

## **Establishment Clause vs. Free Speech: Second Circuit Court of Appeals upholds the use of public facilities by religious groups**

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### **Synopsis**

Historically, many government entities have avoided granting facility access to religious groups. This avoidance was based on the belief that separation of church and state, stemming from the United States Constitution's Establishment Clause<sup>1</sup>, prevented government from having any connection with a religious group. As a result, many government entities had a blanket ban on any group with a religious connotation using its facilities.

More recently, however, legal analysts and the courts have looked to the fundamental right of free speech<sup>2</sup> for more definitive guidance. As a result, courts have found that government actors that sought to avoid a violation of the Establishment Clause, were actually committing viewpoint discrimination in violation of Free Speech.

Under current legal standards, some government forums are "open" public forums for which there are few legally permissible restrictions. Other government forums are "limited," such as public school facilities, and more limitations are permissible. Such limitations, however, must be neutral and designed to preserve the forum. Therefore, a religiously-neutral policy derived from free speech concepts is the best defense against a constitutional violation where a public school chooses to create a limited public forum.

### **Introduction**

On November 16, 2005, the Second Circuit again weighed in on the issue of religious group access to public school facilities in Bronx Household of Faith v. Board of Educ. of the City of New York.<sup>3</sup> The decision followed the precepts handed down by the Supreme Court's decision in The Good News Club v. Milford Cent. Sch.<sup>4</sup> The decision directed a public school in New York City to allow a religious group to conduct religious services on Sunday mornings based on the fact that the public school had allowed access to its facilities to outside groups. The Court found the school's denial of access constituted viewpoint discrimination.

The Bronx Household of Faith Court reiterated that a public school holds a non-public forum during school hours and that nothing compels a public school to open its forum to others for any purpose. New York Education Law §414, in fact, gives a board of education the discretion to open public school buildings to the public for various purposes, including but not limited to, activities:

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<sup>1</sup> Congress shall make no law respecting an establishment of religion... (U.S.Cons. Amend I).

<sup>2</sup> Congress shall make no law...abridging the freedom of speech... (U.S.Cons. Amend I).

<sup>3</sup> 2005 U.S. Dist. LEXIS 28138 (S.D.N.Y. 2005).

<sup>4</sup> 533 US 98, 121 S. Ct. 2093, 150 L. Ed. 2d. 151 (2001).

(a) For the purpose of instruction in any branch of education, learning or the arts...(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.<sup>5</sup>

When a public school makes its forum available to the public, however, it creates a *limited* public forum. As such, the public school can limit the use of that forum. The limitations must be reasonable in light of the public school's purpose.<sup>6</sup> The public school may not deny access to a social, civic or recreational group based solely on the group's religious character.

### Legal Analysis

There has always been much debate on the limitations a public school may impose on access to its facilities once outside access has been granted. Much of this debate has focused on the ability of religious groups to use public school facilities and if such use violates the Establishment Clause's precepts of separation of church and state. Yet, recent legal analysts avoid application of the Establishment Clause in favor of analyses of free speech concepts under the First Amendment.

#### I. Establishment Clause

There is no agreed upon test for Establishment Clause violations. For many years the "*Lemon* Test" was applied.<sup>7</sup> In more recent history, the "endorsement test" has been used.<sup>8</sup> Neither test has been overturned, therefore, both are still considered for analysis. Yet, both tests have come under much criticism as courts have found each test vague and easily manipulated.<sup>9</sup>

Under the *Lemon* Test, government action does not violate the Establishment Clause if the action: (1) has a secular purpose; (2) does not have the principal or "primary effect" of advancing or inhibiting religion; and, (3) does not foster an excessive entanglement of government and religion.<sup>10</sup> Courts have had difficulty defining the "primary effect" and "excessive entanglement" prongs of the *Lemon* Test.

Under the criticism of the *Lemon* test, Justice O'Connor<sup>11</sup> devised the "endorsement test" in *Lynch v. Donnelly*.<sup>12</sup> Under *Lemon*, the government impermissibly endorses religion if its

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<sup>5</sup> A board may permit the use of district property for educational activities conducted by others, but the organization sponsoring such activities must defray the district's out-of-pocket expenses. *Matter of Steflovich*, 7 Educ. Dept. Rep. 76 (1967).

<sup>6</sup> *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

<sup>7</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

<sup>8</sup> *Lynch v. Donnelly*, 465 U.S. 668, 687-94, 104 S.Ct. 1355, 79 L.Ed. 604 (1984).

<sup>9</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

<sup>10</sup> *Lemon*, at 612-13.

<sup>11</sup> Justice O'Connor, to date, remains on the Court until a replacement is confirmed. Presently Judge Alito is before the United States Senate for confirmation.

<sup>12</sup> *Lynch* at 687-94.

conduct has either: (1) the purpose; or, (2) the effect of conveying a message that “religion or a particular religious belief is favored or preferred.”<sup>13</sup> Under the “purpose” criteria, the legal standard is the “actual” purpose.<sup>14</sup> The “effect” criteria is evaluated as a “reasonable observer, aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval” of religion.<sup>15</sup> Best explained by the Tenth Circuit, this test has also been found to be too vague to effectively apply with any certainty:

Having struggled to meaningfully apply the purpose component of the endorsement test to the alleged Establishment Clause violation in this case, we agree it is an unworkable standard that offers no useful guidance to courts, legislators or other government actors who must assess whether government conduct goes against the grain of religious liberty the Establishment Clause is intended to protect.<sup>16</sup>

Years of attempting to devise a “workable” test for an Establishment Clause violation has created a situation whereupon most religious groups are denied access to government forums in their entirety as decision makers have no certainty over whether they are violating the Establishment Clause. This has swayed legal analysts from the Establishment Clause analysis in search of a more definitive analysis. As a result, for public school forums, courts have looked to First Amendment tests finding that in avoiding Establishment Clause violations, government entities have been violating another fundamental right; that of free speech.

## II. Free Speech

The legal standards that apply to whether a State has unconstitutionally excluded a private speaker from use of a public forum first depend on the nature of the forum.<sup>17</sup> Second, the restrictions that may apply to the type of forum are analyzed.<sup>18</sup> If the forum is a traditional or open public forum, the government's restrictions on speech are subject to stricter scrutiny than restrictions in a limited public forum. Yet, the government's restrictions in a limited public forum are not entirely discretionary.

### a. Forum

Public property that is not designated as a public forum open for indiscriminate public use for communicative purposes, is considered a limited public forum or non-public forum. Courts have determined that control over access to a non-public forum can be based on content and/or identity of the speaker “so long as the distinctions drawn are reasonable in light of the purpose

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<sup>13</sup> Id. at 592-93. (Emphasis supplied).

<sup>14</sup> Bauchman v. West High School, 132 F.3d. 542 at 551 (1997).

<sup>15</sup> Id. citing Capital Square v. Pinette, 515 U.S. 753 at 779-81, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995).

<sup>16</sup> Bauchman at 552.

<sup>17</sup> See Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

<sup>18</sup> Good News Club at 106.

served by the forum and are viewpoint neutral.”<sup>19</sup> Additionally, courts have determined there to be no question that a public school, “like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated.”<sup>20</sup> The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the government to reserve it for certain groups or for the discussion of certain topics.<sup>21</sup> Therefore, a public school may limit access to social or civic meetings but may not further restrict that access unless it is “reasonable in light of the purpose served by the forum,”<sup>22</sup> and viewpoint neutral.<sup>23</sup>

## b. Viewpoint Discrimination

In determining whether a government is acting within its power to preserve the limits it has set for a limited public forum so that the exclusion of a class of speech there is legitimate, the courts observe a distinction between content discrimination and viewpoint discrimination.<sup>24</sup> Content discrimination may be permissible if it preserves the purposes of that limited forum, while viewpoint discrimination is presumed impermissible when directed against speech otherwise within the forum's limitations.<sup>25</sup> The former is discrimination against speech because of its subject matter which may be permissible if it preserves the limited forum's purposes. The latter is discrimination because of the speaker's specific motivating ideology, opinion, or perspective which is presumed impermissible when directed against speech otherwise allowed in the forum when issued by a different motivating ideology, opinion, or perspective. These principles provide the framework forbidding the government from exercising viewpoint discrimination, even when the limited public forum is one of its own creation.

The most recent and definitive case in this area is Lamb's Chapel v. Center Moriches Union Free School Dist. in which the Court held that permitting school property to be used for the presentation of all views on an issue except those dealing with it from a religious standpoint constituted viewpoint discrimination.<sup>26</sup> Good News Club, which is governed by Lamb's Chapel, also found it improper to exclude access to available school facilities after hours on the basis of religious viewpoint when the school has established a neutral use of facilities policy. A restriction based on the group's character as religious was deemed engaging in “viewpoint discrimination.”

Good News Club heavily cited Rosenberger v Rector and Visitors of the University of Virginia, where the university of Virginia denied monies from the “Student Activities Fund” to the

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<sup>19</sup> Cornelius, 473 U.S. at 806, citing Perry Educ. Assn., supra, at 49.

<sup>20</sup> Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830, 132 L.Ed.2d 700, 115 S. Ct. 2510 (1996) citing Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 390, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993).

<sup>21</sup> See, e. g., Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); Perry Educ. Assn., supra, at 49.

<sup>22</sup> Cornelius, supra, at 804-806; see also Perry Educ. Assn., supra, at 46, 49.

<sup>23</sup> Lamb's Chapel, supra, at 392-393; see also Perry Educ. Assn., supra, at 46; R. A. V. v. City of St. Paul, Minnesota, 505 U.S. 377, 386-388, 391-393, 112 S.Ct. 2538, 120 L.ed.2d 305 (1992); Texas v. Johnson, 491 U.S. 397, 414-415, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

<sup>24</sup> Perry Educ. Assn., at 49.

<sup>25</sup> See Perry Educ. Assn., supra, at 46.

<sup>26</sup> Lamb's Chapel, at 393.

printing cost of a student group's newspaper because the paper "primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality."<sup>27</sup>

The Rosenberger court's holding reveals the difficulty under the competing concerns of the Establishment Clause and the First Amendment. In Rosenberger, the court held that denying a group student activity funds solely based on its views constituted viewpoint discrimination in violation of Free Speech. But, by applying the policy in a neutral manner, the University's action did not violate the Establishment Clause. The Rosenberger court opined:

...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.<sup>28</sup>

A public university does not violate the Establishment Clause when it grants access to its facilities on a religion-neutral basis to a wide spectrum of student groups, even if some of those groups would use the facilities for devotional exercises. See e.g., Widmar, 454 U.S., at 269, 102 S.Ct., at 274. This is so even where the upkeep, maintenance, and repair of those facilities are paid out of a student activities fund to which students are required to contribute. Id., at 265, 102 S.Ct., at 272. There is no difference in logic or principle, and certainly no difference of constitutional significance, between using such funds to operate a facility to which students have access, and paying a third-party contractor to operate the facility on its behalf. That is all that is involved here: The University provides printing services to a broad spectrum of student newspapers. Were the contrary view to become law, the University could only avoid a constitutional violation by scrutinizing the content of student speech, lest it contain too great a religious message. Such 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.<sup>29</sup>

The Court has found that avoiding an Establishment Clause violation "may be characterized as compelling," and thus justifies content-based discrimination.<sup>30</sup> But the Court further opined in Good News, that this interest may not be sufficient to justify viewpoint discrimination.<sup>31</sup> The best practice for public schools that decide to open their facilities to the public, then, is to craft a neutrally drawn facilities use policy that takes is based on legally permissible free speech concepts.

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<sup>27</sup> See Rosenberger, at 825.

<sup>28</sup> Id. at 839

<sup>29</sup> Id.

<sup>30</sup> Widmar v. Vincent, 454 U.S. 263, 271 S.Ct. 269, 70 L.Ed 440(1981)

<sup>31</sup> Good News at 113.

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