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Recent Developments: Rosenberger v. Rector and Visitors of the University of Virginia: State's Violation of Organization's Free Speech Rights Not Excused by the Necessity of Complying with the Establishment Clause

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Rosenberger v. Rector and Visitors of the University of Virginia:

STATE'S VIOLATION OF ORGANIZATION'S FREE SPEECH RIGHTS NOT EXCUSED BY THE NECESSITY OF COMPLYING WITH THE ESTABLISHMENT CLAUSE.

In a five to four decision that reviewed both the right to free speech and the Establishment Clause, the Supreme Court held that a group's First Amendment right of free speech was violated when a state university attempted to comply with the Establishment Clause of the First Amendment. In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. ---, 115 S. Ct. ---, 132 L. Ed. 2d 700 (1995), the Court first determined that the state violated an organization's First Amendment right of free speech by discriminating based upon its viewpoints. The Court then went on to hold that such a violation was not excused in order to comply with the Establishment Clause.

Wide Awake Productions ("WAP") was established by a group of students of the University of Virginia ("University") to publish a magazine focusing on Christian viewpoints and expression and to foster tolerance toward their views. WAP was classified as an independent organization of the University and as such, was not affiliated with the University. University guidelines allowed such groups to gain access to University facilities and allowed funds, which were collected from a mandatory student fee, to be distributed for payment to the independent organization's third party contractors if such expenses were for educational purposes. However, the guidelines specifically forbade payment to contractors

for an organization's religious activity. WAP applied for funds but was denied by the University on the basis that the magazine was a religious activity.

After exhausting their options in the University appeals process, WAP brought suit against the University in the United States District Court for the Western District of Virginia alleging that the denial of funds violated its rights of free speech and press, equal protection of the law, and free exercise of religion. The district court granted summary judgment for the University, finding that there was no free speech violation and that the University's denial of funds for this religious activity was justified to maintain compliance with the Establishment Clause of the First Amendment. The United States Court of Appeals for the Fourth Circuit disagreed with the lower court by citing a free speech violation, but permitted the University's action because of the compelling interest of separating church and state. The Supreme Court of the United States granted certiorari.

The Supreme Court began its analysis by reiterating the firmly rooted free speech guarantees of the First Amendment. These guarantees prohibit the government from regulating speech based upon its subject matter or substantive content. *Id.* at 714 (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). Included within this principle is the more blatant and illegal

speech restriction based upon the speaker's viewpoint. This includes restricting speech because of the speaker's specific ideology or perspective. *Id.* at 715. However, as the Court explained, these rules are not absolute in a setting such as at a university, a state created public forum. *Id.* A state may exclude a class of speech in a forum that it has created when the exclusion is based upon the content of the speech and is done to preserve the purpose of the forum. *Id.* The state is still forbidden, however, from employing viewpoint discrimination, even in a setting which it has created. *Id.*

With these guidelines in mind, the Court addressed whether the University's denial of funds to WAP based upon its "religious activity" discriminated against WAP's viewpoints or the magazine's content. *Id.* at 716. It was acknowledged from the outset that "the distinction is not a precise one." *Id.* The Court held that by denying funds to WAP because it published a religious magazine, the University discriminated against the organization's viewpoint. *Id.* This occurred because the University's guidelines allowed the payment of contractor's bills for organizations which dealt with or wrote about religion, but it excluded such payments only to those groups that had religious editorial viewpoints. *Id.* Thus, the guidelines did not exclude religion as a subject matter, but disadvantaged organizations

that dealt with subjects from a religious viewpoint.

The Court likened this situation to a case in which a school district, which allowed its facilities to be used for a wide variety of purposes by all community groups except religious organizations, denied use of its facility to a group which was to show films on child rearing solely because the film was based upon a religious perspective. *Id.* (citing *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. ___, 113 S. Ct. 2141 (1993)). The Court concluded that the school district discriminated against the group's viewpoint because any organization could have used the school's facilities to show child rearing films except those groups that were to deal with it from a religious standpoint. *Id.* (citing *Lamb's Chapel*, 113 S. Ct. 2141). Similarly, the University's action was deemed viewpoint discrimination, and thus, a violation of the free speech guarantees. "The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications." *Id.* Any group could have discussed the issues that WAP discussed in the magazine and receive funds, however, because WAP analyzed the issues from their particular religious viewpoint, they were denied funds.

The Court concluded its free speech analysis by declar-

ing that actions such as the denial of funds by the University to a group because of its religious views could have dangerous consequences upon society. *Id.* at 719. If the Court were to allow such government actions, it would thus be allowing the State to examine publications to determine whether they are based upon some religious viewpoint. Such a classification would have a chilling effect upon free speech. *Id.*

After determining that the University violated WAP's right of free speech, the Court considered whether the violation was justified by the necessity of complying with the Establishment Clause. *Id.* at 720-21. The Court began its inquiry by reviewing the basic rationale of the Clause. To comply, the government must adhere to a strict policy of neutrality with respect to religion. *Id.* at 721. The policy of neutrality is upheld if the government formulates and follows neutral criteria and policies, even if adherence to such criteria would confer a benefit upon a religious viewpoint. *Id.* at 722. Finally, the Court noted that it has rejected the notion that free speech rights must bow to the Establishment Clause in situations where a religious speaker participates in a government program which is neutral in its design. *Id.*

Applying these principles, the Court determined that the University's program in question was neutral toward religion. *Id.* at 722. There was

no allegation that the University created the fund either to advance or aid a religion, and the program did not create an impression that the University endorsed any particular religious belief. *Id.* "The program respects the critical difference 'between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Exercise Clauses protect.'" *Id.* at 723 (quoting *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis in original)). Therefore, the University's program withstood an Establishment Clause inquiry.

Finally, the Court reiterated that WAP was not a religious organization, but rather a publication with religious views. *Id.* at 725. The denial of funds was based upon a determination by the University after reviewing the content of the publication. This was a violation of the Constitution. *Id.* The publication was an outlet "for the expression of ideas, ideas that would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in a divine being." *Id.* The right of free speech would be violated if the Court imposed a "baseline standard of secular orthodoxy," which in essence is a form of censorship. *Id.* State censorship by reviewing student pub-

lications is far more inconsistent with the Establishment Clause than state funds provided to publications with religious viewpoints based upon religiously neutral criteria. *Id.* The censorship denied WAP of its free speech rights and "undermine[d] the very neutrality the Establishment Clause requires." *Id.* at 726. To conform to the requirement of the Establishment Clause, it was not required that the State deny funds based upon an organization's views. Such government censorship creates negative feelings toward religious beliefs, which in itself violates the very principle of neutrality upon which the Establishment Clause is based. *Id.* Had the University honored its free speech duties, it would not have violated the Establishment Clause. *Id.*

The dissent harshly criticized the majority's analysis on several points. It noted that for the first time, the Court has upheld a state program that provides direct funding to a religious activity of an organization. *Id.* at 737. The mandatory student fee levied by the University was indistinguishable from general government taxes, and accordingly, payment to a religious group from the tax is a blatant violation of the Establishment Clause. *Id.* at 743-44. The dissent reasoned that because of this violation, a free speech inquiry was unnecessary. *Id.* at 755-56. It concluded by entertaining a free speech analysis and determined that the University program did

not discriminate against WAP's views, but that it denied payment based upon its religious activities. *Id.* at 758.

The Supreme Court's decision in *Rosenberger v. Rec-tor and Visitors of the University of Virginia* once again signified the importance of one's free speech rights. By holding that a group's free speech right was violated by a state institution's attempt to follow the requirements of the Establishment Clause, the Supreme Court declared the right of free speech is of paramount importance, even when such speech involves religious views. This holding partially erodes the strict policy of the separation of church and state that the Constitution requires and will allow a greater degree of state involvement in religious activities in the future.

-Peter Greenbaum

