

## Selective Taxation and the First Amendment

by

Stanley R. Kaminski  
Duane Morris LLP  
190 South LaSalle Street, Suite 3700  
Chicago, IL 60603-3433  
P: 312.499.0105 F: 312.277.6423  
[SRKaminski@duanemorris.com](mailto:SRKaminski@duanemorris.com)

Jordan M. Goodman  
Horwood Marcus & Berk Chartered  
180 N. LaSalle Street, Suite 3700  
Chicago, Illinois 60601  
312-606-3225 (direct)  
312-606-3232 (fax)  
[jgoodman@hmblaw.com](mailto:jgoodman@hmblaw.com)

### **I. General First Amendment Tax Principals and Notable Quotes**

- “The government cannot, without compelling justification: (1) exercise its taxing power to single out the press; (2) target a small group of speakers; or (3) discriminate on the basis of the content of the taxpayers speech.” *Pooh-Bah Enterprises, Inc. v. County of Cook*, \_\_\_ Ill. 2d \_\_\_ (March 19, 2009) citing *Leathers v. Medlock*, 499 U.S. 439, at 447 (1991).
- “In order to justify differential taxation, the state must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221, at 231 (1987).
- “First Amendment hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.” *Arkansas Writers*, at 230. (Court held that exempting only certain magazines and excluding others based on type (i.e. content) violated First Amendment).
- “We are aware of no general principle that freedom of speech may be abridged [even] when the speaker’s listeners could come by the message by some other means.” *Arkansas Writers*, at 231, citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).
- “To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.” *Speiser v. Randall*, 357 U.S. 513, at 518 (1958).
- “The denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from proscribed speech. The denial is frankly aimed at the suppression of dangerous ideas.” *Speiser*, at 519.
- “[p]lainly a community may not *suppress*, or the state *tax*, the dissemination of views because they are unpopular, annoying or distasteful” *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

- “a city may not *regulate* the secondary affects of speech by ‘*suppressing*’ the speech itself. A city may not, for example, impose a content based fee or *tax*.” *Los Angeles v. Alameda Books, Inc.*: 122 S.Ct. 1728, 1739 (2002) (Kennedy, J., concurring)
- “Speech cannot be financially burdened, any more than it can be punished or banned.” *Forsythe County v. The Nationalist Movement*, 505 U.S. 123, 135 (1992)
- “Speaker-based laws demand strict scrutiny when they reflect the Government’s preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).” *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 658 (1994) *citing* *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (*finding* that there was no content-based discrimination in that case).
- “If the Government may not impose a tax upon the expression of ideas in order to discourage them, it may not achieve the same end by reducing the individual who expresses his views to second-class citizenship by withholding tax benefits granted others.” *Speiser v. Randall*, 357 U.S. at 536 (1958) (Douglas, J., concurring).
- “[A] statute is presumptively *inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.” *Simon & Schuster*, 502 U.S. at 115 (emph. added), *citing* *Leathers*, 499 U.S. at 447.
- “To use [Justice] Holmes phrase, that taxpayers will occasionally be obligated to support not only the thought of which they approve, but also the thought that they hate. That is one of the fundamental premises of American law.” *Gay & Lesbian Students Assoc*, 850 F.2d 361, 362 (8<sup>th</sup> Cir. 1988)
- “in the realm of private speech or expression, government regulation may not favor one speaker over another.” *Rosenberger*, 515 U.S. 819, 828 (1995)
- “illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.” *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 117, 116 L.Ed. 2d 476, 488, 112 S. Ct. 501, 509 (1991), quoting *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592, 75 L.Ed. 2d 295, 309, 103 S. Ct. 1365, 1376 (1983).”
- “Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system.” *Regan*, 461 U.S. at 544.
- “What is good art varies with individuals as it does from one generation to another.” *Hennegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946) (Court held postage subsidy for artistic magazines but not *Esquire* a violation of the First Amendment).
- “erotic entertainment is firmly within the scope of expression protected under the First Amendment.” *Odle v. Decatur County*, 2005 U.S. App. LEXIS 18412 (6<sup>th</sup> Cir. 2005); *City of Erie v. Pap’s AM*, 529 U.S. 277 (2000).

- “As soon as municipal officials are permitted to pick and choose, as they are in all existing socialist regimes, between those productions which are clean and healthful and culturally uplifting in content and those which are not, the path is cleared for a regime of censorship under which full voice can be given only to those views which meet the approval of the powers that be.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 564 (Douglas, J., concurring and dissenting)
- “[I]t is well established that the government can make content-based distinctions when it subsidizes speech.” *Davenport v. Washington Education Assoc.*, 127 S. Ct. 2372, 2381 (2007) citing *Regan* as authority. (But see *Rosenberger*, 515 U.S. at 834 (“*Regan* relied on a distinction based on a preferential treatment of certain speakers – veterans organization – and not a distinction based on the content or messages of those groups.”))

## **II. Selective Taxation Issues**

- Illicit Intent vs. Effect Issue
- Suppression of Expression vs. Encouragement of Alternate Expression Issue
- True Subsidy vs. Tax Exemption /Regulation Issue
- Government Speech Issue
- Different type of Expression vs. Content Based Issue
- Level of Scrutiny Issue

## **III. Selective Decisions**

Speiser v. Randall

Regan v. Taxation with Representation of Washington

Arkansas Writers Project v. Ragland

Leathers v. Medlock

Tenn. Attorney General Op. 08-78

Texas Entertainment Assoc. v. Combs

Pooh-Bah v. County of Cook (Appellate Court)

Pooh-Bah v. County of Cook (Supreme Court)

677 New London Corp. d/b/a Nite Moves (N.Y. Admin. case)