

## LET THEM EAT CAKE

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By Scott Forsyth

“Let them eat cake,” so proclaimed Marie Antoinette allegedly when told of a shortage of bread among the peasantry. Not true, say historians today. Closer to home, this phrase is the apt title of a very real work of public art proposed for the center of the village of Caledonia in Livingston County, New York.

Simple in concept, the work would involve five bakers serving twenty cakes in the streets adjacent to the Soldier’s Monument in the center of the village. The cakes would have different themes, such as birthday and wedding, and would represent “life events,” that soldiers, past and present, have missed as a result of their service and sacrifice. The artist’s message is antiwar, “encourag(ing) the examination of the true outcomes” of military force “from the reference point of residents’ own families.”

The artist wanted to close off a portion of the streets at the center of the village for three hours to present her antiwar work. She asked the village for permission to do so. On October 4, 2005, the village board granted her the permission, no conditions attached.

The board’s action set off a hue and cry, primarily among local veterans. An “insult to veterans” and “unpatriotic” were some of the kinder statements. Citizens jammed the next meetings of the board, demanding that it reverse itself. One board member agreed to do so, because he did not like certain statements made by the artist in an op-ed piece.

On December 6, 2005, the board revoked its permission to close the streets and offered as an alternative site an adjacent park. According to the Mayor, closing the streets “raised insurance issues and potential safety concerns.”

Do the actions of the board comply with the Free Speech Clause of the First Amendment? No.

A street is a traditional public forum for the expression of speech. A government may require a speaker to obtain its permission to use a public forum. Such a requirement is a prior restraint on speech and there is a “heavy presumption” against its validity Bantam Books, Inc. v Sullivan, 372 US 58, 70 (1963). A government can overcome this presumption if (1) it limits its review of an application to use a public forum to the time, place, and manner of expression, and (2) the review process contains “narrow, objective, and definite standards to guide the (government).” Shuttlesworth v Birmingham, 394 US 147, 150-151 (1969); Forsyth County, Georgia v Nationalist Movement, 505 US 123, 131 (1992).

Restrictions on the time, place, and manner of expression must be content-neutral and “must be narrowly tailored to serve a significant government interest and must leave open ample alternatives for communication.” U.S. v Grace, 461 U.S. 171, 177 (1983).

Didn’t Caledonia do this ultimately? Traffic safety and maybe the burden on taxpayers from higher insurance costs, if verifiable, are significant government interests. The board made available one alternative for communication, an adjacent park. Parks, like streets, are traditional public forums.

Unfortunately, for Caledonia the sequence of events indicates that the restrictions were a ruse. The Mayor's statement notwithstanding, the board adopted the restrictions because it disapproved of the content of the artist's message. It bowed to the pressure of the veterans. Doing so makes the restrictions content-based and invalidates them. Id.

Would the board be in a better position if it had adopted the restrictions on October 4, before the hue and cry? No.

Village law and practice on granting permission are devoid of standards. "Such discretion has the potential for becoming a means of suppressing a particular point of view." Heffron v International Society for Krishna Consciousness, Inc., 452 US 640, 649 (1981). The suppression can take the form, as here, of a government saying one thing for reasons not easily detected or the form of a speaker censoring herself or himself to obtain the necessary permission. A review process "that allows arbitrary application is *inherently inconsistent* with a valid time, place, and manner regulation." Forsyth County, Georgia v Nationalist Movement, *supra* at 130 (emphasis added).

The artist did not have to apply for permission and be turned down. She could have mounted a "facial" challenge to the constitutionality of the process.

The artist's experience with Caledonia is a good illustration of why we need limits on the discretionary power of government, even at the local level.