CONSTITUTIONAL LAW FOR A CHANGING AMERICA

RIGHTS, LIBERTIES, AND JUSTICE

1994–1996 SUPPLEMENT

LEE EPSTEIN AND THOMAS G. WALKER

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LEE EPSTEIN
WASHINGTON UNIVERSITY

THOMAS G. WALKER
EMORY UNIVERSITY

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During the 1994–1996 terms the Supreme Court handed down several decisions that helped define the constitutional protection of individual rights. The first Amendment's freedom of religion clauses were interpreted in *Rosenberger v. University of Virginia,* a challenge to the use of state funds to support the newspaper of a student religious group. Commercial expression was the focus of *44 Liquormart v. Rhode Island,* which settled a conflict between First Amendment expression rights and the states' powers under the Twenty-First Amendment to regulate alcoholic beverages. Privacy concerns were paramount in *Vernonia School District 47J. v. Acton,* a challenge to drug testing programs in public schools.

Four major decisions affected the rights of the criminally accused. The authority of police to stop and search automobiles, an issue that has given the justices difficulty for several decades, was the primary subject of *Whren v. United States.* Three other major decisions dealt with criminal trials and punishments: *Lewis v. United States* (jury trial rights for petty crimes), *United States v. Ursery* (whether imposing both prison sentences and civil property forfeitures constitutes double jeopardy), and *Felker v. Turpin* (access to the appellate courts in order to challenge death sentences).

Perhaps the three most controversial cases of the last two years focused on unconstitutional discrimination. In *Romer v. Evans* the justices handed down their first major decision on state discrimination based on sexual orientation; in *United States v. Virginia* the Court looked at the constitutionality of all-male state military schools; and in *Adarand Constructors, Inc. v. Peña* the justices examined the validity of a program that set aside a specified proportion of federal construction funds for minority owned firms.

Finally, issues of voting and representation were of major concern. These included challenges to the way the U.S. Census counts Americans for purposes of political representation (*Wisconsin v. City of New York*) and the validity of constructing legislative districts so as to virtually guarantee the election of minority representatives (*Miller v. Johnson*).

CHAPTER 3

RELIGION: EXERCISE AND ESTABLISHMENT

When the Court agreed to hear two cases involving the Religious Establishment Clause during its 1994 term, many observers thought that it would, finally, overrule *Lemon v. Kurtzman* and advance a new standard by which to adjudicate these cases. Yet, it did not take this step.

On what grounds, then, did the Court decide the following case? Ask yourself this question as you read *Rosenberger v. University of Virginia* (1995) along with material contained in Chapters 3 and 4 of the text.

Rosenberger v. University of Virginia

___U.S.___ (1995)

Vote: 5 (Kennedy, O'Connor, Rehnquist, Scalia, Thomas)
4 (Breyer, Ginsburg, Souter, Stevens)
Opinion of the Court: Kennedy
Concurring opinions: O'Connor, Thomas
Dissenting opinion: Souter

The University of Virginia, a state institution, established the Student Activities Fund (SAF) to support various extracurricular student activities. The SAF receives its money from a mandatory fee of $14 assessed to all full-time Virginia students.

"Contracted Independent Organizations" (CIOs)—groups of students that comply with certain procedural requirements (for example, they must file their constitutions with the university; they must sign a disclaimer saying that they are independent of the university)—can apply to the SAF for funding to pay outside contractors for the costs associated with printing

their publications. Under university guidelines, though, some student activities are excluded from SAF funding. These include religious activities, defined as any activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."

In 1990, Ronald Rosenberger and other undergraduates formed Wide Awake Productions (WAP) "to provide a unifying focus for Christians of multicultural backgrounds." Soon after it was established, WAP applied for and received CIO status. It then asked the SAF to pay a printer $5,862 for the costs of producing its newspaper, *Wide Awake: A Christian Perspective*. This paper seeks "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."

When the SAF turned down WAP on the ground that *Wide Awake* was a "religious activity," the editors of *Wide Awake* and members of WAP filed suit against the university. They alleged that the school's refusal to pay its printing costs, solely because the publication's "religious viewpoint," violated First Amendment guarantees of free speech and free exercise of religion. The university countered that reimbursement for *Wide Awake* would constitute a violation of the Establishment Clause. A federal district court and court of appeals held for the university.

JUSTICE KENNEDY delivered the opinion of the Court.

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. See *R. A. V. v. St. Paul* (1992). Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district's provision of school facilities for private uses, we declared that "there is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel v. Center Moriches Union Free*

School Dist. (1993). The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," nor may it discriminate against speech on the basis of its viewpoint, *Lamb's Chapel*. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable. The most recent and most apposite case is our decision in *Lamb's Chapel*. . . . There, a school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the district rejected a request from a group desiring to show a film series addressing various child-rearing questions from a "Christian perspective.". . . Our conclusion was unanimous: "It discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.". . .

The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid. . . .

The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to clas-

sify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses. . . .

Based on the principles we have discussed, we hold that the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment. It remains to be considered whether the violation following from the University's action is excused by the necessity of complying with the Constitution's prohibition against state establishment of religion. We turn to that question. . . .

A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. We have decided a series of cases addressing the receipt of government benefits where religion or religious views are implicated in some degree. The first case in our modern Establishment Clause jurisprudence was *Everson v. Board of Ed. of Ewing*. There we cautioned that in enforcing the prohibition against laws respecting establishment of religion, we must "be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief." We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. See *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*. More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design. See *Lamb's Chapel*.

The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The University's SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." The category of support here is for "student news, information, opin-

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ion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was. . . .

Government neutrality is apparent in the State's overall scheme in a further meaningful respect. 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 Free Exercise Clauses protect." In this case, "the government has not willfully fostered or encouraged" any mistaken impression that the student newspapers speak for the University. *Capitol Square Review and Advisory Bd. v. Pinette*. The University has taken pains to disassociate itself from the private speech involved in this case. . . .

The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions. The error is not in identifying the principle but in believing that it controls this case. . . .We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to WAP's coffers.

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses is paid from a student activities fund to which students are required to contribute. The government usually acts by spending money. . . .The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying

a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIOs by reason of their officers and membership. Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life. . . .

Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content. . . . To impose that standard on student speech at a university is to imperil the very sources of free speech and expression. . . . [O]fficial censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis. . . .

To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering 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.

The judgment of the Court of Appeals must be, and is, reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. . . .

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging-sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case. . . .

The need for careful judgment and fine distinctions presents itself even in extreme cases. *Everson v. Board of Ed. of Ewing* (1947), provided perhaps the strongest exposition of the no-funding principle: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Yet the Court approved the use of public funds, in a general program, to reimburse parents for their children's bus fares to attend Catholic schools. Although some

would cynically dismiss the Court's disposition as inconsistent with its protestations, the decision reflected the need to rely on careful judgment—not simple categories—when two principles, of equal historical and jurisprudential pedigree, come into unavoidable conflict.

So it is in this case. The nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's decision today. Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective.

First, the student organizations, at the University's insistence, remain strictly independent of the University. . . .

Second, financial assistance is distributed in a manner that ensures its use only for permissible purposes. A student organization seeking assistance must submit disbursement requests; if approved, the funds are paid directly to the third-party vendor and do not pass through the organization's coffers. This safeguard accompanying the University's financial assistance, when provided to a publication with a religious viewpoint such as Wide Awake, ensures that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective. . . .

Third, assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message. Wide Awake does not exist in a vacuum. It competes with 15 other magazines and newspapers for advertising and readership. The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University. . . .

The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence. As I observed last Term, "experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test." When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified. The Court today does only what courts must do in many Establishment Clause cases-focus on specific features of a particular government action to ensure that it does not violate the Constitution. By withholding from Wide Awake assistance that the University provides generally to all other student publications, the University has discriminated on the basis of the magazine's religious viewpoint in violation of the Free Speech Clause. And particular features of the University's program-such as the explicit disclaimer, the disbursement of funds directly to third-party vendors, the vigorous nature of the forum at issue, and the possibility for objecting students to opt out-convince me that providing such assistance in this case would not carry the danger of impermissible use of public funds to endorse Wide Awake's religious message.

Subject to these comments, I join the opinion of the Court.

JUSTICE THOMAS, concurring.

Though our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants. Under the dissent's view, however, the University of Virginia may provide neutral access to the University's own printing press, but it may not provide the same service when the press is owned by a third party. Not surprisingly, the dissent offers no logical justification for this conclusion, and none is evident in the text or original meaning of the First Amendment. . . .

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such. Because there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause. I would therefore affirm. . . .

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money. Evidence on the subject antedates even the Bill of Rights itself, as may be seen in the writings of Madison, whose authority on questions about the meaning of the Establishment Clause is well settled. . . .

The Court, accordingly, has never before upheld direct state funding of the sort of proselytizing published in Wide Awake and, in fact, has categorically condemned state programs directly aiding religious activity. . . .

Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter.

Reasonable minds may differ over whether the Court reached the correct result in each of these cases, but their common principle has never been questioned or repudiated. "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed . . . indoctrination into the beliefs of a particular religious faith."

Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme here is a clear constitutional violation? The answer must be in part that the Court fails to confront the evidence set out in the

preceding section. Throughout its opinion, the Court refers uninformatively to Wide Awake's "Christian viewpoint." The Court does not quote the magazine's adoption of Saint Paul's exhortation to awaken to the nearness of salvation, or any of its articles enjoining readers to accept Jesus Christ, or the religious verses, or the religious textual analyses, or the suggested prayers. And so it is easy for the Court to lose sight of what the University students and the Court of Appeals found so obvious, and to blanch the patently and frankly evangelistic character of the magazine by unrevealing allusions to religious points of view.

Nevertheless, even without the encumbrance of detail from Wide Awake's actual pages, the Court finds something sufficiently religious about the magazine to require examination under the Establishment Clause, and one may therefore ask why the unequivocal prohibition on direct funding does not lead the Court to conclude that funding would be unconstitutional. The answer is that the Court focuses on a subsidiary body of law, which it correctly states but ultimately misapplies. That subsidiary body of law accounts for the Court's substantial attention to the fact that the University's funding scheme is "neutral," in the formal sense that it makes funds available on an evenhanded basis to secular and sectarian applicants alike. While this is indeed true and relevant under our cases, it does not alone satisfy the requirements of the Establishment Clause, as the Court recognizes when it says that evenhandedness is only a "significant factor" in certain Establishment Clause analysis, not a dispositive one. This recognition reflects the Court's appreciation of two general rules: that whenever affirmative government aid ultimately benefits religion, the Establishment Clause requires some justification beyond evenhandedness on the government's part; and that direct public funding of core sectarian activities, even if accomplished pursuant to an evenhanded program, would be entirely inconsistent with the Establishment Clause and would strike at the very heart of the Clause's protection.

Nothing in the Court's opinion would lead me to end this enquiry into the application of the Establishment Clause any differently from the way I began it. The Court is ordering an instrumentality of the State to support religious evangelism with direct funding. This is a flat violation of the Establishment Clause. . . .

Since I cannot see the future I cannot tell whether today's decision portends much more than making a shambles out of student activity fees in public colleges. Still, my apprehension is whetted by Chief Justice Burger's warning in *Lemon v. Kurtzman* (1971): "in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."

I respectfully dissent.

Rosenberger is an interesting case for at least two reasons. First, note that, despite the expectations of some legal analysts, the Court did not

overrule *Lemon;* if fact, it barely mentioned the case. Second, while the case seemed to hinge on an interpretation of the Establishment Clause, the Court put a good deal of emphasis on expression guarantees contained in the First Amendment.

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