ROSENBERGER EFFECTIVELY HARMONIZES FIRST AMENDMENT TENSIONS, BUT FAILS TO LAY THE SPECTER OF *LEMON* TO REST

> *I am for freedom of Religion, and against all maneuvers to bring about a legal ascendancy of one sect over another . . . .*
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> —Thomas Jefferson[1]

INTRODUCTION

The United States Supreme Court ended its 1995 Term with an attempt to reconcile First Amendment tensions. The case selected for this was *Rosenberger v. Rector & Visitors of University of Virginia.*[2] In its opinion, the Court confronted the problem of the Establishment Clause and the Free Speech Clause -- two competing constitutional provisions that, at first blush, seem to direct a different outcome.

The conflict arose when the University of Virginia, a state entity, denied Wide Awake Productions, a Christian student news organization, the same activity funds that were available to other student groups. In ruling that the denial constituted viewpoint discrimination, thus violating the group's First Amendment right to free speech,[3] the Court concluded that access to those funds by a group with a Christian perspective did not violate the Establishment Clause of the First Amendment.[4] The Court's rationale represents a significant departure from the traditional Establishment Clause test articulated in *Lemon v. Kurtzman.*[5] Moreover, the neutrality standard applied in *Rosenberger* accomplishes the one thing *Lemon* never could: harmonization between the Establishment Clause and other

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1. CATHERINE MILLARD, THE REWRITING OF AMERICA'S HISTORY 100 (1991).
2. 115 S. Ct. 2510 (1995).
3. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").
4. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion.").
5. 403 U.S. 602 (1971).

First Amendment Clauses. Its omission of *Lemon*, however, leaves the lower courts with ambiguous precedent and Establishment Clause jurisprudence in continued disarray.

This Note explains the factual and procedural history of *Rosenberger* through the U.S. Court of Appeals decision. It then summarizes the relevant holdings of the U.S. Supreme Court majority, concurrences, and dissent. Finally, it presents a criticism of the long-held Establishment Clause test, the so-called *Lemon* test, and proffers that the neutrality standard is a premium to other tests proposed by the Court. This Note concludes that *Rosenberger* is a significant step towards an Establishment Clause jurisprudence that is hospitable, not hostile, to its neighboring First Amendment Clauses.

I. THE HISTORY OF *ROSENBERGER*

A. The Student Activities Fund

The University of Virginia has traditionally supported a variety of student organizations, activities and publications through its Student Activities Fund (SAF). In 1991, when Ronald W. Rosenberger first sought access to the SAF, it was financed from a mandatory $14 student activities fee. The University collected the fee from each full-time student every semester and allocated funds to organizations based on the Guidelines[6] established by the Rector and Visitors of the University. The Guidelines expressly prohibited funding for religious activities.[7]

To qualify for SAF funding, an organization must have applied for and been granted status as a "Contracted Independent Organization" (CIO),[8] which conferred both access to University facilities and the

6. The Guidelines delineated eleven categories of student organizations and activities that were eligible for funding along with certain categories that were excluded from eligible funding. Among those eligible were "student news, information, opinion, entertainment, or academic communications media groups." *Rosenberger*, 115 S. Ct. at 2514. The University funded organizations that "express[ed] a variety of ideological viewpoints, including but not limited to viewpoints which [were] inconsistent with or antagonistic to various religious beliefs." Petitioners' Brief at 5, *Rosenberger* (No. 94-329).

7. Petitioners' Brief, *supra* note 6, at 3.

8. There were four general requirements for attaining CIO status: (1) the

right to apply for student funds from the SAF.[9] The CIO agreement contained a general disclaimer that any views presented by student organizations did not necessarily represent the views of the University. To receive University funds, an approved student group had to submit its bills to the Student Council which then paid the group's creditors directly.[10] Never did the University make payments directly to the student organizations.

B. Wide Awake Productions

In the academic year 1990-91, 135 out of the 343 eligible CIO groups applied for SAF funding. The University approved 118 of those organizations, including 15 groups that either wrote or edited student newspapers and magazines.[11] These 15 student groups published material that represented a diverse range of interests and perspectives. Several "issue-oriented" and "potentially controversial" groups such as the Gandhi Peace Center, the Federalist Society, Students for Animal Rights, and the Lesbian and Gay Student Union received funding.[12] Still others included the Muslim Students Association,[13] the Jewish Law Students Association,[14] and the C. S. Lewis Society.[15] The University classified these last three organizations as cultural, as opposed to religious, activities.[16]

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organization must have been made up of at least fifty-one percent students; (2) the group's officers must have been "full time, fee-paying students"; (3) an updated copy of the group's constitution must have been kept on file with the University; and (4) the group must have signed an anti-discrimination disclaimer. *Id.*

9. *Id.*

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

11. Petitioners' Brief, *supra* note 6, at 2.

12. *Id.* at 4.

13. The Constitution of the Muslim Student Association identified the purpose of the group as an organization formed "to promote a better understanding of Islam to the University Community." It used SAF funds to publish a magazine entitled AL-SALAM. This publication presented an Islamic viewpoint of world issues and included discussion of Islamic doctrine. *Id.* at 5.

14. The By-Laws of the Jewish Law Students Society state its purposes are to "encourage Jewish law students to participate in Jewish activities" and to "be a focal point for Jewish activities at the law school." *Id.*

15. The C. S. Lewis Society's Constitution states its purpose as "promot[ing] interest in and discussion of, various literary, moral, and philosophical topics, with a particular

In September of 1990, Ronald W. Rosenberger and three other undergraduate students at the University of Virginia joined together to form Wide Awake Productions (WAP).[17] WAP's stated purpose was to (1) "publish[ ] a magazine of philosophical and religious expression"; (2) "facilitat[e] discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints"; and (3) "provid[e] a unifying focus for Christians of multicultural backgrounds."[18] WAP published the student magazine *Wide Awake: A Christian Perspective at the University of Virginia*.[19] According to the editor's statements in the first issue of the publication, the magazine offered, "a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia."[20] The University determined that WAP fell within the Guideline's classification of "student news, information, opinion, entertainment, or academic communications media group" and granted CIO status to the organization.[21]

Over the next eighteen months, WAP published three issues of *Wide Awake* and distributed over 5,000 free copies throughout the campus.[22] The first issue dealt with racism, crisis pregnancy, fear of flying, and the philosophy of C. S. Lewis. It also included an interview with a university professor as well as biblical passages on the abundance of life.[23] The second issue contained articles about homosexuality, the meaning of a passage in the Gospel of John, and an interview with a mathematics professor concerning free will and the

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emphasis on the work of the 'Oxford Christians.'" *Id.*

16. *Id.* at 6.

17. Petitioners' Brief, *supra* note 6, at 6.

18. *Id.*

19. *Id.* The magazine was started when Rosenberger and his fellow founders discovered "that none of the fifteen student ... publications ... provided a forum for Christian expression." *Id.* (quoting Ronald Rosenberger). Rosenberger decided to fill that void. WAP has no affiliation with any particular denomination or church and does not discriminate against new members regarding race, sex, color *or religion*. *Id.*

20. *Id.* at 7 (quoting Ronald W. Rosenberger, WIDE AWAKE: A CHRISTIAN PERSPECTIVE AT THE UNIVERSITY OF VIRGINIA, Nov./Dec. 1990, at 2).

21. *Id.* at 8.

22. Petitioners' Brief, *supra* note 6, at 6.

23. *Id.* at 7.

problem of evil.[24] The third issue contained articles on eating disorders, Rome's teaching on Marxism and the free market, university pedagogy from an Augustinian perspective, and a missionary alumnus' experiences in Moldavia.[25]

After distributing three issues of *Wide Awake* at no cost, WAP submitted a funding request to the Appropriations Committee of the Student Council for $5,862 in printing costs incurred from the publication of *Wide Awake*.[26] The Committee denied the request after reviewing the first issue of *Wide Awake,* determining that WAP constituted a "religious activity." The Committee sent Rosenberger a letter explaining their refusal to fund WAP which read:

> 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."[27]

WAP then appealed to the Student Council claiming it conformed with the Guidelines for requesting funds from the SAF and that the Appropriations Committee's denial based on WAP's religious viewpoint violated the United States Constitution.[28] However, the Student Council affirmed the Appropriations Committee's denial of funds.[29] WAP next appealed on the same grounds to the Student Activities Committee at the University, which also affirmed the denial of funds.[30] At that point, Ronald Rosenberger and WAP had

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24. *Id.*
25. *Id.*
26. Petitioners' Brief, *supra* note 6, at 8.
27. *Id.* at 8 (alterations in original).
28. *Id.* at 8-9.
29. *Id.* at 9.
30. The Associate Dean of Students, Ronald J. Stump, wrote in the letter:

> After reviewing your organization's constitution, copies of the magazine's first two editions, and the arguments presented at last week's appeal by Wide Awake

exhausted all their appeals within the University of Virginia. With nowhere else to turn, the students' only recourse was to file suit in the federal district court for the Western District of Virginia.

C. *The District Court*

Now before the United States District Court,[31] WAP alleged that the denial of SAF funding based on the religious viewpoint of their publication violated their rights of free speech, free press, freedom of association, free exercise of religion, and equal protection under the United States Constitution, Article I of the Virginia Constitution and the Virginia Act for Religious Freedom.[32] The students sought compensatory damages of at least $5,862,[33] as well as declaratory and injunctive relief prohibiting the University from denying funding on the basis of the content or viewpoint of their publication.

The district court saw the preliminary question in the case to be whether the University's SAF qualified as a limited public forum or was in fact a non-public forum.[34] The court found this determination crucial as it dictated the degree of scrutiny to be used in reviewing the Guidelines.[35] After discussing the tripartite classification of public fora,[36] the court held that the University had intended the SAF to be a

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> Productions and by [the] Student Council, the Committee determined that the Wide Awake magazine could not be funded as it is a religious activity. In effect, the Student Activities Committee fully supports the decision and reasoning provided to you in the February 26 letter from [the Appropriations Committee].

Id. (alterations in original).

31. Rosenberger, together with three editors and members of WAP, filed suit in the United States District Court, Western District of Virginia, Charlottesville Division on July 11, 1991, pursuant to 42 U.S.C. §1983. Rosenberger v. Rector & Visitors of Univ. of Va., 795 F. Supp. 175, 178 (W.D. Va. 1992).

32 VA. CODE ANN. §§ 57-1 to -2.

33. This amount represented WAP's printing costs.

34. *Rosenberger*, 795 F. Supp. at 178.

35. *Id. See also* Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 44 (1983) (holding that the rights and limitations of accessibility to public property depends on the property's character).

36. The three categories of public fora are traditional public fora, limited public fora and non-public fora. A limited public forum is one which the State has opened for use by the public "even if it was not required to create the forum in the first place." *Rosenberger*,

non-public forum. The court based this holding on the consistent exclusion in the Guidelines of religious, political, fraternal and other groups and organizations.[37] Furthermore, because the University had no intention of opening its coffers to all CIOs,[38] the court held there to be no violation of WAP's right to free speech. The court also upheld the University's fear of violating the federal and state constitutional mandate of neutrality toward religion as being reasonable. Thus an investigation into whether the Guidelines themselves violated the Establishment Clause was unnecessary.[39] WAP then appealed to the United States Court of Appeals.

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795 F. Supp. at 178 (quoting *Perry*, 460 U.S. at 45). "A state may only restrict access to limited public fora if such a restriction is narrowly drawn to effectuate a compelling state interest." *Rosenberger*, 795 F. Supp. at 178 (quoting *Perry*, 460 U.S. at 46).

A non-public forum is classified as "property which is not by tradition or designation a forum for public communication." *Rosenberger*, 795 F. Supp. at 178 (quoting *Perry*, 460 U.S. at 46). This forum is afforded less scrutiny as it is limited only by restrictions which are "reasonable and [are] not an effort to suppress expression merely because the public officials oppose the speaker's view." *Rosenberger*, 795 F. Supp. at 178 (quoting *Perry*, 460 U.S. at 46) (alteration in original). The district court did not expound the qualifications for a traditional public forum because plaintiff did not argue the existence of one. *Rosenberger*, 795 F. Supp. at 178 n.6.

37. An excerpt from the Guidelines in question reads as follows:

> STATEMENT OF PURPOSE
> The purpose of the student activity fee is to provide financial support for student organizations that are related to the educational purpose of the University of Virginia. As a required student fee, the monies collected by the University for funding student activities are public funds which must be administered in a manner consistent with the educational purpose of the University as well as with state and federal law.

Rosenberger, 795 F. Supp. at 180. The district court did not read this excerpt to indicate that the University desired to encourage a free exchange of opinions and viewpoints, but rather to fund only those groups that supported the focus of the University's educational mission. *Id.*

38. *Id.*

39. *Id.* at 181 (stating that "[g]iven the complexity of the law in this regard, this court has little trouble in finding the ... restriction ... reasonable .... [t]o prevent excessive entanglement with religion."). *Id.*

D. The Fourth Circuit

The United States Court of Appeals for the Fourth Circuit eschewed the district court's emphasis on forum analysis.[40] Unafraid of setting two Constitutional provisions at odds with one another, the Fourth Circuit balanced WAP's right to free speech against the state's interest in avoiding an Establishment Clause violation. The state won. The court found the forum analysis applied by the district court inappropriate. The Fourth Circuit ruled that the University's condition for receipt of funds on WAP amounted to viewpoint discrimination which violated the group's right to free speech.[41]

However, the court held such discrimination justified because of the University's compelling interest in maintaining strict separation of church and state.[42] Applying the tripartite *Lemon* test,[43] the court then concluded that funding WAP would amount to excessive government entanglement with religion which would constitute an establishment of religion at the University.[44]

The court found the facts of *Rosenberger* different from the 1993 Supreme Court decision, *Lamb's Chapel v. Center Moriches Union Free School District*,[45] which stated that equal access to government facilities did not violate the Establishment Clause. The Fourth Circuit opined that although religious groups may directly benefit from access to *facilities*, direct monetary subsidization of religious organizations and projects was a "beast of an entirely different color."[46] WAP appealed the decision again, this time to the United States Supreme Court.

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40. Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 287 (4th Cir. 1994).

41. *Id.*

42. *Id.*

43. The *Lemon* Court established that a government regulation violated the Establishment Clause if (1) the policy did not have a secular legislative purpose; (2) its primary effect was to either advance or inhibit religion; and (3) the policy fostered an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13.

44. *Rosenberger*, 18 F.3d at 282-86.

45. 113 S. Ct. 2141 (1993).

46. *Rosenberger*, 18 F.3d at 286.

II. THE U.S. SUPREME COURT

The Supreme Court reversed the Court of Appeals in a 5-4 decision. Justice Kennedy, delivering the opinion of the majority, wrote that the University's denial of student activity funds to WAP violated the group's First Amendment right to free speech, and such support would not run afoul of the Establishment Clause.

The Court began its analysis with the axiom that "[*any* d]iscrimination against speech because of its message is presumed to be unconstitutional."[47] First Amendment violations, declared the majority, are all the more blatant when the government bases its discrimination on an individual view on a subject.[48] "The government must abstain from regulating speech when the specific motivating ideology or the opinion or personal perspective of the speaker is the rationale for the restriction."[49]

Reviving the forum analysis espoused by the district court, the majority found that even though the "SAF is a forum more in a metaphysical than in a spatial or geographic sense,"[50] the University created a limited public forum instead of a nonpublic forum. The Court recognized that a state may reserve a specific forum for specific topics to preserve the legitimate purpose of that forum.[51] However, once a University has opened a limited forum by funding student groups, it must abide by the boundaries it set for itself.

The Court admitted that the distinction between content and viewpoint discrimination when dealing with questions of religion is not precise.[52] Nevertheless, it found that viewpoint discrimination was the befitting interpretation of the University's actions against WAP.[53]

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47. *Rosenberger*, 115 S. Ct. at 2516 (citing Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2458-59 (1994)) (emphasis added).

48. *Id.* (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)).

49. *Rosenberger*, 115 S. Ct. at 2516 (citing Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983)).

50. *Id.*

51. *Id.* at 2516-17 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

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

53. *Id.* (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993)).

Because the University recognized WAP as an approved CIO, WAP's religious viewpoint was the only grounds for the University's discrimination.[54]

Having decided that the University's regulation denied WAP's right of free speech under the First Amendment, the Court then turned to the issue of whether such a violation was excused by the University's fear of violating the Establishment Clause.[55] Without even mentioning the *Lemon* test, the Court held, "neutrality is not offended when the government follows neutral criteria and evenhanded policies in extending benefits to groups with diverse viewpoints."[56]

The majority found the University Guidelines were neutral toward religion and determined the University's fear of an Establishment Clause violation unfounded.[57] Because the object of the SAF was to establish a forum for speech and support various student enterprises, the Court found no suggestion that the University created it to "advance religion or adopt[ ] some ingenious device with the purpose of aiding a religious cause."[58] WAP sought a subsidy under the classification of a legitimate student news group, not as a publication with a Christian editorial viewpoint.[59]

Noting that the University had taken pains to dissociate itself from the various student viewpoints, the Court found it implausible that one could attribute any student ideas to the University.[60] The Guidelines' respect for the distinction "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion which the and Free Exercise Clauses protect," according to the Court, was further evidence of neutrality within the University program.[61]

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54. *Rosenberger*, 115 S. Ct. at 2517-18.
55. *Id.*
56. *Id.* at 2521.
57. *Id.* at 2522.
58. *Id.*
59. *Id.*
60. *Id.* at 2523.
61. *Id.* at 2522 (quoting Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)) (emphasis in original).

In conclusion, the majority stated that obedience to the Establishment Clause did not require that the University deny funding to an otherwise eligible student publication based on its religious viewpoint.[62] No Establishment Clause dangers existed where the University honors its duty to protect free speech. The Court ordered the judgment of the Court of Appeals reversed.[63]

Justice O'Connor joined the opinion of the Court, but chose to write separately. She remarked that when two bedrock principles collide, one must draw lines based on the particular facts of a case.[64] Employing the "endorsement test" -- which states that an objective observer's public perception of a message as government endorsed violates the Establishment Clause -- she concluded that by "providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective."[65]

In a formidable opinion penned by Justice Souter, the dissent disagreed with the majority's Establishment Clause arguments as well as the Court's free speech arguments.[66] Contesting the majority's Establishment Clause ruling, the dissent presented historical evidence that the Founders would have thought the payment of printing expenses on behalf of WAP antithetical to the intent of the Establishment Clause, even if accomplished pursuant to evenhanded programs.[67] The dissent acknowledged the validity of "neutrality" and "evenhandedness" in Court precedent,[68] but suggested that none of

62. *Id.* at 2524.
63. *Id.* at 2525.
64. *Id.* at 2525-26.
65. *Id.* at 2526.
66. *Rosenberger*, 115 S. Ct. at 2533-2551 (Souter, J., dissenting).
67. *Id.* at 2540.
68. *See* Widmar v. Vincent, 454 U.S. 263 (1981) (state university's ban on the use of its facilities for prayer and religious discussion by student groups disallowed); Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (Act mandating school sponsorship of religious organizations upheld); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (public school's ban on use of facilities for secular subject matter presented with a religious viewpoint disallowed).

these cases used evenhandedness to constitutionally justify the direct subsidizing of religion by the government.[69]

The dissent also found fault in the majority's treatment of WAP's free speech claim. The regulations did not amount to viewpoint discrimination, according to the dissent, because they applied to Christians as well as to agnostics and atheists. The regulations rather amounted to constitutionally allowable content discrimination because the University denied "funding for the entire subject matter of religious apologetics."[70]

Justice Thomas also joined in the majority opinion but wrote separately to rebut the dissent's interpretation of history. He took issue with the dissent's historical analysis of James Madison's *Memorial and Remonstrance Against Religious Assessments*, arguing that one must understand the document as an opposition to preferential treatment of one religious sect, not as an assertion that religious entities may never participate on equal terms in neutral government programs.[71] He further noted the dissent's failure to produce any evidence that the Framers intended to enfeeble religious groups from participating on neutral terms in evenhanded government programs.[72] The evidence that was produced, he maintained, "points in the opposite direction and provides ample support for today's decision."[73]

III. TENSIONS AND RESOLUTIONS

The judicial indecisiveness manifest in the Supreme Court's line of split decisions concerning the Establishment Clause has left lower courts and lawyers caught in the uncertainty of unpredictable changes in the Court's positions.[74] For the past quarter century the Court has

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

70. *Id.* at 2549. The dissent was surprisingly silent, however, on the University's justification for funding the Muslim Student Association and the Jewish Law Students Society.

71. *Rosenberger*, 115 S. Ct. at 2529 (Thomas, J., concurring).

72. *Id.* at 2533.

73. *Id.*

74. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947) (5-4; state

mainly used the three-prong test announced in *Lemon v. Kurtzman*.[75] The *Lemon* Court established the following tripartite test to determine whether a policy withstands an Establishment Clause challenge: (1) the policy must have a secular legislative purpose; (2) its primary effect must be one that neither advances nor inhibits religion; and (3) the policy must not foster an excessive government entanglement with religion.[76] However, courts have been so inconsistent in applying the test that Justice Scalia once compared it to a "ghoul in a late-night horror movie," and both jurists and legal academicians have advocated its demise.[77]

However, *Rosenberger* appears as a beacon in this fog. *Rosenberger* never once cited *Lemon*, and the decision marks a departure from the inharmonious approach represented by the long-standing test. Although itself a split decision, *Rosenberger* was soundly reasoned and proved that the Establishment Clause could be

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reimbursement of cost of bus transportation to parochial schools approved); Tilton v. Richardson, 403 U.S. 672 (1971) (5-4; construction grants to church related colleges for non-religious buildings allowed); Meek v. Pittenger, 421 U.S. 349 (1975) (5-4; state support to church schools for auxiliary services disallowed); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (5-3; noncategorical grants to religious colleges for nonsectarian purposes upheld); Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980) (5-4; state mandated tests administered in church schools but graded by state officials upheld); Stone v. Graham, 449 U.S. 39 (1980) (5-4; state law that Ten Commandments be posted in public school classrooms disallowed); Mueller v. Allen, 463 U.S. 388 (1983) (5-4; state law allowing taxpayers to deduct tuition, textbooks, and transportation expenses for children attending parochial schools upheld); Lynch v. Donnelly, 465 U.S. 668 (1984) (5-4; annual Nativity scene display erected in city's shopping district allowed); School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985) (5-4; state program that funded public school teachers to teach sectarian school courses disallowed); Wallace v. Jaffree, 472 U.S. 38 (1985) (5-4; state law authorizing schools to set aside time for meditation and voluntary prayer disallowed); Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (plurality opinion; Act mandating school sponsorship of religious organizations upheld); Lee v. Weisman, 505 U.S. 577 (1992) (5-4; nonsectarian prayer at public school graduation ceremony disallowed).

75. 403 U.S. 602 (1971).

76. *Id.* at 612-13.

77. *See* Wallace v. Jaffree, 472 U.S. 38, 108-14 (1985) (Rehnquist, J., dissenting); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring); Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 468 (1994); Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses -- A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1216-24 (1980); WAYNE R. SWANSON, THE CHRIST CHILD GOES TO COURT 185-86 (1990).

harmonized with other First Amendment provisions. As Justice O'Connor recognized in her concurrence, "When two bedrock principles so conflict, understandably neither can provide the definitive answer."[78] This decision accomplished two significant things. First, it broadened the definition of viewpoint discrimination, thus strengthening Free Speech jurisprudence. Second, and more importantly, it articulated a synchronous Establishment Clause jurisprudence based on the principle of government neutrality toward religion and eliminated the conflict of "bedrock principles."

The neutrality standard is clearly an improvement over the uncertain *Lemon* test used by courts for nearly two decades. *Rosenberger* no longer requires the Court to do what the Fourth Circuit thought necessary: to justify First Amendment violations in order to prevent a violation of the Establishment Clause, thus giving primacy to the Establishment Clause over all the individual protections guaranteed by the Bill of Rights.[79]

However, by failing to directly overrule *Lemon* -- a test often criticized for its inability to lead judges to consistent decisions[80] and for coming into direct conflict with other First Amendment principles[81] -- the Court allows its continued use by lower courts. This permits much of the confusion concerning the Establishment Clause to endure.

The conflict begins with the long-held supposition that the Establishment Clause is the counterweight to the Free Exercise Clause. The first prong of the *Lemon* test -- the "secular purpose" requirement -- has often been misconstrued to reach an untenable reading of the two religion clauses. The test states, "the statute must have a secular legislative purpose."[82] As construed, however, the test implies "that laws motivated by a desire to promote religious freedom or to

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

79. *See Rosenberger*, 18 F.3d at 281-82.

80. *See* John H. Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61, 66-67 (showing how *Lemon* leads to differing results even when given similar facts).

81. *See* Sherbert v. Verner, 374 U.S. 398, 403-04 (1963) (holding that the Free Exercise Clause is violated when religious accommodation is denied); *but see* Thornton v. Caldor, Inc., 472 U.S. 703, 708-11 (1985) (holding that accommodation of religion violates the Establishment Clause).

82. *Lemon*, 403 U.S. at 612.

accommodate religious practice automatically constitute an establishment of religion."[83] Thus, any promotion of *religious freedom* -- as opposed to religion -- is viewed as an improper government act.

The second "primary effects" prong states, "[the statute's] principal or primary effect must be one that neither advances nor inhibits religion."[84] The problem is determining what constitutes government "advancement" of religion, and the test fails to establish the proper baseline against which one measures such effects.[85] Under this prong, tax exemptions and other benefits to churches would be considered government advancement of religion. The *Rosenberger* dissent, although it did not apply the *Lemon* test *per se*, arrived at the same result by declaring the Founder's intent to have been a "no-aid" policy to religious activities. Justice Thomas recognized this difficulty:

> Consistent application of the dissent's "no-aid" principle would require that "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." The dissent admits that "evenhandedness may become important to ensuring that religious interests are not inhibited." Surely the dissent must concede, however, that the same result should obtain whether the government provides the populace with fire protection by reimbursing the costs of smoke detectors and overhead sprinkler systems or by establishing a public fire department. If churches may benefit on equal terms with other groups in the latter program

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83. Michael S. Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993).

84. *Lemon*, 403 U.S. at 612.

85. Paulsen, *supra* note 83, at 804; *see also* Justice Thomas' concurrence:

> [T]he Establishment Clause may be judged against either a baseline of "neutrality" or a baseline of "no aid to religion," but the appropriate baseline surely cannot depend on the fortuitous circumstances surrounding the *form* of aid. The contrary rule would lead to absurd results that would jettison centuries of practice respecting the right of religious adherents to participate on neutral terms in a wide variety of government-funded programs.

Rosenberger, 115 S. Ct. at 2533 (Thomas, J., concurring) (emphasis in original).

> -- that is, if a public fire department may extinguish fires at churches -- then they may also benefit on equal terms in the former program.[86]

The third prong of *Lemon* -- "excessive entanglement" -- provides the greatest pitfall. It creates a "damned-if-you-do-damned-if-you-don't dilemma."[87] The exact requirement is, "the statute must not foster 'an excessive government entanglement with religion.'"[88] The steps that the government needs to take to assure that a program does not advance religion may entail excessive government oversight -- the very thing prohibited by the excessive entanglement prong.[89] The *Rosenberger* majority explicitly recognized this problem:

> [T]he University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.[90]

When courts apply all three prongs of *Lemon* as written and construed, the effect is that one First Amendment right, such as Free Speech or Free Exercise, must be denied in order for the government to avoid violating the Establishment Clause.[91]

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86. *Rosenberger*, 115 S. Ct. at 2532 (Thomas, J., concurring) (citations omitted).

87. Paulsen, *supra* note 83, at 809.

88. *Lemon*, 403 U.S. at 613.

89. Paulsen, *supra* note 83, at 809.

90. *Rosenberger*, 115 S. Ct. at 2524-25.

91. Although Justice O'Connor's conclusion under the "endorsement test" in *Rosenberger* aligned with the majority's conclusion under the neutrality standard, the endorsement test by no means reflects the future of a harmonized First Amendment. The endorsement test is a misnomer. It is not a test at all. It is rather a label for the subjective judgments of a justice. Paulsen, *supra* note 83, at 815; *see also* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 148 (1992). Justice O'Connor has attempted to refine the "test" by postulating a neutral "objective observer" who is "familiar with this Court's precedents." *See* Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in part and concurring in the judgment); Lynch v. Donnelly, 465

Rosenberger attempts to solve this predicament by maintaining the standard of neutrality and evenhandedness first alluded to in the 1973 case *Committee for Public Education & Religious Liberty v. Nyquist*.[92] The *Rosenberger* majority cautioned that in enforcing the prohibition against laws respecting the establishment of religion, the Court must ensure that it does not inadvertently prohibit the government from extending "benefits to all its citizens without regard to their religious beliefs."[93] While *Rosenberger*'s neutrality standard does away with the "secular purpose" and "excessive entanglement" prongs of *Lemon*, the two cases do continue to share the "primary effect" test. The difference between the "effect" analysis under *Rosenberger* and the same analysis under *Lemon* is that a neutrality standard only requires a government regulation be neutral toward religion.[94] *Lemon* would go further and require a complete separation of church and state. The key effect of the *Rosenberger* distinction is that it mandates that a religious organization not be excluded from neutral regulations even if there is an incidental benefit to that organization.[95]

U.S. 668, 691 (1984) (O'Connor, J., concurring). Michael S. Paulsen aptly criticizes the endorsement test as not resembling anything close to "law." Paulsen, *supra* note 83, at 816. Regarding Justice O'Connor's "objective observer," Professor Paulsen remarks:

> It is doubtful whether any of the justices have met such a person – if one exists – leaving the unmistakable impression that O'Connor is talking about herself. The standard has a distinct feeling of academic unreality. A reasonable person familiar with the Court's wildly erratic precedents in this area would have a most difficult time using them as the baseline for measuring "endorsement." The "objective observer" canard is merely a cloaking device, obscuring intuitive judgments made from the individual judge's own personal perspective.

Id. at 815. Since there is nothing "objective" about the endorsement test, it leaves one no closer to a legal reconciliation of the "conflicting bedrock principles" dilemma than the *Lemon* test.

92. 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.").

93. *Rosenberger*, 115 S. Ct. at 2521 (citing *Everson*, 330 U.S. at 16).

94. *Id.* at 2522 (noting that since the objective of the SAF was "to open a forum for speech and to support various student enterprises," there was no suggestion that it was created to advance religion or aid in a religious cause).

95. *Id.* at 2532 (Thomas, J., concurring); *see also* Note, *Viewpoint Discrimination* --

Rosenberger is clear, however, that the incidental benefit to religious organizations must be in kind and not in direct monetary subsidies. Although the majority recognized that there "is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf,"[96] they also recognized "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions."[97] Direct monetary subsidies are, indeed, a "beast of an entirely different color."[98]

Within this limitation, neutrality allows the First Amendment Clauses to work in harmony with each other. A court need not violate the rights of Free Speech to ensure a securing of rights under the Establishment Clause as evidenced in *Rosenberger*. Neutrality also harmonizes Free Exercise jurisprudence with Establishment Clause jurisprudence. Considering recent case law,[99] Free Exercise becomes the opposite side of the Establishment Clause coin; for neutral and generally applicable laws do not violate the Free Exercise Clause even if there is an incidental burden on religion.[100] Unfortunately, the Court avoided the issue of *Lemon*'s continued viability by not overruling the case in its analysis, thus failing to herald neutrality as the absolute new standard in Establishment Clause jurisprudence. The specter of *Lemon* continues to haunt the hallowed halls of the First Amendment.

CONCLUSION

It is only logical that Constitutional analysis must recoil from admitting that the document behests two contradictory rights. The judicial interpreter cannot acknowledge that an action violates one

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Funding For Religious Publication, 109 HARV. L. REV. 210, 219 (1995).

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

97. *Id.* at 2523.

98. *See Rosenberger*, 18 F.3d at 286.

99. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 882-90 (1990) (holding that the sacramental use of peyote could not be protected from state drug prohibitions under the Free Exercise Clause).

100. *Id.* at 879-89.

right, but is justified by the need to avoid violating another right.[101] After decades of choosing between the clauses of the First Amendment, the Supreme Court in *Rosenberger* decrees an Establishment Clause standard that is hospitable and not hostile towards its neighboring clauses in the First Amendment. The majority has laid a substantial foundation for a return to reason.

Rosenberger takes a significant step towards reconciliation of First Amendment jurisprudence and many lower courts have already followed *Rosenberger*'s lead.[102] Although the Court has attempted to dilute the authority of *Lemon*, tenacious lower courts still continue to employ it.[103] Thus, *Lemon*'s continued viability continues to muddy the waters of Establishment Clause jurisprudence.

Rosenberger also leaves many colleges and universities unsure how to draft policies that would conform to its ruling because the Court's direction lacks specificity. While some lawyers and administrators continue to consider the appropriate change required in their policies,[104] other institutions began implementing changes immediately.[105]

The Court's avoidance concerning the veracity of *Lemon* is perhaps unnoticeable, but not insignificant. Until the Supreme Court hands down a decision free from ambiguity, Establishment Clause jurisprudence may very well remain in what Justice Thomas calls a

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101. Charles Fried, *Forward: Revolutions?*, 109 HARV. L. REV. 13, 70 (1995).

102. *See, e.g.*, Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581 (7th Cir. 1995) (district court's denial of a Jewish organization's right to display a menorah in a county building during the eight days of Chanukah reversed); Ceniceros v. Board of Trustees of the San Diego Unified Sch. Dist., 66 F.3d 1535 (9th Cir. 1995) (district court's denial of religious club to meet during lunch as other clubs were allowed to reversed).

103. *See, e.g.*, Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995) (noting that although the Court's reliance on *Lemon* has not been consistent, *Lemon* has not been overruled).

104. *See* The Associated Press, *Colleges struggle to deal with ruling in U. Va. case*[:] *student fee may end some say*, RICHMOND TIMES-DISPATCH, September 4, 1995, at B4.

105. The University of North Carolina at Chapel Hill was the first to adopt *Rosenberger*, interpreting the case broadly to preclude student organizations from being denied funds for political reasons as well as religious viewpoints. David DuBuisson, *Suddenly, anything goes with student fees*, GREENSBORO NEWS & RECORD, July 23, 1995, at F2.

state of disarray.[106] Although the neutrality standard is a premium to the enigmatic three-prong test, the *Rosenberger* Court failed to seize the opportunity to bury the "ghoul" of *Lemon* conclusively.

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106. *Rosenberger*, 115 S. Ct. at 2532 (Thomas, J., concurring).