Volume 98 | Issue 1 Article 14

September 1995

The Wall Crumbles: A Look at the Establishment Clause Rosenberger v. Rector & Visitors of the University of Virginia

Paul L. Hicks
West Virginia University College of Law

THE WALL CRUMBLES: A LOOK AT THE ESTABLISHMENT CLAUSE *ROSENBERGER v. RECTOR & VISITORS OF THE UNIVERSITY OF VIRGINIA*

I. INTRODUCTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom

of speech, ..."[1] In 1947, the Supreme Court interpreted this First Amendment Clause, in *Everson v. Board of Education*,[2] to require a "wall of separation" between church and state.[3] Since *Everson*, the Court has slowly become more permissive toward governmental action involving religious matters. Most recently, the United States Supreme Court, in *Rosenberger v. Rector & Visitors of the University of Virginia*,[4] favored the protection of free religious speech over the separation of church and state. Therefore, while acknowledging a continuing conflict between the Free Speech Clause and the Establishment Clause, the Court has apparently torn down the "wall of separation."

In *Rosenberger*, the respondent, University of Virginia (the University), withheld payments to a printer on behalf of the petitioner's student group, Wide Awake Productions (WAP). The respondent claimed that WAP's newspaper, *Wide Awake: A Christian Perspective at the University of Virginia*, violated the University's Student Activities Fund (SAF) guidelines, in that it "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[5] The petitioner alleged that the refusal to authorize payment violated their First Amendment right to freedom of speech. The district court granted summary judgment for the University[6] concluding that: (1) the SAF was not a "limited public forum;" (2) the application of the funding guidelines did not result in viewpoint discrimination; and (3) the denial of funds did not burden the plaintiff's exercise of religious freedom.[7] In affirming the district court, the Fourth Circuit held that the University justified its use of unconstitutional viewpoint discrimination to comply with the Establishment Clause.[8]

---

1. U.S. CONST. amend. I.

2. 330 U.S. 1 (1947) (upholding public transportation for both public and parochial students).

3. *Id.* at 18.

4. 115 S. Ct. 2510 (1995), *rev'g* 18 F.3d 269 (4th Cir. 1994).

5. *Id.* at 2512.

6. Rosenberger v. Rector & Visitors of the Univ. of Va., 795 F. Supp. 175 (W.D. Va. 1992).

7. *Id.* at 180-83.

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

The Supreme Court granted certiorari and held that the University's guidelines, both in their terms and in their application, were a denial of the petitioner's right of free speech and amounted to unconstitutional viewpoint discrimination.[9] Furthermore, the Court held that the governmental program at issue was neutral toward religion and there was no suggestion that the University created its program to advance or aid a religious cause.[10] Therefore, the necessity of complying with the Establishment Clause did not excuse the discrimination.[11]

The Supreme Court framed the issue in *Rosenberger* as follows:

> 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 non-religious.[12]

A 5-4 majority[13] held that "[t]here is no Establishment Clause violation in the University honoring its duties under the Free Speech Clause."[14]

This Comment will (1) give a summary of the history of Establishment Clause jurisprudence; (2) explore the Supreme Court's decision in *Rosenberger*; and (3) speculate on the effect *Rosenberger* will have on future Establishment Clause cases.

---

9. 115 S. Ct. at 2520.
10. *Id.* at 2522.
11. *Id.* at 2524.
12. *Id.* at 2521.
13. Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C.J., and O'Connor, Scalia, & Thomas, JJ., joined. O'Connor, & Thomas, JJ., filed concurring opinions. Souter, J., filed a dissenting opinion, in which Stevens, Ginsburg, & Breyer, JJ., joined.
14. 115 S. Ct. at 2525.

II. BACKGROUND OF THE LAW

A. *Early Establishment Clause Analysis*

In 1947, the Supreme Court established the "strict separationist" view of the Establishment Clause in *Everson v. Board of Education*,[15] and erected the "wall of separation" between church and state.[16] In *Everson*, the Court wrote extensively on the history of the First Amendment and its constitutional origins, and concluded that the "First Amendment has erected a wall between church and state [and] [t]hat wall must be kept high and impregnable."[17] However, since *Everson*, several Justices have repeatedly rejected the "wall" metaphor.[18] For example, in *Lemon v. Kurtzman*,[19] Chief Justice Burger stated that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[20] Chief Justice Burger also stated, in *Lynch v. Donnelly*,[21] that "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[22] Finally, in *Wallace v. Jaffree*,[23] Justice Rehnquist declared that:

> There is simply no historical foundation for the proposition that the framers intended to build the 'wall of separation' that was constitutionalized in *Everson*. . . . The 'wall of separation between church and state' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.[24]

---

15. 330 U.S. 1 (1947).

16. James M. Lewis & Michael L. Vild, Note, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671, 672 (1990) [hereinafter Lewis & Vild].

17. *Everson*, 330 U.S. at 18.

18. Lewis & Vild, *supra* note 16, at 672 n.11.

19. 403 U.S. 602 (1971).

20. *Id.* at 614.

21. 465 U.S. 668 (1984).

22. *Id.* at 673.

23. 472 U.S. 38 (1985).

24. *Id.* at 106-07 (Rehnquist, J., dissenting).

Thus, the "wall" was never sturdy and produced various unpredictable applications. For instance, in *Everson,* the Court upheld public transportation for both public and parochial students.[25] While in *McCollum v. Board of Education,*[26] the same Court struck down optional religious instruction in public schools.[27] Furthermore, four years later in *Zorach v. Clauson,*[28] the Court upheld the release of students from public school classes to attend private religious classes.[29] Although the Supreme Court decided all of these cases while presumably applying the "wall of separation" principle, the results are not consistent with the strict separationist view. Accordingly, the Court's decisions failed to produce a consistent analytical framework for future courts to follow.[30]

In 1963, the Court introduced a two-step Establishment Clause analysis in *Abington Township School District v. Schemp.*[31] The Court held that in order to withstand scrutiny under the Establishment Clause, the government action must have a secular purpose and a primary effect that neither advances nor inhibits religion.[32] The Court in *Abington Township* intended the two-step-test to remain within the strict separation doctrine while providing an analytical framework for Establishment Clause analysis.[33]

In 1970, the Court decided *Walz v. Tax Commission*[34] which added a third step to Establishment Clause analysis: there must not be "excessive government entanglement with religion."[35] The Court held that it was not enough to determine that the property tax exemption was not aimed at establishing, sponsoring, or supporting religion, but

25. 330 U.S. 1 (1947).
26. 333 U.S. 203 (1948).
27. *Id.* at 212.
28. 343 U.S. 306 (1952).
29. *Id.* at 315.
30. Lewis & Vild, *supra* note 16, at 672.
31. 374 U.S. 203 (1963).
32. *Id.* at 222.
33. Lewis & Vild, *supra* note 16, at 673.
34. 397 U.S. 664 (1970) (approving a tax exemption for church property).
35. *Id.* at 667.

the end result must not involve an excessive government entanglement with religion.[36] In *Walz*, the Court acknowledged that some interaction between church and state will occur.[37] For example, the *Walz* Court noted that government provided fire and police protection results in unavoidable church and state interaction.[38] However, the Establishment Clause prohibits an *excessive* entanglement.[39] Therefore, the Court determined that the tax exemption would result in less entanglement than would enforcing the payment of taxes by religious organizations.[40]

Finally, in 1971, the Court in *Lemon v. Kurtzman*[41] synthesized the two step process set forth in *Abington* with the excessive entanglement doctrine of *Walz* into what became the benchmark of Establishment Clause jurisprudence.[42] The three-pronged *Lemon* test required the government action to (1) have a secular purpose, (2) neither advance nor inhibit religion in its principal or primary effect, and (3) not foster an excessive entanglement with religion.[43] The aesthetic simplicity of the test and the unanimous decision by the Court were the keys to the *Lemon* test becoming the standard for Establishment Clause analysis.[44]

B. Development of the Endorsement Test

Since the *Lemon* decision, the make-up of the Court has changed considerably.[45] Justice O'Connor, who joined the Court in 1981, has

---

36. *Id.* at 674.

37. *Id.* at 675.

38. 397 U.S. at 676.

39. *Id.* at 675 (upholding a property tax exemption for religious organizations because it would entangle government and religion less than would tax valuation, tax liens, tax foreclosures and related procedures).

40. *Id.* at 674.

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

42. Lewis & Vild, *supra* note 16, at 673.

43. 403 U.S. at 612-13.

44. Lewis & Vild, *supra* note 16, at 673.

45. Between 1970 and 1984, four members of the Court retired and were replaced. Justice Powell replaced Justice Black and Justice Rehnquist replaced Justice Harlan in 1971; Justice Stevens replaced Justice Douglas in 1975; and Justice O'Connor replaced

had a significant impact on Establishment Clause jurisprudence.[46] She led the Court in proposing a revision of the secular purpose and primary effect prongs of the *Lemon* test. These revisions would focus the analysis on government endorsement of religion.[47] The introduction of the endorsement analysis occurred in three principal cases: *Lynch v. Donnely*,[48] *Wallace v. Jaffree*,[49] and *School District v. Ball*.[50]

In *Lynch*, the Court considered the constitutionality of a Christmas display erected in a private park within the city's shopping district.[51] The display included a Santa Clause house, reindeer pulling a sleigh, a Christmas tree, a talking wishing well, several hundred colored lights and a creche (nativity scene).[52] Of the five Justices remaining from the *Lemon* Court, three[53] found that displaying the creche failed the three-pronged test, while two[54] believed the creche was acceptable in its secular surrounding. The four new Justices were also divided and in the end, Justice O'Connor provided the swing vote by joining the majority in favor of allowing the creche.[55]

In deciding *Lynch*, the majority applied the *Lemon* test and expressly rejected the "wall of separation" view from *Everson*.[56] The

---

Justice Stewart in 1981.

46. Lewis & Vild, *supra* note 16, at 673.

47. *Id.* at 678.

48. 465 U.S. 668 (1984) (upholding the constitutionality of a Christmas display erected by the city of Pawtucket, Rhode Island, in a private park within the city's shopping district).

49. 472 U.S. 38 (1985) (finding unconstitutional an Alabama statute providing for a moment of silence for meditation or voluntary prayer in school).

50. 473 U.S. 373 (1985) (finding unconstitutional a school district's shared time education program for public school instruction at private, parochial schools).

51. 465 U.S. at 668.

52. *Id.* at 671.

53. Justices Brennan, Marshall, and Blackmun.

54. Chief Justice Burger and Justice White.

55. Lewis & Vild, *supra* note 16, at 674.

56. *Lynch*, 465 U.S. at 673 (quoting Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 (1973), the Court stated:

> [The wall] metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state. . . . "It has never been thought either possible or desirable to enforce a regime of total separation . . . . Nor does the Constitution require complete separation of church

rejection of the "wall of separation" indicated that the Court was adopting a more permissive stance with respect to the relationship between government action and religious matters.[57] However, Justice O'Connor, agreeing with the majority in the outcome but not necessarily in the more permissive stance, wrote a separate concurring opinion to "suggest a clarification in our Establishment Clause doctrine."[58] Out of concern for the religious minority, Justice O'Connor suggested a shift in the focus of the purpose and effect inquiry toward detecting governmental "endorsement" of religion.[59] Justice O'Connor wrote:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . [Governmental endorsement of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[60]

Under this revised test, Justice O'Connor concluded that the creche did not violate the Establishment Clause.[61]

In the second case, *Wallace v. Jaffree*,[62] the majority for the first time considered endorsement when applying the *Lemon* test. In *Wallace*, the Court reviewed an Alabama statute that provided for a

---

and state . . . .").

57. *Lynch*, 465 U.S. at 673.

58. *Id.* at 687.

59. *Id.* at 690. Justice O'Connor states her revised approach as follows:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Id.

60. *Id.* at 687-88.

61. *Id.* at 694 ("I cannot say that the particular creche display at issue in this case was intended to endorse or had the effect of endorsing Christianity.").

62. 472 U.S. 38 (1985).

moment of silence "for meditation or voluntary prayer."[63] Justices Powell and O'Connor joined the four dissenters of *Lynch*[64] to strike down the prayer statute under the Establishment Clause. Justice Stevens, writing for the majority, began his three-pronged *Lemon* analysis with a reference to Justice O'Connor's concurring opinion from *Lynch*.[65] The majority found that the state had violated the Establishment Clause and framed its conclusion in the language of Justice O'Connor's "endorsement" test.[66]

Finally, in *School District v. Ball*,[67] the Court embraced the "endorsement" analysis when the majority opinion focused on the effect of the questioned programs.[68] Decided only a month after *Wallace*, *Ball* addressed public school instruction at private, parochial schools. Justice Brennan wrote the opinion for the majority, and for the first time he used the endorsement test to invalidate a government action. Justice Brennan referred to the physical proximity of the public and parochial instruction as a "powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same [classrooms] at some other time in the day."[69] Based upon this, and other more straightforward *Lemon* violations, Justice Brennan concluded that the school programs violated the Establishment Clause by having the

---

63. *Id.* at 40.

64. Justices Brennan, Marshall, Blackmun, and Stevens.

65. 472 U.S. at 56 (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring), the Court held that "[i]n applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion'").

66. *Id.* at 60. The Court stated:

> The legislature enacted [the statute] . . . for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice. Such an *endorsement* is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

Id. (emphasis added).

67. 473 U.S. 373 (1985).

68. *Id.* at 383.

69. *Id.* at 392.

effect of promoting religion.[70] Justice O'Connor again wrote a brief separate opinion focusing on Justice Brennan's effect analysis.[71]

Lynch, *Wallace*, and *Ball* represent the evolution of the Court's Establishment Clause analysis. Throughout the evolution, Justice O'Connor, writing in separate opinions, has struggled to define the endorsement test and win over a majority of the Court.

C. *A More Recent View of Establishment Clause Analysis*

1. The Endorsement Analysis

During the October 1988 term, the Supreme Court, in deciding two cases, *Texas Monthly v. Bullock*[72] and *County of Allegheny v. American Civil Liberties Union*,[73] confirmed that the endorsement test had become a part of Establishment Clause jurisprudence. In *Texas Monthly*, the Court addressed a Texas statute exempting magazine subscriptions from state sales tax.[74] Texas had also specifically exempted religious periodicals from this tax.[75] However, from 1984 to 1987, Texas eliminated the exemption for magazines in general, while maintaining the exemption for religious periodicals. The appellant, Texas Monthly, Inc., paid $150,000 in sales tax and sued to recover the payments on Establishment Clause and free press grounds.[76] The state trial court found that the religious exemption violated both the Establishment Clause and the Free Speech Clause, and struck down the tax on non-religious periodicals.[77] The Texas Court of Appeals, applying *Lemon*, reversed the trial court.[78]

---

70. *Id.* at 397.
71. *Id.* at 398-400.
72. 489 U.S. 1 (1989).
73. 492 U.S. 573 (1989).
74. TEX. TAX CODE ANN. § 151.312 (West 1982).
75. *Id.* (Texas exempted "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to religious faith").
76. *Texas Monthly*, 489 U.S. at 5-6.
77. *Id.* at 6.
78. *Id.*

In the United States Supreme Court decision, authored by Justice Brennan, the Court decided that the trial court had properly concluded that the religious exemption violated the Establishment Clause.[79] Justice Brennan used an endorsement analysis to determine whether the statute had a secular or neutral purpose and effect.[80] Justice Brennan reasoned that the fact that a government action benefits religious groups does not affect its constitutionality if it also benefits a large number of nonsectarian groups and has a legitimate secular end.[81] But when government directly subsidizes religious groups exclusively, "[it] 'provides unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community."[82] Because the Texas statute directly benefited religious publications without benefiting all publications, the community would automatically perceive that the government was endorsing religion; therefore, it was a *per se* violation of the Establishment Clause.

In the second case, *Allegheny County*, the ACLU challenged two holiday displays in Pittsburgh as violative of the Establishment Clause.[83] The first display was a creche located on the grand staircase of the county courthouse. The second was a Chanukah menorah erected outside the city-county building. The district court, relying on *Lynch*, held that both displays were merely parts of larger holiday displays and therefore were constitutional.[84] The Third Circuit reversed, distinguishing *Lynch*, and held that the displays were unconstitutional endorsements of religion.[85]

---

79. *Id.* at 7.

80. *Texas Monthly*, 489 U.S. at 9 (stating that Justice O'Connor's *Wallace* concurrence "properly emphasized" this point, Justice Brennan noted, "*Lemon's* inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement").

81. *Id.* at 10.

82. *Id.* at 15 (quoting Corporation of Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amons, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring)).

83. *Allegheny County*, 492 U.S. at 587-88.

84. *Id.* at 588.

85. *Id.* at 588-89.

Justice Blackmun, writing for the majority, reaffirmed the three-pronged *Lemon* test and went on to explicitly adopt the endorsement analysis. Justice Blackmun quoted Justice O'Connor's definitive interpretation of the *Lemon* test from *Lynch:* "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[86] Next, the Court looked at the creche display and determined that it was the center of that particular Christmas display and there were very few additional secular displays involved. In this particular setting, the creche sent a message of religious endorsement and therefore violated the Establishment Clause.[87] The menorah, however, was surrounded by a Christmas tree and a sign entitled "Salute to Liberty." Because these other elements of the display were secular, the menorah took on the attributes of the surronding elements and did not violate the Endorsement Clause.[88]

The significance of the Court's opinion in *Allegheny* is that it confirmed the indications in *Texas Monthly* that the Court had adopted the endorsement test.[89] The Court revised the purpose and effect prongs of the *Lemon* test according to Justice O'Connor's concurring opinions.[90]

2. The *Lemon* Test Survives

Although the endorsement test has become a part of Establishment Clause analysis, the *Lemon* test has not been abandoned. In a 1993 case, *Lamb's Chapel v. Center Moriches,* the majority continued to use the *Lemon* test.[91] In *Lamb's Chapel,* the Court held that a

86. *Id.* at 594 (quoting *Lynch,* 465 U.S. at 687 (O'Connor, J., concurring)).

87. *Id.* at 601-02.

88. *Allegheny County,* 492 U.S. at 617-18. ("[i]n these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both Christian and Jewish faith, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition").

89. Lewis & Vild, *supra* note 16, at 684.

90. *Id.*

91. Lamb's Chapel v. Center of Moriches Union Free Sch. Dist., 113 S. Ct. 2141

school board violated the First Amendment's Free Speech Clause when it denied access to school premises, outside of school hours, to a church seeking to show a film dealing with family issues. The school board refused to give the Church access to the school solely because the film was based on a religious viewpoint.[92]

The Supreme Court first concluded that the school board had opened the school for a wide variety of communicative purposes making it a limited public forum.[93] Therefore, since it appeared the school board would have allowed films about family issues if they had not been from a religious viewpoint, the Court held that the school board had participated in unconstitutional viewpoint discrimination.[94] The school board tried to defend its position by arguing that to allow a religious viewpoint to be displayed on school grounds would violate the Establishment Clause.[95] The Court applied the *Lemon* test to address that argument and found that allowing the church to use the school would not offend the Establishment Clause.[96] In applying the three-prong *Lemon* test, the Court found that "[t]he challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion."[97]

Justice White, delivering the opinion for the majority, also remained loyal to the endorsement analysis stating that "[u]nder these circumstances, . . . there would have been no realistic danger that the community would think that the District was endorsing religion or any

---

(1993) *rev'g* 959 F. 2d 381 (1992).

92. *Id.* at 2147.

93. *Id.* at 2146 (The school was not required to open its facilities for after hours use by groups in the community. However, once the school had opened its facility to after hours use for a wide variety of communicative purposes and groups, the school had created a limited public forum. The restrictions applied by the school must satisfy the same constitutional limitations as restrictions in traditional public areas such as sidewalks and parks.).

94. *Id.* at 2147.

95. *Id.* at 2148.

96. *Lamb's Chapel*, 113 S. Ct. at 2148.

97. *Id.*

particular creed . . . ."[98] Justice O'Connor must have been satisfied with the majority's use of the endorsement analysis, since this is one of the few Establishment Clause cases in which she did not file a separate opinion.

However, while *Lemon* has not been abandoned, it may not be the benchmark it once was. Justice Scalia's concurring opinion in *Lamb's Chapel* agreed with the majority's judgment, but departed from the Court's use of the *Lemon* test.[99] Justice Scalia compared the Court's use of the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ."[100] Justice Scalia explained that there were numerous examples of the Court's selective use of the *Lemon* test. For example, when the Court desires to overrule a practice the test forbids, they use it;[101] when the Court desires to uphold a practice the test forbids, they ignore it entirely.[102] Furthermore, the Court at times merely used the test as a "helpful signpost."[103] Because Justice Scalia felt the *Lemon* test suffers from intermittent use and a lack of clear precedential value, he declined to apply *Lemon*.[104]

3. Religious Neutrality — Not Hostility

The majority in *Lamb's Chapel* stated that it is the requirement of government neutrality toward religion that explains why the Court has held that schools may not discriminate against religious groups by denying them equal access to facilities made available to the general public.[105] A significant factor in recent Establishment Clause cases is

98. *Id.*

99. *Id.* at 2149 (Scalia, J., concurring).

100. *Id.*

101. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985) (striking down state remedial education programs administered in part in parochial schools).

102. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983) (upholding state legislative chaplains).

103. *See, e.g.*, Hunt v. McNair, 413 U.S. 734 (1973) (upholding a state action aiding colleges by issuing revenue bonds for capital projects, some of which might be used by sectarian schools).

104. *Lamb's Chapel*, 113 S. Ct. at 2150.

105. *Rosenberger*, 115 S. Ct. at 2511 (citing Lamb's Chapel v. Center Moriches

the revitalized focus on neutrality toward religion. While a general requirement of neutrality is not new, as the Court considered neutrality in *Everson*,[106] it may have a greater impact on the Court's analysis.

In *Board of Education v. Grumet*,[107] the majority clearly emphasized neutrality as a general principle in Establishment Clause jurisprudence, stating "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."[108] Additionally, the Court noted that "[neutrality] is well grounded in our case law as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause Challenges."[109]

Furthermore, the Court has often held that the message is one of neutrality, rather than hostility, toward religion.[110] Justice O'Connor best enunciated the principle in her concurring opinion in *Kiryas:*

> We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or don't worship. The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion. The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools. It is the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here. The Court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, towards religion.[111]

Union Free Sch. Dist., 113 S. Ct. 2141 (1993)).

106. 330 U.S. at 18 (Noting that the First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.).

107. 114 S. Ct. 2481 (1994) (holding unconstitutional a statute creating a special school district for religious enclave of Satmar Hassidim, practitioners of strict form of Judaism).

108. *Id.* at 2486 (quoting *Nyquist*, 413 U.S. at 792-93).

109. *Id.* at 2491 (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)).

110. *Mergens*, 496 U.S. at 248 (plurality opinion); *see also* Board of Educ. v. Grumet, 114 S. Ct. 2481 (1994) (O'Connor, J., concurring in part and concurring in judgment).

111. 114 S. Ct. at 2497 (citations ommitted) (O'Connor, J., concurring in part and

III. STATEMENT OF THE CASE

The University of Virginia collects a mandatory fee per semester from all full-time students and deposits the proceeds in the Student Activities Fund (SAF).[112] The University then uses the SAF to support a wide variety of student organizations, activities, and publications.[113] To qualify for funds from the SAF, a student group must first be declared a "Contracted Independent Organization" (CIO).[114] CIOs have access to the University facilities, as well as, the right to apply for SAF funds.[115] The standard CIO agreement states that benefits provided to qualified groups by the University "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations or other acts or omissions, or that the University approves of the organizations' goals or activities."[116]

The Rector and Visitors of the University of Virginia is the corporate body responsible under state law to promulgate the guidelines for the awards of SAF monies.[117] These guidelines charge the Student Council with administering the SAF "in a manner consistent with the educational purpose of the University as well as with State and Federal law."[118] The guidelines prohibit several categories of student organizations from obtaining SAF funds "according to the nature of the organization and the purpose for which the funds would be used."[119] For example, "[a]lthough they may attain CIO status, fraternities and sororities, political and religious organizations, and groups whose membership policies are exclusionary in nature are

---

concurring in the judgment).

112. *Rosenberger*, 18 F.3d at 270.
113. *Id.*
114. *Id*
115. *Id.*
116. *Id.* at 270-71.
117. *Rosenberger*, 18 F.3d at 271.
118. *Id.*
119. *Id.*

ineligible for SAF funding."[120] The guidelines also exclude the following expenditures and activities: (1) honoraria or similar fees; (2) religious activities; (3) social entertainment and related expenses; (4) philanthropic contributions and activities; and (5) political activities.[121]

Once a student organization is declared a CIO and eligible for funding, it submits expense vouchers which the University pays if that particular expense is fundable under the guidelines.[122] The University pays the SAF monies directly to the group's creditors to discharge the fundable expense.[123] For the academic year 1990-91, 343 student organizations qualified as CIOs. Of these 343 groups, 135 applied for SAF funding, and the University awarded SAF monies to 118 groups.[124] Numbered among the funded organizations were fifteen student publications; also included were the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society.[125]

In September 1990, Ronald W. Rosenberger, an undergraduate at the University, founded Wide Awake Productions (WAP).[126] WAP's constitution states that it is an unincorporated association with the stated purpose of (1) "publishing a magazine of philosophical and religious expression"; (2) "facilitating discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints"; and (3) "providing a unifying focus for Christians of multicultural backgrounds."[127] WAP publishes *Wide Awake: A Christian Perspective at the University of Virginia (Wide Awake). Wide Awake* and WAP are not affiliated with any religious institution.[128]

---

120. *Id.*
121. *Id.*
122. *Rosenberger*, 18 F.3d at 271.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Rosenberger*, 18 F.3d at 271-72.
128. *Id.* at 272.

Wide Awake's mission is two-fold: "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."[129] In furtherance of this mission, *Wide Awake* "offers a Christian perspective on both personal and community issues especially those relevant to University of Virginia students."[130]

WAP attained CIO status shortly after its founding.[131] The University granted WAP the same access to the university facilities as other CIOs.[132] Such access included the use of the University property for the group's meetings, functions, programs, and access to the University computer terminals, printers, and other equipment for preparing its manuscripts for publication.[133]

In January 1991, WAP submitted an application for SAF funding to cover publishing costs for *Wide Awake*.[134] On February 26 of that year, the Appropriations Committee denied WAP's application, stating:

> In reviewing the request by Wide Awake Productions, the . . . committee determined your organization's request could not be funded as it is a religious activity. This determination was made after reviewing your first issue of Wide Awake. In particular, the committee noted in your Editor's Letter that the publication was "a forum for Christian expression" and a means "to challenge Christians (in how) to live". . . .
>
> Please be aware that this decision simply denies Student Activity Fee funding for your publication. Wide Awake Production may still print and distribute issues on Grounds.[135]

After exhausting all avenues of appeal within the University, on July 11, 1991, Rosenberger, as president of WAP, brought action in the district court.[136] Rosenberger's complaint alleged three counts. Count one alleged that the guidelines' proscription of SAF funding for

---

129. *Id.*
130. *Id.*
131. *Rosenberger*, 18 F.3d at 273.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. Rosenberger v. Rector & Visitors of the Univ. of Va., 795 F. Supp. 175 (W.D. Va. 1992).

the publication costs of *Wide Awake* violated the Free Speech and Press Clauses of the First Amendment to the United States Constitution by: (1) unlawfully depriving the members of WAP government benefits solely because of the content and viewpoint of their speech in *Wide Awake*; and (2) illegally excluding members of WAP from the "limited public forum" created by the Rector and Visitors' establishment of the SAF and promulgation of the funding guidelines.[137]

Count two of Rosenberger's complaint maintained that the committee's denial of SAF funding to "religious activities" violated the Free Exercise Clause of the First Amendment to the United States Constitution by discriminating in the granting of a government benefit based upon (1) the religious content of the expression in *Wide Awake*; and (2) the religious beliefs, character, or affiliation of the members of WAP.[138]

Count three of the complaint alleged that the guidelines' prohibition against subsidizing "religious activit[ies]," coupled with the committee's denial of SAF funds to WAP, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[139] Specifically, count three contended (1) that the guidelines denied WAP the benefits to which other students and CIOs were entitled by unconstitutionally discriminating against WAP on the basis of the content or viewpoint of its members' speech and association; and (2) that the guidelines unconstitutionally discriminated against WAP's religious speech by denying it the benefits that other students and CIOs engaged in religious speech and activities receive and have received.[140]

The district court granted summary judgment in favor of the Rector and Visitors on each count of Rosenberger's complaint, concluding: (1) that the SAF was not a "limited public forum;" (2) that application of the funding guidelines did not result in viewpoint or

137. *Rosenberger*, 18 F.3d at 274.
138. *Id.* at 275.
139. *Id.*
140. *Id.*

content discrimination against the speech of WAP; and (3) that the denial of funding did not burden WAP's free exercise of religion.[141]

On appeal, the Fourth Circuit disagreed with the district court and found that the guidelines did discriminate based on content.[142] The circuit court ruled that, although the Constitution does not require the state to underwrite speech, a presumptive violation of the Free Speech Clause existed when the University denied third-party payment otherwise available to CIOs.[143] However, the circuit court affirmed the district court's judgment by holding that a "compelling interest in maintaining strict separation of church and state" justified the University's viewpoint discrimination.[144]

The United States Supreme Court granted certiorari 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 non-religious.[145]

IV. THE DECISION

A. *The Majority Opinion*

The majority in *Rosenberger* held that the guidelines the SAF used to deny funding to the petitioner, both in its terms and application, constituted a denial of the petitioner's right of free speech. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[146] In affirming that

141. *Rosenberger*, 795 F. Supp. at 178-83.
142. *Rosenberger*, 18 F.3d at 281.
143. *Id.* at 279-81.
144. *Id.* at 281.
145. *Rosenberger*, 115 S. Ct. at 2521.
146. *Rosenberger*, 115 S. Ct. at 2516 (quoting Police Dep't v. Mosley, 408 U.S. 92, 96 (1972)).

the University's actions amounted to unconstitutional viewpoint discrimination, the Supreme Court compared *Rosenberger* to *Lamb's Chapel.*[147] The Court determined, as it did in *Lamb's Chapel,* that the petitioner's request was denied solely based upon the petitioner's viewpoint.[148] The Court pointed out that the University's SAF guidelines did not exclude religion as a topic, but instead prohibited publications produced from a religious editorial viewpoint.[149] It was the prohibited prospective, not the subject matter, that resulted in the denial of funds and thus denied the petitioner's right of free speech guaranteed by the First Amendment.[150] Therefore, the guidelines invoked by the University constituted a denial of WAP's right of free speech and was not excused by the necessity of complying with the Establishment Clause.[151]

The University attempted to distinguish their actions in *Rosenberger* from the school board's action in *Lamb's Chapel* by urging that their case involved funding rather than access to facilities.[152] Thus, the University asserted it should have the right to make content-based decisions in the allocation of scarce resources.[153] The Court acknowledged that the University had a duty to allocate its educational resources efficiently.[154] However, the Court also reaffirmed its viewpoint neutrality requirement for governmental allocations of financial benefits, by holding that "[t]he Government cannot justify viewpoint discrimination among private speakers on the eco-

147. *Id.* at 2518 (comparing *Lamb's Chapel v. Center of Moriches Union Free Sch. Dist.,* 113 S. Ct. 2141 (1993)).

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

149. *Id.* at 2517.

150. *Id.* at 2517-18.

151. *Id.* at 2525.

152. *Id.* at 2518.

153. *Rosenberger,* 115 S. Ct. at 2518 (citing Widmar v. Vincent, 454 U.S. 263, 276 (1981)). The Court noted:

> There in the course of striking down a public university's exclusion of religious groups from use of school facilities made available to all other student groups, we stated: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources."

Id.

154. *Id.*

nomic fact of scarcity."[155] Based on the stated principles of unconstitutional viewpoint discrimination and the neutrality requirement for allocating funds, the Court found that the SAF's regulation acted as a denial of the petitioner's right of free speech.[156]

After deciding the free speech issue, the Court turned its attention to the Establishment Clause. Curiously, however, the majority did not utilize the three-prong-test of *Lemon*,[157] but instead stated that the necessary inquiry looks to the purpose and object of the governmental action and the practical details of the program's operation.[158] The Court determined that the purpose of the SAF was to encourage an open forum for speech, recognizing the diverse viewpoints of student life.[159] The Court also noted that the University went to great lengths to detach itself from the student journals by requiring each organization to include in its publications a disclaimer of any University support of the organization's goals.[160] The fact that the University required this disclaimer demonstrated that the University respected the critical difference between government speech endorsing religion, which violates the Establishment Clause, and private speech endorsing religion, which the Constitution protects by the Free Speech and Free Exercise Clauses.[161]

The majority also addressed the issue of direct support to a religious organization. First, the Court noted that the funds in question

---

155. *Id.* at 2519.

156. *Id.* at 2525.

157. 403 U.S. at 612-13 (The three-pronged *Lemon* test states that, to withstand scrutiny, the government action must (1) have a secular purpose, (2) neither advance nor inhibit religion in its principle or primary effect, and (3) not foster an excessive entanglement with religion.).

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

159. *Id.* at 2522.

160. *Id.* at 2514. The Court noted:

> A standard agreement signed between each [student organization] and the University provides that the benefits and opportunities afforded to [student organizations] "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities."

Id.

161. *Id.* at 2522-23.

were from student fees and "not a general tax designed to raise revenue for the University."[162] Second, the disbursements go to a private contractor for the cost of printing the student publications which are protected under the First Amendment.[163] The funds would not be directly distributed to WAP. The Court noted that "[t]his is a far cry from a general public disbursement designed and effected to provide financial support for a church."[164] Third, the Court stated that WAP is not the usual religious institution as defined by the Court's case law or the University's own regulations.[165] Furthermore, WAP was not seeking support as a religious organization but only as a student journal.[166] Therefore, any benefit to religion was incidental to the SAF program's secular services provided for secular purposes on a religion-neutral basis.[167]

In conclusion, the Court declared that the significant factor in upholding governmental programs in the face of Establishment Clause attack is the programs neutrality towards religion.[168] The *Rosenberger* Court held that the original intent of the government program in question was neutral toward religion, and never intended a purpose of advancing a specific religion or religion in general.[169] The Court stated that when the government follows neutral criteria and policies to extend benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse, the guarantee of neutrality is respected, not offended.[170] Therefore, the Establishment Clause did not call for the University to violate WAP's right of free speech.[171]

---

162. *Id.* at 2522.
163. *Rosenberger,* 115 S. Ct. at 2522.
164. *Id.*
165. *Id.* at 2524.
166. *Id.*
167. *Id.*
168. *Rosenberger,* 115 S. Ct. at 2521.
169. *Id.* at 2522.
170. *Id.* at 2521.
171. *Id.* at 2525.

B. The Concurring Opinions

1. Justice O'Connor

Justice O'Connor began her concurring opinion by stressing the importance of neutrality,[172] noting that neutrality is one hallmark of the Establishment Clause.[173] Next, she acknowledged that Justice Souter, in his dissent, recounted another axiom in Establishment Clause jurisprudence in that public funds may not be used to endorse a religious message.[174] Then, with the principles of neutrality and the restriction on public funds in mind, Justice O'Connor began her endorsement test analysis.

Justice O'Connor reasoned that the University had clearly established a general program to encourage a free exchange of ideas.[175] As she continued her review of the University's program, Justice O'Connor outlined three issues that led her to conclude that the Establishment Clause was not violated based upon an endorsement analysis.[176] First, at the University's insistence, the student organizations were strictly independent.[177] Second, the University had procedures in place to ensure that the monies were distributed for permissive pur-

172. *Rosenberger*, 115 S. Ct. at 2525 ("We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or don't worship." *Grumet*, 114 S. Ct. at 2497 (O'Connor, J., concurring in part and concurring in judgment). "[T]he message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248 (plurality opinion). "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." *Grumet*, 114 S. Ct. at 2498 (O'Connor, J.).).

173. *Rosenberger*, 115 S. Ct. at 2525.

174. *Id.* at 2525 (citing Bowen v. Kendrick, 487 U.S. 589, 642 (1988) (Blackmun, J., dissenting)).

175. *Rosenberger*, 115 S. Ct. at 2525.

176. *Id.* at 2526.

177. *Id.* (citing the University's agreement with the organization, the Court stated:

> The University is a Virginia public corporation and the CIO is not part of that corporation, but rather exists and operates independently of the University . . . . The parties understand and agree that this Agreement is the only source of any control the University may have over the CIO or its activities.).

poses only.[178] Third, the assistance provided to a religious organization would not promote a perception of government endorsement of the religious message because the widely divergent viewpoints of the various groups, equally supported by the University, diminished the danger of any perception of endorsement by the University.[179]

In conclusion, Justice O'Connor stated that to deny WAP funds, which are available to all other student publications, based on the magazine's religious viewpoint, violates WAP's free speech right.[180] Furthermore, because of the particular features of the University's program — (1) the disclaimer; (2) the direct payment to third-party vendors; and (3) the unliklihood of a perception of University endorsement — Justice O'Connor believed that the assistance requested by WAP would not constitute an impermissible use of public funds.[181] Therefore, pursuant to this analysis, Justice O'Connor joined in the opinion of the majority.[182]

2. Justice Thomas

Justice Thomas wrote a separate concurring opinion to address the historical analysis presented by the dissent.[183] The analyses of both the dissent and Justice Thomas boiled down to a single issue: Did the framers intend the Establishment Clause to bar all government financial aid, including programs designed for the beneficiaries to participate on an equal, neutral basis?

First, Justice Thomas addressed the principle that the United States has a long tradition of allowing religious groups to participate on equal terms in neutral government programs.[184] He used the Vir-

178. *Id.* at 2527 (Noting that the way the funds were paid to third party vendors after being approved ensures the funds were only being spent to further the University's purpose in maintaining a free speech forum. Justice O'Connor compares this to a school providing equal access to physical facilities.).

179. *Id.* at 2527.

180. *Rosenberger*, 115 S. Ct. at 2528.

181. *Id.*

182. *Id.*

183. *Id.* (Thomas, J., concurring).

184. *Id.*

ginia debate on the so-called "Assessment Controversy" as the basis for his opinion. The assessment was to be imposed for the support of clergy for teaching religion.[185] Justice Thomas asserted that James Madison's objection to that assessment was based not on the premise that religious entities could not participate on equal terms, but instead on the fact that the assessment singled out religious entities for special benefits.[186] Furthermore, Justice Thomas cited examples of government support for religious entities. Such as, property tax exemption,[187] direct public funding of congressional chaplains,[188] and protection provided by city police and fire departments.[189]

Finally, Justice Thomas' concurrence recognized that the Establishment Clause jurisprudence has been less than settled.[190] He believed that *Rosenberger* offered an opportunity to reaffirm one basic principle that has enjoyed a consensus:[191] "The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants."[192]

C. *The Dissenting Opinion*

In the dissent, Justice Souter proclaimed that even if the guidelines were a denial of freedom of speech, it was justified by the necessity to comply with the Establishment Clause.[193] Initially, Justice Souter did not appear to differ with the majority's interpretation of the law as much as the majority's interpretation of the facts. Jus-

185. *Rosenberger,* 115 S. Ct. at 2528.
186. *Id.* at 2529.
187. *Id.* at 2531 (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)).
188. *Id.* (citing Marsh v. Chambers, 463 U.S. 783 (1983)).
189. *Id.* at 2532 (citing Widmar v. Vincent, 454 U.S. 263 (1981)).
190. *Rosenberger,* 115 S. Ct. at 2532.
191. *Id.*
192. Id. (citing Lamb's Chapel v. Center of Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993); Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993); Board of Ed. v. Mergens, 496 U. S. 226 (1990); Texas Monthly, Inc. v. Bullock, 489 U. S. 1 (1989); Witters v. Washington Dep't of Services for Blind, 474 U. S. 481 (1986); Mueller v. Allen, 463 U. S. 388 (1983); and Widmar v. Vincent, 454 U. S. 263 (1981)).
193. *Rosenberger,* 115 S. Ct. at 2533 (Souter, J., dissenting).

tice Souter asked, "Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme is a clear constitutional violation?"[194] In answering, he implied that the majority had failed to confront the evidence accurately.[195] The majority described WAP's publication as a student journal with a religious viewpoint, which did not constitute a religious activity.[196] However, Justice Souter clearly felt that the publication crossed the line demarcating secular publications from evangelical publications, a crossing which Justice Souter contended clearly violated the Establishment Clause.[197]

The dissent also attacked the Court's use of the neutrality standard, noting that while neutrality was a relevant factor in Establishment Clause cases it was not dispositive.[198] Instead, Justice Souter contended that the Court must look to see if the government program is directly benefiting religion, and if so, the Establishment Clause required more justification than evenhandedness.[199]

Unlike the majority, the dissent did not readily agree that the student funds were not a tax.[200] The dissent reasoned that since the University exercised the power of the state to compel a student to pay the fee, it was the equivalent of a tax.[201] Justice Souter claimed that, at a minimum, the Establishment Clause stands for the proposition 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.[202] Moreover, he asserted that, by ordering the University to pay the petitioner through the SAF, "[t]he Court is ordering an instrumentality of the

194. *Id.* at 2539-40.
195. *Id.* at 2540.
196. *Id.* at 2515-18.
197. *Rosenberger*, 115 S. Ct. at 2540 (Souter, J., dissenting) (citing the "patently and frankly evangelistic character of the magazine").
198. *Id.*
199. *Id.*
200. *Id.* at 2538.
201. *Id.*
202. *Rosenberger*, 115 S. Ct. at 2538 (citing *Ball*, 473 U.S. at 385).

State to support religious evangelism with direct funding."[203] Therefore, even if the University did deny WAP's free speech rights, the University's attempt to comply with the Establishment Clause justified the discrimination.[204]

However, Justice Souter also questioned whether the University even violated the Free Speech Clause by denying the funding request.[205] Viewpoint discrimination is based upon the premise that the government should not skew debate by allowing one side to present its view while denying the opposing view.[206] Justice Souter felt that, since the SAF guidelines denied funding to any group whose message "primarily promotes or manifests" any view on the merits of religion, the University was not practicing viewpoint discrimination.[207]

V. ANALYSIS OF THE CASE

What does the future hold for Establishment Clause jurisprudence? On the basis of the current membership of the Supreme Court, it would appear that Establishment Clause jurisprudence has taken a new direction. In fact, the Court appears to have made an about-face from the "wall of separation" approach to take an "accommodationist" stance.

A. Accommodationist as the Majority

Chief Justice Rehnquist has stated that the Supreme Court Justices can be categorized with respect to their church/state perspective as either: Accommodationists, Separationists, or Centrists.[208] Accommodationists are those Justices that stray from using the *Lemon* test and tend to accommodate religion by permitting aid to religious

203. *Id.* at 2547.
204. *Id.*
205. *Id.*
206. *Rosenberger*, 115 S. Ct. at 2548-49.
207. *Id.* at 2549.
208. DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS 158 (1991) [hereinafter DAVIS].

organizations as long as the program provides the aid without discrimination.[209] Separationists on the other hand firmly believe in a strict separation of church and state.[210] Finally, Centrists are simply those Justices that fall in the middle, and perhaps lie closest to the Court's official position of neutrality.[211]

Based upon these three categories, Chief Justice Rehnquist has labeled five of the presently sitting Justices: Separationist — Justice Stevens; Accommodationists — Chief Justice Rehnquist and Justices Scalia and Kennedy; and Centrists — Justices Souter and O'Connor.[212] With respect to those Justices whom Chief Justice Rehnquist has not labeled, it appears that Justice Thomas would side with the Accommodationists; Justice Ginsberg with the Separationists and Justice Breyer most probably with the Centrists.[213] Based on the above classifications, the Accommodationists appear to have a four to two advantage. However, it should be noted that the Centrists are capable of providing the swing vote either way. Furthermore, Justice O'Connor has a track record of siding with the Accommodationists,[214] while Justice Souter is also more likely an Accommodationist than a Separationist.[215] The dominance of the Accommodationists on the Court probably explains the Court's move toward a more tolerant stance concerning the Establishment Clause.

---

209. *Id.* at 48.

210. *Id.*

211. *Id.* at 158.

212. DAVIS, *supra* note 208, at 160-62.

213. The likelihood of their category is based upon their participation in *Rosenberger*, 115 S. Ct. 2510 (1995); and Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) (The majority held that the state did not violate Establishment Clause of First Amendment by permitting private party to display unattended cross on grounds of state capitol. In this decision, Justice Thomas joined with the majority; Justice Bryer joined with the concurring opinions of Justice O'Connor and Justice Souter; and Justice Ginsberg filed a dissenting opinion.).

214. DAVIS, *supra* note 208, at 160.

215. *Id.* at 160-61.

B. *The Rights of Religious Groups*

Another important trend shows that the most recent Accommodationist cases have focused upon the right of religious groups to gain equal access to public schools and public fora.[216] Beginning with *Widmar v. Vincent*,[217] the Court held that a public university could not prevent a student religious group from meeting in university classrooms after hours when similar non-religious groups were given access. The Court applied the same rule to high schools in *Board of Education v. Mergens*,[218] requiring a high school to allow church groups to use classrooms after school hours if other non-religious groups were allowed to do so. Finally, in *Lamb's Chapel*,[219] the Court required a high school to allow a Christian organization to use the school facilities to show a Christian movie because other groups were permitted to use the school for similar purposes.

C. *An Objective Test and Neutrality*

Finally, since Accommodationists are those Justices that stray from using the *Lemon* test, it is significant to note that the majority in *Rosenberger* did not cite the three-prong-test of *Lemon*. However, *Rosenberger* does not stand for the principle that the Court has abandoned the *Lemon* test, for, in reality, there is no significant difference between the *Lemon* test and the test applied in *Rosenberger*. The "purpose and object of the governmental action"[220] inquiry used in *Rosenberger* is essentially identical to the first and second prongs of *Lemon*. Likewise, "the practical details of the program's operation"[221] inquiry from *Rosenberger* is not much different from looking into the government's excessive entanglement proscribed in the third prong of *Lemon*. Therefore, the majority in *Rosenberger* revealed

---

216. Charles Roth, Comment, Rosenberger v. Rector: *The First Amendment Dog Chases Its Tail*, 21 J.C. & U.L. 723, 746 (1995).

217. 454 U.S. 263 (1981).

218. 496 U.S. 226 (1990).

219. 113 S. Ct. 2141 (1993).

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

221. *Id.*

that the Court is still concerned with some form of objective test to review the substance of the program. This objective testing represents the Supreme Court's effort to be neutral in religious matters.[222] As the Court continues to focus on the neutrality of the program in question, the Court is likely to continue relying on some form of an objective test like the *Lemon* test or a modified version.

The *Rosenberger* Court discussed at great length the importance of neutrality towards religion.[223] *Rosenberger,* appears to be a reaffirmation of those earlier cases that held that the Establishment Clause is not violated by programs that extend benefits on a religion-neutral basis.[224] The Court has held that "[i]t does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises."[225] The majority goes on to compare *Rosenberger* to the facilities cases and states that there is no difference in "logic or principle" between the use of funding a facility to which student groups have access and paying a third-party contractor to provide the facility on behalf of the school.[226] Therefore, the majority found that if a government agency could expend funds by allowing use of its facilities on a religion-neutral basis such as in *Lamb's Chapel,* then it could pay third party creditor's for a like purpose as in *Rosenberger.*[227]

Justice O'Connor also linked the importance of neutrality towards religion and the endorsement test in her concurring opinion.[228] Justice O'Connor noted the significance of neutrality when she pointed out that the University supported, on an equal basis, widely divergent

222. DAVIS, *supra* note 208, at 158.

223. *Rosenberger,* 115 S. Ct. at 2521-25.

224. *Id.* at 2523-24 (citing *Widmar,* 454 U.S. at 269 and *Mergens,* 496 U.S. at 252); *see also Lamb's Chapel,* 113 S. Ct. 2141 (1993) (allowing access to school facilities on a religion-neutral basis).

225. *Rosenberger,* 115 S. Ct. at 2523 (citing *Widmar,* 454 U.S. at 269 and *Mergens,* 496 U. S. at 252).

226. *Id.* at 2524.

227. *Id.*

228. *See supra* notes 172-174 and accompanying text.

opinions in many of the student publications.[229] Then, turning to the endorsement analysis, she found that the neutrality of the University's SAF program and the diversity of the publications it supported, significantly diminished the danger that the message of any one publication was perceived as endorsed by the University.[230]

VI. CONCLUSION

The Accommodationist majority in *Rosenberger* has continued the trend of the Supreme Court in putting an end to the belief that to conform to the Establishment Clause of the First Amendment the government must exclude religion. Whereas the "strict separationist" view followed a presumption of unconstitutionality if the government was involved in any way with religion, the Court now requires a compelling reason for the government to deny aid to religious groups when it offers the same benefits to non-religious groups. The Court suggests that government programs should treat a religious viewpoint on an equal basis as other viewpoints. If there is a neutral government benefit, a concern for violating the Establishment Clause is not a compelling reason to violate the free speech guarantee. Therefore, it appears likely that the "wall of separation" has been razed and that it will be easier in the future for religious groups to participate in aide programs that the government administers in a religion-neutral manner, especially when it concerns a freedom of speech issue. Even Justice Souter in his dissenting opinion in *Rosenberger,* recognized this trend when he stated, "The Court's contrary holding amounts to a significant reformation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums."[231]

The current make-up of the Supreme Court and the breakdown between the Accommodationists, Separationists, and Centrists combined with the recent trend of accommodation decisions concerning the rights of religious groups, produces a somewhat predictable future for Establishment Clause jurisprudence. Nevertheless, Establishment

229. *Rosenberger*, 115 S. Ct. at 2527 (O'Connor, J., concurring).
230. *Id.*
231. *Rosenberger*, 115 S. Ct. at 2551.

Clause cases are always fact specific and the swing vote provided by the Centrists allows for an element of surprise. Finally, it is important to remember a comment made by Justice Scalia during his tenure as a United States Court of Appeals Judge: "[the] Supreme Court jurisprudence concerning the Establishment Clause in general . . . is in a state of utter chaos and unpredictable change."[232]

Paul L. Hicks

232. DAVIS, *supra* note 208, at 157.