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I. INTRODUCTION

During the closing weeks of the 1994-1995 Term, the United States Supreme Court issued *Rosenberger v. Rector & Visitors of the University of Virginia*[1] and *Capitol Square Review & Advisory Board v. Pinette*,[2] two decisions that further obfuscated the parameters of

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1. 115 S. Ct. 2510 (1995) [hereinafter *Rosenberger III*]. For representative commentary on *Rosenberger III*, see Larry Cata Backer, *The Incarnate Word, That Old Rugged Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L.J. 447 (1996); Howard Wade Bycroft, *Ready—Aim—Fire?—The Supreme Court Continues Its Assault on the Wall of Separation in* Rosenberger, 31 TULSA L.J. 533 (1996); Jennifer Lynn Davis, *The Serpentine Wall of Separation Between Church and State:* Rosenberger v. Rector and Visitors of the University of Virginia, 74 N.C. L. REV. 1225 (1996); Paul L. Hicks, *The Wall Crumbles: A Look at the Establishment Clause:* Rosenberger v. Rector and Visitors of the University of Virginia, 98 W. VA. L. REV. 363 (1995); Rena M. Bila, Note, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535 (1995); Charles Roth, Note, Rosenberger v. Rector: *The First Amendment Dog Chases its Tail*, 21 J.C. & U.L. 723 (1995); Robert L. Waring, Note, *Talk is Not Cheap: Funded Student Speech at Public Universities on Trial*, 29 U.S.F. L. REV. 541 (1995).

2. 115 S. Ct. 2440 (1995). For representative commentary on *Capitol Square III*, see Backer, *supra* note 1; Brant W. Bishop, *Protecting Private Religious Speech in the Public Forum:* Capitol Square Review and Advisory Board v. Pinette, *115 S. Ct. 2440 (1995)*, 19 HARV. J.L. & PUB. POL'Y 602 (1996); Bernard James & Joanne Kuhns, *Establishment Clause Yields to Free Speech*, NAT'L L.J., July 31, 1995, at C10; John E. Joiner, Note, *A Page of History or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 DENV. U.L. REV. 507 (1996); Gregory A. Napolitano, Note, *Constitutional Law—First Amendment—Establishment Clause—Symbolic Expression*, 34 DUQ. L. REV. 1209 (1996); Leading Cases, *Viewpoint Discrimination—Funding for Religious Publication*, 109 HARV. L. REV. 210 (1995).

both free exercise and establishment of religion.[3] In these opinions,

3. In 1996, the Supreme Court denied certiorari in the one Establishment Clause case before it. City of Edmond v. Robinson, 68 F.3d 1226 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1702 (1996). In 1965, the city of Edmond adopted an official seal (designed by a local resident) with four separate quadrants, each having its own design. *Robinson*, 68 F.3d at 1228. One quadrant depicted a steam engine and oil derrick, another depicted the Old North Tower, and a third depicted a covered wagon. *Id.* Each had historical significance. *Id.* The fourth quadrant depicted a Christian cross. *Id.* Since 1965, the seal appeared throughout the city, and it was on city limits signs, city flags, police and firefighter uniforms, city vehicles, stickers identifying city property, and in the City Council chambers. *Id.*

Plaintiffs, non-Christians, lived or worked in the city of Edmond. *Id.* They claimed that the inclusion of the Christian cross violated the Establishment Clause and the Free Exercise Clause of the First Amendment. *Id.* The district court held that the plaintiffs remained free to exercise their respective religions, and held for the defendants (the city and the mayor) because the seal did not violate the Establishment Clause under the three-part "*Lemon* test." *Id.*

On plaintiffs' appeal of the denial of their Establishment Clause claim, the Tenth Circuit also applied the *Lemon* test. *Id.* Under the *Lemon* test, government action violates the Establishment Clause if it fails any of the following conditions: (1) it must have a secular purpose; (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) it "must not foster excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

At issue was whether part two of the *Lemon* test was violated because the seal conveyed or attempted to convey a message that a particular religious belief is favored or preferred. *Robinson*, 68 F.3d at 1229. In determining the "effect," the Tenth Circuit looked at the particular physical setting, and used an objective standard that looked to the reaction of the average receiver of a government communication, or the perception of an average observer when viewing the action of the city. *Id.* at 1229-30.

The Tenth Circuit also looked to other circuit court cases addressing the issue of a government seal containing a religious symbol. *Id.* at 1230. In *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169 (1986), the court considered the "seal's composition and use" in finding a violation of the Establishment Clause. *Friedman*, 781 F.2d at 782. There, the cross was prominent in the seal, and the court found that the seal "pervades the daily lives of . . . residents." *Id.* The seal was on county vehicles, stationery, and the sheriff's uniform. *Id.*

Other circuits have similarly dealt with this issue. In the companion cases of *Kuhn* and *Harris*, for example, the Seventh Circuit ruled the same as the Tenth Circuit. Kuhn v. City of Rolling Meadows, 927 F.2d 1401 (7th Cir. 1991); Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991). In *Kuhn*, one quadrant of the seal of the city of Rolling Meadows contained a depiction of a church under construction with a cross in front. *Kuhn*, 927 F.2d at 1403. The seal was used extensively throughout the city, on letterhead, uniform shoulder patches, and city vehicles. *Id.* The Seventh Circuit found that the seal was a permanent statement viewed year-round and rejected the city's argument that the presence of other secular images on the seal "neutralized" any religious message. *Id.* at 1412. The court found such images an endorsement of Christianity and a violation of the Establishment Clause. *Id.* at 1413. Similarly, in *Harris*, the Seventh Circuit rejected the argument that a seal with a religious symbol merely commemorated the historical origins of the city and held that "the City may not honor its history" by retaining a blatantly sectarian seal. *Harris*, 927 F.2d at 1414-15.

Because the Tenth Circuit found no meaningful distinction between the seal of the city of Edmond and the seals at issue in *Friedman*, *Kuhn* and *Harris*, it found the seal a

the Court again failed to articulate clear guidelines for the many aspects of religious activity in the public arena. The decisions present the nation with the very difficult—perhaps impossible—task of effectively balancing potentially conflicting constitutional principles.[4] More specifically, the cases raise the trying question of to what extent, if any, the government can regulate religious speech without violating the First Amendment Free Exercise and/or Establishment Clauses by aiding, advancing, or suppressing a particular religious perspective.[5]

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violation of the Establishment Clause. *Robinson*, 68 F.3d at 1232-33. In the Edmond seal, the cross was prominent, the religious meaning or significance was clear, and the use of the seal was pervasive throughout the city. *Id.* at 1232. As in *Harris*, the Tenth Circuit held that the city may not honor its heritage with a "blatantly sectarian" seal. *Id.* In response to the city's argument that the majority of the people in Edmond do not view the seal as endorsing religion, the court stated that the comfort of the majority is not the main concern of the Bill of Rights. *Id.* at 1232-33. The city also argued that the other depictions in the seal (the Tower, steam engine, derrick, and covered wagon) neutralized any religious message of the cross. *Id.* at 1233. In response, the court declined to hold that some clearly defined religious images are permissible in some seals and not others, depending on their size or the number of other, secular depictions in the seal. *Id.*

The petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit was denied. 116 S. Ct. 1702 (1996). Chief Justice Rehnquist, with whom Justices Scalia and Thomas joined, dissented. *Id.*

4. Jurisprudential literature on the Establishment and Free Exercise Clause of the First Amendment (the "Religion Clauses") continues to proliferate. Some astute scholars have questioned why anyone should continue any involvement in the infinite metaphysical parsing of the Religion Clauses as a meaningless exercise. *See, e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM at v (1995) (noting that "a better title for the book, my colleague Paul Campos suggested, would be 'Honey, I Blew Up the First Amendment!'").

Other recent First Amendment religion clause literature has included: WILLIAM J. MURRAY, LET US PRAY: A PLEA FOR PRAYER IN OUR SCHOOLS (1995); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); THE WILLIAMSBURG CHARTER FOUNDATION, A NATIONAL CELEBRATION AND REAFFIRMATION OF THE FIRST AMENDMENT RELIGIOUS LIBERTY CLAUSES (1988).

Of course, a classic source for First Amendment religion clause jurisprudence includes, for example, JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶¶ 1, 8 (1785). *See also* WILLIAM BENTLEY BALL, MERE CREATURES OF THE STATE? EDUCATION, RELIGION AND THE COURTS: A VIEW FROM THE COURTROOM (1994); JESSIE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995); FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE (1995); KENT GREENAWALT, RELIGIOUS CONVICTION AND POLITICAL CHOICE (1988); LEONARD LEVY, THE ESTABLISHMENT CLAUSE 246 (1994) (noting that "[b]ecause the domains of religion and government remain separated, religion in the United States, like religious liberty, thrives mightily").

5. U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

For recent Establishment clause and Free Exercise clause analyses, see Paul Earl Pongrace III, *Justice Kennedy and the Establishment Clause: The Supreme Court Tries*

Rosenberger III involved the First Amendment right of free exercise of religion and speech/press rights of students at the University of Virginia who wished to recoup, from a student activities fund, the cost of publishing a campus magazine with a religious editorial perspective.[6] Reversing the rulings of both the federal district court and the Fourth Circuit, and holding in favor of the students, the Supreme Court substantially liberalized the First Amendment freedoms of speech, press, and free exercise of religion of students at public colleges and universities, permitting them to express their views through public university-sponsored newspapers, pamphlets, and magazines.[7]

Among the significant jurisprudential questions related to *Rosenberger III* is whether, consistent with the legal developments that originated in *Widmar v. Vincent*,[8] the constitutional rights of public

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the Coercion Test, 6 U. FLA. J.L. & PUB. POL'Y 217 (1994); Jay Alan Sekulow et al., *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351 (1995); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837 (1995); Karen T. White, *The Court-Created Conflict of the First Amendment: Marginalizing Religion and Undermining the Law*, 6 U. FLA. J.L. & PUB. POL'Y 181 (1994); Bila, *supra* note 1; Marc Falconetti, Comment, *Constitutional Law: Does the Establishment Clause Prohibit Sending Public Employees into Religious Schools?* 6 U. FLA. J.L. & PUB. POL'Y 277 (1994). *See also* Kristin M. Engstrom, *Establishment Clause Jurisprudence: The Souring of* Lemon *and the Search for a New Test*, 27 PAC. L.J. 121 (1995); Jason C. Kravitz, *Repelling a Constitutional Battering Ram: The Fight to Keep Nonstudent Religious Worship Services Out of Public Schools*, 19 VT. L. REV. 643 (1995).

6. *Rosenberger III*, 115 S. Ct. 2510 (1995). *See infra* Part II.

7. *See infra* Part II.C.

8. 454 U.S. 263 (1981). In *Widmar*, the Court ruled that a public university could not constitutionally deny students access to university buildings for voluntary religious programs. *Id.* at 276. For commentary on *Widmar*, see Deborah Brown, *The States, the Schools and the Bible: The Equal Access Act and the State Constitutional Law*, 43 CASE W. RES. L. REV. 1021 (1993); Debra Gail Minker, *Constitutional Law—First Amendment—State University's Policy of Equal Access to Campus Facilities For All Organizations Including Those of a Religious Character Does Not Violate the Establishment of Religion Clause of the First Amendment*, 32 EMORY L.J. 319 (1983); Arval A. Morris, *The Equal Access Act After* Mergens, 61 EDUC. L. REP. 1139 (1990); Rosemary C. Salomone, *From* Widmar *to* Mergens: *The Winding Road of First Amendment Analysis*, 18 HASTINGS CONST. L.Q. 295 (1991); Waring, *supra* note 1.

The developments in *Widmar* were refined by the Equal Access Act. 20 U.S.C. §§ 4071-4074 (1988). The Act permits student-initiated religious groups to meet in certain public schools during non-instructional time on the same basis as any other student organized noncurricular groups. *Id.* § 4071(c).

In addition, two recent cases have extended the scope of the Equal Access Act. *See* Hsu v. Roslyn Union Free Sch. Dist., 85 F.3d 839, 857-58 (2d Cir. 1996) (holding that the constitution of an after-school Christian Bible study club, with membership open to all students, could require the club's president, vice president and music minister, but not the club's secretary and activities coordinator, to be "professed Christians" since their

elementary and secondary school students may have been analogously extended. At the same time, it is important to appreciate the practical ramifications of *Rosenberger III* in the political and cultural contexts outside of the public university setting.[9]

Meanwhile, in *Capitol Square Review and Advisory Board v. Pinette*,[10] the Court affirmed the First Amendment right of that most pernicious of racist groups, the Ku Klux Klan, to erect a conspicuously displayed cross on public property.[11] This added to the consternation that resulted in 1978 when the federal judiciary declined to prevent the American Nazi party from marching through the streets of Skokie, Illinois,[12] a home to many survivors of the Holocaust.[13]

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duties required them to lead Christian prayers and devotions while safeguarding the spiritual content of the club's meetings), *cert. denied*, 117 S. Ct. 608 (1997); Ceniceros v. San Diego Unified Sch. Dist., 66 F.3d 1535, 1540 (9th Cir. 1995) (holding that since no classes met during lunch time, a student-sponsored religious club must be granted the same rights to meet as other voluntary, non-curricular activities), *opinion withdrawn and superceded by* 106 F.3d 878 (9th Cir. 1997).

The developments in *Widmar* were further endorsed in *Board of Education v. Mergens*, 496 U.S. 226 (1990) (holding that a school policy of allowing non-curricular groups to meet on school premises required the school to extend the same privilege to a Christian group). In *Mergens*, Justice O'Connor, writing for the Court, pointed out that in the federal Equal Access Act of 1984, Congress explicitly extended the Court's reasoning in *Widmar* to public secondary schools. *Id.* at 2364 (citing 20 U.S.C. §§ 4071-4074). For further discussion of *Mergens*, see David L. Gregory & Charles J. Russo, *Let Us Pray (But Not "Them"!): The Troubled Jurisprudence of Religious Liberty*, 65 ST. JOHN'S L. REV. 273 (1991); Charles J. Russo & David L. Gregory, Board of Education of Westside Community Schools v. Mergens*: A Case Analysis*, 17 J. RELIGION & EDUC. 18 (1990).

9. For a thorough discussion of the place of religion in the marketplace of ideas, see STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

10. 115 S. Ct. 2440 (1995) [hereinafter *Capitol Square III*]. *Capitol Square III* was decided by the Court at the same time as *Rosenberger III*.

11. *Id.* at 2450. The Court affirmed the appellate court and noted that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. . . . [and since] [t]hose conditions are satisfied here . . . the State may not bar respondents' cross from Capitol Square." *Id. See also infra* Part III.

12. In Smith v. Collin, 578 F.2d 1197 (1978), the Seventh Circuit upheld the right of the American Nazi Party to march in Skokie, Illinois. On appeal, the United States Supreme Court denied the petition for certiorari, 439 U.S. 916 (1978). Justice Blackmun, joined by Justice White, dissented, stating that "this is litigation that rests upon critical, disturbing, and emotional facts, and the issues cut down to the very heart of the First Amendment." *Id.* (Blackmun, J., dissenting). For a detailed discussion of the events in Skokie, see Franklin S. Haiman, *Nazis in Skokie: Anatomy of the Heckler's Veto*, *in* FREE SPEECH YEARBOOK 11 (Gregg Phifer ed., 1978).

13. More recently, in *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995), the Klan was involved in another dispute involving a public forum. The Klan appealed the state's rejection of its application for participation in an Adopt-A-Highway program based on its policy of excluding individuals and political groups. *Id.* at 1077. The Fifth Circuit affirmed that Texas, through the program, had not created a public

Unfortunately, neither *Rosenberger III* nor *Capitol Square III* fully addresses nor reconciles the continuing tension surrounding the First Amendment prohibition on government establishment of religion and the right of free exercise of religion.[14] Consequently, the Court has further confused the treatment of religious symbol and substance in these decisions. This Essay studies how the Court has exacerbated the lack of clarity in the constitutional jurisprudence of religion in the public arena. A close consideration of *Rosenberger III* and *Capitol Square III* is an important propaedeutic to proper analysis of this issue.

This Essay reviews the *Rosenberger III* decision, from its beginning in the district court, to the Fourth Circuit, and finally to the United States Supreme Court,[15] and it provides an in-depth analysis of the Supreme Court's *Rosenberger* opinion.[16] This Essay similarly assesses *Capitol Square III*,[17] and it reviews the decisions of the district court, the Sixth Circuit, and the Supreme Court.[18] The Essay then analyzes the Supreme Court decision in *Capitol Square III*.[19] Using these discussions as a background, the authors survey the current status of the Supreme Court's religious symbol jurisprudence, and conclude that the cases offer little guidance to government officials concerned about the Establishment Clause.[20] Finally, the Essay presents the text of Clinton Administration directives that are relevant to these discussions.[21]

II. ROSENBERGER V. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA

The University of Virginia, founded by Thomas Jefferson in 1819, is preserved under the laws of the Commonwealth of Virginia as a public corporation.[22] Student groups among the University's more than 11,000 undergraduate and 6,000 professional students are

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forum, because the program's purpose was to allow citizens to support efforts to control and reduce litter, not to provide a forum for expressive activity. *Id.* at 1078. The court ruled that the state had rejected the Klan's application because the section of highway was located near a desegregated housing project whose residents had been subject to harassment and intimidation by the Klan. *Id.* at 1080. Thus, denial of the application was a reasonable and viewpoint-neutral restriction on speech. *Id.*

14. *See infra* Part IV.
15. *See infra* Part II.A-C.
16. *See infra* Part II.D.
17. *See infra* Part III.
18. *See infra* Part III.A.-C.
19. *See infra* Part III.D.
20. *See infra* Part IV.
21. *See infra* Part V (Appendix).
22. *Rosenberger III*, 115 S. Ct. at 2514.

supported by a detailed program designed to bolster extracurricular activities.[23] Before a student organization can submit a request to the University to compensate outside contractors and service providers from the Student Activities Fund ("SAF"), which receives its monies from a mandatory activities fee paid by all full-time students,[24] the group must become a Contracted Independent Organization ("CIO").[25]

The benefit of acquiring CIO status is that, in addition to being eligible to submit a request for the payment of bills, a recognized CIO has access to a variety of university facilities, including computer terminals and meeting rooms.[26] Guidelines regulating the use of the SAF explicitly specify that eligible CIOs will not be reimbursed for the costs of religious activities.[27] The Guidelines define a religious activity as one which "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[28]

In September 1990, Ronald Rosenberger and fellow undergraduates at the University of Virginia created Wide Awake Productions ("WAP") after they realized that none of the fifteen student-run publications on campus provided a forum for Christian expression.[29] Membership in WAP was open to any student who wished to join, without regard to sex, race, religion, or color. WAP acquired CIO status shortly after it was formed.[30] The organization, which was not affiliated with any particular religious institution, was formed with three express purposes: to "(1) publish a magazine of philosophical and religious expressions; (2) facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints; and (3) provide a unifying focus for Christians of multicultural

23. *Id.*

24. *Id.* Each full-time student is required to pay $14.00 per semester to the SAF to support recognized Contracted Independent Organizations. *Id.*

25. *Id.* The district court in *Rosenberger* noted that there are four general criteria for CIO status: (1) at least 51% of the group's members must be students; (2) the group's officers must all be full-time, fee-paying students; (3) the group must keep an updated copy of its constitution on file with the university; and (4) the group must sign an anti-discrimination disclaimer. Rosenberger v. Rector and Visitors of the Univ. of Va., 795 F. Supp. 175, 177 n.1 (W.D. Va. 1992) [hereinafter *Rosenberger I*], *aff'd*, 18 F.3d 269 (4th Cir. 1994) [hereinafter *Rosenberger II*], *rev'd*, 115 S. Ct. 2510 (1995).

26. *Rosenberger III*, 115 S. Ct. at 2514.

27. *Id.* Other activities which are excluded from reimbursement are "philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax exempt status, those which involve payment of honoraria or similar fees, or social, entertainment or related expenses." *Id.*

28. *Id.* at 2515.

29. *Id.*

30. *Id.*

backgrounds."[31] As part of its mission, WAP publishes a newspaper, *Wide Awake: A Christian Perspective at the University of Virginia.*[32] Each issue of *Wide Awake* is distributed on campus free of charge.[33]

Based on comments by editor-in-chief Rosenberger in the first issue of *Wide Awake*, the newspaper's twin goals are "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."[34] The articles, essays, and poems exhort the readership to "actualize" Christianity fully in every aspect of their social, economic, political, and cultural lives.

When Rosenberger sought reimbursement of $5,862 from the SAF in January 1991 to cover *Wide Awake's* printing costs, the Appropriations Committee of the Student Council denied the request. The Committee based its decision on the fact that the newspaper was a "religious activity" within the meaning of its Guidelines. This was WAP's first and only request for funds.[35]

WAP did not dispute that it was engaged in a religious activity as defined in the SAF Guidelines.[36] Even so, WAP appealed the denial of funds, contending not only that it met the appropriate SAF Guidelines, but also that the Student Council's action violated the United States Constitution.[37] In March 1991 the full Student Council, followed in April by the Student Activities Committee, upheld the decision to deny funds.[38] During this same time, the University provided financial support for general news publications including *The Yellow Journal*, a "humor" magazine which occasionally targets Christianity as a subject of satire, and *Al-Salam*, the Muslim Students Association publication, which seeks to "promote a better understanding of Islam."[39] The fund also contributed support for the Jewish Law Students Association to "be a focal point for Jewish activities" and "to encourage law students to participate in Jewish

31. *Rosenberger I*, 795 F. Supp. at 177 n.3; *see also Rosenberger II*, 18 F.3d at 271-72.

32. *Rosenberger III*, 115 S. Ct. at 2515.

33. *Id.* By June of 1992, 5,000 copies of *Wide Awake* had been distributed. *Id.*

34. *Id.*

35. *Id.* Of the 343 CIOs on campus during the 1990-1991 academic year, 118 of the 135 groups which applied for support from the SAF received funding. *Id.* Fifteen of the CIOs that received funding were "student news, information, opinion, entertainment, or academic communications media groups." *Id.*

36. *Rosenberger II*, 18 F.3d at 273. *See also supra* text accompanying note 28 (providing the SAF Guidelines' definition of a "religious activity").

37. *Rosenberger II*, 18 F.3d at 273.

38. *Id.* at 273-74.

39. *Rosenberger III*, 115 S. Ct. at 2527.

activities," as well as for the C.S. Lewis Society, which was created to "promote interest in, and discussion of, various . . . topics, with a particular emphasis on the work of the 'Oxford Christians.'"[40] The University contended that these groups received funds as cultural, not religious, activities, and denied funds to the students' *Wide Awake* Christian newspaper venture.[41]

A. The District Court Decision

Rosenberger and WAP filed suit in the United States District Court for the Western District of Virginia,[42] seeking relief pursuant to 42 U.S.C. § 1983.[43] The claim alleged that the University's denial of SAF benefits for their Christian newspaper violated the group members' First Amendment rights to free speech, free exercise of religion, and Fourteenth Amendment equal protection of the laws.[44] The students did not dispute the University's assertion that *Wide Awake* was a religious activity.[45] Rather, they maintained that the denial of funds from the SAF solely on the basis of WAP's religious editorial viewpoint violated their constitutional rights.[46] The court granted summary judgment in favor of the University on all three counts.[47]

The district court first addressed the freedom of speech claim. It relied on Supreme Court precedent[48] to find that the SAF was a "non-

40. Brief for Petitioners at 5-6, Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1994) (No. 94-329).

41. *Id.* at 6.

42. *Rosenberger I*, 795 F. Supp. at 177.

43. *Id.* at 178. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

44. *Rosenberger I*, 795 F. Supp. at 177-78. The suit also included freedom of the press and freedom of association claims. *Id.* In addition, the students also added claims based on Article I of the Virginia Constitution and the Virginia Act for Religious Freedom. *Id.*

45. *Id.* at 177 n.3.

46. *Id.* at 177-78.

47. *Id.* at 183.

48. *Id.* at 178. The court relied on *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) (setting forth a non-public versus limited public forum analysis to determine what is the required degree of scrutiny) (relying on Widmar v. Vincent, 454 U.S. 263 (1981)).

public" rather than a "limited public" forum.[49] Relying on this distinction, the district court held that the University met its burden of having a reasonable basis for excluding *Wide Awake*. It observed that a state may restrict access to a non-public forum if the restriction regulating speech is "reasonable and not an effort to suppress expression merely because the public officials oppose the speaker's view."[50] The district court further noted that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[51]

Turning to the students' claim regarding free exercise of religion, the district court made two related points in dismissing in favor of the University. First, it observed that the University did not treat *Wide Awake* any differently from other student organizations that were denied funding.[52] Second, it noted that where the alleged burden on the students' free exercise rights was not substantial, the University, the public organ of the state, was not required to prove a compelling state interest in denying the funds.[53] Moreover, the court added that even if it were to concede that the denial of funds did impose a burden on the students' constitutional rights, the University's desire to avoid

49. *Rosenberger I*, 795 F. Supp. at 180-81.

50. *Id.* at 179 (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

51. *Id.* (citation omitted).

52. *Id.* at 182.

53. *Id.* at 182-83. The court grounded its reasoning on *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), and *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991). The Court in *Smith* stated that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883. The Fourth Circuit in *Goodall* upheld a school district's refusal to provide an interpreter for a deaf child in a non-public school. *Goodall*, 930 F.2d at 370. The *Rosenberger I* court interpreted *Goodall* as "appear[ing] to have adopted [the *Smith*] position" that the state is not required to prove a compelling interest where the burden on religion is not substantial. *Rosenberger I*, 795 F. Supp. at 183 (citing *Goodall*, 930 F.2d at 369). *See also* KR v. Anderson Community Sch. Corp., 81 F.3d 673 (7th Cir. 1996) (for a similar ruling denying a full-time instructional assistant for a student in a Catholic school); Cefalu v. East Baton Rouge Parish Sch. Bd., 103 F.3d 393 (5th Cir. 1997) (vacating the ruling of the district court ordering school board to provide sign language interpreter for student at private school, and remanding to determine whether denial of services was appropriate exercise of school board's discretion). *But see* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that providing a sign language interpreter at a Catholic school did not violate the Establishment Clause); Russman v. Board of Educ., 22 IDELR 1028 (N.D.N.Y. 1995) (ordering sign language interpreter and consulting teacher to provide services on site for student with disability).

Moreover, in an unusual move, the Court agreed to take a second look at *Aguilar v. Felton*, 473 U.S. 402 (1985), which prohibited on-site delivery of Title I services for students enrolled in a religiously-affiliated non-public school in New York City. *Agostini v. Felton*, 117 S. Ct. 759 (1997) (agreeing to re-examine *Aguilar*).

an Establishment Clause violation would constitute a compelling state interest.[54]

The district court then dismissed WAP's claim that because SAF provided money to other "religious groups," it was denied equal protection. The court granted summary judgment in favor of the University because it concluded that the University did not act with the requisite discriminatory intent.[55]

B. The Fourth Circuit Decision

Rosenberger and WAP appealed to the United States Court of Appeals for the Fourth Circuit.[56] Albeit on different grounds than the district court, the Fourth Circuit unanimously affirmed in favor of the University on both the First Amendment free speech and press claims, and on the equal protection charge.[57]

The court began its analysis by holding that WAP's publication of religious speech in *Wide Awake* fell within the protective ambit of the free speech clause of the First Amendment.[58] Next, the court reasoned that although none of the student groups on campus, including WAP, had a right to SAF monies, once the University made funds "available to CIOs generally, they must be distributed in a viewpoint-neutral manner."[59] As such, the court held that the University had, in fact, engaged in viewpoint discrimination[60] that could be justified only if it could establish a compelling interest in maintaining strict separation of church and state.[61]

Consequently, the Fourth Circuit addressed whether the University had a compelling state interest in refusing to fund WAP by relying upon the tripartite *Lemon v. Kurtzman*[62] test. First, the court ruled that

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54. *Rosenberger I*, 795 F. Supp. at 183.

55. *Id.* The court relied on *Irby v. Virginia State Board of Elections*, 889 F.2d 1352 (4th Cir. 1989), which stated that a plaintiff challenging a facially neutral statute must establish both disparate effect and discriminatory intent. *Irby*, 889 F.2d at 1352.

56. *Rosenberger II*, 18 F.3d at 276.

57. *Id.* at 270. The state claims and free exercise claim were not raised on appeal. *Id.* at 276.

58. *Id.* at 280.

59. *Id.* at 280-81.

60. *Id.* at 281. In so holding, the Fourth Circuit disagreed with the district court on this point. *Id. See also Rosenberger I*, 795 F. Supp. at 181-82 (finding that the university did not engage in viewpoint discrimination); *Rosenberger III*, 115 S. Ct. at 2516 (acknowledging disagreement between appellate and district courts on this issue).

61. *Rosenberger II*, 18 F.3d at 281.

62. 403 U.S. 602 (1971). For a discussion of the *Lemon* test, see *supra* note 3. Interestingly, the Supreme Court in *Rosenberger III* subsequently ignored the *Lemon* test, thereby casting further doubt on the contemporary viability of this seemingly

prohibiting funds for religious activities did not violate the Establishment Clause because the proscription in the guidelines was not motivated by an impermissible purpose.[63] Second, it reasoned that the University's refusal to provide financial support for such activities did not impermissibly inhibit religion.[64] Third, the court held that providing funding to *Wide Awake* would have constituted an excessive entanglement with religion by the government in the capacity of the University.[65] It reached this result by explaining that the "[d]irect monetary subsidization of [WAP] . . . would . . . send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values."[66] Thus, the Fourth Circuit concluded that the University had a compelling state interest in refusing to grant funds to WAP.[67] Moreover, the Fourth Circuit held that the University's restriction against funding religious activities was narrowly tailored to achieve its stated purpose.[68]

C. The Supreme Court Decision

The Supreme Court, in a five to four ruling,[69] reversed in favor of Rosenberger and WAP. The Court held that denial of funding for *Wide Awake* infringed WAP's constitutionally guaranteed rights of free speech and free exercise of religion.[70]

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ubiquitous constitutional law jurisprudential standard. *See infra* Part II.C. At the same time, the endorsement test that has surfaced as a possible replacement for *Lemon* continues to remain viable based upon the Court's extensive debate of it in *Capitol Square III*. *See generally Capital Square III*, 115 S. Ct. 2440, 2447 (1995). *See also infra* note 148 (discussing the endorsement test). For discussions of the continuing viability of *Lemon*, see Timothy V. Franklin, *Squeezing the Juice out of the* Lemon *Test*, 72 EDUC. L. REP. 1 (1992); Ira C. Lupu, *Which Old Witch? A Comment on Professor Paulsen's* Lemon *is Dead*, 43 CASE W. L. REV. 883 (1993); Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

63. *Rosenberger II*, 18 F.3d at 284.

64. *Id.* at 285.

65. *Id.* at 285-86. The court held, in fact, that "the primary effect of an SAF subsidy of *Wide Awake* publication costs would be to advance religion." *Id.*

66. *Id.* at 286.

67. *Id.*

68. *Id.* at 286-87. As a final matter, the Fourth Circuit summarily rejected the students' equal protection claim as lacking the requisite discriminatory intent. *Id.* at 288.

69. *Rosenberger III*, 115 S. Ct. at 2513. Justice Kennedy, writing for the Court, was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. *Id.* Justices O'Connor and Thomas each filed concurring opinions. *Id.* at 2525, 2528. Justice Souter's dissent was joined by Justices Stevens, Ginsburg, and Breyer. *Id.* at 2533.

70. *Id.* at 2520, 2524-25.

1. The Majority Opinion

Writing for the majority, Justice Anthony Kennedy, relying primarily on *Lamb's Chapel v. Center Moriches Union Free School District*,[71] held that the University violated the free speech rights of WAP because the school's actions constituted viewpoint discrimination.[72] Justice Kennedy illustrated his point by noting the distinction between content and viewpoint discrimination. The former may be permissible, he noted, if it helps to preserve the purpose of a limited forum, while the latter is presumptively inappropriate when it is directed against speech that might otherwise fall within a forum's limitations.[73] As a preliminary matter, Justice Kennedy held that contrary to the ruling below, the SAF constituted a limited public forum, albeit "more in a metaphysical than in a spatial or geographical sense."[74] Therefore, he found it essential to apply viewpoint discrimination analysis.[75]

Justice Kennedy rejected both arguments advanced by the University in support of its refusal to make third-party payments for WAP. He dismissed the first argument that the University practiced content rather than viewpoint discrimination. He noted that it was WAP's specific Christian editorial viewpoint, rather than a general opposition to the subject of religion, that led to the University's refusal to make third-party payments, as other groups were supported by University funds.[76]

Justice Kennedy rejected the second, and more complex, argument wherein the University maintained that requiring it to fund all available viewpoints would improperly limit its right to make academic decisions.[77] He observed that such reasoning applies only when the University itself is speaking.[78] Kennedy also rebuffed the University's position that *Lamb's Chapel* had limited applicability because financial resources were more limited than physical facilities.[79] Consequently, the Court held that "the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a

71. 508 U.S. 384 (1993). *See also infra* text accompanying notes 144-46, 173, 175 (noting the Supreme Court's reliance on *Lamb's Chapel* in its decision in *Capitol Square III*, 115 S. Ct. 2440, 2448 (1995)).

72. *Rosenberger III*, 115 S. Ct. at 2518.

73. *Id.*

74. *Id.* at 2517.

75. *Id.* at 2518.

76. *Id.* at 2517-18.

77. *Id.* at 2518.

78. *Id.* at 2518-19.

79. *Id.* at 2519-20.

denial of their right of free speech guaranteed by the First Amendment."[80]

Acknowledging that the Fourth Circuit had relied on *Lemon* in sustaining the University's viewpoint discrimination, Justice Kennedy found it necessary to examine whether the decision to refuse funding to WAP would have been justified under the Establishment Clause. He determined that there would not have been a Establishment Clause violation because the University's policy of funding student publications was otherwise neutral.[81] In fact, he pointed out that WAP sought funding not because of its religious editorial perspective, but because it was a recognized student publication under University guidelines.[82] Kennedy noted that, if anything, the University distanced itself from student organizations, disclaimed them as University agents, and paid the monies directly to third parties, rather than to the organizations themselves.[83]

Justice Kennedy took the discussion one step further and maintained that if the University had scrutinized the content of student speech to decide whether there was too much religious content, then the school's conduct would have amounted to "censorship . . . far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis."[84] As such, he concluded that funding WAP, along with the other student publications, would not violate the Establishment Clause.[85]

2. The Concurring Opinions

Justice O'Connor joined in the majority opinion but authored a separate concurrence to emphasize what she perceived as the best way to resolve the conflict between the "two bedrock principles" of "governmental neutrality and the prohibition on state funding of religious activities."[86] In so doing, she offered that, as in the case at bar, the Court sometimes has to draw fine lines based on unique factual settings. Therefore, she examined the four elements that were

80. *Id.* at 2520.
81. *Id.* at 2522.
82. *Id.*
83. *Id.* at 2523-24. *See supra* note 25 and accompanying text for a description of how a student group obtains CIO status, which then makes them eligible to submit requests to the University for the payment of bills.
84. *Id.* at 2524.
85. *Id.* at 2524-25.
86. *Id.* at 2525 (O'Connor, J., concurring).

present in the University's program that she believed violated *Wide Awake's* right to free speech.[87]

First, Justice O'Connor noted that student organizations, including WAP, remained strictly independent of the University.[88] Second, the payment in question was made directly to the private vendor and did not pass through WAP's coffers.[89] Under these circumstances, Justice O'Connor asserted, the payment method was more like providing equal access to a printing press that was generally available, and less like donating a block grant to a religious institution. Third, the probability of any governmental endorsement was minimal under the circumstances since *Wide Awake* competed with fifteen other student publications that received similar funding from the University.[90] Finally, Justice O'Connor noted that even though the issue had not been raised, there may be a free speech clause basis for a student to refuse to pay the student fee to avoid supporting speech with which he or she disagrees.[91]

Justice O'Connor thus maintained that, in light of these considerations, the Court's decision neither "trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence."[92] Rather, she was satisfied that the Court focused on the specifics of the University's funding scheme and acted to safeguard the rights of *Wide Awake*.

Justice Thomas' lengthy concurrence[93] essentially rebutted Justice Souter's dissent. The first of Justice Thomas' two points was intertwined with an historical analysis of the role of James Madison in

87. *Id.* at 2526-28 (O'Connor, J., concurring).

88. *Id.* at 2526 (O'Connor, J., concurring). Justice O'Connor quoted the University's agreement with the CIOs, which stated that:

> 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 . . . .

Id. (O'Connor, J., concurring) (citing Joint App. of the Writ of Cert. at 27, *Rosenberger II*, 18 F.3d 269 (No.94-329)).

89. *Id.* at 2527 (O'Connor, J., concurring).

90. *Id.* (O'Connor, J., concurring). Justice O'Connor noted that other publications, such as the humor magazine *The Yellow Journal*, have previously satirized Christianity. *Id.* O'Connor went on to state that because the University allowed for "non-religious, anti-religious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical." *Id.*

91. *Id.* (O'Connor, J., concurring).

92. *Id.* at 2528 (O'Connor, J., concurring).

93. *Id.* at 2528-33 (Thomas, J., concurring).

Virginia's "Assessment Controversy."[94] In so doing, he rejected the dissent's argument that the government is required to discriminate against religious groups by excluding them from generally available financial subsidies.[95]

Justice Thomas' second point differed from the dissent's position that governmental neutrality extended to facilities but not to funds.[96] He bolstered his position by noting historical[97] and contemporary[98] precedents in which the government offered support to religious institutions. He also noted a lack of conceptual consistency: the dissent would apparently accept granting *Wide Awake* access to the University's own printing press, but would not accept permitting a third party to render the same service.[99]

3. The Dissent

Justice Souter's dissent,[100] which was almost twice as long as the majority opinion, differed on at least three major points. First, Justice Souter argued that the Court violated the Establishment Clause by ordering an instrumentality of the state to provide direct support for religious evangelization.[101] Second, even though the payment was to a supposedly neutral third party, he distinguished *Rosenberger* from a number of other cases in which the Court permitted support for religious activities.[102] He maintained that this case violated the Establishment Clause because "there is no third party standing between

94. *Id.* at 2528-30 (Thomas, J., concurring). The debate concerned a bill in Virginia which provided for the collection of a specific tax to support clergy in teaching religion. *Id.* at 2528.

95. *Id.* at 2528-29 (Thomas, J., concurring).

96. *Id.* at 2531 (Thomas, J., concurring).

97. *Id.* at 2531 nn.3-4 (Thomas, J., concurring) (discussing a number of examples of "what amount to direct funding" in early Acts of Congress).

98. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding the tax-exempt status of churches).

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

100. *Id.* at 2533-51 (Souter, J., dissenting).

101. *Id.* at 2535-47 (Souter, J., dissenting).

102. *Id.* (Souter, J., dissenting). *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (permitting the state to fund a sign language interpreter for a student in a Catholic high school because such a service is not skewed toward religion and does not offend the Establishment Clause); Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481 (1986) (upholding a tuition payment, provided by the state, for a blind student enrolled in a Bible college, because it did not advance religion in a way which was inconsistent with the Establishment Clause); Mueller v. Allen, 463 U.S. 388 (1983) (Minnesota statute permitting a tax deduction for tuition, textbooks, and transportation for parents of children in both public and non-public schools, in compliance with the Establishment Clause).

the government and the ultimate religious beneficiary to break the circuit by its independent discretion to put state money to religious use."[103] Third, Justice Souter agreed with the majority that the University could not engage in viewpoint discrimination.[104] He was of the opinion, however, that the University had properly denied funding to *Wide Awake* because in so doing, it prohibited religious advocacy or proselytizing that applied equally to other religious groups on campus.[105]

D. Analysis

In *Rosenberger III*, the First Amendment rights of free exercise of religion and of free speech arguably trumped First Amendment establishment concerns. *Rosenberger III* represents the apparent melding of the ascendant socio-political tide in the United States into the libertarian constitutional jurisprudence of the Supreme Court. These interwoven trends ultimately may lead to a reassessment of some of the most fundamental principles of our system of government. Meanwhile, if indeed it ever existed, the mythical Jeffersonian Wall of Separation[106] between church and state continues to be dismantled, most ironically, at Jefferson's pride, the University of Virginia. President Clinton and his Republican rivals jointly promise the further injection of religion into the realm of public education.[107] *Rosenberger III* is the most important and most recent piece in this rapidly emerging new jurisprudential fabric that melds dramatically liberalized speech and press rights with the right to free exercise of religion.

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

104. *Id.* at 2547-48 (Souter, J., dissenting).

105. *Id.* at 2549 (Souter, J., dissenting).

106. Despite the great amount of ink spilled over the "wall" of separation between church and state erected by Jefferson, the Commonwealth of Virginia continued to support religious institutions well into the nineteenth century, even during Jefferson's own lifetime. For a good discussion, see Ralph D. Mawdsley, *Prohibition of Student Religious Activities on Public School Premises: Unreasonable Content-Based Restriction*, 4 COOLEY L. REV. 117, 145 n.199 (1986).

107. *See, e.g.*, Voluntary School Prayer Protection Act, S. 185, 105th Cong. (1997) (introduced by Senator Helms and prohibiting the provision of federal funds to state or local educational agencies that deny or prevent participation in constitutional prayer in public schools). In addition, joint resolutions have been introduced in both the House and the Senate proposing an amendment to the United States Constitution providing that the Constitution shall not prohibit voluntary prayer in public schools. S.J. Res. 15, 105th Cong. (1997); H.R.J. Res. 55, 105th Cong. (1997).

III. CAPITOL SQUARE REVIEW AND ADVISORY BOARD V. PINETTE[108]

In November 1993, the Ohio Knights of the Ku Klux Klan ("Klan"), through its officer Donnie A. Carr, applied to the Capitol Square Review and Advisory Board to erect a large cross, ten feet in height, on Capitol Square in Columbus, Ohio.[109] Capitol Square is a ten-acre plaza, owned by the state of Ohio, surrounding the Ohio Statehouse.[110] The Board is authorized by Ohio statute to regulate public access to the square. The Ohio Administrative Code makes the square available for "free discussion of public questions, or for activities of a broad public purpose."[111] For many years the Square has been used for gatherings, speeches, and festivals that celebrate a variety of secular and religious causes.

In order to use the Square, a group is required to fill out an official form and meet several safety, sanitation, and non-interference criteria that are neutral to the speech content of the proposed event.[112] In recent years, groups as diverse as the Ku Klux Klan and various homosexual rights organizations have used the Square under this policy to hold public rallies.[113] Furthermore, unattended displays, including a state-sponsored Christmas tree and a privately-sponsored menorah, have also been erected in Capitol Square under the Board's policies.[114]

Carr's application to erect the cross followed a month in which the Board reversed its earlier decision not to allow unattended holiday displays on the Square in 1993. Following the reversal of the ban on such displays, the Board approved a state-sponsored Christmas tree and, on the day of Carr's application, it granted a rabbi's application to erect a menorah on the Square.[115] Carr's application requested permission to erect the cross from December 8, 1993, to December 24, 1993.[116]

The Board denied Carr's application on December 3, 1993, and informed the Ku Klux Klan in a letter that the decision "'was made upon the advice of counsel, in a good faith attempt to comply with the

108. *Capitol Square III*, 115 S. Ct. 2440 (1995).
109. *Id.* at 2445.
110. *Id.* at 2444.
111. *Id.* (citing OHIO ADMIN. CODE ANN. § 128-4-02(A) (1994)).
112. *Id.* at 2444.
113. *Id.*
114. *Id.*
115. *Id.* at 2445.
116. *Id.*

Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts.'"[117] After unsuccessfully seeking administrative relief, the Klan filed suit to compel the issuance of a permit.

A. The District Court Decision

On December 20, 1993, the Ohio Klan, through its representatives Vincent Pinette and Donnie Carr, filed suit in the United States District Court for the Southern District of Ohio[118] seeking a temporary restraining order and a preliminary injunction of the Board's order. The district court consolidated the hearing on the motion with trial on the merits of the Klan's First Amendment claim, and granted the Klan's requested relief.[119]

The district court initially addressed the question of whether the Square was a traditional public forum. Based on the Board's long-established practice of holding the Square open to the speech of heterogeneous groups, the district court held that the Square should indeed be considered a traditional public forum.[120]

The district court cited the significant constitutional protection afforded speech in the traditional public forum, specifically noting that the "First Amendment Free Speech Clause prohibits content-based regulation of the use of public fora."[121] It noted that religious expression is entitled to no less protection than other forms of expression under the Constitution.[122] The district court further stated that the government may not exclude speech from a traditional public forum unless the exclusion is necessary to achieve a compelling state interest and is narrowly drawn to achieve that end.[123]

The Board, however, raised the countervailing consideration, proffered as a compelling state interest, that the erection of a cross in a

117. *Id.* (citing Joint App. of the Writ of Cert. at 47, Capitol Square Review & Advisory Bd. v. Pinette, 30 F.3d 675 (6th Cir. 1994) (No. 94-780)).

118. 844 F. Supp. 1182, 1183 (S.D. Ohio 1993) [hereinafter *Capitol Square I*].

119. *Id.*

120. *Id.* at 1185.

121. *Id.*

122. *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263 (1981), which held that a university exclusionary policy prohibiting the use of university buildings was unconstitutional since it failed to regulate in a content-neutral fashion).

123. *Id.* (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), which held that the First Amendment was not violated where a union elected by public school teachers as exclusive bargaining representative was granted access to teacher mailboxes and interschool mail system while access was denied to a rival union, as such exclusion was not viewpoint discrimination and was a reasonable regulation on speech in light of union's responsibilities to teachers).

square that also is home to the seat of government of the state of Ohio amounted to an "establishment of religion in violation of the First Amendment."[124] The Board cited *County of Allegheny v. American Civil Liberties Union*[125] to bolster its argument that placing the cross on Capitol Square was an Establishment Clause violation.[126]

The district court distinguished *County of Allegheny* on its facts, stating that it "involved very obvious efforts by the government to associate itself with a particular religious display."[127] In *Capitol Square I* the district court concluded that the situation before it was more analogous to the circumstances before the Sixth Circuit in *Americans United for Separation of Church and State v. City of Grand Rapids*,[128] and went on to interpret *County of Allegheny* as did the Sixth Circuit in *Grand Rapids*.[129] The district court noted that in *Grand Rapids*, the Sixth Circuit held that the unattended display of a large menorah in a plaza surrounded by public and private buildings did not constitute a state endorsement of religion, and similarly distinguished *County of Allegheny* on its facts.[130]

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124. *Id.*

125. 492 U.S. 573 (1989) (finding an Establishment Clause violation in a holiday crèche display where the government "effectively associated itself with that particular religious message" by giving special preference to the private group displaying the crèche, mentioning the crèche in government press releases, and using similar visual images as were used in the crèche display with official government signs).

126. *Capitol Square I*, 844 F. Supp. at 1187.

127. *Id.*

128. *Id.* at 1185-87.

129. The district court in *Capitol Square I* discussed the Sixth Circuit opinion in *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992), and how the Sixth Circuit interpreted and applied the Supreme Court decision in *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989). *Id.* The *Capitol Square I* court determined that "[a]pplying the Sixth Circuit's reasoning in *Grand Rapids* to the facts and issues presented in the instant case leaves little doubt that the plaintiffs must be permitted to erect a cross on the Capitol Square." *Id.* at 1187. The *Capitol Square I* court borrowed the Sixth Circuit's reasoning in *Grand Rapids* and focused upon the fact that the request to use Capitol Square "comes from a private party." *Id.* (citing *Grand Rapids*, 980 F.2d at 1553). Thus, the *Capitol Square I* court stated that the proposed Klan "'display is privately sponsored, and it stands in a traditional public forum to which all citizens have equal access.'" *Id.* at 1186 (quoting *Grand Rapids*, 980 F.2d at 1545). In contrast, the *Capitol Square I* court noted that in *County of Allegheny* the county gave a preferential position to a crèche in a holiday display, associated itself with the crèche in county press releases, and "visually linked" the county with the crèche by placing next to official county signs two evergreens identical to those in the crèche display. *Id.* (citing *Grand Rapids*, 980 F.2d at 1545). In so doing, the *Capitol Square I* district court noted, the "county effectively associated itself with [a] particular religious message." *Id.* (citing *Grand Rapids*, 980 F.2d at 1545).

130. *Capitol Square I*, 844 F. Supp. at 1186.

The court explained that, pursuant to *Grand Rapids*, the inquiry of whether the cross display offended the Establishment Clause would properly focus on the second prong of the *Lemon* test.[131] Therefore, the district court restricted its analysis to the question of whether a reasonable observer would perceive the government action allowing the cross display as an endorsement of a particular religion. The district court concluded that the private aspects of the display, in combination with facts and circumstances evincing Ohio's "toleration of religious and secular pluralism," would prohibit the reasonable observer from concluding that the Klan's cross display constituted a state endorsement of religion offending the Establishment Clause.[132]

B. The Sixth Circuit Decision

In affirming in favor of the Ku Klux Klan, the Sixth Circuit reviewed the decision of the trial court, on the premise that the denial of the Klan's application involved the consideration of "wrongs capable of repetition yet evading review."[133]

The Sixth Circuit agreed with the district court that Capitol Square is indeed a public forum. The appellate court further agreed that in order to justify a content-based regulation under these circumstances, the state must show that its regulation is necessary to forward a compelling state interest and is narrowly drawn to achieve its end.[134]

To determine whether the erection of the cross would offend the Establishment Clause, the Sixth Circuit likewise employed *Lemon*.[135] The court agreed that *Lemon* had been subsequently refined, so that the proper line of inquiry was whether the erection of the cross would be perceived by the reasonable observer as a state endorsement of religion.[136] The Sixth Circuit noted that the trial court had properly applied the law in distinguishing this case from *County of Allegheny*, which involved a ceremonial courthouse staircase location that could not be considered a public forum.[137]

The Sixth Circuit summarily discounted the Board's reliance on *Doe v. Small*,[138] a Seventh Circuit case that had intimated that the physical distance from the seat of government may have some determinative

131. *Id.* See *supra* note 3 for a discussion of the *Lemon* test.
132. *Capitol Square I*, 844 F. Supp. at 1187.
133. 30 F.3d 675, 677 (6th Cir. 1994) [hereinafter *Capitol Square II*].
134. *Id.*
135. *Id.* at 678-79.
136. *Id.* at 679.
137. *Id.*
138. 964 F.2d 611 (7th Cir. 1992).

effect on whether a particular expression might reasonably be perceived as a state endorsement of religion. The Sixth Circuit concluded that the language in *Small* amounted to nothing more than a "gratuitous observation" used to support the Seventh Circuit's opinion that the park was likewise a public forum.[139] The Sixth Circuit affirmed the district court's order that the Klan's representatives be issued a permit to display their cross.[140]

C. The Supreme Court Decision

The United States Supreme Court, in a seven to two decision,[141] affirmed the decisions of the lower courts permitting the Klan's display of the cross in the state capitol's public square. Justice Scalia delivered the opinion of the Court that the erection of the Klan's cross would not be an unconstitutional state endorsement of religion, and therefore could not be prohibited by the First Amendment.[142]

1. The Plurality and Concurring Opinions

As a preliminary matter, the Court's opinion disposed of the Klan's argument that the Board's actual reason for denying the permit was its unconstitutional censorship, because of its disapproval of the Klan's political views. The Court noted that since that argument had not been raised below, the opinion would be limited to the consideration of the Establishment Clause issue.[143]

Justice Scalia's consideration of the Establishment Clause issue rested primarily on the Court's decisions in *Lamb's Chapel v. Center Moriches Union Free School District*[144] and *Widmar v. Vincent*.[145] Scalia noted that *Capitol Square*, like *Widmar* and *Lamb's Chapel*, involved speech that was not sponsored by the state, was expressed on

139. *Capitol Square II*, 30 F.3d at 680.

140. *Id.* at 675.

141. *Capitol Square III*, 115 S. Ct. 2440 (1994). Justice Scalia's majority opinion was joined in Parts I, II, and III by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas and Breyer. Part IV of Justice Scalia's opinion was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas. Justice Thomas filed a separate concurrence. Justice O'Connor concurred in part and in the judgment; she was joined by Justices Souter and Breyer. Justice Souter's concurrence in part and in the judgment was joined by Justices O'Connor and Breyer. Justices Stevens and Ginsburg filed dissenting opinions.

142. *Id.* at 2450.

143. *Id.* at 2445.

144. 508 U.S. 384 (1993).

145. 454 U.S. 263 (1981).

government property open to the public, and was subject to the same application process as other types of private expression.[146]

Part IV of Justice Scalia's opinion, which was joined only by the Chief Justice and Justices Kennedy and Thomas, concluded that religious expression "cannot violate" the First Amendment Establishment Clause when it is purely private and occurs in a traditional public forum.[147] In this portion of his opinion, Scalia indicated that the "so-called endorsement test"[148] has "no antecedent in our jurisprudence."[149] He noted that the Court had previously equated the term "endorsement" with "promotion" or "favoritism."[150] Therefore, he reasoned, any neutral policy that produced an incidental benefit to religion could not be properly construed as an unconstitutional "endorsement."[151]

Justice Scalia argued that the government's reliance on *County of Allegheny* and *Lynch v. Donnelly*[152] was misplaced. He explained that where the government has not fostered or encouraged the public to mistake private religious speech for government endorsement of religion, the Establishment Clause is not violated.[153] Scalia likened the "endorsement" test, favored in the concurring and dissenting opinions, to "transferred endorsement" and argued that it would lead government entities, such as school districts, to "guess whether some undetermined critical mass" of the public might perceive access as "endorsement of a religious viewpoint."[154] He noted that the continued application of the endorsement test to Establishment Clause cases would endanger "the settled principle that policies providing incidental benefits to religion do not contravene the Establishment

146. *Capitol Square III*, 115 S. Ct. at 2447.

147. *Id.* at 2450.

148. *Id.* at 2447. The "endorsement test" determines whether the challenged government practice has either the prohibited purpose or effect of "endorsing" religion. County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 592 (1988). The petitioners argued that the state's content-based restriction was constitutional because an observer might mistake private expression for officially "endorsed" religious expression. *Capitol Square III*, 115 S. Ct. at 2447.

149. *Id.* at 2448.

150. *Id.* at 2447 (citing *County of Allegheny*, 492 U.S. at 593).

151. *Id.* at 2447-48.

152. 465 U.S. 668 (1984) (finding legitimate secular purpose, no advancement of religion and therefore no establishment clause violation where city included nativity scene in Christmas display for purpose of celebrating and depicting origins of holiday). See also Village of Scarsdale v. McCreary, 471 U.S. 83 (1985). See *supra* notes 125-29 and accompanying text for a discussion of the government's reliance on *County of Allegheny*.

153. *Rosenberger III*, 115 S. Ct. at 2448.

154. *Id.* at 2449.

Clause."[155] In closing, Justice Scalia indicated that a state cannot ban all religious speech or force it to be accompanied by a disclaimer of public sponsorship, because this would constitute prohibited content-based discrimination.[156]

Justice O'Connor's concurrence, joined by Justices Breyer and Souter, disagreed with Part IV of the Scalia opinion. Justice O'Connor saw "no necessity to carve out, as the plurality opinion would today, an exception to the endorsement test for the public forum context."[157] Justice O'Connor cited with approval the analysis the Court employed in *County of Allegheny* and *Lynch* while repudiating the plurality's position that the endorsement test should be limited to expression by the government.[158] She pointed out that Capitol Square's status as an open public forum did not dispose of whether the state may be endorsing religion. O'Connor noted that "[a]t some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval."[159]

Although Justice O'Connor made her disagreement with the plurality's relegation of the endorsement test abundantly clear, she also reasoned that she could not accept the dissent's argument that the test should focus on the actual perception of the individual observers of the religious display.[160] Justice O'Connor explained that pursuant to the rationale elucidated in *County of Allegheny*, the endorsement inquiry must focus on the "reasonable" observer who is "deemed aware of the history and context of the community and forum in which the religious display appears."[161]

The plurality could envision no circumstance where private religious expression in a public forum could be mistaken for government endorsement of religion. To the extent the Court's decision in *Lynch* could be construed to the contrary, Justice Scalia asserted, "the case neither holds nor even remotely assumes that the government's neutral treatment of private religious expression can be unconstitutional."[162]

Justice Scalia most interestingly noted that the perpetuation of the "endorsement" test would render religious speech as unprotected as

155. *Id.*
156. *Id.* at 2450.
157. *Id.* at 2451 (O'Connor, J., concurring).
158. *Id.* at 2452 (O'Connor, J., concurring).
159. *Id.* at 2454 (O'Connor, J., concurring).
160. *Id.* at 2458-59 (O'Connor, J., concurring).
161. *Capitol Square III*, 115 S. Ct. at 2455 (O'Connor, J., concurring).
162. *Id.* at 2448.

pornography, and he declared this bizarre result "perverse."[163] However, his analysis neglects a salient fact: sexually explicit and commercial speech have not traditionally been subject to review under the Court's Establishment Clause jurisprudence. As Justice Stevens indicated, this point is not lost on the dissent: "conspicuously absent from the plurality's opinion is any mention of the values served by the Establishment Clause."[164]

Scalia's observations are based on two fundamental concepts. The first is that the American society has ceased to be, if it ever was, secular. Justice Kennedy implicitly makes this argument in *Rosenberger III*. In fact, that is the area of substantial contention here—whether and at what point society needs to concern itself with the fact that "private" expressions become "public." If Justice Scalia chooses to ignore the endorsement test, he should state why he believes it is irrelevant. Rather, he seems to endeavor to write the Establishment Clause out of the First Amendment.

Justice Scalia's views are not a misapprehension of the contrary position; rather, they evince a belief that the values expressed in the Establishment Clause are overtly and exclusively temporal and secular. He believes that modern society is not threatened by the inculcation of religious mores into the political sphere.[165]

Scalia's perceptive comments on pornographic and commercial speech are illustrative of his second salient concept. He asks us to consider the crucially important place of religious expression in the Constitution. But, he cannot ignore the fact that no other form of expression is conditioned by a clause that warns that the government "shall make no law respecting its establishment."[166] Scalia astutely points out that there is no formal Establishment Clause equivalent for pornographic or commercial speech.[167] Yet, perhaps there is an effective de facto establishment clause for pornography and commercial speech: the Establishment Clause itself.

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163. *Id.* at 2449.

164. *Id.* at 2472 (Stevens, J., dissenting).

165. In a play on words, Scalia, a Roman Catholic, told students at a prayer breakfast sponsored by the Mississippi College School of Law, "[w]e are fool's for Christ's sake," and explained that the word cretin, or fool, is derived from the French word for Christian. *Scalia Says Christians Should Stand Tall*, 4 DALLAS/FORT WORTH HERITAGE 11 (May 1996)<http://www.fni.com/heritage/may96. He argued that "[o]ne can be sophisticated and believe in God. Reason and intellect are not to be laid aside where matters of religion are concerned." *Id.*

166. U.S. CONST. amend. 1.

167. *Capitol Square III*, 115 S. Ct. at 2449.

2. The Dissenting Opinions

Justice Stevens' dissent focused on the historical interpretation of the Establishment Clause. In attempting to repudiate Justice Scalia's approach, he highlighted the opinion of one of the Court's most famed literalists, Justice Black. Stevens warned that the position of the plurality "entangles two sovereigns in the propagation of religion and it disserves the principle of tolerance that underlies the prohibition against state action 'respecting an establishment of religion.'"[168]

In her brief dissenting opinion, Justice Ginsburg focused on the lack of an adequate disclaimer "to disassociate the religious symbol from the State."[169] She identified as the purpose of the Establishment Clause "to uncouple government from church."[170] Thus, she concluded, the display violated the Establishment Clause because "[n]o plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message."[171]

Neglected throughout the decision is the point that, by stating that the private religious expression in a public forum cannot be construed as government endorsement of religion, Justice Scalia has melded Free

168. *Id.* at 2472 (Stevens, J., dissenting). The Religious Freedom Restoration Act ("RFRA"), signed into law by President Clinton on November 16, 1993, was enacted with the express intention of restoring the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* 42 U.S.C. § 2000b-1 to bb-4 (1994). The test had been virtually eliminated by the Court's controversial decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). In *Smith*, Justice Scalia, writing for the Court, announced a startling, sweeping standard designed to vitiate the First Amendment free exercise clause, stating that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest." *Id.* at 886 n.3.

In pertinent part, RFRA mandates that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). RFRA goes on to state an exception: that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). For commentary on RFRA, see *Symposium*, 56 MONT. L. REV. 171 (1995); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5 and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995).

169. *Capitol Square III*, 115 S. Ct. at 2474 (Ginsburg, J., dissenting).

170. *Id.* (citing Everson v. Board of Educ. of Ewing, 330 U.S. 1, 16 (1947)) (Ginsburg, J., dissenting).

171. *Id.* at 2475 (Ginsburg, J., dissenting). In Ginsburg's view, the disclaimer attached by the Klan to the display was inadequate as it did not identify the Klan as sponsor, was not legible from a distance, and did not state unequivocally that the state did not endorse the display. *Id.* (Ginsburg, J., dissenting).

Speech and Establishment Clause analyses. Prior to Part IV of the plurality opinion, the fact that religious expression occurred in a traditional public forum had no legal significance under the Establishment Clause. Justice Scalia's argument would make the location of religious expression determinative of whether a state may proffer a narrowly tailored policy aimed at serving the principles of the Establishment Clause as a compelling state interest sufficient to permit a content-based speech restriction. In effect, content-based judicial scrutiny of expression—such as censorship—would allow the Court to discriminate against the pernicious motives of those such as the Klan who would provide symbols of religious substance such as the cross.

D. Analysis

After *Capitol Square III*, a state cannot regulate private religious speech or expression without the risk of violating the protection of the First Amendment when the religious expression is "(1) purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."[172] Further, the Establishment Clause is not violated by a state policy that confers indirect or incidental benefits upon an establishment of religion. Therefore, if the Ku Klux Klan wants to erect a cross in a public square near the site of the state capitol, it may. Consistent with the Court's reasoning in *Mergens* that permission to act in a public forum is not governmental endorsement of a specific group's message, the fear that the public may perceive this as governmental endorsement of Christianity or an endorsement of the Ku Klux Klan itself is not a sufficiently compelling reason to permit state prohibition of this type of expression.

It can be asked how *Capitol Square III* came to the Supreme Court as a religion case when the Ku Klux Klan is not a religious organization and the Klan's use of the cross is arguably in the form of a political, not religious, statement. The Ku Klux Klan's promotion of hatred, bigotry, and racism is totally antithetical to all that is holy. Moreover, its ceremonial use of the burning cross has historically been employed to *restrict* others' rights, not to convey the right of all religious views to be expressed on an equal basis. One would not fault the Capitol Square Advisory Board for denying the Klan's application to erect a statue of a sheeted Klansman, for example, because there is no social value in allowing such a display. The

172. *Capitol Square III*, 115 S. Ct. at 2450.

Board's fatal mistake was that it acknowledged the Klan's cross as a religious symbol, implicating the Establishment Clause, instead of what the cross really connoted in this context: a prominent political and racist symbol of white supremacy. By taking the symbolic meaning of the cross completely out of its contextual religious history, the controversy was stripped of its true prejudicial symbolic meaning and erroneously transformed into a legitimate religious issue by the courts. As long as the underlying connotation of the private expression is hidden to the general public, its display in an open forum is permissible as religious expression. But, ignoring the argument that the Klan's use of the cross in this instance is politically and not religiously motivated, private religious expression thereby enjoys full protection under the First Amendment. Because a religious symbol is implicated in the controversy, the question is not whether the state violates the Free Speech Clause by disallowing private religious expression in a public forum. Rather, the issue is more properly whether the government violates the Establishment Clause by allowing it. The Court made no effort whatsoever to appreciate the real dynamics and motives of the Klan in *Capitol Square III.*

Relying on *Lamb's Chapel*[173] and *Widmar,*[174] the Court in *Capitol Square III* rejected the compelling-state-interest Establishment Clause defense, because the state did not sponsor the religious expression, the property was open to the public to a wide variety of uses, and access to the forum occurred on an equal basis.[175] The Establishment Clause, the Court concluded, applies only to direct governmental expression and never was meant to temper private religious expression connected to the state only through its occurrence in a public forum.[176] Any benefit to a religious group from use of the public forum would be incidental and shared by other groups.[177] The message here is that the Establishment Clause is violated only when a state affirmatively endorses or favors a religion through its own speech; any indirect or incidental benefit to a religion is permissible.

The proximity of the cross display to a seat of government, which might be mistakenly perceived by a reasonable observer as unconstitutional official endorsement of Christianity, does not violate the Establishment Clause when other displays have been given the same access under a content-neutral policy. The plurality rejected the

173. *See supra* note 71 and accompanying text.
174. *See supra* note 8 and accompanying text.
175. *Capitol Square III,* 115 S. Ct. at 2448.
176. *Id.* at 2449.
177. *Id.*

application of the "endorsement test," as this was not a case in which the religious expression was by the government itself, or in which the government discriminated in favor of religious expression or activity. It matters not that an "outsider" or "uninformed" individual may jump to the conclusion that the state sponsored the expression. As long as the state provides an open forum, the religious expression is purely private, and there is no realistic danger that the "community" would think that the state endorsed the religion, there is no Establishment Clause violation.

Justices O'Connor and Souter, both concurring in the judgment, and Justice Stevens, dissenting, took issue with Justice Scalia on this point, asserting that the endorsement test should be extended beyond direct government speech or favoritism to encompass private religious expression in a public forum. Justice O'Connor's test would be whether a reasonable, informed observer, aware of the history and context of the community and forum in which the religious display appears, would view a government practice as endorsing religion, regardless of governmental intent or encouragement.[178] She reasoned that a religious display, like the Klan's cross, would otherwise be precluded so long as some passersby, unaware of the forum and context, would find an endorsement of religion.[179] Justice O'Connor's "ultra-reasonable" observer, therefore, would not encompass an "outsider" to the community, a tourist, or a young child passing by who knew nothing of the history of Capitol Square or of the Klan's history of distorted evil use of the symbol of the cross. This test would not impute the Klan's private religious expression, adequately disclaimed, in a public forum near a seat of government, to the state.

Justice Stevens' dissent agreed that the endorsement test was appropriate but he disagreed on the standard. His test would be whether a reasonable observer would objectively perceive governmental sponsorship of a private religious display.[180] His reasonable observer would be less knowledgeable than Justice O'Connor's "ideal" or "ultra-reasonable" observer.[181] This rule is more sensitive than Justice O'Connor's because it takes into account the community "outsiders," the "non-adherents," and the "uninformed." Thus, Justice Stevens argues that any reasonable observer of a religious symbol placed unattended near a seat of

178. *Id.* at 2455 (O'Connor, J., concurring).
179. *Id.* (O'Connor, J., concurring).
180. *Id.* at 2466 (Stevens, J., dissenting).
181. *Id.* at 2466 n.5 (Stevens, J., dissenting).

government would typically assume that the state has implicitly endorsed the message by allowing its use of the forum.[182]

Similarly, Justice Souter would extend the endorsement test "by asking whether the practice in question creates the appearance of endorsement to the reasonable observer."[183] What is important is whether, under the specific circumstances of the case, the state policy has the effect of endorsing religion.[184] The Establishment Clause may then be violated in situations other than religious expression by the government itself or active governmental favoritism. Were it otherwise, the result would be a contracting out of religion by encouraging private religious expression to dominate the forum, such as happened in reaction to the erection of the Klan's cross in Capitol Square. However, Justice Souter admits that an Establishment Clause violation can be cured by a disclaimer accompanying a private, unattended display sufficiently large and clear to preclude any reasonable inference that the cross was government sponsored, or a policy restricting all private, unattended displays to one area of the square with a permanent disclaimer of similar content marking the area for private expression.[185] But Justice Souter also recognized that the presence of a disclaimer may not adequately dispel the notion that the property owner endorses the religious expression by allowing it to be displayed.[186]

As Justice Ginsburg points out, the purpose of the Establishment Clause is to "uncouple government from church."[187] If, however, states are denied the power to prevent private displays of religious symbols from being erected on governmental property, the values of the Establishment Clause are disserved. A separation of church and state is not accomplished when government policies benefit religion either directly, through government expression or action promoting or favoring religion, or indirectly, through government sponsorship or support of religious speech or expression. The line cannot be drawn between direct and indirect benefits, for it may be impossible at times to distinguish the two. While some, like Justice Scalia, will view the use of government property as an indirect benefit, others, like Justice Souter, will see it as a direct benefit.

182. *Id.* at 2467 (Stevens, J., dissenting).
183. *Id.* at 2458 (Souter, J., concurring).
184. *Id.* (Souter, J., concurring).
185. *Id.* at 2462 (Souter, J., concurring).
186. *Id.* at 2462 n.2 (Souter, J., concurring).
187. *Id.* at 2475 (Ginsburg, J., dissenting).

IV. REFLECTIONS ON THE COURT'S JURISPRUDENCE OF RELIGIOUS SYMBOL AND SUBSTANCE

The principal disagreement between the plurality and the concurring opinions in *Capitol Square III* added fuel to the fire in the ongoing debate over the continuing validity of the "endorsement" test in the public forum/ private speaker context.

Tolerance is not the same as endorsement. Even so, they are often very difficult to distinguish. Religious speech in an open, public forum by a private speaker must be tolerated by the government under the First Amendment. However, private religious expression that stands unattended in a public forum looks like endorsement by virtue of its location and should not have to be tolerated by the government.

In both of these recent decisions, the Free Speech Clause trumps the Establishment Clause for a majority of the Court. However, it is clear that the Court itself is in conflict: there is profound internal disagreement as to what test to apply and what standards to use when the Religion Clauses clash.[188] The unfortunate consequence is that these opinions provide little guidance to government officials concerned about the Establishment Clause.

The fact that the *Rosenberger III* and *Capitol Square III* opinions proceed along two distinct paths of Establishment Clause jurisprudence notwithstanding, the cases intersect at one logical juncture: a general reassessment of the principles that formerly were the anchors of a fairly well-settled, albeit controversial, area of the law. The realignment is at least a complete repudiation, if not a de facto overruling, of the guiding precepts of the Court's landmark decision in *Lemon v. Kurtzman*.[189]

The change is best viewed in a comparison between Chief Justice Burger's point of departure in *Lemon* and the language employed in the opinion of Justices Kennedy and Scalia in *Rosenberger III* and *Capitol Square III*, respectively. In *Lemon*, Burger stated:

> A law may be one 'respecting' the forbidden objective while falling short of its total realization. A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.[190]

188. *See supra* Parts II.C, III.C.

189. 403 U.S. 602 (1971). *See supra* notes 3, 62-68 and accompanying text for a discussion of the *Lemon* test.

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

In contrast, Justice Kennedy's commencement of Establishment Clause analysis of the University policy in *Rosenberger III* appeared markedly less concerned with former Chief Justice Burger's distinctions. Kennedy noted:

> A central lesson in our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. We have decided a series of cases addressing the receipt of government benefits where religion or religious views are implicated in some degree.[191]

The first case Kennedy highlights in the First Amendment Establishment Clause decisions "series" is, of course, *Everson v. Board of Education*,[192] which permits a school district to provide transportation to children in a private school.[193] However, the Kennedy opinion in *Rosenberger III* subsequently makes a conspicuous jump over the *Lemon* line of cases directly to *Lamb's Chapel v. Center Moriches Union Free School District*[194] and *Widmar v. Vincent*,[195] which are regarded as dealing merely with the question of access of religious viewpoints to certain speech fora. If *Rosenberger III* is considered under this paradigm, the Establishment Clause tests set forth by *Lemon* and its progeny are not only neglected by the Court, they are made completely irrelevant. Thus, as the Court noted, *Rosenberger III* is reduced to a consideration of whether the University's regulation is prohibited "viewpoint discrimination." Just as Justice Kennedy's opinion in *Rosenberger III* evades *Lemon's* excessive entanglement test, Scalia's dismissive treatment of the endorsement test in *Capitol Square III* indicates a disregard of the principles inherent in *Lemon*.

> By its terms that [Establishment] Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum.[196]

Justice Scalia's statement, notwithstanding the certainty with which it is delivered, is directly contradicted in *Lemon*, which was not overruled. Chief Justice Burger's opinion, in its discussion of the dangers inherent in government entanglement in the acts and words of

191. *Rosenberger III*, 115 S. Ct. at 2521.
192. 330 U.S. 1 (1947).
193. *Id.* at 17.
194. 508 U.S. 384 (1993).
195. 454 U.S. 263 (1981).
196. *Capitol Square III*, 115 S. Ct. at 2449.

private citizens, notes that "[w]e cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education."[197]

Justice Kennedy's perspective likewise ignores the cumulative danger of programs benefiting religion, despite their apparent neutrality. Chief Justice Burger's analysis clearly did not consider neutrality the dispositive element of the Court's analysis. "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands . . . ."[198]

Justice Scalia's emphasis in *Capitol Square III* on governmental neutrality[199] is perhaps the clearest indication of how the Court will deal with speech cases that raise Establishment Clause issues. It appears that so long as there is no disparate treatment among religious groups, the Court will look only to free expression principles to determine whether governmental regulation is proper. Furthermore, it is unclear whether a state's interest in complying with the Establishment Clause will ever be deemed "compelling" enough to sustain regulation.

The Court's new view of the Establishment Clause simultaneously rendered Chief Justice Burger's statements in *Lemon* both prophetic and obsolete. The proliferation of religious expression in arenas that were once primarily secular has brought the Establishment Clause into the uncertain realm of late twentieth century American politics. Yet, while the deconstruction of Establishment Clause jurisprudence may not have been envisioned by Chief Justice Burger and his colleagues in 1971, the implications of such actions were quietly acknowledged. "As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal."[200]

In the wake of *Mergens*,[201] the Religious Freedom Restoration Act,[202] which restored the judicially created "compelling interest" test

197. Lemon v. Kurtzman, 403 U.S. 602, 617 (1971).

198. *Id.* at 623.

199. See *supra* notes 143-56 and accompanying text for a discussion of Justice Scalia's opinion.

200. *Lemon*, 403 U.S. at 624-25.

201. Board of Educ. v. Mergens, 496 U.S. 226 (1990) (holding that a school which denied a student's request to form a religious group violated the Equal Access Act). *See supra* note 8 and accompanying text .

202. 42 U.S.C. § 2000b to bb-4 (1994). *See supra* note 168 (discussing RFRA). The constitutionality of RFRA is before the Court in *Flores v. City of Boerne*, 73 F.3d 1352

that the government must meet when it presumes to constrain one's right of free exercise of religion, was signed into law by President Clinton in November 1993. In *Lamb's Chapel*,[203] a unanimous Supreme Court further obfuscated the appropriate place of religious activity in the public arena when it held that a school policy which permitted public school property to be used to present all but religious viewpoints was unconstitutional viewpoint discrimination.[204]

Adding fuel to the fire is Justice Souter's observation in his dissent in *Rosenberger III* that the Court "for the first time, approves direct funding of core religious activities by an arm of the State."[205] In fact, one could just as readily argue that *Rosenberger III* is an extension of the revived "child benefit" test that emerged in *Mueller*, *Witters*, and *Zorbest*, because the dissent's argument that all three of these cases involved a "third party" standing between the government and the ultimate beneficiary[206] does not withstand closer scrutiny. In all three of those cases it is arguable whether beneficiaries were religious institutions, or whether the so-called child benefit test is still applicable, especially when an adult student, as in *Witters*, is involved.

The effect of *Rosenberger III* is that when a public university offers funds, directly or indirectly, for any student paper, pamphlet, or

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(5th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996). The Fifth Circuit held that RFRA did not violate the Establishment Clause, where a city Landmark Commission denied a parish's appeal for a variance that would have allowed it to enlarge a church that was located in an historic district. *Id.* *Compare* Hamilton v. Schriro, 74 F.3d 1545, 1557 (8th Cir. 1996) (McMillan, J., dissenting) (concluding that RFRA is unconstitutional), *cert. denied*, 117 S. Ct. 193 (1996).

For a discussion of the status of RFRA in light of the Supreme Court's grant of certiorari in *Flores*, see Ralph D. Mawdsley, Flores v. City of Boerne: *Testing the Constitutionality of the Religious Freedom Restoration Act*, 115 EDUC. L. REP. 593 (1997). *See also* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994) (stating that the RFRA violates principles of religious freedom, goes beyond limitations of legitimate federal authority, and manipulates the judiciary's interpretation of the Constitution).

203. 508 U.S. 384 (1993).

204. *Lamb's Chapel* was preceded by three cases, all of which ruled in favor of non-school religious groups that sought equal access to public school facilities. *See* Travis v. Owego-Appalachian Sch. Dist., 927 F.2d 688 (2d Cir. 1991); Gregorie v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir. 1990) (enjoining school board from denying access to school auditorium in the first post-*Mergens* case to rely on the Equal Access Act, 20 U.S.C. § 4071); Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676 (2d Cir. 1988) (upholding preliminary injunction). It is important to note that in both *Gregorie* and *Travis*, the religious groups had other facilities available. In *Deeper Life*, the religious group sought to use public school facilities temporarily because its church had been destroyed by fire.

205. *Rosenberger III*, 115 S. Ct. at 2533 (Souter, J., dissenting).

206. *Id.* at 2544 (Souter, J., dissenting).

magazine, religiously-affiliated students at the public university now have constitutional rights under the First Amendment to public funding in order to utilize such public school, taxpayer-supported media to pay and to proselytize in print. Ultimately, whether this is acceptable or is unconstitutional establishment of religion is debatable. Yet, if one agrees with Justice O'Connor's concurring reasoning, it merely puts all groups on an equal footing.

Indeed, President Clinton, a Yale Law School graduate and a former professor of constitutional law at the University of Arkansas Law School, in a major policy address on July 12, 1995, in the immediate wake of *Rosenberger III*, eloquently defended the constitutional and proper place of religion in public schools. The President declared:

> [N]othing in the First Amendment converts our public schools into religion-free zones or requires all religious expression to be left behind at the schoolhouse door. While the government may not use schools to coerce the conscience of our students or to convey official endorsement of religion, the [public] schools also may not discriminate against private religious expression during the school day.
>
> Religion is too important in our history and our heritage for us to keep it out of our schools. . . . [I]t shouldn't be demanded, but as long as it is not sponsored by school officials and doesn't interfere with other children's rights, it mustn't be denied.[207]

President Clinton vigorously reaffirmed the First Amendment free exercise rights and principles forcefully enunciated by the Court in *Lamb's Chapel* and *Rosenberger III*, and supported by the Equal Access Act and the Religious Freedom Restoration Act of 1993. The President's July 12, 1995, memorandum to Attorney General Reno and Secretary of Education Riley most directly addressed the free exercise rights at stake in *Rosenberger III*.[208] President Clinton's memorandum states, in pertinent part:

> Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute to their schoolmates other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other

207. Letter from Richard W. Riley, United States Secretary of Education, to public school superintendents (Aug. 10, 1995) (quoting address of President Clinton, July 12, 1995) (on file with authors).

208. For partial text of the President's Memorandum on Religious Expression in Public Schools, 31 WEEKLY COMP. PRES. DOC. 1227 (July 12, 1995) [hereinafter President's Memorandum], and full text of the Secretary of Education's letter, see the Appendix at the end of this Essay.

> constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.[209]

The principles expressed by the Court in *Rosenberger III* will certainly flourish in this broader and very hospitable political and social cultural climate. However, there has been a very problematic and unprecedented melding of First Amendment speech expression and religion (establishment/free exercise) jurisprudence, via the *Rosenberger III* and *Capitol Square III* decisions. Religious symbols, like the cross, and substances likewise have been confusingly merged by the Court, without regard to whether the religious symbol and substance is wholly perverted by the pernicious motives of the particular entity—most notably for the purposes of this Essay the Klan—sponsoring the display of the symbol.

The Court's content neutrality—and deep aversion to censorship—has now unwittingly fostered the insidious use of religious symbol by those most antithetical to the religious tenets exemplified by the symbol. While Justice Scalia astutely criticizes the bizarre subordination of religious expression to a constitutional status less protected than non-obscene pornography, no Justice, including Scalia, is sensitive to the pernicious ramifications of the Klan's use of the cross.[210] The shame of it is that none of the Justices has yet

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209. President's Memorandum, *supra* note 208, at 1228.

210. *Miller v. California*, 413 U.S. 15 (1973), represents the Supreme Court's modern criteria for whether pornographic material is considered obscene and thus subject to regulation under the states' police power. Writing for the Court, Chief Justice Burger explained that the First Amendment would not protect material if: (1) the "average person, applying contemporary community standards" would find the work appeals to the prurient interest; (2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and (3) the work "lacks serious literary, artistic, political, or scientific value." *Id.* at 24. The Court's three-part definition of obscene material is most significant for its enunciation of the "community standards" doctrine in the first prong of the definition. The Court noted that the applicable community standard ought to be local, in light of the "futility" of attempting to construct national community standards. *Id.* at 30. Despite its significance, the "contemporary community standards" doctrine has led to some confusing results. In *Smith v. United States*, 431 U.S. 291 (1977), Justice Powell attempted to define how a state may set boundaries for a jury's consideration of community standards, notwithstanding the fact that direct legislation setting such boundaries was prohibited. *Id.* at 302-03. Furthermore, the *Smith* decision implied that a jury sitting in a federal or state prosecution might properly be directed to apply the national community standard declared futile in *Miller*. *Id.* at 312. However, the Court recently repudiated an attack on a federal statute regulating obscene telephone recordings as attempting to create a national standard of obscenity. In *Sable Communications v. FCC*, 492 U.S. 115 (1989), Justice White explained that the federal statute was in no way inconsistent with *Miller* (it did not create a national standard) and that materials covered by the law may be subjected to the varying community standards of the judicial districts in which actions

confronted the potentially radical consequences of the Court's continuing confusion of the First Amendment's free expression and Religion Clauses jurisprudence.

V. APPENDIX

On August 10, 1995, the United States Secretary of Education, Richard W. Riley, sent to each public school superintendent in the United States a "statement of principles addressing the extent to which religious expression and activity are permitted in our public schools."[211] Secretary Riley's August 10, 1995 letter and the Clinton administration's "Statement of Principles" follow:

Dear Superintendent:

On July 12th, President Clinton directed the Secretary of Education, in consultation with the Attorney General, to provide every school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. In response to the President's request, I am sending to you this statement of principles.

In the last two years, I have visited with many educators, parents, students, and religious leaders. I have become increasingly aware of the real need to find a new common ground in the growing and, at

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are commenced. *Id.* at 125-26.

The increasing confusion surrounding the contemporary community standards test is further highlighted by recent cases involving commercial on-line transmissions of a sexually explicit nature. In *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (1996), the Sixth Circuit soundly rejected the premise that because the transmission took place in "cyberspace" the court was forced to adopt a new definition of "community." *Id.* at 711-12. *Cf.* United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996) (military court's community, for purposes of determining if on-line material was obscene, was properly "Air Force-wide").

Perhaps the confusion regarding the *Miller* test led the Court to consider other means of analyzing questions of whether obscene expressions enjoy First Amendment protection. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), Chief Justice Rehnquist employed the test elucidated in *United States v. O'Brien*, 391 U.S. 367 (1968), to find that a state's regulation of the non-speech element of nude dancing (that incidentally infringed upon the arguably protected erotic message element of the dancing) was justified because it furthered an important governmental interest—the "disapproval of nudity in public places." *Barnes*, 501 U.S. at 571-72. *See also* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) (upholding pornography and indecency on cable access channels, and striking down attempts to regulate cable access indecent materials); American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (analyzing Communications Decency Act regulation of Internet pornography as unconstitutional).

211. Letter from Richard W. Riley, United States Secretary of Education, to public school superintendents (Aug. 10, 1995) (quoting address of President Clinton, July 12, 1995) (on file with authors).

times, divisive debate about religion in our public schools. President Clinton and I hope that this information will provide useful guidance to educators, parents, and students in defining the proper place for religious expression and religious freedom in our public schools.

As the President explained, the First Amendment imposes two basic and equally important obligations on public school officials in their dealings with religion. First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. Schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. Generally, this means that students may pray in a non-disruptive manner during the school day when they are not engaged in school activities and instruction, subject to the same rules of order as apply to other student speech.

At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. Among other things, of course, school administrators and teachers may not organize or encourage prayer exercises in the classroom. And the right of religious expression in school does not include the right to have a "captive audience" listen, or to compel other students to participate. School officials should not permit student religious speech to turn into religious harassment aimed at a student or a small group of students. Students do not have the right to make repeated invitations to other students to participate in religious activity in the face of a request to stop.

The statement of principles set forth below derives from the First Amendment. Implementation of these principles, of course, will depend on specific factual contexts and will require careful consideration in particular cases.

Although most schools have been implementing these principles already, some problems have arisen where people are unaware of, or do not understand, these obligations. It is my sincere hope that these principles will help to end much of the confusion regarding religious expression in public schools and that they can provide a basis for school officials, teachers, parents, and students to work together to find common ground—helping us to get on with the important work of education. I want to recognize again the efforts of religious and other civic groups who came together earlier this year to issue a statement of current law on religion in the public schools, from which we drew heavily in developing these principles.

I encourage you to share this information widely and in the most appropriate manner with your school community. Accept my sincere thanks for your continuing work on behalf of all of America's children.

Sincerely,

Richard W. Riley
U.S. Secretary of Education

RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable non-disruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers

and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals: Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. School officials may neither encourage nor discourage students from availing themselves of an excusal option. Under the Religious Freedom Restoration Act, if it is proved that particular lessons substantially burden a student's free exercise of religion and if the school cannot prove a compelling interest in requiring attendance, the school would be legally required to excuse the student.

Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages. When wearing particular attire, such as yarmulkes and head scarves, during the school day is part of students' religious practice, under the Religious Freedom Restoration Act schools generally may not prohibit the wearing of such items.

THE EQUAL ACCESS ACT

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media—including the public address system, the school newspaper, and the school bulletin board—to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory manner. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.