and acquisition is meaningless. "Why does the coincidence of timing become the basis of a constitutional holding?" Burger asked. Despite these objections, however, Justice Brennan rightly prevailed, because none of the dissenting Justices could persuasively refute Justice Brennan's central thesis: even if the school district had no affirmative duty *in the first instance* to create a school library, once it did, the principle of neutrality and the corollary notion of professional independence were activated. No one doubted that it would violate the Constitution for a Democratic school board, motivated by party loyalty, to ban books favoring Republicans, or for an all-white school board, motivated by racial animus, to ban books written by black authors or advocating civil rights. The motivation was what mattered, and the deviation from professional norms was evidence that the motivation was suspect.

After the Supreme Court rendered its decision, the School Board reversed itself, voting to return the banned books to the library.¹⁷ This took the steam out of the lawsuit, and there was no further hearing on the merits of the case. Whether or not one considers the School Board's retreat to be an implicit confession of its improper motives, the *Pico* decision was an important beginning in establishing the professionalism principle.

Censorship in Private Institutions

It is worth saying a word about *private* acts of censorship aimed at private-sector libraries, such as libraries at private universities. The decision by a private university to engage in censorship is not, of course, subject to the restraints of the First Amendment at all, because the Constitution places restrictions only on government. Borrowing on notions of academic, artistic, and scientific freedom, surely the nation's great private institutions of learning and culture ought to operate *as if* the First Amendment applied to them. The fabric of society's intellectual and cultural life is a tightly knit weave of private and public institutions. An open society committed to free expression as a transcendent value will be committed to principles of artistic and scholarly freedom in private universities, museums, theaters, and libraries as well as public institutions, encouraging the free flow of information among all of them. The life of the mind should not be cramped by the artificial distinctions of law.

17. Richard Levine & William C. Rhoden, *School Board Unbans Books*, N.Y. TIMES, Aug. 15, 1982, at E5.

Conclusion

This returns us to the role of the librarian, who can influence our social respect for free speech in all American institutions, public and private. I hope librarians will make a profound commitment to maintaining the intellectual openness of libraries. Let this be a guiding ethos of what librarians are all about: to fight censors wherever they are found. Fight them in conventions, in newsletters, on library boards, in bureaucracies. Fight them in legislatures. Fight them in the courts; fight them in the forums of public opinion. Fight them because librarians have professional influence and because librarians matter. Fight them because librarians are vital players in the never-ending struggle to maintain the free flow of information in a wide-open and robust democracy.

