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The Serpentine Wall of Separation between Church and State: Rosenberger v. Rector and Vistors of the University of Virginia

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NOTES

The Serpentine Wall of Separation Between Church and State: *Rosenberger v. Rector and Visitors of the University of Virginia*

In 1802, in a now-famous letter to the Danbury Baptist Association, Thomas Jefferson wrote: "I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State."[1] However clear it was to Jefferson that the purpose of the Establishment Clause was to erect such a "wall of separation," that clarity is lacking in modern-day Establishment Clause doctrine.[2] Grounded on "catchy phrases," "neat tests," and what many critics brand as inaccurate historical analysis, Establishment Clause jurisprudence has been labeled a "jurisprudence of chance."[3] Perhaps Justice Jackson foresaw this

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1. SAUL K. PADOVER, THE COMPLETE JEFFERSON 518-19 (1943) (quoting letter from Thomas Jefferson to the Danbury Baptist Association, Jan. 1, 1802). In this letter, Jefferson referred to the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution, which states: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

2. *See infra* notes 83-90 and accompanying text.

3. Jay A. Sekulow et al., *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351, 354-55 (1995). The authors add that "the Court's religious freedom cases are often logically incomprehensible, its First Amendment jurisprudence irreconcilable from one case to the next. The reasoning suffers from a lack of intelligible consistency and constitutional congruency." *Id.* at 353; *see also* Carole F. Kagan, *Squeezing the Juice From* Lemon*: Towards a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 630 (1995) (noting that "the Court has not been able to enunciate any consistent test . . . leav[ing] lower courts, local governments and school boards with little guidance on how to interpret the Establishment Clause in future cases"); Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 115 (1992) (quoting Professor Leonard Levy, from whom Professor McConnell stands ideologically at "a pole opposite," as stating that " 'a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices.' "); M.G. "Pat" Robertson, *Squeezing Religion Out of the Public Square—The Supreme Court,* Lemon*, and the Myth of the Secular Society*, 4 WM. & MARY BILL RTS. J. 223, 223 (1995) (noting that Establishment Clause jurisprudence "has accomplished the amazing feat of drawing criticism from 'people who disagree about nearly everything else in the law' ") (quoting Steven D. Smith, *Separation and the "Secular": Reconstructing the*

phenomenon when he warned the Court more than four decades ago that great care must be taken in Establishment Clause cases lest the Court "make the legal 'wall of separation between church and state' as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded."[4]

Ironically, the Supreme Court in *Rosenberger v. Rector and Visitors of the University of Virginia*[5] recently had the opportunity to review an Establishment Clause challenge to the procedure for distributing student fees at the university Mr. Jefferson founded. This Note examines *Rosenberger* and the Court's modern First Amendment doctrine. After briefly discussing the facts and the lower courts' dispositions of *Rosenberger*,[6] this Note delineates the majority's opinion, which held that the University unconstitutionally denied a group of undergraduate students their rights to freedom of expression.[7] Next, the Note addresses the arguments of the dissent that this denial was necessary to avoid a violation of the Establishment Clause.[8] This Note examines relevant topics within the confusing and unclear area of Establishment Clause doctrine to determine whether the Court's decision in *Rosenberger* was consistent with past Establishment Clause cases.[9] This Note then focuses on the second aspect of the First Amendment implicated by *Rosenberger*—freedom of speech—and the Court's past decisions in this realm that have created a doctrine condemned by many as dependent upon a "myopic focus on formalistic labels."[10] Finally, this Note addresses the significance of the *Rosenberger* decision by discussing the future of student fee programs in the university setting.[11]

At issue in *Rosenberger* was whether the University of Virginia was constitutionally required to subsidize a Christian magazine using fees it had collected as part of a program created "to support a broad

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Disestablishment Decision, 67 TEX. L. REV. 955, 956 (1989)).

4. McCollum v. Board of Educ., 333 U.S. 203, 238 (1948) (Jackson, J., concurring).

5. 115 S. Ct. 2510 (1995).

6. *See infra* notes 12-36 and accompanying text.

7. *See infra* notes 37-61 and accompanying text. The opinion of the *Rosenberger* Court was delivered by Justice Kennedy and joined by Chief Justice Rehnquist, and by Justices O'Connor, Scalia, and Thomas. Justices O'Connor and Thomas wrote separate concurring opinions. Justice Souter wrote the dissenting opinion in which Justices Stevens, Ginsberg, and Breyer joined. *Rosenberger*, 115 S. Ct. at 2510.

8. *See infra* notes 62-82 and accompanying text.

9. *See infra* notes 83-152 and accompanying text.

10. Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987); *see infra* notes 153-75 and accompanying text.

11. *See infra* notes 176-225 and accompanying text.

range of extracurricular student activities that 'are related to the educational purpose of the University.' "[12] Each semester, full-time students at the University were charged a mandatory student fee of fourteen dollars, which went into a Student Activities Fund (SAF).[13] Organizations at the University that had acquired the status of a Contracted Independent Organization (CIO) could apply to the fund for payment of bills from outside contractors.[14] An organization obtained CIO status if the majority of its members were students, its managing officers were full-time students, and it complied with certain procedural requirements such as taking a pledge not to discriminate in admitting members.[15] The administration of the fund was legally controlled by the University, which delegated authority to allocate SAF funds to the Student Council, a body of elected students.[16] Whether a CIO could apply to the Student Council for funding was governed by several factors outlined in the Guidelines established by the University.[17] For example, the Guidelines made eligible for SAF funds any "student news, information, opinion, entertainment, or academic communications media groups."[18] Excluded from eligibility for student funds were religious activities, political groups, sororities, fraternities, honor societies, and organizations whose membership was exclusionary.[19] Religious activities were defined by the Guidelines as any activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."[20] The Guidelines required that funds be distributed based on the following criteria:

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12. Application to Petition for Certiorari at 61a, Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329)).

13. *Id.* at 2514.

14. *Id.*

15. *Id.*

16. *Id.*

17. Application to Petition for Certiorari at 61a-67a, Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329).

18. *Rosenberger*, 115 S. Ct. at 2514. In the 1990-91 academic year, 343 student groups qualified as CIOs, of which 135 applied for support from the SAF. Of those 135 groups, 118 received funding. Fifteen of those groups were funded as " 'student news, information, opinion, entertainment, or academic communications media groups.' " *Id.* at 2515. Among the funded organizations were groups such as "the Gandhi Peace Center, the Federalist Society, Students for Animal Rights, the Lesbian and Gay Student Union, and the Student Alliance for Virginia's Environment." Brief of Petitioner at 4, Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329). The Jewish Law Students Association and the Muslim Students Association also received student fees. The University stated that both organizations had cultural, instead of religious, purposes. *Id.* at 5-7.

19. Brief of Petitioner at 3-4, *Rosenberger* (No. 94-329).

20. Application to Petition for Certiorari at 66a, *Rosenberger* (No. 94-329).

"the size of the group, its financial self-sufficiency, and the University-wide benefit of its activities."[21]

The petitioner, Ronald Rosenberger, was an undergraduate student at the University when he formed Wide Awake Productions (WAP) " 'to publish a magazine of philosophical and religious expression,' '[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints' and '[t]o provide a unifying focus for Christians of multicultural backgrounds.' "[22] The organization's magazine, *Wide Awake: A Christian Perspective at the University of Virginia*, addressed issues such as racism, crisis pregnancy, homosexuality, and eating disorders from a "Christian perspective."[23] The editors of WAP stated the purpose of the magazine as twofold: "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."[24]

Despite its religious purpose, WAP was given CIO status soon after it was organized by Rosenberger.[25] A few months later WAP applied for funds from the SAF to pay for the printing costs of *Wide Awake*.[26] The Student Council Appropriations Committee denied WAP's request for funding because of its conclusion that publishing *Wide Awake* was a "religious activity" within the meaning of the Guidelines.[27] WAP unsuccessfully appealed this finding to the full Student Council and then to the University administration's Student

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21. *Rosenberger*, 115 S. Ct. at 2515.

22. Application to Petition for Certiorari at 67, *Rosenberger* (No. 94-329).

23. *Rosenberger*, 115 S. Ct. at 2515.

24. *Id.* The conclusion of each article in the magazine was marked by a cross. *Id.* The advertisers in the magazine consisted largely of churches, centers for Christian study, and Christian bookstores. *Id.*

25. *Id.* The Court noted that the fact that WAP was accorded CIO status was "an important consideration in this case, for had it been a 'religious organization,' WAP would not have been accorded CIO status." *Id.* The University's Guidelines prohibited a religious organization, defined as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity," from obtaining CIO status. *Id.* One critic contends that "[c]ontrary to the Supreme Court's assertion that the University denies religious organizations CIO status," the only demands made by the University of a group requesting CIO status are those basic requirements listed *supra* at text accompanying note 15. Luba L. Shur, Note, *Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest*, 81 VA. L. REV. 1665, 1667 n.10 (1995).

26. *Rosenberger*, 115 S. Ct. at 2515. WAP requested $5,862 for these printing costs. *Id.*

27. Application to Petition for Certiorari at 66a, *Rosenberger*, (No. 94-329). The Committee made this determination after reviewing WAP's first issue. *Id.* For a closer look at the articles found in the magazine, see *infra* note 64 and accompanying text.

Activities Committee, both of which sustained the Student Council Appropriation Committee's denial of funding.[28] Finally, Rosenberger and WAP filed suit in the United States District Court for the Western District of Virginia.[29]

The district court, upholding the University's denial of funds to WAP, granted the University's motion for summary judgment.[30] The court reasoned that the critical issue of the case was whether the University, in creating the SAF, had created a limited public forum or a nonpublic forum.[31] Finding that the University had created a nonpublic forum, the district court concluded that the Student Council's denial of funding to WAP was " 'reasonable and not an effort to suppress expression merely because public officials oppose the speaker'[s] views.' "[32]

The Fourth Circuit affirmed the district court's judgment but disagreed with its analysis.[33] Holding that the Guidelines discriminated against WAP because of its religious speech, the court of appeals nonetheless upheld the denial of funding as permissible to serve the compelling state interest of avoiding a violation of the Establishment Clause.[34] Using the three-prong test established by the Supreme Court in *Lemon v. Kurtzman*,[35] the Fourth Circuit held that funding WAP's publication of *Wide Awake* would violate the

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28. *Rosenberger*, 115 S. Ct. at 2515.

29. *Id.* at 2515-16; *see* Rosenberger v. Rector and Visitors of the Univ. of Va., 795 F. Supp. 175 (W.D. Va. 1992).

30. *Rosenberger*, 795 F. Supp. at 181-84.

31. *Id.* at 178. The court stated that "[t]his determination is crucial as it dictates the degree of scrutiny to be used by this court in reviewing the Board of Visitor Guidelines." *Id.* Access to a limited public forum can be restricted only by a compelling state interest narrowly drawn to effectuate that interest. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983); *see also* Cornelius v. NAACP Legal Defense Fund & Educ. Fund, Inc., 473 U.S. 788, 797 (1985) (discussing a nonpublic forum). Access to a nonpublic forum, however, can be limited by restrictions that are " 'reasonable and not an effort to suppress expression.' " *Id.* at 800 (quoting *Perry*, 460 U.S. at 46).

32. *Rosenberger*, 795 F. Supp. at 181 (misquoting *Perry*, 460 U.S. at 46, by omitting the letter "s" after the word "speaker' " in *Rosenberger* and using "views" in *Rosenberger* where it is "view" in *Perry*.).

33. Rosenberger v. Rector and Visitors of the Univ. of Va., 18 F.3d 269, 277-88 (4th Cir. 1994).

34. *Id.* at 281. The Fourth Circuit concluded that the First Amendment did not require the state to fund speech. *Id.* The Supreme Court has similarly rejected the theory that free speech rights "are somehow not fully realized unless they are subsidized by the state." Regan v. Taxation With Representation, 461 U.S. 540, 546 (1983) (denying tax-exempt status to an organization whose primary activity was political lobbying).

35. 403 U.S. 602 (1971). For a discussion of the three prongs of the *Lemon* test, see *infra* notes 101-14 and accompanying text.

third prong of the *Lemon* test, which prohibits excessive state entanglement with religion.[36]

The United States Supreme Court reversed the Fourth Circuit, holding that the denial of financial support by the University unconstitutionally denied WAP its free speech rights.[37] Agreeing with the Fourth Circuit that the SAF was a limited public forum, but "more in a metaphysical than in a spatial or geographic sense," the Court noted that there was "a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."[38] Because the University's Guidelines excluded speech about "religion as a subject matter," the Court held that "viewpoint discrimination [wa]s the proper way to interpret the University's objection to *Wide Awake*."[39]

The majority then concluded that the University's "unremarkable proposition" that the State should have substantial discretion to allocate scarce resources was unpersuasive.[40] Similarly, the majority

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36. Rosenberger v. Rector and Visitors of the Univ. of Va., 18 F.3d 269, 285-86 (4th Cir. 1994). The court of appeals stated that:

> Because *Wide Awake* is a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy, for the University to subsidize its publication would, we believe, send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values.

Id. at 286. One critic has argued that the Fourth Circuit's "conclusion that a blanket exclusion of all religious groups from SAF funding was necessary to avoid an Establishment Clause violation was flawed" because of a misapplication of the *Lemon* test. Recent Cases, 108 HARV. L. REV. 507, 509-12 (1994).

37. *Rosenberger*, 115 S. Ct. at 2524.

38. *Id.* at 2517. For a discussion of forum analysis, see *infra* notes 153-67 and accompanying text.

39. *Rosenberger*, 115 S. Ct. at 2517. The dissent asserted that the majority erred in finding viewpoint discrimination because the Guidelines discriminated against an entire class of viewpoints and were, thus, content discrimination. *Id.* at 2548-50 (Souter, J., dissenting). The majority responded that "[t]he dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways." *Id.* at 2518.

40. *Id.* at 2518. In support of this proposition, the University cited Widmar v. Vincent, 454 U.S. 262 (1981), in which the Court stated: " 'Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources.' " *Rosenberger*, 115 S. Ct. at 2518 (quoting *Widmar*, 454 U.S. at 276). In response, the Court rather unconvincingly distinguished this statement as applicable only when the state is the speaker, but not when the state "expends funds to encourage a diversity of views from private speakers." *Id.* at 2519. In its brief, however, the University argued that in the public university setting,

was unpersuaded by the University's attempt to distinguish *Lamb's Chapel v. Center Moriches School District*[41] in which the Court held that a school district that had opened school facilities to a variety of community groups was constitutionally required to open the facilities to religious organizations.[42] In attempting to distinguish *Lamb's Chapel*, the University argued that funding of speech differs from access to school facilities in that "money is scarce and physical facilities are not."[43] The Court dismissed this argument, which it noted "might not be true as an empirical matter," because the government could not "justify viewpoint discrimination among private speakers on the economic fact of scarcity."[44]

The majority made clear that its main concerns were the "[v]ital First Amendment speech principles . . . at stake."[45] The Court expressed its fear that the University's power to review publications with the intention of censoring prohibited speech was a "danger to liberty."[46] Similarly, the Court feared the potential chilling effect on free speech that the censorship might have.[47] If enforced vigorously, the broad prohibitions of the Guidelines would cause "major essays [to be] excluded from student publications," including those written by "hypothetical student contributors" such as Plato, Descartes, Marx, and Sartre.[48] Thus, the Court stated, "Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter

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> virtually every allocation of funds involves speech. The selection of courses for the curriculum, the provision of support for research, and the hiring and promotion of professors are obvious examples. If the First Amendment were construed to demand content-neutrality in funding, routine decisions would invite a lawsuit. Everyday academic determinations would trigger the search for a compelling interest, and judicial review would supplant academic decisions in the management of public universities. In short, to require that scarce dollars be distributed without regard to the content of speech would be to disable public universities from using public funds to pursue public policies.

Brief of Petitioner at 15, Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329).

41. 113 S. Ct. 2141 (1993); *see infra* notes 149-52 and accompanying text (discussing *Lamb's Chapel*).

42. *Lamb's Chapel*, 113 S. Ct. at 2143-44.

43. *Rosenberger*, 115 S. Ct. at 2519.

44. *Id.*

45. *Id.* at 2520.

46. *Id.*

47. *Id.* The majority noted that the potential for a chilling effect on speech was "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Id.*

48. *Id.*

cookies, provided he did not point out their (necessary) imperfections."[49]

Finding that the University had discriminated against WAP based on the viewpoint of its speech, the Court next considered whether the University's actions were excused by the necessity of complying with the Establishment Clause of the First Amendment.[50] Stating that the University's Establishment Clause claim "lack[ed] force," the majority nonetheless addressed it because the dissent and the Fourth Circuit had focused their arguments on the claim.[51] Labeling the student fee as "an exaction" instead of a "tax,"[52] and noting that funds from the SAF would have gone to a third party printer and not directly to WAP,[53] the Court found that the University would be free from any appearance of a lack of neutrality by subsidizing WAP.[54] Similarly,

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49. *Id.* The dissent took aim at this line of reasoning by noting that the majority reads the word 'primarily' ('primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality') right out of the Guidelines, whereas it is obviously crucial in distinguishing between works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve, or simply descriptive writing informing a reader about the position of a given religion.

Id. at 2550 (Souter, J., dissenting).

50. *Id.* at 2520.

51. *Id.* at 2521.

52. *Id.* at 2522. The Court stated that "[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.* (citing United States v. Butler, 297 U.S. 1, 61 (1936)). The Court distinguished the "exaction" in this case as "a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission." *Id.*

53. *Id.* at 2524. The dissent argued that "[t]he formalism of distinguishing between payment to Wide Awake so it can pay an approved bill and payment of the approved bill itself cannot be the basis of a decision of Constitutional law." *Id.* at 2545 (Souter, J., dissenting). The dissent noted that:

> The printer, of course, has no option to take the money and use it to print a secular journal instead of Wide Awake. It only gets the money because of its contract to print a message of religious evangelism at the direction of Wide Awake, and it will receive payment only for doing precisely that.

Id. (Souter, J., dissenting); *see also* Herman Schwartz, *The New Imprint on Religion Cases: Is the New Majority a Wrecking Crew or a Renovation Team?*, TEX. LAW., July 31, 1995, at 22 (arguing that "[i]t makes no sense . . . to distinguish between giving $5,000 to a religious group to use solely for printing and paying the printer directly. The distinction between taxes and student fees is equally artificial, for in both cases money raised by state mandate is being used for religious purposes.").

54. *Rosenberger*, 115 S. Ct. at 2523-24. The majority, however, noted that "[i]t is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." However, the Court concluded that WAP was not "a religious institution, at least in the usual sense of the term." *Id.* at 2524. The Court did not

the Court noted that the University had distanced itself from the message of student publications by a disclaimer that gave the clear impression that the student newspapers did not speak for the University.[55] Thus, the Court concluded that there was "no Establishment Clause violation in the University's honoring its duties under the Free Speech clause."[56]

Justice O'Connor's concurring opinion pointed out the difficulty of decisionmaking when "two bedrock principles"—freedom of speech and the Establishment Clause—collide, leaving the Court with the "hard task of judging."[57] Because of the University's clear message of independence from the speech of student newspapers funded by the SAF,[58] and because "financial assistance [wa]s distributed in a manner that ensure[d] its use only for permissible purposes,"[59] Justice O'Connor concluded that "by providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective." [60] Finally, however, Justice O'Connor noted the possibility that the Court's decision left the SAF susceptible to a Free Speech Clause challenge by a student who believed she should not be forced to pay for speech with which she did not agree.[61]

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elaborate on what the "usual sense" was.

55. *Id.* at 2523. The majority noted that " 'the government has not willfully fostered or encouraged' any mistaken impression that the student newspapers speak for the University." *Id.* (quoting Capitol Square Review Bd. v. Pinette, 115 S. Ct. 2440, 2448 (1995)).

56. *Id.* at 2525.

57. *Id.* (O'Connor, J., concurring).

58. *Id.* at 2526 (O'Connor, J., concurring). Justice O'Connor noted that the University required student groups to "include in every letter, contract, publication, or other written materials the following disclaimer: 'Although this organization has members who are University of Virginia students (faculty) (employees), the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions." *Id.* at 2526-27 (O'Connor, J., concurring).

59. *Id.* at 2527 (O'Connor, J., concurring).

60. *Id.* at 2526 (O'Connor, J., concurring).

61. *Id.* at 2527 (O'Connor, J., concurring); *see infra* notes 194-218 and accompanying text (discussing the implications of such a challenge). Justice Thomas also wrote a concurring opinion limited to an expression of his disagreement with the historical analysis of the dissent. *Rosenberger*, 115 S. Ct. at 2528-33 (Thomas, J., concurring). Citing such examples as the Northwest Ordinance of 1787, James Madison's Memorial and Remonstrance Against Religious Assessments, and Madison's actions as a Congressman in the first Congress, Justice Thomas argued that "history provides an answer for the constitutional question posed by this case," which was that the funding of WAP was constitutionally permissible. *Id.* at 2533 (Thomas, J., concurring).

Justice Souter, in his lengthy and spirited dissent, argued that "[t]he Court today, for the first time, approves direct funding of core religious activities by an arm of the State," in violation of the Establishment Clause.[62] In support of this proposition, the dissent began by taking a "closer look at *Wide Awake*."[63] Citing several passages from the magazine, the dissent argued that *Wide Awake* was a "straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ."[64] Thus, as the subject of the magazine was not that of "the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit," Justice Souter contended that the Establishment Clause barred the use of public funds for subsidization of its message.[65] Justice Souter argued that this prohibition was perhaps one of the clearest intentions of the Framers in drafting the Establishment Clause[66] and he cited

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62. *Rosenberger*, 115 S. Ct. at 2533 (Souter, J., dissenting).

63. *Id.* at 2534 (Souter, J., dissenting).

64. *Id.* at 2535 (Souter, J., dissenting). Justice Souter quoted articles from *Wide Awake*, including the following:

> When you get to the final gate, the Lord will be handing out boarding passes, and He will examine your ticket. If, in your lifetime, you did not request a seat on His Friendly Skies Flyer by trusting Him and asking Him to be your pilot, then you will not be on His list of reserved seats (and the Lord will know you not). You will not be able to buy a ticket then; no amount of money or desire will do the trick. You will be met by your chosen pilot and flown straight to Hell on an express jet (without air conditioning or toilets, of course).

Id. at 2534 (Souter, J., dissenting) (quoting Stephanie Ace, *The Plane Truth*, *Wide Awake: A Christian Perspective at the University of Virginia*, Nov./Dec. 1990, at 3). Justice Souter also cited pieces on facially secular topics that became "platforms from which to call readers to fulfill the tenets of Christianity." *Id.* at 2539. For example, in a piece on racism in *Wide Awake*, the authors wrote: "God calls us to take the risks of voluntarily stepping out of our comfort zones and to take joy in the whole richness of our inheritance in the body of Christ. We must take the love we receive from God and share it with all peoples of the world." *Id.* (quoting Liu et al., *"Eracing" Mistakes*, *Wide Awake: A Christian Perspective at the University of Virginia*, Nov./Dec. 1990, at 14).

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

66. *Id.* (Souter, J., dissenting). Justice Souter cited as evidence of the Framers' intent Madison's Memorial and Remonstrance Against Religious Assessment in which Madison wrote: "Who does not see that . . . the 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?" *Id.* at 2536 (Souter, J., dissenting) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENT (1785)). Justice Souter also cited Thomas Jefferson for the proposition that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Id.* at 2536 (Souter, J., dissenting) (quoting THOMAS JEFFERSON, BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779), *reprinted in* 5 THE FOUNDER'S CONSTITUTION 84-85 (P. Kurland & R. Lerner eds., 1987)); *see also* Douglas Laycock, *"Non-Preferential" Aid to Religion: A*

numerous cases demonstrating that the Court has never upheld direct state funding of the type of "proselytizing" found in *Wide Awake*.[67]

Not only had the Court overlooked the evangelistic nature of the magazine, but also, Justice Souter concluded, the majority had misapplied the Court's precedents.[68] For example, Justice Souter argued that neutrality or evenhandedness towards religion was only one of many factors to consider in reviewing the constitutionality of a governmental program that directly or indirectly aided religion.[69] Thus, the *Rosenberger* Court erred, Justice Souter explained, in its general assumption that neutrality was a "*sufficient condition* of constitutionality" for a governmental program.[70] He also noted that many governmental programs had been struck down by the Court, even though neutral toward religion, because they were deemed to provide direct aid to religion.[71]

Justice Souter next attacked the Court's reliance on the fact that money was paid directly to WAP's printer instead of to WAP as a "formalism . . . [that] cannot be the basis of a decision of Constitutional law."[72] Clearly WAP benefited from the payment of its debt regardless of who actually wrote the check.[73] Similarly,

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False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 921 (1986) (arguing that "if the debates of the 1780's support any proposition, it is that the Framers opposed government financial support for religion"). *But cf.* Robertson, *supra* note 3, at 262 (noting that Madison had studied theology and arguing that Madison's views on the Establishment Clause have been distorted by the Supreme Court).

67. *Rosenberger*, 115 S. Ct. at 2539 (Souter, J., dissenting). The cases Justice Souter cited included Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985); Wolman v. Walter, 433 U.S. 229, 254 (1977); Meek v Pittenger, 421 U.S. 349, 365 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 780 (1973). For a discussion of these cases, see *infra* notes 122-28 and accompanying text.

68. *Rosenberger*, 115 S. Ct. at 2538-40 (Souter, J., dissenting).

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

70. *Id.* at 2542 (Souter, J., dissenting) (emphasis added).

71. *Id.* (Souter, J., dissenting). For example, Justice Souter cited Tilton v. Richardson, 403 U.S. 672, 682-84 (1971), in which the Court invalidated portions of a neutral general aid plan providing for construction of facilities at private universities to the extent that those facilities would directly aid sectarian education. Justice Souter also cited *Wolman*, 433 U.S. at 252-55, in which the Court struck down a statute providing funding for field trips to nonpublic school students, similar to the funding provided to public school students, "because of [the] unacceptable danger that state funds would be used to foster religion." *See Rosenberger*, 115 S. Ct. at 2542-43 (Souter, J., dissenting). For a discussion of direct aid to religious schools and their students, see *infra* notes 115-34 and accompanying text.

72. *Rosenberger*, 115 S. Ct. at 2545 (Souter, J., dissenting); *see supra* note 53 and accompanying text.

73. *Rosenberger*, 115 S. Ct. at 2545 (Souter, J., dissenting).

Justice Souter reasoned that the Court's comparison of this case to cases in which a religious group was allowed access to speak in an open forum was as "unsound as it [wa]s simple," because the University's program would cause the government to directly fund religious evangelism, not merely allow an evangelist to speak in an open forum.[74] In addition, Justice Souter argued that it was "fanciful" to label the student fee as anything but a tax,[75] because the University exercised its power to compel a student citizen to pay the fee and there was no procedural mechanism for a student to decline to pay the fee if she wished to attend the University.[76]

Justice Souter's final attack was on the Court's "flaw[ed]" free speech analysis.[77] First, Justice Souter argued that the Court incorrectly labeled the University's actions as viewpoint discrimination instead of content discrimination because the Guidelines prohibited the funding of all religious activities, not just one religion's activities.[78] Second, the dissent pointed out that the Court's reading of the breadth of the Guidelines was seriously defective, as the majority had neglected the word "primarily" in its analysis.[79] Only publications that *primarily* "promote[d] or manifest[ed]" religious beliefs, Justice Souter argued, were barred from subsidization, not ones that merely carried articles or pieces about religion.[80] In closing, Justice Souter condemned the Court for "making a shambles out of student activity fees in public colleges"[81] and for failing to heed Chief Justice Burger's warning that "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."[82]

The difficulties that the *Rosenberger* Court faced are perhaps the product of what many critics have condemned as an unintelligible Establishment Clause doctrine, within which contradictions and logical

74. *Id.* (Souter J., dissenting).
75. *Id.* at 2546 (Souter, J., dissenting).
76. *Id.* at 2538 n.3 (Souter J., dissenting).
77. *Id.* at 2547 (Souter J., dissenting).
78. *Id.* at 2548-50 (Souter, J., dissenting).
79. *Id.* at 2549-50 (Souter, J., dissenting).
80. *Id.* at 2549 (Souter, J., dissenting).
81. *Id.* at 2551 (Souter, J., dissenting).
82. *Id.* (Souter, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. 602, 624 (1971)).

fallacies abound.[83] Much debate has occurred regarding the original intentions of the drafters and ratifiers of the First Amendment, including whose intentions should be considered.[84] While some

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83. *See supra* note 3 and accompanying text. As one critic demonstrated:

> [I]t is constitutional for a state to hire a Presbyterian minister to lead the legislature in daily prayers, but unconstitutional for a state to set aside a moment of silence in the schools for children to pray if they want to.... It is constitutional for the government to give money to religiously-affiliated organizations to teach adolescents about proper sexual behavior, but not to teach them science or history. It is constitutional for the government to provide religious school pupils with books, but not with maps; with bus rides to religious schools, but not from school to a museum on a field trip; with cash to pay for state mandated standardized tests, but not to pay for safety-related maintenance. It is a mess.

McConnell, *supra* note 3, at 119-20. Professor McConnell (one of Rosenberger's attorneys) further argued that the inconsistent state of Establishment Clause jurisprudence is the result of the changing political leanings of the Justices who have decided Establishment Clause cases over the years. *Id.* at 134. For example, he asserted that "[t]he Religion Clause jurisprudence of the Warren and Burger era was . . . characterized by a hostility or indifference to religion" caused by the "politically dominant ideology of secular liberalism" of the two Courts. *Id.* Conversely, a spokesperson for Americans United for the Separation of Church and State labeled the *Rosenberger* decision "a rank form of right-wing judicial activism." Joan O'Brien, *Visiting U. Prof.'s Crusade Gives Religion a Victory, Religious Cause Wins Court's Blessing*, SALT LAKE TRIB., June 30, 1995, at A1; *see also* Joan Biskupic, *Court's Conservatives Make Presence Felt*, WASH. POST, July 2, 1995, at A1 (noting that the Supreme Court's Reagan appointees, with decisions like *Rosenberger*, were leading the Court's jurisprudence to the right); David G. Savage, *Supreme Court Rulings Herald Rehnquist Era*, L.A. TIMES, July 2, 1995, at A1 (observing the "sad coincidence" that the Supreme Court announced its conservative final ruling on the same day former Chief Justice Warren Burger was laid to rest). *But cf.* Jeremy Rabkin, *Common Sense v. The Court*, AM. SPECTATOR, Sept. 1995, at 26-27. Rabkin contends that "the conservative impulse on the Court can rarely muster a majority without concessions to the soft, muddled sensibilities of the Court's swing voters .... Ignore the media clucking about the Court's 'turn to the right' and don't rely on the Court to resolve the country's most contentious social issues." *Id.* at 70.

84. *See generally* THE SUPREME COURT ON CHURCH AND STATE 3-17 (Robert S. Alley ed., 1988) (describing the origins of the Establishment Clause); ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 49-82, 50 (1982) (contending that "[c]omplete independence of religion and the state or absolute separation of Church and State was not contemplated by the Framers of the First Amendment"); THOMAS CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 193-222 (1986) (arguing that the citizens who ratified the First Amendment "saw government attempts to organize and regulate ... support [of religion] as a usurpation of power, as a violation of liberty of conscience and free exercise of religion, and as falling within the scope of what they termed an establishment of religion"); Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 348 (1995) (arguing that "religion's role in American political life has been restrained principally by constitutional design, not by doctrinal errors or ideological accidents"); Laycock, *supra* note 66, at 878 (stating that the "framers of the religion clauses certainly did not consciously intend to permit nonpreferential aid, and those of them who thought about the

critics have based much of their analysis on the thoughts of James Madison and Thomas Jefferson, the key drafters of the Establishment Clause,[85] others argue that the intentions of the members of Congress who passed the Amendment and the state legislators who ratified it are more relevant.[86] Secondly, the debate as to what either group actually intended can be divided into two general categories of adherents[87]—the separationists, who believe that the Framers intended the First Amendment to place a wall of separation between church and state,[88] and the accommodationists, who believe that the intention of the Framers was merely to guard against the preferential treatment or establishment of one religion as a state religion.[89] Many accommodationists, also called "nonprefer-

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question probably intended to forbid it"); Rodney K. Smith, *Getting off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569 (1984) (criticizing the historical and legal analyses of the religion clauses of the First Amendment contained in several Supreme Court decisions).

85. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 33-43 (1947) (Rutledge, J., dissenting) (tracing both Madison's and Jefferson's thoughts on religious freedom during their struggles in Virginia against a tax supporting religion and the drafting of the First Amendment); THE SUPREME COURT ON CHURCH AND STATE, *supra* note 84, at 3-27 (placing emphasis on Madison's and Jefferson's thoughts on the meaning of the religion clauses of the First Amendment); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 113-45 (Univ. of North Carolina Press ed., 1994) (describing Madison's thoughts on the meaning of the First Amendment and how nonpreferentialists have misconstrued those thoughts).

86. *See, e.g.*, Laycock, *supra* note 66, at 879-902 (discussing the history of the congressional and state legislative debates on the First Amendment); *see also* Robertson, *supra* note 3, at 261 (arguing that "[i]t is simply wrong to take Jefferson's or Madison's views of church-state relations as the final word on the meaning of the Establishment Clause").

87. *See generally* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 124-35 (1993) (describing the two categories and their differing views).

88. *See, e.g.*, Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198 (1992) (arguing that religion has no place in a democratic government); Ruti Teitel, *When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174, 183-89 (1986) (arguing that the Establishment Clause demands strict separation of religion and public education).

89. *See e.g.*, CORD, *supra* note 84, at 49-82 (arguing that strict separation of church and state was not intended by the Framers of the First Amendment); Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 6-41 (calling for an accommodationist approach in adjudicating Establishment Clause cases); Robertson, *supra* note 3, at 257-76 (arguing that the Establishment Clause does not compel the conclusion that religion and government should be kept separate).

entialists," believe that aid to religion as a whole is not only permissible but desirable.[90]

In its first modern Establishment Clause case, *Everson v. Board of Education*,[91] which concluded with a victory for accommodationists, the Supreme Court initially seemed to come down on the side of the separationists.[92] *Everson* marked the Court's first attempt to set out its understanding of the Establishment Clause, using the term "wall of separation,"[93] an idea the Court borrowed from Jefferson nearly seventy years earlier[94] The Court noted, following a lengthy analysis of the history of the First Amendment, that "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another."[95] Similarly, the Court declared that "[n]o 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 adopt to teach or practice religion."[96]

The *Everson* Court, however, then went on to conclude that while the Establishment Clause requires that the state be "neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[97] Thus, the Court held that the state of New Jersey was not prohibited from reimbursing parents of parochial school children along with parents of public school children for city bus fares incurred in sending their children to school.[98] The contradictory conclusions of the majority led the

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90. Robertson, *supra* note 3, at 276 ("[W]ithin reasonable limits, government ought to aid and encourage religion, and religious believers should not need to check their beliefs at the capital [sic] door.").

91. 330 U.S. 1 (1946).

92. *See* LEVY, *supra* note 85, at 150-51 (describing *Everson* as laying down the principle of separation of church and state in Establishment Clause jurisprudence); Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict or Chaos?* 70 NOTRE DAME L. REV. 581, 614 (1995) (noting that "[i]t can generally be said that the Court's cases beginning with *Everson* were animated by a theory of separationism"); Arlen Specter, *Defending the Wall: Maintaining Church/State Separation in America*, 18 HARV. J.L. & PUB. POL'Y, 575, 581 (1992) (noting that "it is *Everson* . . . that [critics] excoriat[e] for its role in fixing the concept of a wall of church/state separation in American jurisprudence").

93. *See* CORD, *supra* note 84, at 109.

94. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878).

95. *Everson*, 330 U.S. at 15.

96. *Id.* at 16.

97. *Id.* at 18.

98. *Id.* at 17-18.

dissent to remark: "[T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."[99] This contradiction also led one critic to remark that *Everson* "may hold the record for being cited most often as a precedent on opposite sides of the same question."[100]

Twenty years later, the most significant case in Establishment Clause doctrine was decided.[101] In *Lemon v. Kurtzman*,[102] the Supreme Court invalidated Pennsylvania and Rhode Island statutes that provided for direct forms of aid to parochial school education.[103] The Pennsylvania statute provided for reimbursements to nonpublic schools for materials, textbooks, and teacher salaries used in teaching secular subjects.[104] The Rhode Island statute allowed for salary supplements to teachers of secular subjects in private schools.[105] The Court found both statutes to be unconstitutional violations of the Establishment Clause.[106]

Expressing a separationist perspective similar to that of the majority in *Everson*,[107] the *Lemon* Court noted that "the three main

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99. *Id.* at 19. (Jackson, J., dissenting). Justice Jackson further commented on the opinion of the Court by noting that "[t]he case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent",—consented.' " *Id.*

100. James C. Kirby, Jr., Everson *to* Meek *and* Roemer: *From Separation to Détente in Church-State Relations*, 55 N.C. L. REV. 563, 565 (1977).

101. *See generally* LEVY, *supra* note 85, at 146-79 (describing judicial tests used prior to and after *Lemon* in Establishment Clause cases); Jay A. Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1059-71 (1995) (explaining the *Lemon* test and its misuse) [hereinafter Sekulow et al., *Proposed Guidelines*]; Rena M. Bila, Note, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1550-80 (1995) (explaining application of the *Lemon* test in several cases and proposing different tests); Stephanie E. Russell, Note, *Sorting Through the Establishment Clause Tests, Looking Past the Lemon*, 60 MO. L. REV. 653, 653 (1995) (noting that "[a]fter the decision in *Lemon v. Kurtzman*, one three-pronged test controlled all Establishment Clause issues") (citations omitted).

102. 403 U.S. 602 (1971).

103. *Id.* at 625. The statutes were PA. STAT. ANN. tit. 24, §§ 5601-09 (Supp. 1971) and R.I. GEN. LAWS § 16-51-1 (Supp. 1970).

104. *Lemon*, 403 U.S. at 609.

105. *Id.* at 607.

106. *Id.* at 625.

107. *See* Kagan, *supra* note 3, at 630 (noting that the *Lemon* test "articulates the separationist view of the Establishment Clause that has informed the [Court] majority's thinking"); McConnell, *supra* note 3, at 128 (arguing that the *Lemon* test "has an inherent tendency to devalue religious exercise").

evils against which the Establishment Clause was intended to afford protection ... [are] 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' "[108] Drawing upon past Establishment Clause cases, the Court then set forth a three-prong test to determine whether a state action violates the Establishment Clause: "First, the statute must have a secular legislative purpose;[109] second, its principle or primary effect must be one that neither advances nor inhibits religion;[110] finally, the statute must not foster 'an excessive government entanglement with religion.' "[111] The Supreme Court has used this test in numerous cases over the last three decades.[112] However, many critics, including Justice Scalia, have condemned the *Lemon* test because it has been misapplied or ignored to fit the particular needs of the court that applies it.[113] This "nonapplication, malapplication, and

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108. *Lemon*, 403 U.S. at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

109. *Id.*

110. *Id.* (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)). Michael McConnell has argued that the phrase "inhibits religion" should be removed from the test as superfluous because "in actual practice, actions 'inhibiting' religion are dealt with under the Free Exercise Clause." McConnell, *supra* note 3, at 118 n.9.

111. *Lemon*, 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674).

112. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2148 (1993); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 485-89 (1986); Aguilar v. Felton, 473 U.S. 402, 410-14 (1984); Committee. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-85 (1973).

113. See *Lamb's Chapel*, 113 S. Ct. at 2150, in which Justice Scalia condemned the *Lemon* test by noting:

> When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Id. (Scalia, J., concurring in the judgment) (citations omitted) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)). Justice Scalia prefaced this observation with the following: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . ." *Id.* at 2149 (Scalia, J., concurring in the judgment). Although the Supreme Court does not consistently utilize the *Lemon* test, it is noteworthy that "lower courts have made the *Lemon* test the sole means for winnowing out instances in which government has become excessively entangled with religion." Sekulow et al., *supra* note 3, at 358-59. Unfortunately, argues Sekulow, "rigid and mechanical application of the vaguely understandable yet easily manipulable *Lemon* test often leads to absurd results." *Id.* at 359. In support of this proposition, Sekulow cites the disposition of *Rosenberger* in the Fourth Circuit. *Id.* For a discussion of the Fourth Circuit opinion, see *supra* notes 33-36 and accompanying text.

misapplication of *Lemon*" is said to be the cause of the Court's inconsistent and confusing Establishment Clause decisions.[114]

Perhaps one of the most important and sensitive areas of Establishment Clause doctrine in which the *Lemon* test has been utilized is the area of government financial assistance to religious schools or students attending those schools.[115] Generally, whether aid to parochial schools is characterized as direct or indirect will affect whether the aid will be upheld under the *Lemon* test.[116] If the aid is considered indirect then it will usually satisfy the *Lemon* test.[117] For example, in *Witters v. Washington Department of Services for the Blind*,[118] the Court upheld a Washington statute that provided a blind student at a Christian college with vocational rehabilitation assistance.[119] The Court held that the first prong of the *Lemon* test was satisfied by the clearly secular purpose of promoting the well-being of the visually handicapped.[120] Regarding the second prong of the *Lemon* test (aid cannot promote or inhibit religion) the Court found that, because aid flowed directly to the student instead of to the institution, the institution was not being subsidized by the state, nor

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114. Kagan, *supra* note 3, at 634. *See also* Sekulow et al., *Proposed Guidelines*, *supra* note 101, at 1060 (noting that the "Supreme Court has ignored the *Lemon* test in a number of recent cases and relegated its three prongs to the status of 'useful guideposts' in others"); Laura Underkuffler-Freud, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 858-73 (discussing analytical and empirical problems with the application of the *Lemon* test); Russell, *supra* note 101, at 660 n.53 (listing several Supreme Court Justices who have criticized *Lemon*'s legacy and have sought to revise the test).

115. *See generally* MARVIN E. FRANKEL, FAITH AND FREEDOM 96-107 (1994) (discussing the numerous issues surrounding the use of governmental money to aid religious schools); GREGG IVERS, REDEFINING THE FIRST FREEDOM: THE SUPREME COURT AND THE CONSOLIDATION OF STATE POWER 65-101 (1993) (explaining the Supreme Court's adjudication of several cases involving aid to religious schools); T. Jonathan Adams, Note, *Interpreting State Aid to Religious Schools Under the Establishment Clause*, 72 N.C. L. REV. 1039, 1043-59 (1994) (reviewing cases involving direct state aid to parochial schools).

116. *See* LEVY, *supra* note 85, at 165 (discussing the Burger Court's distinction between direct and indirect aid). Direct aid is a monetary subsidy that goes directly to the religious institution. *Id.* Indirect aid may come in the form of an "indirect economic benefit" such as a tax exemption, *id.*, or may go to a third party "for the benefit of the student, not the religious school," *id.* at 171. *See also* FRANKEL, *supra* note 115, at 98 (noting "the quest for 'indirect' or partial economic assistance remains essentially a kind of second-best or sideshow position" for those seeking governmental aid for parochial schools).

117. LEVY, *supra* note 85, at 162-67.

118. 474 U.S. 481 (1986).

119. *Id.* at 489. The plaintiff in *Witters* was seeking to become a pastor, missionary, or youth director. *Id.* at 483.

120. *Id.* at 485.

was the state conferring a message of state endorsement of religion.[121]

However, if the Court determines that a governmental program directly aids religious schools, then generally the aid will be invalidated.[122] For example, in *School District of the City of Grand Rapids v. Ball*,[123] the Court invalidated a Michigan statute that provided for public school teachers to teach secular subjects on nonpublic school premises during the school day.[124] After comparing several cases in which the Court had invalidated what it considered direct aid to religious schools, the *Ball* Court concluded that the primary effect of the Michigan program was a "direct and substantial advancement of the sectarian enterprise."[125] Prior to

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121. *Id.* at 486-89. The Court did not address the "entanglement" prong of the *Lemon* test because the lower court had not addressed the issue, thus rendering the record on that issue incomplete. *See id.* at 485. In his concurrence in *Witters*, Justice Powell observed that *Witters* was similar to Mueller v. Allen, 463 U.S. 388, 398-99 (1983), in which the Supreme Court sustained a tax deduction for educational expenses even though the benefit flowed largely to parents of children attending parochial schools. *Witters*, 474 U.S. at 490-92 (Powell, J. concurring). The Court's analysis in *Mueller* was similar to that in *Witters* in that the decision rested on the fact that the "benefit to religion resulted from the 'numerous private choices of individual parents of school-age children.' " *Witters*, 474 U.S. at 491 (Powell, J., concurring) (quoting *Mueller*, 463 U.S. at 399). Strangely enough, eight years after *Witters* was decided, in Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993), the Supreme Court decided a case very similar to *Witters* in both its facts and analysis without specifically using the *Lemon* test even though the Ninth Circuit in *Zobrest* had rested its decision on *Lemon*. *Zobrest*, 113 S. Ct. at 2466-69 (validating a government program that provided a deaf student at a parochial high school with a sign language interpreter).

122. *See* LEVY, *supra* note 85, at 167 (noting the Court's position that a direct money subsidy for parochial schools is impermissible sponsorship of religion).

123. 473 U.S. 373 (1985).

124. *Id.* at 397-98.

125. *Id.* at 393 (quoting Wolman v. Walter, 433 U.S. 229, 250 (1977)); *see also* Aguilar v. Felton, 473 U.S. 402, 408-14 (1985) (invalidating a New York law providing public school teachers for remedial classes for parochial school students on parochial school property as an impermissible direct aid of religion). The direct aid principle was not the only rationale upon which *Ball* was decided. The Court in *Ball* also focused on the "symbolic union of government and religion in one sectarian enterprise." *Ball*, 473 U.S. at 392. Additionally, the Court in *Ball* expressed its concern that a public school teacher in a religious setting "may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction . . . in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect." *Ball*, 473 U.S. at 388; *see also* McConnell, *supra* note 3, at 122 (arguing that the Court's bias against religion is evident in "[t]he evocative words in this passage—'conform,' 'dominantly religious,' 'indoctrination,' "—which demonstrate the Court's assumption that "religious convictions are reached not through thoughtful consideration and experience, but through conformity and indoctrination").

Ball, in *Meek v. Pittenger*[126] and *Wolman v. Walter*,[127] the Court invalidated state programs providing for the loan of instructional equipment to parochial schools because the programs advanced the "primary, religion-oriented educational function of the sectarian school."[128]

Similarly, two decades after *Meek* and *Wolman*, in *Board of Education of Kiryas Joel v. Grumet*,[129] the Court found that the state of New York had impermissibly advanced religion by directly aiding the religious schools of the Satmar Hasidim, practitioners of a strict form of Judaism, by creating a special school district that followed the village's geographical lines.[130] The purpose of the statute was to allow for public education of Satmar children who were handicapped, while not requiring that they attend school with non-Satmar children.[131] The Court, while not specifically using the *Lemon* test, held that New York violated what would have been the second and third prongs of *Lemon* because there was no " 'effective means of guaranteeing' that governmental power will be . . . neutrally

126. 421 U.S. 349 (1975).

127. 433 U.S. 229 (1977).

128. *Meek*, 421 U.S. at 364; *Wolman*, 433 U.S. at 248-51. The instructional materials at issue in *Meek* included such items as maps, tape recorders, and projectors. *Meek*, 421 U.S. at 354-55. Part of the loan programs in both *Meek* and *Wolman*, however, provided for the loan of textbooks; this was upheld by the Court because of prior precedent in Board of Educ. v. Allen, 392 U.S. 236 (1968). *Meek*, 421 U.S. at 359-60; *Wolman*, 433 U.S. at 236-38. In *Allen*, the Court held that textbooks could be loaned to parochial school students as long as the books were supplied directly to students themselves and the content of the books was strictly secular. *Allen*, 392 U.S. at 243-45. Seemingly inconsistent in *Wolman* was the Court's invalidation of a portion of the governmental program which provided for field trip transportation to nonpublic schools in light of Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947), which upheld reimbursement for travel expenses incurred by parochial school children on the way to school. *See Wolman*, 433 U.S. at 252-55. The Court in *Wolman* distinguished *Everson* under the direct aid principle because reimbursements in *Everson* flowed directly to the parents of parochial school children and not to the parochial school itself. *Wolman*, 433 U.S. at 252-53. Finally, the Ohio statute at issue in *Wolman* provided for speech, hearing, and psychological diagnostic services, for therapeutic, guidance, and remedial services, and for the provision and grading of state-funded standardized objective tests to be given on the premises of parochial schools. *Wolman*, 433 U.S. at 238-48. All of these provisions were upheld. *Id.* The testing was upheld largely because the service provided was impersonal and brief, *id.* at 238-41, and the remedial and diagnostic services were upheld largely because they were not provided on the actual parochial school premises, *id.* at 241-48. The *Lemon* test was applied to each provision of the *Wolman* statute. *Id.* at 236-55.

129. 114 S. Ct. 2481 (1994).

130. *Id.* at 2494.

131. *Id.* at 2485-86.

employed"[132] (primary effect prong) and because there was " 'a fusion of governmental and religious functions' " (entanglement prong).[133] Although the reasoning of the Justices differed, the thrust of the plurality opinion was that the state could not directly promote religion in this fashion.[134]

Another trend in the Court's Establishment Clause analysis in the education context is that the Court is generally more likely to invalidate aid flowing to parochial secondary schools than aid to sectarian higher education.[135] For example, in *Roemer v. Board of*

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132. *Id.* at 2491. The Court noted that "[t]he fact that this school district was created by a special and unusual Act of the legislature . . . gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups." *Id.*

133. *Id.* at 2487-88 (citation omitted). Justice Blackmun chastised the Court for not explicitly using the *Lemon* test because, in Justice Blackmun's words, "the two principles on which the opinion bases its conclusion that the legislative act is constitutionally invalid essentially are the second and third *Lemon* criteria." *Id.* at 2495 (Blackmun, J., concurring).

134. *See* Welton O. Seal, Jr., Note, *"Benevolent Neutrality" Toward Religion: Still an Elusive Ideal After* Board of Education of Kiryas Joel v. Grumet, 73 N.C. L. REV. 1641, 1645-52 (1995) (discussing the conclusions of the plurality). Several Justices in *Kiryas Joel* wrote separate opinions. In his concurrence, Justice Blackmun noted his "disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon v. Kurtzman*. The opinion of the Court . . . relies upon several decisions . . . that explicitly rested on the criteria set forth in *Lemon*." *Kiryas Joel*, 114 S. Ct. at 2494-95 (Blackmun, J., concurring) (citations omitted). However, Justice O'Connor wrote a concurrence to express her discontent with *Lemon*, arguing that "shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test." *Id.* at 2499 (O'Connor, J., concurring in part and concurring in the judgment). Justice Kennedy's concurrence focused in part on the potential for civil strife when the government prefers one religion over another. *Id.* at 2501-05 (Kennedy, J., concurring in the judgment). In a vehement dissent, Justice Scalia argued that the Court had disabled a religiously homogeneous group from exercising political power benevolently conferred upon it without regard to religion. *Id.* at 2505-08 (Scalia, J., dissenting).

135. Kirby, *supra* note 100, at 571-74; *see* IVERS, *supra* note 115, at 69 (noting that the Burger Court "took a firm line against parochial statutes that earmarked public monies for direct and indirect use by religious elementary and secondary schools . . . . [but] developed far less stringent rules for governmental funds that flowed to sectarian colleges"). Professor Kirby suggests that one reason for this different treatment, at least where Catholic schools are concerned, is that "[a]t the lower levels, Catholic education is an integral part of the practice and propagation of the Catholic faith" while "under national standards of academic freedom and tenure, there is much truly separable secular instruction in church-related higher education." Kirby, *supra* note 100, at 572; *see also* Everson v. Board of Educ., 330 U.S. 1, 24 (1947) (Jackson, J., dissenting) (arguing that "Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself").

Public Works of Maryland,[136] the Court upheld a Maryland statute that granted aid in the form of subsidies to all private institutions of higher learning as long as the subsidy was not "utilized by the institution for sectarian purposes."[137] In upholding the statute, the Court concluded that the colleges were not "pervasively sectarian"[138] in purpose and in fact were "characterized by a high degree of institutional autonomy"[139] from their religious affiliates.[140] Thus, the Court concluded that the *Lemon* standard would not be offended by the aid.[141]

One of the areas of Establishment Clause doctrine in which the Court's decisions have remained fairly consistent are those cases in which religious groups seek access to educational facilities open to the public.[142] Generally, the Court has noted that to deny a religious group its freedom of expression, guaranteed by the First Amendment, in a state-created forum is to "demonstrate not neutrality but hostility toward religion."[143] One of the earliest cases to test this issue was *Widmar v. Vincent*,[144] in which a registered student religious group sought access to facilities at the University of Missouri at Kansas City,

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136. 426 U.S. 736 (1976)

137. *Id.* at 741 (quoting MD. ANN. CODE art. 77A, § 68A (1975)).

138. *Id.* at 755.

139. *Id.*

140. *Id.*; *see also* Hunt v. McNair, 413 U.S. 734, 743 (1973) (upholding state aid to a Baptist college and holding that "the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends"); Tilton v. Richardson, 403 U.S. 672, 689 (1971) (plurality opinion) (upholding construction grants to colleges for buildings and facilities used for secular educational purposes). In *Roemer*, the Court distinguished its decision from that made in Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973), in which the Court invalidated aid to religious secondary and elementary schools because the schools were primarily sectarian in purpose. *Id.* at 796-98. Unlike the colleges involved in *Roemer*, the Court noted, secondary schools "placed religious restrictions on admission and also faculty appointments; that they enforced obedience to religious dogma; that they required attendance at religious services and the study of particular religious doctrine; [and] that they were an 'integral part' of the religious mission of the sponsoring church." *Roemer*, 426 U.S. at 752 n.18; *see also Nyquist*, 413 U.S. at 767-68 (noting the same phenomenon).

141. *Roemer*, 426 U.S. at 766-67.

142. *See Rosenberger*, 115 S. Ct. at 2525 (O'Connor, J., concurring) ("Th[e] insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all."); Jeff Horner, *Access to Educational Facilities for School and Public Groups*, 54 EDUC. L. REP. 1, 3 (West 1989) (noting that the Court has "generally upheld the use of school facilities by outside church groups for secular purposes"); *see generally* IVERS, *supra* note 115, at 17-41 (discussing equal access cases under the Establishment Clause).

143. Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 248 (1990).

144. 454 U.S. 263 (1981)

to conduct its meetings.[145] The group was denied access because of a University regulation that prohibited the use of school buildings "for purposes of religious worship or religious teaching."[146] The Court held that the denial of access to the religious group represented content-based discrimination[147] and that the state's interest in avoiding an Establishment Clause violation was not sufficiently compelling because no such violation would occur.[148]

Twelve years after *Widmar*, the Court faced similar facts in *Lamb's Chapel v. Center Moriches Union Free School District*;[149] however, in *Lamb's Chapel* the access was sought by a religious group to use secondary and elementary school facilities open to the public by the school district.[150] The religious group was an evangelical church, Lamb's Chapel, that sought to use a public school facility to show a set of films on parenting from a Christian perspective.[151] In requiring that the school district open its facilities to the religious group, the Court held that "as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."[152]

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145. *Id.* at 265.

146. *Id.*

147. *But cf. Rosenberger*, 115 S. Ct. at 2517 (finding discrimination against religious groups to be viewpoint discrimination instead of content discrimination).

148. *Widmar*, 454 U.S. at 270-75. The Court used the *Lemon* test to reach the conclusion that "a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion." *Id.* at 273.

149. 113 S. Ct. 2141 (1993).

150. *Id.* at 2143.

151. *Id.* at 2143-44. The film series contained lectures by Dr. James Dobson, a clinical professor of pediatrics and a best-selling author, on "influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage." *Id.* at 2144.

152. *Id.* at 2148. Like the *Widmar* Court, the *Lamb's Chapel* Court used the three-part *Lemon* test to find that "the challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion." *Id.* This led Justice Scalia, in his opinion concurring in the judgment, to make his now-famous remark condemning the *Lemon* test. *See supra* note 113. In response to Justice Scalia's condemnation, Justice White, writing for the majority, noted that "while we are somewhat diverted by Justice Scalia's evening at the cinema, we 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." *Id.* at 2148 n.7; *see also* Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2444-64 (1995) (holding that the state of Ohio was required to allow the Ku Klux Klan to place a cross in the Capitol Square, which the Court regarded as a traditional public forum). The Court in *Pinette* noted that "[w]e have twice previously addressed the combination of private religious expression, a forum available for public use, content-based

In addition to the Establishment Clause issues presented by cases such as *Widmar* and *Lamb's Chapel*, the Court often faces—as in *Rosenberger*— accompanying freedom of speech issues. One critic has observed a "tension inherent in attempting to reconcile the constitutional promises of church-state separation, religious free exercise, and freedom of speech embodied in the First Amendment."[153] One reason for this tension is that freedom of speech cases involving the deceptively well-defined three categories of fora—the traditional public forum, the limited public forum and the non-public forum—have caused tremendous confusion.[154] As one critic noted:

> In a world of disputatious academic criticism, the unrelenting and unanimous condemnation of contemporary public forum doctrine is truly remarkable. The critics' reasons for rejecting the doctrine are nearly always the same. Public forum doctrine is said to depend upon a "myopic focus on formalistic labels" that "serve only to distract attention from the real stakes" at issue in disputes over public use of government resources for communicative purposes.[155]

At least one Supreme Court Justice has argued, however, that the forum categories were not meant to be definite, explaining that "[t]he line between limited public forums and nonpublic forums 'may blur at the edges' and is really more in the nature of a continuum than a definite demarcation."[156]

Perry Education Association v. Perry Local Educators' Association is the Supreme Court opinion most often cited for its

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regulation [as opposed to viewpoint-based regulation], and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content." *Id.* at 2446 (citing *Widmar* and *Lamb's Chapel*). Curiously, however, the Court in *Pinette* did not use the *Lemon* test to strike down the restriction as it did in *Widmar* and *Lamb's Chapel*. *Widmar*, 454 U.S. at 273; *Lamb's Chapel*, 113 S. Ct. at 2148.

153. IVERS, *supra* note 115, at 17.

154. *See, e.g.*, Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984) (arguing that the three categories distract "attention from the first amendment values at stake in a given case"); Keith Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335, 341 (1986) (condemning the doctrine as a confusing and simplistic "jurisprudence of labels").

155. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1716 n.7 (1987) (quoting Stone, *supra* note 10, at 93); *see also* Robert L. Waring, Comment, *Talk Is Not Cheap: Funded Student Speech at Public Universities on Trial*, 29 U.S.F. L. REV. 541, 555-62 (1995) (discussing public fora in the context of mandatory university student fees).

156. Cornelius v. NAACP, 473 U.S. 788, 819 (1985) (Blackmun, J., dissenting).

definition and explanations of the three forum categories.[157] In *Perry*, the Court stated that "[i]n a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject."[158] However, in defining the nonpublic forum, the Court recognized that "public property which is not by tradition or designation a forum for public communication is governed by different standards."[159] Within these nonpublic fora, the Court declared, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[160]

Additionally, a forum may be created for a limited purpose such as use by certain groups or for discussion of certain subjects.[161] However, the Court has held that if the limited forum maintains the characteristics of a public forum, then, as long as the State maintains the forum, "it is bound by the same standards as apply in a traditional public forum . . . . [such that] a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."[162] If the limited forum is deemed to be a nonpublic limited forum, then the Court has required the State's restrictions on speech to be merely reasonable in light of the stated purpose of the forum.[163]

For example, in *Cornelius v. NAACP*,[164] the Court held that the federal government had created a limited nonpublic forum by creating the Combined Federal Campaign, a charity drive aimed at federal employees and limited to nonprofit charitable organizations that provided health and welfare services to individuals and families.[165] Thus, the Court held that the government could restrict the speech of the forum as long as the restrictions satisfied the reasonableness standard and were viewpoint neutral.[166] However, the Court

157. Gail P. Sorenson, *The 'Public Forum Doctrine' and Its Application in School and College Cases*, 20 J.L. & EDUC. 445, 445 n.2 (1991); Waring, *supra* note 155, at 555.

158. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983).

159. *Id.* at 46.

160. *Id.*

161. *Id.* at 46 n.7 (noting that "[a] public forum may be created for a limited purpose such as use by certain groups . . . or for the discussing of certain subjects").

162. *Id.* at 46.

163. *Id.*

164. 473 U.S. 788 (1985).

165. *Id.* at 801-06.

166. *Id.* at 806.

warned that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[167]

Like the forum determination, the inquiry into whether a government action is a content-based restriction or a viewpoint-based restriction is a significant one because of the consequences that follow such a determination.[168] When the government restricts particular views taken by a speaker on a subject, instead of the whole subject matter, the violation of the First Amendment is more blatant.[169] In the Court's own words, "[v]iewpoint discrimination is thus an egregious form of content discrimination."[170] For example, in *R.A.V. v. City of St. Paul*,[171] the Court struck down a St. Paul ordinance that prohibited bias-motivated speech based on race, religion, creed, or gender.[172] The Court held that the ordinance went "beyond mere content discrimination, to actual viewpoint discrimination,"[173] because it restricted one side of a debate—the side that used bias-motivated speech—and not the other side—those

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167. *Id.*

168. *See* Post, *supra* note 155, at 1824-32 (discussing the differences between viewpoint discrimination and content-based discrimination and the reasons why viewpoint discrimination is impermissible).

169. *Rosenberger*, 115 S. Ct. at 2516.

170. *Id.* Professor Post has demonstrated the difference between viewpoint and content discrimination in the following manner:

> University A chooses not to fund any political groups. All University A's political student groups are denied funding based on the political content of their speech [this is content discrimination] . . . . Meanwhile, University B refuses to fund any political group that advocates the overthrow of the current government [this is viewpoint discrimination] . . . .

Post, *supra* note 155, at 1751. Another observer has stated: "University A's policy will likely survive constitutional scrutiny because it treats all political groups equally . . . . University B's policy will not survive constitutional scrutiny because it treats political student groups unequally, discriminating among their individual political viewpoints." Elizabeth E. Gordon, Comment, *University Regulation of Student Speech: Considering Content-Based Criteria Under Public Forum and Subsidy Doctrines*, 1991 U. CHI. LEGAL F. 393, 399.

171. 505 U.S. 377 (1992).

172. *Id.* at 395-96.

173. *Id.* at 391.

who spoke in favor of tolerance and equality.[174] This viewpoint discrimination, held the Court, was impermissible.[175]

In light of the confused state of both the freedom of speech and Establishment Clause doctrines, it is difficult to determine whether the Court in *Rosenberger* remained consistent with its past holdings. The Court provided no new insight as to its position on the *Lemon* test[176] but did add clarity to its views on several freedom of speech issues in the context of the mandatory student fee system at public universities.[177] While some critics have viewed the *Rosenberger* decision as a victory for accommodationists,[178] others decry the fact that the Court did not seem eager to profess explicit support for the accommodationist perspective.[179] Most critics agree, however, that

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174. *Id.* at 391-92. Thus, the Court noted that

> [d]isplays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But 'fighting words' that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc. tolerance and equality, but could not be used by those speakers' opponents.

Id. at 391.

175. *Id.*

176. *See infra* notes 181-83 and accompanying text.

177. *See infra* notes 184-93 and accompanying text.

178. *See, e.g.*, Phillip Walzer & Esther Diskin, *Religious Free Speech, Some Colleges May Choose to Stop Funding All Activities*, VIRGINIAN-PILOT, June 30, 1995, at A1 (quoting Jay Sekulow, Chief Counsel for the American Center for Law and Justice, as saying, "[w]e have crossed a critical threshold in the fight for religious liberty"). In response to this "victory" for accommodationists, however, Barry Lynn, Executive Director of Americans United for the Separation of Church and State, said: "When you have a public university picking the pockets of some students to pay for the evangelizing of other students, that's not free speech. That's tyranny." *Id.*

179. *See, e.g.*, Julia Lieblich, *Christian Soldier Wins Skirmish*, TIMES-PICAYUNE, July 1, 1995, at D8 (noting that "[w]hat rankles Rosenberger is that four judges dissented, maintaining that the decision violated the Constitution"). Rosenberger has expressed his discontent with the lack of unanimity in the Court in this case elsewhere:

> What is shocking to me is not the fact that I won, but that four of the nine justices failed to see the light. Four of the highest judges in our nation, not to mention the judges in the lower courts who ruled against us, believe that the University of Virginia was justified in denying Wide Awake equal access. This means that replacing just one justice could give us a strikingly different decision in future religious liberty cases.

Prepared Testimony of Ronald W. Rosenberger Before the Senate Judiciary Committee, FED. NEWS SERVICE (Sept. 12, 1995) *available in* LEXIS, NEWS Library, FEDNEW file. Other critics have commented on Justice O'Connor's emphasis on a resolution of Establishment Clause cases that involves case by case analysis with no "categorical obstinacy," *Rosenberger*, 115 S. Ct. at 2528 (O'Connor, J., concurring), as limiting the strength and clarity of the victory for accommodationists. *See, e.g.*, Schwartz, *supra* note 53 at 22 (noting that Justice O'Connor "has been on the winning side in every religion

Rosenberger will clearly, and most likely detrimentally, affect the future of university student fee systems.[180]

One significant aspect of the *Rosenberger* decision is that the Court decidedly chose not to invoke the *Lemon* test in reaching its decision that funding WAP was not a violation of the Establishment Clause. However, the fact that the Court merely chose not to use *Lemon*, rather than explicity overruling it, may not be the victory that *Lemon*'s opponents desire.[181] Just two years before *Rosenberger* was decided, in *Lamb's Chapel*, Justice White remarked that *Lemon* had not been overruled and thus was a necessary aspect of deciding Establishment Clause cases.[182] Many critics noted prior to *Rosenberger* that a majority of the *Rosenberger* Court seemed poised to overrule *Lemon*.[183] However, the Court provided no explanation for its nonapplication. Inevitably, the *Rosenberger* Court will draw criticism for not clarifying its position on the notorious *Lemon* test.

By implication, it appears that the Court did make several decisions regarding its position on free speech issues. For example, one of the most hotly contested issues of the briefs submitted to the Supreme Court in *Rosenberger* was whether the University's action constituted content or viewpoint discrimination.[184] In its brief, WAP cited *Lamb's Chapel*, in which the Court stated that "it discriminates on the basis of *viewpoint* to permit school property to be used for the presentation of all views . . . except those dealing with the subject matter from a religious standpoint."[185] However, in *Windmar*, the case upon which *Lamb's Chapel* was largely based, the Court held that "we are unable to recognize the State's interest as sufficiently

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case, often writing separately," for the past decade); *see also* Lieblich, *supra*, at D8 (describing Rosenberger as "distressed" that Justice O'Connor "wrote that the First Amendment's establishment clause on religion could not 'easily be reduced to a single test' . . . suggest[ing] that the Court was going to tackle church-state issues case by case").

180. *See infra* notes 194-218 and accompanying text.

181. *See, e.g.*, Jennifer Ferranti, *High Court Mandates Equal Treatment for Religion: University Ordered to Fund Wide Awake Magazine*, CHRISTIANITY TODAY, Aug. 14, 1995, at 62 (noting that "legal experts caution that the victory is a limited one" for accommodationists because, among other aspects of the opinion, *Lemon* was not explicitly overruled).

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

183. *See, e.g.*, Sekulow et al., *supra* note 3, at 358 (noting that Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas had all expressed their discomfort with *Lemon*).

184. *See* Brief of Petitioner at 16-20, Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510 (No. 94-329); Brief of Respondent at 6-8, *Rosenberger* (No. 94-329).

185. Brief of Petitioner at 18, *Rosenberger* (No. 94-329) (quoting *Lamb's Chapel*, 113 S. Ct. 2141, 2147 (1993)) (emphasis added).

'compelling' to justify *content-based* discrimination against respondents' religious speech."[186] One significant aspect of the *Rosenberger* opinion, then, is that the Court concluded that a prohibition on all forms of religious speech is viewpoint discrimination and not content discrimination.[187]

Similarly, the Supreme Court appeared to establish that a student fee system at a university constituted a limited public forum.[188] In *Widmar v. Vincent*, the Supreme Court held that the university setting could generally be thought of as a limited public forum because "the University was not required to create the forum in the first place."[189] The *Widmar* Court required the University to show a compelling state interest for discriminating against the content of student speech, even though the Court recognized that the University could close the forum completely.[190] However, lower courts have split on the issue of whether student fee systems at public universities, as opposed to a university's physical facilities, are limited public fora or nonpublic fora.[191] Even though the district court in *Rosenberger* held that the University of Virginia had created a nonpublic

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186. Widmar v Vincent, 454 U.S. 263, 276 (1981) (emphasis added). In one significant lower court student fee case, the Eighth Circuit used the concepts of content and viewpoint discrimination interchangeably. *See* Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 366 (8th Cir. 1988). One student commentator argued that the Court's failure to distinguish between viewpoint and content discrimination was entirely appropriate because "[w]hen the subject matter of which a group speaks is inherently controversial, it is difficult to categorize the discrimination against it as either content-based or viewpoint-based." Carolyn Wiggin, Note, *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, 2034 (1994).

187. *Rosenberger*, 115 S. Ct. at 2517.

188. *Id.*

189. *Widmar*, 454 U.S. at 268.

190. *Id.* The Court recognized that

> First Amendment rights must be analyzed "in light of the special characteristics of the school environment." . . . A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.

Id. at 268 n.5 (citation omitted).

191. *See, e.g.*, Tipton v. University of Hawaii, 15 F.3d 922, 923-24 (9th Cir. 1994) (upholding district court's summary judgment finding that the university's student fee system was a nonpublic forum); Carroll v. Blinken, 957 F.2d 991, 1001 (2d Cir.), *cert. denied*, 113 S. Ct. 300 (1992) (holding that student fee system is a limited public forum); Kania v. Fordham, 702 F.2d 475, 479 n.7 (4th Cir. 1983) (holding that the campus of a public university possesses many of the characteristics of a public forum).

forum,[192] the Supreme Court concluded that the student fee system was a limited public forum though "more in a metaphysical than in a spatial or geographic sense."[193]

One potential consequence of the *Rosenberger* opinion is that it calls into question the longevity of student fee programs at public universities around the country. As Justice O'Connor warned in her concurrence in *Rosenberger*, "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."[194] In such a case, the Court could be faced with "[f]our distinct lines of First Amendment doctrine" never before combined in one case,[195] including: freedom of speech and association, viewpoint limitations on speech,[196] public forum analysis, and the right of a university to allocate scarce resources.[197] The *Rosenberger* Court clarified its position on three of these four lines of First Amendment doctrine, leaving the compelled speech and association issues of mandatory student fees for a later determination.[198]

Several of the Supreme Court's prior cases may be relevant in a suit challenging the assessment of student activities fees used to support speech, especially the Court's decisions regarding challenges to compelled association in the union fee context.[199] For example, in *Abood v. Detroit Board of Education*,[200] the Supreme Court was faced with a challenge to the " 'agency shop' arrangement, whereby every employee represented by a union—even though not a union

192. Rosenberger v. Rector and Visitors of the Univ. of Va., 795 F. Supp. 175, 180 (W.D. Va. 1992), *aff'd*, 18 F.3d 269 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).

193. *Rosenberger*, 115 S. Ct. at 2517. One commentator has argued that this decision will affect the Court's future resolution of forum analysis regarding the funding of "cyberspace" at public universities. Joseph C. Beckham & William Schmid, Jr., *Forum Analysis in Cyberspace: The Case of Public Sector Higher Education*, 98 EDUC. L. REP. 11 (1995).

194. *Rosenberger*, 115 S. Ct. at 2527 (O'Connor, J., concurring).

195. Waring, *supra* note 155, at 542 (quoting Galda v. Rutgers, 772 F.2d 1060, 1071 (3d Cir. 1985) (Adams, J., dissenting)).

196. *See supra* notes 184-87 and accompanying text.

197. Waring, *supra* note 155, at 542.

198. The *Rosenberger* decision clarified the Court's position on the content versus viewpoint discrimination issue, see *supra* notes 184-87 and accompanying text, and public forum analysis of the student fee system, see *supra* notes 188-93 and accompanying text. The Court also dismissed the University's arguments that it needed wide discretion in the distribution of its fees. *See supra* notes 40-44 and accompanying text.

199. Waring, *supra* note 155, at 547-51.

200. 431 U.S. 209 (1977) (plurality opinion).

member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues."[201] Some of the fees were used by the labor union for political activities not involving collective bargaining.[202] Thus, the Court noted that these fees might hinder "an employee's freedom to associate for the advancement of ideas, or to refrain from doing so."[203] While it validated the mandated fees used for collective-bargaining purposes, the Court held that the agency could not force the union employees to pay for "the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to . . . collective-bargaining."[204] The precise procedure of avoiding the mandatory fee for political activities was left up to the parties.[205]

Similarly, in *Keller v. State Bar of California*,[206] the Court dealt with the issue of mandatory fee payments to the California State Bar Association and the use of those fees to fund ideological activities such as lobbying the state legislature, filing amicus curiae briefs, and approving resolutions of the state bar.[207] Relying on *Abood*, a unanimous Supreme Court held that the bar association, resembling a union, cannot use its mandatory fees to fund "activities having political or ideological coloration."[208] The Court also noted that the " 'constitutional requirements for the [association's] collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.' "[209]

Although the Supreme Court has never addressed the issue of mandatory student fees and the compelled speech and associational implications the fees present, several lower courts have done so.[210]

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201. *Id.* at 211. The union in *Abood* was a union of public school teachers. *Id.*
202. *Id.* at 213.
203. *Id.* at 222.
204. *Id.* at 235-36.
205. *Id.* at 237-42.
206. 496 U.S. 1 (1990).
207. *Id.* at 5.
208. *Id.* at 15.
209. *Id.* at 16 (quoting Keller v. State Bar, 767 P.2d 1020, 1046 (Cal. 1989) (Kaufman, J., concurring and dissenting) (quoting Chicago Teachers Union v. Hudson, 475 U.S. 292, 210 (1986))).
210. *See, e.g.*, Carroll v. Blinken, 957 F.2d 991, 995-1001 (2d Cir.), *cert. denied*, 113 S. Ct. 300 (1992) (upholding use of mandatory student fees at the State University of New York at Albany for a public interest research group); Galda v. Rutgers, 772 F.2d 1060, 1068 (3d Cir. 1985) (holding unconstitutional the use of mandatory student fees at Rutgers University to support an organization engaged in research, lobbying, and advocacy for

Smith v. Regents of the University of California,[211] decided by the California Supreme Court, is one example of several recent lower court cases in which students have challenged the student fee system at their universities on compelled speech and associational grounds. The plaintiffs in *Smith*, students at the University of California at Berkeley, sought to recover the portion of their student fees that funded speech with which they did not agree.[212] While the California Supreme Court held that the Regents of the University of California were constitutionally permitted to collect the student fees, the money raised by the fees could be used only for activities that were "germane" to education.[213] The California Supreme Court stated that recognizing all student political activity as germane to education would put "a much greater burden on speech and associational rights than the high court [in *Keller*] necessarily contemplated when it used that term [germane]."[214] In identifying which activities could permissibly receive funding, the Court suggested that the University weigh each organization's "political and ideological activities" against its educational benefit with the purpose of protecting student's rights from subsidization of political speech.[215]

The *Smith* Court's analysis, if adopted by the United States Supreme Court—a plausible outcome in light of *Abood* and *Keller*—would probably sound a death knell for the student fee system as it exists today. Facing the possibility of having to establish a system that would require such immense oversight, many universities would most likely opt to avoid the entanglement by dismantling their existing student fee systems. In response to the *Rosenberger* decision, the University of Virginia established a committee to "come up with a plan for making student fees at least partially optional to

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social change), *cert. denied*, 475 U.S. 1065 (1986); Kania v. Fordham, 702 F.2d 475, 477-80 (4th Cir. 1983) (upholding use of student fees at the University of North Carolina at Chapel Hill for the support of the student newspaper); Larson v. Bd. of Regents of the Univ. of Neb., 204 N.W.2d 568, 570-71 (Neb. 1973) (affirming denial of injunctive relief in a challenge to the use of mandatory student fees to fund a student newspaper). For a detailed and informative discussion of all of these cases, see generally Waring, *supra* note 155, at 570-85.

211. 844 P.2d 500 (Cal.), *cert. denied*, 114 S. Ct. 181 (1993).

212. *Id.* at 505. The fee collected by the University in 1982 when the case began was $12.50 per student, per quarter. *Id.* at 504. More than 150 student organizations were funded by the student fees including the Campus Abortion Rights Action League, the Gay and Lesbian League, the National Organization for Women, and Greenpeace Berkeley. *Id.* at 504-05.

213. *Id.* at 507-08.

214. *Id.* at 508.

215. *Id.* at 513.

avoid future lawsuits."[216] The committee is also considering abolishing the student fee system altogether.[217] Other universities are responding to the *Rosenberger* decision by discussing potential modifications of their own student fee systems and by closely observing what critics have called the "conservative" approach to modification at the University of Virginia.[218]

Some commentators have argued that the end of government funding of speech would be a much easier response to *Rosenberger* for public universities.[219] As one observer noted, "The most sensible solution is no government funding, which would avoid vexing constitutional problems and acrimonious social disputes."[220] Other commentators view the potential end of the student fee system not only as a sensible response, but also as a desirable one:

> If cities were run like some colleges and universities, all the service clubs and unions and churches and garden clubs in town would be supported by general taxation and we would all be excused from paying dues. . . . What happened to the concept of expecting people, student or otherwise, to pay the upkeep of their own clubs?[221]

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216. David Reed, *Ruling May End Mandatory Activity Fees*, GREENSBORO NEWS & REC., Sept. 23, 1995, at B7.

217. *Id.*

218. *See id.* (noting that legal experts "believe the ruling will lead to the end of mandatory student activities fees" and that "dozens of colleges have . . . called Virginia's student government and student affairs offices to see how the school is interpreting the Supreme Court ruling"); *Court Ruling Forces UVa. to Regroup*, THE DAILY TAR HEEL, Sept. 7, 1995, at 1 (noting that the "Supreme Court's decision in [*Rosenberger*] has forced universities across the nation to revaluate [sic] their own funding requirements" and that the University of Virginia was taking "a conservative approach" to modifying its system for that reason). Regarding the University of Virginia's conservative approach, the student body president at the University recently said, "If we open Pandora's Box and give student activities funds to every organization, we won't survive the onslaught . . . . We know other schools are watching us, and we are being especially careful for that reason." *Court Ruling Forces UVa. to Regroup*, *supra*, at 1. Ronald Rosenberger, Wide Awake's founder, recently commented on UVa's conservative response to the *Rosenberger* decision by labeling it a "Band-Aid solution." *Prepared Testimony of Ronald W. Rosenberger Before the Senate Judiciary Committee*, FED. NEWS SERVICE (Sept. 12, 1995), *available in* LEXIS, NEWS Library, FEDNEW File. Rosenberger explained that "[i]nstead of doing away with its discriminatory prohibition against religious activities, those which 'profess or manifest a belief in a deity or ultimate reality,' UVA simply made an exclusion for student publications." *Id.*

219. *See, e.g.*, Robert R. Detlefsen, *Corrective Action or Conservative Hijacking*, RECORDER, Aug. 30, 1995, at 8 (stating that strict neutrality in distributing student fees is the only constitutionally defensible policy).

220. *Id.*

221. Bill Hall, *Supreme Court Not Wacked Out but the Colleges Are*, THE LEWISTON MORNING TRIB., July 9, 1995, at 1F.

Other critics, however, view the potential end of the student fee system as an "erosion of the opportunity for intellectual exploration .... [and] an attempt to homogenize thinking at universities by eliminating support for alternative viewpoints."[222]

It is difficult to say whether mandatory student fees would have continued to thrive at universities around the country had the Supreme Court decided *Rosenberger* differently. Clearly, however, the continued vitality of the student fee system is now in peril, especially because the system invites unlimited cries of foul play any time an organization feels that a denial of funding is silencing its expression. One critic has argued that Rosenberger's expression was hardly silenced by the University.[223] His group "was free to distribute its own literature, to hold meetings and to speak on university grounds. What the university denied to *Wide-Awake* magazine was the *privilege* of having the university use student fees to subsidize its plainly sectarian message."[224] Perhaps that "privilege" should be denied to all university groups. Even in the university setting, with its thriving marketplace of ideas, the Fourth Circuit was correct when it warned that "[t]he Speech and Press Clause cannot be metamorphosed into a promise that the federal government will purchase a bullhorn, paper, and ink for the convenience of every garrulous member of the American populace" who wishes to have a subsidized forum, funded by taxpayers, for the distribution of her particular ideas.[225]

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222. Waring, *supra* note 155, at 628. Waring also cites the dissent in *Smith v. Regents of the University of California* in which Justice Arabian observed:

> We are given here the solemn opportunity [by preserving the student fee system] of enriching the spirit of liberty by shielding all persons against the imposition of an educational philosophy based on cynicism and divisiveness by fashioning a decree which fosters the concept of community as opposed to constructing a wall of separatism. This we have failed to do. We have lost the light of wisdom and diminished our noble heritage.

844 P.2d 500, 533 (Cal.) (Arabian, J., dissenting), *cert. denied*, 114 S. Ct. 181 (1993), *quoted in* Waring, *supra* note 155, at 630.

223. *Church and State United*, ATLANTA J. & CONST., July 8, 1995, at A10.

224. *Id.*

225. Rosenberger v. Rector and Visitors of the Univ. of Va., 18 F.3d 269, 277 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).