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Rosenberger v. Rector & Visitors of the University of Virginia: Free Speech Clause and Establishment Clause Doctrines Work Together to Protect Individual Thought and Expression

In *Rosenberger v. Rector & Visitors of the University of Virginia*,[1] the United States Supreme Court evaluated the constitutionality of a state university's refusal to fund a student group's activity based solely on the group's Christian perspective.[2] Respondent, the University of Virginia, regularly authorizes the payment of the printing bills for various student publications.[3] Upon authorization, the University pays outside printing contractors directly with money from the Student Activities Fund ("SAF"), which is supported by mandatory student fees.[4] The purpose of the SAF is to make available to students a wide range of opportunities by supporting extracurricular activities that are related to the educational purpose of the University.[5] A student organization must be a Contracted Independent Organization ("CIO") to receive funding.[6] The contract between the University and the CIOs states that the University does not approve of the goals and activities of CIOs and that the benefits afforded to CIOs should not be "misinterpreted as meaning that those organizations are part of or controlled by the University."[7] The University further disclaims responsibility for CIOs by requiring that the organizations include a clause in all written materials stating that they are independent of the University.[8] CIOs may apply for publication

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1. 115 S. Ct. 2510 (1995).
2. *Id.* at 2513.
3. *Id.* at 2514.
4. *Id.* Students must pay fourteen dollars per semester to fund student activities through the SAF. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* Such benefits include use of University facilities and the possible opportunity to receive SAF funding. *Id.*
8. *Id.*

funding if they qualify as one of eleven categories of student groups.[9] SAF guidelines prohibit the funding of "religious activities," defined as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[10] Petitioner Rosenberger's organization, Wide Awake Productions ("WAP"), qualified as a CIO and was eligible to apply for SAF funding under the category of "student news, information, opinion, entertainment, or academic communications media groups."[11] WAP publishes a paper called "Wide Awake: A Christian Perspective at the University of Virginia."[12] The paper's purpose is to "publish a magazine of philosophical and religious expression, to facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints, and to provide a unifying focus for Christians of multicultural background."[13] WAP applied to the SAF for payment of its printing bills, but the SAF refused to fund WAP's publication based upon its finding that the paper was a "religious activity."[14] After making the proper appeals through the University,[15] WAP filed suit against the University alleging that the SAF guideline restricting funding for "religious activities" violated its rights to free speech, press, and exercise of religion.[16] The District Court for the Western District of Virginia found for the University and held that the University's guideline did not discriminate against either the content or viewpoint of student speech and that the University's Establishment Clause concern over "religious activities" justified the denial of funding to WAP.[17] The Fourth Circuit Court of Appeals held that the SAF guideline did, in fact, discriminate against speech content, but affirmed the district court because of a "compelling interest in maintaining strict separation of church and state."[18] The United States Supreme Court granted certiorari and reversed.[19] The Court held (1)

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9. *Id.*
10. *Id.* at 2514-15.
11. *Id.* at 2517-18.
12. *Id.* at 2515.
13. *Id.* The editors' mission is to challenge Christians to live according to their faith and "to encourage students to consider what a personal relationship with Jesus Christ means." Articles in the magazine cover various topics including eating disorders, racism, crisis pregnancy, and professor profiles. *Id.*
14. *Id.*
15. *Id.* The Appropriation Committee of the Student Council makes the initial decisions regarding disbursement of SAF support. Appeals are taken by the full Student Council and then the Student Activities Committee. *Id.*
16. *Id.* at 2515-16.
17. 795 F. Supp. 175, 183 (W.D. Va. 1992).
18. 18 F.3d 269, 281 (4th Cir. 1994).
19. 115 S. Ct. 2510 (1995).

the SAF Guideline discriminated against private speech based on its viewpoint,[20] and (2) such discrimination was not justified by an Establishment Clause concern because the University's program, absent the discriminatory aspect, was neutral toward religion.[21]

The Supreme Court has rendered numerous decisions based on the interpretation of these important words in American jurisprudence: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."[22] The Court has interpreted the Free Speech Clause to protect both the content and the viewpoint of private speech. In *Police Department of Chicago v. Mosley*,[23] the Court struck a city's ordinance which allowed peaceful picketing on the subject of a school's labor-management dispute but prohibited all other peaceful picketing.[24] The Court held that the ordinance violated citizens' rights to free speech: "[G]overnment may not grant the use of a forum to people whose views it finds acceptable but deny use to those wishing to express less favored or more controversial views."[25] More recently, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[26] the Court summarized the development of the forum analysis approach to free speech issues with four rules of law. First, in natural public forums, such as streets and parks, government regulation of the content of private speech must serve a compelling state interest and be narrowly drawn to achieve that interest.[27] Second, the content of private speech in a public forum created by the government, such as a school, receives the same constitutional protection as private speech in natural public fora.[28] Third, the government may regulate the content of private speech in a nonpublic forum in order to serve the purpose for which the forum was

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20. *Id.* at 2520.

21. *Id.* at 2525.

22. U.S. CONST. amend. I. The First Amendment is applicable to the states through the Fourteenth Amendment. Everson v. Board of Educ. of Ewing Township, 330 U.S. 1 (1947).

23. 408 U.S. 92 (1972).

24. *Id.* at 95.

25. *Id.*

26. 460 U.S. 37 (1983). In *Perry*, the Educators' Association opened its intermail system to the Perry Education Association ("PEA"). As the newly-elected and sole representative of teachers, PEA's exclusive access negated prior access rights of a rival union. *Id.* at 38. The court held the Educators' Association had created a non-public forum and thus had the right to make distinctions in access based on subject matter and identity. *Id.* at 48.

27. *Id.* at 45 (citing Carey v. Brown, 477 U.S. 455, 461 (1980)).

28. *Id.* (citing Widmar v. Vincent, 454 U.S. 263 (1981)).

created.[29] Fourth, the government may never regulate speech, in any type of forum, based on the viewpoint of such speech.[30] The Court analyzed private student speech in a public forum created by the government in *Tinker v. Des Moines Independent Community School District*.[31] In *Tinker*, the Court held that the viewpoints of high school students were protected by the First Amendment, and thus, the public school's prohibition of black armbands worn in protest of the Vietnam Conflict was unconstitutional.[32] Three years later, the Court clearly interpreted the First Amendment to protect the rights of student speech on state university campuses.[33] The United States Supreme Court's interpretation of the Establishment Clause, began in *Everson v. Board of Education of Ewing Township*.[34] The Court articulated a neutrality test in *Everson:* On one hand "the clause . . . was intended to erect 'a wall of separation between Church and State'";[35] on the other hand "other language of the amendment commands that the [State] cannot hamper its citizens in the free exercise of their own religion."[36] Until the early 1970's, this fact-sensitive neutrality test dominated Establishment Clause analysis.[37] In 1971, a three-part test, articulated in *Lemon v. Kurtzman*[38] replaced the neutrality test. Under the *Lemon* test, an Establishment Clause violation occurs if the act at issue (1) has a nonsecular purpose, (2) has a primary effect of advancing or inhibiting

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29. *Id.* at 46 (citing United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981)).

30. *Id.*

31. 393 U.S. 503 (1969).

32. *Id.* at 505-06.

33. Healy v. James, 408 U.S. 169, 180 (1972). Justice Powell wrote, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* (citing Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

34. 330 U.S. 1 (1947).

35. *Id.* at 16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1879)).

36. *Id.*

37. *See* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a city ordinance that allowed public schools to release students during school hours to attend off-campus religious training sessions); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (holding that a state law requiring classes to begin each day with readings from the Bible was not neutral toward religion and thus unconstitutional).

38. 403 U.S. 602 (1971). The three-part test comprised three prior cases decided by the Court: McGowan v. Maryland, 366 U.S. 420 (1961) (holding a state's Sunday closing laws were valid because the laws served a secular purpose of providing a uniform day of rest); *Schempp*, 374 U.S. 203 (holding that reading the Bible at the opening of each school day violated the Establishment Clause because it had the primary effect of advancing religion); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (holding that a state law granting tax exemptions to religious properties was valid because the law did not lead to "excessive entanglement" with religion).

religion, or (3) fosters an excessive entanglement with religion.[39] Establishment Clause jurisprudence has been uncertain since the introduction of this test. Many decisions resulting from its application have been inconsistent.[40] For example, the Court in *Lemon*, cited with approval the decision in *Board of Education v. Allen*,[41] which held that a law providing for the loan of state-supplied textbooks to parochial schools did not violate the Establishment Clause.[42] The Court applied the *Lemon* test in a subsequent case and reached a decision that seemed inconsistent with *Allen*; the Court held in *Meek v. Pittenger*[43] that provision of state personnel and equipment to parochial schools violated the Establishment Clause. Not only has the *Lemon* test resulted in inconsistencies as applied, but the Court has also rendered the test inconsistent on its face by choosing to apply it in some Establishment Clause cases and completely ignoring the test in others.[44] *Lemon*'s validity has been further undermined by appeals for the adoption of new tests to analyze Establishment Clause cases in concurring and dissenting opinions.[45] The Establishment Clause and the Free Speech Clause have come together in at least two important cases in recent years. In *Widmar v. Vincent*,[46] the University of Missouri regularly opened its facilities to registered student groups for activity use.[47] The University denied such use to a registered religious group when it passed a regulation that prohibited use of school facilities for "purposes of religious worship or religious teaching."[48] The Court held that religious worship and discussion are protected by the First Amendment and applied the forum analysis doctrine articulated in *Perry*.[49] Since the University had created a forum generally open for use by student

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39. 403 U.S. at 612.

40. *See* School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Board of Educ. v. Allen, 392 U.S. 236 (1968).

41. 392 U.S. 236 (1968).

42. 403 U.S. at 612.

43. 421 U.S. 349 (1975).

44. The Court ignored the *Lemon* test in Marsh v. Chambers, 463 U.S. 783 (1983) (holding that the government sponsorship of a legislative chaplain did not violate the Establishment Clause because the framers of the Constitution did not find such funding unconstitutional).

45. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (concurring with the majority that a city-owned nativity scene affixed to public property at Christmas did not violate the Establishment Clause because the city did not intend to endorse any message of Christianity).

46. 454 U.S. 263 (1981).

47. *Id.* at 265.

48. *Id.*

49. *Id.* at 269-70.

groups, the State had to prove that the content discrimination was necessary to serve a compelling state interest. The Court held that compliance with the United States Constitution is a compelling state interest, but the University in *Widmar* would not violate the Establishment Clause by adopting an equal access policy.[50] A similar case, *Lamb's Chapel v. Center Moriches Union Free School District*,[51] involved a school regulation denying facility use to any group for religious purposes, but permitting use for "social and civic" meetings.[52] Lamb's Chapel, a religious group, requested permission to use the school's facilities to show a film about child-rearing, but the request was denied because the film was "church-related."[53] The Court held that the school, as a nonpublic forum, denied access to a group that would otherwise be eligible based on the content of its speech, solely because of that group's viewpoint.[54] This, the Court held, violated the Free Speech Clause. The Court rejected the state's theory in *Lamb's Chapel* that compliance with the Establishment Clause justified violation of rights to free speech.[55] The recent case law addressing free speech in schools and establishment of religion, combined with the uncertainty of future Establishment Clause doctrine, set the stage for the importance of the decision in *Rosenberger*. Many scholars hoped that the Court would take the opportunity to clarify whether the *Lemon* test or another test governs Establishment Clause analysis.[56] Others anxiously waited to see how the Court would handle a purported conflict between two clauses of the First Amendment.[57]

The Supreme Court, in the five to four decision in *Rosenberger*, held that the University violated the First Amendment rights of students by

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50. *Id.* at 271-72. The Court applied the *Lemon* test and found no Establishment Clause violation where a school provides equal access to campus facilities for group activities. *Id.*

51. 113 S. Ct. 2141 (1993).

52. *Id.* at 2144. A religious group petitioned the school for use of its facilities in order to show a film on child-rearing from a Christian viewpoint. Similar use had been permitted for nonsectarian groups. *Id.*

53. *Id.* at 2144-45.

54. *Id.* at 2147. The Court found that the school had, in fact, created an open public forum, but applied the nonpublic forum analysis as it was more favorable to the State. *Id.*

55. *Id.* at 2148. The Court applied both the *Lemon* and endorsement tests to reach this conclusion.

56. Jay Alan Sekulow et al., *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351 (Summer 1995); Recent Cases, *Fourth Circuit Upholds University's Refusal to Consider Religious Organizations for Student Acitvities Funding*, 108 HARV. L. REV. 507, 510 (1994).

57. Sekulow, *supra* note 56; Annual Fourth Circuit Review, 52 WASH. & LEE L. REV. 471, 575 (1995).

denying their funding request for a publication solely because the students' printed speech contained a Christian perspective.[58] This landmark case was decided primarily on the basis of free speech law.[59] The most important factor in the Court's analysis was the distinction between private and government speech.[60] The University made student funds available to pay the printing expenses of student publications to facilitate student speech; the Court found that the publications constituted private citizens' speech rather than government speech.[61] The contract between the CIOs and the University disclaiming endorsement or responsibility for CIO goals or activities was very important in this finding.[62] The Court found the University's actions created a limited forum for private speech in a "metaphysical sense."[63] Such a forum is protected by the First Amendment, and the University violated that protection by prohibiting speech based on a particular viewpoint.[64] SAF Guidelines did not exclude the subject matter of religion, and WAP's paper was eligible for funding under the publications category.[65] The University's sole basis for the denial was the classification of WAP as a "religious activity."[66] The Court compared the forum of "student funds" in *Rosenberger* to the forum of "facility use" in *Lamb's Chapel*: in both cases religious groups met the subject matter requirements for gaining access to limited forums; in both cases religious groups were denied access to forums because the subjects were displayed from a religious viewpoint.[67] In holding that the University violated students' rights to free speech by prohibiting funding for "religious activities," the Court stressed the importance of individual thought and expression, especially in a university setting.[68] The Court then analyzed *Rosenberger* under Establishment Clause doctrine[69] by applying a neutrality test.[70] Under the doctrine of neutrality, both the purpose of the government action and the details of the government's

58. 115 S. Ct. at 2520.
59. *Id.*
60. *Id.* at 2519.
61. *Id.*
62. *Id.*
63. *Id.* at 2517.
64. *Id.* at 2518.
65. *Id.* at 2517-18.
66. *Id.* at 2517. "Religious activity" is defined as any activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.* at 2515.
67. *Id.* at 2518.
68. *Id.* at 2520 (citing Healy v. James, 408 U.S. 169, 180-81 (1972)).
69. *Id.* at 2521. The dissent would have affirmed the Fourth Circuit based on a violation of the Establishment Clause. *Id.* at 2533 (Souter, J., dissenting).
70. 115 S. Ct. at 2521.

program must be neutral toward religion.[71] The Supreme Court found that the purpose of the SAF was to open a forum for private speech and to support various student groups, including publication groups.[72] There was no indication that the University's purpose in disbursing funds to student groups was to advance religion.[73] Had the University granted funding, it would not have done so because of WAP's religious perspective but, instead, because WAP fell into the category of "student news, information, opinion, entertainment, or academic communications media groups."[74] Therefore, the Court held that the University's purpose was neutral toward religion.[75] The Court next analyzed the details of the SAF program and found that it too was neutral toward religion.[76] Most important in this finding were the steps that the University took to disassociate itself from both the goals and activities of the CIOs and any written materials published by such groups.[77] The Court alluded to two tests that have played a part in the uncertain history of Establishment Clause doctrine, the endorsement and coercion tests: "[T]here is no real likelihood that the speech in question is being either endorsed or coerced by the State."[78] Finding both the purpose and the details of the SAF program neutral toward religion, the Court held that the Free Speech violation was not justified by fears that the Establishment Clause would be violated if publications with a religious viewpoint were funded through mandatory student fees.[79] In fact, the Court suggested that upholding the University's action would not only violate individuals' rights to free speech, but it may also violate the Establishment Clause itself by risking the "fostering [of] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."[80]

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71. *Id.*
72. *Id.* at 2522.
73. *Id.*
74. *Id.* In the 1990 school year, WAP was one of fifteen groups to qualify under this category. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 2523.
78. *Id.*
79. *Id.* at 2525. Justice O'Connor predictably wrote a concurring opinion in which she advocated her own two-part test for Establishment Clause cases involving public funding: (1) the government action must be neutral toward religion and (2) the facts of the case must result in the conclusion that the government is not endorsing religion. *Id.* at 2526 (O'Connor, J., concurring).
80. 115 S. Ct. at 2525.

The Supreme Court's decision in *Rosenberger* is important in the development of First Amendment jurisprudence. First, the decision reinforces the strength and validity of the Free Speech Clause. By reversing the Fourth Circuit's holding that free speech rights must be sacrificed for the sake of separation of church and state, the Supreme Court in *Rosenberger* restored a logical principle: The Establishment Clause does not trump the Free Speech Clause; the two clauses are designed to work together to protect individual thought and expression.[81] Under the Court's analysis, if the circumstances clearly indicate that a private citizen is speaking, rather than government, the Establishment Clause has not been violated because the government must be speaking for the wall separating church and state to crumble.[82] This analysis promotes one of the most important aspects of American society—the marketplace of ideas.[83] When a state entity opens a public forum such as the Student Activities Fund to encourage the exchange of private thoughts and expressions, that state entity should not have the authority to "define [religious viewpoints] out of the marketplace of ideas."[84] The decision in *Rosenberger* is important to First Amendment jurisprudence for a second reason. The Court's analysis of the Establishment Clause issue illustrates the continued demise of the *Lemon* test.[85] The Court's opinion completely ignored the *Lemon* test, even though the Fourth Circuit based its finding of an Establishment Clause violation upon a *Lemon* analysis.[86] But even though *Rosenberger* added to the line of cases which seem to invalidate *Lemon*, this recent Court did not take yet another opportunity to articulate a clear test for Establishment Clause problems. Thus, lower courts are left in the same pool of uncertainty that existed prior to *Rosenberger*.[87] Lower courts might interpret *Rosenberger* to mandate use of the neutrality test only in cases where student activity fees at universities are used to support services for student organizations.[88] In other cases with dissimilar facts, lower

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81. *See* Herman Schwartz, *When Speech is Religious, Doctrines May Clash*, NEW JER. L.J., Aug. 28, 1995.

82. 115 S. Ct. at 2525.

83. Sekulow, *supra* note 56.

84. *Id.*

85. Daniel B. Kohrman & Kathryn M. Woodruff, *The 1994-95 Term of the United States Supreme Court and its Impact on Public Schools*, 102 EDUC. LAW REP., Oct, 1995, at 421.

86. 18 F.3d 269 (1994).

87. Ralph D. Mawdsley, *Lamb's Chapel Revisited: A Mixed Message on Establishment of Religion, Forum and Free Speech*, 101 EDUC. LAW REP. 531 (1995).

88. Mawdsley, *supra* note 87; Marcia Coyle, *Although the Center Waved, the Court's Rulings Had a Big Effect on Race, Religion, and Federalism*, NAT'L L.J., July 31, 1995. Both the majority opinion and Justice O'Connor's opinion contained language which

courts will be forced to choose between the mirage of Establishment Clause tests that have colored judicial history for the past twenty years.[89] Nonetheless, the Supreme Court's use of the neutrality test in *Rosenberger* symbolized a retreat to the common-sense principles that existed prior to *Lemon*:[90] The First Amendment requires "the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[91] The neutrality doctrine supplements forum analysis when private speech is religious to prevent the government from regulating speech based on its religious viewpoint. As *Rosenberger* illustrates, the two doctrines work together, resulting in a neutral government which permits various and unlimited views to enter the marketplace of ideas. Whether this concept of neutrality will continue to prevail in Establishment Clause jurisprudence is uncertain. Perhaps the answer will be revealed the next time the Supreme Court has an opportunity to overrule *Lemon*.

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suggested that the rule of *Rosenberger* is limited. First the majority declined to establish a new test for Establishment Clause problems and stressed the importance of free expression in Universities. Second, Justice O'Connor focused on the importance of the fact-specific characteristic of the test in *Rosenberger*.

89. Mawdsley, *supra* note 87.

90. Sekulow, *supra* note 56.

91. *Everson*, 330 U.S. at 18.