

Dangers to Religious Liberty from Neutral Government Programs

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The premise of Professor Paulsen's strongly argued paper¹ draws mainly on the rulings and implications of two decisions from the last Term of the Supreme Court — *Rosenberger v. Rector of the University of Virginia*² and *Capitol Square Review and Advisory Board v. Pinette*³ — both of which Professor Paulsen enthusiastically endorses. In the usual role of a commentator, I agree with many of Professor Paulsen's views and I disagree with certain of his positions as well.

As a matter of doctrine, I dissent from both his approval and interpretation of *Rosenberger*, and, although I concur with his approval of the result in the *Pinette* decision, I would state several qualifications of his reading of the opinions. Most importantly, I do not believe that either of these rulings, or both of them combined, moves the Supreme Court's Establishment Clause doctrine nearly as far as Professor Paulsen suggests, his contention being that these cases produce a final settlement of contested principles, an end of an era. Finally, as a matter of policy, I both agree and disagree with certain of his positions in respect to what the law should be.

I.

Let me begin with *Rosenberger*. It posed a direct conflict between two basic religion clauses principles. The first is that government may not fund religious activities. That has been a long

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¹ Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653 (1996).

² 115 S. Ct. 2510 (1995).

³ 115 S. Ct. 2440 (1995).

held precept with which most people would express agreement, at least as generally stated. The doctrinally influential “equal access” cases decided during the past fifteen years did not involve that issue. Rather, the government programs in *Widmar v. Vincent*,⁴ *Board of Education v. Mergens*,⁵ and *Lamb’s Chapel v. Central Moriches Union Free School District*⁶ only involved the provision of certain non-cost government benefits for religious groups along with other organizations. The second principle is that government must be neutral between religion and non-religion. The issue in *Rosenberger* was how these two basic religion clauses principles play out when a state university’s Student Activities Fund is used to support an activity (publication of student newspapers) that is engaged in by both religious and non-religious groups.

The neutrality principle won by a vote of five to four but, I want to emphasize, with a very limited thrust. The majority opinion was written by Justice Kennedy and was joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas. Justice Kennedy placed two very important limitations on the scope of the Court’s ruling. First, he emphasized that the university was not transferring money directly to the religious student organization that published the newspaper promoting a Christian perspective. Rather, the check was drawn to the printer of the newspaper with which the religious organization contracted to produce it.⁷ While this may not be a very persuasive distinction, it plainly indicates the majority’s discomfort in reconciling the two religion clauses principles under the facts presented.

Second, Justice Kennedy pointed out that the case did not involve general support for the activities of a religious institution. Rather, it was confined to financial aid for newspapers.⁸ If the University of Virginia were barred from funding religious newspapers, the Court reasoned, some university administrator would have to review all the student publications and determine

⁴ 454 U.S. 263 (1981).

⁵ 496 U.S. 226 (1990).

⁶ 508 U.S. 384 (1993).

⁷ *Rosenberger*, 115 S. Ct. at 2524.

⁸ *Id.* at 2522.

whether they were religious or not. This raises the spectre of classic censorship and its consequent chilling effect on the freedoms of speech and press. Justice Kennedy's second argument is plainly more appealing than his first distinction. More important for our purpose, however, is the fact that this point underlines the narrowness of the Court's decision, restricting its rationale to government funding of newspapers published by religious organizations — and nothing else.

The most critical limiting distinction, however, came in a concurrence written by Justice O'Connor.⁹ (That it is a separate opinion does not diminish its importance because Justice O'Connor is one of the five members of the Court that made up the majority.) She stressed that the money for the University of Virginia's Student Activities Fund came from student fees, not from the University's general account. Justice O'Connor opined that it may be possible that any students who object to the way the money is spent have a right under the First Amendment to opt out and get a refund.¹⁰ That is a far-reaching limitation. Taxpayers have no constitutional right to opt out if they do not like the way government spends compulsorily raised tax funds. Thus, virtually all other government expenditure programs are distinguishable from the one in *Rosenberger*.

II.

If it were not for these (or other) distinctions, then Professor Paulsen would be right. All forms of financial assistance to religion would be permissible — even if the money were spent for core religious activities rather than for secular purposes — as long as the aid was part of a neutral general program. For example, suppose that the state were to appropriate money to all voluntary organizations to buy insignias for their members. Public funds would be used to purchase the Chamber of Commerce symbol for one group and the United Way symbol for another. And, no matter how counterintuitive it would seem to be, public

⁹ *Id.* at 2525.

¹⁰ In support of this possible right, Justice O'Connor cited *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (compulsory state bar dues) and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (mandatory "service charges" to union members as condition of employment).

funds would also be used to buy Latin Crosses and Stars of David for religious organizations. Or suppose that the government decided to construct new buildings for all voluntary associations. Once again, the government would erect a new building for the United Way and for the Chamber of Commerce, as well as for the Roman Catholic Church, the Episcopal Church, and a set of synagogues for various Jewish religious denominations.

More realistically, suppose the federal government appropriated funds to public or private organizations for education advocacy programs to prevent teenage pregnancy. This, of course, is an actual case: *Bowen v. Kendrick*,¹¹ involving the Adolescent Family Life Act of 1981. Suppose that one of the grantees were the Roman Catholic church, which proves to be very effective in teaching and advocating abstinence as the way to avoid pregnancy. The primary vehicle of persuasion is indoctrinating the children in basic Roman Catholic doctrine. Can the government pay for that? Under the neutrality principle advocated by Professor Paulsen, there would be no violation of the Establishment Clause. Yet I seriously doubt that all five Justices that comprised the majority in *Rosenberger* would go that far. Therefore, I disagree with Professor Paulsen that the decision means "no discrimination in eligibility for a right, benefit, or privilege on the basis of religious viewpoint,"¹² and that it stands for the proposition that "the First Amendment creates an affirmative right of equal access to funding by religious speakers and groups."¹³

III.

I would also be somewhat more hesitant than Professor Paulsen's confident conclusion that the *Rosenberger* decision and earlier cases make it "abundantly clear . . . that inclusion of religious schools in voucher plans is . . . constitutionally permissible."¹⁴ On the one hand, despite the specific limitations the majority put on the scope of its rationale in *Rosenberger*, I believe that the position of Justice Scalia, joined by Chief Justice

¹¹ 487 U.S. 589 (1988).

¹² Paulsen, *supra* note 1, at 654-55.

¹³ *Id.* at 711.

¹⁴ *Id.* at 712.

Rehnquist and Justices Kennedy and Thomas in the *Pinette* case — to be discussed shortly — strongly supports Professor Paulsen's prediction. But I am less clear than I once was about Justice O'Connor.¹⁵

Professor Paulsen relies on three additional cases. *Mueller v. Allen*¹⁶ involved tax deductions for educational expenses in all schools, including religious schools. But the Court reasoned that tax deductions are not the same as grants. In *Witters v. Washington Department of Services for the Blind*,¹⁷ the state provided vocational assistance for the visually handicapped; recipients could spend the education voucher — I think it is fair to say that this is exactly what it was — at any qualified school. Witters took his to a Christian college where he was studying to be a “pastor, missionary, or youth director.” Despite the fact that the rationale of the separate concurrences of five Justices (including Justice O'Connor) plainly extended to a conventional voucher system for elementary and secondary schools,¹⁸ the *Witters* case involved higher education, not elementary or secondary schools, and the Court has drawn a sharp distinction between these different types of recipients of public aid.¹⁹

Finally, Professor Paulsen points to *Zobrest v. Catalina Foothills School District*,²⁰ decided just two years ago, in which the Court upheld the state's payment of a sign language interpreter for a deaf student in a Catholic high school. Relying mainly on *Mueller* and *Witters*, the Court reasoned, inter alia, that payment of government funds to a state employee is distinguishable from payment of public money directly to a parochial school. More important for our purpose, however, is the fact that Justice O'Connor dissented in *Zobrest*, although not on the merits, possibly suggesting some reluctance on her part to follow to its full distance the course of reasoning in the earlier opinions that she

¹⁵ See Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools — An Update*, 75 CAL. L. REV. 5, 13 (1987).

¹⁶ 463 U.S. 388 (1983).

¹⁷ 474 U.S. 481 (1986).

¹⁸ Choper, *supra* note 15, at 13.

¹⁹ Compare *Lemon v. Kurtzman*, 403 U.S. 602 (1971) with *Tilton v. Richardson*, 403 U.S. 672 (1971). See also *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973).

²⁰ 509 U.S. 1 (1993).

joined.²¹ Although many observers understandably find that the distinctions the Court has drawn in these cases are not very persuasive, what is important to remember is that the Court has drawn them. In predicting results of future cases, one must take serious account of that.

IV.

Drawing on analysis by Justice Scalia in the *Pinette* case, Professor Paulsen suggests that there are more limited constitutional restrictions on government funding for parochial schools, which are engaged in their own private expression, in contrast to government funding of organizations (including religious ones) which are carrying out programs of government expression, as in *Bowen v. Kendrick*²² and *Rust v. Sullivan*.²³ It seems to me equally plausible, however, to conclude that parochial schools are carrying out programs of government expression. They are, after all, satisfying the state's compulsory education requirement in connection with which the government has substantial regulatory authority over both private and public schools.

V.

The second decision from last Term that forms the basis for Professor Paulsen's position is the *Pinette* case. Despite the fact it was decided by a seven to two vote, its thrust is even narrower than the *Rosenberger* ruling because there was no true majority opinion. Four members of the Court — Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas — took a stance very similar to the one that Professor Paulsen advocates. They contended that since the Capitol Square Board's policy of permitting various displays on the state house plaza was neutral, there could be no Establishment Clause objection even

²¹ Justice O'Connor may have found the situation in *Zobrest* distinguishable from a voucher system because the sign language interpreter would appear to be stationed full time in the Catholic high school and thus, like a parochial school teacher, might be perceived as advancing the religious aims of the school. See *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 398-400 (1985) (O'Connor, J., concurring in the judgment and dissenting in part).

²² 487 U.S. 589 (1988).

²³ 500 U.S. 173 (1991).

though the government policy may have resulted in substantial benefit to religion. Nonetheless, one cannot at all be confident that all four of these Justices would apply this rationale, as Professor Paulsen does, to government financial support. The *Pinette* case involved no funding; it only concerned permitting the display of organizational symbols in a public forum.

Even more importantly, the other three members of the seven-Justice majority — Justices O'Connor, Souter and Breyer — produced two separate concurrences. They maintained that there is an Establishment Clause violation even though a government program is neutral if, under Justice O'Connor's approach, it can be reasonably perceived as an "endorsement" of religion. Since the two dissenting members of the Court, Justices Stevens and Ginsburg, agree with Justice O'Connor that an endorsement of religion by government, even as part of a neutral program, is a violation of the Establishment Clause,²⁴ I think that the *Pinette* case was highly significant for a very different reason than Professor Paulsen finds. Although the conservatives won the battle in terms of the result in this particular dispute, they lost the war in terms of a doctrinal replacement for the *Lemon* test. Basically, the alternatives were the more accommodationist position of neutrality, as Professor Paulsen has urged, or the more separationist position of endorsement, as Justice O'Connor has championed. The latter now has garnered five votes as the result of the *Pinette* case, and that would seem to be the prevailing test for alleged violations of the Establishment Clause — at least until the next Justice comes along.²⁵

The Court upheld the KKK's erection of the Latin Cross in the Capitol Square in Columbus because concurring Justices

²⁴ Justice Stevens has directly subscribed to Justice O'Connor's "endorsement" approach for Establishment Clause interpretation on a number of occasions. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (opinion for the Court by Stevens, J.); *County of Allegheny v. ACLU*, 492 U.S. 573, 650, (1989) (Stevens, J., concurring in part and dissenting in part); *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2464-66 (1995) (Stevens, J., dissenting). Although Justice Ginsburg's adherence to the "endorsement" principle has been less explicit, see *id.* at 2474-75 (Ginsburg, J., dissenting) (stating that it was unclear that Ohio "did not endorse" cross), it would appear to be closest to the separationist rationale that she favors than any other approach that is capable of attracting a majority.

²⁵ For discussion of how Justice Kennedy's "coercion" approach failed to be installed as the operative standard despite the support of a majority of the Court, see Jesse H. Choper, *Benchmarks*, 79 A.B.A.J. 78, 80 (Nov. 1993).

O'Connor, Souter and Breyer, who were necessary to make a majority, found that a disclaimer sign could clarify that the KKK's cross did not have the "sponsorship or endorsement" of government. (Justice Ginsburg dissented on the ground that "no plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message."²⁶) It is therefore clear that a disclaimer sign was needed to avoid a reasonable perception of government endorsement, regardless of the neutrality of the state's activity, program or policy.

VI.

Professor Paulsen's basic argument is that the religion clauses do not "require exclusion of religious leaders or groups from public fora . . . or public benefits, solely on account of the religious content of their speech or purposes."²⁷ *In general*, I subscribe to this position, and would explicitly base it on the Free Speech Clause of the First Amendment, which makes viewpoint discrimination "an egregious form of content discrimination,"²⁸ and consequently almost always invalid. Thus, I agree with the Court's result in the *Pinette* case, regardless of whether there is a plainly visible disclaimer. Indeed, when the viewpoint being discriminated against is religious, the presumption of invalidity under the First Amendment would appear even stronger because of the Free Exercise Clause. Still, I believe it is preferable to rest the decision on the Free Speech Clause rather than on the Free Exercise Clause. A major advantage of doing so is that there is no need to confront the extremely thorny issue of defining what is "religion" and what is not.

Similarly, I agree with Professor Paulsen that the freedom of association component of the Free Speech Clause is preferable to the Free Exercise Clause for protecting campus religious groups in maintaining the religious identity of their members. This avoids difficult issues which periodically arise under free exercise doctrine — and will likely be presented under the Reli-

²⁶ *Pinette*, 115 S. Ct. at 2474.

²⁷ Paulsen, *supra* note 1, at 654.

²⁸ *See, e.g.*, *Rosenberger v. Rector of the Univ. of Va.*, 115 S. Ct. 2510, 2516 (1995).

gious Freedom Restoration Act as well — such as whether the group's precept is a cardinal (or core) principle of its religious faith,²⁹ or whether the challenged government action really imposes a "burden" on the free exercise of the member's religion.³⁰ The freedom of association approach sidesteps such matters because it provides that the right of members of a group to associate or identify with whom they please is "an indispensable means of preserving other individual liberties."³¹

But although I agree *generally* with Professor Paulsen's contention, I would engraft a critical limitation: when the inclusion of religious groups in a public forum or program of public benefits poses a significant threat to religious liberty — which, in my judgment, is the dominant concern of both religion clauses — it should be held unconstitutional under the Establishment Clause.³² (A danger to religious liberty may arise in a number of ways — by coercing religious beliefs either directly or indirectly, or by strongly influencing religious choice — and an important illustration of coercion is government compelled financial support, i.e., use of tax raised funds, for religious activities.³³) Authoritative free speech doctrine permits even viewpoint discrimination if it is necessary to achieve a compelling government interest. I believe that avoidance of an Establishment Clause violation is such an interest, and that the Establishment Clause is violated when inclusion of religion in a neutral government program endangers religious liberty.

The illustrations mentioned earlier of the religious insignia, the religious buildings, and the teenage pregnancy efforts involve the use of compulsorily raised tax funds to advance religion even though part of a neutral program. Because these programs threaten religious liberty in this way, they should be held to violate the Establishment Clause. In addition, I would not think that Bible reading and prayer in the public schools would be valid, even if the practice were made part of a weekly series in which on Mondays, there was a history reading (e.g., a

²⁹ See *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990).

³⁰ See *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985).

³¹ *Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984).

³² See *generally* JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* (1995).

³³ *Id.* at 14-19, 117-19.

description of the firing on Fort Sumter); on Tuesdays, a patriotic reading (e.g., the Gettysburg Address); on Wednesdays, the flag pledge; on Thursdays, a literary reading (e.g., a Shakespeare sonnet); and on Fridays, a reading of a selection from some version of the Bible followed by the Lord's Prayer. For the reasons the Court emphasized in *Lee v. Weisman*,³⁴ Friday's activities abridge religious liberty even though part of a neutral government program.

VII.

A final point of agreement with Professor Paulsen: government benefits to religious groups, *if permissible*, do not enlarge the government's power to affect the constitutional rights of the recipients. Various decisions to the contrary notwithstanding,³⁵ I believe that to hold otherwise would be contrary to the prohibition against unconstitutional conditions.³⁶ Professor Paulsen and I disagree, however, on the scope of government power to regulate private schools that satisfy the states' compulsory education requirements. The landmark decision of *Pierce v. Society of Sisters*³⁷ itself recognized that the government has substantial supervisory power. Although the state could not forbid parents from sending their children to private schools, it could regulate those private schools to a considerable extent. While I think the government has that power, I agree with Professor Paulsen that it is not in any way enlarged by the grant of public funds.

³⁴ 505 U.S. 577 (1992).

³⁵ See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980).

³⁶ See, e.g., Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J. L. & PUB. POL'Y 460 (1995); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Michael J. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L. J. 1191 (1978); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

³⁷ 268 U.S. 510 (1925).