RECENT DEVELOPMENTS

TEARING DOWN THE WALL: *Rosenberger v. Rector of the University of Virginia*, 115 S. Ct. 2510 (1995).

Inconsistent Supreme Court pronouncements in the name of the Establishment Clause[1] have long bedeviled lower courts and commentators alike.[2] Though Thomas Jefferson's famous "wall of separation between church and state" became an accepted metaphor for the proper relationship between government and religion,[3] modern judicial attempts to preserve a place for religion in a society governed by today's ubiquitous government have revealed the weaknesses in this Court-constructed wall. The Court's more recent public forum decisions herald the destruction of this wall and its replacement with an alternative principle of government neutrality.[4] Last Term, in *Rosenberger v. Rector of the University of Virginia*,[5] the Court strengthened the neutrality principle, holding that public universities must fund religiously-oriented student journals if funding is made widely available to other student publications. Although the Court's decision was correct, its rationale was overly formalistic. A more explicit functional analysis using the Establishment Clause's true purpose—ensuring that government action does not influence religious choices—would have provided a more coherent basis for future

1. *See* U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion. . . .").

2. Justice Thomas has characterized the Court's Establishment Clause jurisprudence as "in hopeless disarray." Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510, 2532 (1995) (Thomas, J., concurring); *see also* Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) ("[O]ur Establishment Clause cases have been neither principled nor unified."). *But see* Carl Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 615 (1995) (arguing that the Court's religion jurisprudence has a logic).

3. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 164 (1879) (citing Jefferson's Letter to the Danbury Baptists). For the full text of the letter, see Thomas Jefferson, *To Nehemiah Dodge and Others, A Committee of the Danbury Baptist Association, in the State of Connecticut, in* THE PORTABLE THOMAS JEFFERSON 303-04 (Merrill D. Peterson ed., 1975).

4. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (holding that a public school district violated the First Amendment by refusing after-hours classroom access to a church wishing to show a film, when access was refused based on the film's religious viewpoint); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (upholding the constitutionality of a statute requiring public secondary schools to permit religious groups to meet on campus if other noncurriculum-related groups are permitted to meet); Widmar v. Vincent, 454 U.S. 263 (1981) (requiring a state university to permit religious groups equal access to classrooms used by other student groups); *see also* Esbeck, *supra* note 2 (discussing trends in the Court's recent religious decisions); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality toward Religion*, 39 DEPAUL L. REV. 993 (1990) (discussing various concepts of neutrality toward religion).

5. 115 S. Ct. 2510 (1995).

religion jurisprudence and for religious equality in an increasingly pluralistic society.

The University of Virginia (University) instituted an expansive support system for student groups. Certification as a Contracted Independent Organization (CIO) was opened to all student groups that disclaimed official University approval of their activities. CIO status entitled student groups to use University facilities and to apply for funding from the University's Student Activities Fund (SAF). Money for the SAF came from a mandatory fee collected from each student.[6] Groups awarded funding submitted receipts for approved activities to the SAF, which then paid the private contractors providing the services. In this way, money never entered the hands of the students themselves. At the time the case was brought, University rules barred otherwise eligible groups from receiving funding if they engaged in certain types of activity, such as electioneering, social entertainment, and religious activity.[7]

In 1991, a student journal, *Wide Awake: A Christian Perspective at the University of Virginia* (*Wide Awake*), applied for funding in the category of "student news, information, opinion, entertainment, or academic communications media groups."[8] The University denied funding because *Wide Awake* was a "religious activity," defined by the University as "[an] activity that primarily promotes or manifests a particular belie[f] in or about a deity or ultimate reality."[9] Though the journal neither affiliated itself with any particular denomination or church nor discriminated among its members with regard to their religion, its stated aim was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."[10] Thus, *Wide Awake* did not dispute the label "religious." However, because the University was funding the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society (a group

6. *See* Rosenberger v. Rector of the Univ. of Va., 18 F.3d 269, 270 (4th Cir. 1994).

7. *See Rosenberger*, 115 S. Ct. at 2514.

8. *Id.* at 2514.

9. *Id.* at 2515. *Wide Awake* was not deemed a "religious organization," which the University defined as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." *Id.* The distinction is important. "Religious organizations" did not engage in activities considered educational by the University. In contrast, "religious activities" were activities eligible for funding because of their educational nature, but denied funds solely because the participants were motivated by religion. *See id.*

10. *Id.*

studying the works of Christian apologists),[11] the editors of *Wide Awake* felt they had been treated unequally. In addition, they believed the University's decision to deny funds was based solely on the journal's religious advocacy and therefore was an unconstitutional condition. Consequently, after exhausting administrative appeals within the University structure, *Wide Awake*'s publisher Ronald Rosenberger sued in federal district court under 42 U.S.C. § 1983, alleging First Amendment violations by the University.[12]

On cross motions for summary judgment, the district court ruled against the journal.[13] The court found that the SAF was not a public forum.[14] On the theory that, absent public forum constraints, a university is free to fund only those activities it favors, the court ruled that the University had not engaged in viewpoint discrimination.[15] The court also denied *Wide Awake*'s equal protection claim, finding that the University did not have a discriminatory intent.[16]

The Court of Appeals for the Fourth Circuit affirmed the district court's decision unanimously, though on different grounds.[17] Although agreeing that the University had not created a limited public forum,[18] the appeals court found in a de novo review that the University had engaged in viewpoint discrimination in denying funds to *Wide Awake*.[19] The court nonetheless used the *Lemon* test[20] to conclude that the University's

11. *See Rosenberger*, 18 F.3d at 271.

12. *See* Rosenberger v. Rector of the Univ. of Va., 795 F. Supp. 175 (W.D. Va. 1992). As a state actor, the University must obey the dictates of the First Amendment. *See Rosenberger*, 18 F.3d at 280 n.26.

13. *See Rosenberger*, 795 F. Supp. at 183.

14. *See id.* at 178-81.

15. *See id.* at 181.

16. *See id.* at 180, 183.

17. *See* Rosenberger v. Rector of the Univ. of Va., 18 F.3d 269 (4th Cir. 1994).

18. The court's "literalistic" reading led it to conclude that Supreme Court precedents referred only to physical space. *See id.* at 287.

19. *See id.* at 281. The court explained that viewpoint discrimination is forbidden by the First Amendment and by the prohibition against unconstitutional conditions. The Constitution does not require the University to fund student journals, but once it has chosen to do so, it is impermissible for the University to "condition[ ] the plaintiffs' receipt of government benefits upon their foregoing constitutionally protected religious expression." *Id.*

20. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). The court acknowledged that a majority of Justices have supported overruling *Lemon*, but did not feel free to ignore the *Lemon* test in its analysis. *See Rosenberger*, 18 F.3d at 282 n.30. The court found: (1) that the University's purpose in denying funds was a valid and secular one; (2) that denying funds did not inhibit religion because the magazine still was free to publish (whereas awarding funds would impermissibly advance religion by allowing government funds to flow di-

decision was justified because it served the "compelling state interest" in avoiding an Establishment Clause violation and was "narrowly drawn to achieve that end."[21]

The Supreme Court reversed in a five-to-four decision.[22] Justice Kennedy, writing for the majority,[23] relied on public forum principles[24] to find that the University had discriminated against *Wide Awake* on the basis of its religious viewpoint,[25] thus violating the Free Speech Clause[26] of the First Amendment. In response to the University's argument that it was "speaking" through its decisions about which groups to fund, Justice Kennedy acknowledged the University's undoubted freedom to select its own message, but explained that the University's decision to fund student publications without regard to subject matter had created a limited public forum. Though the forum existed "more in a metaphysical than in a spatial or geographic sense,"[27] public forum doctrine still required neutrality in the distribution of funds to fund private speech.[28]

Justice Kennedy's opinion further argued that the University would not commit an Establishment Clause violation merely by

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rectly to a religious activity); and (3) that denying funds saved the University from excessive entanglement with religion (whereas awarding funds would "send an unmistakably clear signal that the University . . . supports Christian values."). *Id.* at 284, 285, 286.

21. *Rosenberger*, 18 F.3d at 281.

22. *See* Rosenberger v. Visitor of the Univ. of Va., 115 S. Ct. 2510 (1995).

23. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined Justice Kennedy's opinion.

24. Once a State has created a limited public forum, it "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" *Rosenberger*, 115 S. Ct. at 2517. The Court has interpreted this to mean that States may engage in content-related discrimination if the restriction is narrowly drawn to serve a compelling state interest, but never may engage in viewpoint-related discrimination. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993). In other words, an initial limitation on the subject matter of a forum is acceptable (for example, a kiosk may allow posters only about events sponsored by student groups), but a limitation on the viewpoints expressed is not acceptable (for example, a kiosk could not bar socialist student groups from publicizing their events if all other groups were permitted to do so).

25. *See Rosenberger*, 115 S. Ct. at 2518. Justice Kennedy dismissed the University's argument that the guidelines were content-based, not viewpoint-based, because "the University [did] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints. . . . [This] reflects an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech." *Id.* at 2517-18.

26. *See* U.S. CONST. amend. 1 ("Congress shall make no law . . . abridging the freedom of speech . . . .").

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

28. Relying on *Lamb's Chapel*, Justice Kennedy also held that "the government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. . . . [Resources must be allocated] on some acceptable neutral principle." *Rosenberger*, 115 S. Ct. at 2519.

"honoring its duties under the Free Speech Clause."[29] Signalling the Court's disenchantment with the *Lemon* test, Justice Kennedy addressed the arguments in the appeals court's *Lemon* analysis without citing the case itself. He explained that government funding would not have the purpose, effect, or impression of impermissibly advancing religion. The University had not created the SAF to benefit religion unduly; funding would not have benefited them in a way defined by their religion; and the students had signed a waiver disclaiming University sponsorship. Justice Kennedy also pointed out that denying funding caused far more harm than would equal treatment, because the University guidelines disfavored an unacceptably broad range of expression.[30] As written, they would deny funding to "essays by hypothetical student contributors named Plato . . . Descartes . . . . Karl Marx . . . and Jean-Paul Sartre."[31] Further, "granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. . . . raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy."[32]

Finally, Justice Kennedy emphasized that the SAF money in question neither was raised from the general public nor expended directly for religion. The SAF fee was not a tax because it was collected only from students. And because the SAF paid the printer, not the students, the transfer was not direct financial support of religion. To say otherwise would be "formalistic,"[33] wrote Justice Kennedy, reasoning that there is "no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf."[34]

Justice O'Connor joined the opinion of the majority, but wrote a concurring opinion to express her view that no broad conclu-

29. *Rosenberger*, 115 S. Ct. at 2525.
30. *See id.* at 2520.
31. *Id.*
32. *Id.* at 2520, 2524.
33. *See id.* at 2524.
34. *Rosenberger*, 115 S. Ct. at 2524. If this were not the case, universities could have escaped the *Lamb's Chapel* requirement of neutrality simply by restructuring their relationships with student groups—for example, by requiring that groups rent classrooms for use after school hours, and then rebating the rent to all but religious groups. *See* Reply Brief for the Petitioners at *17, *Rosenberger* (No. 94-329), *available in* 1995 WL 65465, at *17.

sions should be drawn from the Court's judgment.[35] Because the case lay "at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities,"[36] wrote Justice O'Connor, no "categorical answers [about the demise of one or the triumph of the other] . . . should . . . be inferred from the Court's decision."[37] Justice O'Connor argued that the Establishment and Free Speech Clauses "cannot easily be reduced to a single test."[38] Rather, decisions in this area are inescapably fact-driven. For Justice O'Connor, it was not the legal principles but the particular array of facts in this case—"the explicit disclaimer, the disbursement of funds directly to third party vendors, [and] the vigorous nature of the forum at issue"—that led to the result.[39]

Agreeing with the Court's opinion "in full," Justice Thomas added a concurrence to expose what he termed the dissent's "misleading application of history."[40] Justice Thomas reasoned that "the dissent's argument is reduced to the claim that our Establishment Clause jurisprudence permits neutrality in the context of access to government *facilities* but requires discrimination in access to government *funds*."[41] Justice Thomas argued that the dissent failed to explain historical and continuing instances of government funding of religious activity, such as Congressional and military chaplains, support of religious colleges and sectarian Native American education, and property tax exemptions for houses of worship.[42] Finally, Justice Thomas took issue with the dissent's emphasis on the directness of the funding. Because the Court and its precedents agree that "[t]he [Establishment] Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants,"[43] Justice Thomas concluded it would

35. *Rosenberger*, 115 S. Ct. at 2526 (O'Connor, J., concurring).
36. *Id.* at 2525.
37. *Id.* at 2526.
38. *Id.* at 2528 (quoting Board of Educ. v. Grumet, 114 S. Ct. 2481, 2499 (O'Connor, J., concurring in part and concurring in the judgment)). The collision of the two principles in this case, wrote Justice O'Connor, "expose[s] the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified." *Id.*
39. *Id.* Justice O'Connor also mentioned the possibility that the University could revise its rules to permit students to opt out of the mandatory fee. Lower courts have split on whether such an option is mandated by the Constitution, and the majority opinion did not address the issue. *See id.* at 2527.
40. *Rosenberger*, 115 S. Ct. at 2528 (Thomas, J., concurring).
41. *Id.* at 2531.
42. *See id.*
43. *Id.* at 2532.

be "absurd" to make "the appropriate baseline [neutral provision of benefits, or, no aid to religion] . . . depend on the fortuitous circumstances surrounding the *form* of aid."[44]

Justice Souter dissented,[45] charging that the Court had "for the first time, approve[d] funding of core religious activities by an arm of the State."[46] Relying on a historical analysis, Justice Souter argued that Madison and the Framers had not intended to permit any direct government support of religion, even when given in accordance with neutral principles,[47] because the Establishment Clause had been intended in part "to protect religion from a corrupting dependence on support from the Government."[48] Justice Souter thus argued that the Establishment Clause forbids direct support of religion[49] and that evenhandedness in the distribution of benefits is only relevant to those cases involving nondirect funding in which there is initial uncertainty about whether the law is intended to benefit religion.[50]

Justice Souter further disagreed that the funding could be justified by viewing the SAF as a public forum, arguing that this position ignored precedents defining public fora as places for "literal speaking."[51] Appealing again to history, Justice Souter argued that "[t]here is no traditional street corner printing . . . . [T]he rule against direct aid stands as a bar to printing services as well as printers."[52] Justice Souter then warned that the Court's reasoning "would commit the Court to approving direct religious aid beyond anything justifiable for the sake of access to speaking forums."[53]

Finally, Justice Souter argued that there had been no viewpoint discrimination, because the University "den[ied] funding

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44. *Id.* at 2533.

45. Justice Souter was joined by Justices Stevens, Ginsburg, and Breyer.

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

47. *See id.* at 2535-37.

48. *Id.* at 2547.

49. *See id.* at 2535. Justice Souter disagreed with Justice Thomas's characterization of tax exemptions as direct aid, because they do "not involve the *expenditure* of government funds in support of religious activities." *Id.* at 2542 (emphasis added). Justice Thomas replied in a footnote that "the large body of literature about tax expenditures supports the basic concept that special exemptions from tax function as subsidies." *Id.* at 2532 n.5 (Thomas, J., concurring) (citing Donna D. Adler, *The Internal Revenue Code, the Constitution and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 862 n.30 (1993)).

50. *Rosenberger*, 115 S. Ct. at 2541 (Souter, J., dissenting).

51. *Id.* at 2546.

52. *Id.*

53. *Id.* at 2534.

for the entire subject matter of religious apologetics."[54] Justice Souter maintained that scholarly examinations of religion, and even "discuss[ing] issues in general from a religious viewpoint" were acceptable under the Establishment Clause, but that "proselytizing" was not.[55]

The Supreme Court's decision in *Rosenberger* was correct, but too limited. The University's attempt to discriminate against *Wide Awake* rightly was seen as a breach of the neutrality required in a public forum. But the Court missed an opportunity to hold that private free speech by definition cannot violate the Establishment Clause.[56] Furthermore, in giving such weight to the fact that the funding was neither directly from taxpayers nor directly to religion, the Court unnecessarily limited both its holding and religious freedom. The Court's refusal to hold explicitly that direct aid to a religious activity[57] is not inevitably unconstitutional left murkiness in its religion-related jurisprudence that is likely to require much future litigation to clarify. The Court should have relied more explicitly on a functional neutrality test, asking if the aid (whether direct or indirect) encouraged adherence to or abandonment of religion. Aid should not be deemed unconstitutional if its recipients use it to promote religion. Rather, aid

54. *Id.* at 2549.

55. *Rosenberger*, 115 S. Ct. at 2550, 2538 (Souter, J., dissenting).

56. The Court's discussion of endorsement left open the possibility that other Establishment Clause concerns might permit limitations on speech. *See* Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2446 (1995) (stating that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech" where there is a danger that the speech will be misinterpreted as having received government endorsement).

The endorsement test can itself be characterized as hostile to religion. *See* Gerard V. Bradley, *Religion and the Court 1995*, FIRST THINGS, Dec. 1995, at 25 ("[I]f the Court really means to be 'neutral'—to neither favor nor disfavor religion—how come the test is not the other way around: government may do nothing whatsoever that may be taken by some citizen(s) as a sign of hostility or disfavor to religion?").

57. A "religious activity" is defined most appropriately as any activity guided by a religious philosophy, but many religious activities would have general public value even if guided by some other philosophy. The activities with general public value should not be denied access to funding distributed on neutral criteria simply because those who act happen to be inspired by religion. Awarding funding to such activities would not create, nor threaten to create, a theocratic state.

The Supreme Court has refused to define the "centrality" of worship activities in the Free Exercise context because such a definition would entail too great an examination into the tenets of particular religions. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 457-58 (1988). However, when Establishment Clause funding decisions are at issue, courts can avoid such an examination by looking not at the motivation behind the activity but at the independent value of the activity to the general public community.

should be held unconstitutional only if individuals are tempted to alter their religious views to qualify for the aid.

The Court's extension of public forum analysis to this case shows its developing understanding of the Establishment Clause and its interaction with the Free Speech Clause. The Court appropriately defined the SAF as a public forum. Despite the SAF's "metaphysical" nature, it serves the same purpose as a bulletin board or a public park: facilitating communication of private opinion to the public (in this case, the student body). A definition of a public forum that limited it to traditional physical locations, taking no account of changes in technology and communications habits, would unduly reduce constitutional protections for free speech.[58] Further, defining the SAF as a public forum allowed the Court to emphasize the private character of *Wide Awake*'s speech and thus to hint at the proper relationship between the two Clauses.

Although the University's arguments for infringing *Wide Awake*'s speech, simply because it was religious, gave undue emphasis to the Establishment Clause at the expense of the Free Speech Clause,[59] the Court correctly held that arguments based on such mismeasures must fail. Justice Kennedy's public forum neutrality approach avoided a conflict between the Establishment and Free Speech Clauses by interpreting the two in harmony. Justice Kennedy declined to use the appeals court's balancing approach, which required that one of the two Clauses be favored over the other. Instead, Justice Kennedy correctly reasoned that, at least in this case, the very fact that the student editors of *Wide Awake* were engaging in private free speech ensured that funding them would not violate the Establishment Clause—because the Establishment Clause limits only government action, not private action.

58. For example, Fourth Amendment protection against unlawful searches has been extended to modern technologies such as wiretapping, despite their not having been a traditional method of searching. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

59. The dissent's attempt to draw a distinction between discussion about religion (which the dissent said the University could fund) and "proselytizing" (which the dissenters argued the University could not fund) was flawed. As Professor McConnell stated in oral argument, "proselytize . . . is nothing but an ugly word for persuade, which is just exactly what the Free Speech Clause is designed to protect." Transcript of Oral Argument of Michael W. McConnell on behalf of the Petitioners at *53, *Rosenberger* (No. 94-329), *available in* 1995 WL 117631, at *53; *see also* William B. Ball, *Religion and the Court 1995*, FIRST THINGS, Dec. 1995, at 28 (suggesting that if "proselytizing"—religious advocacy—could be limited without offending the Free Speech Clause, then advocacy about race or sex could be limited as well).

Unfortunately, the Court backed away from the logical conclusion that private free speech by definition cannot violate the Establishment Clause. Though the Court may have been influenced by Justice O'Connor's worries about the possibility of the perception of government endorsement of religion in future cases, these worries are exaggerated. The protection of free speech is mandated by the Constitution. Therefore, rational observers should understand that a government allowing free private speech, even religious speech, is not endorsing the content of the speech but merely fulfilling its constitutional duties. Government funding of free speech, even religious speech, also should be understood as acceptable, so long as the government is funding the speech for a secular government purpose. In *Rosenberger*, the University's purpose in funding student journals was a desire to further student education. The process of writing, editing, and distributing a journal is educational in itself, regardless of the content of the journal produced. Because the viewpoints of the journals are legally irrelevant to the government purpose, inclusion of a religiously-oriented journal among funding recipients should not create a perception of endorsement.

Reading the two Clauses so that they do not clash is the best way to make sense of them. The Establishment Clause was designed to protect against unequal government treatment based on the content of individual religious views.[60] The government should not have to face an Establishment Clause challenge every time it uses state power to protect the right of religious speakers to participate in public life, whether by speaking in the park or by receiving funding awarded on the basis of neutral principles. Funding the journal was entirely appropriate because, as Justice Kennedy pointed out, *Wide Awake* "did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was."[61] When the government funds a broad spectrum of opinion, it should not discriminate against private religious speakers. The Establishment Clause should not

60. The Clause originally was intended only to prevent a national government-sponsored religion, and indeed was designed in part to protect existing state-established religions. *See* Robert L. Cord, SEPARATION OF CHURCH AND STATE 15 (1982); William K. Leitzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986). The propriety of the Court's manner of incorporating the Establishment Clause through the Fourteenth Amendment is a subject beyond the scope of this Recent Development.

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

be used to force—or even permit—government to cleanse opinions of religious content before allowing their proponents to participate in government programs based on other criteria, for allowing such examination and censorship would itself surely violate both the Establishment and Free Speech Clauses. The neutrality approach used in public forum analysis offers a better way to distinguish generally-available government programs, in which religious groups may participate, from impermissible public aid aimed solely at religion.

Despite Justice O'Connor's protestations to the contrary, *Rosenberger* indeed should be seen as a victory for the neutrality principle. Continued use of the neutrality test strengthens the test and further weakens Jefferson's wall.[62] However, the Court's split over the permissibility of "direct" funding of religion shows that the triumph of neutrality is at best incomplete. One problem is that neutrality has been defined in many different ways.[63] To decide whether government has acted neutrally, one theory would examine the *form* of a public benefit; an opposing theory would decide based on the *principle* by which the benefit was distributed.[64] The lower courts and dissenters in *Rosenberger* seemed to use the first theory, basing their opinions on the claim that neutrality permits only benefits characterized by detachment or separation. According to this view, religion may not receive cash or direct aid from government,[65] but religion need not contribute to government support (tax exemptions for religion thus being acceptable). In contrast, the majority opinion approved the second theory, judging benefits to be acceptable when distributed according to a principle of evenhandedness. The decision thus offers support to the view that a neutral government should ensure that citizens are not influenced to embrace or reject religion based on the proffering or withdrawing of government

62. Of course, the neutrality principle alone cannot solve all Establishment Clause questions. But equal treatment can provide strong evidence that no Establishment violation has occurred.

63. *See* Laycock, *supra* note 4, at 994 ("From benevolent neutrality to separate but equal, people with a vast range of views on church and state have all claimed to be neutral.").

64. *See* Reply Brief at *14, *Rosenberger* (No. 94-329), *available in* 1995 WL 65465, at *14.

65. The Court's current members have all agreed at times that religion may receive attenuated benefits from neutral government programs affecting a wide variety of recipients. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993); Board of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

funding.[66] In other words, the government should attempt to minimize its impact on private religious choice—for example, by permitting religions to participate equally in government funding programs according to neutral criteria.[67] The functional approach of this second theory thus asks not whether government aid is direct or indirect, but whether it would induce people to change or misrepresent their religious beliefs to qualify for it.

Justice Souter's view of neutrality as separation underlies his assertion that the no-direct-funding rule should trump what he describes as the evenhandedness principle. For Justice Souter, any flow of government funds is a benefit, forbidden if too direct or substantial, permissible if evenhanded and attenuated. In contrast, Justice Kennedy's opinion reflects an attempt to ensure that decisions about religion are not made with an eye to government benefits. For Justice Kennedy, there is no danger of establishment so long as religion is not singled out. As Justice Kennedy wrote, "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[68] Indeed, it is actively hostile to religion to deny funding to religious activity when it is extended to every other kind. In a pluralistic society, all groups deserve equal respect from government—and an equal chance to qualify for direct aid if the activity being aided fits governmental objectives.[69]

The Court's reliance on the assertion that the SAF funds neither were collected through taxes nor were given directly to religion may have been necessary to gain Justice O'Connor's vote, but it was not commanded by the Constitution. Although the assertion was true in this case, the Court missed a chance to

66. Laycock describes the second view as "substantive neutrality," which he defines as "requir[ing] the government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice .... [R]eligion is to be left as wholly to private choice as anything can be." Laycock, *supra* note 4, at 1001-02.

67. *See* Laycock, *supra* note 4.

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

69. The program at issue in Bowen v. Kendrick, 487 U.S. 589 (1988) (upholding a federal program providing funds to organizations, including religious organizations, for research into teen parenting problems) is an example of an acceptable program and a good analogy to the University's SAF program. The government had no obligation to fund either program. However, once it chose to do so, it did not violate the Establishment Clause by including otherwise eligible groups run by religious adherents. *Kendrick* did not go so far as to mandate that religious groups be included in such programs, but *Rosenberger* might prompt the Court to entertain future challenges to discriminatory government programs.

emphasize through a functional neutrality analysis that this program would be constitutional even if the money were collected through taxes or distributed directly to the groups.[70] A functional approach would find fewer programs unconstitutional than would the Court's more formalistic approach, because it would target more precisely those (few) programs that actually threatened an establishment. Religion should not be said to be unconstitutionally benefited simply because funding is direct. The true test should be whether the program is intended to benefit religion solely *qua* religion, or whether there is another rational purpose for the program. The traditional model, indirect funding with an attenuated benefit, is strong proof that a separate rational purpose exists. But a wide distribution of benefits, whether direct or indirect, is an equally powerful argument for the existence of a rational purpose.

To understand why the functional neutrality approach should have prevailed more explicitly in *Rosenberger*, and why it ought to prevail in all such Free Speech-Establishment Clause conflicts, it is necessary to look at the Court's evolving definition of religion. Religion traditionally was assumed to be theistic.[71] In 1961 the Court also acknowledged as religion "Buddhism, Taoism, Ethical Culture, [and] Secular Humanism."[72] Today secular humanist ideas receive many of the protections accorded to a religion, in certain contexts.[73] Indeed, it is plausible to charge that the Court actually is establishing secularism, in effect, through its *Lemon*-inspired search for a secular purpose for challenged government actions.[74] Whether or not this charge is true, it is impossible to "disestablish" every comprehensive world view. A government must have a guiding philosophy, one most appropriately devel-

70. The majority's attempt to make a distinction between direct and indirect funding seems particularly weak given modern methods of rearranging funding. It is not difficult to imagine ways in which the government could aid improperly without giving cash; similarly, there are ways the government could give cash without overbenefiting religion.

71. *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1179 (2d ed. 1987) ("[T]hrough the nineteenth century, courts defined 'religion' [as] . . . theistic . . . .").

72. Torcaso v. Watkins, 367 U.S. 488 (1961).

73. For example, pacifists seeking exemptions from the draft do not need to profess a belief in God to qualify. *See* United States v. Seeger, 380 U.S. 163 (1965).

74. *See* Leitzau, *supra* note 60, at 1222 (describing the current "inverted" situation in which the Establishment Clause is used to "favor[ ] irreligion"); ROCKNE MCCARTHY, DONALD OPPEWAL, WALFRED PETERSON & GORDON SPYKMAN, SOCIETY, STATE, & SCHOOLS: A CASE FOR STRUCTURAL AND CONFESSIONAL PLURALISM 120-33 (1981). "There is significant evidence that public schools increasingly promulgate, perhaps more unwittingly than by design, the religion of naturalistic humanism." *Id.* at 123.

oped by citizens voting in accordance with their consciences, because value-laden decisions must be made about what programs to fund and to what extent. But government should at least attempt to ensure that its actions do not encourage people to change their religious beliefs based on the availability of government funds.[75]

Given that almost every comprehensive world view now seems to qualify as a religion in the eyes of the Supreme Court,[76] there is a danger that groups made up of adherents to only one religion (especially a traditional majority religion) will be seen as unduly religious, whereas pluralistic groups (and groups that actively disclaim the label "religious" despite having views that would qualify them under the Court's definitions) will be seen as safely secular. The University's argument that the Muslim and Jewish groups were "cultural" activities eligible for funding, whereas the Christian journal was a "religious" activity not eligible, suggests this danger exists.[77] A functional neutrality analysis reduces this danger by providing that if a group qualifies for government funds allocated through the political process and based on neutral (that is, nonreligiously-based) criteria, that group should not be excluded simply because its members all share a religion, or a religiously-guided purpose.

The strength of the functional neutrality approach should be evident from a discussion of its possible future applications. An obvious example is that of public school graduation ceremonies. Some school administrators have claimed the Establishment Clause mandates the elimination of any reference to religion on the grounds of a public school. Yet student valedictorians who have won their place on the stage according to neutral criteria—most commonly, their personal academic excellence—should have the right to speak on a subject of their own choosing. In effect, valedictorians are taking advantage of a limited public fo-

75. Although government is free to attempt to influence citizens' ordinary beliefs (for example, the government may run ads about the dangers of using drugs), the very existence of the Establishment and Free Exercise Clauses implies that the Framers wished to protect religious beliefs by instituting special protection from government attempts to influence such beliefs. If those beliefs actually mandate criminal behavior, the government should react—but this situation is rare.

76. *See supra* note 72 and accompanying text.

77. *See* Brief for the Petitioner at *19-*20, *Rosenberger* (No. 94-329), *available in* 1994 WL 704081, at *19-*20 ("The line between 'culture' and 'religion' is highly subjective . . . . Some religious groups will look more 'cultural' or 'civic' while others will look more 'religious' — depending on the familiarity of the group and the biases of the government decisionmakers.").

rum and should not be subjected to viewpoint discrimination. Courts should use *Rosenberger* to protect valedictorians' freedom of speech by ruling that the exercise of private free speech by definition cannot violate the Establishment Clause.[78]

More importantly, the constitutionality of voucher programs for religious schools soon may reach the Court.[79] The Court should apply *Rosenberger* and rule such programs constitutional.[80] First, *Rosenberger* supports the proposition that when activities are funded by government, the government not only *may* fund identical (but religiously-inspired) activities, it *must* do so. The government is not required to fund any private schools. But if it chooses to fund secular private schools generally, it should not be allowed to deny funding to accredited religious schools solely because of their religious nature.[81] Second, because vouchers are given to students, not schools, *Rosenberger*'s indirect distribution test will be satisfied. State-funded students who choose to apply their vouchers to a religious school provide a much less direct channel of aid than the University-funded printer who was paid specifically to print *Wide Awake*.[82] Finally, funding religious schools would eliminate the current financial disincentive against attending such schools. Removing the weight of government influence from one side of the schooling choice would bring greater freedom of conscience to all children, and thus would accord better with the principle of functional government neutrality toward religion.

Protection of free speech and religious freedom, enshrined into law as the First Amendment, has been of special concern to America since those fleeing religious persecution first settled this

78. There should be no worry about government endorsement in these cases. A reasonable observer would understand that public schools have no control over the messages spoken by valedictorians exercising their free speech rights.

79. The Wisconsin Supreme Court has agreed to take the case in its original jurisdiction and has granted a preliminary injunction preventing the inclusion of religious schools in the State's voucher program; the court will hear oral arguments early in 1996. *See* Thompson v. Jackson, No. 95-2153-OA (Wis. Aug. 17, 1995) (order granting petition for leave to commence an original action); *id.* (Wis. Aug. 25, 1995) (order enjoining the extension of the Milwaukee Parental Choice program to sectarian schools).

80. Students already may use federal student aid to pay tuition at religious colleges.

81. Limiting eligibility to accredited schools ensures that funded schools will fulfill the government objective: providing education.

82. The only dissimilarity is that voucher programs are funded through general taxes rather than only from the students themselves. But the source of the funds should be unimportant in determining their constitutionality. The functional neutrality test shows that voucher programs would reduce the extent of government interference with religion, a showing that should suffice to validate such programs.

continent. *Rosenberger* marks the Court's return to an understanding of the Establishment Clause that more fully provides this protection and points to a more harmonious interpretation of the relationship between the Establishment and Free Speech Clauses. The Court's decision partly released speakers from government coercion; listeners are still free in heart and mind to believe as they choose. The decision does not establish religion. On the contrary, the Court finally has begun to restore access to the "public square" for all comprehensive world views, including theistic views—access that has long been improperly blocked off by Jefferson's wall.

A. Louise Oliver

PROTECTING PRIVATE RELIGIOUS SPEECH IN THE PUBLIC FORUM: *Capitol Square Review & Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995).

Despite a number of recent victories for religious expression[1] and the passage of the Religious Freedom Restoration Act,[2] the Supreme Court's jurisprudence still does not afford religion equal access to the public sphere.[3] Last Term, the Court was

1. *See* Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510 (1995) (holding that a public university violates free speech rights by denying funds to religious student publication when it makes funds available to other student journals); Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993) (holding that a public school district cannot prohibit after-hours use of school property by religious group while allowing such use to nonreligious groups); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (holding that the Equal Access Act does not violate the Establishment Clause); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a public university may not constitutionally exclude student religious groups from a generally open forum).

2. Pub. L. No. 103-141, 107 Stat. 1488 (1993), codified at 42 U.S.C. § 2000bb (1995) (requiring that state action burdening religious exercise be in furtherance of a "compelling state interest" to avoid violation of Free Exercise Clause).

3. *See* William P. Barr, *Legal Issues in a New Political Order*, 36 CATH. LAW. 1, 9 (1995) (predicting increased efforts to use the Establishment Clause "to exclude religiously motivated citizens from participation in public benefits and from the public square generally"); David B. Salmons, Comment, *Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion*, 62 U. CHI. L. REV. 1243 (1995) (arguing that the Court's free exercise jurisprudence systematically undervalues religion, regardless of the standard of review used); *see also* Thomas C. Berg, *Slouching Towards Secularism: A Comment on* Kiryas Joel School District v. Grumet, 44 EMORY L.J. 433 (1995) (arguing that the Court's approach may be characterized as indifferent if not hostile to religious freedom); M.G. "Pat" Robertson, *Squeezing Religion out of the Public Square—The Supreme Court, Lemon, and the Myth of the Secular Society*, 4 WM. & MARY BILL RTS. J. 223 (1995) (arguing that the Court's jurisprudence has for fifty years pushed toward the unhealthy ideal of a completely secular public life). *But cf.* John E. Burgess, Recent Development, Lamb's Chapel v. Center Moriches Union Free School District: *A Critical Analysis of the Supreme Court's First Amendment Jurisprudence in the Context of Public*

given a chance to step yet further away from state-supported secularism. In *Capitol Square Review & Advisory Board v. Pinette*,[4] the Court held that government could not exclude unattended private religious displays from public fora at the seat of government. Although the plurality urged a bright-line rule protecting speech in such spaces, three concurring Justices stated that some situations might appear so much like state-sponsored religious speech that they would result in a violation of the Establishment Clause.[5] The Court's decision in *Pinette* was basically correct, but the hesitant concurrences needlessly left standing some of the constitutional barrier that unfortunately continues to separate the public sphere from the private self.[6]

Under Ohio law, the Capitol Square, a ten-acre plaza surrounding the Ohio statehouse, was designated as a forum "for use by the public . . . for free discussion of public questions."[7] Ohio law further granted the Capitol Square Review and Advisory Board the responsibility of regulating public access to the Capitol Square,[8] which it did according to content-neutral criteria of safety, sanitation, and noninterference with other uses.[9] The Board had no policy against unattended displays.[10]

On November 29, 1993, the same day that the Board granted a rabbi's application to erect a menorah, Donnie Carr of the Ohio Ku Klux Klan applied for a permit to place a cross on Capitol Square during the Christmas season.[11] The Board denied the application in what it deemed "a good faith attempt to comply with the Ohio and United States Constitutions."[12]

Schools, 47 VAND. L. REV. 1939 (1994) (seeing a continuing trend of weakened limitations on the role of organized religion in schools); Basilios E. Tsingos, Comment, *Forbidden Favoritism in the Government Accommodation of Religion:* Grumet *and the Case For Overturning* Aguilar, 18 HARV. J.L. & PUB. POL'Y 867, 868 (1995) (seeing increased Court willingness to accommodate religious belief and practice on equal, nonpreferential basis).

4. 115 S. Ct. 2440 (1995).

5. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

6. *Cf.* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 3 (1993) ("In our sensible zeal to keep religion from dominating our politics, we have created a political and legal culture that presses the religiously faithful to be other than themselves, to act publicly . . . as though their faith does not matter to them.").

7. OHIO ADMIN. CODE § 128-4-02(A) (1994).

8. *See* OHIO REV. CODE ANN. § 105.41 (Baldwin 1994); *Pinette*, 115 S. Ct. at 2444.

9. *See Pinette*, 115 S. Ct. at 2444.

10. *See id.* at 2444-45; Pinette v. Capitol Square Review & Advisory Bd., 844 F. Supp. 1182, 1184 (S.D. Ohio 1993).

11. *See Pinette*, 115 S. Ct. at 2445.

12. *Id.*

After failing in efforts to obtain administrative relief,[13] Vincent Pinette, the Ohio Klan's leader, sued for an injunction in federal district court. The district court held that the State does not endorse or otherwise establish Christianity by allowing the Klan to build a cross in a public forum.[14] The district court relied on "settled law" in the Sixth Circuit that unattended religious displays in public fora do not violate the Establishment Clause.[15] Instead, the reasonable observer would conclude only that the State tolerated religious and secular expression.[16] Consequently, the district court ordered the Board to permit the cross.

After an emergency stay of the district court's order was denied,[17] a panel of the Court of Appeals for the Sixth Circuit unanimously affirmed the district court ruling.[18] The Sixth Circuit emphasized the "two crucial facts" that the display was privately sponsored and stood in a public forum.[19] Such "truly private religious expression in a truly public forum cannot be seen as endorsement by a reasonable observer."[20] The court saw itself as refusing to recognize what it termed "[t]he Ignoramus's Veto . . . in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended."[21]

In a seven-to-two decision, the Supreme Court affirmed.[22] Justice Scalia wrote for the Court in refusing to address the Klan's argument that the Board denied a permit because of its political disapproval of the Ku Klux Klan.[23] For him the relevant legal question was the one for which certiorari had been granted: "whether the unattended display on government property of a purely religious symbol . . . directly in front of a seat of government . . . violates the Establishment Clause, even if such display is

13. *See id.*
14. *See Pinette*, 844 F. Supp. at 1188.
15. *Id.* at 1187-88 (citing Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) (en banc) (holding that an unattended menorah in a public square does not violate the Establishment Clause)).
16. *See id.* at 1187.
17. *See* Capitol Square Review & Advisory Bd. v. Pinette, 114 S. Ct. 626 (1993) (Stevens, J., in chambers).
18. *See* Pinette v. Capitol Square Review & Advisory Bd., 30 F.3d 675 (6th Cir. 1994).
19. *Id.* at 679.
20. *Id.* (quoting Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc)).
21. *Id.*
22. *See Pinette*, 115 S. Ct. at 2450.
23. *See id.* at 2445.

sponsored by a private group in a public forum?"[24] Justice Scalia began his answer by noting that "private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression."[25] Thus, permissible restrictions on such speech, he argued, must be necessary and narrowly tailored to a compelling state interest.[26] Although Justice Scalia did not doubt that complying with the Establishment Clause was a sufficiently weighty state interest to justify speech restrictions, he did not find that interest implicated by private speech in a public forum.[27] He cited prior cases[28] in which the Court had held that access for religious groups to publicly available facilities "does not confer any imprimatur of state approval on religious sects or practices."[29]

Writing only for a plurality of four,[30] Justice Scalia rejected the Board's proposed "endorsement test,"[31] which would uphold content-based restrictions if an observer might mistake private speech for governmentally endorsed religious expression. He argued the Court could not accept the principle that private mistakes about what is government speech could create a constitutional violation, "at least where . . . the government has not fostered or encouraged the mistake."[32] Prior cases, Justice Scalia argued, supported the proposition that "given an open forum and private sponsorship, erroneous conclusions do not count."[33] Justice Scalia opined that to hold otherwise would "exile[ ] private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech."[34] Justice Scalia concluded by proposing a bright-line rule: "Religious expression cannot violate the Estab-

24. See Brief for Petitioners at i, *Pinette* (No. 94-780), *available on* Westlaw, 1995 WL 89301, at *i.

25. *Pinette*, 115 S. Ct. at 2446; *see* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

26. *See Pinette*, 115 S. Ct. at 2446.

27. *See id.*

28. *See* Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

29. *Widmar*, 454 U.S. at 274.

30. Justice Scalia was joined by the Chief Justice and Justices Kennedy and Thomas.

31. *Pinette*, 115 S. Ct. at 2448 (Scalia, J., plurality opinion).

32. *Id.* Justice Scalia accordingly called the test a "transferred endorsement test" because no government action was involved. *See id.* at 2447-48.

33. *Id.* Justice Scalia went on to argue that invalidating neutral laws, *even if based on reasonable confusion* about government endorsement, would "disrupt settled principles that policies providing incidental benefits to religion do not contravene the Establishment Clause." *Id.* at 2449-50.

34. *Id.* at 2449.

lishment Clause where it (1) is purely private and (2) occurs in a . . . public forum."[35]

Justice Thomas, who joined Justice Scalia's opinion in full, wrote a separate concurrence.[36] Though he agreed that the case's procedural history required treatment under the Establishment Clause, Justice Thomas did not view the Klan's speech as primarily religious.[37] Regardless of whether the cross was a religious symbol for some Klan members, Justice Thomas argued, the message the Klan had in mind was primarily political.[38] For that reason, he explained, the Establishment Clause issue may have been pretextual and thus there may have been "much less here than meets the eye."[39]

Justices O'Connor and Souter concurred in part and concurred in the judgment and wrote separate opinions,[40] each joined by the other and Justice Breyer. Justice O'Connor argued that the Board's "endorsement test" was appropriate[41] and understood the Establishment Clause to "impose[ ] affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message."[42] Justice O'Connor argued that the Establishment Clause is violated when the reasonable observer, "aware of the history and context of the community and forum in which the religious display appears,"[43] interprets religious speech as state-endorsed.

Justice Souter surveyed prior cases and concluded that they formed no basis for creating a per se test when religious speech occurs in a public forum.[44] Rather, he argued that "a contextual judgment taking account of the circumstances of the specific case"[45] was more appropriate. The plurality's bright-line rule, Justice Souter argued, created a "serious loophole" in the Establish-

35. *Id.* at 2450.
36. *See Pinette*, 115 S. Ct. at 2450-51 (Thomas, J., concurring).
37. *See id.* at 2451.
38. *See id.*
39. *Id.*
40. *See id.* at 2451-57 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2457-64 (Souter, J., concurring in part and concurring in the judgment).
41. *See Pinette*, 115 S. Ct. at 2453 (O'Connor, J., concurring in part and concurring in the judgment).
42. *Id.* at 2454.
43. *Id.* at 2455. Justice O'Connor's reasonable observer test would focus not on the reactions of actual individuals, no matter how reasonable those individuals are, but on reasonability as a collective judgment.
44. *See id.* at 2457 (Souter, J., concurring in part and concurring in the judgment).
45. *Id.* at 2459.

ment Clause, effectively inviting government to "contract out its establishment of religion."[46]

Justice Stevens wrote a dissenting opinion,[47] agreeing with Justice O'Connor that the "endorsement test" should apply,[48] but disagreeing about the level of knowledge and reason that should be attributable to the observer under such a test.[49] He thought that no disclaimer[50] nor the existence of a public forum by itself could "dispel the message of endorsement" left in reasonable people's minds when an unattended religious display is placed at the seat of government.[51]

Justice Ginsburg also dissented in a brief opinion.[52] In her view, the Establishment Clause's purpose of "uncoupl[ing] government from church"[53] rendered a religious display at or close to the seat of government impermissible.

Although the Court's result steps away from the secular public order that Justice Ginsburg appears to think the Constitution commands, it does so only hesitantly and incompletely. The hesitation is perhaps most evident in Justice O'Connor's refusal to adopt a bright-line rule protecting religious expression in public fora. Justice O'Connor's familiar distaste for bright-line rules[54] perhaps made her reluctant to accept Justice Scalia's position. But on closer inspection, it seems that drawing a bright line would not have upset any of the reasoning in her opinion.

Indeed, once the concurring Justices: (1) recognized that this type of case did not present a reasonable confusion about endorsement; and (2) rejected the individual perceptions of actual observers in favor of "a personification of a community ideal,"[55]

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46. *Pinette*, 115 S. Ct. at 2461 (Souter, J., concurring in part and concurring in the judgment).

47. *See id.* at 2464-74 (Stevens, J., dissenting).

48. *See id.* at 2466.

49. For example, at one point, Justice Stevens argued that "Justice O'Connor . . . presumes a reasonable observer so prescient as to understand legal doctrines that this Court has not yet adopted." *Id.* at 2467 n.7. At another, Justice Stevens characterized Justice O'Connor's test as relying on "an 'ultra-reasonable observer' who understands the vagaries of this Court's First Amendment jurisprudence." *Id.* at 2469.

50. *See id.* at 2469 n.13.

51. *Pinette*, 115 S. Ct. at 2469 (Stevens, J., dissenting).

52. *See id.* at 2474-75 (Ginsburg, J., dissenting).

53. *Id.* at 2474 (citing Everson v. Board of Educ., 330 U.S. 1, 16 (1947)).

54. Suzanna Sherry surveys Justice O'Connor's early jurisprudence in *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). Sherry observes that O'Connor "often rejects bright-line rules and occasionally makes explicit her preference for contextual determinations." *Id.* at 605.

55. *Pinette*, 115 S. Ct. at 2455 (O'Connor, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

there was no reason to avoid a per se rule. When authoritative interpretation of the Constitution proceeds in terms of a "[collective] social judgment"[56] rather than particularized human perceptions, it has the character of constituting what is reasonable as well as discovering it. After all, the Supreme Court has the final word on what the collective social judgment on many of our most vital public questions shall be. Indeed the message of *Marbury v. Madison*[57] is not only that the Court describes the Constitution, but that its descriptions *constitute* constitutional law.[58] Drawing a bright line does not disturb authoritative social judgments as embodied in law, even it if does leave some individuals' misperceptions without protection. But Justice O'Connor's reluctance to draw a line cannot be based on these individual perceptions; particularized perception, even of reasonable people, is precisely the test that Justice O'Connor rejects.[59]

Justice O'Connor's reticence seems doubly odd in light of her desire for a government disclaimer. A per se constitutional rule that private speech is not attributable to the government is essentially an announcement on behalf of all state and local governments that speech in a public forum is not endorsed but "merely allow[ed]," a disclaimer that would seem to satisfy Justice O'Connor.[60] Similarly, a published constitutional line does not differ appreciably from a "permanent sign" designating public fora "for private speech carrying no endorsement from the State," which would seem to satisfy Justice Souter's concerns.[61] That some people might not read Supreme Court opinions is no answer; the same would be true of a sign or disclaimer. Unless it is legible at any distance from which religious displays are visible,

56. *Id.* (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984)).

57. 5 U.S. (1 Cranch) 137 (1803).

58. *See id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."); *see* JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS 4-11 (2d ed. 1975) (describing as "performative utterances" such statements that accomplish a state of affairs by describing it).

59. *See Pinette*, 115 S. Ct. at 2455 (O'Connor, J., concurring in part and concurring in the judgment) ("I therefore disagree that the endorsement test should focus on the actual perception of individual observers . . . .").

60. *See id.* at 2456 (stating that a reasonable observer would be able to read a disclaimer, "which the Klan had informed the State it would include in the display").

61. *Id.* at 2462 (Souter, J., concurring in part and concurring in the judgment) ("[T]he Board could have instituted a policy of restricting all private, unattended displays to one area of the square, with a permanent sign marking the area as a forum for private speech carrying no endorsement from the State.").

some people will not read the government's physically present disclaimer.[62]

But those who seek greater government accommodation of religion should be less troubled by the concurring Justices' hesitation than by the unstated ideas, discernible in their *Pinette* opinions, that appear to form the basis of their approach to religion. Besides being unnecessarily hesitant, the concurring Justices partake of many of the same philosophical commitments that inform Justice Ginsburg's view of the Constitution as commanding the maintenance of a secular public order. What Justice Ginsburg insufficiently considers is the tremendous difference between uncoupling government from church and exiling individuals' most deeply-held beliefs from public discussion. The latter, besides ignoring other constitutional guarantees,[63] seems to accept the dubious notion from some philosophers that deeply-held beliefs are separable from the "self."

The idea of being separable from one's core beliefs is unsurprising in the wake of Enlightenment political theory. To maintain the notion of liberty, Enlightenment thinkers such as Immanuel Kant and John Locke posited a content-free self capable of radical disengagement from social attachments, history, and beliefs. For example, Locke's notion of freedom has been described as "procedural reason" which disengages from the particular features of oneself and opens up the possibility of self-remaking.[64] Similarly, Kant has been seen as developing a "more radical definition of freedom which rebels against nature as what is merely given, and demands that we find *freedom* in a life whose normative shape is somehow *generated by rational activity.*"[65] In other words, the "self" to be respected is freedom as rationality and volition, unburdened by beliefs or attachments.

John Rawls has restated almost axiomatically the contemporary formulation of the same widely-accepted idea: "the self is prior to the ends which are affirmed by it."[66] Such a notion naturally

62. *See id.* at 2450 n.4 (Scalia, J., plurality opinion) ("[T]he only principled line for adequacy of identification would be identification that is legible at whatever distance the cross is visible.").

63. *See id.* at 2448 (quoting Board of Educ. v. Mergens, 496 U.S. 226, 250 (O'Connor, J., plurality opinion) (stating that "private speech endorsing religion" is protected by the Free Speech and Free Exercise Clauses)).

64. *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 159-76 (1989).

65. *Id.* at 364 (emphasis added).

66. JOHN RAWLS, A THEORY OF JUSTICE 560 (1971).

leads to viewing religious belief as just another unnecessary personal accouterment. In fact, the Court has previously employed just such a notion in religion cases. Consider, for example, the judicial treatment of religious claims in *Havasupai Tribe v. United States*[67] and *Lyng v. Northwest Indian Cemetery Protective Ass'n.*[68] The Indian tribes in these cases respectively claimed that federal construction and mine operations would destroy sacred lands, kill their gods, and effectively annihilate the tribal religion. Although the courts accepted these assertions of belief as genuine, they treated them as mere beliefs, unworthy of constitutional protection under the Free Exercise Clause.[69] The Court would have us believe that the results in these cases were unproblematic because, notwithstanding the destruction of their religions, tribe members were not "coerced by the Government's action into violating their religious beliefs."[70] In other words, because their freedom *qua* rationality and volition was not overborne, the individuals had not been violated.

Such constitutional treatment of religious beliefs is indeed unproblematic if one accepts Rawls's notion that "the self is prior to the ends which are affirmed by it."[71] But if a person cannot be abstracted so easily from her beliefs, such treatment and Justice Ginsburg's dissent in *Pinette* effectively mean that some Americans are only invited into the public debate if they shed their identity, at least temporarily. That is tantamount to saying that they are invited into public discussion only with respect to issues which may be relatively unimportant to them. In this way, the public forum is intermittently closed to some Americans (unless, of course, they are willing to become someone else by leaving their religious beliefs "safely" behind).

Through the Kantian or Rawlsian lens, having to leave one's religious beliefs at the threshold of the public forum may present a difficult choice, but it does not threaten one's identity because the "self" is viewed as independent from any beliefs. But in the words of one critic of such ideas, "we cannot regard ourselves as independent in this way without great cost to those loyalties and

67. 752 F. Supp. 1471 (D. Ariz. 1990), *aff'd on other grounds sub nom.* Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 503 U.S. 959 (1992).

68. 485 U.S. 439 (1988).

69. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

70. *Lyng*, 485 U.S. at 449.

71. RAWLS, *supra* note 66, at 560 (1971).

convictions whose moral force consists partly in the fact that *living by them is inseparable from understanding ourselves as the particular persons we are.*"[72] It is only by referring to deeply-held religious beliefs that the religious individual can express herself fully, because those beliefs are part of her "self" in a strong, constitutive sense.[73]

If indeed some individuals experience their faith as an indispensable, constitutive part of themselves, Justice Scalia's per se rule is the only defensible treatment of religious speech in a public forum. Any other result cannot avoid sending the message to religious adherents that Justice O'Connor abhors: "they are outsiders, not full members of the political community."[74] To be sure, Justice O'Connor is here speaking of messages the Establishment Clause prevents government from sending to "nonadherents." But the Free Speech and Free Exercise Clauses should prevent the same exclusionary message to the "faithful."[75]

Of course, if Justice Stevens is right that unattended religious displays near the seat of government invariably send the forbidden message,[76] the message of exclusion will be sent to either "nonadherents" or the "faithful." Forbidding the religious display will make an outsider of the religious individual; permitting it will make an outsider of the nonadherent who mistakes private expression for state-sponsored religious speech. When a choice is forced, should the government allow the faithful to express themselves or allow some nonadherents who mistakenly perceive state endorsement to silence the faithful? Surely the First Amendment demands a prohibition against silencing religious individuals more strongly than it implies protection for erroneous perceptions of state endorsement.[77]

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72. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 179 (1982) (emphasis added).

73. This necessary relation between the self and moral belief should not be regarded as peculiar to the religious. As Charles Taylor explains, there is an "essential link between identity and a kind of orientation. To know who you are is to be oriented in moral space, a space in which questions arise about what is good or bad, what is worth doing and what is not, what has meaning and importance . . . ." TAYLOR, *supra* note 64, at 27-28 (1989).

74. *Pinette*, 115 S. Ct. at 2452 (O'Connor, J., concurring in part and concurring in the judgment) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

75. *Cf.* Board of Educ. v. Mergens, 496 U.S. 226, 250 (O'Connor, J., plurality opinion) (stating that the Free Exercise and Free Speech Clauses protect private speech endorsing religion).

76. *See Pinette*, 115 S. Ct. at 2466-67 (Stevens, J., dissenting).

77. Importantly, the entire First Amendment is phrased as a prohibition against government action like silencing: "Congress shall make no law . . . ." U.S. CONST. amend. I.

By hesitating short of Justice Scalia's bright-line rule, the concurring Justices needlessly have kept the door partially closed to religious expression in public fora. Perhaps more importantly, they have done so by unwittingly perpetuating an impoverished understanding of the self that virtually guarantees that religious claims will be undervalued.

Brant W. Bishop

THE PRECARIOUS POSITION OF COMMERCIAL SPEECH: *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

Since the Supreme Court held in 1976 that the First Amendment[1] protects commercial speech,[2] the Court has struggled to define the scope of that protection. Scholars also have struggled; some argue that commercial speech should receive the full protection that other speech enjoys,[3] and others argue that First Amendment protection does not cover commercial speech at all.[4] Last Term, in *Rubin v. Coors Brewing Co.*,[5] the Court extended commercial speech protection to labels on alcoholic beverages but left the doctrine as unclear as before. The Court applied the four-prong test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[6] and held that a federal ban on disclosure of the alcohol content of beer on labels was overbroad and failed to advance directly the government's interest in preventing "strength wars" between brewers. Although *Coors* represents a continued willingness to strike down local, state, and federal restrictions on commercial speech,[7] it fails to provide any sure foundation for protection for commercial speech. The *Central*

Thus, at least in the face of a forced choice, Justice Scalia is correct to say that "erroneous conclusions do not count." *Pinette*, 115 S. Ct. at 2448 (Scalia, J., plurality opinion).

1. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

2. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

3. *See* Ronald K. L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697 (1993); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).

4. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

5. 115 S. Ct. 1585 (1995).

6. 447 U.S. 557 (1980).

7. *See, e.g.*, Edenfield v. Fane, 113 S. Ct. 1792 (1993); City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993).

Hudson test has proven to be too manipulable to provide any determinate boundaries around when commercial speech can be regulated. Until the Court sheds more light on the meaning of the prongs of the test, the protection of commercial speech will be in doubt in each new case.

In 1987, Coors sought approval from the Bureau of Alcohol, Tobacco, and Firearms (BATF) for its beer labels and advertisements.[8] The BATF refused to grant its approval because the labels and advertisements disclosed the alcohol content of Coors's beer in violation of section 5(e)(2) of the Federal Alcohol Administration Act (FAAA).[9] When Coors challenged the provision's constitutionality in federal district court, the trial judge granted Coors declaratory and injunctive relief.[10]

The Tenth Circuit reversed, finding a substantial government interest in avoiding strength wars, and remanded for the trial court to determine whether section 5(e)(2) directly advanced that interest.[11] On remand, the district court upheld the prohibition on disclosing alcohol content in advertising but struck down the ban on labeling.[12] Because Coors did not appeal the advertising ban further, the Tenth Circuit, in the second appeal, considered only the labeling ban. The circuit court affirmed the district court's decision, finding that "there was no evidence of any relationship between the publication of factual information regarding alcohol content and competition on the basis of such content."[13]

In a unanimous opinion, the Supreme Court affirmed.[14] Justice Thomas, writing for the court,[15] found that, although the Government's interest was substantial, 27 U.S.C. § 205(e)(2)

8. *See Coors*, 115 S. Ct. at 1588.
9. 27 U.S.C. § 205(e)(2) (1988).
10. *See Coors*, 115 S. Ct. at 1588.
11. *See* Adolph Coors Co. v. Brady, 944 F.2d 1543 (10th Cir. 1991).
12. *See Coors*, 115 S. Ct. at 1588.
13. *Id.* (citing Adolph Coors Co. v. Bentsen, 2 F.3d 355, 358-59 (10th Cir. 1993)).
14. Justice Stevens wrote a separate opinion, concurring in the judgment.
15. Justice Thomas was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer.

failed the *Central Hudson* test[16] because it lacked a "reasonable fit" with that interest.[17]

All the parties agreed that the beer labels constituted commercial speech[18] and that Coors met the first prong of *Central Hudson*'s test in that it sought to "disclose only truthful, verifiable, and nonmisleading factual information about alcohol content on its beer labels."[19] Justice Thomas, therefore, focused on the other "factors that courts should consider in determining whether a regulation of commercial speech survives First Amendment scrutiny"[20] and turned to the substantiality of the government's interest.[21] Justice Thomas rejected the government's asserted interest in facilitating state regulation of alcohol, but accepted as substantial the goal of suppressing strength wars among brewers.[22] Justice Thomas acknowledged as plausible Coors's claim that Congress had intended to prevent misleading statements in a time when technology could not accurately measure the alcohol content of beers,[23] but stated that section 205(e)(2) does not have to serve one exclusive interest. The government, Justice Thomas concluded, "has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs."[24]

The Court next turned to "the 'fit' between the legislature's ends and the means chosen to accomplish those ends."[25] Justice Thomas outlined the government's arguments—that history,[26]

16. *See Coors*, 115 S. Ct. at 1589. *Central Hudson* held that, to be protected, commercial speech "must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 556.

17. *Coors*, 115 S. Ct. at 1589.

18. *See id.*

19. *Id.* at 1590.

20. *Id.* at 1589.

21. *See id.* at 1590-91.

22. *See Coors*, 115 S. Ct. at 1590-91.

23. *See id.*

24. *Id.* at 1591.

25. *Id.* at 1592 (citing Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986)).

26. "According to the Government, at the time Congress enacted the FAAA, the use of labels displaying alcohol content had helped produce a strength war." *Coors*, 115 S. Ct. at 1592.

common sense,[27] Coors's motives in pressing the litigation, and developing strength wars in the current consumer market serve as evidence that the labeling ban would prevent strength wars[28]—but rejected them as founded only on "anecdotal evidence and educated guesses."[29]

Justice Thomas then examined the FAAA's regulatory scheme, which banned disclosure of alcohol content on labels. The FAAA took an entirely different course with wines and spirits than with beer, requiring disclosure of alcohol content for wines with greater than fourteen percent alcohol.[30] With regard to beer, federal regulations prohibited the disclosure of alcohol content in labeling unless state law required it, but allowed it in advertising unless state law prohibited it.[31] Although many terms describing high alcohol content in beer were prohibited,[32] manufacturers were allowed to use the term "malt liquor" to indicate a class of beverages with higher alcohol contents.[33]

Thus, although the government asserted a valid, substantial interest in preventing strength wars, Justice Thomas asserted that "the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve that end . . . [because] other provisions of the same act directly undermine and counteract its effects."[34] Finally, Justice Thomas wrote that, even if the labeling restriction could directly and materially advance the Government's interest, it would still fail the *Central Hudson* test. The Court cited Coors's many suggestions of less in-

27. "It is assuredly a matter of 'common sense,' Brief for Petitioner 27, that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait." *Id.*

28. *See id.*

29. *Id.* at 1593.

30. *See id.* at 1592; 27 C.F.R. §§ 4.36, 5.37 (1994).

31. *See* 27 U.S.C. § 205(f)(2) (1988); *Coors*, 115 S. Ct. at 1592; 27 C.F.R. § 7.50 (1994). The effect of these regulations was that disclosure in beer advertising, "which would seem to constitute a more influential weapon in any strength war than labels," was prohibited in only eighteen States. *Coors*, 115 S. Ct. at 1592.

32. The prohibited terms include "strong," "full strength," "extra strength," "high test," "high proof," "pre-war strength," and "full oldtime alcoholic strength." *See Coors*, 115 S. Ct. at 1589 (citing 27 C.F.R. § 7.29(f) (1994)).

33. *See id.* at 1592-93.

34. *Id.* at 1593.

trusive regulatory options[35] and held that the labeling ban was more extensive than necessary.[36]

Concurring only in the judgment, Justice Stevens rejected *Central Hudson*'s test as formulaic,[37] and the rigid distinction between commercial and noncommercial speech as artificial.[38] The crux of Justice Stevens's argument is that the government constitutionally may restrict commercial speech only when the decision to regulate rather than protect is related to the legitimate reasons for giving commercial speech less constitutional protection. Justice Stevens argued that those reasons entail "the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker."[39] Because the FAAA's labeling ban on disclosure of alcohol content does not deal with untruthful, incomplete, or inaccurate information and does not protect consumers from misleading speech, Justice Stevens continued, the restriction on speech is unconstitutional.

Justice Stevens further argued that, regardless of the standard applied to review the regulation, the government's interest in curbing strength wars does not justify the restriction on commercial speech. On the contrary, it is a paternalistic and unacceptable "attempt to blindfold the public."[40] The First Amendment would not prevent Congress from protecting the consuming public by restricting the alcohol content of beers, but it does not allow Congress to pursue the same goal "through a policy of consumer ignorance, at the expense of the free-speech rights of the sellers and purchasers."[41]

Coors may appear to be another in a line of cases increasing the constitutional protection of commercial speech, but it promises more than it can provide. It is disappointing that the Court did not use the *Central Hudson* test to strike a balance between the

35. Among these suggestions were "directly limiting the alcohol content," "prohibiting marketing efforts emphasizing high alcohol strength," and "limiting the labeling ban only to malt liquors, which is the segment of the market that allegedly is threatened with a strength war." *Id.*

36. *See id.* at 1593-94.

37. *See Coors*, 115 S. Ct. at 1594 (Stevens, J., concurring).

38. *See id.* at 1595 ("The speech at issue here is an unadorned, accurate statement, on the label of a bottle of beer, of the alcohol content of the beverage contained therein.... The majority does not explain why the words '4.73% alcohol by volume' are commercial.").

39. *Id.* at 1594.

40. *Id.* at 1597.

41. *Id.*

values of free speech embodied in the First Amendment and the government's various policy goals that require limiting free speech. Instead, *Coors*, like other cases applying *Central Hudson*, lacks any discussion of the First Amendment value of commercial speech. A survey of commercial speech cases since 1986 reveals no clear view of the value of commercial speech and no predictable guide as to when a regulation can survive *Central Hudson*.

In 1986, in a case that has been called the "low water mark" of commercial speech protection,[42] the Court upheld a regulation that banned any advertising of casino gambling that was directed to Puerto Rican residents.[43] The Court's *Central Hudson* analysis in *Posadas* resulted in startling deference to the legislature's determination to restrict commercial speech.

The Court accepted as substantial Puerto Rico's interest in reducing the demand for casino gambling among its local residents and thereby reducing harmful effects on the welfare of the citizens.[44] The Court had "no difficulty in concluding" that this interest was substantial in spite of the legislature's contrary determinations that the lottery, horse racing, and cockfighting would not produce serious harms and did not require advertising restrictions.[45] The answer to the question whether the advertising restriction directly advanced the government's interest was just "clearly 'yes.'"[46] The Court relied on the legislature's apparent belief that casino gambling posed more risk than other forms of gambling and that the advertising ban would reduce the potential harms that could result from gambling.[47]

The Court required even less from the Puerto Rican government when it came to the "no more extensive than necessary"

42. P. Cameron DeVore, *The Two Faces of Commercial Speech Under the First Amendment*, COM. LAW., Spring 1994, at 23, 23; *see also* Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289 (1987) (arguing that the deferential stance of the Court in Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986), gave commercial speech little more protection than it had had in the era of Valentine v. Chrestensen, 316 U.S. 52 (1942), when commercial speech was held to be completely beyond the realm of First Amendment protection).

43. *See Posadas*, 478 U.S. at 330-31. The Puerto Rican legislature had legalized casino gambling in 1948 to promote tourism but had prohibited the advertising of casinos "to the public of Puerto Rico." *Id.* at 332 (quoting P.R. LAWS ANN., tit. 15, § 77 (1972)).

44. *See id.* at 341.

45. *See id.*

46. *Id.*

47. *See id.* at 341-43. The dissent condemned the majority because it did "little more than defer to what it perceive[d] to be the determination by Puerto Rico's Legislature that a ban on casino advertising aimed at residents [was] reasonable." *Id.* at 352 (Brennan, J., dissenting).

test. It rejected the suggestion that Puerto Rico could have sponsored additional speech to discourage gambling instead of restricting advertising, saying that "*it is up to the legislature to decide* whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling."[48]

In addition, the *Posadas* Court introduced a new and disturbing basis for the regulation of commercial speech. In distinguishing the case at bar from *Bigelow v. Virginia*,[49] which invalidated a prohibition of abortion advertising, the Court suggested that "the constitutional status of commercial speech is tied to the constitutional status of the underlying activity."[50] Because Puerto Rico had the power to prohibit casino gambling altogether, it also could prohibit related advertising.[51]

In the years since *Posadas*, the Court has taken a number of opportunities to protect commercial speech against state regulation. For example, *City of Cincinnati v. Discovery Network, Inc.*[52] struck down a city ordinance that prohibited the distribution of commercial handbills through newsracks on public property. Although the Court said that the city's "interest in the safety and attractive appearance of its streets and sidewalks" was substantial,[53] the ordinance failed the "reasonable fit" test because the distinction, drawn between newspapers that could be distributed in newsracks and commercial handbills that could not be, was not relevant to the city's interest in safety and aesthetics.[54]

In *Edenfield v. Fane*,[55] the Court invalidated the Florida Board of Accountancy's rule that CPAs could not seek clients by personal solicitation.[56] The language of *Edenfield* seemed to bolster the "substantial interest" and "directly advance" prongs of *Central Hudson*'s test.[57] In finding Florida's interests in preventing fraud and maintaining high professional standards to be substantial, the Court cautioned that, "[u]nlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise

48. *Posadas*, 467 U.S. at 344 (emphasis added).
49. 421 U.S. 809 (1975).
50. Lively, *supra* note 42, at 292.
51. *See Posadas*, 478 U.S. at 345-46.
52. 113 S. Ct. 1505 (1993).
53. *Id.* at 1507.
54. *See id.* at 1516.
55. 113 S. Ct. 1792 (1993).
56. *See id.* at 1796.
57. *Central Hudson*, 447 U.S. at 556.

interests put forward by the State with other suppositions."[58] The Court held that the Board had not proven that the ban advanced the asserted interests and explained that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[59]

Last Term in *Coors*, the Court accepted the Government's interest in curbing strength wars, but relied on *Edenfield* to invalidate a labeling ban on alcohol content because the statutory scheme was irrational and inconsistent. More important, *Coors* made clear that the Government's ability to limit directly the alcohol content of beers did not carry with it the right to ban disclosure of the alcohol content. The *Coors* decision implies that the *Posadas* rationale, that the power to ban the underlying activity gives the power to ban speech, will not always apply.[60]

Discovery Network, *Edenfield*, and *Coors* may lead observers to believe that *Posadas* is "shrinking as an authority" and that commercial speech is on firmer ground now than it was in 1986.[61] This is not the case. The *Coors* Court used *Edenfield* and *Posadas* as equal authorities, and it actually relied on *Posadas*'s finding of substantial interest, analogizing the concern for reduction in welfare

58. *Edenfield*, 113 S. Ct. at 1798-99. Note that, despite accusations by the *Posadas* dissent that the asserted interests had no factual basis in the record of the legislature's proceedings, the tourism company at least had put them forward in litigating the case.

59. *Id.* at 1800.

60. *See Coors*, 115 S. Ct. at 1589 n.2.

61. *See* DeVore, *supra* note 42, at 24 (arguing that *Posadas* largely "stood alone among the progeny of *Central Hudson*"); *see also* Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1182 (1988) (predicting that the irreconcilability of *Posadas* with previous cases would keep "almost all of the foundational questions about first amendment protection for commercial speech . . . on the table for consideration and reconsideration."). *But see* Daniel H. Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205 (1988). Lowenstein makes an interesting, though unconvincing, argument that the Court is most likely to strike down restrictions on commercial speech designed to mitigate externalities that the individual's behavior imposes on other members of society or on society at large and most likely to uphold restrictions that are genuinely paternalistic. Thus, *Posadas*, in upholding a ban designed to keep local residents from the harmful activity of gambling, is perfectly consistent with precedent. *See id.* at 1240-43.

One can challenge both Lowenstein's assessment of what the Court is likely to do and on what grounds and his belief that the *Posadas* advertising ban arises more from a paternalistic concern for the individuals than from concern with the externalities of gambling. On the issue of whether *Posadas* is consistent and applicable precedent, however, Lowenstein is closer to the Court's position than other commentators.

that might result from increased gambling to the reduction in welfare that might result from alcohol strength wars.[62]

Nothing in these cases precludes a return to *Posadas* and its deference to regulation of commercial speech.[63] The *Central Hudson* test, as currently applied, is manipulated just as easily to uphold regulations as to invalidate them.[64] When the Court applies *Central Hudson* to each case, the outcome is indistinguishable except upon the specific facts of the case. Only if the identical fact pattern arose could the outcome in the next case be predicted.

Central Hudson's "substantial government interest" test has become completely indiscriminate. A look at the cases reveals that almost any interest will be sufficient.[65] When the range of accept-

62. *See Coors*, 115 S. Ct. at 1591. There was no hint that *Edenfield* had established a more restrictive test than *Posadas*. Although the more restrictive language discussed above, *see supra* pp. 618-19, is what courts typically quote, *Edenfield* also contains a rather loose reading of *Central Hudson*. Before beginning the analysis of the individual prongs of the *Central Hudson* test, *Edenfield* explained the commercial speech doctrine in general: "Commercial speech, however, is 'linked inextricably' with the commercial arrangement that it proposes, so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. For this reason, laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." *Edenfield*, 113 S. Ct. at 1798 (citations omitted). This language is even less protective of commercial speech than the *Posadas* case.

63. *Compare Coors*, 115 S. Ct. at 1592-93 (striking down a regulation because the government did not satisfy the burden, illuminated in *Edenfield*, of proving that the regulation advanced the government interest), *with* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2377-78 (1995) (upholding regulation, requiring only a summary of study by the petitioner to meet the *Edenfield* burden).

64. *See, e.g.*, Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (finding the state interests substantial and holding that the "least restrictive means" required only that the restriction be "narrowly tailored" to fit the purpose in upholding a campus prohibition on the operation of any private commercial enterprise, in this case a Tupperware party); *see also* United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993) (upholding a restriction on lottery advertisements in nonlottery States). Edge Broadcasting was a radio station in North Carolina, a nonlottery State, 90% of whose listeners resided in Virginia, a lottery State. Edge challenged a federal statute which prohibited it from broadcasting lottery advertisements. The Court found substantial the state interest in supporting the respective policies of both States and held that Congress's middleground solution of letting stations in lottery states broadcast advertisements but prohibiting stations in nonlottery States was an acceptable means to advance the interest. The First Amendment issue in *Edge* was "complicated a bit by concerns over federal-state relations and state-state comity," Christopher C. Faille, *Spinning the Roulette Wheel: Commercial Speech and Philosophical Cogency*, 41 FED. BUS. NEWS & J. 58, 63 (1994), but the Court upheld the regulation.

65. *See Coors*, 115 S. Ct. at 1591 (accepting state's interest in discouraging competition among brewers on the basis of alcohol strength, but rejecting the second interest in facilitating state regulation of alcohol); *Edge Broadcasting*, 113 S. Ct. at 2703 (accepting state's interest in supporting the policies of nonlottery states); Edenfield v. Fane, 113 S. Ct. 1792, 1799-800 (1993) (accepting state's interests in preventing fraud, protecting privacy, and maintaining professional ethical standards); City of Cincinnati v. Discovery Network, Inc.,

able state interests is so broad, the burden of protecting commercial speech falls on the last two prongs: the requirements that the regulation chosen directly advance the interest and be no more extensive than necessary. The Court has provided only "ad hoc subject-specific examples of what is permissible and what is not,"[66] and the commercial speech doctrine has become precariously unpredictable under *Central Hudson* because the Court has failed to establish, in any concrete sense, the contours of what the *Central Hudson* test requires of regulations and what protection it provides commercial speech.

To provide reliable protection for commercial speech, the Court first must address some key questions that seem to have been forgotten: what is the constitutional value of commercial speech? Is commercial speech as important as other speech to First Amendment values like the free exchange of ideas and information? What types of policy concerns, like consumer fraud or city aesthetics, might justify limiting commercial speech more than other speech? Only with these issues in mind can the Court apply *Central Hudson* with any coherence.

The Court discussed the nature of commercial speech and some of the values at stake in its regulation when it first rejected the holding of *Valentine v. Chrestensen*.[67] The Court placed commercial speech solidly within the realm of the First Amendment where it is protected simply because it is speech. Then it emphasized the value of information in commercial speech and rejected paternalistic regulations.

According to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[68] (*Virginia Pharmacy Board*) commercial speech does not have to earn its way into constitutional protection. The Court held that "commercial speech, like other varieties, is protected" by the First Amendment.[69] Speech does not lose that protection because it is paid for, because it solicits

113 S. Ct. 1505, 1510-11 (1993) (not even challenging state's interests in sidewalk aesthetics and safety); *Fox*, 492 U.S. at 475 (accepting state's interests in maintaining educational atmosphere, preventing exploitation of students, and promoting safety, security, and "residential tranquillity"); Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986) (accepting state's interest in protecting health, safety, and welfare by reducing residents' demand for casino gambling); *Central Hudson*, 447 U.S. at 568-69 (accepting state's interests in energy conservation and fair and efficient utility rates).

66. Kozinski & Banner, *supra* note 3, at 631.

67. 316 U.S. 52 (1942); *see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

68. 425 U.S. 748 (1976).

69. *Id.* at 770.

money, or because it proceeds from a profit motive.[70] Explaining the value of commercial speech, the Court focused on both the consumer's and society's "interest in the free flow of commercial information."[71] The more "intelligent and well informed"[72] consumers' economic decisions are, the closer we will come to the most efficient allocation of resources, at both individual and societal levels.[73]

As clearly as the Court upheld the importance of the flow of information, it rejected paternalism as an unacceptable motive.[74] The Court found that the only connection between the state's advertising ban and the protection of consumers was the manipulation of consumer decisions by keeping them in ignorance.[75] It held that the First Amendment prohibits the State from restricting speech based on state fears the information may be misused "if it is freely available."[76]

Virginia Pharmacy Board indicated that the government constitutionally could prohibit misleading or deceptive commercial speech.[77] The "commonsense differences"[78] between commercial and noncommercial speech, which have been quoted out of context to justify all kinds of restrictions,[79] explained that a requirement that commercial speech be truthful is a reasonable one and does not pose the same danger of chilling truthful speech as a restriction on all speech would.[80] Later cases broadened the narrow "commonsense differences" argument into a general statement of second-class protection for commercial

70. *See id.* at 761.

71. *Id.* at 764.

72. *Id.* at 765.

73. *See Virginia Pharmacy Bd.*, 425 U.S. at 763-65.

74. The State argued that the ban on pharmacy price advertising was necessary to maintain professional standards among pharmacists and to protect consumers from poor-quality pharmacists. *See id.* at 767-69.

75. *See id.* at 769.

76. *Id.* at 770.

77. *See id.* at 770-73. According to the Court, the State should "insur[e] that the stream of commercial information flow [sic] cleanly as well as freely." *Id.* at 772.

78. *Virginia Pharmacy Bd.*, 425 U.S. at 772 n.24.

79. *See, e.g.*, United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2703 (1993); *Central Hudson*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978).

80. *See Central Hudson*, 447 U.S. at 578 (Blackmun, J., concurring); *see also Virginia Pharmacy Bd.*, 425 U.S. at 772 n.24 (The "greater objectivity and hardiness of commercial speech may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.").

speech, but did not justify this move with any explanation of commercial speech's lesser value.[81]

Central Hudson briefly mentioned the value of information and the hostility toward paternalism, but it defined the First Amendment protection for commercial expression as limited by the nature of "the expression and of the governmental interests served by its regulation."[82] Since 1980, the Court has focused its attention on the *Central Hudson* analysis, giving only the most cursory glances to questions of commercial speech's value and appropriate standards for restricting it.[83] When the Court applies the words of the *Central Hudson* test without considering the underlying values, it can reach almost any outcome.

If the Court is to give consistent protection to commercial speech, it must stop relying on a formulaic test and come to terms with the constitutional values at stake. First, the Court must agree that the First Amendment protects commercial speech. Courts and commentators too often take the tone that "commercial speech must earn its way into constitutional protection by offering something of value in its content."[84] Instead of asking "what qualifies commercial speech for First Amendment coverage," the Court should realize that commercial speech enjoys the same First Amendment protection as other speech.[85]

Once it agrees on the protected status of commercial speech, the Court then can explore possible limitations to that protection. The Court should return to the original justification for regulation of commercial speech, given in *Virginia Pharmacy Board.*[86] As Justice Stevens argued in his *Coors* concurrence, the goal of protecting consumers from deceptive, incomplete or inaccurate information is the value that justifies limiting commercial

81. *See, e.g., Central Hudson,* 447 U.S. at 562; *Ohralik,* 436 U.S. at 455-56.

82. *Central Hudson,* 447 U.S. at 563.

83. *Posadas* provides a vivid example of this dearth of discussion. One sentence, placed between the technical matters, such as jurisdiction and timeliness, and the *Central Hudson* analysis, disposes of the constitutional value of commercial speech. "Because this case involves the restriction of pure commercial speech . . . our First Amendment analysis is guided by the general principles identified in *Central Hudson.*" Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 340 (1986) (citations omitted); *see Coors,* 115 S. Ct. at 1589; City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1512-13 (1993); *cf.* Edenfield v. Fane, 113 S. Ct. 1792, 1797-98 (1993) (exploring solicitation as a subset of commercial speech but no discussion of general value of commercial speech).

84. Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech,* 71 TEX. L. REV. 777, 779 (1993).

85. *Id.* at 780; *see Virginia Pharmacy Board,* 425 U.S. at 760-61, 770.

86. *See Virginia Pharmacy Board,* 425 U.S. at 771-72.

speech's protection.[87] Thus, only misleading speech should be restricted.[88] Perhaps, there are other valid and beneficial values that could inform the *Central Hudson* analysis and justify restrictions of commercial speech. To date, however, the Court has not put forward any reasons or commonsense differences between commercial and noncommercial speech to justify its "relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech."[89]

Florida Bar v. Went For It, Inc.[90] is an example of where the commercial speech doctrine can go after *Coors*. The Court used the *Central Hudson* test to uphold a rule prohibiting attorneys from using targeted direct-mail solicitations within thirty days of an injury or death. Justice O'Connor, who authored the lone dissent in *Edenfield* but wrote for the majority in this case, relied on all the strictest tests of *Edenfield* in upholding the solicitation ban.[91] The lack of studies or anecdotal evidence which doomed the ban in *Edenfield*[92] was read to suggest that almost any study or collection of anecdotal evidence, no matter how statistically questionable or unvalidated, would be sufficient to prove that the State's regulation directly advanced its interest.[93] After using *Central Hudson* to justify the solicitation ban, Justice O'Connor's conclusion was reminiscent of the deference of *Posadas*: it is "appropriate that we limit our scrutiny of state regulations to a level commensurate with the 'subordinate position' of commercial speech in the scale of First Amendment values."[94]

There is no reason to think that the Court will maintain this extreme deference any longer than it maintained the protectiveness suggested in *Edenfield*. *Florida Bar* simply demonstrates how

87. *See Coors*, 115 S. Ct. at 1594-96 (Stevens, J., concurring).

88. *See id.*

89. *Central Hudson*, 447 U.S. at 578 (Blackmun, J., concurring).

90. 115 S. Ct. 2371 (1995). This case was decided two months after *Coors*.

91. *See id.* at 2376, 2377 (allowing no "supposition" when evaluating the state's interests, and no "mere speculation and conjecture" when finding that the regulation advances the interests).

92. *See Edenfield*, 113 S. Ct. at 1800-01.

93. *See Florida Bar*, 115 S. Ct. at 2378. Justice Kennedy's dissent points out that the evidence O'Connor relies on is merely a summary of studies, contains no actual survey results or discussion of the statistical universe or methodology employed, and deals largely with forms of advertising other than targeted direct-mail solicitations. "The most generous reading of this document" finds only two pages that "are even a synopsis of a study of the attitudes of Floridians towards [direct-mail] solicitations. . . . Our cases require something more than a few pages of self-serving and unsupported statements by the State." *Id.* at 2384 (Kennedy, J., dissenting).

94. *Florida Bar*, 115 S. Ct. at 2381.

little protection is guaranteed by the empty *Central Hudson* test. The Court did not shed any light on the current doctrine of commercial speech last Term. As a comparison of *Coors* and *Florida Bar* shows, there is a grave need for an examination of the First Amendment protection demanded for commercial speech.

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