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When the Issue Is Funding, No News *Isn't* "Good News"

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WHEN THE ISSUE IS FUNDING, NO NEWS *ISN'T* "GOOD NEWS": *Rosenberger v. Rector & Visitors of University of Virginia*, 115 S. Ct. 2510 (1995)

TABLE OF CONTENTS

I. INTRODUCTION

> While Paul was . . . in Athens, he was greatly distressed to see that the city was full of idols. So he reasoned . . . in the marketplace day by day with those who happened to be there. A group of . . . philosophers began to dispute with him. Some of them asked, "What is this babbler trying to say?" Others remarked, "He seems to be advocating foreign gods." They said this because Paul was preaching the good news about Jesus and the resurrection . . . . When they heard . . . some of them sneered, but others said, "We want to hear you again on this subject."[1]

When Ron Rosenberger arrived at the University of Virginia in 1988, he encountered an atmosphere hostile to his Christian beliefs.[2] Like the Apostle Paul in Athens nearly twenty centuries before, Rosenberger sought to publicize

1. *Acts* 17:16-32 (New International Version).

2. Scott Jaschik, *Plaintiff Perceives Use of 'Double Standards' in Colleges' Treatment of Religious Students*, THE CHRON. OF HIGHER EDUC., July 7, 1995, at A25.

his beliefs in a place traditionally considered a marketplace of ideas. Unlike Paul, who eventually spoke directly to the government,[3] Rosenberger sought government funding assistance to make his views known to the general public. Rosenberger and Wide Awake Publications, the student organization Rosenberger founded, petitioned the University of Virginia to have the University's Student Activities Fund pay $5,862 in printing costs for an issue of their newspaper, *Wide Awake*. Although the Fund subsidized fifteen other student newspapers, the Fund denied monies for *Wide Awake* because of the overtly Christian nature of the publication.

In *Rosenberger v. Rector & Visitors of University of Virginia*,[4] the United States Supreme Court encountered tension between two Constitutional mandates: the need to provide broad access to a public forum and the need to avoid the establishment of a religion.[5] The Court reversed the Fourth Circuit and the district court, holding that denying funding to *Wide Awake* was not compelled by the Establishment Clause.[6] The Court further held that the denial of funding was an impermissible form of viewpoint discrimination that violated Wide Awake Publications' free speech rights.[7] The Court avoided sweeping doctrinal change but did signal its receptiveness to free speech claims by religious groups. In particular, the Court acknowledged that religious speech is real speech, entitled to equal access to the marketplace of ideas.[8] The decision also highlighted the majority's dissatisfaction with current Establishment Clause jurisprudence, while revealing the difficulty in forming a satisfactory test to replace the widely used *Lemon v. Kurtzman* test. Due to the relatively specialized facts involved, however, *Rosenberger's* primary value may be symbolic.

This Note analyzes *Rosenberger* and the collision between the Freedom of Speech and Establishment Clauses. Section II of this Note examines the Establishment Clause and public forum cases forming the background of *Rosenberger*.[9] Section III examines the facts and holding of *Rosenberger*, as well as the concurring and dissenting opinions.[10] Section IV examines the Court's use of a neutrality test,[11] its recognition that public debate is not bipolar,[12] and its flexible definition of religion.[13] Section IV also evaluates the

3. Paul's speech in *Acts* 17:22-31 was made before the Areopagus, the highest council of ancient Athens.
4. 115 S. Ct. 2510 (1995).
5. *Id.*
6. *Id.* at 2524.
7. *Id.* at 2525.
8. *Id.* at 2524-25.
9. *See infra* notes 13-60 and accompanying text.
10. *See infra* notes 61-124 and accompanying text.
11. *See infra* notes 125-31 and accompanying text.
12. *See infra* notes 132-43 and accompanying text.
13. *See infra* notes 144-58 and accompanying text.

probability that a new Establishment Clause test will be developed[14] and examines the potential applicability of the *Rosenberger* holding to non-university settings.[15] Finally, Section V concludes that *Rosenberger* represents not a major change in Establishment Clause jurisprudence, but rather, an enlargement of a limited "free speech exception" to the Establishment Clause.

II. BACKGROUND

A. Establishment Clause

The Establishment Clause of the First Amendment serves as a potential bar to any federal, state, or local government seeking to extend free speech rights to religious groups.[16] When government facilitates the exercise of free speech rights by allowing religious speakers or groups to use public facilities or resources, it risks an improper establishment of religion. In 1947, in *Everson v. Board of Education,*[17] the United States Supreme Court held that the Establishment Clause applied to the states.[18] *Everson* also made popular Thomas Jefferson's assertion that "[t]he First Amendment has erected a wall between church and state."[19] Many of the Establishment Clause cases since *Everson* have involved public schools[20] and universities.[21] Establishment Clause jurisprudence since *Everson* has been characterized by complexity and inconsistency.[22]

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14. *See infra* notes 159-67 and accompanying text.

15. *See infra* notes 168-77 and accompanying text.

16. The First Amendment provides that "Congress shall make no law regarding an establishment of religion . . . ." U.S. CONST. amend. I.

17. 330 U.S. 1 (1947).

18. *Id.* at 15.

19. *Id.* at 18.

20. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (holding unconstitutional a nonsectarian prayer at a junior high graduation ceremony); Edwards v. Aguillard, 482 U.S. 578 (1987) (holding unconstitutional a statute requiring presentation of creation science if evolution is taught); Wallace v. Jaffree, 472 U.S. 38 (1985) (holding unconstitutional, for lack of a secular purpose, a one-minute moment of silence for meditation or voluntary prayer at start of public school day); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (holding Bible reading as religious exercise and recitation of the Lord's Prayer unconstitutional in public school); Engel v. Vitale, 370 U.S. 421 (1962) (holding public school prayer unconstitutional); Zorach v. Clauson, 343 U.S. 306 (1952) (allowing public school students to be released during the school day for religious classes taught off school grounds); McCollum v. Board of Educ., 333 U.S. 203 (1948) (holding unconstitutional a public school program allowing students to participate in religious classes taught on school grounds during school day by parochial school teachers).

21. *See, e.g.*, Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986) (permitting use of a state grant by an individual pursuing a course of study at a Christian college leading to a career in full-time religious work); Widmar v. Vincent, 454 U.S. 263 (1981) (permitting use of university facilities by a student group for religious worship and discussion); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (permitting government grants to church-related colleges if not used for sectarian purposes); Tilton v. Richardson, 403 U.S. 672 (1971) (permitting federal construction grants to church-related colleges if used for secular educational purposes).

22. Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses,* 25 CUMB. L. REV. 247, 256-66 (1995).

B. Establishment Clause Application to Public Forum Cases

The Supreme Court has developed the "public forum" doctrine in making the First Amendment guarantee of free speech operational. The Court did not use the term "public forum" until 1972, but began developing the doctrine in the 1930s. The Court first developed this doctrine in the context of public parks and streets,[23] subsequently extending it to less traditional fora.[24] In general, the less the forum resembles a public park or street, the more likely the forum will not be considered a public forum.[25] Judges grant considerable deference to the government's decision to allow or to deny public access to a nonpublic forum. For "nontraditional" public fora, a government is not compelled to provide a forum for private speakers to express their views, but once it has done so, a government is required to allow all speakers equal access to the forum.[26] In particular, the government is not allowed to skew public debate by allowing speakers with one point of view on a particular issue access to the forum, while denying access to those with contrary views.[27]

When the government creates a public forum, the government is using the power of the state to facilitate speech. When religious speakers take advantage of their right to make equal use of the forum created by government, they are to some degree receiving government aid. If the aid extended to the religious speaker is too significant, or of the wrong type, an Establishment Clause challenge becomes likely.

The Court extended the guarantee of free access to the public forum to religious groups at a public university in *Widmar v. Vincent.*[28] In *Widmar*, a

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23. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (reversing the conviction of a Jehovah's Witness arrested for street proselytizing and for soliciting religious funds without a permit); Schneider v. State, 308 U.S. 147 (1939) (holding unconstitutional ordinances forbidding distribution of leaflets); Lovell v. Griffin, 303 U.S. 444 (1938) (holding unconstitutional a city ordinance requiring prior written permission before distributing literature); *see also* Hague v. CIO, 307 U.S. 496, 515-16 (1939) (Roberts, J., concurring) ("Streets and parks . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use . . . has, from ancient times, been a part of the privileges . . . of citizens. The privilege . . . may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied.").

24. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (holding municipal theater to be a public forum).

25. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) (holding government fundraising drive conducted during working hours by federal employees not a public forum); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (holding public school's interschool mail system not a public forum); United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (holding home mailboxes not public forum); Lehman v. Shaker Heights, 418 U.S. 298 (1974) (holding advertising space on city-owned buses not a public forum).

26. *See Perry Educ. Ass'n*, 460 U.S. at 45 (summarizing open forum jurisprudence).

27. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 785-86 (1978) (noting that a government violates the First Amendment when it gives one side of a debatable question an advantage in expressing its views); City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976) (finding the same result when government grants one side a monopoly in expressing its views).

28. 454 U.S. 263 (1981).

religious organization at the University of Missouri at Kansas City, "Cornerstone," was told it could not use university buildings for its meetings.[29] The Court held that the University's Establishment Clause concerns were not sufficiently compelling to justify violating Cornerstone's free speech rights.[30] Although the Court characterized the basis for its decision as "narrow,"[31] the Court actually later extended the rationale of *Widmar,* that religious speakers are entitled to the same access to public fora as nonreligious speakers, to public high schools used for meetings by student groups,[32] and to public school buildings made available to community groups.[33]

Lamb's Chapel v. Center Moriches Union Free School District[34] represents an example of this extension. In this case, the petitioners, an evangelical church in Center Moriches, New York, sought permission to use public school facilities to show a six-part film series about family life, presented from a Christian perspective.[35] Section 414 of the New York Education Law allowed school buildings to be made available for social, civic, or recreational meetings open to the general public but not for religious meetings.[36] The school district had previously granted access to a purported "New Age religious group," as well as a variety of other community groups.[37] The Supreme Court concluded that the film series, which addressed a topic permitted by the law, was excluded solely because the series dealt with the topic from a religious point of view.[38] Allowing presentation of the series would not violate the Establishment Clause because, considering the wide variety of previous organizations that used the school's facilities, there would be "no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion . . . would [be] no more than incidental."[39] The Court also concluded, without any systematic analysis, that permitting the exhibition would not violate the *Lemon v. Kurtzman* test.[40]

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29. *Id.* at 265.
30. *Id.* at 276.
31. *Id.* at 277.
32. Board of Educ. v. Mergens, 496 U.S. 226 (1990) (upholding the constitutionality of the Equal Access Act, 98 Stat. 1302, *codified at* 20 U.S.C. §§ 4071-4074).
33. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (holding a church group must be allowed to show a film series dealing with family issues from a religious perspective when forum is also used by a wide variety of organizations).
34. *Id.*
35. *Id.* at 2144-45.
36. *Id.* at 2143-44.
37. *Id.* at 2147.
38. *Id.*
39. *Id.* at 2148.
40. *Id.* For an explanation of the *Lemon* test, see *infra* notes 41-45 and accompanying text.

C. *Standards of Review—The* Lemon *Test and Its Competitors*

Since 1971, the test for an Establishment Clause violation has generally been the three-part test set forth in *Lemon v. Kurtzman.*[41] Under the *Lemon* test, government action will not violate the Establishment Clause if it: (1) has a secular legislative purpose; (2) has a principal or primary effect that neither advances nor inhibits religion; and (3) does not foster an excessive entanglement with religion.[42] In recent years, the *Lemon* test has come under intense criticism from some members of the Court, particularly Justice Scalia, who derided the test's uncanny flexibility in his concurrence to *Lamb's Chapel*: "When we wish to strike down a practice [*Lemon*] 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.'"[43] While *Lemon* has occasionally been ignored,[44] the case has never been overruled.[45]

The form in which a government provides aid to religious activities affects the likelihood of an Establishment Clause violation. In order to survive an Establishment Clause challenge, the aid must be "indirect," rather than in the form of a direct cash subsidy: "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."[46] By contrast, indirect aid, for example a tax exemption, has been permitted.[47] Direct aid and indirect aid, however, are not always easy to differentiate, since the economic effects of the two may be identical.[48] Regardless of the validity of the underlying economic debate, as one commentator notes, "[t]he Court seems to be adopting an 'equal access' type of analysis in the tax exemption area."[49] Religious institutions may, without Establishment Clause problems, share in government benefits that are available to a wide variety of organizations.[50]

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41. 403 U.S. 602 (1971).

42. *Id.* at 612-13.

43. *Lamb's Chapel,* 113 S.Ct. at 2150 (1993) (Scalia, J., concurring) (citations omitted).

44. *See, e.g.,* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative chaplains as justified by tradition).

45. *Lamb's Chapel,* 113 S. Ct. at 2148 n.7. *See also* Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2494-95 (1994) (Blackmun, J., concurring) (stating Court's holding not different than principles underlying *Lemon*).

46. Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

47. Walz v. Tax Comm'n, 397 U.S. 664 (1970) (holding that state tax exemptions for religious organizations do not involve the state in establishing a religion, but rather promote the guarantee of free exercise of all forms of religion).

48. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (noting a tax exemption is considered the equivalent of a subsidy); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (equating tax exemption with government assistance); Regan v. Taxation With Representation, 461 U.S. 540 (1983) (same).

49. Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision-Making,* 28 WAKE FOREST L. REV. 855, 902 (1993).

50. *Id.*

Several other trends in Establishment Clause jurisprudence have emerged to coexist with the *Lemon* test. One theme is contention over whether a government may provide "nonpreferential" aid to religion, that is, aid to religion in general that does not favor one faith or sect over another.[51] In the past, the "Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."[52] Considerable scholarly comment has arrived at a similar position,[53] although this view is far from unanimous.[54] Three members of the current Court have expressed a willingness to permit nonpreferential aid to religion,[55] making the nonpreferentialist view a force to be contended with in Establishment Clause cases.

A second Establishment Clause theme has been the search for a new test to replace *Lemon*. Justice O'Connor, in particular, has emphasized the "endorsement" test in determining whether an Establishment Clause violation has taken place.[56] Under this test, government action violates the Establishment Clause when the action either endorses or disapproves of a particular religion.[57] The Court has employed the endorsement test,[58] although the test was not designed and has not been applied as a definitive replacement for *Lemon*. The endorsement test is important in Establishment Clause cases due to Justice O'Connor's position as a swing vote in close cases.[59] Justice Kennedy, also considered a swing vote,[60] has tended to focus on the coercive aspects of alleged establishments of religion.

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51. *See* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986).

52. Abington School Dist. v. Schempp, 374 U.S. 203, 216 (1963) (finding unconstitutional a school board regulation requiring daily reading of Bible passages and recitation of Lord's Prayer, even if individual students were permitted to be excused).

53. *See* Laycock, *supra* note 51, at 922-23.

54. *See, e.g.*, Jay Alan 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 (1995).

55. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2532-33 (1995) (Thomas, J., concurring) (noting the tradition of allowing religious groups to participate in benefit programs available to the general public); Lee v. Weisman, 505 U.S. 577, 633-34 (1992) (Scalia, J., dissenting, joined by Thomas, J., White, J., and Rehnquist, J.) (asserting Establishment Clause violations should be interpreted in light of a tradition of approval of nonsectarian prayer at government functions); Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (asserting Establishment Clause allows a government to pursue secular ends through nondiscriminatory sectarian means).

56. *See* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

57. *Id.* at 688.

58. Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 595 (1989).

59. William H. Freivogel, *Making Things Right*, ST. LOUIS POST-DISPATCH, July 2, 1995, at 1E ("[Jesse] Choper says, 'When the lawyers come to argue the next religion case, all they need do is address O'Connor.'").

60. *Id.* (quoting Roger Goldman of St. Louis University: "The right and left on the [C]ourt are almost irrelevancies. It comes down to O'Connor and Kennedy."); *see also* Lee v. Weisman, 505 U.S. 577, 592 (1992) (noting that prayer at junior high school graduation "may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy"); *Allegheny County*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part) (stating that the "government may not coerce anyone to support or participate in any religion or its exercise").

III. FACTS AND HOLDING

A. Facts

The University of Virginia (UVA), a state funded school, has established a procedure through which certain student groups may obtain reimbursement for activity expenditures.[61] In order to obtain funding, the student groups are required to obtain certification as a Contracted Independent Organization (CIO).[62] CIOs must be composed entirely of students and managed by full-time students.[63] CIOs must file a constitution with the University and pledge not to discriminate in membership.[64] Additionally, CIOs must notify third parties by written disclaimer that the CIO is independent from the University.[65]

Certain CIOs are eligible to obtain payments of selected expenditures from the University's Student Activities Fund (SAF).[66] The payments are made directly to the third-party vendors, not to the treasuries of the CIOs.[67] The SAF consists of a $14 per semester mandatory fee assessed against each full-time student.[68] The SAF is designed to support extracurricular activities "related to the educational purposes of the University."[69] Under SAF guidelines, eleven categories of student groups are eligible to receive payment of their expenses.[70] One category of groups eligible for funding includes "student news, information, opinion, entertainment, or academic communications media groups."[71] The guidelines specifically exclude from funding "religious activities," defined as any activities that primarily promote or manifest a particular belief in or about a deity or an ultimate reality.[72]

Petitioner Ronald Rosenberger was a member of a student organization called Wide Awake Publications (WAP), which was formed in part to publish a newspaper called Wide Awake: A Christian Perspective at the *University of Virginia*.[73] The newspaper's objective 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."[74] *Wide Awake* contained a variety of articles on spiritual and secular topics, almost all

61. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2513 (1995).
62. *Id.* at 2514.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 2515
67. *Id.*
68. *Id.* at 2514.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 2514-15.
73. *Id.* at 2515.
74. *Id.*

containing encouragement to readers to enter into a personal relationship with Jesus Christ or to live their lives in accordance with the moral dictates of Christ's teachings.[75]

WAP acquired CIO status shortly after its formation.[76] WAP requested a disbursement to its printer from the SAF of $5,862 to pay printing costs for an issue of *Wide Awake*.[77] The Student Council Appropriations Committee denied funding because the publication was considered to be a "religious activity" as defined by the SAF guidelines.[78]

B. Lower Court Opinions

After exhausting its internal appeals,[79] WAP brought an action against UVA in the United States District Court for the Western District of Virginia to recover printing costs, attorney's fees, and to obtain injunctive and declaratory relief.[80] WAP alleged the denial of funding was a violation of Revised Statute § 1979, 42 U.S.C. § 1983, and a violation of their rights to freedom of speech, freedom of the press, free exercise of religion, and equal protection of the law.[81] Both parties filed motions for summary judgment.[82] The district court granted summary judgment in favor of UVA, finding no discrimination against petitioners[83] and holding UVA's fear of violating the Establishment Clause was sufficient to allow denial of funding.[84]

The Fourth Circuit Court of Appeals upheld the district court's decision.[85] The Fourth Circuit found WAP's free speech rights had been violated, noting that the "funding proscription creates an uneven playing field" to the advantage of organizations "engaged in wholly secular modes of expression."[86] The court, however, held this discrimination was justified by UVA's interest in maintaining strict separation of church and state.[87] Funding WAP would be "a patent Establishment Clause violation," which would "carr[y] the potential for seriously divisive political consequences at the University of Virginia."[88] The court, applying "the strictest judicial scrutiny," also determined that the UVA's

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75. *Id.* at 2535 (Souter, J., dissenting).
76. *Id.* at 2515.
77. *Id.*
78. *Id.*
79. *Id.* The full Student Council upheld the Appropriations Committee action without comment. *Id.* The highest level of appeal, the Student Activities Committee, rejected the appeal in a letter signed by the Dean of Students. *Id.*
80. Rosenberger v. Rector & Visitors of Univ. of Va., 795 F. Supp. 175, 177-78 (W.D. Va. 1992).
81. *Id.*
82. *Id.* at 178.
83. *Id.* at 183-84.
84. *Id.* at 181.
85. Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269 (4th Cir. 1994).
86. *Id.* at 281.
87. *Id.* at 287.
88. *Id.* at 285-86.

restriction was narrowly tailored to achieve its interest in avoiding an Establishment Clause violation.[89] The Supreme Court granted certiorari[90] on the following question: "Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious."[91]

C. United States Supreme Court Opinion

The United States Supreme Court found UVA's funding mechanism violated the petitioners' free speech rights.[92] Justice Kennedy, writing for the Court,[93] characterized the SAF as a public forum, albeit in a "metaphysical sense."[94] Excluding religious publications from funding causes the debate in the "marketplace of ideas" to be "skewed in multiple ways."[95] According to the Court, UVA's guidelines constitute an overly broad restriction on student speech, affecting "any writing advocating a philosophic position that rests upon a belief in a deity or ultimate reality."[96]

The Court rejected the Fourth Circuit's Establishment Clause analysis, holding that neutrality should be a central consideration.[97] The Court stated: "More than once we have rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."[98] Additionally, the Court found the necessity of evaluating the funding of student publications, with respect to the violation of the Establishment Clause could itself "undermine the very neutrality the Establishment Clause requires."[99]

A central theme in the majority opinion is the differentiation between speech by government and speech by individuals in an open forum created by government.[100] According to the Court, when the government itself speaks

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89. *Id.* at 286-88.

90. 115 S. Ct. 417 (1994).

91. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2521 (1995).

92. *Id.* at 2424-25.

93. Justice Kennedy was joined by Chief Justice Rehnquist, Justices O'Connor, Scalia, and Thomas. *Id.* at 2513.

94. *Id.* at 2517.

95. *Id.* at 2518. Justice Kennedy stated that "[h]aving 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." *Id.* at 2519.

96. *Id.* at 2520.

97. *Id.* at 2521.

98. *Id.* at 2522.

99. *Id.* at 2525.

100. This theme is also prominent in another case the Court decided on the same day as *Rosenberger*. *See* Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) (holding display of a cross

through its officials, a significant possibility exists that statements of a religious nature will be perceived as constituting official state policy.[101] By contrast, when a private individual makes the same statements in an open forum created by the government considerably less danger exists that citizens would perceive any endorsement of religion, particularly when a wide variety of views are expressed.[102]

The Court took considerable efforts to distinguish the Student Activities Assessment fee from a tax designed to aid religion, noting that "our decision . . . cannot be read as addressing an expenditure from a general tax fund."[103] Instead, the Court characterized the fund as a special-purpose assessment made available to cover the "whole spectrum of speech."[104] Additionally, the Court placed emphasis on the fact that the funds went directly to the third-party printer for a use permitted by the fund, rather than to the student organization's treasury.[105] Accordingly, in the Court's view, the payments merely represented a financial substitute for access to in-house printing services that UVA would be permitted to supply under the rationale of *Widmar* and *Lamb's Chapel.*[106]

1. Justice O'Connor's Concurring Opinion

Justice O'Connor notes the case "lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities."[107] To resolve such a conflict, courts must look beyond "categorical platitudes" to the hard task of "sifting through the details" to determine whether an Establishment Clause violation is present.[108] Four factors convinced Justice O'Connor that no violation had taken place. First, student organizations remain independent of the University.[109] Second, financial assistance goes directly to third parties rather than the student organization.[110] Third, since a broad variety of viewpoints are funded, there is little danger of perceived government endorsement of any particular religious message.[111] This point represents an application of the "endorsement" test Justice O'Connor has used in previous Establishment Clause cases.[112] Finally, objecting students might

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by the Ku Klux Klan on public land sometimes used for public demonstrations not an Establishment Clause violation).

101. *Rosenberger*, 115 S. Ct. at 2518-19.
102. *Id.* at 2519.
103. *Id.* at 2522.
104. *Id.*
105. *Id.* at 2523.
106. *Id.* at 2523-24.
107. *Id.* at 2525 (O'Connor, J., concurring).
108. *Id.* at 2525-26.
109. *Id.* at 2526.
110. *Id.* at 2527.
111. *Id.*
112. *See supra* notes 56-59 and accompanying text.

be able to challenge mandatory payment of the student activities fee in a court proceeding.[113] These circumstances provided adequate safeguards against any government endorsement of religion.

2. Justice Thomas' Concurring Opinion

Justice Thomas challenged the dissent's characterization of the original intent of the Establishment Clause, stating "[t]he Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants."[114] Justice Thomas relied in part on historical examples of government funding that provided benefits to religion in general.[115] Justice Thomas also found the dissent's distinction between direct aid and in-kind aid to be a mere formalism: "[T]he appropriate baseline [for determining the propriety of aid] surely cannot depend on the fortuitous circumstances surrounding the *form* of aid."[116] Justice Thomas, by his concurring opinion, clearly placed himself in the "nonpreferentialist" group of justices.[117]

3. Dissenting Opinion

Justice Souter, joined by Justices Breyer, Ginsburg, and Stevens, strongly criticized the majority's holding for its "erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses."[118] According to the dissent, "[t]he Court today, for the first time, approves direct funding of core religious activities by an arm of the State."[119] The dissent characterizes the majority's neutrality analysis as a "subsidiary body of law, which [the Court] correctly states but ultimately misapplies."[120]

To the dissent, any direct funding arrangement that benefits religion is an Establishment Clause violation; the neutrality with which any incidental benefits are distributed is relevant only if there has been no direct funding.[121] The dissent rejected the Court's distinction between the SAF and a tax, noting as well that there is no Constitutional justification for funding religious activities regardless of the source of the funds.[122] The dissent attempted to

113. *Rosenberger*, 115 S. Ct. at 2527 (O'Connor, J., concurring).
114. *Id.* at 2532 (Thomas, J., concurring).
115. *Id.* at 2531, 2533 (citing, *inter alia*, funding of Congressional chaplains, land grants aiding religion and religious schools, and copyright protection extending to religious works).
116. *Id.* at 2533 (emphasis added).
117. *See supra* note 55 and accompanying text.
118. *Id.* at 2533 (Souter, J., dissenting).
119. *Id.*
120. *Id.* at 2540.
121. *Id.*
122. *Id.* at 2546-47.

distinguish the public forum cases of *Widmar* and its progeny by declaring that providing public classroom space for meetings is analogous to maintaining a street corner available for the use of speakers.[123] The dissent further stated that "[t]here is no traditional street corner printing provided by the government on equal terms to all comers, and the forum cases cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid."[124] The contrast between the conclusion drawn by the dissent and that drawn by Justice Thomas illustrates how a single body of history can produce sharply differing interpretations.

IV. ANALYSIS

In *Rosenberger*, the Court attempted to steer a careful course between permitting either an Establishment Clause violation or an abridgment of free speech rights in a public forum. The majority, together with Justice O'Connor's concurring opinion, found no Establishment Clause violation, but only by placing several qualifications on the type of aid extended. The public forum doctrine requires that religious speech be granted access to the forum. The Court, however, dismissed the Establishment Clause concerns by finding that the funding scheme could be applied neutrally between religious speech and other philosophical speech. The Court used a flexible definition of religion and refused to find an Establishment Clause violation.[125] Even though *Rosenberger* has some symbolic importance, it will be difficult to apply to other factual settings.[126] Accordingly, the approach used in *Rosenberger* probably will not replace *Lemon*, and there are no significant prospects for replacing *Lemon* in the near future.[127] *Rosenberger* most clearly fits in the line of other cases granting religious speakers equal access to public fora,[128] and may represent the greatest possible assistance to religious speakers that would not be considered an Establishment Clause violation.

A. Establishment Clause: Old "Neutrality" Wine in New Philosophical Bottles?

Rosenberger arrived at the Court as an Establishment Clause case.[129] Inextricably bound up with the case, however, were the free speech rights of petitioners. Unlike many Establishment Clause cases, the Court did not require

123. *Id.* at 2546.
124. *Id.*
125. *See infra* notes 144-58 and accompanying text.
126. *See infra* notes 168-77 and accompanying text.
127. *See infra* notes 159-67 and accompanying text.
128. See *supra* notes 28-40 and accompanying text for an explanation of these cases.
129. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2521 (1995).

a balancing between the conflicting mandates of the Free Exercise Clause and the Establishment Clause. The University did not restrict petitioner's free exercise rights since UVA permitted WAP to distribute their newspaper on campus even though UVA denied funding for the newspaper.[130] Instead, the required balancing was between petitioner's free speech rights, specifically their access to the limited public forum of the SAF, and the prohibitions of the Establishment Clause. The free speech component of *Rosenberger* creates a limited vehicle for developing coherent Establishment Clause doctrine.

The majority did not cite *Lemon*. This fact may or may not signal *Lemon's* demise. As the Court noted in *Lamb's Chapel*, "there is a proper way to inter an established decision,"[131] which the Court declined to undertake. Accordingly, while it would still be prudent to address the *Lemon* inquiries in an Establishment Clause case, it is possible to defeat a challenge under the Clause if one or more of the prongs of the test are not satisfied.

1. The Bipolar Chill

The *Rosenberger* majority focused on the neutrality with which governments make benefits available.[132] This approach has a long history in Establishment Clause cases. In *Everson v. Board of Education,*[133] the Court determined that ensuring neutrality among religions, and between religion and nonreligion, was one of the key purposes of the Establishment Clause.[134] Various Establishment Clause cases prior to *Lemon* mentioned neutrality.[135] After *Lemon* was decided, the neutrality inquiry generally was subsumed under the second prong of the *Lemon* test, requiring that government activity neither advance nor inhibit religion.[136] At the same time, the first *Lemon* prong, requiring a secular legislative purpose, increased the relative importance of maintaining neutrality between religion and nonreligion. Neutrality among

130. Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 278 (4th Cir. 1994).

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

132. *Rosenberger*, 115 S. Ct. at 2521-22.

133. 330 U.S. 1 (1947).

134. *Id.* at 15-16.

135. *See, e.g.*, Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result) ("To conform with the requirements of the First Amendment's religious clauses as reflected in the mainstream of American history, legislation must, at the very least, be neutral."); Abington School Dist. v. Schempp, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though . . . application . . . requires interpretation . . . the rule itself is clearly and concisely stated in the words of the First Amendment."); Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment leaves the Government in a position not of hostility to religion but of neutrality."); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects.").

136. *See generally* John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine,* 48 U. PITT. L. REV. 83, 129 (1986).

religions is still required.[137] The neutrality requirement has considerable overlap with the "endorsement" test applied by Justice O'Connor.[138]

The significance of *Rosenberger's* neutrality test is that the test encompasses claims between religions and other philosophical schemes rather than claims among competing religions. A key characteristic of neutrality is the notion that it is difficult to preclude entire discussions of certain broad areas of inquiry without inadvertently discriminating against some viewpoints regarding an issue. Precluding religious speech is especially pernicious since religion "provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered."[139] Prior to *Rosenberger*, as one commentator notes, "[t]he Court was willing to recognize that public aid of religion *A* inhibits religion *B* and all other religions not subsidized, but was not willing to admit that public aid of idea or philosophy *A* inhibits religion *A* and *B* and all other religious ideas not subsidized."[140] Following this philosophy, governments were free to exclude religious expression from the public forum as long as governments simultaneously excluded what might be termed "irreligion" or "nonreligion."

The *Rosenberger* court discards this approach, at least in the public forum context. To the majority, attempts to eliminate entire categories of speech "reflect[] an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech."[141] If the Constitution were "interpreted to require that state officials scan . . . publication[s] to ferret out views that principally manifest a belief in a divine being" then "ideas . . . would be both incomplete and chilled."[142] As the Court notes, its interpretation makes sense because it avoids state entanglement with religion.[143] On a more practical level, however, the Court's approach makes sense because it relieves governments and courts of the difficult task of defining religion, and the intractable problem of defining "nonreligion."

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137. *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982) (holding unconstitutional a Minnesota statute imposing registration requirements only on religious organizations soliciting more than fifty percent of their funds from nonmembers).

138. *See supra* notes 56-59 and accompanying text. The endorsement test itself is a component of the second *Lemon* prong, requiring that government action have a primary effect that neither advances nor inhibits religion. *See* Rena M. Bila, Note, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1566-68 (1995). *Lemon's* second prong was an outgrowth of the neutrality requirement originally developed by *Everson*. *See* Valauri, *supra* note 136, at 134. Therefore, the overlap between the approaches is logical.

139. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2517 (1995).

140. Sekulow et al., *supra* note 54, at 365.

141. *Rosenberger*, 115 S. Ct. at 2518.

142. *Id.* at 2524.

143. *Id.*

2. Definition of Religion

The amount of conflict between the Establishment Clause "no funding" mandate and the free speech "equal access" mandate varies in proportion to the broadness of the definition of religion that a court employs. A relatively narrow definition of religion might be stated as "the expression of man's belief in and reverence for a superhuman power recognized as the creator and governor of the universe."[144] When such a definition is employed, conflicts will not seem frequent—as long as speech does not explicitly discuss one's relationship to a deity, the speech is nonreligious. Thus, this narrow definition possibly would allow a fairly broad range of philosophical inquiry to be discussed in the forum, while denying discussion of "secular" topics motivated or informed by one's religious beliefs.

The Court has never adopted a single, all-purpose definition for religion. The definition in use until the middle of the twentieth century was basically theistic.[145] In the 1960s, the Court began expanding the definition of religion employed in Free Exercise cases to encompass a system of beliefs that held for its adherents a position similar to that held by traditional religions.[146] This broader view of religion has given individuals who adhere to a nontraditional belief system greater protection from government coercion than does the theistic definition. This broad approach, however, is not applied to Establishment Clause cases. The use of the narrow definition for Establishment Clause cases is readily seen by the general lack of success enjoyed by litigants attempting to argue that public schools have developed an atheistic orthodoxy of "secular humanism" that has assumed the role of a state religion.[147] Some commentators have recommended the adoption of a "bifurcated" definition of religion, that is, a broad definition for Free Exercise cases and a narrow definition for Establishment Clause cases.[148] This approach allows for a range of government action which might be helpful to an individual's practice of his religion, while not being pervasive enough to constitute an establishment of religion. In its favor, this approach can relieve some of the purported tension between the application of the Free Exercise and the Establishment Clauses. The major drawback to the bifurcated approach, however, is that it is not

144. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1099 (1975).

145. David Young, Comment, *The Meaning of "Religion" in the First Amendment: Lexicography and Constitutional Policy,* 56 UMKC L. REV. 313, 322 (1988); *see also* United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, J., dissenting) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.").

146. *See, e.g.,* Welsh v. United States, 398 U.S. 333, 339 (1970) (construing conscientious objector provisions of draft law); United States v. Seeger, 380 U.S. 163, 176 (1965) (same).

147. *See* Richard O. Frame, *Belief in an Nonmaterial Reality—A Proposed First Amendment Definition of Religion*, 1992 U. ILL. L. REV. 819, 831 (1992).

148. *E.g.,* Note, *Toward A Constitutional Definition of Religion,* 91 HARV. L. REV. 1056, 1084 (1978).

directly supported by the text of the First Amendment.[149] The Amendment uses the term "religion" only once,[150] implying a unitary meaning for both of the clauses.

The *Rosenberger* court does not define religion. In fact, the majority simultaneously seems to embrace both broad and narrow definitions for different purposes. The University's own guidelines suggest the use of the broad definition, for the guidelines bar funding to any organization "primarily promoting or manifesting a belief in a deity or ultimate reality."[151] In judging whether granting access to the forum, the Court noted that debate is not bipolar and virtually any writing with some philosophical underpinnings manifests a belief about ultimate reality.[152]

The Court's use of the broad definition of religion for determining whether religious views have been permitted into the forum seems particularly apt in light of the role philosophical presuppositions play in education. One author notes:

> [I]t is not possible to make statements about reality without first having a theory for arriving at truth; and, on the other hand, a theory of truth cannot be developed without first having a concept of reality. . . . Every person . . . lives by a faith. The acceptance of a particular [philosophical] position . . . is a "faith-choice" made by individuals, and it entails a commitment to a way of life.[153]

To assure evenhandedness under a broad definition of religion as "faith-choice" while avoiding Establishment Clause violations, it would be necessary to preclude funding for a broad variety of student speech. If the University applied its policy "with much vigor at all," it would be "difficult to name renowned thinkers whose writings would be accepted," unless they disclaimed "all connection to their ultimate philosophy. Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections."[154] Denying such a broad range of speech would harm the free exchange of ideas central to the learning process.

Perhaps to foster its goal of ensuring the free exchange of ideas in the university environment, the Court used a narrow definition of religion in discussing the possibility of an Establishment Clause violation, noting that

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149. *See* Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting) (asserting single use of "religion" in First Amendment requires the same restrictions for the Free Exercise Clause as for the Establishment Clause).

150. U.S. CONST. amend. I.

151. Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 279 (4th Cir. 1994) (quoting the University of Virginia's guidelines for funding campus organizations).

152. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2520 (1995).

153. GEORGE R. KNIGHT, PHILOSOPHY AND EDUCATION: AN INTRODUCTION IN CHRISTIAN PERSPECTIVE 28 (1980).

154. *Rosenberger*, 115 S. Ct. at 2520.

"[w]e do not confront a case where . . . the government is making direct money payments to an institution or group that is engaged in religious activity."[155] The Court expressed doubt that WAP was comparable to a church, or that its speech was comparable to religious exercises.[156] Further, WAP was neither a religious institution as the term relates to case law, nor a religious organization as defined by the University's regulations.[157] This focus on "church," "religious exercises," and "religious institutions" is more reminiscent of a traditional, narrow view of religion than of a broad "world view" definition.

The Court, by refusing to adhere to one definition of religion, obtained maximum flexibility at the expense of doctrinal purity. This approach is helpful in *Rosenberger* because of the value of the petitioners' free speech rights. Allowing governments to exclude religious speech from a public forum as long as governments also exclude nonreligious speech requires governments and courts to undertake the formidable task of defining both "religion" and "nonreligion." The Court has wrestled with defining religion for a number of years and has yet to come up with a consistent all-purpose definition. It hardly seems likely that the Court would have any more success at defining nonreligion. As society's view of religion becomes more expansive, the task of excising religion and nonreligion from public debate grows even more difficult. The remedy for this conflict is not to place certain topics off limits, but rather to allow more speech:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[158]

Freedom of conscience and expression thus provides a strong foundation for a free society.

B. Dim Prospects for a New Establishment Clause Test

The major drawback to the Court's flexible approach is that it will create further confusion and conflict over the appropriate Establishment Clause test. *Rosenberger* is better understood as a strengthening of the "free speech exception" to the full reach of the Establishment Clause, rather than as a definitive new test. The many qualifications and restrictions noted by the

155. *Id.* at 2523.
156. *Id.*
157. *Id.* at 2524.
158. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

majority[159] and by Justice O'Connor[160] are more consistent with a decision regarded as an exception to an established rule, rather than a decision announcing a significant new right. The Establishment Clause was not applied with much vigor in *Rosenberger* because of the Court's desire not to chill the free speech rights of the petitioners. The Establishment Clause prohibition probably would be applied more stringently if the countervailing interest was something less highly regarded than free speech.

It seems unlikely, given the Court's current composition, that a significant, persuasive new Establishment Clause test will emerge in the near future. Justices Souter, Breyer, Ginsburg, and Stevens, based on their dissent in *Rosenberg*er, appear to be committed to the Establishment Clause jurisprudence of *Lemon* and its progeny.[161] Justices Scalia, Thomas, and Rehnquist prefer a more accomodationist stance, which is less likely to find "nonpreferential" government assistance to religion in violation of the Establishment Clause.[162] These three justices are also likely to evaluate historical practices when attempting to discern the meaning of the Establishment Clause.[163] Justice O'Connor applies the endorsement test, which has some similarities to the nonpreferentialist view, but is more likely to find violations, in part because the endorsement test generally does not look at traditional or historical practice.[164] Justice Kennedy's approach defies easy classification, although his focus on neutrality does allow for some nonpreferential aid to religion as seen in *Rosenberger*.[165] Justice Kennedy generally gives less weight to historical practice than the nonpreferentialist

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159. *See supra* notes 92-106 and accompanying text.

160. *See supra* notes 107-13 and accompanying text.

161. See *supra* notes 41-46 and accompanying text for a discussion of *Lemon* and its progeny.

162. *See supra* note 55 and accompanying text; *see also* Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 114 S. Ct. 2481, 2513-14, 2516 (1994) (Scalia, J., dissenting, joined by Rehnquist, J., and Thomas, J.) (stating "all my opinions are consistent with the view that the Establishment Clause prohibits the favoring of one religion over others," and noting "a recent tendency in the opinions of this Court to turn the Establishment Clause into a repealer of our Nation's tradition of religious toleration").

163. *See supra* note 55 and accompanying text; *see also Kiryas Joel,* 114 S. Ct. at 2512 (Scalia, J., dissenting, joined by Rehnquist, J., and Thomas, J.) (citing instances of legislative accommodation for school release time programs, property tax exemptions for churches, and exemption of religious groups from Title VII anti-discrimination provisions).

164. *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in judgment) (noting activities proscribed by Constitution not acceptable merely because of long toleration, and stating role of history is to provide context for reasonable observer's evaluation of whether a government practice constitutes an endorsement of religion); *see also* Steven A. Seidman, *County of Allegheny v. American Civil Liberties Union: Embracing the Endorsement Test,* 9 J. L. & RELIGION 211, 231-34 (1991) (discussing use of history under the endorsement test).

165. *See Allegheny County*, 492 U.S. 573 at 662 (1989) (Kennedy, J., concurring in part and dissenting in part) (noting "noncoercive government action . . . or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage"); *see also* Steven G. Gey, *Religious Coercion and the Establishment Clause,* 1994 U. ILL. L. REV. 463, 494-504 (discussing Justice Kennedy's use of a coercion test for evaluating Establishment Clause violations).

justices and shows some tendency to use psychological and philosophical considerations in developing his conclusions.[166]

These divisions on the Court make crafting a majority in close cases a difficult task. For example, *Board of Education of Kiryas Joel Village School District v. Grumet,* a 1994 Establishment Clause case decided by a six to three margin, produced four separate concurring opinions.[167] Although a change of one or two justices could cause voting patterns to shift, it seems unlikely that a credible new test could emerge without wholesale personnel change on the Court.

C. Application of Rosenberger to Non-University Settings

The result of the *Rosenberger* approach, regardless of characterization, is certainly more favorable than the *Lemon* test to religious groups' requests for access to public benefits. Under the *Lemon* test, the Court invalidates government action if the action has a central purpose that advances religion.[168] Providing funding for a newspaper that "encourages students to consider what a personal relationship with Jesus Christ means"[169] would certainly seem to be an advancement of religion under all but the narrowest definition of religion. Justice Souter has no doubt on this point: "[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 the preaching of the word."[170] Subsidizing such preaching "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."[171]

This more accommodating stance toward public funding of religious speech is far from a blank check. The specialized nature of the facts in *Rosenberger* suggests religious groups should temper their enthusiasm over the ruling[172] with a dose of caution. It may be difficult to extend the rationale of *Rosenberger* from the university to the public school or community setting due to several factors. First, UVA did not give aid to the student organization but rather paid the third-party vendor directly.[173] This type of system seems much

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166. *See, e.g.*, Lee v. Weisman 505 U.S. 577, 592-94 (1992) (holding presence of coercion was one indicator of an Establishment Clause violation).

167. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (holding unconstitutional the creation of a separate public school district to serve the educational needs of learning-disabled adherents of Hasidic Judaism).

168. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

169. Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2515 (1995).

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

171. *Id.*

172. *High Court Decisions Narrow Division Between Church, State,* L. A. TIMES, July 1, 1995, at B12 ("Jay Sekulow of the American Center for Law and Justice, [a conservative] legal advocacy group . . . called the Rosenberger ruling 'a major victory for religious freedom' that will pave the way for 'government subsidizing tuition vouchers for religious schools.'").

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

more common in the university or school setting than in the community setting. Second, UVA required organizations to maintain complete independence from the University. Third, a large variety of views are represented, reducing the chance for a perception of government endorsement of a particular religious message. While this diversity would seem to be readily obtainable in most universities and in large cities, it is less likely a small community or a neighborhood school could generate the diversity of opinions necessary to avoid the perception of endorsement.

The most difficult facts to duplicate are the financial source of the aid and the type of aid provided. The majority took considerable effort to distinguish this mandatory assessment from a general tax, noting the SAF "cannot be used for unlimited purposes . . . . Our decision . . . cannot be read as addressing an expenditure from a general tax fund."[174] This distinction does not rest on strong analytical ground when considering history.[175] The type of aid provided in *Rosenberger,* like its source, was specialized. Since UVA could have provided access to printing equipment without Establishment Clause violation, reimbursement to a third party for printing services was seen as merely an alternative method to allow students free access to the means of expression.[176] When compared to universities, communities typically do not have extensive means of communication at their disposal. A school, in contrast, typically has some easy means of communication with students. Under the *Rosenberger* ruling, it may now be arguable that if these means of communication are made available to a variety of groups, the communication means should be made available to religious speakers as well.

Another reason to be cautious about extending the rationale of *Rosenberger* is that it takes place in the university context. "[I]n the University setting . . . the state acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[177] Free exchange of ideas is considered to be the norm from which variations

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174. *Id.* at 2522.

175. In 1786, in response to a proposal to levy a small tax for the support of ministers, James Madison wrote the Memorial and Remonstrance Against Religious Assessments. Justice Rutledge, in an Appendix to his dissenting opinion in Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947), reproduced the entire Memorial and Remonstrance. Since Madison also introduced the initial version of what is now the First Amendment to Congress, the strict separation views he advocated in the Memorial and Remonstrance have been considered helpful to Establishment Clause interpretation. The Memorial and Remonstrance has been cited in numerous Supreme Court cases decided since Everson. *E.g.* Lee v. Weisman, 505 U.S. 577 *passim* (1992); Edwards v. Aguillard, 482 U.S. 578, 605-06 (1987) (Powell, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 55 n.38 (1985); Lemon v. Kurtzman, 403 U.S. 602, 633 n.18 (1971) (Douglas, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203, 213, 225 (1963); Engel v. Vitale, 370 U.S. 421, 433 nn.13, 15, 436 n.22 (1962); McCollum v. Board of Educ., 333 U.S. 203, 247, 248 n.14 (1948) (Reed, J., dissenting). In *Rosenberger*, both Justice Thomas, 115 S. Ct. at 2529-30 (noting neutrality, entanglement, and chilling effect concerns), and Justice Souter, 115 S. Ct. at 2536-37 (noting separation concerns), cite the Memorial and Remonstrance in support of their positions.

176. *Rosenberger,* 115 S. Ct. at 2523-24.

177. *Id.* at 2520.

must be justified. Assuming, however, that the other requirements are met, this rationale can probably be extended to community use of public facilities, just as *Lamb's Chapel* extended the equal access requirements of *Widmar* from universities to communities. Application to public schools is more problematic, since students younger than college age are considered less able to distinguish between private and government speech than are college students.

V. CONCLUSION

Rosenberger stands at the place where the path to truth, as embodied by free speech, runs into the Establishment Clause's purported wall of separation between church and state. The wall has never served as an absolute barrier and does not now. *Rosenberger* is best understood not as a crumbling or restructuring of the wall itself, but as an enlargement of the door that allows ideas to pass unimpeded from one side of the wall to the other. This door, which existed long before the Court decided *Rosenberger*, is clearly not big enough to allow unlimited passage. The government need not always open the door; indeed, there are times when the government should keep the door securely locked. Once the government has chosen to open the door for a particular time to some, however, it has an obligation to keep the door open to others without requiring any of the entrants to obtain approval for their ideologies.

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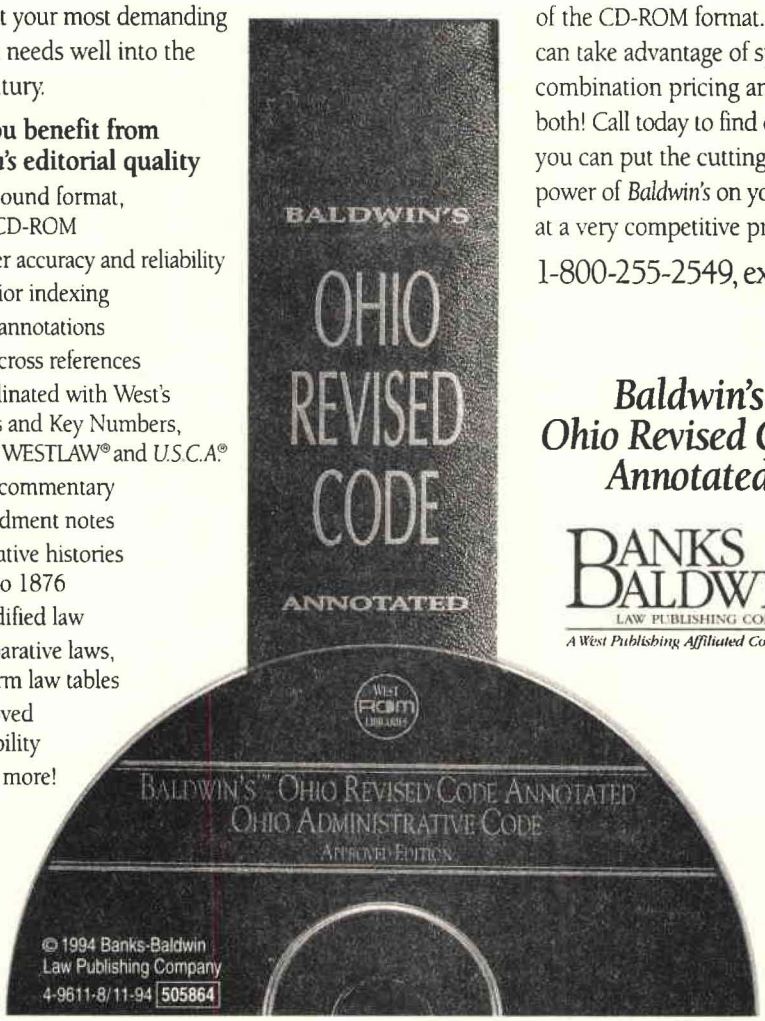

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