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## The Incarnate Word, That Old Rugged Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity As Jurisprudence

Larry Cata Backer

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**THE INCARNATE WORD, THAT OLD  
RUGGED CROSS AND THE STATE: ON  
THE SUPREME COURT'S OCTOBER  
1994 TERM ESTABLISHMENT  
CLAUSE CASES AND THE PERSISTENCE OF  
COMIC ABSURDITY AS JURISPRUDENCE\***

Larry Catá Backer†

I always like to begin any discussion of the case law of the Religion Clauses with something simple — after all what could be more straightforward than religion in the United States!<sup>1</sup> We Americans have a penchant for *starting* with something simple, and the way in which we have chosen to arrange the relationship between the state and religion is no exception. I refer, of course, to the language of the Religion Clauses themselves: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”<sup>2</sup>

Simple words, very simple. They describe an obligation which is clarity itself. Well, irony has always been the handmaid of constitutional jurisprudence. And we must remember that our American love of simplicity is matched only by our infatuation with its opposite. For the culture that has given us the simplicity of the First Amendment and the Religion Clauses has also produced the Internal Revenue

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\* Based on remarks delivered at the Conference, *Practitioner's Guide to the October 1994 Supreme Court Term*, at The University of Tulsa College of Law, Tulsa, Oklahoma, on November 17, 1995. In order to keep as close to the original flavor of the remarks, the text has been edited sparingly and footnotes have been added.

† Associate Professor of Law, University of Tulsa; B.A. 1977, Brandeis University; M.P.P. 1979, John F. Kennedy School of Government, Harvard University; J.D. 1982, Columbia University.

1. For a flavor of the complexity which passes for religion in this country, see, e.g., MARTIN E. MARTY, *PROTESTANTISM IN THE UNITED STATES: RIGHTEOUS EMPIRE* (2d ed. 1986).

2. U.S. CONST. amend. 1.

Code,<sup>3</sup> Rube Goldberg contraptions,<sup>4</sup> and the jurisprudence of the Religion Clauses in case law and scholarly commentary.<sup>5</sup>

Since first reading *Everson v. Board of Education*,<sup>6</sup> I have become convinced, deep in my heart, that the jurisprudence of the Religion Clauses of the Constitution is sometimes no more than a manifestation of the (mostly French) theater of the absurd.<sup>7</sup> Recall that in *Everson*, the Supreme Court stated uncatagorically that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."<sup>8</sup> On the basis of these *words*, the Court held that the use of public funds to reimburse parents for the cost of their children's bus fares to attend the Catholic School at which these children were enrolled did not violate the Establishment Clause. Thus, much like the task of coordinating the building of the Tower of Babel after God got wind of the enterprise, the task of building a predictable and coherent Establishment Clause jurisprudence reduces itself to the absurdity of the *Everson* case. Judges, lawyers, scholars, politicians — who *cannot* speak the same language, and who do not know they cannot speak the same language because their individual vocabularies are built on identical words (sounds) — reduce words to meaninglessness and elevate judgment, the thing actually done, to jurisprudence.

Very little has changed since 1947 when *Everson* was decided, except that the Supreme Court case law on the Establishment Clause continues to multiply. Like so many dandelion seeds on a breezy day, it is overrunning more and more of the mundane parts of the daily lives of ordinary citizens. This past Term exposes yet again a Supreme

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3. The complexity and perceived unfairness of the current taxing system has spawned a number of political campaigns based on the elimination of income taxation as we now know it. See Nancy Gibbs, *Knock 'em Flat*, TIME, January 29, 1996, at 22.

4. I refer, of course, to those outrageously complex and convoluted machines, designed by Professor Lucifer Gorgonzola Butts, A.K., the purpose of which were to perform absurdly trivial tasks. Professor Butts was the creation of the early twentieth century cartoonist, Rube Goldberg.

5. For a taste of this dialogue, see notes 22-23, below.

6. 330 U.S. 1 (1947).

7. I refer to that movement in French and English theatre, at its popular and creative height in the 1950s and 1960s, that lamented and exposed the senselessness of the human condition. Generally, absurdist writers hold that human beings exist in an unpredictable universe in which their actions tend to compound the general unpredictability of phenomena. Forging predictability is futile in this universe because humans are innately incapable of communicating with each other at any but the most superficial level. For a discussion of absurdist theatre, see, e.g., DEBORAH B. GAENSBauer, *THE FRENCH THEATER OF THE ABSURD* (1991).

8. 330 U.S. at 16.

Court whose members continue hard at work on an Establishment Clause Tower of Babel, each equipped with a unique language made up of words/sounds which are common to all. The October 1994 Term spawned well over a hundred pages of *words* at war with themselves, unintelligible to any but the authors and their linguistic acolytes, and given meaning only through the reality of the judgment actually rendered — the *thing* actually required to be done.

From my perspective, then, Establishment Clause jurisprudence has devolved into an endless conversation between people who, in trying to order a limited universe, find they cannot make themselves understood — an absurdist melodrama. We, as audience, are reduced to finding meaning in the action that proceeds from these nonsensical conversations. Each Establishment Clause opinion produces an interaction between the Justices substantially the same as that between the characters in an absurdist play. Indeed, these opinions call to mind the dialogue between the character of Papa<sup>9</sup> and that of his daughter Josette.<sup>10</sup> These archetypal characters appear in Eugene Ionesco's *Story No. 2*, an absurdist story written, ironically enough, for children. I quote it at length:

Josette says to her Papa, "Are you talking on the telephone?"

Papa hangs up. He says, "This is not a telephone."

"Yes it is," Josette answers. "Mama told me so. Jacqueline [the maid] said so too."

"Your Mama and Jacqueline are wrong," Papa says. "Your Mama and Jacqueline don't know what it is called. It's called cheese."

"That's called a cheese?" asks Josette. "Then people are going to think it made out of cheese."

"No," says Papa, "because cheese isn't called cheese. It's called music box. And the music box is called a rug. The rug is called a lamp. The ceiling is called floor. The floor is called ceiling. The wall is called a door."

So Papa teaches Josette the real meaning of words. A chair is a window. The window is a penholder. A pillow is a piece of bread. Bread is a bedside rug. Feet are ears. Arms are feet. A head is a behind. A behind is a head. Eyes are fingers. Fingers are eyes.

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9. Papa is in many respects and in different contexts our courts, our judges, our commentators, ourselves — each of us attempting an ordering of even the simplest things.

10. Josette is in many respects ourselves, but also at times our courts, our judges, and our commentators — our ordered and orderers. Like Papa and Josette, we change roles to suit ourselves. But, however much we try, we can't extricate ourselves from this dialogue, at once powerful in its implications ("we create meaning") and useless ("we cannot make sense of the meanings we create; they do not fit").

Then Josette speaks the way her father teaches her. She says: "I look out the chair while eating my pillow. I walk with my ears. I have ten eyes to walk with and two fingers to look with. I sit down with my head on the floor. I put my behind on the ceiling. When I have eaten the music box, I put jam on the bedside rug, for a good dessert. Take the window, Papa, and draw me some pictures."<sup>11</sup>

Please keep this little dialogue in mind as we delve through the seemingly endless pages of words accompanying the cases I will discuss today. Everyone, it seems, has developed a personal language to navigate the few words of the Religion Clauses. Shorn of a common language, or even a common ideology for understanding and regulating our public religious lives through the Religion Clauses, the Supreme Court has largely abandoned principle as it cobbles together judgments under the cover of increasingly absurdist, simultaneous monologues which are passed off as principled decisions. But, as I will explain in more detail below, to her credit, at least Justice O'Connor is both conscious of this jurisprudential turn and has begun to incorporate it to some extent into her own judging.

I was asked to discuss today one small aspect of the absurdity that is the Establishment Clause's jurisprudence: the Supreme Court's church-state cases decided during the October 1994 term. I will be looking closely at two cases in the spirit of the dialogue between Josette and her Papa. Both were rendered on June 29, 1995. In one, *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>12</sup> the Supreme Court spoke through five of its members, including a critical, if relatively wishy-washy, concurrence by Justice O'Connor. These five indicated that the University of Virginia, through its student council, had to pay to print a student publication which complied with the authors' duty to, as the Good Book says, "Go into all the world and preach the good news to all creation."<sup>13</sup> In the other case, *Capitol Square Review & Advisory Board v. Pinette*,<sup>14</sup> a majority of the members of the Supreme Court determined that the State of Ohio did not violate the Establishment Clause by permitting the Ku Klux Klan to display an unattended Latin cross on the grounds of the Ohio State Capitol.

Both cases are important for a number of reasons, some of which have already been mentioned by the earlier speakers in connection

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11. EUGENE IONESCO, STORY NUMBER 2 7-11 (1970).

12. 115 S. Ct. 2510 (1995).

13. *Mark* 16:15.

14. 115 S. Ct. 2440 (1995).

with the October 1994 Term race cases. First, and probably for me among the most important, is that these cases continue to evidence a lack of jurisprudential moorings especially relating to Establishment Clause issues. Much like Josette, we are left to try to learn the meaning of the words used by our parents, even as we begin to suspect that neither parent knows what the other is talking about. But, also like Josette, we exist in a world where our parents use the same words to speak different languages. This highlights the *incoherence* inherent in the absurdity which passes for the jurisprudence with which we are saddled.

Second, these cases are especially useful for highlighting the boundaries of the ideological *volk cultures* within the Supreme Court. Specifically they evidence the rise of three *communities* intent on undoing the civilization in which they exist.<sup>15</sup> One of the communities, the Rehnquist-Scalia-Thomas-Kennedy camp, as Judge Sven Erik Holmes noted in his address,<sup>16</sup> might have one time been called conservative. I certainly believe that one cannot, on any principled basis, categorize these Justices as conservative.<sup>17</sup> These are Justices who mouth the conventional language of judicial conservatism and its core notion of restraint, but who use the language to clothe their brand of judicial activism and interventionism. The primary difference between these justices and those on the so-called “left” is their political ideology.<sup>18</sup>

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15. This is meant as a somewhat sly reference to FERDINAND TÖNNIES, *COMMUNITY AND SOCIETY* (Charles Loomis, trans. and ed., 1957) (1887). Particularly relevant is Tönnies notion of language and understanding:

Understanding is based upon intimate knowledge of each other in so far as this is conditioned and advanced by direct interest of one being in the life of the other, and readiness to take part in his joy and sorrow. . . . The real organ of understanding, through which it develops and improves, is language. . . . Language can be used, however, among those who do understand each other as a mere system of symbols, the same as other symbols which have been agreed upon.

*Id.* at 47-48. I refer also to the notions of *Gesellschaft* (civilization) and *Gemeinschaft* (society or folkways superior to the artificiality and isolation of civilization) which were first seriously discussed by Ferdinand Tönnies in the 19th century. TÖNNIES, *supra*. Ultimately, notions of superiority of common folk communities, of “*volkheit*” (peoplehood), over multicultural society were exploited by the craftors of the self styled Nazi “*volk kultur*” to suppress and destroy. See Detlev F. Vagts, *International Law in the Third Reich* 84 AM. J. INT’L L. 661, 687 (1990).

16. Sven Erik Holmes, *Introduction: The October 1994 Supreme Court Term*, 31 TULSA L.J. 421 (1996).

17. For a trenchant analysis of the radicalism of the new so-called judicial conservatives, see Bernard Schwartz, ‘*Brennan v. Rehnquist*’ *Mirror Images in Constitutional Constructions*, 19 OKLA. CITY U. L. REV. 213 (1994).

18. For an interesting commentary on this notion, see, Scott C. Idleman, *Ideology as Interpretation, A Reply to Professor Greene’s Theory of the Religion Clauses*, 1994 U. ILL. L. REV. 337.

The second community is made up of our “leftie judges,” so-called, and usually (but not always) includes Justices Stevens, Breyer and Ginsburg. This is my definition, and I invite your furious disagreement during the question and answer period. Our so-called leftie judges are not necessarily all uniformly leftie (in the conventional or antique sense) or even equally dark shades of pink.<sup>19</sup> For instance, Justice Breyer might be better characterized as a conventional conservative, especially with respect to economic matters; he would certainly be more conventionally conservative than our ostensibly conservative but, in reality populist, Justice Thomas. And then, of course, there is the community in the middle — Justices Souter and O’Connor. These make up the core of what I call the shifting middle, sometimes joined by Justice Kennedy, sometimes by Justice Breyer, sometimes by neither.

What *Rosenberger* and *Pinette* continue to demonstrate is that these communities are good at talking *at* each other, and preaching to their respective cliques outside the Court, but they are incapable of speaking to each other with a commonly comprehensible language. That makes it very easy to criticize their dogma, which is certainly what academics are fond of doing.<sup>20</sup> But we do this without considering the real jurisprudence of the Establishment Clause: there is no *law*, there is only *judgment*.

Third, these cases serve as evidence of the continued juridification of everyday life and especially of everyday *religious* and *political* life.<sup>21</sup> Like Josette, we tend more and more to go to Papa to talk about what in days past might otherwise have been resolved without the intervention of “Papa” Court, or “Papa” Government. This

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19. I refer, of course, with a good bit of irony, to that OLD curse of the American left, its supposed connection with the worldwide communist movement. For those of you too young to remember, communists were sometimes called “reds” and closet communists in this country were sometimes called “pinkos,” referencing some sort of dilution of doctrinal affinity with true “reds.”

20. See, e.g., Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463; Michael W. McConnell and Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986); Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817 (1984); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

21. One gets a taste of the degree to which our courts must negotiate the boundaries of everyday life when one examines the cases in which the courts have been asked to rule on one or another aspect of these borders. See, e.g., Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017 (1995) (with an extensive description of current caselaw).

juridification has lent a certain air of fantasy to real life as we try to squeeze reality through the language filters over which we fight. The results can be surreal. This is especially so in *Pinette* where the battle over real life effects was fought through the reportage of photographs.<sup>22</sup>

Lastly, and perhaps most importantly, these cases continue to highlight the critical importance of factual narrative in a constitutional jurisprudence which has become highly contextualized — dependant on the reality crafted from the factual picture painted by the court. Now what does *that* mean? Jurisprudence does not matter. Standards do not matter. Uniformly applicable rules cannot exist. Facts exist, narratives exist, results exist, sensibilities exist and *judging* exists. Theory exists only as the afterthought of *judgment*. As so eloquently implied by Justice Souter in his dissent in *Rosenberger*, the days of the bright-line rule are long dead.

There is no such thing as jurisprudence, certainly in the recent Establishment Clause cases. There is content, and there is narrative. In the end there is resolution, narrowly tailored to the particular context in which the dispute arose. And, for those of you who don't believe me, I invite you to consider carefully Justice O'Connor's understanding of the Supreme Court's role as Constitutional Common Law Court of last resort as set forth in her concurrence in *Rosenberger*: "Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging — sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case."<sup>23</sup>

For me, then, what this Term's Establishment Clause cases continue to make very clear is that our Supreme Court has basically eliminated — has abandoned — the notion of simple bright line rules. There are no easily applied standards. I would argue that there are no standards at all. What there are, instead, are facts and circumstances. And facts and circumstances are notoriously incapable of generalized

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22. See 115 S. Ct. at 2474. "[I]n other words, it is in the realm of the abstract that the more important things happen in these times, and it is the unimportant that happens in real life." ROBERT MUSIL, *THE MAN WITHOUT QUALITIES I-76* (Eithne Wilkins & Ernst Kaiser trans., 1953) (1930).

23. *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2525-26 (1995) (O'Connor, J., concurring).



treatment. Welcome back to the good old days of the English common law, when courts freely assessed the law, fettered only by the restraints of national culture, as personally understood.

To see how all of these strains work now in the context of Supreme Court discourse this Term, I want to take a close look at both *Rosenberger* and *Pinette*, starting with *Rosenberger*. Since these are ultimately fact driven cases, I start with the facts, first as the five justices who cobbled together the judgment saw them. Justices Kennedy (the author of the Court's opinion), Rehnquist, O'Connor, Scalia, and Thomas see a fairly simple and compelling case.<sup>24</sup>

The University of Virginia authorizes payments from its Student Activities Fund (SAF) to outside contractors for the printing costs of a variety of publications issued by student groups called "Contracted Independent Organizations" (CIOs). The SAF is funded through the collection of a mandatory \$14 per semester student activity fee which is extracted from each student to support a wide variety of student activities.

CIO status is available to any group the majority of whose members are students and which meets a number of other criteria. A religious organization cannot become a CIO. CIOs must include statements in all of their written material disclaiming any association with the University of Virginia. Lots of disclaimers. No problem: any CIO functionary can sign them whether or not he or she actually means what these disclaimers say.

None of this is particularly interesting or important except for one thing — money. The University of Virginia has it, the University means to distribute it, and there are lots of people who want it. The University provided Guidelines which permitted printing cost reimbursement for material falling under one of eleven categories, all deemed related to the educational purposes of the University of Virginia. Among these categories was one covering "student news, information, opinion, entertainment, or academic communications media groups."<sup>25</sup> Certain endeavors were prohibited from gorging at the trough. One was a narrowly defined category — *political activities*. Another was a broadly defined area — *religious activities*. A religious activity was defined as "any activity that primarily promotes or

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24. Substantially all of the rendition of the facts of this case which follows can be found at *Rosenberger*, 115 S. Ct. at 2513-16.

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

manifests a particular belief in or about a deity or an ultimate reality.”<sup>26</sup>

Enter our plaintiff, Wide Awake Productions (WAP), which qualified as a CIO and sought reimbursement of about \$5,800 in printing costs. WAP was established: (i) to publish a magazine (called *Wide Awake*) of philosophical and religious expression; (ii) to facilitate discussion which fosters an atmosphere of sensitivity and tolerance of Christian viewpoints; and (iii) to provide a unifying focus for Christians of multicultural backgrounds.<sup>27</sup>

Well, WAP’s reimbursement request was denied. After exhausting its internal administrative remedies, WAP, *Wide Awake*, and three of its editors filed suit alleging a violation of their civil rights under 42 U.S.C. § 1983 and, most particularly, violation of their rights to freedom of speech and free exercise of religion. These free expression and free exercise rights were denied them by the University because it failed to make money available to Plaintiffs. Though Plaintiffs originally also included several state statutory and constitutional claims in their suit, these were dropped fairly early in the litigation.

The district court granted the University’s motion for summary judgment. It held that the University’s reimbursement refusal did not amount to impermissible content or viewpoint discrimination. That determination was affirmed on appeal by the Fourth Circuit Court of Appeals, but on different grounds. The Appellate Court held that the University’s actions amounted to content discrimination; the Plaintiffs’ First Amendment rights had been violated by the refusal of the University of Virginia to give them money. However, this violation of constitutional rights was of no use to the Plaintiffs because the University’s invidious discrimination in this case was perfectly permissible as it was a greater folly for the Commonwealth of Virginia, through the University of Virginia, to act in a manner which appeared to establish a religion than it was for that entity to give the Plaintiffs’ First Amendment rights (that is, the right of the Plaintiffs to share in the University’s haul from student activities fees) short shrift.

On the basis of this construction of the facts, four Justices determined that *Rosenberger* was primarily a free speech case. This is not hidden from view. Justice Kennedy exclaims early on: “Vital First

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26. *Id.*

27. *Id.* at 2515. Even a cursory reading of this statement of purpose makes it clear that it was quite carefully crafted; the authors were well versed in modern discursive babble and used it to good effect.

Amendment speech principles are at stake here.”<sup>28</sup> For these Justices, what the University of Virginia did in refusing to reimburse *Wide Awake’s* printing costs amounted solely to garden variety viewpoint discrimination and, as such, the resolution of the case was simple and straightforward.<sup>29</sup>

Moreover, for these Justices, the evidence of the viewpoint discrimination practiced by the University of Virginia was also clear. Religion may be a vast area of inquiry, but it also provides a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed. The particular Christian perspective of WAP, not the general subject matter, resulted in the refusal to reimburse. After all, the subject matter included articles on C.S. Lewis, homosexuality, Christian missionary work, racism, crisis pregnancy, eating disorders and the like.<sup>30</sup> The resulting mistreatment of *Wide Awake* denied WAP’s particular Christian perspective at the University of Virginia as opposed to establishing some kind of religion.

Ultimately, there was little difference between this case and the Court’s prior decision in *Lamb’s Chapel v. Center Moriches Union Free School*.<sup>31</sup> According to the Justices, all the University of Virginia was doing was creating a little metaphysical space. The space provided by reimbursement of these expenses ought to be as available to the University of Virginia religious community as the physical space made available to the religious community in *Lamb’s Chapel*. No problem.

The Establishment Clause issues raised by the Court of Appeals were given short shrift by the plurality. The plurality noted that the governmental regulation was neutral towards religion. The SAF was meant to create a metaphysical open forum for speech.<sup>32</sup> Moreover, the Student Activities Fee used to fund the reimbursement was not a tax. A tax, after all, must be defined only as a general assessment by or on behalf of the state, and student activities fees do not qualify. Why, these fees are not even called a tax!<sup>33</sup>

28. *Id.* at 2520.

29. *Id.* at 2515-20.

30. *Id.* at 2515.

31. 113 S. Ct. 2141 (1993) (holding that it was constitutionally impermissible to deny religious groups after hours access to school facilities otherwise made available to a wide range of other groups).

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

33. Justice Kennedy’s “tax” analysis is astonishing in its formalism and narrowness. The label game he appears to play has all the earmarks of the trial scene in *Alice in Wonderland*. See LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* (Bantam Classics ed. 1981) (1865).

This tax analysis, perhaps, argues too much, even for these Justices. And so the plurality hints that students objecting to the use of the fee might well have a First Amendment right to demand a *pro rata* return of their fee to the extent the fee is used for speech to which the students do not subscribe.<sup>34</sup> Of course, students taking this position would have to pay (or fail to pay and incur the consequences) and then pay to litigate the issue in the courts.

For these Justices, not only was the student activity fee not a tax, but the WAP was not a church or otherwise characteristic of a religious organization. How could it be? WAP was not an organizational counterpart to, say, the organized Catholic Church (or its subsidiary organs), or even the Southern Baptist Convention. Religion, after all, if it is to reside in a “church,” apparently needs some sort of traditional or divine *imprimatur* of a type lacking here.

And even if the student activity fee might be treated as a tax of sorts, and WAP treated as a religious organization, no government instrumentality could be said to have made a *direct* payment to *religion*. The money to be received by WAP was in reality to go directly to the printer. Since the money never passed through the hands of WAP, there could not possibly be a problem of payment to a religious organization. Besides, paying WAP’s printers would be like letting WAP use campus facilities, an activity clearly permitted under *Lamb’s Chapel*.<sup>35</sup> For the plurality, then, the picture they have painted is fairly innocuous.

A vastly different picture emerges from the facts related by the dissenting Justices (Justice Souter (the dissent’s author), and Justices Stevens, Ginsburg, and Breyer). These Justices seem to better recall what the others dismiss, that the mission of *Wide Awake* was to “encourage students to consider what a personal relationship with Jesus Christ means.”<sup>36</sup> The masthead of *Wide Awake* bears the exhortation of St. Paul (whom some still call Saul) that “[t]he hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed.”<sup>37</sup> Each issue of the magazine echoes the Apostle’s call to accept salvation: “[t]he only way to salvation through Him is by confessing and repenting sin. It is the Christian’s

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

35. *Id.* at 2523-24.

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

37. *Id.* at 2534 (quoting *Romans* 13:11).

duty to make sinners aware of their need for salvation.”<sup>38</sup> This is reflected in the articles so much more innocuously described by the other Justices.

The dissent sees a publication vastly different from that apparently read by the other Justices. For the dissent

[t]he 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 preaching of the Word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.<sup>39</sup>

No problem — except they are doing this with money given by the state. “The Court, accordingly, has never before upheld direct state funding of the sort of proselytizing published in *Wide Awake*.”<sup>40</sup> Were all of the Justices reading from the same set of facts? Perhaps *Wide Awake* publishes two editions? It appears here that, even at the stage of factual exposition, our judicial “Papa” and “Josette” cannot agree even on what they see!

The result is predictable if disturbing. On the basis of this *vastly* different view of the narrative which gave rise to this case, the dissenting justices framed the central question not as one touching on issues of constitutional guarantees of freedom of speech, but as to “whether a grant from the Student Activities Fund to pay *Wide Awake’s* printing expenses would violate the Establishment Clause.”<sup>41</sup> Well, this certainly seems to be a case different from that posited by the plurality. We appear to move between space-time continua as we proceed between Justice Kennedy’s reality and that of Justice Souter.

Having framed the issue in such stark terms, Justice Souter’s conclusion is as unequivocal as was Justice Kennedy’s: “[t]he Court is ordering an instrumentality of the State to support religious evangelism with direct funding. This is a flat violation of the Establishment Clause.”<sup>42</sup>

What did the plurality do wrong? Well, says Justice Souter, they took a subsidiary body of Establishment Clause case law — the open access cases like *Lamb’s Chapel* — and they misapplied it to a case where the core of the Establishment Clause prohibitions is at issue,

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38. *Id.*

39. *Id.* at 2535.

40. *Id.* at 2539.

41. *Id.* at 2533-34.

42. *Id.* at 2547.

that is, the prohibition of direct financial aid to religion.<sup>43</sup> In the eyes of the dissent, the plurality's cavalier approach to the Establishment Clause issues in the case evidences their blindness to those issues. The plurality's notion that there is no direct payment to religion because the payment is made to religion's creditor is especially held up to ridicule.<sup>44</sup> Thus, Justice Souter notes, applying the plurality's theory, that "the State could simply hand out credit cards to religious institutions and honor the monthly statements (so long as someone could devise an evenhanded umbrella to cover the whole scheme)."<sup>45</sup> Absurd. Moreover, Justice Souter finds the use of *Lamb's Chapel* completely inappropriate here. For the dissent, there was a vast difference between providing religion a room in a school and what they call economic equivalence. In this case the prohibitions of the Establishment Clause were crystal clear. The First Amendment itself forbids funding equivalence.<sup>46</sup> The driving imperative is "no direct funding;" having found direct funding, the analysis is at an end.

Well, what happened to the vital freedom of speech issues which were so important to the plurality? Remember them? It is true that we might be excused for having forgotten about them by now — *that* discussion was about twenty pages ago. But it turns out, these issues are not forgotten, merely relegated to irrelevance. For the dissent, "[g]iven the dispositive effect of the Establishment Clause's bar to funding the magazine, there should be no need to decide whether in the absence of this bar the University would violate the Free Speech Clause by limiting funding as it has done."<sup>47</sup> There is no free speech issue here. We are not going to worry about it. We stop after we decide that the University of Virginia is now funding evangelism. And that's it. However, the dissent did go on for three or four pages to explain why the plurality's First Amendment analysis was totally off base anyway, just in case.<sup>48</sup> There was no viewpoint discrimination in this case because all discussion of religion (whether for, against, or in between, religious, anti-religious, or agnostic) was banned.<sup>49</sup>

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43. *Id.* at 2540-44.

44. *Id.* at 2544-47.

45. *Id.* at 2545.

46. *Id.* at 2545-46.

47. *Id.* at 2547.

48. *Id.* at 2547-51.

49. Consider especially, *Rosenberger*, 115 S. Ct. at 2550 n.13 (Souter, J., dissenting).

Into this manichean drama steps Justice O'Connor, who appears to have inherited the mantle of "Great Fulcrum" from Justice Powell.<sup>50</sup> In the critical opinion in this case, Justice O'Connor lays out her analysis in Establishment Clause cases: an analysis quite conscious of and rejecting the doctrinal absolutism of both the plurality and the dissent.

In her concurrence Justice O'Connor notes that the case "lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities."<sup>51</sup> Rather than choose one over the other, as the other Justices were content to do, Justice O'Connor concludes that "*When two bedrock principles so conflict, understandably neither can provide the definitive answer.*"<sup>52</sup>

Well, okay, what can provide the answer for Justice O'Connor? That, too, is easy, if somewhat Olympian. Line drawing, she says, will do the trick. It's line drawing that provides our answer, line drawing "based on the peculiar facts of each case."<sup>53</sup> This requires the kind of refined, impressionistic weighing and balancing that only judges, constrained by cultural norms, can apparently apply. "[D]ecision[s must] reflect . . . the need to rely on careful judgment — not simple categories — when two principles, of equal historical and jurisprudential pedigree, come into unavoidable conflict."<sup>54</sup>

And that's precisely what she does. She starts by explaining that, though there exist all of these wonderful, wonderful jurisprudential standards, none of them make any difference anyway. As balancers and judges, the Court sits as an old-fashioned English common law court. Her task is to render judgment — to make justice — on the

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50. This is my description. On the centrism and balancing of Justice Powell, see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994). William Cohen's description of Justice Powell applies with equal force to Justice O'Connor in her role in the jurisprudence of the Establishment Clause. "Powell was, in many ways, the quintessential 'balancer' in his approach to constitutional law. But Powell went beyond the usual debate between 'balancers' and 'categorizers.' He 'characteristically tried to balance conflicting arguments in an open quest for compromise,' but his balancing tended to be particularistic and ad hoc." William Cohen, *Justice in the Balance*, 81 VA. L. REV. 927, 940 (1995) (reviewing JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994)). I tend to agree with Mark Tushnet's criticism of the Powell/O'Connor type of centrism: "There is an underside to balance and centrism that Powell's work on the Court also illustrates. Both principles can degenerate into an effort to have things two ways. Too often on critical matters Powell tried to do this." Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1879 (1995) (citations omitted) (reviewing JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994)).

51. *Rosenberger*, 115 S. Ct. at 2525 (O'Connor, J., concurring).

52. *Id.* (emphasis added).

53. See *supra* note 25 (citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. at 2526 (1995) (O'Connor, J., concurring)).

54. *Rosenberger*, 115 S. Ct. at 2526 (O'Connor, J., concurring).

particular facts of the case.<sup>55</sup> She will take these facts, masticate them, and decide them on the basis of personal principles. These principles, reflecting internalized cultural norms, can then be related to whatever standards she might have enunciated and which might well provide the excuse for our decision. Of course, we have two sets of facts to choose from, and that is the problem here for Justice O'Connor.

Justice O'Connor, much like Justice Powell before her, uses her concurrence and her principles of judging "in an effort to have things two ways."<sup>56</sup> She concludes that Virginia's reimbursement refusal more offends the speech principle than the Establishment Clause principle for several reasons.<sup>57</sup> "First, the student organizations, . . . remain . . . independent of the University."<sup>58</sup> This implicates Justice O'Connor's endorsement principle for Establishment Clause cases which she defends quite vigorously in the *Pinette* case.<sup>59</sup> "Second, financial assistance is distributed in a manner that ensures its use only for permissible purposes."<sup>60</sup> In effect, Justice O'Connor adopts the plurality's analogy to *Lamb's Chapel* and rejects the notion that the funds constitute a type of block grant for religion. Permissible purposes apparently include proselytizing, which she equates to the use of a room in a school after-hours life, like *Lamb's Chapel*. She is convinced that the assistance is provided in the context that makes it improbable to impute any perception of government endorsement of the religious message. This is especially so given the wide divergence of views subsidized. These included publications of Islamic and Jewish organizations which were characterized as "cultural."

This last point is something of a curiosity given the state of even the most arguably politically liberal of the briefs submitted to the Court. In its *amicus* brief, the ACLU felt that the funding for the publications of these religiously centered organizations was as problematic as the funding of the Christian group.<sup>61</sup> Perhaps, for the plurality and Justice O'Connor, Christianity is as much cultural as is Judaism or Islam. And, as such, the proselytizing which the dissent finds so telling in its analysis might well be of the same type as that

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55. *Id.*

56. Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1879 (1995) (reviewing JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* (1994)).

57. *Rosenberger*, 115 S. Ct. at 2526-28.

58. *Id.* at 2526.

59. See below at note 68.

60. *Rosenberger*, 115 S. Ct. at 2527.

61. *Amicus Curiae* Brief for the American Civil Liberties Union at 26-28, *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995) (No. 94-329).



Newt Gingrich engages in when he goes out and raises money for his causes.

Having accepted the plurality's characterization of the facts of the case, Justice O'Connor attempts to embrace the dissent's concerns as well. This she does by elevating the issue of the consequence of the imposition of the student activity fees by the Commonwealth of Virginia.<sup>62</sup> Critical to her judgment is her conclusion that students ought not to be compelled to pay the student fees. Because payment of the fees can be withheld by the students, Virginia merely serves as a conduit for funds freely given by individuals. Consequently, in her judgment, there is no Establishment Clause problem, only a free speech problem. To paraphrase her concurrence, she is saying something like this: "Now the University of Virginia is going to have to fund this group. A few Terms from now we might well have to entertain, on an expedited basis, of course, the petition by the students of the University of Virginia who refuse to pay their fees because the fees are going to support speech with which they disagree. We'll decide that one later. Of course our constitutional principles depend on the narrative, and there are no sure things (despite the hints I am dropping in this concurrence) but we leave that for another day. I assure you that I know how I'm going to vote," says Justice O'Connor in my paraphrase, "and therefore we're implicating free speech, we're not implicating establishment. The University of Virginia has nothing to worry about. Go ahead and spread the Word on the state's money." And, of course, if this characterization is true, then the fee looks less like a tax and the case looks less like an Establishment Clause case. The converse is also true, and that is the point of the O'Connor compromise position. If the fee remains mandatory, even in the face of a First Amendment challenge, then the tax characterization argument becomes stronger and the case for the application of the "plain meaning" of the Establishment Clause becomes stronger as well.

Justice O'Connor's concurrence in *Rosenberger* provides a marvelous *segue* to the other pillar of Supreme Court Establishment Clause jurisprudence during the 1994-95 term — *Capitol Square Review and Advisory Board v. Pinette*.<sup>63</sup> That case concerns an argument over the power of citizens to use an area in front of the State House in Ohio, which is situated in the middle of downtown Columbus, unhampered by the State. In this place, for roughly the last century, the

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62. *Rosenberger*, 115 S. Ct. at 2527-28.

63. 115 S. Ct. 2440 (1995).

State of Ohio had permitted its citizens to “say” all kinds of things. They also were permitted to put up all kinds of things. And in the year in question, people put up a Christmas tree; they put up one of those United Way fund drive goal thermometers, and they even put up a Menorah. Apparently, that was the straw that broke the camel’s back. The Klan, through its Grand Titan, decided that most of these things (and especially the Menorah) needed some kind of “counterbalancing,” so that organization sought to erect a Latin Cross. The Cross was to be placed right in front of the Statehouse, right alongside of statues of various leaders of Ohio, the Ohio state flag, flags of world peace, and whatever other flags the State of Ohio displays on the grounds. The regulatory body in charge of displays, the Capitol Square Review and Advisory Board, initially denied the Klan’s request. The Klan challenged the determination and a majority of the Supreme Court ultimately agreed that the Klan had the right to erect its Cross.<sup>64</sup>

*Pinette* clearly demonstrates the power of narrative, even surreal narrative, over jurisprudential concerns (also a significant point in *Rosenberger*). It also provides a useful window into the Court’s current and very heated struggle to find some kind of new principled linguistic superstructure on which to base discussion of Establishment Clause cases. That debate, currently between Justices Scalia and O’Connor, appears at Part IV of the plurality opinion<sup>65</sup> and in Justice O’Connor’s concurrence.<sup>66</sup>

Justices Scalia and O’Connor do not represent the champions of the only two jurisprudential *volk* communities vying for control of the meaning of the words used to decide Establishment Clause cases. *Pinette* also provides a natural forum for the expression of that (now, ironically) more traditional (and restrictive) Establishment Clause *volk* represented by Justice Stevens in dissent.<sup>67</sup> Justice Stevens’ dissent provides what has come to be the old-fashioned way of preparing factual narrative for application of the Establishment Clause.<sup>68</sup> Ironically, and to paraphrase a modern American kitsch idiom attributed

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64. *Id.* at 2450.

65. *Pinette*, 115 S. Ct. at 2447-50.

66. *Pinette*, 115 S. Ct. at 2451-57 (O’Connor, J., concurring). For an interesting turn on this debate, see David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829 (1993).

67. *Id.* at 2454-73 (Stevens, J., dissenting).

68. I refer here, of course, to the now old *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, government unconstitutionally entangles itself with religion unless the

to Yogi Berra, in the end *Pinette* is *deja vu* all over again. It reeks of the absurdist juxtaposition of narrative and theory that we encountered in *Everson*.

Interestingly, in this case, the roles taken by the Justices changed. This evidences the point I stressed earlier — that at the margin some of the ideological folk groups on the Court travel. The strongly equivocating position that Justice O'Connor took in *Rosenberger* was taken in *Pinette* by Justice Souter.<sup>69</sup> Justice Souter determined that there was a substantial likelihood of governmental entanglement in a case like this (which he described in the language of Justice O'Connor's endorsement analysis). He explained how the government, in this case, encouraged churches to overwhelm the Klan's cross with crosses of their own, with the result of a government square filled with conflicting crosses.<sup>70</sup> However, he still concurred in the judgment because he believed that the State ought to have resorted to a more narrowly drawn alternative than outright prohibition.<sup>71</sup> I return to this below.

With this, we turn to Justice O'Connor. For her, *Pinette* provides a useful vehicle for the advancement of her Establishment Clause idioms. But Justice O'Connor does not merely use *Pinette* to further elaborate her "endorsement" test. *Pinette* provides Justice O'Connor with another forum to elaborate her notions of constitutional judging and her adherence to the principle of common law methodology for constitutional Establishment Clause cases: "In the end, I would recognize that the Establishment Clause inquiry cannot be distilled into a fixed, *per se* rule."<sup>72</sup> Every case must be judged by its unique facts and the endorsement test provides the best formal rationalization for the judgment of these facts. We are thrown back into the world of judging the facts and circumstances on the basis of the personal predictions of the judge (to be aided by the appropriate theoretical language over which the Justices are arguing in *Pinette*).

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court can be convinced that the challenged action has a secular purpose, *and* has a primarily secular effect, *and* does not excessively entangle the government with religion. *Id.* at 612-13. The *Lemon* test has been much criticized. *See, e.g.,* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127-34 (1992); Michael S. Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795 (1993). It is not clear that it enjoys the support of a majority of the sitting members of the Supreme Court. Consider the dialogue on this point between Justices Blackmun and O'Connor in *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994).

69. *Pinette*, 115 S. Ct. at 2457-63 (Souter, J., concurring).

70. *Id.* at 2461.

71. *Id.* at 2461-62.

72. *Id.* at 2454 (O'Connor, J., concurring).

Like *Rosenberger*, then, *Pinette* evidences the difficulty of Establishment Clause jurisprudence in the 1990s. First, *Pinette* highlights the conflict between the state's obligation to refrain from establishing any religion, and the state's obligation not to interfere with the free speech rights of its citizens. This is an old problem which has become much more significant in this decade. Second, the case demonstrates the growing importance of narrative in a contextualized jurisprudence, one where the factual reality drives the application of constitutional principles. Just as "conservatives" are now "liberals," and "communists" are now "democrats," in our current constitutional political schemata, "facts" are "jurisprudential" and "jurisprudence" is "excuse," a cover for action. That must be the primary lesson of *Pinette*.

*Pinette*, then, presents a situation where the majority of the plurality again sees nothing but speech, just as they did in *Rosenberger*. All we have *speaking* is a Christian Cross, and it is not speaking for the State of Ohio. Therefore there is no constitutional problem present under these facts. It is not speaking for the State of Ohio because the Klan, and not the State of Ohio, erected the Cross. Absent the transmogrification of the Klan into an instrumentality of the state, the Klan cannot (as a matter of dry logic — even if logic divorced from reality) speak for the state.

Indeed, the surreality of the logic propelling this view is somewhat astonishing. Consider, for a moment, *reality*: Envision a Latin Cross standing before the State House of Ohio. It is clearly visible from the road for all passersby to admire; it stands in front of the Statehouse. Suppose you are driving through Ohio from one state to another and you don't know about the absence of any relationship between the Klan and Ohio, or of the existence of this little space for public displays in front of the State House. All you know, as you drive by, is that here is the State House and here is this Latin Cross (perhaps it is in flames, perhaps not).

Well, what is one to think? The plurality insists that we have nothing to worry about under the circumstances. Sure it may look bad, the plurality insists, but if you are so concerned, perhaps you ought to stop your car and take the time to investigate. The fact that some yokel from another state or, God forbid, you, should happen to see that Latin Cross and say, "Oh glory to God, we have stumbled onto the beginnings of our Christian nation, finally, here in Ohio," is irrelevant. It is irrelevant for Establishment Clause cases because we are expected to know that the State of Ohio is not *directly* involved.

The Establishment Clause becomes an impediment only if the State of Ohio actually and directly erected that forbidden symbol. For the plurality, Justice O'Connor's little endorsement test comes into play only if the State is directly involved.

For the plurality, then, the Establishment Clause is violated in a public forum only when the government, itself, intentionally endorses religion or when it willfully fosters a misperception of endorsement in the forum or when it manipulates the public forum in such a manner that only certain religious groups can take advantage of it.<sup>73</sup> Otherwise, private religious speech in public must be accorded the same protections as private political speech in public.

Notice the similarity with the majority's viewpoint in *Rosenberger*. In both cases, the plurality in one (Scalia, Kennedy, Rehnquist, and Thomas) and the majority in the other (Kennedy, Scalia, Rehnquist, Thomas, and O'Connor) took a fairly narrow view of what constitutes governmental involvement. In both cases, it appears that such involvement must be direct and unequivocal. Mere encouragement is never sufficient — intentional manipulation is a prerequisite. I think the plurality is wrongheaded in its approach and I tend to agree with Justice Souter in this respect: "By allowing government to encourage what it cannot do on its own, the proposed *per se* rule would tempt a public body to contract out its establishment of religion, by encouraging the private enterprise of the religious to exhibit what the government could not display itself."<sup>74</sup>

What emerges from the plurality's reading of the case is that *Pinette* is a First Amendment case. It is *not* an Establishment Clause case, as far as one can tell from the *opinion*. Yet the Court (through the judgment of seven of the Justices) tells us that *Pinette* is strictly speaking nothing more than an Establishment Clause case; the Establishment Clause issue was the only one on which the Court granted *certiorari*.<sup>75</sup> But almost immediately after acknowledging this fact unequivocally, the Court gets to the heart of the real issue: "Respondents' religious display in Capitol Square was private expression" which must be accorded the same protections as private secular speech.<sup>76</sup> Since this private religious speech was made in a public forum otherwise open for speech, then, as in *Rosenberger*, the Court is

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73. *Pinette*, 115 S. Ct. at 2449.

74. *Id.* at 2461 (Souter, J., concurring).

75. *Id.* at 2445.

76. *Id.* at 2446. This approach is emphasized by Justice Thomas in his concurring opinion: "But the fact that the legal issue before us involves the Establishment Clause should not lead

merely presented with yet another case indistinguishable from *Lamb's Chapel*.<sup>77</sup> On that basis, four members of the Court were satisfied that Justice O'Connor's endorsement test was unsuitable as a vehicle for Establishment Clause analysis in a *private* religious speech case such as this one (as opposed to one in which the government acts directly).<sup>78</sup>

Behind this argument over applicable theory, the narrative of this case again propels the underlying jurisprudential analysis. The facts *do* make a difference in this case. Consider the facts on which the majority/plurality base their judgment. They explained that the square in front of the Ohio State House had been used for over a century as a forum for the expression of lots of views. The Board governing the access to the Square was substantially a ministerial body, concerned almost exclusively with "safety, sanitation and non-interference."<sup>79</sup> Many different groups had used the Capitol square for personal expression. Some groups had used that square to deposit unattended displays: a Christmas tree, a Chanukah Menorah and a United Way campaign thermometer.<sup>80</sup> These had been permitted to stand after the Board reversed an earlier decision banning such unattended displays.<sup>81</sup> The day the Menorah was put up, the Board received a request for the erection of a Latin Cross by the Ku Klux Klan. The request was denied, and the Klan sued after exhausting its administrative remedies. The district court issued an injunction instructing the Board to grant the Klan's request on the grounds that the Klan's Free Speech rights could not be overcome by any Establishment Clause concerns of the state since it was clear that the expression in this public forum would not amount to an endorsement by Ohio of Christianity. The 6th Circuit affirmed.

On this basis, four justices found the case unproblematic from an Establishment Clause perspective. The five other justices found the plurality's Establishment Clause rhetoric problematic, but of these only two found the *judgment* problematic.

Thus, from Justice Souter's factual perspective the opposite conclusion is as inevitable. Consider the facts revealed by Justice Souter

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anyone to think that a cross erected by the Ku Klux Klan is a purely religious symbol. The erection of such a cross is a political act, not a Christian one." *Id.* at 2450 (Thomas, J., concurring).

77. *Id.* at 2446-47.

78. *Id.* at 2447-50.

79. *Id.* at 2444.

80. *Id.*

81. *Id.* at 2445.

which so discomfited him (but not enough, it seems, to join the dissent): The Latin Cross is the principal symbol of Christianity and would be displayed alone “in front of the Ohio Statehouse with the government’s flags flying nearby, and the government’s statues close at hand. . . . There was nothing else on the . . . lawn” to suggest that the Cross was displayed on a public forum open to all and not a part of the government.<sup>82</sup> Then why not dissent? Again *facts*: “I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it.”<sup>83</sup>

The dissenting opinions add even more disturbing perspectives. Consider the facts highlighted by Justice Ginsburg: “No human speaker was present to disassociate the religious symbol from the State. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio’s government did not endorse the display’s message.”

For Justice Stevens, the photographs in the record were alone sufficient to demonstrate that the placement of the Latin Cross would appear to a reasonable observer to have the endorsement of the State of Ohio in contravention of the Establishment Clause. Of course, Justice Stevens would go further — endorsement is explicit in the placement of the religious symbol before the State House. But Justice Stevens also relies on entanglement theory as well, one of the prongs of the almost forgotten *Lemon* test.<sup>84</sup> As such, no amount of disclaiming could eliminate the endorsement implicit in permitting the erection of the symbol in the first place.<sup>85</sup>

Lastly, consider the fact that the district court issued an order permitting the Klan to erect a cross without any further requirement of identification of the ownership of the display. The three Justices of the concurring opinions (Souter, O’Connor and Breyer) seemed to have ignored this. Justice O’Connor (unreasonably, I believe) assumes an appropriate disclaimer of ownership.<sup>86</sup> Justice Souter assumes that the Board can revisit the issue of the permit conditions.<sup>87</sup> But the disclaimer is substantially irrelevant for the plurality because the speech is private, despite the fact that some people might well

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82. *Id.* at 2461 (Souter, J., concurring).

83. *Id.* at 2457. See also discussion text at notes 88-90, *infra*.

84. *Id.* at 2471-72 (Stevens, J., dissenting).

85. *Id.* at 2469-71 (Stevens, J., dissenting).

86. *Id.* at 2457 (O’Connor, J., concurring).

87. *Id.* at 2462 (Souter, J., concurring).

reasonably assume that the Cross was part of the government's speech.<sup>88</sup> The important thing for both the plurality and the concurring Justices is the battle over "theory." This is a case of proselytizing by the disciples of the Scalia and O'Connor catechisms among the heathen.

To this, Justice Ginsburg, rightly, I believe, argued in her dissent that the issue of least restrictive means was not at issue because the order they were affirming contained no such narrowly tailored limitation.<sup>89</sup> The District Court just issued an injunction that commanded the State of Ohio to permit the erection of the Klan Cross; there was no discussion of least restrictive means. In this context, Justice Souter's discussion of less restrictive alternatives as a basis for concurring in the judgment makes no sense, unless one assumes that Justice Souter was using his concurrence as a way of aiding Justice O'Connor in her battle with Justice Scalia over the proper Establishment Clause test.

Both *Rosenberger* and *Pinette* provide good evidence of the bankruptcy of *doctrine* as a guiding force for our application of the Establishment Clause. Unable to articulate a popular or coherent structure for delineating the basic rules of the relationship between the state, its citizens and religious expression,<sup>90</sup> the Court has been forced to retreat to narrative. It has done so unwillingly. The incoherence of the Justices' articulated doctrine is coupled with the almost feverish attempts by each to impose the structure of his and her language on the others. Much like Josette and her Papa, the Justices build on observed relationships (the narrative) to construct a language useful for understanding the facts in a particular way. Establishment Clause "analysis

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88. *Id.* at 2449.

89. *Id.* at 2475 (Ginsburg, J., dissenting).

90. There is, after all, something to be said for Professor Gedicks' proposition that Constitutional doctrine can succeed — that is, it can endure and have a significant effect in American life — if it has either coherence or popular support. Ideally a doctrine should have both, but one or the other will do. . . .

. . . .  
Lacking popular support, and unable to give any coherent account of itself, religion clause doctrine has become like economic due process in the 1930's — a failed doctrine ripe for dismantling.

Frederick Mark Gedicks, *The Ironic State of Religious Liberty in America*, 46 MERCER L. REV. 1157, 1162, 1163 (1995).



thus confronts a conundrum: existing doctrine is thoroughly unsatisfactory, but the most prominent alternatives offer little prospect of improvement."<sup>91</sup>

The Court is most sincere when it takes the narrative, weighs it subjectively, and on that basis renders *justice*. It is the narrative that crafts the jurisprudence of these cases. That is the critically illuminating function of Justice O'Connor in *Rosenberger* and Justices O'Connor and Souter in *Pinette*.

But even given all of this, *Rosenberger* and *Pinette* do provide morals, even if ones of limited value. And the moral of these tales, as Justice Thomas perhaps described best in the *Pinette* case, is much smaller than all of these 120-odd pages might lead you to believe: "In the end, there may be much less here than meets the eye."<sup>92</sup> For *Rosenberger* the moral is that student activity fees will be harder to collect or may even suffer the fate of the California Bar dues.<sup>93</sup> Alternatively, student organizations will have to look for funding for their publications elsewhere, because universities sensitive to the obligation to support the publishing activities of all types of religious activities after *Rosenberger* may well decline to support *any* activity with university or student funds. If the students want to publish something, of course, they remain free to whine to Mommy and Daddy for funding, buy themselves some big old printer with some big old computer and print these things themselves. That's the reality of *Rosenberger* when you cut through everything. The irony is evident.

The moral of *Pinette* is only slightly different, though no less ironic, in its absurdity. The most effective way to regulate unattended displays after *Pinette* may well be to ban them all. Indeed, perhaps the most important aspect of *Pinette* is the confirmation of the state's power to significantly curtail speech on the symbolic center of its power. The state certainly has the right to ban all unattended displays, unless there's a sign there that says, "This is not Ohio speaking." The state probably could also eliminate anyone's right to put symbols on state grounds, such as the Klan cross, unless attended by a representative of the organization — perhaps someone with a hood — and only then would it be okay. Then it's not religious speech, perhaps.

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91. Steven D. Smith, *Separation and the 'Secular': Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 957 (1989).

92. *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2451 (1995).

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

The more likely alternative in many places, however, will be to create a well defined and highlighted area for political speech on public grounds. As long as we put these symbols in a ghetto somewhere, with nice high walls, and with a big sign that says, "Speech will set you free"<sup>94</sup> or the like, the state's participation in this scheme will be free of Constitutional infirmity. As long as we do that, then we're okay, because it will be clear that it is private speech. And this certainly is the most perverse irony of *Pinette*.

The Supreme Court's *Rosenberger* and *Pinette* cases are this Term's contribution to our theatre of the absurd. Much as in the works of an absurdist like Ionesco, the Supreme Court, in these cases, continues to describe surreal situations with incomprehensible language. In so doing, they successfully continue to evidence the futility of their Establishment Clause jurisprudence. The result (other than the *comedy* inherent in these decisions) is small cases. Perhaps we are just *Waiting for Godot*.<sup>95</sup>

In the end, we must be content to confine ourselves to the narrative of the cases. The notion of an Establishment Clause jurisprudence is oxymoronic. To quote from *Lee v. Weisman*, "Our Establishment Clause jurisprudence remains a delicate and fact sensitive one . . ."<sup>96</sup> As *Rosenberger* and *Pinette* evidence, the result is a regime where narrative provides its own jurisprudence and where even seemingly everyday occurrences must of necessity be juridified.

It is to the *judges* and not to the *law* that we must turn. That is the real continuing lesson of our Establishment Clause cases. And with that, I'll end. Thanks a lot.

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94. I am making an all too ironic reference to the German original from which I have paraphrased. The sign "Arbeit macht frei" (work shall make you free) hung over the entrance to a different sort of enclosed expressive place — Auschwitz. See Harry Conway, *A Lesson in History: Images From the United States Holocaust Museum*, THE ETHNIC NEWSWATCH, Sept. 30, 1994, at 27.

95. SAMUEL BECKETT, *WAITING FOR GODOT* (1954) (a play expressing the absurdity of, as well as the human need for, some external rational guide).

96. *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992).

