CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

Widmar v. Vincent, 454 U.S. 263 (1981)

Here, UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. *See, e.g., Heffron v. International Society for Krishna Consciousness, Inc.*,452 U. S. 640 (1981); *Niemotko v. Maryland*,340 U. S. 268 (1951); *Saia v. New York*,334 U. S. 558 (1948). [Footnote 6] In order to justify discriminatory

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exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest, and that it is narrowly drawn to achieve that end. *See Carey v. Brown*,447 U. S. 455, 447 U. S. 461, 447 U. S. 464-465 (1980). [Footnote 7]

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to

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other groups without violating the Establishment Clause of the Constitution of the United States. [Footnote 8] We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test:

"First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.'"

Lemon v. Kurtzman,403 U. S. 602, 403 U. S. 612-613 (1971). *See Committee for Public Education v. Regan*,444 U. S. 646, 444 U. S. 653 (1980); *Roemer v. Maryland Public Works Bd.*,426 U. S. 736, 426 U. S. 748 (1976).

In this case, two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open forum policy, including nondiscrimination against religious speech, [Footnote 9] would have a secular purpose [Footnote 10] and would

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avoid entanglement with religion. [Footnote 11] But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion. [Footnote 12]

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First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities. 635 F.2d at 1317. [Footnote 14]

Second, the forum is available to a broad class of nonreligious, as well as religious, speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. *See, e.g., Wolman v. Walter*,433 U. S. 229, 433 U. S. 240-241 (1977); *Committee for Public Education v. Nyquist, supra,* at 413 U. S. 781-782, and n. 38. If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments,

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or have its public sidewalk kept in repair." *Roemer v. Maryland Public Works Bd., supra,* at 426 U. S. 747 (plurality opinion); quoted in *Committee for Public Education v. Regan,* 444 U.S. at 444 U. S. 658, n. 6. [Footnote 15] At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

JUSTICE STEVENS, concurring in the judgment.

As the Court recognizes, every university must "make academic judgments as to how best to allocate scarce resources," *ante* at 454 U. S. 276. The Court appears to hold, however, that those judgments must "serve a compelling state interest" whenever they are based, even in part, on the content of speech. *Ante* at 454 U. S. 269-270. This conclusion apparently flows from the Court's suggestion that a student activities program -- from which the public may be excluded, *ante* at 454 U. S. 267-268, n. 5 -- must be managed as though it were a "public forum." [Footnote 2/1] In my opinion, the use of the terms "compelling

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state interest" and "public forum" to analyze the question presented in this case may needlessly undermine the academic freedom of public universities.

In Sweezy v. New Hampshire,354 U. S. 234, Justice Frankfurter forcefully spoke of "the grave harm resulting from governmental intrusion into the intellectual life of a university. . . ." *Id.* at 354 U. S. 261 (concurring in result). Justice Frankfurter quoted with approval portions of an address by T. H. Huxley:

"'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"

Id. at 354 U. S. 263. Although these comments were not directed at a public university's concern with extracurricular activities, it is clear that the "atmosphere" of a university includes such a critical aspect of campus life. *See also University of California Regents v. Bakke*,438 U. S. 265, 438 U. S. 312 (opinion of POWELL, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment"); Note, Academic Freedom and Federal Regulation of University Hiring, 92 Harv.L.Rev. 879 (1979). *Cf.* Van Alstyne, The Specific Theory of Academic Freedom and the General Issue of Civil Liberty, reprinted in The Concept of Academic Freedom 59, 77-81 (E. Pincoffs ed.1972).

[Footnote 2/3]

Cornerstone was denied access to University facilities because it intended to use those facilities for regular religious services in which "worship is an important part of the general atmosphere." There is no issue here as to the application of the regulation to "religious teaching." Reaching this issue is particularly inappropriate in this case because nothing in the record indicates how the University has interpreted the phrase "religious teaching," or even whether it has ever been applied to activity that was not clearly "religious worship." The District Court noted that plaintiffs did not contend that they were "limited, in any way, from holding on-campus meetings that do *not* include religious worship services." 480 F.Supp. at 913. At oral argument, counsel for the University indicated that the regulation would not bar discussion of biblical texts under circumstances that did not constitute "religious worship." Tr. of Oral Arg. 9. The sole question in this case involves application of the regulation to prohibit regular religious worship services in University buildings.

[Footnote 3/2]

Indeed, while footnote 6 of the majority opinion suggests that no intelligible distinction may be drawn between worship and other forms of speech footnote 9 recognizes that the Establishment Clause "requires" that such a line be drawn The majority does not adequately explain why the State is "required" to observe a line in one context, but prohibited from voluntarily recognizing it in another context.

[Footnote 3/4]