***Rosenberger v. University of Virginia*** **(1995)**

515 U.S. 819

*The Student Activity Fund (SAF) at the University of Virginia receives its money from mandatory student fees and supports extracurricular student activities related to the university's educational purposes. In order to qualify for SAF support, a student organization must be recognized as a "contracted independent organization" (CIO) by the university. CIOs are required by university regulation to include in their dealings with third parties and in all written materials a disclaimer, stating that the CIO is independent of the university and that the university is not responsible for the CIO. The University of Virginia authorizes payment from the SAF to outside contractors for the printing costs of student publications. The university's guidelines recognize various categories of CIOs that can receive such payment, including "student news, information, opinion, entertainment, or academic communications media groups." The guidelines, however, specify that the costs of certain activities of CIOs that are otherwise eligible for funding, including religious activities, cannot be reimbursed by the SAF.*

*Wide Awake Productions (WAP), which was formed by Ronald Rosenberger and other undergraduates in 1990, qualified as a CIO. The organization published a newspaper, Wide Awake: A Christian Perspective at the University of Virginia, whose mission was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." When WAP requested the SAF to pay the costs of printing the newspaper, the SAF denied the request on the grounds that Wide Awake was a "religious activity." After appeals of the decision within the university proved unavailing, WAP,* Wide Awake, *and three of its editors filed suit in federal court, charging that the refusal to authorize payment of the printing costs solely on the basis of Wide Awake's religious orientation violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the laws. In response, the University of Virginia contended that underwriting the printing costs of a religious publication would violate the Establishment Clause. After the district court and the court of appeals ruled for the university, the US Supreme Court granted certiorari.*

Opinion of the Court: Kennedy, Rehnquist, O'Connor, Scalia, Thomas.

Concurring opinions: O'Connor; Thomas.

Dissenting opinion: Souter, Stevens, Ginsburg, Breyer.

**JUSTICE KENNEDY delivered the opinion of the Court**.

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Department of Chicago v. Mosley* (1972). Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.

These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving

a school district's provision of school facilities for private uses, we declared that "there is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel v. Center Moriches Union Free School District* (1993). The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," nor may it discriminate against speech on the basis of its viewpoint. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed 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.

The most recent and most apposite case is our decision in *Lamb's Chapel*. There, a school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the district rejected a request from a group desiring to show a film series addressing various child-rearing questions from a "Christian perspective." Our conclusion was unanimous: "It discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint."

The University tries to escape the consequences of our holding in *Lamb's Chapel* by urging that this case involves the provision of funds rather than access to facilities. To this end the University relies on our assurance in *Widmar v. Vincent*. There, in the course of striking down a public university's exclusion of religious groups from use of school facilities made available to all other student groups, we stated: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." The quoted language in Widmar was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices.

The distinction between the University's own favored message and the private speech of students is evident in the case before us. The University itself has taken steps to ensure the distinction in the agreement each CIO must sign. The University declares that the student groups eligible for SAF support are not the University's agents, are not subject to its control, and are not its responsibility. Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is 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. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of

free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.

Based on the principles we have discussed, we hold that the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment. It remains to be considered whether the violation following from the University's action is excused by the necessity of complying with the Constitution's prohibition against state establishment of religion. We turn to that question.

A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic. It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises. There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIOs by reason of their officers and membership. Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis.

To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.

The judgment of the Court of Appeals must be, and is, reversed.

**JUSTICE O'CONNOR, concurring**.

"We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or don't worship." *Board of Education of Kiryas Joel Village School District v. Grumet* (1994). As JUSTICE SOUTER demonstrates, however, there exists another axiom in the history and precedent of the Establishment Clause. "Public funds may not be used to endorse the religious message." *Bowen v. Kendrick* (1988). This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. It is clear that the University has established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes

some 15 student publications with predictably divergent viewpoints. It is equally clear that petitioners' viewpoint is religious and that publication of *Wide Awake* is a religious activity, under both the University's regulation and a fair reading of our precedents. Not to finance *Wide Awake*, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance *Wide Awake*, argues the University, violates the prohibition on direct state funding of religious activities.

When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified. The Court today does only what courts must do in many Establishment Clause cases—focus on specific features of a particular government action to ensure that it does not violate the Constitution. By withholding from *Wide Awake* assistance that the University provides generally to all other student publications, the University has discriminated on the basis of the magazine's religious viewpoint in violation of the Free Speech Clause. And particular features of the University's program—such as the explicit disclaimer, the disbursement of funds directly to third-party vendors, the vigorous nature of the forum at issue, and the possibility for objecting students to opt out—convince me that providing such assistance in this case would not carry the danger of impermissible use of public funds to endorse *Wide Awake*'s religious message.

**JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG and JUSTICE BREYER join, dissenting**.

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such. Because there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause. I would therefore affirm.

This writing is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems. Nor is it merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation. It is 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. These are not the words of "student news, information, opinion, entertainment, or academic communication" (in the language of the University's funding criterion), but the words of "challenge to Christians to live, in word and deed, according to the faith they proclaim and to consider what a personal relationship with Jesus Christ means" (in the language of *Wide Awake*'s founder). The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money. Evidence on the subject antedates even the Bill of Rights itself, as may be seen in the writings of Madison, whose authority on questions

about the meaning of the Establishment Clause is well settled. Four years before the First Congress proposed the First Amendment, Madison gave his opinion on the legitimacy of using public funds for religious purposes, in the Memorial and Remonstrance Against Religious Assessments, which played the central role in ensuring the defeat of the Virginia tax assessment bill in 1786 and framed the debate upon which the Religion Clauses stand "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?"

Madison wrote against a background in which nearly every Colony had exacted a tax for church support, the practice having become "so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence." Madison's Remonstrance captured the colonists' "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." Their sentiment as expressed by Madison in Virginia, led not only to the defeat of Virginia's tax assessment bill but also directly to passage of the Virginia Bill for Establishing Religious Freedom, written by Thomas Jefferson. That bill's preamble declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," and its text provided "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." We have "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."

The principle against direct funding with public money is patently violated by the contested use of today's student activity fee. Like today's taxes generally, the fee is Madison's three pence. The University exercises the power of the State to compel a student to pay it, and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly held to be the heart of the prohibition on establishment. The Court, accordingly, has never before upheld direct state funding of the sort of proselytizing published in *Wide Awake* and, in fact, has categorically condemned state programs directly aiding religious activity. Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter.

Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme here is a clear constitutional violation? The answer is that the Court focuses on a subsidiary body of law, which it correctly states but ultimately misapplies. The relationship between the prohibition on direct aid and the requirement of evenhandedness when affirmative government aid does result in some benefit to religion reflects the relationship between basic rule and marginal criterion. At the heart of the Establishment Clause stands the prohibition against direct public funding, but that prohibition does not answer the questions that occur at the margins of the Clause's application. Is any government activity that provides any incidental benefit to religion likewise unconstitutional? Would it be wrong to put out fires in burning churches, wrong to pay the bus fares of students on the way to parochial schools, wrong to allow a grantee of special education funds to spend them at a religious college? These are the questions that call for drawing lines, and it is in drawing them that evenhandedness becomes important.

Evenhandedness as one element of a permissibly attenuated benefit is, of course, a far cry from evenhandedness as a sufficient condition of constitutionality for direct financial support of religious proselytization, and our cases have unsurprisingly repudiated any such attempt to cut the Establishment Clause down to a mere prohibition against unequal direct aid.

Since I cannot see the future I cannot tell whether today's decision portends much more than making a shambles out of student activity fees in public colleges. Still, my apprehension is whetted by Chief Justice Burger's warning in *Lemon v. Kurtzman* (1971): "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."