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Ready--Aim--Fire--The Supreme Court Continues Its Assault on the Wall of Separation in Rosenberger

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NOTES AND COMMENTS

READY—AIM—FIRE! - THE SUPREME COURT CONTINUES ITS ASSAULT ON THE WALL OF SEPARATION IN *ROSENBERGER*

I. INTRODUCTION

Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.¹

Exactly where the line of separation between church and state is to be drawn (if there is to be a line at all) has become a topic of much debate.² In *Rosenberger v. Rector and Visitors of the University of Virginia*,³ a sharply divided United States Supreme Court continued its recent move towards dissolving this line in a case that involved a direct conflict between the First Amendment's Free Speech and Religious Establishment Clauses.⁴

The Court, in an opinion written by Justice Kennedy,⁵ stated that the University of Virginia guidelines prohibiting the funding of *Wide*

1. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

2. See, e.g., Betsy Boldt, *McHenry County Church Craft Fair Raises Legal Questions At School*, CHI. TRIB., Dec. 21, 1995, at A3; Keith Epstein, *Park Service Preacher Stirs Up Growing Church/State Debate*, OREGONIAN, Apr. 20, 1995, at A12; Isaac Kramnick, *In Godless We Trust; Why The Founding Fathers Created a Religion-Free Political Order, And Why We Shouldn't Change It*, WASH. POST, Jan. 14, 1996, at C1; Clifford D. May, *Church And State Republican Majority Puts School Prayer, Vouchers Back On Congressional Table*, ROCKY MTN. NEWS, June 4, 1995, at A90; Jill Severn, *Christian Right Isn't Alone In Spiritual Values*, SEATTLE POST-INTELLIGENCER, Mar. 17, 1995, at A15.

3. 115 S. Ct. 2510 (1995).

4. *Id.* The First Amendment to the United States Constitution declares, in relevant part: "Congress shall make no law respecting an establishment of religion [Establishment Clause], or prohibiting the free exercise thereof [Free Exercise Clause]." U.S. CONST. amend. I.

5. The majority opinion, written by Justice Kennedy, was directly joined by Chief Justice Rehnquist and Justice Scalia. *Rosenberger*, 115 S. Ct. at 2510. Justice O'Connor authored a concurring opinion which was more narrowly drawn than the majority opinion. *Id.* at 2525

Awake, a Christian newspaper created by students at the University of Virginia,⁶ amounted to viewpoint discrimination.⁷ The Court noted that such discrimination would not only undermine the purpose and atmosphere of a university but would also violate the Free Speech Clause.⁸ The possibility of direct funding for religious speech, in violation of the Establishment Clause, was dismissed by distinguishing between a direct tax of the students and a mandatory student fee.⁹ The Court concluded that subsidizing the newspaper with mandatory fees did not offend the Establishment Clause mandate.¹⁰

The *Rosenberger* decision represents another step in the Court's recent move towards abolishing the wall of separation between church and state.¹¹ This Note argues that the Court's inadequate treatment of several relevant issues in *Rosenberger* was motivated by a desire to effectuate the decision it sought in order to continue this movement. The Note focuses on the Establishment Clause concerns raised by the *Rosenberger* decision. As such, the discussion of the Free Speech principles presented in the case are limited in scope to their relevance in understanding the decision of the Court. The Note begins with a brief presentation of the *Rosenberger* facts and procedural history set forth in Part II. An historical analysis of the Court's interpretation of the phrase "establishment of religion" is discussed in Part III. The decision of the Supreme Court in the *Rosenberger* case is then discussed in Part IV, followed by an analysis of the case in Part V. The analysis focuses on three specific propositions: 1) the Court erroneously determined that the mandatory student fee was not equivalent to a direct tax on the students and, therefore, the student fee did not result in a direct subsidization of a religious activity; 2) the Court refused to determine whether a student could demand a return of his or her mandatory fee, because resolving that issue would have forced the Court to conclude that *Wide Awake* was a religious entity and not

(O'Connor, J., concurring). Justice Thomas wrote a concurring opinion in which he joined the majority "in full," but authored the opinion to express his views on the history behind the Establishment Clause as a counter to the dissent's assertions. *Id.* at 2528 (Thomas, J., concurring). A dissent written by Justice Souter was joined by Justices Ginsberg, Stevens, and Breyer. *Id.* at 2533 (Souter, J., dissenting).

6. *Id.* at 2515. For a more detailed analysis of *Wide Awake*, see *infra* notes 14-21 and accompanying text.

7. *Id.* at 2517. Viewpoint discrimination is directed against speech based on the ideas or messages of the speaker. *Id.* If these views would normally be permissible within the forum, then the discrimination is presumed impermissible. *Id.*

8. *Id.* at 2520.

9. *Id.* at 2522. For criticism of the Court's analysis of this issue see *infra* Part V(A).

10. *Id.* at 2524.

11. For a discussion of this recent move, see *infra* Part III(C).

merely a student newspaper; and 3) the Court was unwilling to apply the *Lemon* test¹² to the *Rosenberger* case, reflecting the Court's continuing attempt to circumvent the constitutional mandate requiring a separation of church and state.

II. STATEMENT OF THE CASE

A. Facts

Ronald W. Rosenberger and several other students at the University of Virginia¹³ founded Wide Awake Productions (hereinafter WAP), an organization established "[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints."¹⁴ This objective was to be accomplished through a student newspaper, *Wide Awake: A Christian Perspective at the University of Virginia*.¹⁵ The newspaper's mission was "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."¹⁶ The newspaper covered such topics as racism, homosexuality, crisis pregnancy, missionary work, and eating disorders.¹⁷ It also contained professor interviews and Christian music reviews.¹⁸ After discussing the platform of an issue, the articles implored the reader to "satisfy a series of moral obligations derived from the teachings of Jesus Christ."¹⁹ A symbol of a cross was then placed at the end of each article.²⁰ Nearly all advertising in the paper was by churches, Christian bookstores, and centers for Christian study.²¹

12. The *Lemon* test is a standard established by the Supreme Court to determine whether a governmental activity violates the First Amendment's prohibition on the establishment of religion. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). For a more detailed description of the *Lemon* test, see *infra* notes 78-85 and accompanying text.

13. The University of Virginia is recognized by state law as "the Rectors and Visitors of the University of Virginia." *Rosenberger*, 115 S. Ct. at 2514.

14. *Id.* at 2515.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 2535. After a brief discussion on the secular aspects of bulimia and anorexia, in an article dealing with eating disorders, the author stated:

As thinking people who profess a belief in God, we must grasp firmly the truth, the reality of who we are because of Christ. Christ is the Bread of Life (John 6:35). Through Him, we are full. He alone can provide the ultimate source of spiritual fulfillment which permeates the emotional, psychological, and physical dimensions of our lives.

Id. at 2535.

20. *Id.* at 2515.

21. *Id.*

The University's policy required full-time students to pay \$14 per semester into a Student Activities Fund (SAF).²² A Student Council, elected by the full student body, had authority to disburse these funds to all eligible Contracted Independent Organizations (CIOs) related to the educational purpose of the University.²³ CIO status was awarded to any student organization managed by officers who were full-time students and who followed certain procedural requirements.²⁴ These requirements included filing a constitution, notifying all third parties with whom the CIOs dealt that they were not affiliated with the University, and not discriminating for membership purposes.²⁵ The CIOs were also required to sign an agreement that the privileges they received through the University "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities."²⁶

CIOs could submit a request for funds from the SAF, but not all requests would be granted.²⁷ Examples of activities that were expressly prohibited from receiving funds included "religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses."²⁸ The school defined a religious activity as "any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality'."²⁹ There were eleven categories that could have received funds, among which were "student news, information, opinion, entertainment, or academic communications media groups."³⁰

22. *Id.* at 2514.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* Among the privileges given to CIOs is the use of the University's computers, meeting rooms, and other facilities, as well as possible funding for various activities. *Id.*

27. *Id.*

28. *Id.* The prohibition on political activities is limited to lobbying and electioneering. *Id.* It is not intended to preclude funding for unpopular or generally unaccepted ideological viewpoints. *Id.* at 2514-2515.

29. *Id.* at 2515.

30. *Id.* at 2514.

WAP applied, and was granted, status as a CIO.³¹ After accumulating \$5,862 in printing costs for *Wide Awake*, WAP applied for student funding from the SAF.³² The Appropriations Committee of the Student Council denied the request, noting the newspaper was a religious activity.³³ WAP appealed to the full Student Council and was again denied funding.³⁴ Finally, WAP took their grievance to the University's last level of appeal, the Student Activities Committee.³⁵ The denial of funding was upheld in a letter by the Dean of Students.³⁶ After exhausting all avenues of appeal at the university level, WAP filed suit in the United States District Court for the Western District of Virginia.³⁷

B. *The Rosenberger Decision*

The United States District Court granted summary judgment for the University.³⁸ The court reasoned the denial of funds was not a violation of free speech, but rather was legitimately based on the constitutional mandate of neutrality between religion and the state and the University's limited monetary resources.³⁹ Furthermore, the University's Establishment Clause concerns were reasonable, therefore justifying denial of funds to WAP.⁴⁰ On appeal, the District Court's

31. *Id.* at 2515.

32. *Id.* During the 1991 school year, 135 of the eligible 343 CIOs at the university applied for SAF funding, with 118 of these organizations actually receiving funds. *Id.*

33. *Id.* Rosenberger acknowledged at trial that *Wide Awake* was a publication written "from a 'religious perspective.'" *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 795 F. Supp. 175, 177 n.3 (W.D. Va. 1992).

34. *Rosenberger*, 115 S. Ct. at 2515. On appeal to the full Student Council, WAP contended that refusal of the funds was a violation of their constitutional rights. *Id.*

35. *Id.* The Student Activities Committee is chaired by the Vice President of Student Affairs, and is comprised of members of the faculty body. *Id.* at 2514.

36. *Id.* at 2515.

37. *Id.* at 2515-2516. WAP alleged that denial of funding violated their freedom of press, freedom of speech, free exercise of religion, and equal protection under the United States Constitution pursuant to 42 U.S.C. § 1983 (1979). *Id.* at 2516. § 1983 states, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State. . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

38. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 795 F. Supp. 175 (W.D. Va. 1992), *aff'd*, 18 F.3d 269 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

39. *Id.* at 180-181.

40. *Id.* at 181. The District Court, relying on Rosenberger's arguments, noted that Rosenberger was asserting the idea that publishing *Wide Awake* constituted a religious practice. *Id.* at 183 n.10.

ruling was affirmed by the Fourth Circuit.⁴¹ The court held that denying funds for speech dealing with a religious activity, but not other speech, amounted to discrimination.⁴² The court continued by stating the only defense that would justify this discrimination was a compelling state interest.⁴³ The court determined that direct subsidization of the paper would result in the University becoming excessively entangled in religious activities in violation of the Establishment Clause, thus the University had met the burden of showing a compelling state interest.⁴⁴ The court also stated the University afforded the members of WAP the same privileges granted to all other CIOs, including the publication of *Wide Awake*.⁴⁵ Funding, however, could not be provided for *Wide Awake* because of the excessive religious entanglement.⁴⁶ WAP, therefore, was not unfairly singled out by the University.⁴⁷

The United States Supreme Court granted certiorari to decide whether the University of Virginia's regulations prohibiting funding of WAP denied WAP's right to free speech, and, if so, whether the University was justified in its denial by the Establishment Clause.⁴⁸

III. DEFINING THE "ESTABLISHMENT OF RELIGION"

A. *Early Modern Interpretation*

The first modern United States Supreme Court case to examine the limitations of what constitutes an "establishment of religion" was *Everson v. Board of Education*.⁴⁹ *Everson* concerned a New Jersey statute which allowed a board of education to reimburse parents of children who used public transportation to attend school.⁵⁰ Some of

41. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 18 F.3d 269 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

42. *Id.* at 281.

43. *Id.* A compelling state interest requires the strictest judicial scrutiny upon review. "[W]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests." *Carey v. Brown*, 447 U.S. 455, 461 (1980).

44. *Rosenberger*, 18 F.3d at 286.

45. *Id.* at 285.

46. *Id.* at 288.

47. *See id.*

48. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 417 (1994).

49. 330 U.S. 1 (1947).

50. *Id.* at 3. The statute stated, in relevant part, "any district [where] there are children living remote from any schoolhouse, the board of education . . . may make rules and contracts for the transportation of such children to and from school, including . . . to and from school other than a public school." N.J. REV. STAT. § 14-8 (1941).

this money was disbursed to parents who sent their children to parochial schools.⁵¹ The vast majority of these schools instructed the students in both secular and religious ideas.⁵² Everson, a New Jersey taxpayer, filed suit alleging the statute violated both the state and Federal constitutional prohibition against an establishment of religion.⁵³ Writing for a sharply divided Court, Justice Black stated that the religion clause established:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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 be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.⁵⁴

He continued by noting that the First Amendment requires the state to be neutral with both religious believers and non-believers.⁵⁵ Furthermore, he stated that it was not a violation of the First Amendment to reimburse parents who sent their children to parochial schools, so long as the schools met New Jersey's educational requirements.⁵⁶ He concluded that the First Amendment has erected a "high and impregnable" wall between church and state, and this statute did not violate this separation.⁵⁷

Fifteen years later, the United States Supreme Court began more fully defining the parameters of what constituted a violation of this "wall of separation" between church and state and an establishment of religion.⁵⁸ In *Engel v. Vitale*,⁵⁹ the Board of Regents, an agency created by the New York Constitution, was given broad powers over the State's public schools.⁶⁰ Under the Regents' "Statement on Moral

51. *Everson*, 330 U.S. at 3.

52. *Id.*

53. *Id.* at 3-5.

54. *Id.* at 15-16.

55. *Id.* at 18.

56. *Id.*

57. *Id.*

58. See *infra* text accompanying notes 59-64.

59. 370 U.S. 421 (1962).

60. *Id.* at 422-423.

and Spiritual Training in the Schools," the Board initiated a mandatory school prayer recitation in every class on each day of school.⁶¹ Parents of ten New York school children brought suit against the State Board of Regents to prevent the continuation of the mandatory prayer.⁶² The parents contended the reading was a violation of their First and Fourteenth Amendment rights.⁶³ The Supreme Court agreed, declaring "an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."⁶⁴

One year later, the Court reaffirmed this position in *School District of Abington v. Schempp*,⁶⁵ when it struck down both a Pennsylvania and Maryland law mandating readings from the Bible and recitation of the Lord's Prayer at the beginning of each school day.⁶⁶ Analyzing the "purpose" and "primary effect" of the enactment, the Court stated that for a law "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."⁶⁷ Applying this rule, the Court determined that the readings constituted a "religious activity" mandated by State law, and was in violation of the Establishment Clause.⁶⁸

61. *Id.* at 423. The prayer the students were required to recite was "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

62. *Id.* at 423.

63. *Id.*

64. *Id.* at 425. The Court focused on the historical relationship between church and state in recognizing:

[T]he Establishment Clause . . . rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.

Id. at 431.

65. 374 U.S. 203 (1963). The decision was based on the compilation of two cases in which the parents of children attending schools in Maryland and Pennsylvania brought action against each state to end compulsory bible reading sessions in the respective school districts. *Id.* at 203.

66. *Id.* at 205. The Pennsylvania law required that "[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." *Id.* The Maryland rule required, in relevant part, "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer," each school day. *Id.* at 211.

67. *Id.* at 222.

68. *Id.* at 223. Five years after the *Schempp* decision, the Court would again use the same standard of analyzing the "purpose" and "primary effect" of a New York Statute in determining a law requiring the purchase and loaning of non-sectarian textbooks to students attending parochial schools did not violate the Establishment Clause. *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

B. *The Turning Point*

After the *Engel* and *Schempp* decisions, the Court began developing a more expansive definition for interpreting the Establishment Clause. It moved away from its hard-line approach to defining the "establishment of religion" and toward a less separationist stance.⁶⁹ This move marked a drastic change in the Court's jurisprudence dealing with religion.⁷⁰

In *Walz v. Tax Commission of the City of New York*,⁷¹ the Court continued the use of the "purpose" and "primary effect" tests in determining what constituted an "establishment of religion" by implying an additional element of "excessive government entanglement with religion."⁷² In *Walz*, a property owner sued the New York Tax Commission seeking an injunction to prohibit the Commission from granting property tax exemptions to religious organizations for land used strictly for religious worship.⁷³ In rejecting this claim, the Court applied this "new" approach and determined that the purpose of the exemption neither inhibited nor promoted religion.⁷⁴ The Court further stated that the exemption did create some government involvement, but the involvement was only minimal and remote.⁷⁵ The Court concluded by stating that "it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution."⁷⁶ The Court fully adopted the standard created in *Walz* for dealing with the Establishment Clause one year later.⁷⁷

In *Lemon v. Kurtzman*,⁷⁸ the Court firmly acknowledged a three-prong standard that was to be used in analyzing cases dealing with the Establishment Clause.⁷⁹ The three "prongs" that were required for a

69. GREGG IVERS, *LOWERING THE WALL: RELIGION AND THE SUPREME COURT IN THE 1980s* 3 (1991).

70. *Id.* at 2-3.

71. 397 U.S. 664 (1970).

72. *Id.* at 674.

73. *Id.* at 666.

74. *Id.* at 672. The Court specifically focused on the historical roots of tax exemptions to churches. *Id.* at 673. The Court determined that it was far better to offer an exemption to a church, rather than to directly tax a church; the latter could lead to an excessively entangled relationship between church and state. *Id.* at 673-74.

75. *Id.* at 676. To counter the dissent's assertion that this tax exemption would create an establishment of religion, the Court stated, "[i]f tax exemption can be seen as this first step toward 'establishment' of religion . . . the second step has been long in coming." *Id.* at 678.

76. *Id.* at 679. For an informative analysis of tax exemptions for religion, see Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 *YALE L.J.* 1285 (1969).

77. See *infra* text accompanying notes 78-85.

78. 403 U.S. 602 (1971).

79. *Id.* at 612-13.

law to be declared constitutional were: (1) the law's legislative purpose must be secular in nature; (2) the law must not have the primary effect of inhibiting or advancing religion; and (3) the law must not result in an excessive entanglement between church and state.⁸⁰ In applying this standard, the Court concluded that both a Rhode Island statute and a Pennsylvania statute providing aid to church-related schools were in violation of the First Amendment.⁸¹ The Court emphasized that "parochial schools involve substantial religious activity and purpose."⁸² Thus, these schools would require continuous surveillance because ignoring teachers who were under "religious control" would be dangerous.⁸³ This continuous surveillance would then result in a violation of the excessive entanglement element of the "test."⁸⁴ Therefore, the statute violated the First Amendment's Establishment Clause.⁸⁵

On the same day the Court decided *Lemon* it also handed down the *Tilton v. Richardson*⁸⁶ decision, which expanded the rule on religious involvement in applying the three elements of the standard developed in *Lemon*.⁸⁷ Four church-related universities applied and received construction grants under The Higher Education Facilities Act of 1963.⁸⁸ The Act offered federal grants to colleges provided they did not use the facilities for sectarian instruction, religious worship, or any other activity that might be directly connected with a school of divinity, for twenty years.⁸⁹ In beginning its analysis, the

80. *Id.*

81. *Id.* at 607-11. The Rhode Island Salary Supplement Act provided that salaries of school teachers who taught secular subjects at private schools be supplemented up to 15%. *Id.* at 607. This included 250 teachers at parochial schools. *Id.* at 608. Pennsylvania's Non-Public Elementary and Secondary Education Act authorized the reimbursement of teacher's salaries, textbooks, and other materials used in the teaching of specific secular subjects at parochial schools. *Id.*

82. *Id.* at 616.

83. *See id.* at 618-19.

84. *Id.* at 619. The Court asserted that "state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive governmental direction of church schools and hence of churches." *Id.* at 620.

85. *Id.* at 625.

86. 403 U.S. 672 (1971).

87. *Id.* at 682-89.

88. *Id.* at 674. The four universities that had received assistance were: 1) Sacred Heart University which had used the funds to build a library; 2) Annhurst College which constructed a music, drama, and arts building; 3) Fairfield University which built both a library and a science building; and 4) Albertus Magnus College which used the funds for a language library. *Id.* at 676.

89. *Id.* at 675.

Court stated there could be no specific standard upon which each element would be measured.⁹⁰ The Court further stated that the entire *Lemon* test should only be viewed as a guideline for resolving conflicts with the Religion Clauses⁹¹ and not as an absolute boundary.⁹² The Court first held the twenty-year limitation was in violation of the Constitution, because the schools could use the property, after the twenty years, for any purpose they wanted.⁹³ This would amount to a federal grant that, in the future, may advance religion.⁹⁴ The Court did not invalidate the Act for this reason, but continued its analysis noting that there were three reasons the Act did not violate the Establishment Clause.⁹⁵ First, the colleges' primary purposes were not religious indoctrination; therefore, it was less likely that secular and religious teachings would become interrelated.⁹⁶ Furthermore, the government was providing facially neutral aid to the colleges.⁹⁷ Finally, a single-purpose, one-time grant greatly reduced the possibility of government entanglement with religion.⁹⁸ The Court concluded with the notion that no one of the three factors in this application was controlling, and collectively they resulted in a "narrow and limited relationship with government."⁹⁹ The Court severed the twenty-year limitation section from the Act and declared the remaining parts constitutionally valid.¹⁰⁰ This process of severing sections from a statute that violated the Establishment Clause, without invalidating the entire law, would continue to be used by the Court after the *Tilton* decision.¹⁰¹

90. *Id.* at 677.

91. Establishment Clause and Free Exercise Clause, U.S. CONST. amend. 1. See descriptions *supra* note 4.

92. *Tilton*, 403 U.S. at 678.

93. *Id.* at 683.

94. *Id.* at 683.

95. *Id.* at 687-88.

96. *Id.* at 687.

97. *Id.* at 687-88.

98. *Id.* at 688.

99. *Id.*

100. *Id.* at 689. The Court stated "[t]he unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions." *Id.* at 684 (quoting *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)).

101. See also *Wolman v. Walters* 433 U.S. 229 (1977) (finding the use of public money to non-public schools for the purchase and loaning of secular textbooks, use of a test scoring system, and providing therapeutic services was within Constitutional limits, while money used for field trips and other instructional materials at non-public schools violated the Establishment Clause); *Meeke v. Pittenger*, 421 U.S. 349 (1975) (holding provisions of a Pennsylvania statute which authorized the loaning of secular textbooks to non-public schools did not offend the Constitution, while other provisions providing counseling, therapy, and other instructional material to non-public schools violated the Establishment Clause).

In *Lemon*, Chief Justice Burger noted "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."¹⁰² Once this process was set in motion, the Court would continue to gradually hammer away at the wall of separation between church and state, destroying the separationist principles established in previous decisions.¹⁰³ Ironically, it was Chief Justice Burger who wrote all three majority opinions which began the initial erosion of the "wall" and which resulted in this "downhill thrust."

C. *A New Direction*

The Court's new direction in religious jurisprudence was notably highlighted in *Widmar v. Vincent*.¹⁰⁴ Eleven students who attended the University of Missouri at Kansas City brought suit against the University charging a violation of their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution.¹⁰⁵ The students challenged a 1972 University regulation that prohibited the University's buildings from being used "for purposes of religious worship or religious teaching."¹⁰⁶ The Court began by declaring that the University was a public forum.¹⁰⁷ In order to justify discriminatory restrictions on religious activities in a public forum, the University must show "a

102. *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971).

103. See *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976) (holding a Maryland statute that provided noncategorical grants to four Roman Catholic Church affiliated colleges did not violate the Establishment Clause); *Hunt v. McNair*, 413 U.S. 734 (1973) (applying the *Lemon* test to determine a South Carolina Act providing a Baptist-controlled college with revenue bonds did not violate the Establishment Clause). *But see* *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (holding a New York statute which provided for tuition reimbursement grants and income tax benefits to parents of children attending non-public schools, and maintenance and repair grants to non-public schools violated the Establishment Clause).

104. 454 U.S. 263 (1981).

105. *Id.* at 266. The students were members of an evangelical Christian organization named Cornerstone. *Id.* at 265 n.2.

106. *Id.* at 265. From 1973 to 1977 the University permitted the members of Cornerstone to regularly use the University's buildings for meetings. *Id.* These meetings included prayer sessions, religious discussions, Bible commentary, and hymns. *Id.* at 265 n.2. In 1977, the group was informed they could no longer meet in the University buildings pursuant to University regulations. *Id.*

107. *Id.* at 267-268. A limited public forum is created when the state opens a facility for public speech or expression, but limits its use in order to preserve the primary purpose of the forum. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). The Court has generally recognized a university as a limited public forum, restricted only in furtherance of its primary mission towards

compelling state interest and that it is narrowly drawn to achieve that end.”¹⁰⁸ In applying the *Lemon* test, the Court determined that an “equal access” policy for religious organizations would not violate the Establishment Clause.¹⁰⁹ Specifically focusing on the “primary effect” element, the Court stated that incidental benefits were not incompatible with the prohibition against advancing religion.¹¹⁰ The University, therefore, had to allow religious organizations equal access to University facilities.¹¹¹ The Court concluded that allowing religious organizations access to open forums at the University would not “confer any imprimatur of state approval on religious sects or practices.”¹¹²

In *Marsh v. Chambers*,¹¹³ the Court continued tearing down the “wall of separation” by holding that the Nebraska Legislature’s practice of opening each session with a prayer by a chaplain paid with public funds did not violate the Establishment Clause.¹¹⁴ Noticeably avoiding the *Lemon* test, the Court analyzed the Establishment Clause issue from an historical perspective.¹¹⁵ Acknowledging historical patterns of Congressional approval of payment to chaplains for these services, the Court concluded that “opening legislative sessions with prayer has become part of the fabric of our society.”¹¹⁶ By not applying a formal standard or test to this issue, the Court effectively

education. *Id.* For a detailed analysis of the public forum, see Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

108. *Widmar*, 454 U.S. at 270. In this case, the compelling state interest related to the Establishment Clause provisions in the Federal and Missouri Constitutions. *Id.*

109. *Id.* at 271.

110. *Id.* at 273. The Court accepted the District Court’s and Court of Appeals’ conclusions that the “secular purpose” and “excessive entanglement” elements were properly satisfied. *Id.* at 271-72.

111. *See id.* at 273-74. The Court did mention, however, that the University could still exclude activities in violation of the First Amendment if their exclusion was reasonably related to maintaining a campus atmosphere conducive to education. *Id.* at 276-77 (citing *Healy v. James*, 408 U.S. 175 (1972)).

112. *Id.* at 274.

113. 463 U.S. 783 (1983).

114. *Id.* at 791-94. The chaplain for the Nebraska legislature was of Presbyterian faith, and had served as chaplain for 16 years. *Id.* at 793. All of his prayers were recited and fashioned in the Judeo-Christian tradition. *Id.*

115. *Id.* at 786. Both the Court of Appeals and the dissent applied the *Lemon* test and determined that all three elements had failed the test, and therefore concluded that the Establishment Clause had been violated. *Id.* at 786, 800-01.

116. *Id.* at 792. The Court noted that the First Congress had considered the election of a House and Senate chaplain an important task during its first session. *Id.* at 787-88. It also recognized that a challenge to the chaplaincy in the 1850’s was unsuccessful, and a majority of states now begin each legislative session with prayer. *Id.* at 788-89 nn.10-11.

carved out an exception to the Establishment Clause without directly reshaping this doctrine.¹¹⁷

In *Lynch v. Donnelly*,¹¹⁸ the Court moved even further away from the separationist views of the past.¹¹⁹ The city of Pawtucket, Rhode Island had erected a Christmas display in a centrally-located park, owned by a non-profit organization, every year for over forty years.¹²⁰ Among the decorations was a nativity scene that included the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals.¹²¹ Residents of the city sued to have the scene excluded from the annual display.¹²² The Court began its analysis by arguing that the "wall of separation" was a nice metaphor, but inaccurate in its description of the relationship between church and state.¹²³ The Court further noted that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any."¹²⁴ The Court went on to state this issue should be analyzed in terms of its context in the Christmas season.¹²⁵ Under this analysis, the Court noted that the scene does advance religion in a sense, but prior decisions realize that this will occasionally happen.¹²⁶ In this particular case, the relationship was "indirect, remote, and incidental."¹²⁷ Consequently, the city had not violated the Establishment Clause with the display of the nativity scene.¹²⁸

The most recent case to highlight this trend away from the separationist views of the past is *Lamb's Chapel v. Center Moriches School District*.¹²⁹ An Evangelical church wanted to show a six-part film series about instilling traditional Christian values to children at a young

117. See *id.* at 795-96. The Court justified this exception by stating, "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step towards establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792.

118. 465 U.S. 668 (1984).

119. *Id.*

120. *Id.* at 671.

121. *Id.* The nativity scene originally cost the city \$1,365, but is now valued at only \$200. *Id.* It requires approximately \$20 to dismantle and erect the scene each year, plus nominal costs for lighting. *Id.*

122. *Id.*

123. *Id.* at 673.

124. *Id.*

125. *Id.* at 679. The Court refused to apply any "rigid" test noting, "[i]n our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Id.* at 678.

126. *Id.* at 683.

127. *Id.*

128. *Id.* at 684-85.

129. 113 S. Ct. 2141 (1993).

age.¹³⁰ The school district denied the request noting the films violated section 414 of the New York Education Law.¹³¹ The church then brought suit against the school district under 42 U.S.C. § 1983 alleging a violation of free speech, assembly, and freedom of religion.¹³² The Court began by finding the prohibition on access to the school's premises resulted in viewpoint discrimination in violation of the First Amendment.¹³³ The Court continued by noting that this may be permissible if allowing the speech into the school would result in an establishment of religion.¹³⁴ Returning to the *Lemon* test, behind sharp criticism,¹³⁵ the Court found that all three elements were satisfied and there would be no misconceptions that the school district was directly endorsing these religious beliefs.¹³⁶ The Court therefore held that the school district had violated Lamb's Chapel's First Amendment speech rights.¹³⁷

Since *Widmar*, the Court has generally favored a more accommodationist approach to Establishment Clause jurisprudence.¹³⁸ There have been a few exceptions over the last decade, but none have slowed down this rapidly evolving trend.¹³⁹ The *Rosenberger* decision accentuates the Court's continuing commitment towards abolishing "the wall of separation."

130. *Id.* at 2144.

131. *Id.* at 2144-45. Section 414 of the New York Education Law gave local school boards the authority to adopt regulations on the use of school facilities. *Id.* at 2143. Religious activities were expressly forbidden while "social, civic, and recreational meetings" were permitted. *Id.* at 2143-44. The school district issued ten rules in accordance with this Act; Rule 7 expressly prohibited school premises to be used for religious purposes. *Id.* at 2145.

132. *Id.* at 2145. The church conceded to the District Court that the presentation of the film series was for religious purposes. *Id.*

133. *Id.* at 2147-48.

134. *Id.* at 2148.

135. *Id.* at 2149-50. (Kennedy, J., concurring) ("[T]he Court's citation of *Lemon* . . . is unsettling and unnecessary"); "I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced." *Id.* at 2149-50 (Scalia, J., concurring).

136. *Id.* at 2148.

137. *Id.* The Court declined to address the issue of whether the rule excluding the property from being used for religious purposes was hostile to religion. *Id.* at 2146 n.4.

138. See *supra* text accompanying notes 113-137.

139. Compare *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (holding a Michigan school program that financed classes for non-public school students with public funds had the "primary effect" of advancing religion) and *Wallace v. Jaffree*, 472 U.S. 38 (1985) (applying the *Lemon* test to an Alabama statute authorizing a one minute period of silence for meditation or voluntary prayer in schools, the Court ruled the statute violated the Establishment Clause) with *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990) (holding a Christian club could not be denied equal access to a school's facilities based on the religious content of the speech at their meetings) and *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (ruling a Washington state statute that provided governmental assistance for a blind man to attend a private Christian college did not violate the Establishment Clause).

IV. DECISION OF THE CASE

Before addressing the Establishment Clause concerns in *Rosenberger*, the Supreme Court first decided the free speech issue that was presented.¹⁴⁰ Relying on precedent, the Court noted that any form of discrimination based on the views or message of a speaker in a public forum was generally unconstitutional.¹⁴¹ An exception to this rule existed if the discrimination was used as a means of preserving the forum.¹⁴² In order to determine whether the discrimination was permissible, the Court first defined the concepts of content and viewpoint discrimination.¹⁴³ In accordance with *Lamb's Chapel*, the Court disagreed with the defendant's contention that the University's guidelines were based on content and not viewpoint discrimination.¹⁴⁴ The Court began by stating the line between content and viewpoint discrimination was not easily discernable.¹⁴⁵ The Court continued that, like the rejection of the school facilities in *Lamb's Chapel* based on the religious perspective of the group and not the subject matter of its speeches, the SAF guidelines also discriminated against WAP based on its editorial perspective, not the content of the magazine.¹⁴⁶ The Court concluded by stating that there can be viewpoint discrimination even where the entire class of religious viewpoints is discriminated

140. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2516 (1995).

141. *Id.* The Court reasoned that the SAF represented a forum "in a metaphysical than in a spatial or geographical sense," yet the same principles of forum analysis applied. *Id.* at 2517.

142. *Id.* at 2516-17. The Court has generally recognized that a university's primary purpose is to provide education to its students. A university, therefore, may regulate or discriminate against the free speech rights of individuals if it substantially impairs the school's ability to teach. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 507-14 (1969).

143. *Rosenberger*, 115 S. Ct. at 2517. Content discrimination is based on speech and may be permissible if the discrimination supports and preserves the goal and purpose of the forum. *Id.* Viewpoint discrimination is directed against speech based on the ideas or messages of the speaker. *Id.* at 2516. If these views would normally be permissible within the forum, then the discrimination is presumed impermissible. *Id.* at 2517.

144. *Id.*

145. *Id.* Obviously the Court's attempt to draw this distinction proved more confusing than it believed. The Court conceded:

It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history.

Id.

The Court then remarkably concluded the University rejection of funds to *Wide Awake* amounted to viewpoint discrimination. *Id.*

146. *Id.*

against.¹⁴⁷ All debate is not bi-polar, therefore, *any* exclusion results in some form of viewpoint discrimination.¹⁴⁸

Furthermore, the Court struck down the University's contention that the scarcity of money differs from the availability of physical facilities, so funding of speech should differ from access to facilities.¹⁴⁹ The Court stated that regardless of the supply or demand of scarce resources, there was no acceptable excuse for viewpoint discrimination.¹⁵⁰ The University was still required to allocate scarce resources on "neutral principle[s]."¹⁵¹ If the University was permitted to use this as an excuse, it could selectively choose the ideas that would be expressed and effectively suppress thoughts and opinions that were contrary to its beliefs.¹⁵² This would undermine the very purpose of the University — a setting for evolving philosophy and thought.¹⁵³

Based on these findings, the Court concluded the University had violated WAP's First Amendment free speech rights.¹⁵⁴ After this finding, the Court proceeded to examine whether this violation was justified because of compliance with the Establishment Clause.¹⁵⁵

The Court began its Establishment Clause analysis with the general principle that all governmental programs should be facially neutral to religion.¹⁵⁶ All criteria and policies should be fashioned so that decision making is done evenhandedly between competing interests, with religion exempt as a factor for consideration.¹⁵⁷ The Court then

147. *Id.* at 2518.

148. *Id.* In his dissent, Justice Souter argued that viewpoint discrimination, according to precedent, did not encompass the vast interpretation the majority set forth. *Id.* at 2548 (Souter, J., dissenting). He stated that the concept of viewpoint discrimination is more narrowly drawn. *Id.* Viewpoint discrimination occurs when "government allows one message while prohibiting the messages of those who can reasonably be expected to respond," not when it excludes an entire class or subject of speech altogether. *Id.* at 2548-49.

149. *Id.* at 2518.

150. *Id.* at 2518-19.

151. *Id.* at 2519.

152. *Id.* at 2520. The Court noted that "[t]he 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 classify them." *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 2520-21.

156. *Id.* at 2521.

157. *Id.* Justice Souter's dissent disagreed with the expansive interpretation of this policy, arguing:

[W]henver 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.

Id. at 2540 (Souter, J., dissenting).

determined the SAF program was facially neutral.¹⁵⁸ After making this determination, the Court explained why it believed the mandatory student fee was not a tax.¹⁵⁹ The fee represented the need and purpose of a university to promote divergent speech, not support specific religious sects or raise revenue for the University.¹⁶⁰ As such, the expenditure of these funds, in a religion-neutral program, is permissible.¹⁶¹ The Court continued that payment to a third-party contractor furthered the separation between the University and *Wide Awake*, diminishing the possibility of entanglement.¹⁶² It concluded that any imposition of censorship on religious speech would not only violate the University's commitment towards fostering an atmosphere for diverse views, but may lead to deprivation of Constitutional rights.¹⁶³

V. ANALYSIS

A. *The Mandatory Student Fee - Forced Taxation*

James Madison is generally acknowledged as the author of the First Amendment Religion Clauses.¹⁶⁴ As such, he not only understood the need for religious freedom but also the importance of separation of church and state.¹⁶⁵ To the latter argument, he wrote his *Memorial and Remonstrance Against Religious Assessment*, which

158. *Id.* at 2522.

159. *Id.*

160. *Id.* at 2522-23.

161. *Id.* at 2524. In making this assertion, the Court relied upon the reasoning expressed in *Widmar, Mergens, and Lamb's Chapel*. It stated that a contrary assumption to this belief would effectively overrule all the cases. *Id.* at 2523.

162. *Id.* at 2524. In her concurring opinion, Justice O'Connor defended payment to third-party contractors asserting, "[t]his 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." *Id.* at 2527 (O'Connor, J., concurring). Justice Souter, in his dissent, attacked the majority's assertion arguing payment to printers results in "new economic benefits . . . being extended directly to religion in clear violation of the principle barring direct aid." *Id.* at 2546 (Souter, J., dissenting).

163. *Id.* at 2524-25.

164. Michael W. McConnell, *Taking Religious Freedom Seriously* (1990), reprinted in RELIGIOUS LIBERTY IN THE SUPREME COURT: THE CASES THAT DEFINE THE DEBATE OVER CHURCH AND STATE 497 (T. Eastland ed. 1993). In his concurring opinion, Justice Thomas tried to downplay some of Madison's separationist views set forth by the dissent stating, "[i]n any event, the views of one man do not establish the original understanding of the First Amendment." *Rosenberger*, 115 S. Ct. at 2530. Ironically, much of Justice Thomas' opinion is based on lengthy quotes from this "insignificant" source. *Id.* at 2529-30.

165. Michael J. Sandel, *Freedom of Conscience or Freedom of Choice* (1990), reprinted in RELIGIOUS LIBERTY IN THE SUPREME COURT: THE CASES THAT DEFINE THE DEBATE OVER CHURCH AND STATE 483-96 (T. Eastland ed. 1993).

consisted of fifteen arguments advocating a separation of church and state.¹⁶⁶ This remonstrance amounted to both “the defeat of Virginia’s tax assessment bill . . . [and the] passage of the Virginia Bill for Establishing Religious Freedom.”¹⁶⁷ With such a powerful mandate, it is difficult to understand the Supreme Court’s justification for the direct funding of *Wide Awake*.

This justification was based, in large part, on the Court’s erroneous rationalization that the mandatory student fee was not a tax; therefore, the funding of *Wide Awake* was not governmentally financed.¹⁶⁸ The Court stated that the mandatory student fee represented an exaction upon the students for the use of facilitating “wide-ranging speech and inquiry” at the University.¹⁶⁹ As such, the exaction was in compliance with the University’s primary purpose of fostering an educational setting for diverse views and opinions.¹⁷⁰ It concluded that the fee may be mandatory in nature, but the exaction is not used to raise revenue for the University, so it can not be considered a “tax” within the general meaning of the term.¹⁷¹

The obvious flaw in this assertion is that the Court avoids acknowledging that the “University exercises the power of the State to compel a student to pay” money to support its primary purpose.¹⁷²

166. *Id.* at 491-92. In relevant part, Madison stated:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785-86), reprinted in *THE SUPREME COURT ON CHURCH AND STATE* 19-20 (Robert S. Alley ed. 1988).

167. *Rosenberger*, 115 S. Ct. at 2536-37. Thomas Jefferson, in his *Bill for Establishing Religious Freedom*, stated, in relevant part:

[T]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . [t]hat no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . . that the rights hereby asserted are of the natural rights of mankind.

Thomas Jefferson, *Bill for Establishing Religious Freedom* (1785-86), reprinted in *THE SUPREME COURT ON CHURCH AND STATE* 25-26 (R. Alley ed. 1988). The Virginia tax assessment bill was developed for “the support of clergy in the performance of their function of teaching religion.” *Rosenberger*, 115 S. Ct. at 2528 (Thomas, J., concurring).

168. *Rosenberger*, 115 S. Ct. at 2522.

169. *Id.*

170. *Id.*

171. *Id.* The Court stated “[a] tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government.” *Id.* (quoting *United States v. Butler*, 297 U.S. 1 (1936)).

172. *Rosenberger*, 115 S. Ct. at 2538 (Souter, J., dissenting).

The University is a governmental body given its power by state law.¹⁷³ As an entity of the state, any fee a person is compelled to pay and which is used as a means to raise revenue to support the University's mission is regarded as a tax.¹⁷⁴ In this case, the exaction is used to support the *primary purpose* of the University — providing quality education.¹⁷⁵ To support this mission, the University initiated a program that provided funding for organizations with the collection of a mandatory student fee.¹⁷⁶ The fee is mandatory since the students have no recourse or means of objecting to it.¹⁷⁷ The mandatory fee, therefore, is directly correlated to the educational mission of the University, and is used as a means of *raising revenue to support that primary purpose*. It is apparent, therefore, that the mandatory student fee is equivalent to a direct tax on the students. As a result, the students are forced to support a religious activity in contradiction of the mandate of the Establishment Clause. This coercion into financing religious proselytization exposes an even greater flaw in the Court's analysis, or lack thereof.

B. *Swept Under the Rug - The Unresolved Issue*

A disturbing issue left unresolved by the Court was whether a student, under the First Amendment, could successfully require a reimbursement of his or her mandatory fee that was used for purposes inconsistent with the student's beliefs.¹⁷⁸ The Court declined to address this issue, stating that it was not before the Court.¹⁷⁹ A closer examination of the implications resulting from an analysis of this issue leaves the Court's denial highly suspect.

There currently exists a split among the lower courts over whether such a claim would prevail.¹⁸⁰ One similarity among all of these cases is their agreement that the relevant starting point for this

173. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 18 F.3d 269, 271 n.1 (4th Cir. 1994), *rev'd* 115 S. Ct. 2510 (1995).

174. *See Butler*, 297 U.S. at 1.

175. *Rosenberger*, 115 S. Ct. at 2514.

176. *Id.*

177. *Id.* at 2538 n.3. (Souter, J., dissenting).

178. *Id.* at 2522.

179. *Id.* at 2522-23 ("The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a prorata return to the extent the fee is expended for speech to which he or she does not subscribe."); *id.* at 2527 (O'Connor, J., concurring) ("[A]lthough the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees.").

180. *Compare Hays v. Supple*, 969 F.2d 111, 122 (5th Cir. 1992) (mandatory student fees used to support student newspaper did not violate the First Amendment), *cert. denied*, 113 S. Ct.

analysis is two Supreme Court cases, *Abood v. Detroit Board of Education*¹⁸¹ and *Keller v. State Bar of California*.¹⁸² In *Abood*, the Court addressed the issue of whether members of a union could withhold mandatory membership dues that were being used for political and ideological causes inconsistent with their own views.¹⁸³ The Court, in a unanimous opinion, held that as long as the dues were supporting the primary purpose of the union, collective bargaining, then they were valid.¹⁸⁴ If they were used to support political or ideological beliefs inconsistent with the union's primary purpose, they would be unconstitutional.¹⁸⁵ Specifically, the Court stated "that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."¹⁸⁶ The Court concluded by emphasizing that an employee did not have to point to specific ideological causes he opposed.¹⁸⁷ He was only required to indicate opposition to any expenditure that was contrary to the primary purpose of the union.¹⁸⁸ In *Keller*, the Court reaffirmed this position in a case challenging the use of mandatory bar dues by the State Bar of California.¹⁸⁹ Writing for the Court, Chief Justice Rehnquist argued that the dues were valid if used to promote the mission of the State Bar, but funding for ideological or political beliefs, with which the members disagreed, outside this mission, was unconstitutional.¹⁹⁰ He emphasized that the dues should not be used to "endorse or advance" goals or views contrary to the primary purpose of the organization.¹⁹¹

It may be asserted that the funded speech relates to the University's goal of providing a "marketplace of ideas,"¹⁹² therefore *all* views should be funded. The only test used to determine whether the funded speech falls into this "marketplace" is whether it is germane to the

1067 (1993) *with* *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 516-17 (Cal. 1993) (University was required to provide a partial refund of mandatory student fee to students who objected to the use of the fees for certain political or ideological views), *cert. denied*, 114 S. Ct. 181 (1993)).

181. 431 U.S. 209 (1977).

182. 496 U.S. 1 (1990).

183. *Abood*, 431 U.S. at 211.

184. *Id.* at 225-26.

185. *Id.* at 234.

186. *Id.* at 235.

187. *Id.* at 241.

188. *Id.*

189. *Keller v. State Bar of California*, 496 U.S. 1, 4 (1990).

190. *Id.* at 14.

191. *Id.* at 16.

192. See *Healy v. James*, 408 U.S. 169, 180 (1972). This concept refers to the diverse views, opinions, philosophy, and beliefs that are an integral part of a college environment. *Id.*

primary purpose of the University.¹⁹³ Since all diverse views are germane to a university's purpose of providing a culturally divergent atmosphere of education, no view should be excluded.

The problem with this argument is that this expansive interpretation lacks any real foundation, limitations, or support. This broad proposition has long been discarded by the courts and replaced with a balancing test that weighs the interests of the individual's speech and association rights with that of the activity in question.¹⁹⁴ The Supreme Court has stated that even incidental burdens on speech must be narrowly drawn when dealing with compelled speech.¹⁹⁵

Had the Court balanced these interests in *Rosenberger*, it would have revealed the true religious character of *Wide Awake*. The newspaper is not a forum for academic communication used to express Christian news and information, but rather a religious activity with the singular purpose of evangelism.¹⁹⁶ The Court would have been forced to recognize the candidly religious nature of the newspaper that it *conveniently* ignored in its opinion. The Court would have acknowledged the mission statement signed "Love in Christ," the masthead on

193. See Carolyn Wiggin, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 YALE L.J. 2009, 2014 (1994) ("If the funded speech is germane to the function served by the organization - that is, the function which justifies the government compelling individuals to fund the organization in the first place - then the organization may use the compelled dues to fund the speech").

194. See *Carroll v. Blinken*, 42 F.3d 122, 127 (2d Cir. 1992) ("[E]ven activities that physically occur on campus may not fulfill [State University of New York] Albany's educational objectives and therefore should not be allocated to the Albany campus."), *cert. denied*, 113 S. Ct. 300 (1992); *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3d Cir. 1985) ("[A] university's role of presenting a variety of ideas is a sufficiently compelling reason for some infringement of First Amendment rights [T]hat contention loses its force, however, when an outside organization independent of a university and dedicated to advancing one position . . . [compels] contributions from those who are opposed."), *cert. denied*, 475 U.S. 1065 (1986); *Kania v. Fordham*, 702 F.2d 475, 477 n.3 (4th Cir. 1983) ("[T]he extent of the abridgment is properly considered in striking the constitutional balance between the educational goals of a state university and the speech and association rights of its students."); *Veed v. Schwartzkopf*, 353 F. Supp. 149, 150 (D. Neb. 1973) ("Whether such activities in fact are educational in nature is for the Board of Regents to determine, subject only to the limitations that the determination . . . not have the effect of imposing upon the student the acceptance or practice of religious, political, or personal views repugnant to him"), *aff'd*, 478 F.2d 1407 (3d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 508 (Cal. 1993) ("[T]he University's educational function is extremely broad . . . [B]y recognizing that student political activity can be 'germane' to education we run the risk of sanctioning a much greater burden on speech and association rights than the [C]ourt necessarily contemplated when it used that term."), *cert. denied*, 114 S. Ct. 181 (1993); *Good v. Associated Students of the Univ. of Wash.*, 542 P.2d 762, 768 (Wash. 1975) ("[W]e must balance the plaintiff's First Amendment rights against the traditional need and desirability of the university to provide an atmosphere of learning, debate, dissent, and controversy.").

195. See *Carroll v. Blinken*, 975 F.2d 991, 999 (2d Cir. 1992) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

196. *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2535 (1995).

each issue containing St. Paul's exhortation, the continuous calls for salvation, teaching of religious practice, and composition of prayers.¹⁹⁷ Even subjects on racism, anorexia, and bulimia consisted of lengthy dissertations of biblical texts and concluded with religious messages imploring salvation through God.¹⁹⁸ Even the most staunch religious accommodationist would have had trouble articulating secular benefits to the University from this publication. The revelation of the magazine's religious nature would *never* have withstood Madison's, Jefferson's or the Court's Establishment Clause analysis. The Court effectively overlooked this issue in order to reach the opinion it desired, and effectively carved out another exception to the Establishment Clause.

It may be countered that the Court's lack of attention to this issue was not driven by a desire to escape the conclusion that *Wide Awake* really was a religious activity. The real reason may have been based on the potential procedural and administrative problems that would be faced by universities had the Court decided a student could demand a pro rata return of his or her mandatory student fee. Unfortunately, this argument fails because it was previously settled in *Keller* that "[w]hile such a procedure would likely result in some additional administrative burden to [an organization] and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate."¹⁹⁹ Under this reasoning, universities would have to modify their existing systems for disbursement of funds. They could not use this administrative burden excuse to circumvent the Constitution.

C. *An Aversion to Lemon - A Sour Note*

One of the most disturbing aspects of the *Rosenberger* opinion was the Court's unwillingness to apply the *Lemon* test to its Establishment Clause analysis.²⁰⁰ The Court relied heavily upon *Lamb's Chapel* as an analogous case in its analysis of *Rosenberger*.²⁰¹ It is

197. *Rosenberger*, 115 S. Ct. at 2534-35 (Souter, J., dissenting). Justice O'Connor did not share the opinion of her colleagues that *Wide Awake* was not a Christian newspaper; in her concurring opinion she asserted "[i]t is equally clear that [WAP's] viewpoint is religious and that publication of *Wide Awake* is a religious activity, under both the University's regulations and a fair reading of our precedents." *Id.* at 2525 (O'Connor, J., concurring).

198. *Id.* at 2535 (Souter, J., dissenting).

199. *Keller v. State Bar of California*, 496 U.S. 1, 16 (1990).

200. *Rosenberger*, 115 S. Ct. at 2521.

201. *Id.* at 2521-24. "[T]he most recent and opposite case is our decision in *Lamb's Chapel* . . ." *Id.* at 2517.

ironic that *Lamb's Chapel* reaffirmed the position that *Lemon* was still the appropriate means for analyzing Establishment Clause cases.²⁰² Regardless of how many Justices may have "personally driven pencils through the creature's heart,"²⁰³ the *Lemon* test has yet to be overruled.²⁰⁴

The reasoning behind the Court's hesitancy to apply *Lemon* becomes apparent with an analysis of this test, specifically focusing on excessive entanglement. If the Court had been forced to analyze the "excessive entanglement" issue in *Rosenberger*, it would have had to begin by scrutinizing the specific nature of *Wide Awake*. As previously discussed, the Court would have concluded that *Wide Awake* was a religious activity devoted strictly to evangelism.²⁰⁵ This would have resulted in direct funding of a religious activity by a state entity, in violation of the Establishment Clause. The Court could not have justified its opinion with this conclusion, so by ignoring the *Lemon* test, the Court effectively prejudiced the decision it sought to obtain.

It has been argued that the *Lemon* test "was never designed to deal with free expression questions," so its absence from *Rosenberger* was correct.²⁰⁶ This argument fails to encompass the bilateral nature of First Amendment religion cases. Once a court determines there has been an abridgment of a free-speech right in cases dealing with religion, the next step is to determine *whether the abridgment was justified in compliance with the Establishment Clause*; even the majority in *Rosenberger* acknowledged this.²⁰⁷ As was previously stated, the recognized standard used by the Court in analyzing Establishment Clause concerns is the *Lemon* test.²⁰⁸ The Court's avoidance of this

202. *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2148 n.7 (1993).

203. *Id.* at 2150 (Scalia, J., concurring).

204. *Id.* at 2148 n.7.

205. See *supra* text accompanying notes 196-98.

206. See Ralph D. Mawdsley and Charles J. Russo, *Religion in Public Education: Rosenberger Fuels an Ongoing Debate*, 103 WELR 13 (1995).

207. *Rosenberger*, 115 S. Ct. at 2520 ("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."). *Id.*

208. See *Lamb's Chapel*, 113 S. Ct. at 2148 n.7 ("[W]e return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled."); *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("As in previous cases involving facial challenges on Establishment Clause grounds . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon* . . ."); *Wallace v. Jaffree*, 472 U.S. 38, 63 (1985) (Powell, J., concurring) ("*Lemon* . . . identifies standards that have proved useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted"); *Mueller v. Allen*, 463 U.S. 388, 394 (1983) ("The general nature of our inquiry in [the Establishment Clause] area has been guided, since the decision in *Lemon* . . . by the 'three-part' test laid down in that case . . .").

test only accentuates its continued attempt to circumvent the Establishment Clause mandate in order to accommodate religion.

VI. CONCLUSION

The Court appears to be on a mission to dissolve the barriers between church and state. The Court's erroneous rationalization that the mandatory student fee was not equivalent to a direct tax may open the door for more direct subsidization of religion and religious activities. Furthermore, the Court's unwillingness to provide students with a means of return for his or her mandatory fee which was used to support religious activities accentuates the Court's desire to force students to pay for religious proselytization. Finally, the apparent demise of the *Lemon* test will result in a more lenient standard in determining what governmental activities violate the Establishment Clause.

With a current conservative majority on the Court favoring the accommodationists' views, it is unlikely much will change in the near future. With carefully written opinions crafting exceptions to the Establishment Clause, the Court appears determined to break down the wall of separation between church and state.

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