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Introduction: The Difficult First Amendment

*Christina E. Wells**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.¹

The First Amendment looks easy. After all, its proscriptions are expressed in fewer than forty-five words.² It further embodies a concept elegant in its simplicity: “Everyone has the right to say what they believe and to believe what they want.” Yet even a superficial glance at modern Supreme Court jurisprudence reveals that, from its inception, the First Amendment was never easy. Despite the Amendment’s express mandate that Congress “make *no* law,” the Court has never interpreted it as an absolute. Instead, the Court has embarked upon a delicate and sometimes treacherous balancing act attempting to determine when free speech or religious exercise rights trump state interests and when they do not. So difficult is the Court’s First Amendment doctrine that one scholar has quite fittingly described it as “a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, [and] predilections . . . requir[ing] determined interpretive effort to derive a useful set of constitutional principles.”³

Although the Court’s First Amendment jurisprudence has never been easy, there was a time when it was easier. The Court’s early jurisprudence, while

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1. U.S. CONST. amend. I.

2. Compare the First Amendment, for example, with another venerable legal institution, the United States Tax Code, which at “more than 5.5 million words spanning over eight thousand pages in the United States Code” does not even look easy. See Michelle Arnopol Cecil, *Toward Adding Further Complexity to the Internal Revenue Code: A New Paradigm for the Deductibility of Capital Losses*, 1999 U. ILL. L. REV. 1083, 1084.

3. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991).

fraught with difficult social policy concerns, posed reasonably straightforward questions: May government officials punish a speaker for advocating a particular ideology?⁴ Must the government make its property available to the public for expressive purposes?⁵ May a public school enact a policy requiring the recitation of a particular daily prayer?⁶ May the government require a license to solicit religious donations?⁷ Coming in the early stages of its jurisprudence, the Court's answers to these questions appeared as basic, foundational principles: Government officials cannot discriminate against speech simply because they or other members of society disagree with its content.⁸ The government must make some but not all of its property available to speakers.⁹ School-sponsored recitation of a daily prayer "officially establishes . . . religious beliefs" in violation of the First Amendment.¹⁰ Substantial burdens on religious solicitations impermissibly infringe upon the free exercise rights of citizens.¹¹

Our increasingly complex world, however, has taken its toll on First Amendment doctrine, adding layer after layer of difficulty to these seemingly straightforward principles. Nowhere is that more evident than with the content discrimination principles at the heart of the Court's free speech jurisprudence. Under those principles, the Court heavily disfavors "content-based" regulations—i.e., regulations aimed at speech because of its message. It does so primarily to guard against illegitimate government motives, such as government disagreement with the speaker's viewpoint, that so often underlie content-based regulations.¹² Because so many of its early cases involved restrictive laws with

4. See *Terminiello v. Chicago*, 337 U.S. 1 (1949) (punishing speaker under breach of peace statute for angering crowd).

5. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (requiring city permit from chief of police in order to lease public halls).

6. See *Engel v. Vitale*, 370 U.S. 421 (1962).

7. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

8. See *Terminiello*, 337 U.S. at 4.

9. Compare *Hague*, 307 U.S. at 515 ("Wherever the title of streets and parks may rest they have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."), with *Adderly v. Florida*, 385 U.S. 39, 48 (1966) (upholding protestors' convictions for trespass on jail property because First Amendment "does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose").

10. *Engel*, 370 U.S. at 430.

11. See *Cantwell*, 310 U.S. at 307; see also *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking down flat license tax imposed upon solicitors as applied to individuals soliciting for religious purposes).

12. See Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 173-75 (1997).

just such motivations, the Court's unyielding antagonism toward content-based restrictions was understandable.¹³

Recent changes in technology have put great pressure on the Court's traditional antagonism. The Cable Television Consumer Protection and Competition Act of 1992 ("the Cable Act"),¹⁴ for example, enacted "must-carry" rules for cable operators, requiring them to devote certain channels to local broadcasters.¹⁵ Does such a law violate the Court's prohibition on content-based regulations? On the one hand, the law overtly requires cable operators to carry material of certain speakers (i.e., broadcasters with local content), which suggests an affirmative answer. On the other, the regulations do not aim to suppress a specific message but to *enhance* speech rights by preventing cable operators from squeezing out local broadcasters,¹⁶ which suggests a negative answer. Not surprisingly, once the Cable Act reached the Supreme Court, the Court's attempt to apply content discrimination principles ended badly, with the Justices unable to agree even on whether the Cable Act was content-based.¹⁷ The once-simple principle disfavoring content-based regulations, then, has become far less so in an increasingly modern world where government regulates a specific industry in the name of public good rather than out of hostility toward the speaker's message.¹⁸

The Court's jurisprudence pertaining to speech on government property further reflects the increasing intricacy of free speech doctrine. The "public forum" doctrine initially came to life in an era of tangible property—streets, parks, sidewalks, libraries, prisons, etc. The Court's task was to determine when such property was available for expressive purposes. Its three-tiered approach to this issue,¹⁹ while barely coherent, at least involved property we could see and

13. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 519 (1958) ("[D]enial of a tax exemption for engaging in certain speech . . . is frankly aimed at the suppression of dangerous ideas."); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) ("[A] state may not unduly suppress free communication . . . under the guise of conserving desirable conditions.").

14. Pub. L. No. 102-385, 106 Stat. 1460 (1992).

15. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 630-32 (1994) (describing "must-carry" provisions of the Cable Act).

16. *Id.* at 633-34 (citing to Congressional findings regarding the Cable Act).

17. Chief Justice Rehnquist, and Justices Blackmun, Stevens, Kennedy, and Souter voted to uphold the regulations, arguing that they were essentially content-neutral. See *id.* at 641-61 (majority opinion). Justices O'Connor, Scalia, Thomas, and Ginsberg believed that the regulations were illegitimately content-based. See *id.* at 674 (O'Connor, J., concurring in part, dissenting in part).

18. For criticism of the Court's application of content discrimination principles in *Turner*, see C. Edwin Baker, *Turner Broadcasting: Content-Based Regulations of Persons and Presses*, 1994 SUP. CT. REV. 57; Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141 (1995).

19. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

touch. Moreover, application of the public forum doctrine to tangible property involved two reasonably straightforward steps (classification of property into the appropriate forum and subsequent application of the appropriate rule). The expanding concept of property amenable to forum analysis, however, creates tension within the Court's traditional approach.

Recently, the Court faced the issue of whether non-traditional "property"—such as a monetary fund for university organizations created from student fees²⁰ or a debate among political candidates televised on a public broadcasting station²¹—were government-created fora to which speakers were entitled access. In both cases, the Court found forum analysis to be appropriate.²² In extending its analysis to non-traditional property, though, the Court raised issues far different from earlier decisions. In the student fee situation, for example, use of forum analysis required the Court to distinguish a seemingly-applicable line of cases involving government subsidies of speech.²³ In the candidate debate scenario, the Court had to grapple not only with forum analysis but with its jurisprudence regarding the editorial discretion accorded to broadcasters.²⁴ Extension of forum analysis beyond traditional notions of property thus reveals an interdependence of doctrines formerly thought to be

The Court created three classes of fora: (1) "public fora" to which all speakers are entitled access and in which the Court's content discrimination principles apply, (2) "designated fora" which involves property the government is not required to make available to speakers but once it does, content discrimination principles apply, and (3) "non-public fora" from which all exclusions but viewpoint-based exclusions are acceptable as long as they are reasonable. *Id.* at 45.

20. *See* Bd. of Regents v. Southworth, 529 U.S. 217 (2000); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995); *see also* *Cornelius v. NAACP*, 473 U.S. 788 (1985).

21. *See* *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

22. *See* *Forbes*, 523 U.S. at 674-83; *Rosenberger*, 515 U.S. at 829-30.

23. The Court accords almost total deference to government decisions selectively to subsidize speech. *See* *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). In contrast, if the Court deems government money to be a forum for speech, selective exclusions of speakers are scrutinized more carefully. *See* *Perry*, 460 U.S. at 45-46. For a discussion of the interaction of these two doctrines in the student fee cases, *see* *Southworth*, 529 U.S. at 229-32; *Rosenberger*, 515 U.S. at 829-32.

24. *See* *Forbes*, 523 U.S. at 668-76. The Court typically accords privately owned broadcasters great deference in making editorial decisions. *See* *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). The television station in *Forbes*, however, was publicly owned. As such, *Forbes* raised the question regarding whether the Court should analyze the issue from a public forum perspective (i.e., government as owner of property) or from a journalism perspective (i.e., government as broadcast journalist). Although the Court ostensibly used the former analysis, "the journalistic character of Arkansas Educational Television may have been more determinative than is indicated by the structure of the majority opinion." Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 90 (1998).

separate and raises questions regarding the continuing viability of those doctrines in their current form.²⁵

A case involving the opposition of the Free Speech and Religion Clauses provides a final example. That the government cannot discriminate against particular viewpoints is a cardinal principle of the Free Speech Clause.²⁶ That the government cannot directly fund religious organizations has been a cardinal principle of the Establishment Clause.²⁷ *Rosenberger v. Rector of the University of Virginia*²⁸ presented the Court with a clash between these principles, forcing it to choose between them in a way that will only complicate existing doctrine. In *Rosenberger*, a religiously-oriented student newspaper claimed that the University of Virginia's exclusion of it from eligibility for student funds amounted to viewpoint discrimination. The university maintained that the Establishment Clause's prohibition on direct funding of religious organizations compelled it to exclude the newspaper. The *Rosenberger* majority ultimately ruled in favor of the newspaper, holding that the Free Speech Clause required the university to treat religiously-oriented newspapers in the same manner that it treated secularly-oriented newspapers. To do otherwise would violate its longstanding requirement of viewpoint neutrality in speech regulations.²⁹

Rosenberger's reliance on free speech principles does not merely resolve the question of which clause trumps in a clash; it likely will have significant implications for the Court's Establishment Clause jurisprudence. To many, the Court's reliance on neutrality principles to protect the newspaper signals a lessening of its traditional antagonism toward government funding of religious organizations, at least when similar secular organizations receive funds.³⁰ Indeed, the Court specifically referred to *Rosenberger's* neutrality principle in justifying its most recent decision upholding the constitutionality of state and

25. See, e.g., Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1596-1610 (1998) (advocating that the Court use a forum rather than a subsidy analysis in determining the constitutionality of conditions attached to government subsidized speech); Schauer, *supra* note 24, at 97-99, 119-20 (suggesting that the Court discard forum analysis in *Forbes* in favor of rules gauged to institutional specificity).

26. See *infra* notes 27-31 and accompanying text.

27. See Jesse H. Choper, *Dangers to Religious Liberty From Neutral Government Programs*, 29 U.C. DAVIS L. REV. 719, 719-20 (1996) (noting the "long held precept" that "government may not fund religious activities").

28. 515 U.S. 819 (1995).

29. *Id.* at 828-37.

30. See, e.g., Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285 (1999); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999). *But see* Alan E. Brownstein, *Interpreting the Religion Clauses In Terms of Liberty, Equality and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 268-78 (1999); Choper, *supra* note 27, at 720-21.

federal aid programs as applied to parochial schools.³¹ The fractured nature of this most recent decision, however, suggests that the Court's Establishment Clause jurisprudence is far from settled.³²

If the 1999 Term is a useful indicator, the state of the Court's First Amendment jurisprudence weighs heavily on its mind. Ten of the seventy-three decisions³³ handed down during that period involved First Amendment issues³⁴—a remarkable number given that the Court has hundreds of constitutional and federal statutory issues from which to choose its cases.³⁵ Furthermore, many of those cases garnered only thin majorities or pluralities, reflecting profound disagreement among the Justices regarding the application

31. See *Mitchell v. Helms*, 120 S. Ct. 2530, 2551 (2000).

32. Justice Thomas, who announced the Court's judgment in *Helms*, could garner only a plurality of Justices to join his reasoning. *Id.* at 2536.

33. See Linda Greenhouse, *The Nation: Split Decisions; The Court Rules, America Changes*, N.Y. TIMES, July 2, 2000, § 4, at 1 (noting that the Court handed down seventy-three cases last Term—the smallest number in decades).

34. The 1999 Term's First Amendment cases included the following: *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) (upholding federal program providing aid in the form of computers and other equipment to parochial schools); *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (upholding a bubble-zone statute pertaining to protests outside of hospitals and medical clinics); *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000) (ruling that state antidiscrimination law as applied to Boy Scouts violated their right to associate); *Ca. Democratic Party v. Jones*, 120 S. Ct. 2402 (2000) (striking down California's blanket primary as violating political parties' right to associate); *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000) (holding that practice of organized student-led prayer at public high school football games violated the Establishment Clause); *United States v. Playboy Entm't Group*, 120 S. Ct. 1878 (2000) (striking down federal law requiring cable systems to scramble or time channel sexually explicit channels); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (upholding city ordinance regulating nude dancing); *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000) (upholding university's use of student fees to fund political student organizations); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (upholding Missouri's regulation of campaign contributions in state elections); *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) (upholding state law permitting public access to arrestee's identity only for prescribed non-commercial purposes).

35. Those ten cases represented almost fourteen percent of the Court's docket during the 1999 Term. That percentage reflects a trend of increased interest in First Amendment cases in recent years. Between 1985 and 1994, for example, the Court's First Amendment cases constituted, on average, eight percent of its caseload. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 88-93, tbl. 2-9 (2d ed. 1996). In contrast, from 1946 to 1955, First Amendment cases made up only an average of 5.7% of the Court's docket. *Id.*

of its jurisprudence.³⁶ It is safe to assume, I think, that the difficulties that mark First Amendment jurisprudence are here to stay.³⁷

Much of this issue is devoted to the First Amendment. The themes running through the articles and student note herein aptly reflect the increasing intricacy of the Court's doctrine as well as recent and related trends in First Amendment jurisprudence. Professor Brian Freeman's article,³⁸ for example, focuses on the complexity of the Court's free exercise jurisprudence and its relationship to free speech doctrine. Professor Freeman examines the religion clauses' traditional commitment to neutrality toward religion and argues that the Court has abandoned this principle, making "[g]overnment neutrality in matters of religion . . . hardly more than an aspiration."³⁹ He goes even further to suggest that the Court's treatment of religious exercise issues as compared to its free speech doctrine reflects the Court's fundamental inability to grasp the continuity of these First Amendment issues. Professor Freeman thus proposes a novel approach for evaluating both free speech and free exercise claims that he argues will bring coherence and "unity" to First Amendment doctrine.

Professor David Bernstein's article⁴⁰ focuses on the association aspects of the First Amendment. Examining the Court's past freedom of association cases, Professor Bernstein argues that the Court, though purporting to subject such laws to the strictest of scrutiny, actually has applied a reasonably toothless version of judicial review. As such, the Court's jurisprudence regarding association issues has been out of step with other areas of First Amendment law. He finds hope, however, in last Term's decision, *Boy Scouts of America v. Dale*,⁴¹ which found that a New Jersey public accommodations law prohibiting discrimination based on sexual orientation violated the Boy Scout organization's First Amendment right to expressive association. *Dale*, Professor Bernstein argues, not only normalizes constitutional law, it actually benefits gays and lesbians, who are generally better off with strong protection of the right to associate.

36. See, e.g., *Helms*, 120 S. Ct. at 2530 (plurality); *Hill*, 120 S. Ct. at 2480 (6-3 decision); *Dale*, 120 S. Ct. at 2446 (5-4 decision); *Playboy*, 120 S. Ct. at 1878 (5-4 decision); *Pap's A.M.*, 529 U.S. at 277 (plurality); *Shrink*, 528 U.S. at 377 (6-3 decision). The 1999 Term's abundance of split decisions represents a trend throughout the decade of the 1990s. See Christina E. Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling Into the Theoretical Abyss*, 33 GA. L. REV. 1, 5 n.20 (1998).

37. In fact, the 2000 Term is also shaping up to be a significant one for First Amendment issues. See David L. Hudson, Jr., *Speaking of Firsts . . .*, 86 A.B.A. J. 30 (2000).

38. See Brian A. Freeman, *Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions From Neutral Laws of General Applicability*, 66 MO. L. REV. 9 (2001).

39. *Id.* at 81.

40. See David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83 (2001).

41. 120 S. Ct. 2446 (2000).

Professor Christina Wells's essay⁴² discusses *Nixon v. Shrink Missouri Government PAC*,⁴³ a case decided last Term involving Missouri's campaign finance laws. She argues that, while *Shrink* could be viewed as simply the latest in a long line of decisions regarding campaign finance reform, its implications are far more global. Specifically, she maintains that *Shrink* reflects certain flaws associated with a common method of judicial review in First Amendment cases. Failure to acknowledge that *Shrink*'s flaws result at least partly from the Court's approach to judicial review, Professor Wells argues, not only renders the campaign finance debate incomplete, it affects the legitimacy of the Court's decision-making generally.

Lynn Brackman's student note⁴⁴ tackles the thorny issue of student expression. Although the Court has held that "students do not shed their constitutional rights . . . at the schoolhouse gate,"⁴⁵ its jurisprudence has been far less simple. Recognizing that students are not yet adults, the Court also allows schools leeway in regulating some aspects of students' speech while on school premises. As Ms. Brackman's note discusses, the ensuing balancing act has resulted in lower court decisions with wildly disparate treatment of students' free speech rights. Such treatment leaves school officials with little guidance and allows them far more discretion than necessary to fill their supervisory role. She also suggests that the Eighth Circuit's recent actions push free speech doctrine even further down the path toward eliminating student speech rights.

42. See Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of Nixon v. Shrink Missouri Government PAC*, 66 MO. L. REV. 141 (2001).

43. 528 U.S. 377 (2000).

44. See Lynn S. Brackman, Note, *High Schools and the First Amendment: The Eighth Circuit Leaves Students' Rights at the Schoolhouse Gate*, 66 MO. L. REV. 169 (2001).

45. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).