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## The Cabining of *Rosenberger. Locke v. Davey* and the Broad Nondiscrimination Principle That Never Was

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THE CABINING OF *ROSENBERGER*: *LOCKE v. DAVEY*  
AND THE BROAD NONDISCRIMINATION PRINCIPLE  
THAT NEVER WAS

*Alan Trammell\**

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#### INTRODUCTION

IN 1995, the Supreme Court in *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>1</sup> held that the University of Virginia had violated the Constitution when it distributed money to student organizations but refused to fund “religious activities.” Nine years later, in *Locke v. Davey*,<sup>2</sup> the Supreme Court appeared to contradict itself. It held that the state of Washington had not violated the Constitution in denying scholarship money to students of devotional theology, while providing scholarships to students in all other disciplines. These cases seem at best conflicted and at worst unprincipled. This Note explores the doctrinal confusion, which in many ways began with *Rosenberger*, and seeks to bring clarity to the jurisprudence.

The Court in *Rosenberger* found that the University, by inviting a plethora of student organizations to partake of an activities fund and contribute to the life of the University, had created a limited public forum in which all viewpoints were welcome. Allowing religious speech was part of the bargain. In the rare instance when the government creates a public forum—a venue for free speech by private individuals—the government is not allowed to disfavor any viewpoints, including religious ones. Since *Rosenberger*, the Supreme Court and lower courts have read the case narrowly and

<sup>1</sup> 515 U.S. 819 (1995).

<sup>2</sup> 540 U.S. 712 (2004).

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treated it as only a public forum case. But this is not the only, or even the most natural, reading of *Rosenberger*.

This Note explores the idea that the Court in *Rosenberger* went further and announced a broad principle of nondiscrimination against religion. While public fora had traditionally involved places, such as streets and parks, *Rosenberger* extended the logic into the realm of funding schemes. This move could have obliterated a distinction that the Court had long drawn between places and funding schemes. Public fora have always been at one end of the spectrum. They are places in which the government must behave with utmost neutrality because streets and parks are quintessential places where citizens may speak freely. At the other end of the spectrum are funding decisions that the government makes. The government has always enjoyed wide latitude over what it chooses to fund and, just as significantly, what it chooses *not* to fund. Courts have almost uniformly ignored the proverbial elephant in the room: *Rosenberger* was a funding case. The Court in *Rosenberger* applied the stringent criteria of the public forum doctrine to a funding decision, an area in which the government's discretion is usually at its apex. In addition to exploring the idea that *Rosenberger* was a funding case—though this is not the dominant reading of the opinion—this Note also discusses the nondiscrimination principle possibly announced by the Court.

If *Rosenberger* does embody a broad nondiscrimination principle, there are two other lines of doctrine that, at first blush, stand in tension with such a principle. One line of precedent involves the theory of “play in the joints,” the notion that there is a gap between what the Establishment Clause forbids and what the Free Exercise Clause requires. *Davey* was the first Supreme Court case to endorse “play in the joints” in an actual holding. The concept of a gap between the two Religion Clauses is in some ways intuitive, even though the Court has not systematically developed the theory. For instance, legislative prayer is permissible under the Establishment Clause; however, someone cannot demand, on the strength of the Free Exercise Clause, that a legislature support such prayers. The other precedents that potentially stand in tension with a broad nondiscrimination principle are the funding cases. In many ways, the traditional latitude that the government has over funding decisions is most difficult to square with *Rosenberger*.

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This Note critically examines the three lines of precedent and argues that, despite their apparent tension, they are reconcilable and can usefully balance competing values. Part I analyzes *Rosenberger* and the broad nondiscrimination principle that derives from it. Part II examines the theory of “play in the joints,” which almost surely will constitute *Davey*’s most enduring legacy, and the extent to which the theory had been a fixture of Religion Clauses doctrine before *Davey*. Largely owing to the recentness of *Davey*, scholars have not yet addressed this question. Part III explores the funding cases and the wide discretion that they generally afford to the government. Part IV then triangulates the three lines of precedent, arguing that a broad nondiscrimination principle can coexist with both a theory of “play in the joints” and the premises of the funding cases. Despite the ability to reconcile the three lines of cases, courts have assumed that they must choose one of the precedents to govern any given problem. Part IV analyzes how courts have treated each line of cases, including how courts have unsatisfyingly cabined *Rosenberger* as nothing more than a public forum case.

I. *ROSENBERGER*, THE PUBLIC FORUM DOCTRINE, AND A BROAD  
NONDISCRIMINATION PRINCIPLE

A broad nondiscrimination principle is potentially discernible from the Supreme Court’s language in *Rosenberger*. This Part assesses whether the logic of the public forum doctrine, especially as presented in *Rosenberger*, applies outside of the forum context, thereby creating a broad principle of nondiscrimination against religion. Of particular relevance is the academic commentary after *Rosenberger* that discussed the reach of the public forum doctrine. This Part concludes that a broad nondiscrimination principle readily derives from *Rosenberger*; however, as Parts II and III discuss, other lines of precedent necessarily restrict the expansiveness of the principle.

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## A. Rosenberger

## 1. Rosenberger's Public Forum Holding

*Rosenberger* involved the distribution of funds to student organizations at the University of Virginia. Wide Awake Publications (“WAP”) was a student group<sup>3</sup> primarily engaged in publishing *Wide Awake*, a journal<sup>4</sup> dedicated to offering a Christian perspective on contemporary issues.<sup>5</sup> Certain student organizations were allowed to apply for funding from the Student Activities Fund (“SAF”) in accordance with the University Guidelines.<sup>6</sup> The Guidelines, however, delineated certain endeavors to which SAF monies could not be directed, including “religious” and “political” activities as well as other activities that would have jeopardized the University’s tax-exempt status.<sup>7</sup> WAP applied for SAF funds in or-

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<sup>3</sup> WAP was registered as a “Contracted Independent Organization” (“CIO”). Any student group that met certain minimal prerequisites was eligible to register as a CIO. *Rosenberger*, 515 U.S. at 823.

<sup>4</sup> The Fourth Circuit noted WAP’s objection to defining *Wide Awake* as a “journal,” preferring instead the word “perspective.” Nomenclature aside, WAP operated analogously to other student-run publications. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 18 F.3d 269, 272 n.4 (4th Cir. 1994).

<sup>5</sup> WAP’s stated purposes included “publishing a magazine of philosophical and religious expression,” “facilitating discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,” and “providing a unifying focus for Christians of multicultural backgrounds.” *Id.* at 271–72. This language is still in WAP’s charter on file with the University. Constitution of Wide Awake Productions, art. 1, [http://www.virginia.edu/newcombhall/sac/search\\_display\\_constitution.php?org\\_id=172](http://www.virginia.edu/newcombhall/sac/search_display_constitution.php?org_id=172) (last visited Sept. 18, 2006).

<sup>6</sup> The University maintained the SAF, to which each student contributed a mandatory fee of \$14 per semester, in order to promote an array of activities “related to the educational purpose of the University.” *Rosenberger*, 515 U.S. at 824. During the 1990–91 academic year, 343 CIOs were registered at the University. Of these, 135 applied for SAF funding, and 118 organizations actually received funding. Fifteen of those 118 organizations were student publications, but according to WAP founder Ronald Rosenberger, none of the fifteen journals provided a “forum for Christian expression,” a void that *Wide Awake* sought to fill. *Rosenberger*, 18 F.3d at 271–72.

<sup>7</sup> *Rosenberger*, 515 U.S. at 825. The Supreme Court noted that only electioneering and lobbying came under the rubric of unfundable “political activities,” whereas funding was theoretically available to organizations that espoused a particular political viewpoint or ideology. By contrast, SAF monies were not available for any “religious activity,” which the Guidelines defined as an activity that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.” *Id.* Although some organizations with religious trappings did receive funding, the University argued that those organizations qualified as “cultural organizations.” Brief for Respondents at 5–6, *Rosenberger*, 515 U.S. 819 (No. 94-329). The difference, according to the Uni-

der to cover \$5862 in printing costs, but the University rejected the request on the grounds that WAP had sought funding for a religious activity.<sup>8</sup> Ronald Rosenberger, the founder of WAP, challenged the University Guidelines as a violation of the First Amendment.

The Supreme Court's decision rested primarily on the conclusion that the University of Virginia had created a limited public forum and, therefore, could not exclude potential participants based on their viewpoint. In essence, the University compelled students to contribute to the SAF and thereby sought to foster a diversity of viewpoints, a goal consistent with the University's mission of providing secular education.<sup>9</sup>

The public forum doctrine is an exception to the axiom that the Free Speech Clause confers only negative rights.<sup>10</sup> While the First Amendment prohibits governmental interference with free speech, it does not create an entitlement to governmental support. Since 1939, though, the Supreme Court has recognized that government ownership of property does not entail an unfettered right to exclude speech.<sup>11</sup> Certain government property, such as streets and parks, has become a "public forum" by virtue of its historical pedigree as a venue for the expression of ideas.<sup>12</sup>

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versity, was that "[k]ey elements of [religious] activities are religious observances and proselytizing." *Id.* at 6; see also Transcript of Oral Argument at 35, *Rosenberger*, 515 U.S. 819 (No. 94-329). The University argued credibly that organizations engaged in academic discussion—regarding politics or religion—do serve the University's mission of pursuing truth, whereas organizations that presume their conclusions to be correct (such as political or religious advocacy organizations) are fundamentally different. Despite the elegance of this distinction, the Court in *Rosenberger* placed great weight on the Guidelines' own definition of "religious activity," which seemed overinclusive. See *Rosenberger*, 515 U.S. at 840.

<sup>8</sup> The Student Council initially rejected the request, and on appeal the University's Student Activities Committee affirmed the Student Council's decision. *Rosenberger*, 18 F.3d at 273-74.

<sup>9</sup> See *Rosenberger*, 515 U.S. at 840-41.

<sup>10</sup> For a succinct overview of the development of the public forum doctrine, see Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 Sup. Ct. Rev. 79, 81-96.

<sup>11</sup> *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939).

<sup>12</sup> See *id.* at 515-16 (observing, in a plurality opinion, that certain public property has "immemorably been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). Professor Kalven coined the phrase "public forum"

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The modern era of public forum analysis recognizes three or four types of public fora, depending on who is counting. At one end of the spectrum is a traditional public forum, which the government can regulate only in rare situations. At the other end is the nonpublic forum, which the government has the most latitude to regulate. In between are designated and limited public fora.<sup>13</sup> Although the Supreme Court has been less than clear in defining this sliding scale, all fora share one thing in common—the requirement of viewpoint neutrality. Even when the government may limit a forum to certain classes of speakers or to certain subject matters, it may never discriminate in a forum based on someone’s viewpoint or perspective.<sup>14</sup> For purposes of this Note, the precise contours of

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to describe such property. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 11–12.

<sup>13</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n* established the initial tripartite formulation of traditional public fora, designated public fora, and nonpublic fora. 460 U.S. 37, 45–46 (1983). In traditional public fora, any regulations must be narrowly tailored to serve a compelling state interest. *Id.* at 45. In nonpublic fora, regulations are permissible if they are reasonable and viewpoint neutral. *Id.* at 46. The jurisprudence surrounding these categories is relatively settled. The middle ground is where controversy and confusion have characterized the Supreme Court’s jurisprudence, lower court opinions, and academic commentary. For instance, it is unclear whether “designated public forum” and “limited public forum” are interchangeable terms. The Ninth Circuit aptly summarized this point of confusion: “Some courts and commentators refer to a ‘designated public forum’ as a ‘limited public forum’ and use the terms interchangeably. But they are not the same, at least not in this circuit.” *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001). In a related vein, the Supreme Court has occasionally treated limited fora as a subset of designated fora and at other times has regarded limited fora as a subset of nonpublic fora. Compare *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (treating *Perry*, which involved a nonpublic forum, as a limited public forum case) with *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 791 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (treating limited public fora as a subset of designated public fora). Finally, it is unclear what kinds of regulations are permissible in this middle ground. Compare *BeVier*, *supra* note 10, at 92–93 (arguing that subject-matter restrictions are permissible in nonpublic fora but not in designated public fora) with Douglas Laycock, *Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 *Harv. L. Rev.* 155, 221 (2004) (“Designated . . . forums can be open to private speakers but may be limited by subject matter or speaker identity.”).

<sup>14</sup> One of the principal debates between the majority and dissenters in *Rosenberger* concerned whether the exclusion of “religious activities” from eligibility for the SAF constituted viewpoint discrimination or a legitimate subject-matter restriction. In any forum, even a nonpublic forum, viewpoint discriminatory restrictions are unconstitutional. Justice Souter, in dissent, noted that certain subject-matter distinctions are permissible in limited public fora: “In a limited-access forum, a speech restriction



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the forum categories are not critical. Instead, the focus is on the requirement of viewpoint neutrality and, specifically, whether it extends beyond the public forum analysis into other areas of government action.

In *Rosenberger*, the Supreme Court held that the University had created a limited public forum. Although the SAF constituted “a forum more in a metaphysical than in a spatial or geographic sense,” the Court held that the same governing principles should obtain.<sup>15</sup> Here the Court quickly elided from geographic fora, like public school facilities,<sup>16</sup> to so-called metaphysical fora, which create audiences, in a very abstract sense, through the expenditure of generally available money. Despite the Court’s seemingly logical progression, the gap between geography and metaphysics is quite wide. In public forum cases, the Court had traditionally concerned itself with *places*, rather than *means*, of communication. As discussed below, the Court had historically drawn a critical distinction between places and funding schemes, yet *Rosenberger* blurred that distinction.

## 2. *The Textual Basis for a Broad Nondiscrimination Principle*

What this Note terms *Rosenberger*’s broad nondiscrimination principle derives textually from the Fourth Circuit opinion and the Supreme Court’s response to it. In no uncertain terms, the Fourth

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must be reasonable in light of the purpose served by the forum as well as viewpoint neutral.” *Rosenberger*, 515 U.S. at 893 n.12 (Souter, J., dissenting) (internal quotations and citations omitted). Justice Souter posited that the essence of viewpoint discrimination is the skewing of public debate. To the extent that the University excluded an entire subject matter from the SAF—religious activities—such a limitation did not entail viewpoint discrimination. The University, in the dissenters’ view, treated all religious perspectives equally and thus did not skew the public debate. *Id.* at 894–96. Justice Kennedy’s opinion for the majority rejected this approach. While conceding that the line between viewpoint and more general content-based discrimination is somewhat murky, the Court held that the University had engaged in viewpoint discrimination. The University Guidelines did not single out specific religions, but the Guidelines’ exclusion did skew public debate by permitting funding for secular, but not religious, perspectives. *Id.* at 830–32 (majority opinion). For an argument that the majority unhelpfully blurred the distinction between subject-matter and viewpoint-based distinctions, see Kent Greenawalt, *Viewpoints From Olympus*, 96 *Colum. L. Rev.* 697, 707–08 (1996).

<sup>15</sup> *Rosenberger*, 515 U.S. at 830.

<sup>16</sup> See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993).

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Circuit held that the University's policy of excluding religious activities from eligibility for SAF funding involved viewpoint discrimination;<sup>17</sup> however, the Fourth Circuit found that a countervailing constitutional value, embodied in the Establishment Clause, ultimately justified the Guidelines' exclusionary policy.<sup>18</sup> The Supreme Court seemed to accept the Fourth Circuit's premises but found that making *Wide Awake* eligible for SAF funds would not run afoul of the Establishment Clause. At least within the public forum context, only an actual Establishment Clause violation could justify facially disparate treatment of religious perspectives.<sup>19</sup>

According to the Fourth Circuit, the University had engaged in viewpoint discrimination when it made religious commentary ineligible for SAF funding.<sup>20</sup> The court emphasized that while the University was under no compulsion to provide funding for student organizations, SAF funds, once generally available, "must be distributed in a viewpoint-neutral manner, *absent considerations of equal constitutional dignity*."<sup>21</sup> Even though the Fourth Circuit found that the University had not created a public forum,<sup>22</sup> viewpoint neutrality was still presumptively required.<sup>23</sup>

Despite finding that the Guidelines entailed viewpoint discrimination, the Fourth Circuit noted that the restrictions could be justifiable if they served a compelling state interest and were narrowly tailored to achieve that purpose. The court held that avoiding a violation of the Establishment Clause was a compelling state interest and that the University would have violated the Establishment Clause if WAP had been eligible for SAF funding.<sup>24</sup> "Using public funds to support a publication so clearly engaged in the propagation of particular religious doctrines would constitute a patent Establishment Clause violation."<sup>25</sup>

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<sup>17</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 18 F.3d 269, 281 (4th Cir. 1994).

<sup>18</sup> *Id.* at 287.

<sup>19</sup> See *Rosenberger*, 515 U.S. at 845–46.

<sup>20</sup> *Rosenberger*, 18 F.3d at 280–81.

<sup>21</sup> *Id.* at 281 (emphasis added).

<sup>22</sup> *Id.* at 278–79.

<sup>23</sup> *Id.* at 280–81.

<sup>24</sup> *Id.* at 281–82, 285. Importantly, the Fourth Circuit found that the University Guidelines neither evinced an impermissible purpose (that is, hostility toward religion) nor inhibited the practice of religion. *Id.* at 284–85.

<sup>25</sup> *Id.* at 285.

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The Supreme Court opinion in *Rosenberger* never explicitly articulated that only an actual Establishment Clause violation can justify abridgement of other First Amendment freedoms. In light of the Fourth Circuit's opinion, however, the Supreme Court decision takes on added significance. Justice Kennedy, in the final paragraph of the majority opinion, stated in relevant part:

To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. . . . There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.<sup>26</sup>

The Supreme Court's language is interesting for two reasons. First, and most obviously, it signals that a nondiscrimination principle might apply not only to the Free Speech Clause but to the Free Exercise Clause as well. The remainder of this Part grapples with the validity of that construction. Second, and somewhat less obviously, the underlying premise of Justice Kennedy's statement stands in contrast to the idea that the Establishment Clause and the Free Exercise Clause are in tension. Instead of treating the Religion Clauses as a minefield of contradictory commands, as the Court had done for decades and as Chief Justice Rehnquist later did in *Locke v. Davey*,<sup>27</sup> Justice Kennedy appeared to regard them as being in a symbiotic relationship.<sup>28</sup> According to this view, the various clauses of the First Amendment do not necessarily conflict; rather, they articulate a standard of neutrality that the state must observe.<sup>29</sup> When the government scrupulously respects the Free Speech and Free Exercise Clauses, it behaves neutrally with re-

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<sup>26</sup> *Rosenberger*, 515 U.S. at 845–46.

<sup>27</sup> 540 U.S. at 718.

<sup>28</sup> See Thomas C. Berg & Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 *Tulsa L. Rev.* 227, 245–46 (2004) (criticizing Chief Justice Rehnquist's characterization of the tension in the Religion Clauses).

<sup>29</sup> The Establishment, Free Exercise, and Free Speech Clauses read as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ." U.S. Const. amend. I.

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spect to religion, such that the Establishment Clause is not even implicated. Thus, under at least some circumstances, there are no competing interests that courts have to balance.

What is also striking about both the Fourth Circuit and Supreme Court opinions is the two courts' agreement that the University had engaged in viewpoint, not just subject-matter, discrimination.<sup>30</sup> By implication, they also agreed that the exclusion of religious activities from SAF eligibility could rest only on the need to preserve a countervailing constitutional value. The Fourth Circuit implied that only an Establishment Clause violation would satisfy this requirement. Justice Kennedy and the majority apparently agreed, such that the real debate between the two courts was whether the University would in fact have run afoul of the Establishment Clause by allowing WAP to receive SAF funds. The Supreme Court answered this question in the negative. Only an *actual* Establishment Clause violation would have justified differential treatment of religious organizations and the perspectives that they articulated. The Supreme Court believed that this query was dispositive of the case, refusing to leave open a cliff effects argument whereby the University could justify differential treatment of religious groups in order to steer clear of *potential* Establishment Clause violations. After *Rosenberger*, there appeared to be no "play in the joints" between the Establishment Clause and the other First Amendment rights.<sup>31</sup>

The textual basis for a nondiscrimination principle thus derives from two aspects of the Supreme Court's opinion in *Rosenberger*. First, excluding religion from the forum was not just a subject-

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<sup>30</sup> Before both courts, the University lost on the question of whether it had simply precluded an entire subject matter from SAF eligibility. At the Fourth Circuit, though, the University won on the question of whether the Establishment Clause justified this exclusion. Somewhat tellingly, the University abandoned its Establishment Clause argument before the Supreme Court, perhaps recognizing that the Court would find the argument unpersuasive. Instead, the University focused on the subject-matter exclusion argument in hopes that it would prove more persuasive before the Supreme Court. See generally Greenawalt, *supra* note 14, for an insightful criticism of both courts' conclusion that the University had drawn viewpoint, not just subject-matter, distinctions.

<sup>31</sup> Cf. *Davey*, 540 U.S. at 718 (holding that the Establishment Clause and Free Exercise Clause "are frequently in tension" and that the Supreme Court has long recognized "room for play in the joints between them" (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970))).

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matter restriction; instead, it was viewpoint discrimination. Second, including religious voices in the forum would not have violated the Establishment Clause. Consequently, there was no countervailing constitutional interest that could have justified viewpoint discrimination. As the following Sections discuss, the fact that the Court advanced this logic in a funding case, far beyond the context of a pure public forum, ultimately gives rise to the idea that *Rosenberger* announced a broad nondiscrimination principle.

*B. Preliminary Concerns About Locating a Broad  
Nondiscrimination Principle in Rosenberger*

Before delving further into the arguments for discerning a broad nondiscrimination principle from *Rosenberger*, this Section addresses two preliminary objections in order to establish that there is at least a colorable argument in favor of a nondiscrimination principle. First, a nondiscrimination principle, as entertained here, is not unqualified. It would not inflate the Free Exercise Clause into a guarantor of any entitlements. One axiom of the Free Exercise Clause is that it does not grant individuals the right to any affirmative support from the state.<sup>32</sup> Thus, the mere fact that particular governmental action would not violate the Establishment Clause does not give a religious organization or speaker an automatic entitlement to government largesse. For instance, after *Zelman v. Simmons-Harris*,<sup>33</sup> localities can provide school vouchers for use at sectarian schools without necessarily running afoul of the Establishment Clause. This does not create a corollary right to demand that the government create a voucher scheme (at least not based upon the Free Exercise Clause). Instead, the nondiscrimination principle applies only once the government has affirmatively acted. Governmental inaction, even when it hinders the exercise of religion, does not violate the Free Exercise Clause.

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<sup>32</sup> See *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) (“The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.”); see also *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988).

<sup>33</sup> 536 U.S. 639 (2002).

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Second, one might object that reading a nondiscrimination principle into the Free Exercise Clause, based on *Rosenberger*, blurs an important distinction between the Free Speech Clause and the Free Exercise Clause. Traditionally, the Free Speech Clause has more independent clout than does the Free Exercise Clause. For instance, questions of “chilling effects” and “overbreadth” are commonplace in Free Speech jurisprudence,<sup>34</sup> such that even potential infringements of Free Speech rights are constitutionally problematic. These doctrines typically have no place in Free Exercise cases, though.<sup>35</sup>

Any differences between the Free Speech and Free Exercise Clauses are arguably much less consequential in light of the concession that the nondiscrimination principle is not unqualified. Traditionally, the Supreme Court has indeed protected speech more than the free exercise of religion when evaluating a generally applicable law;<sup>36</sup> however, the Free Exercise Clause, in at least some contexts, affords equally strong protection against *facially* discriminatory laws.<sup>37</sup> Applying the logic of Free Speech cases in the Free Exercise context is certainly a major obstacle that any proponent of a broad nondiscrimination principle must overcome. But the argument is at least plausible and merits serious consideration.

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<sup>34</sup> See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 243, 255 (2002); *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus*, 482 U.S. 569, 574 (1987); *Houston v. Hill*, 482 U.S. 451, 458 (1987).

<sup>35</sup> See, e.g., *Lying*, 485 U.S. at 441–42 (holding that a law permitting timber harvesting and road construction in an area of a national forest used by Native Americans for religious purposes did not violate the Free Exercise Clause). Although the asserted claim seemed more like a disparate impact claim, the respondents essentially asserted a chilling effect on their ability to practice a religion that was otherwise protected by the Free Exercise Clause. *Id.* at 447. Thus, generally applicable laws are subject to less stringent constitutional scrutiny in the Free Exercise context than in the Free Speech context.

<sup>36</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990) (“The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . .”).

<sup>37</sup> *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) (holding that in the Free Exercise context “the minimum requirement of neutrality is that a law not discriminate on its face”).

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*C. Early Indications of a Broad Nondiscrimination Principle*

In two cases predating *Rosenberger*, the Supreme Court appeared to indulge the notion that the Free Exercise Clause contains a strong and broad principle of nondiscrimination. In both instances, though, the Court quickly disavowed the broad implications of its earlier holdings and effectively cabined them.

*Widmar v. Vincent* marked the first time that the Supreme Court announced a broad nondiscrimination principle.<sup>38</sup> In *Widmar*, the Court held that when the University of Missouri at Kansas City made its facilities generally available to student groups, the University had created a public forum and, therefore, could not exclude religious groups absent a compelling state interest.<sup>39</sup> Although the Court found that avoiding an Establishment Clause violation was a compelling state interest, it held that allowing “equal access” to a public forum would not run afoul of the Establishment Clause.<sup>40</sup> The question then became whether Missouri could pursue a more rigorous separation of church and state. Justice Powell, on behalf of the majority, observed that “the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well.”<sup>41</sup>

Based on Justice Powell’s observation, the Court appeared to articulate a broad nondiscrimination principle with respect to religion fourteen years before *Rosenberger*. In fact, *Widmar* more explicitly included the Free Exercise Clause within the ambit of the nondiscrimination principle. But *Widmar*, unlike *Rosenberger*, did not lead to wide speculation that the nondiscrimination principle would apply outside of the public forum context. As it turned out, *Widmar* did not have legs.

Two principal reasons explain why *Widmar* did not capture the academic imagination the way *Rosenberger* did. First, despite the sweeping language, Justice Powell made clear that the holding was limited to the facts of the case and that the Court was not address-

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<sup>38</sup> 454 U.S. 263 (1981).

<sup>39</sup> *Id.* at 267–70.

<sup>40</sup> *Id.* at 271.

<sup>41</sup> *Id.* at 276.

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ing the Supremacy Clause question.<sup>42</sup> Missouri's asserted interest in ensuring a more rigorous separation of church and state could obviously be trumped by the Federal Constitution. Specifically, the supremacy of the Free Exercise and Free Speech Clauses might have limited Missouri's ability to enact certain nonestablishment provisions, but the Court in *Widmar*, while acknowledging the question, declined to resolve it. Second, the Court had not yet decided cases like *Mueller*,<sup>43</sup> *Witters*,<sup>44</sup> and *Zobrest*,<sup>45</sup> which began to relax the Establishment Clause's no-aid principle. Even in light of those cases, the history and circumstances of *Witters*, recounted in Part II, implied that the government still had wide discretion in preventing state funds from flowing to religious organizations.<sup>46</sup> In short, the constitutional ethos of the day indicated that the Court did not take seriously the notion that a broad nondiscrimination principle would apply outside of the public forum context.

The second case in which the Court appeared to articulate a broad nondiscrimination principle was *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.<sup>47</sup> At issue was a local ordinance banning animal sacrifice, a central tenet of the Santeria religion, which the city council passed when a Santeria congregation announced plans to build a church in the city. The Court, through Justice Kennedy, declared that the state may never "target[] religious beliefs as such" and must behave neutrally with respect to religion.<sup>48</sup> In determining whether the government has singled out religion for disfavored treatment, the Court noted that "the minimum requirement of neutrality is that a law not discriminate on its face."<sup>49</sup>

*Lukumi* included an explicit articulation of a broad nondiscrimination principle, but the Court yet again retreated from the far-reaching implications of the opinion's language. Writing for the Court in *Davey*, Chief Justice Rehnquist limited *Lukumi* by holding that it stands only for the proposition that the state may not ex-

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<sup>42</sup> Id. at 275–76.

<sup>43</sup> *Mueller v. Allen*, 463 U.S. 388 (1983).

<sup>44</sup> *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

<sup>45</sup> *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

<sup>46</sup> See *infra* notes 118–32 and accompanying text.

<sup>47</sup> 508 U.S. 520 (1993).

<sup>48</sup> Id. at 533.

<sup>49</sup> Id.



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press animus toward religion.<sup>50</sup> Having recast the Free Exercise inquiry as one that turned solely on animus, the *Davey* Court found that Washington's constitutional provision, though more restrictive than the federal Establishment Clause, did not evince such hostility. Instead, Washington merely sought to ensure a reasonable separation of church and state consistent with the practice of most states during the Founding period.<sup>51</sup>

Despite *Lukumi*'s broad language indicating that neutrality requires facial nondiscrimination, the context in which the case arose was significantly different than any of the equal access cases. *Lukumi* involved a state regulation of religion itself, rather than a denial of benefits. With respect to the Free Exercise Clause, "[t]he crucial word in the constitutional text is 'prohibit,'"<sup>52</sup> and the city of Hialeah had effectively sought to prohibit the Santeria religion. As Professor Laycock has argued, regulation and funding cases are conceptually different. Although the state, in its regulatory capacity, may not single out religion for less than even-handed treatment, *Davey* stands for the idea that the state, when providing funding to religious and secular organizations, does not have to behave with the same even-handedness.<sup>53</sup> Thus, *Davey* effectively confined the broad nondiscrimination principle that the Court seemed to have announced in *Lukumi*.

#### *D. Emerging Support for Rosenberger's Broad Nondiscrimination Principle*

Unlike other cases that appeared to announce a broad nondiscrimination principle with respect to the Free Exercise Clause, *Rosenberger* was uniquely poised to effectuate what earlier cases could not. *Widmar* had little effect outside the public forum context after *Witters*, and *Lukumi* pertained only to regulation rather than funding. *Rosenberger* was different for several reasons. Most importantly, even though the Court styled it as a public forum case, *Rosenberger* was just as much a funding case. In *Widmar* and other equal access cases, the Court had emphasized that allowing reli-

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<sup>50</sup> *Davey*, 540 U.S. at 720, 724–25.

<sup>51</sup> *Id.* at 723–25.

<sup>52</sup> *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988).

<sup>53</sup> Laycock, *supra* note 13, at 216–17 (2004).

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gious groups to use public facilities on the same terms as other organizations, unlike providing funds to religious organizations, did not have the primary effect of advancing religion. Any benefits to religion were merely “incidental.”<sup>54</sup> Several scholars have criticized this distinction as a fiction: providing direct monetary aid to religion is no different than allowing religious groups to avail themselves of valuable space; the difference in aid is a matter of degree, not kind.<sup>55</sup> Even if the critics’ contentions are correct, the Court has continued to indulge the idea that the difference between access and funding cases matters. To the extent that *Rosenberger* was indeed a funding case, it effectuated a profound change in Establishment Clause jurisprudence. Furthermore, *Rosenberger* contained none of the limiting language that *Widmar* did.<sup>56</sup>

In the immediate aftermath of *Rosenberger*, some commentators intimated that *Rosenberger* embodied a broad nondiscrimination principle. Several scholars, two of whom are now federal appellate court judges, queried whether *Rosenberger*’s prohibitions against viewpoint discrimination would be far-reaching, possibly extending beyond public fora to tuition-assistance programs.<sup>57</sup> Professor Paulsen, in addition to distilling a broad nondiscrimination principle from *Rosenberger*, explicitly argued that the public forum analysis should apply to funding cases.<sup>58</sup> Although the arguments advanced by these scholars rested solely on the analogy between funding situations and the limited public forum created by the University in *Rosenberger*, there was still one missing piece to the puzzle as far as most scholars were concerned—whether the Estab-

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<sup>54</sup> *Widmar v. Vincent*, 454 U.S. 263, 273–74 (1981).

<sup>55</sup> See, e.g., Michael W. McConnell et al., *Religion and the Constitution 767–77* (2002); Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795, 859 n.211 (1993).

<sup>56</sup> See *Widmar*, 454 U.S. 275–76.

<sup>57</sup> See, e.g., McConnell et al., *supra* note 55, at 530 (“After *Rosenberger*, is the state not only permitted but also constitutionally required to give Larry Witters vocational assistance like other students?”); Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada’s “Little Blaine Amendment” and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 580–81 (2002).

<sup>58</sup> Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on “Equal Access” for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 711–12 (1996) (arguing that *Rosenberger* provides the logical foundation for applying limited public forum analysis and giving religious groups equal access to generally available financial benefits).

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lishment Clause permitted extension of the public forum logic in this way. Not until *Zelman v. Simmons-Harris*<sup>59</sup> did the issue squarely present itself.

When the Court decided *Rosenberger*, the no-aid principle was a hallmark of Establishment Clause jurisprudence, such that government programs directly benefiting religion were presumptively unconstitutional.<sup>60</sup> The Court's equal access rulings like *Widmar*, which entitled religious groups to take advantage of limited public fora, were the exception to the rule. In light of a strong no-aid principle, state constitutional provisions that barred any financial aid to religious organizations—such as the Missouri provision at issue in *Widmar* and the Washington provision that led to the *Davey* litigation—perfectly tracked the federal Establishment Clause.<sup>61</sup> Thus, the potential conflict between state nonestablishment provisions and the Free Exercise Clause was not immediately apparent when the Court decided *Rosenberger*.

This changed with *Zelman v. Simmons-Harris*.<sup>62</sup> *Zelman* dealt with a voucher scheme in Cleveland, Ohio, that granted parents a tuition credit if their children attended a private school, including

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<sup>59</sup> 536 U.S. 639 (2002).

<sup>60</sup> The genesis of the no-aid approach was *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (describing the “three main evils” that the Establishment Clause forbids as “sponsorship, financial support, and active involvement of the sovereign in religious activity” (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970))). In the decade before *Rosenberger*, the Court had begun to retreat from a strict application of the no-aid principle, emphasizing instead the concept of neutrality toward religion; however, a majority of the Court still believed that *direct* aid to religious organizations was unconstitutional. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 841 (2000) (O'Connor, J., concurring in the judgment) (controlling opinion) (“[W]e decided *Witters* [*v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986),] and *Zobrest* [*v. Catalina Foothills School District*, 509 U.S. 1 (1993),] on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use.”).

<sup>61</sup> See Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 *Harv. L. Rev.* 1810, 1859 (2004).

<sup>62</sup> Some might argue that the real change occurred earlier when the Supreme Court abandoned the principle that *direct* aid to religion was forbidden. See *Mitchell*, 530 U.S. at 816; *Agostini v. Felton*, 521 U.S. 203, 225 (1997). Although the earlier cases were clearly important, one could still properly describe the benefits at issue in those cases as “incidental” to the schools’ primary curriculum. While the distinction between funding incidental programs versus a school’s primary curriculum might be one of degree, rather than kind, the difference still seemed important. For an argument that *Zelman* represented the true jurisprudential shift, see Schragger, *supra* note 61, at 1859.

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religious institutions, in lieu of public schools. Although the voucher system resulted in some public funds eventually being directed toward religious institutions, the Supreme Court found that the system did not violate the Establishment Clause for two principal reasons: first, the scheme made educational funds available on a neutral basis, irrespective of whether parents chose a secular or sectarian school; second, parents, rather than the state, chose how to spend the tuition credits.<sup>63</sup> The operative phrase became “true private choice,” which cured any Establishment Clause concerns.<sup>64</sup>

The interaction of *Rosenberger* and *Zelman* teed up the question that *Davey* addressed: if preventing an Establishment Clause violation is a compelling state interest (a point on which the Fourth Circuit and the Supreme Court agreed in *Rosenberger*), but the Establishment Clause no longer requires that religious groups be excluded from neutrally available funding schemes, may states continue to enforce their more stringent nonestablishment provisions?<sup>65</sup> In light of the interaction of *Rosenberger* and *Zelman*, many commentators began to postulate that *Rosenberger* would take on new significance.<sup>66</sup> The Establishment Clause was no longer an impediment to the broad nondiscrimination principle announced by *Rosenberger*.

After *Zelman*, the relevant constitutional inquiry became whether viewpoint discrimination is constitutionally problematic outside of the public forum context. Some commentators have improperly focused on whether differentiation based on religion, even in the context of funding schemes, constitutes viewpoint discrimination.<sup>67</sup> After *Rosenberger*, it almost certainly does. Instead, the real focus should be on whether viewpoint discrimination is problematic only in public fora or in other contexts as well. As Part III discusses in greater length, the Court has given two conflicting

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<sup>63</sup> *Zelman*, 536 U.S. at 661–63.

<sup>64</sup> *Id.* at 663.

<sup>65</sup> See Thomas C. Berg, Vouchers and Religious Schools: The New Constitutional Questions, 72 U. Cin. L. Rev. 151, 189 (2003).

<sup>66</sup> See, e.g., Mark Tushnet, Vouchers After *Zelman*, 2002 Sup. Ct. Rev. 1, 18; Joshua Edelstein, Note, *Zelman*, *Davey*, and the Case for Mandatory Government Funding for Religious Education, 46 Ariz. L. Rev. 151, 177–78 (2004).

<sup>67</sup> See F. Philip Manns, Jr., Finding the “Free Play” Between the Free Exercise and Establishment Clauses, 71 Tenn. L. Rev. 657, 681 (2004); Edelstein, *supra* note 66, at 175.

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answers to this question. In *Legal Services Corp. v. Velazquez*,<sup>68</sup> decided after *Rosenberger*, the Court held that viewpoint discrimination was not permissible, even when an actual forum was not at issue. Ten years earlier in *Rust v. Sullivan*,<sup>69</sup> a case predating *Rosenberger*, the Court reached the opposite conclusion—in the funding context, the allocation of money for certain activities, to the exclusion of others, is constitutionally unproblematic.<sup>70</sup> Few scholars acknowledge this doctrinal tension when arguing for or against the applicability of *Rosenberger* in the funding context.<sup>71</sup>

Since *Rosenberger*, and especially since *Zelman*, several scholars have endorsed the idea that *Rosenberger* announced a broad nondiscrimination principle. According to this perspective, viewpoint discrimination is anathema in the funding context just as it is with public fora. Although earlier cases had appeared to announce a broad principle of nondiscrimination against religion, *Rosenberger* was unique because it involved a funding scheme. Consequently, the requirement of viewpoint neutrality that had always characterized the public forum analysis might logically extend to any governmental action, including the decision to create funding programs. If the government must always behave in a viewpoint-neutral fashion, then a broad nondiscrimination principle would exist. The arguments in favor of such a principle gained new steam once *Zelman* made clear that providing funds to religious organizations does not necessarily violate the Establishment Clause. As a matter of logic and jurisprudence, these arguments are certainly plausible and provide the necessary grounding for a broad nondiscrimination principle. The following sections consider whether these arguments can withstand several important criticisms.

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<sup>68</sup> 531 U.S. 533 (2001).

<sup>69</sup> 500 U.S. 173 (1991).

<sup>70</sup> Admittedly, the Court in *Rust* found that the decision to fund certain programs to the exclusion of others did not actually constitute viewpoint discrimination. *Id.* at 194–95. The point may be somewhat academic, but it seems clear that when the government chooses to support certain ideas to the exclusion of others, it has chosen one viewpoint over another. Thus, the better way to understand *Rust* is not that the government did not engage in viewpoint discrimination, but rather that privileging certain viewpoints is unproblematic in the funding context.

<sup>71</sup> But see Berg, *supra* note 65, at 179–86. Professor Berg candidly admits the tension, but would find that voucher schemes are more analogous to the SAF in *Rosenberger* than to the funding at issue in *Rust*. *Id.* at 186.

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*E. Responses to Critics of a Broad Nondiscrimination Principle*

Opposition to the extension of the public forum analysis to funding cases can take many forms. Some opponents draw on inconsequential distinctions between funding schemes and the activities fund at issue in *Rosenberger*;<sup>72</sup> however, several critics have addressed potentially substantial differences between public fora and funding schemes, particularly vouchers.<sup>73</sup> In *Davey*, the Court relied on the fact that public fora are designed to promote a diversity of viewpoints. Only under such specialized circumstances does the command of viewpoint neutrality obtain.<sup>74</sup> Before *Davey*, some scholars anticipated this distinction, arguing that the context of a public forum is so unique as to render its rules inapplicable in other situations. Instead of simply dismissing *Rosenberger* and other public forum cases as inapposite to Free Exercise cases, as the Court did in *Davey*, Professors Lupu and Tuttle have parsed principled distinctions between public fora and other contexts. “Ordinarily . . . the provision of public services—even if they have an expressive component—is conceptually distinct from the creation of a forum

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<sup>72</sup> For instance, some commentators focus on the distinction between direct aid (paying money to a religious organization) and indirect aid (paying money to third parties who then direct the funds to a religious organization, as was the case in *Rosenberger* and *Zelman*). See Rita-Anne O’Neill, Note, The School Voucher Debate After *Zelman*: Can States Be Compelled to Fund Sectarian Schools Under the Federal Constitution?, 44 B.C. L. Rev. 1397, 1399 (2003) (viewing the direct-indirect distinction as significant). As a formalistic matter, the distinction might function as a constitutional decision rule; however, the real constitutional question is whether individuals have directed the funds through private choice, and not the precise number of hands through which the money passes. On a related note, some might point to the language in *Rosenberger* distinguishing the SAF, to which only University students contributed, from a general tax assessment. Again, for constitutional purposes, the distinction should be irrelevant, because regardless of who contributes to the funding scheme, a state institution would still choose whether to make the funds available to religious groups. See Kyle Duncan, Secularism’s Laws: State Blaine Amendments and Religious Persecution, 72 Fordham L. Rev. 493, 568 n.320 (2003) (arguing that the Court’s distinction is unpersuasive).

<sup>73</sup> In an analysis of whether the logic of *Rosenberger* and *Zelman* would require that religious schools be allowed to participate in voucher programs, Professor Tushnet discusses three possible reasons why *Rosenberger* might not be applicable in the funding context. Interestingly, none of the three rests on the proposition that *Rosenberger* is only a public forum case. Tushnet, *supra* note 66, at 19–21.

<sup>74</sup> *Davey*, 540 U.S. at 720 n.3.

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for debate.”<sup>75</sup> That is, only in the narrow circumstance in which government promotes a diversity of viewpoints for the inherent value thereof do the stringent rules of the public forum apply. When the government seeks to accomplish any other goal, it necessarily must choose between competing alternatives. According to this view, the existence of a public forum is a rare instance when the government *must* fund something.

Despite the analytical elegance of differentiating public fora from almost everything else the government chooses to fund, three responses seem plausible. First, and most importantly, *Rosenberger* is a funding case. Courts have frequently observed that *Rosenberger* is a public forum case and thereby implied that it is not applicable to funding cases.<sup>76</sup> This is a false dichotomy because *Rosenberger* is *both* a public forum case and a funding case.<sup>77</sup> Some might object to this characterization of *Rosenberger* since the University did not pay funds directly to a religious organization.<sup>78</sup> Funding cases, however, rarely entail such direct payment of public resources to support the workings of a religious organization. Instead, they most often involve the provision of general resources that greatly benefit such an organization.<sup>79</sup> For instance, in *Board of Education v. Allen*,<sup>80</sup> when New York provided secular textbooks to religious schools, it did not pay funds directly to a sectarian institution, nor did it directly support the schools’ core religious teachings. Nonetheless, one can hardly doubt that *Allen* is a funding case. Similarly, in her *Rosenberger* concurrence, Justice

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<sup>75</sup> Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 *Notre Dame L. Rev.* 917, 980 (2003). Comparing voucher programs and true public fora, Professors Lupu and Tuttle note that “a voucher program may exclude schools that teach that the Earth is flat, even though a public forum on the shape of the planet may not exclude such a view.” *Id.* at 981.

<sup>76</sup> See *infra* notes 186–89, 210–13 and accompanying text.

<sup>77</sup> See Duncan, *supra* note 72, at 569 (arguing that “*Rosenberger* logically applied to a discriminatory funding scheme the principles of religious non-persecution found in the earlier religious speech cases”).

<sup>78</sup> The payments were indirect, and even though WAP was engaged in a “religious activity,” it was not actually a “religious organization.” See *supra* note 7 and accompanying text.

<sup>79</sup> See Laycock, *supra* note 13, at 163.

<sup>80</sup> 392 U.S. 236 (1968).

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O'Connor conceded that funding of a religious activity, albeit indirectly, was at issue.<sup>81</sup>

Perhaps one could argue that *Rosenberger's* status as a public forum case subsumes any trappings it may have of a funding case. The main problem with this approach is that it seeks to convert a disbursement of funds into a public forum and thereby ignore the fact that any money has inured to the benefit of a religious organization. Before *Rosenberger*, the Court had long drawn a distinction between public fora involving *space* and funding schemes involving *money*.<sup>82</sup> Although some scholars have argued that allowing religious groups to use public space is not constitutionally distinct from inviting them to partake of a neutral funding scheme,<sup>83</sup> the difference is more than one of degree. Intuitively, the benefit to a religious organization that avails itself of a physical public forum is *de minimis*, whereas a monetary contribution attains a greater level of significance.

There is also a meaningful doctrinal difference between public fora and funding schemes. If the government permits unfettered speech in a park, it cannot, for example, allow speech by those who think that the Vietnam War was justified and prohibit speech by those who think it was unjustified. By contrast, if the government builds a memorial to Vietnam War veterans, hardly anyone would argue that the government has a concomitant obligation to build a memorial to the war's protesters. Both scenarios—and their commonsense outcomes—correspond to the idea that a meaningful difference exists between places and funding schemes. In public places, where people traditionally congregate and engage in dialogue, viewpoint discrimination is especially odious. But when government spends public money, it necessarily makes policy choices that not everyone will embrace. The state must have wide discretion to prefer certain viewpoints when spending public funds. By holding that money could constitute a public forum, the Court in *Rosenberger* blurred the distinction between equal access cases and

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<sup>81</sup> *Rosenberger*, 515 U.S. at 846–47 (O'Connor, J., concurring).

<sup>82</sup> For an interesting argument that the Court subtly announced a new definition of neutrality with respect to religion by extending the nondiscrimination principle to funding cases, see Jason S. Marks, Only a "Speed Bump" Separating Church and State?, 57 J. Mo. B. 36, 41 (2001).

<sup>83</sup> See *supra* note 55 and accompanying text.



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funding cases, vastly expanding the reach of the nondiscrimination principle beyond the forum context.

The second response to arguments against a broad nondiscrimination principle is that, as Professor Laycock has argued, the Court's analysis in *Rust v. Sullivan* is inapplicable to a funding case in which religion is the basis for differential treatment. For anyone who would find a broad nondiscrimination principle in *Rosenberger*, *Rust* is one of the most problematic cases. At issue was whether the government could prevent family planning facilities that received government funding from discussing abortion with patients. The Supreme Court upheld the restriction. *Rust* essentially stands for the proposition that even though a constitutional right might exist, such as the right to have an abortion, the government does not have to fund the exercise of that right and may even express disapproval of it. Thus, the government may engage in selective funding that intentionally discourages the exercise of the right to have an abortion. Even if *Rust* states a general proposition to this effect, religion arguably is an exception because of the constitutional imperative that government remain neutral toward religion. Although the Free Exercise Clause may not create an absolute entitlement to governmental support for religious activity, the First Amendment requires that the government affirmatively avoid any expression of disapproval. While the government may engage in selective funding to discourage abortions, such discretion is arguably limited with respect to religion.<sup>84</sup>

If the government can persuasively argue that exclusion of religion from a generally available funding scheme is motivated by a strong interest in separationism, rather than animus, perhaps there has been no expression of disapproval. Even in light of this counterargument, though, Professor Laycock seems correct in suggesting that abortion and religion present conceptually different cases. While government may officially disapprove of abortion and

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<sup>84</sup> Berg & Laycock, *supra* note 28, at 235–36; Laycock, *supra* note 13, at 176–78. This argument has intuitive appeal and may well represent a persuasive case for *Rust*'s inapplicability when funds are available to religious organizations; however, there is something question-begging about it. Although the Religion Clauses do prohibit governmental disapproval of religion, defining the concept of disapproval is important. *Davey*, for instance, is cagey about whether the disqualification of devotional theology majors from the Promise Scholarship program constitutes official disapproval. *Davey*, 540 U.S. at 720.

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refuse to fund it, even the taint of governmental disapproval regarding religion is probably impermissible.

The third response to opponents of a nondiscrimination principle is that the goals of the public forum doctrine and the Religion Clauses are often salutary. Importing public forum analysis into funding cases involving religion might thus be legitimate and doctrinally justifiable. Professor BeVier has argued that the categories comprising the modern public forum analysis roughly correspond to notions of when government regulation of speech is most suspect.<sup>85</sup> According to this theory, the public forum doctrine is best understood as reflecting a distortion model, according to which the principal concern of the Free Speech Clause is preventing the government from manipulating public debate. The public forum categories identify those situations in which a skewing of public discourse is most likely and restrains governmental discretion accordingly.<sup>86</sup> In the Religion Clauses context, Professor Laycock has identified a similar anti-skewing principle, which he terms “substantive neutrality.”<sup>87</sup> According to this view, the constitutional test for whether the government has behaved neutrally with respect to religion turns on whether the government has substantively altered the incentives for someone to engage in or abstain from religious exercise.<sup>88</sup>

Read together, the theories advanced by Professor BeVier and Professor Laycock indicate that the First Amendment embodies an anti-skewing principle. This is not to claim that the various doctrines of First Amendment jurisprudence are interchangeable

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<sup>85</sup> BeVier, *supra* note 10, at 121.

<sup>86</sup> *Id.* at 102–05. For instance, regulations of traditional public fora, such as streets and parks, receive the most scrutiny in part because the government has an absolute monopoly over them. *Id.* at 107.

<sup>87</sup> Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 1001 (1990).

<sup>88</sup> *Id.* at 1001–03. For example, in determining whether a prohibition on the consumption of alcohol must except the use of sacramental wine, the relevant inquiry is whether granting or refusing to grant an exemption skews religious incentives. Arguably an exemption does not encourage more religious participation. “It is conceivable that the prospect of a tiny nip would encourage some desperate folks to join a church that uses real wine . . . but only to a law professor or an economist.” *Id.* at 1003. By contrast, failing to grant an exemption for religious uses of wine would severely discourage religious exercise. *Id.* Admittedly, Professor Laycock’s view, though eminently reasonable, has not attracted universal acceptance. See *id.* at 994–95.

parts. But to the extent that a Free Speech doctrine can help effectuate the goals of the Religion Clauses, such doctrinal fluidity could be beneficial. Especially in light of the Court's recent Establishment Clause jurisprudence, which tends to emphasize neutrality over the no-aid principle, the logic of the public forum doctrine fits cleanly into the modern controversy surrounding the funding cases. The newly relaxed Establishment Clause permits religious organizations to take advantage of certain government funds. Now that governments have the option of including religious organizations in funding schemes, a decision either way—to fund or not to fund—reflects an actual choice by the government; it is no longer a result preordained by the Establishment Clause. The government, endowed with new funding discretion, now has the ability to skew individuals' religious options.<sup>89</sup> If an anti-skewing principle is indeed a hallmark of the Religion Clauses, the principles of the public forum doctrine can alleviate the potential for skewing. This might suggest that despite the government's general latitude over funding decisions, those decisions must be viewpoint neutral with respect to religion. Unlike the intractable problem of defining what counts as "disapproval" of religion, the skewing analysis is arguably more objective. In determining whether the government should include religion in a funding scheme, the salient question becomes whether inclusion or exclusion would substantively alter someone's incentive to engage in religious exercise.

Although there are principled reasons for believing that public fora are unique, those reasons do not necessarily refute arguments in favor of finding a broad nondiscrimination principle in *Rosenberger*. As discussed above, there are three main arguments for believing that a nondiscrimination principle is still plausible. First, and most importantly, *Rosenberger* was both a funding case and a public forum case, indicating the Supreme Court's willingness to extend forum logic to funding schemes. Second, differentiation based on religion is inherently suspect, such that a nondiscrimination principle remains viable notwithstanding *Rust*. Finally, extending the public forum doctrine to funding schemes, thereby creating

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<sup>89</sup> One might argue that under the categorical no-aid principle, religious options were always skewed. Even if this is true, the skewing resulted from constitutional compulsion. Skewing is arguably less tolerable when the government has the latitude to make an actual choice.

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a broad nondiscrimination principle, serves to prevent skewing of religious options. Arguments opposing a broad nondiscrimination principle are thus far from conclusive.<sup>90</sup>

*F. Grounding a Nondiscrimination Principle in the Equal Protection Clause*

Given the Supreme Court's current Free Exercise jurisprudence, some judges have suggested that the Equal Protection Clause might offer a more effective way to challenge facial discrimination against religion. Recent cases have emphasized that "prohibit" is the operative word in the Free Exercise Clause, such that exclusion of religious organizations from funding programs might not offend the First Amendment,<sup>91</sup> a proposition that *Davey* supported.<sup>92</sup> Al-

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<sup>90</sup> Some scholars have made two other arguments in favor of a nondiscrimination principle, but these arguments are less convincing and do not usefully advance the debate. The first argument is that funding schemes, such as vouchers or scholarships, are not simply analogous to public fora but actually are fora for speech. According to this argument, schools teach from different viewpoints; voucher programs and scholarships seek to encourage such diversity; hence, vouchers are fora for speech. See, e.g., Berg, *supra* note 65, at 179. The supposed syllogism fails because the relevant question is whether the vouchers or scholarships, not the schools as such, function as fora for expression. When the government adopts a funding scheme enabling students to attend the private school of their choice, the government promotes education, not the exchange of ideas. To be sure, education involves the dissemination of ideas from specific viewpoints, but the various schools that participate in a voucher program are not in dialogue among themselves about the viewpoints that they promote.

The second line of inquiry that seems unfruitful concerns the dichotomy that scholars and courts sometimes draw by asking who is speaking—the government or a private individual? See *infra* notes 152–58 and accompanying text; see also Berg & Laycock, *supra* note 28, at 233; Duncan, *supra* note 72, at 585; Michael Kavey, Note, Private Voucher Schools and the First Amendment Right To Discriminate, 113 *Yale L.J.* 743, 757 (2003). The dichotomy is often false, though, because funding schemes frequently have nothing to do with communicating a message or, at most, have only an incidental effect on speech. When the government funds a particular activity, the government might be unconcerned with any speech attendant to the activity. For instance, if the government provides financial support on a neutral basis to soup kitchens, it seems highly unlikely that the government is interested in any particular message. The purpose of the program is to feed the indigent. It would be quixotic and nonsensical to ask who is speaking and what the message is.

<sup>91</sup> See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988).

<sup>92</sup> See *Davey*, 540 U.S. at 720; see also *Eulitt v. Me., Dep't of Educ.* 386 F.3d 344, 354 (1st Cir. 2004). Some scholars have objected to the Court's conclusion that the word "prohibit" in the Free Exercise Clause is narrower than the phrases pertaining to other First Amendment freedoms, arguing that the Court's interpretation is incorrect

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though *Davey* found that the Equal Protection claim essentially piggy-backed on the Free Exercise argument,<sup>93</sup> this conclusion is premature.

Even in light of “play in the joints” between what the Establishment Clause forbids and what the Free Exercise Clause requires, the Equal Protection Clause may require that funding schemes not *facially* discriminate against religion. The Court in *Davey* said that without a Free Exercise right, the plaintiff had no fundamental right to even-handed treatment of religion in the context of a funding scheme. In the absence of a fundamental right, a law that is not facially neutral with respect to religion need survive only rational basis scrutiny. *Davey* found that Washington’s asserted interest in maintaining strict separation of church and state could withstand such scrutiny.<sup>94</sup> Despite the lack of a fundamental right based on the Free Exercise Clause, other courts have given more credence to an Equal Protection challenge based on facially disparate treatment of religion. For instance, a Maine voucher program prohibited parents from using state funds to send their children to private sectarian schools. The Supreme Judicial Court of Maine and the First Circuit upheld the facial differentiation based on religion, opining that the Establishment Clause required such a result.<sup>95</sup> (Both cases preceded *Zelman*, the Supreme Court decision holding that the Establishment Clause does not necessarily prohibit voucher programs involving sectarian schools.) The Maine court observed, however, that the Equal Protection Clause would be an impediment to the disparate treatment of religion unless the Establishment Clause required such differentiation.<sup>96</sup> In a concurrence,

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as a matter of original intent. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1486–88 (1990).

<sup>93</sup> *Davey*, 540 U.S. at 720 n.3.

<sup>94</sup> *Id.* at 720–22.

<sup>95</sup> *Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999); *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127, 147 (Me. 1999).

<sup>96</sup> *Bagley*, 728 A.2d at 138 (conversely noting that “[i]f the exclusion is required in order to comply with the Establishment Clause, the State will have presented a compelling justification for the disparate treatment of religious schools, and the parents’ Equal Protection claim will fail”); see also *id.* at 150 (Clifford, J., dissenting) (arguing that “the Equal Protection Clause prohibits discrimination based on religion in a program providing . . . [tuition] aid unless the discrimination is absolutely necessary to avoid Establishment Clause violations”).

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Judge Campbell of the First Circuit endorsed the Maine court's dictum.<sup>97</sup>

Supposing that a plaintiff cannot establish a Free Exercise right to avail himself of a funding scheme, he might be able to argue that facially disparate treatment of religion cannot satisfy even rational basis scrutiny absent an *actual* Establishment Clause violation. Such an approach would essentially impute animus to a state that singles out religion for differential treatment. *Davey* refused to impute animus to the State of Washington; however, the argument still seems plausible, principally because it simply shifts the burden of proof to the defendant to justify why a funding scheme should not treat religion evenhandedly. Although the argument might be difficult after *Davey*, it is at least colorable.

## II. "PLAY IN THE JOINTS" CASES

Part I examined the first line of precedent—the public forum cases—and focused specifically on *Rosenberger*. Based on the text of the opinion and the fact that *Rosenberger* was a funding case, Part I posited that the Court arguably announced a broad nondiscrimination principle with respect to religion. Such a conclusion, however, does not exist in isolation. This Part begins the process of triangulating the three competing lines of cases by turning to the second set of precedent, the “play in the joints” cases. It starts with a brief consideration of the Supreme Court's opinion in *Locke v. Davey*,<sup>98</sup> the first Religion Clauses case to endorse the maxim of “play in the joints” in an actual holding. Although the Court in *Davey* claimed that “play in the joints” had long existed as a fixture of church and state jurisprudence, the Court's assertion is somewhat hasty. After examining the precedents in support of a “play in the joints” theory, this Part concludes that, even though the evidence is far from dispositive, “play in the joints” had existed as a constitutional doctrine before *Davey* and that *Davey* faithfully applied that doctrine. While the notion of “play in the joints” has generated little analysis in the wake of *Davey*, it will probably constitute *Davey*'s most enduring legacy.

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<sup>97</sup> *Strout*, 178 F.3d at 66 n.13 (Campbell, J., concurring).

<sup>98</sup> 540 U.S. 712 (2004).

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A. *Locke v. Davey*

In 1999, the State of Washington created a Promise Scholarship Program that entitled all Washington students meeting certain requirements to a scholarship in excess of \$1000 for college education.<sup>99</sup> Any student receiving the award was bound by only two conditions: he or she (1) had to be enrolled at least half-time and (2) was not permitted to study devotional theology.<sup>100</sup> Joshua Davey, a student of devotional theology at Northwest College, alleged that the law facially discriminated against religion and, therefore, was unconstitutional. Washington argued in defense that its constitution required an even more rigorous separation of church and state than did the federal Constitution.<sup>101</sup>

Until recently, the exclusion of theology majors from the Promise Scholarship program would have seemed unproblematic to most jurists, because relevant Supreme Court precedents indicated that the federal Establishment Clause required such an exclusion.<sup>102</sup> The Supreme Court's decision in *Zelman v. Simmons-Harris*,<sup>103</sup> though, cast the question in an entirely new light. *Zelman* was the Cleveland voucher case in which the Court held that a voucher scheme allowing parents to send their children to sectarian schools did not violate the Establishment Clause.<sup>104</sup> With *Zelman*, the

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<sup>99</sup> Students had to graduate in the top 15% of their high school classes, score at least 1200 on the SAT or 27 on the ACT, and have a family income of less than 135% of the state's median income. The scholarship carried a value of \$1,125 for the 1999–2000 academic year and \$1,542 for the 2000–01 academic year. *Id.* at 715–16.

<sup>100</sup> *Id.* at 716.

<sup>101</sup> *Id.* at 719 n.2 (“No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” (quoting Wash. Const. art. I, § 11)).

<sup>102</sup> Some might take issue with this assertion. In *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), the Court held that the Establishment Clause permitted a recipient of state scholarship funding to attend a private religious vocational school of his choosing. Similarly, the Court in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), upheld against an Establishment Clause challenge the provision of a sign-language interpreter to a deaf child attending a religious school. But both cases are notable for their emphasis on the fact that in neither situation would the state be directly funding religious education as such. By contrast, general voucher schemes seem qualitatively different and thus more problematic under the Establishment Clause because state funds would arguably support the inherently religious aspects of a sectarian school's curriculum.

<sup>103</sup> 536 U.S. 639 (2002).

<sup>104</sup> See *supra* notes 56–60 and accompanying text.

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Court seemed to invite the question that it confronted two years later in *Davey*: if the Establishment Clause does not *prohibit* the inclusion of religious schools in voucher or scholarship schemes, does the Free Exercise Clause *require* that such programs be neutral with respect to religion? *Davey* responded in the negative. The Supreme Court issued a short opinion that focused on whether Washington could enforce a more stringent nonestablishment principle than the Establishment Clause required.

The lynchpin of Chief Justice Rehnquist's analysis in *Davey* was his invocation of "play in the joints," the logic of which the Chief Justice succinctly expressed:

[T]he Establishment Clause and the Free Exercise Clause[] are frequently in tension. Yet we have long said that "there is room for play in the joints" between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.<sup>105</sup>

Aside from the doctrinal holding, which ultimately proved dispositive of the case, there are two notable elements to this quotation. First, the majority treated as given that the Establishment Clause and Free Exercise Clause are in tension. If, as Supreme Court precedent often indicates, the Establishment Clause prohibits the government from "aiding" religion and the Free Exercise Clause requires that religion be treated evenhandedly, there is indeed a tension. *Davey* is the quintessential situation in which the conflict arises. Some jurists and scholars have taken issue with this characterization, though, typically arguing that the Supreme Court has *created* the insuperable tension by unduly expanding the reach of the Establishment Clause.<sup>106</sup> To the extent that the Chief Justice

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<sup>105</sup> *Davey*, 540 U.S. at 718–19 (citations omitted).

<sup>106</sup> Berg & Laycock, *supra* note 28, at 245–46 ("The Religion Clauses should be read as complementary aspects of a single principle. To interpret them as conflicting is, as one of us has previously argued, 'a mistake at the most fundamental level.'"); see also *Sherbert v. Verner*, 374 U.S. 398, 414 (1963) (Stewart, J., concurring in result) (observing that "there are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause"); *id.* at 416 (arguing that "it is the Court's duty to face up to the dilemma posed by the conflict between the Free Exercise Clause of the Constitution and the Establishment Clause *as interpreted by the Court*") (emphasis added); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 Sup. Ct. Rev. 123, 150–53.



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acknowledged an inherent tension, he signaled that *Davey* was not intended to be a departure from existing precedent. Second, and more importantly, the Chief Justice implied that the Court had long embraced “play in the joints” as an integral part of the Religion Clauses. This implication, though, is an overstatement, as discussed in the following Section. The remainder of this Part explores the extent to which the theory of “play in the joints” was part of the Court’s jurisprudence and whether *Davey* faithfully employed the concept.

### *B. Origins of “Play in the Joints”*

The phrase “play in the joints” comes from a 1970 case, *Walz v. Tax Commission*, in which the concept at least partially animated the Court’s decision.<sup>107</sup> Although several Supreme Court opinions have alluded to this idea since 1963, “play in the joints” hardly enjoyed the status of settled doctrine. This Section traces the evolution of the theory, which clearly inspired the thinking of several Justices over the years but never figured into an actual holding by the Supreme Court until *Davey*.

#### *I. Sherbert*

Chief Justice Burger coined the phrase “play in the joints” in *Walz*, but, as he readily acknowledged, the concept traces back at least to Justice Harlan’s dissent in *Sherbert v. Verner*.<sup>108</sup> At issue in *Sherbert* was whether South Carolina could deny unemployment benefits to a woman who declined to accept employment that would require her to work on Saturday, the day she observed as the Sabbath. The Court held that the Free Exercise Clause required that South Carolina’s unemployment law include an exemption for Saturday Sabbatarians.<sup>109</sup> Justice Harlan wrote a dissent, the tenor of which is instructive. A dissent could have taken several tacks. First, it might have noted that the Court’s Establishment Clause jurisprudence forbade any overt accommodation of religion, such that exceptions for Saturday Sabbatarians would violate

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<sup>107</sup> 397 U.S. 664, 669 (1970).

<sup>108</sup> *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting); see *Walz*, 397 U.S. at 669.

<sup>109</sup> *Sherbert*, 374 U.S. at 409–10.

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the no-aid principle.<sup>110</sup> Second, it might have argued that neutral laws by definition cannot violate the Free Exercise Clause because laws that are generally applicable, even if they burden religious exercise, pass constitutional muster. This approach is similar to the Court's current Free Exercise jurisprudence.<sup>111</sup> Justice Harlan, though, preferred a third alternative, a middle ground between the majority opinion that categorically required South Carolina to create an exception and those who argued that South Carolina was forbidden to make any accommodations based on religion. Justice Harlan explained his position as follows:

[I]t would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements for persons like [Mrs. Sherbert]. The constitutional obligation of "neutrality" is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.<sup>112</sup>

Thus, according to Justice Harlan, the Free Exercise Clause did not command South Carolina to create an exception, but neither did the Establishment Clause forbid it.

## 2. Walz

Although Justice Harlan had dissented in *Sherbert*, the Court endorsed his approach in *Walz*. At issue in *Walz* was a New York property tax exemption that applied to "real or personal property used exclusively for religious, educational or charitable purposes."<sup>113</sup> A New York resident challenged the exemption as a violation of the Establishment Clause.<sup>114</sup> Writing for eight Justices, Chief Justice Burger placed great emphasis on the notion that the Free Exercise Clause does not necessarily require that which the Establishment Clause does not forbid. After quoting from Justice

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<sup>110</sup> Justice Stewart made this point in his separate opinion in *Sherbert*. *Id.* at 413–17 (Stewart, J., concurring in result).

<sup>111</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 879–80 (1990); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451–52 (1988).

<sup>112</sup> *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting) (emphasis in original) (citation omitted).

<sup>113</sup> *Walz*, 397 U.S. at 666–67.

<sup>114</sup> *Id.*

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Harlan's dissent in *Sherbert*, Chief Justice Burger offered his gloss on the Religion Clauses.

The general principle deducible from the First Amendment . . . is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.<sup>115</sup>

Similarly, the Chief Justice later observed that “[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.”<sup>116</sup> One should note that the type of accommodation that the Chief Justice discussed in *Walz* was different than the accommodation at issue in *Sherbert*. In *Sherbert*, the Court held that the Free Exercise Clause required the law to include an exemption for religious observation and nothing else. By contrast, the accommodation at issue in *Walz* was a benefit that the government had also made available to other charitable organizations. Perhaps the Court in *Walz* was imprecise when referring to the benefit scheme as an “accommodation” of religion, but the terminology was not consequential for the Court’s “play in the joints” analysis.

Given the centrality of the “play in the joints” theory in the Court’s opinion, combined with the nearly unanimous support for the opinion, the concept arguably acquired doctrinal significance. The problem, and one of the great mysteries of the opinion, is that for all of the attention the Chief Justice devoted to crafting a theory of “play in the joints,” his efforts yielded little more than a superfluous, albeit catchy, turn of phrase. *Walz* was an Establishment Clause case, not a Free Exercise case. There was no need for the Court to mediate the competing demands of the two clauses. If a religious organization had claimed that the Free Exercise Clause entitled it to a property tax exemption, and a citizen objected based on the Establishment Clause, the case would squarely have called for the analysis that Chief Justice Burger undertook. As it

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<sup>115</sup> *Id.* at 669.

<sup>116</sup> *Id.* at 673.

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was, though, only the Establishment Clause was at issue.<sup>117</sup> Thus, the broad language with which Chief Justice Burger announced and developed a theory of “play in the joints” was in dicta, hardly creating settled doctrine.

### 3. Witters

The last major case in this line of precedent was *Witters v. Washington Department of Services for the Blind*,<sup>118</sup> arguably the most relevant case for analyzing the issues presented in *Davey*. By statute, Washington provided financial assistance for blind individuals to obtain educational and vocational training. When Larry Witters applied to the Washington Commission for the Blind in order to attend a private Christian college, the Commission denied the request, relying on Washington’s state constitutional prohibition against funding “religious instruction.”<sup>119</sup> Interestingly, the state constitutional provision was the same one at issue in *Davey*.<sup>120</sup> The Court found that inclusion of religious institutions in the assistance program would not violate the Establishment Clause,<sup>121</sup> but it declined to reach the Free Exercise question:

On remand, the state court is of course free to consider the applicability of the “far stricter” dictates of the Washington State Constitution . . . . We decline petitioner’s invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation

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<sup>117</sup> See *id.* at 667 (“The essence of appellant’s contention was that the . . . grant of an exemption . . . violates provisions prohibiting establishment of religion under the First Amendment which under the Fourteenth Amendment is binding on the states.”). Justice Brennan’s concurrence focused only on whether the exemption violated the Establishment Clause. *Id.* at 680–94 (Brennan, J., concurring).

<sup>118</sup> 474 U.S. 481 (1986).

<sup>119</sup> *Id.* at 483–84.

<sup>120</sup> Wash. Const. art. I, § 11; see *Davey*, 540 U.S. at 719 n.2; *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 484 (1986).

<sup>121</sup> The majority opinion by Justice Marshall emphasized that the state gave financial aid to students who then could direct the money to the institution of their choosing. For Justice Marshall, the element of private choice alleviated any Establishment Clause concerns, such that there was no state action in support of religion. *Witters*, 474 U.S. at 487–89. Justice Powell’s concurrence underscored that *Mueller v. Allen*, 463 U.S. 388 (1983), provided precedential support for the Court’s holding that the program at issue in *Witters* would not violate the Establishment Clause. *Witters*, 474 U.S. at 490–92 (Powell, J., concurring).

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aid to petitioner regardless of what the State Constitution commands or further factual development reveals, and we express no opinion on that matter.<sup>122</sup>

By refusing to answer the Free Exercise question, the Court seemed to take a minimalist approach.

On remand, the Washington Supreme Court had no trouble concluding that the Washington Constitution created an absolute bar to aiding religious instruction.<sup>123</sup> Furthermore, in finding that the denial of the benefit did not have a coercive effect on individuals' private choices, the court concluded that the Washington Constitution did not violate the federal Free Exercise Clause.<sup>124</sup> The United States Supreme Court denied certiorari on this question.<sup>125</sup>

As a matter of precedent, the denial of certiorari meant nothing,<sup>126</sup> such that the Supreme Court remained agnostic about whether the Free Exercise Clause should prevent Washington from enforcing its stricter nonestablishment principle. The history of *Witters*, though, is quite instructive. In Part III of the Supreme Court opinion, Justice Marshall went to great lengths to explain that the Court's holding invalidated only Washington's interpretation of the reach of the federal Establishment Clause. The Court declined to address the Free Exercise issue. Although this appears to be an act of restraint, it is an odd exercise of judicial modesty unless the Supreme Court believed that Washington could indeed apply its stricter nonestablishment provision without running afoul of the federal Free Exercise Clause.

The first time that *Witters* came before the Washington Supreme Court, that court fully addressed the Establishment Clause and the Free Exercise Clause. Since the court concluded that the program was invalid under the federal Establishment Clause, it declined to address the Washington Constitution's "far stricter" nonestablishment provision.<sup>127</sup> If the Supreme Court believed that there was a colorable argument that Washington had misinterpreted both of

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<sup>122</sup> *Witters*, 474 U.S. at 489–90 (citations omitted) (emphasis in original).

<sup>123</sup> *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1121–22 (Wash. 1989).

<sup>124</sup> *Id.* at 1122–23.

<sup>125</sup> *Witters v. Wash. Dep't of Servs. for the Blind*, 493 U.S. 850 (1989).

<sup>126</sup> See, e.g., *Brown v. Allen*, 344 U.S. 443, 491–92 (1953).

<sup>127</sup> *Witters v. State Comm'n for the Blind*, 689 P.2d 53, 55–58 (Wash. 1984).

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the federal Religion Clauses, there is no apparent reason why it would have addressed only one of them.<sup>128</sup>

The most logical explanation for the Supreme Court's actions is that while the Washington Supreme Court had incorrectly interpreted the Establishment Clause, it had faithfully applied the Free Exercise precedents. On closer examination, this seems accurate as a matter of doctrine. Although Justice Marshall's majority opinion did not substantively address *Mueller v. Allen*,<sup>129</sup> five Justices made clear that *Mueller* controlled the Establishment Clause inquiry in *Witters*.<sup>130</sup> In *Mueller*, the Court upheld a tax deduction for educational expenses, even when the expenses involved sectarian school tuition, because the benefit was neutrally available and the result of private choice.<sup>131</sup> To the extent that *Witters* involved an analogous program, *Mueller* was directly on point, and the Washington Supreme Court's decision in *Witters* misapplied governing Establishment Clause precedent. By contrast, the Supreme Court likely viewed Washington's application of the Free Exercise precedents as essentially correct. The first *Witters* decision by the Washington Supreme Court concluded that the Free Exercise Clause did not require the state to make financial aid available for the study of religion.<sup>132</sup> Despite the ripeness of the Free Exercise question, the Supreme Court did not address the issue in its 1986 decision and did not grant certiorari on the question in 1989. One can thus reasonably infer that the Court believed Washington had correctly applied the Free Exercise Clause. If that is the case, the history of

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<sup>128</sup> One might suppose that the Supreme Court wanted to give the Washington court an opportunity to construe its nonestablishment provision independently of the federal Establishment Clause. Theoretically, it is possible that the state court on remand might have interpreted the Washington Constitution to permit inclusion of religious schools. If the state court had taken this approach and allowed inclusion of religious options, the Free Exercise question might have become moot. The problem is that the state court had given no indication that Washington's nonestablishment principle at all hinged on the federal Establishment Clause, and the state court had already opined that Washington's constitutional provision was "far stricter" than the federal Establishment Clause. Thus, a decision by the Washington court on remand in no way would have mooted any potential Free Exercise question that *Witters* raised.

<sup>129</sup> 463 U.S. 388 (1983).

<sup>130</sup> *Witters*, 474 U.S. at 490 (White, J., concurring); *id.* at 490–92 (Powell, J., concurring, joined by Chief Justice Burger and Justice Rehnquist); *id.* at 493 (O'Connor, J., concurring in part and concurring in judgment).

<sup>131</sup> *Mueller*, 463 U.S. at 398–99.

<sup>132</sup> *Witters*, 689 P.2d at 57.

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*Witters* would support the notion of “play in the joints”—the Establishment Clause did not prohibit Washington from making financial aid available to students of religion, but neither did the Free Exercise Clause require an opposite result.

The evidence for a theory of “play in the joints”—Justice Harlan’s dissent in *Sherbert*, an extensive discussion of the concept in *Walz* (albeit in dicta), and the history of *Witters*—is far from overwhelming. Nevertheless, it did enjoy a certain historical pedigree prior to the Court’s *Davey* decision.

*C. Did Davey Faithfully Apply the “Play in the Joints” Theory?*

Despite a flurry of commentary in the wake of *Davey*, few academics have seriously addressed whether *Davey* faithfully applied the concept of “play in the joints.” The obvious counterargument to *Davey*—that the Free Exercise Clause embodies a principle of neutrality—has abounded, but only one scholar seems to have met the Court on its own turf. Professor Manns has argued that the “play in the joints” theory to which *Walz* gave voice is legitimate, but it is moored in the axiom that government must always behave neutrally with respect to religion. What he terms “true *Walz* free play” should govern assessments of whether religious organizations can participate in government funding schemes. “True *Walz* free play” is present when religion motivated neither “(1) the creation of the subsidized and non-subsidized classes [n]or (2) the assignment of religion to a particular class.”<sup>133</sup> When the government creates a general public benefit, it must decide whether religious institutions are sufficiently analogous to the secular institutions that partake of the benefit. If the religious and secular institutions are clearly analogous, the benefit should be available on a neutral basis to all similarly situated institutions. Only when there is a credible argument that the religious and secular institutions do not share the same relevant characteristics for purposes of the public benefit can there be “true free play.”<sup>134</sup> Thus, Professor Manns essentially argues that there is a zone of discretion within which the state may choose to include religion in a general program or exclude religion

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<sup>133</sup> Manns, *supra* note 67, at 659.

<sup>134</sup> See *id.* at 664.

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from the program; however, the zone of discretion is quite limited.<sup>135</sup>

Professor Manns cites the circumstances and logic of *Walz* as illustrative of “true free play.” New York had created a property tax exemption for nonprofit organizations that stood in a “harmonious relationship to the community” and fostered its “moral or mental improvement.”<sup>136</sup> According to Professor Manns, New York could have reasonably placed religious organizations in either the favored or disfavored group based on an assessment of whether religious groups met the neutral, secular objectives of the tax exemption. This is “true *Walz* free play.”<sup>137</sup> Underscoring this interpretation of *Walz* was the Court’s emphasis on the secular objectives of the tax exemption and the fact that the exemptions neither advanced nor inhibited religion.<sup>138</sup> Unlike in *Walz*, the religion-based classification in *Davey* violated both prongs of the “free play” analysis. Religion qua religion was a motivating factor in the creation of the favored and disfavored categories—devotional theology versus all other majors. With the violation of the first element, attaining the second element of neutral categorization became impossible.<sup>139</sup>

Professor Manns brings theoretical clarity to the “play in the joints” debate, but his analysis seems to apply to only one case—*Walz*. This criticism may be slightly unfair because *Walz*, after all, is the only case to have developed even a semblance of a justification for the “play in the joints” theory. Justice Harlan’s dissent in *Sherbert*, the history of *Witters*, and even *Davey* itself do little more than draw on the intuition that a zone of discretion for state action exists between the prohibitions of the Establishment Clause and the requirements of the Free Exercise Clause. Nonetheless, what Professor Manns refers to as “true *Walz* free play” does not appear to offer a generalizable theory. In *Sherbert*, Justice Harlan made clear that, in his view, South Carolina could permissibly create an

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<sup>135</sup> This interpretation of “play in the joints” seems to address Justice Scalia’s concern that “play in the joints,” as presented by the majority in *Davey*, would provide no practical bounds on the state’s authority to discriminate against religion. See *Davey*, 540 U.S. at 730 & n.2 (Scalia, J., dissenting).

<sup>136</sup> *Walz v. Tax Comm’n*, 397 U.S. 664, 667 n.1, 672 (1970).

<sup>137</sup> Manns, *supra* note 67, at 666–67.

<sup>138</sup> *Id.* at 666.

<sup>139</sup> *Id.* at 668.



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exception to an otherwise neutral unemployment statute for Saturday Sabbatarians.<sup>140</sup> Although the Court did not decide *Sherbert* as a “play in the joints” case, but rather required the state to create an accommodation, neutrality is arguably lacking—the Court sanctioned facially differential treatment of religion. More tellingly, the history of *Witters* indicates that the Court found unobjectionable the very state constitutional provision that Professor Manns, in the context of *Davey*, claims is a violation of “true *Walz* free play.” Unlike the neutral benefit scheme at issue in *Walz*, the Washington Constitution singles out religion for disparate treatment.

In addition to the fact that Professor Manns’s theory does not apply to the full panoply of cases in which the Court has advanced the logic of “play in the joints,” the theory depends almost entirely on the analytical baseline and the level of abstraction at which the inquiry is cast. Justice Scalia noted the baseline problem in *Davey*, arguing that a generally available benefit is the proper baseline for assessing whether the state has discriminated against religion.<sup>141</sup> Similarly, in *Walz* the question turned on whether the proper baseline was that all institutions, including religious ones, were subject to the same property tax regime or, instead, that nonprofit organizations were all eligible for a tax exemption. Without a coherent theory of which baseline is appropriate, Professor Manns’s theory can do little work. Furthermore, absent the most explicit animus toward a particular religious viewpoint, the level of abstraction is consequential. The Washington constitutional provision calling for greater separation of church and state, when cast at a low level of abstraction, mandates differential treatment of religion and thereby violates the tenets of “true *Walz* free play.” At a higher level of abstraction, though, the provision simply seeks to ensure greater autonomy for the spheres of government and religion. From an ex ante perspective, then, Washington’s nonestablishment provision seeks neither to inhibit nor to advance religion.

The theory that Professor Manns articulates has a certain appeal, but it may not do much work in practice. Although *Davey*, when seen through the lens of *Walz*, may appear to violate “true *Walz* free play,” so too do Justice Harlan’s preferred resolution of *Sher-*

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<sup>140</sup> *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting).

<sup>141</sup> *Davey*, 540 U.S. at 726–27 (Scalia, J., dissenting).

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*bert* and the result in *Witters*, which the Court implicitly sanctioned. A thorough appraisal of the entire line of “play in the joints” cases, however tenuous they may be, reveals that *Davey* was not out of step with the relevant precedents. Admittedly, the precedents are susceptible to the criticism that Professor Manns and Justice Scalia level against the theory of “play in the joints”—it has no limiting principle. The side constraints that Professor Manns posits might be reasonable and advisable, but the Court has not embraced them as a general matter. Despite all of these criticisms, as well as arguments in favor of other analytical tools discussed in the following Sections, *Davey*’s “play in the joints” logic seems consonant with the case law.

### III. THE FUNDING CASES AND UNCONSTITUTIONAL CONDITIONS

This Part turns to the last line of precedent—the government funding cases. In general, the government has wide latitude to fund those activities that advance its desired policies and to refuse to fund other activities. An important limitation on this maxim is the proscription of unconstitutional conditions. A rich literature exists on the topic,<sup>142</sup> but an in-depth exploration of unconstitutional conditions is not necessary for present purposes. Instead, this Part sketches the basic idea of unconstitutional conditions in order to provide some context for the two cases most relevant to this analysis, *Rust v. Sullivan*<sup>143</sup> and *Legal Services Corp. v. Velazquez*.<sup>144</sup> *Rust* and *Velazquez*, each involving funding schemes created by the government, grappled with whether the viewpoint neutrality requirement of the public forum analysis was applicable to funding cases.

The essence of unconstitutional conditions theory is that “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may

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<sup>142</sup> See, e.g., Mitchell N. Berman, Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions, 90 Geo. L.J. 1 (2001); David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675 (1992); Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989).

<sup>143</sup> 500 U.S. 173 (1991).

<sup>144</sup> 531 U.S. 533 (2001).

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withhold that benefit altogether.”<sup>145</sup> For the purposes of assessing *Rust* and *Velazquez*, as well as their interaction with the public forum cases, the most important precedent dealing with unconstitutional conditions is *FCC v. League of Women Voters*.<sup>146</sup> The Court demarcated what the government could legitimately decline to fund while still steering clear of an unconstitutional condition. Although the government can specify how state funds are to be spent, it may not place conditions on the recipient’s other, unrelated activities.<sup>147</sup> If it is feasible to separate the government-funded activities from other activities that the government does not want to support, the Court is more likely to sustain a funding restriction.<sup>148</sup>

In *Rust*, the Court upheld a provision of Title X that prevented family planning facilities receiving government assistance from discussing abortion with patients. Much of the Court’s logic rested on the fact that the activities that the government wanted to fund were separable from other activities, such as abortion counseling. In other words, a family planning facility could maintain a “separate and independent” program that could advise patients about abortion and would remain distinct from the projects benefiting from governmental aid.<sup>149</sup> By contrast, *Velazquez* held that the Legal Services Corporation (“LSC”), which received government funds to help represent indigent clients, could not be subject to conditions preventing LSC lawyers from challenging the constitutionality of welfare laws on behalf of their clients. According to the Court, differentiating the types of arguments that a lawyer could

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<sup>145</sup> Sullivan, *supra* note 142, at 1415. For example, in one of the earliest unconstitutional conditions cases, *Speiser v. Randall*, the Court held that California could not condition a property tax exemption for veterans on the swearing of a loyalty oath. 357 U.S. 513, 518–19 (1958). The loyalty oath functioned as an unconstitutional condition because “[i]ts deterrent effect is the same as if the State were to fine [veterans] for this speech.” *Id.* at 518.

<sup>146</sup> 468 U.S. 364 (1984).

<sup>147</sup> *Id.* at 399–400; see also *Rust*, 500 U.S. at 197 (observing that the Court’s “unconstitutional conditions” cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service”) (emphasis in original). In *League of Women Voters*, governmental support of a noncommercial television station amounted to only one percent of the station’s income; therefore, the government did not have a right to impose conditions on the entire panoply of activities in which the station engaged. 468 U.S. at 400.

<sup>148</sup> See *League of Women Voters*, 468 U.S. at 400.

<sup>149</sup> *Rust*, 500 U.S. at 196.

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make (constitutional versus other challenges) was not feasible, such that the statutory restriction amounted to an unconstitutional condition.<sup>150</sup> *Velazquez*'s attempt to distinguish *Rust* is not convincing, because in both situations the government sought to fund particular activities and permitted the service providers to establish independent projects that could engage in activities that the government refused to fund.<sup>151</sup> Furthermore, the restrictions in *Rust* arguably interfered with the doctor-patient relationship at least as much as the restrictions in *Velazquez* impaired the lawyer-client relationship. Despite the Court's efforts to distinguish the two cases, there is an insuperable tension between *Rust* and *Velazquez*.

Judging by the language of *Rust*, there is no reason to think that it has anything to do with the government speech or public forum cases.<sup>152</sup> After the fact, though, the Court essentially converted *Rust*'s holding into one that pertains to governmental speech. *Rosenberger* sought to distinguish *Rust*, which at first blush might have seemed to control the inquiry as to whether the University of Virginia had to fund particular activities. If *Rust* stood for the proposition that the government had wide discretion in its funding decisions, the University had arguably acted within the zone of its discretion. But the Court in *Rosenberger* recast *Rust* as a case in which the government effectively used private parties to convey its message,<sup>153</sup> an interpretation that *Velazquez* reaffirmed.<sup>154</sup> Despite the persistence of the Court's reinterpretation of *Rust*, the fact that unconstitutional conditions cases now turn on the speaker's identity has led to considerable confusion. When a funding scheme is at issue, the government often seeks to convey no message at all. *Rust*

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<sup>150</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546–48 (2001).

<sup>151</sup> See *id.* at 556 (Scalia, J., dissenting).

<sup>152</sup> The Court dismissed the First Amendment challenge in *Rust* by noting that recipients were not penalized for engaging in certain speech because they could always have declined the subsidy, and the restrictions applied only to the use of Title X funds. *Rust*, 500 U.S. at 199.

<sup>153</sup> *Rosenberger*, 515 U.S. at 833 (citing *Rust* as a case in which “the government disburse[d] public funds to private entities to convey a governmental message”).

<sup>154</sup> *Velazquez*, 531 U.S. at 541 (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”). The Court cited *Board of Regents v. Southworth*, 529 U.S. 217 (2000), and *Rosenberger* as examples of the recasting of *Rust*. *Velazquez*, 531 U.S. at 541; see also Kavey, *supra* note 90, at 753–54.

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would appear to be such a case; however, courts must now determine who is speaking—the government or private parties—even though this may be something of a trick question.<sup>155</sup>

By treating *Rust* as a government speech case, the Court has effectively permitted seemingly unrelated doctrines—the public forum and unconstitutional conditions cases—to inform an inquiry as to the constitutionality of a funding scheme. In *Velazquez*, the public forum doctrine took center stage and largely subsumed the unconstitutional conditions inquiry. As noted above, an honest appraisal of the scheme in *Velazquez* probably indicates that, because of the separability of government-funded and privately funded legal representation, the conditional nature of the government assistance should not have been unconstitutional. Cutting in the opposite direction, though, was the issue of viewpoint neutrality demanded by the public forum doctrine. While conceding that the LSC was not an actual forum for the exchange of ideas, the Court noted that “limited forum cases such as . . . *Rosenberger* may not be controlling in a strict sense, yet they do provide some instruction.”<sup>156</sup> The Court acknowledged that when the government speaks, viewpoint discrimination is permissible.<sup>157</sup> By contrast, the government was not attempting to convey any particular message through the LSC, such that the requirements of viewpoint neutrality still obtained.<sup>158</sup>

The underlying relevance of the tension between *Rust* and *Velazquez* is twofold. First, the conversion of *Rust* and most funding cases into speech cases has forced courts to ask misleading and inchoate questions about who the real speaker is, even though a speaker as such may not exist. The recasting of *Rust* also obscures the distinction between true funding cases (arguably *Rust* is such

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<sup>155</sup> In his dissent in *Velazquez*, Justice Scalia took umbrage at the characterization of *Rust* as involving government speech: “If the private doctors’ confidential advice to their patients at issue in *Rust* constituted ‘government speech,’ it is hard to imagine what subsidized speech would *not* be government speech.” *Velazquez*, 531 U.S. at 554 (Scalia, J., dissenting) (emphasis in original).

<sup>156</sup> *Id.* at 544 (majority opinion).

<sup>157</sup> *Id.* at 541. In *Rust*, the Court held that the government had not engaged in viewpoint discrimination. *Rust*, 500 U.S. at 193. In light of *Rosenberger*’s recasting of *Rust*, though, it seems more accurate to say that viewpoint discrimination is permissible, but only if the government itself seeks to convey a particular message. See Kavey, *supra* note 90, at 753–54.

<sup>158</sup> See *Velazquez*, 531 U.S. at 542.

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an example) and hybrids of funding and speech cases (such as *Rosenberger*). Second, and perhaps more importantly, *Rust* and *Velazquez* reached diametrically opposed conclusions on the question of whether the public forum doctrine will apply, by analogy, outside of the forum context. *Rust* essentially held that in funding cases, the government has wide discretion, thereby rendering a public forum inquiry inapposite. *Velazquez* explicitly acknowledged the value of a public forum inquiry,<sup>159</sup> even in the context of a funding scheme that did not create a forum as such. Both cases seem highly relevant to *Davey*, yet the Court failed to mention either one.<sup>160</sup> It did, however, appear to resolve the tension in favor of *Rust* by emphasizing the discretion that the government possesses when funding particular programs.<sup>161</sup> One might speculate as to why the Court did not mention either case—although the Court seemed to endorse the “original” holding of *Rust*, it probably did not want to acknowledge that *Rosenberger* had transmogrified *Rust* from a funding case into a speech case. Regardless of the Court’s reasons for not mentioning either *Rust* or *Velazquez*, it seems that *Velazquez*’s approach of extending the public forum doctrine into new contexts is now the exception rather than the rule. The basic principle that the government has wide discretion over funding decisions remains robust.

## IV. THE INTERACTION OF THE THREE LINES OF PRECEDENT

While the three competing lines of precedent—public forum, “play in the joints,” and funding cases—often seem to stand in tension with one another, they can actually exist in a symbiotic relationship and successfully balance competing values. This Part explains how the three lines of precedent can be triangulated and then uses the example of *Davey* to illustrate how all three could have informed that case. Thereafter it examines courts’ receptivity to this triangulation. The underlying principle of the funding cases—that government has wide discretion in choosing which programs to fund—is uncontroversial, and only a handful of cases have

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<sup>159</sup> *Id.* at 544.

<sup>160</sup> See Laycock, *supra* note 13, at 179–80.

<sup>161</sup> *Davey*, 540 U.S. at 721 (“The State has merely chosen not to fund a distinct category of instruction.”).

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dealt with “play in the joints” in the wake of *Davey*; therefore, those cases warrant only brief mention. The bulk of the analysis focuses on the public forum logic of *Rosenberger* and how readily courts have treated *Rosenberger* as announcing a broad nondiscrimination principle.

#### *A. Triangulating the Precedents*

At first blush, one might assume that a broad nondiscrimination principle is irreconcilable with a theory of “play in the joints” and the fundamental premise of the funding cases. At least one of the three lines of cases must seemingly yield to the others. If “play in the joints” is to have any meaning, and if the state truly has wide discretion in choosing which programs to fund, then there is arguably no room for a broad nondiscrimination principle. Conversely, if the nondiscrimination principle governs questions such as those raised in *Davey*, then any notion of “play in the joints” apparently disappears and the state’s discretion over funding decisions is severely curtailed.

Despite the intuition that all three lines of precedent cannot simultaneously govern certain constitutional questions, the principles are reconcilable. As noted in Part I, a broad nondiscrimination principle is not unbounded.<sup>162</sup> Specifically, a nondiscrimination principle is reconcilable with the “play in the joints” and funding cases if the principle applies only when the government has created a generally available benefit. Under funding cases such as *Rust v. Sullivan*, the government still has wide discretion to spend money in numerous ways without creating a generally available benefit. For example, the government might appropriate money for certain types of environmental research. The money is quite obviously not “generally available”—only certain individuals can receive such funding (such as people with the appropriate scientific qualifications who propose to conduct only the research in which the government is interested). Furthermore, when the government has not created a generally available benefit, the concept of “play in the joints” remains robust. For instance, a local government might adopt a school-choice program whereby parents can select which public school their children attend. The program arguably does not

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<sup>162</sup> See *supra* notes 32–33 and accompanying text.

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create a general entitlement to select *any* school; instead, only children who attend public schools are eligible to participate in the school-choice program. This is a situation in which the Establishment Clause would not necessarily prohibit the government from creating a broader voucher scheme that would allow parents and students to choose from among a wider array of schools, including private religious schools. The Free Exercise Clause, however, does not demand inclusion of religious schools because the school-choice program is not a generally available benefit. By contrast, once the government has created a generally available benefit, a broad nondiscrimination principle would prevent the state from singling out religion for facially differential treatment.

The facts of *Locke v. Davey* usefully illustrate how the three lines of precedent could fruitfully have interacted. Under the funding cases, Washington enjoyed wide discretion in choosing whether to create a scholarship program. Furthermore, Washington could have made Promise Scholarships available only to students pursuing certain majors that the state deemed particularly important, such as mathematics and the hard sciences. If certain majors were not eligible for Promise Scholarship funding, such as foreign languages or devotional theology, such differentiation would be largely unproblematic—the government’s choices would need to survive only rational basis scrutiny (which they almost invariably could).<sup>163</sup> Under the Establishment Clause and the theory of “play in the joints,” Washington had latitude to put devotional theology on the list of eligible majors (perhaps alongside education, engineering, nursing, and other more practical areas of study). Again, the classifications would have to survive only rational basis scrutiny. On the actual facts of *Davey*, though, Washington had established a generally available benefit—Promise Scholarships were available to every student who met the income and academic requirements. The only exception was for students of devotional the-

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<sup>163</sup> One might envision an attempt by the government, in delineating those eligible for a benefit, to enumerate every category of potential recipients except religious organizations or individuals. Such an exhaustive list that did not include religion might also violate the nondiscrimination principle. Admittedly, discerning whether the government has generated such an exhaustive list would involve line-drawing difficulties, but the difficulties would arguably be no worse than those that courts confront on a frequent basis.



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ology. Once the state has created a generally available public benefit, the broad nondiscrimination principle would require that religion receive equal treatment. One of the most vexing questions under this approach would concern whether the government has indeed established a generally available funding scheme, but *Davey* surely represents the clearest example of a generally available benefit from which religion, and only religion, was excluded.<sup>164</sup>

The actual opinion in *Davey* unsatisfactorily dealt with the three relevant lines of precedent. Despite embracing the theory of “play in the joints,” the Court did not satisfyingly engage the idea, remaining silent as to the theory’s history and scope and alluding hastily to its bona fides. As for *Rosenberger* and the other public forum cases, the Court dismissed them as inapposite in one paragraph of a footnote, because the Promise Scholarship Program was not designed to “encourage a diversity of views from private speakers.”<sup>165</sup> It seems odd, though, that the Supreme Court could so tersely dismiss *Rosenberger* since the Ninth Circuit opinion had relied heavily on the logic of *Rosenberger*.<sup>166</sup> Finally, the Court in *Davey* did not cite either of the most relevant funding cases—*Rust* or *Velazquez*. From a doctrinal perspective, this is among the decision’s most serious shortcomings, especially because the Court more or less embraced the original logic of *Rust*—the notion that the state has wide discretion when choosing which activities it will fund.<sup>167</sup> An honest appraisal of the funding cases, though, would have forced the Court to confront and distinguish *Velazquez*,

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<sup>164</sup> One might argue that Promise Scholarships were not generally available benefits in light of the income and academic requirements that students had to meet in order to be eligible. But given that those requirements were mere thresholds (rather than guidelines vesting discretion in the government) and that they were irrelevant to the majors covered by the scholarships, it is fairly clear that Promise Scholarships were “generally available.”

<sup>165</sup> *Davey*, 540 U.S. at 720 n.3 (internal citations omitted).

<sup>166</sup> See *Davey v. Locke*, 299 F.3d 748, 755–56 (9th Cir. 2002).

<sup>167</sup> Although *Rust* would have provided significant support for the outcome in *Davey*, invoking *Rust* would have forced the Court to reassess *Rosenberger*’s transformation of *Rust* into a case about government speech. See *supra* notes 152–58 and accompanying text. Absent an actual government message, as was the case in *Davey*, the revised understanding of *Rust* was apparently inapposite. Returning to *Rust*’s original holding would have compelled the Court to overrule the reinterpretation of *Rust* by *Rosenberger* and subsequent cases. Perhaps understandably, the Court was unwilling to do this.

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which explicitly relied on the logic of *Rosenberger*, even though the government had not created a true public forum in *Velazquez*.

*Davey* presented the ideal case in which the Court could have balanced the three lines of precedent. It could have acknowledged the full breadth of “play in the joints” and the government’s discretion to spend money selectively while also indicating that a nondiscrimination principle could actually have teeth. Instead of recognizing a symbiosis between the three lines of cases, though, the Court allowed the theory of “play in the joints” and, by implication, the funding cases to subsume any trappings of a nondiscrimination principle.

*B. Funding Cases and “Play in the Joints” Cases in the Courts*

Although the Supreme Court in *Davey* did not strike the balance between the three competing lines of precedent in the way that this Note has argued is feasible, the following Sections consider the extent to which courts have embraced separately each of the three lines of cases. This Section briefly examines the funding cases and the “play in the joints” cases, and the next Section turns to the more controversial issue of whether courts have interpreted *Rosenberger* as embodying a broad nondiscrimination principle.

The basic premise of the funding cases is so uncontroversial that it hardly merits further discussion. As a matter of first principles, the government clearly has discretion to make funding decisions. The question that this Note has considered is what limits attach to the general axiom. Although the notion of unconstitutional conditions has informed the extent of the government’s discretion to spend money and manage state property, the premise of governmental spending discretion remains strong.<sup>168</sup>

In the wake of *Davey*, the Supreme Court and lower courts have thus far embraced the concept of “play in the joints” and given it full effect. Writing for a unanimous Court in *Cutter v. Wilkinson*, the only Supreme Court case that has cited *Davey*, Justice Ginsburg described *Davey* as “reaffirm[ing] that ‘there is room for play in the joints between’ the Free Exercise and Establishment

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<sup>168</sup> See, e.g., *Cooper v. Florida*, 140 F. App’x 845, 847 (11th Cir. 2005) (citing, *inter alia*, *Davey* for the proposition that the government does not violate a fundamental right when it refuses to subsidize that right).

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Clauses . . . .”<sup>169</sup> Interestingly, the Court continued to indulge the idea that “play in the joints” has long informed questions arising from the Religion Clauses, even though *Davey* was the first case that explicitly endorsed the theory. More significantly, the Court apparently rejected the suggestion by some academics that “play in the joints” might apply narrowly to the facts of *Davey*. Professors Berg and Laycock noted that the Court in *Davey* focused on the long-standing tradition of not funding the training of clergy;<sup>170</sup> however, *Cutter* has confirmed their intuition that “play in the joints” would sweep more broadly.

Lower court opinions have similarly embraced the logic of “play in the joints.” In holding that the federal government may provide certain benefits to public school children only, thereby denying such benefits to children in private religious schools, the First Circuit cited *Davey* for the proposition that “play in the joints” affords the government such discretion.<sup>171</sup> Earlier this year, the Second Circuit cited *Davey* for the broader proposition that the City of New York could seek to avoid even potential Establishment Clause violations without running afoul of the Free Exercise Clause. New York City’s Department of Education had permitted schools to display menorahs during Chanukah and the star and crescent during Ramadan but forbidden crèche displays at Christmas. It reasoned that “the crèche conveys its religious message more representationally and less symbolically than the menorah and the star and crescent.”<sup>172</sup> The Second Circuit cited *Davey*’s invocation of “play in the joints” and held that the City’s conclusion was reasonable even if it was not compelled by the Establishment Clause.<sup>173</sup>

In the few years since the Supreme Court decided *Davey*, the premise of the government funding cases and the theory of “play in

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<sup>169</sup> *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2117 (2005) (quoting *Davey*, 540 U.S. at 718). At issue in *Cutter* was Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000, which provided special protection for inmates’ religious exercise. The Court found that the provision did not violate the Establishment Clause, even though the Free Exercise Clause did not require such special protection. See *id.* at 2116–17.

<sup>170</sup> Berg & Laycock, *supra* note 28, at 250, 252.

<sup>171</sup> *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 20–21 n.3 (1st Cir. 2004) (“If any room exists between the two Religion Clauses, it must be here.” (quoting *Davey*, 540 U.S. at 725)).

<sup>172</sup> *Skoros v. City of New York*, 437 F.3d 1, 28 (2d Cir. 2006).

<sup>173</sup> See *id.*

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the joints” are robust. The only remaining question concerns the extent to which courts have construed *Rosenberger* as announcing a principle that could extend beyond the context of public fora.

*C. Rosenberger in the Courts*

Having considered the various arguments and precedents for discerning a broad nondiscrimination principle rooted in *Rosenberger*, this Note turns to how the Supreme Court and lower federal courts have actually treated *Rosenberger*. In many ways the results of this analysis are unremarkable. Almost all of these decisions have treated *Rosenberger* as a narrow decision, confined it to its facts, and cited it only for the most general truisms about the public forum doctrine. Such cabining of *Rosenberger* is instructive, though, because it illustrates the Court’s unwillingness to transform the First Amendment into a set of positive entitlements. Even if *Rosenberger* was correct on its facts, a point about which considerable debate exists, courts have eschewed the notion that it stands for a broad nondiscrimination principle.

*1. Rosenberger in the Supreme Court*

The Supreme Court has consistently endeavored to sanitize *Rosenberger* by indulging the notion that it was a public forum case and somehow not a funding case. Supreme Court cases in which *Rosenberger* figured prominently into the Court’s analysis generally fall into two categories: cases in which *Rosenberger* is directly on point and cases in which at least one party has invoked *Rosenberger* as standing for a broad nondiscrimination principle outside of the public forum context. In the former, the Court has faithfully applied *Rosenberger*. In the latter, it has repeatedly observed, without analysis, that *Rosenberger* is irrelevant when the government has not created a public forum. There seem to be only two exceptions to this basic dichotomy—the Court’s rationale in *Legal Services Corp. v. Velazquez*<sup>174</sup> and several observations in dicta in *Mitchell v. Helms*.<sup>175</sup>

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<sup>174</sup> 531 U.S. 533 (2001).

<sup>175</sup> 530 U.S. 793 (2000).

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Two cases seem to be on all fours with *Rosenberger*. First, *Board of Regents of University of Wisconsin System v. Southworth*<sup>176</sup> was the obverse of the same coin—an activities fund at a public university. At issue was whether students at the University of Wisconsin, who had to pay a mandatory student activity fee, could demand the right not to contribute to organizations espousing viewpoints with which the students disagreed.<sup>177</sup> As in *Rosenberger*, the Court concluded that the University required students to contribute to the fund in order to facilitate an exchange of ideas, not to compel certain speech; however, the University did have to distribute the funds in a viewpoint-neutral manner. Interestingly, the Court was cagey as to whether the fund actually constituted a limited public forum, but it applied the usual standards of the public forum doctrine, focusing primarily on viewpoint neutrality.<sup>178</sup> The second case, *Good News Club v. Milford Central School*,<sup>179</sup> seemed even more straightforward under *Rosenberger*. The Court held that a public school system had created a limited public forum by making its facilities available and thus could not discriminate against religious groups because such a distinction would entail viewpoint discrimination. In doing so, the Supreme Court explicitly reaffirmed *Rosenberger* and asserted that *Rosenberger* was dispositive of the case.<sup>180</sup> These cases seem straightforward because they involved, respectively, facts that were strikingly similar to *Rosenberger* and a classic limited public forum (school facilities). Thus, it was unnecessary for the Supreme Court to venture beyond the black-letter holdings of *Rosenberger*.

Similarly, the Court has cited *Rosenberger* frequently for the general standards governing a public forum analysis.<sup>181</sup> In such contexts, *Rosenberger* does little if any work in light of the public forum precedents that already delineate the forum categories and

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<sup>176</sup> 529 U.S. 217 (2000).

<sup>177</sup> *Id.* at 222–23, 227.

<sup>178</sup> *Id.* at 229–30 (holding that the “public forum cases are instructive here by close analogy. This is true even though the student activities fund is not a public forum in the traditional sense of the term . . .”); *id.* at 233 (observing that the requirement of viewpoint neutrality was the touchstone of *Rosenberger*).

<sup>179</sup> 533 U.S. 98 (2001).

<sup>180</sup> *Id.* at 110–12.

<sup>181</sup> See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673, 690 (1998).

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their attendant requirements.<sup>182</sup> *Good News Club*, for instance, involved a physical forum from which religious organizations, consistent with the principle of equal access, could not be excluded. Although *Rosenberger* was directly on point, it was superfluous in light of *Widmar v. Vincent*, the 1981 case holding that certain university facilities constituted a public forum.<sup>183</sup> For purposes of assessing conventional fora, *Rosenberger* seems to do hardly any independent work. Only in situations that possibly invite the expansion of public forum analysis would *Rosenberger* actually add to the Court's jurisprudence.

The Court has usually declined to extend the logic of *Rosenberger* beyond conventional fora or funding schemes highly analogous to the SAF at issue in *Rosenberger*. In *Santa Fe Independent School District v. Doe*, the Court held that when a school allowed one student to offer a public prayer before school football games, the school district had not created a limited public forum for speech.<sup>184</sup> This conclusion seems consistent with the Court's jurisprudence on public fora generally—the school district had not made the time and space generally available. Similarly, in *United States v. American Library Ass'n*, the Court refused to find that the mere presence of Internet access in a public library created a public forum for the exchange of ideas; consequently, the Court deemed *Rosenberger* to be inapposite.<sup>185</sup>

More difficult and novel questions arose in *National Endowment for the Arts v. Finley*, a case in which several artists argued that the National Endowment for the Arts ("N.E.A.") had created a public forum by making funds generally available to artists, such that viewpoint-based discrimination was impermissible.<sup>186</sup> *Finley* was the first case to test the bounds of *Rosenberger* and, specifically, the idea that generally available funds could constitute a public forum. The artists' argument failed, though. Although the Court's opinion was not a paragon of clarity, it signaled that the Court would only

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<sup>182</sup> See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

<sup>183</sup> *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); see supra notes 38–41 and accompanying text.

<sup>184</sup> 530 U.S. 290, 302–03 (2000).

<sup>185</sup> 539 U.S. 194, 206 (2003).

<sup>186</sup> 524 U.S. 569 (1998).

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reluctantly find that a funding scheme functioned as a public forum.<sup>187</sup> Justice O'Connor's majority opinion emphasized that by establishing the N.E.A. the government did not "indiscriminately 'encourage a diversity of views from private speakers'" but instead sought to promote excellence in the arts.<sup>188</sup> By prefacing the quotation from *Rosenberger* with the word "indiscriminately," Justice O'Connor subtly narrowed the realm of funding schemes that could be considered public fora—only programs intended to foster a veritable free-for-all among private speakers. The small transformation of *Rosenberger*'s holding was somewhat surreptitious because under this formulation the Court probably would not have found that the SAF in *Rosenberger* itself was a limited public forum. Justice Souter, the lone dissenter in *Finley*, would have found a limited public forum, such that *Rosenberger* should have controlled the case.<sup>189</sup> The other eight Justices made clear, however, that only when the government has unambiguously and without reservation created a forum for the exchange of ideas should public forum logic obtain.

The Court's unwillingness to expand *Rosenberger*'s reach has become a mainstay of its jurisprudence. A few possible exceptions warrant attention. The only case in which the Supreme Court explicitly extended the logic of *Rosenberger* to a funding scheme that did not actually create a public forum is *Legal Services Corp. v. Velazquez*.<sup>190</sup> Although the Court in *Velazquez* evinced solicitude for the approach of *Rosenberger* and other public forum cases, *Velazquez* is the exception that proves the rule, as no other case has embraced the extension of *Rosenberger*'s logic in this way.<sup>191</sup>

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<sup>187</sup> For instance, even though the majority found that the N.E.A. had not created a public forum, the Court nonetheless took pains to argue that the restrictive criteria at issue in *Finley* entailed content-based discrimination but not viewpoint discrimination. See *id.* at 581, 585. This concern seems warranted if the Court were treating N.E.A. funding as a nonpublic forum; however, the majority seemed inclined to view *Finley* as a funding case only, such that the government should have had nearly unfettered discretion to favor certain viewpoints over others. Justice Scalia argued as much in his separate opinion. *Id.* at 596–97 (Scalia, J., concurring in judgment).

<sup>188</sup> *Id.* at 586 (quoting *Rosenberger*, 515 U.S. at 834) (emphasis added).

<sup>189</sup> *Id.* at 600–01, 613 (Souter, J., dissenting).

<sup>190</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

<sup>191</sup> Despite the invocation of the public forum doctrine, *Velazquez* almost surely stands for nothing more than the result it reached. The result probably had more to do with an issue near and dear to any judge—the ability of lawyers to do their jobs—

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The only other instance in which the Court even intimated that *Rosenberger* might be anything more than a public forum case was *Mitchell v. Helms*.<sup>192</sup> In *Mitchell*, the federal government distributed funds to localities, which used the money to lend secular educational materials to public and private schools, including religious schools. The Supreme Court concluded that the program, as applied in Jefferson Parish, Louisiana, did not run afoul of the Establishment Clause.<sup>193</sup> In a footnote, Justice Thomas, writing for a plurality, addressed a Free Exercise question that the case did not actually present. “[A]s petitioners observe, to require exclusion of religious schools from such a program would raise serious questions under the Free Exercise Clause.”<sup>194</sup> Justice Thomas cited to *Rosenberger*, analogizing the Free Speech question at issue there to the Free Exercise question that he hypothesized in *Helms*. The footnote was clearly in dictum because the statute had not actually excluded religious schools. Also in dictum, Justice Thomas treated *Rosenberger* as standing for the proposition that the government may not “discriminat[e] in the distribution of public benefits based upon religious status or sincerity.”<sup>195</sup> Although both observations indicate Justice Thomas’s willingness to embrace the broad nondiscrimination principle that *Rosenberger* seemed to announce, his observations appear to be little more than the personal observations of a single Justice. Both statements were dicta made in the course of a plurality opinion. They hardly portend a doctrinal shift away from the Court’s consistent practice of cabining *Rosenberger* as a public forum case.

## 2. *Rosenberger in the Lower Courts*

As one would expect, lower court decisions have wrestled with the implications of *Rosenberger* more frequently and extensively than has the Supreme Court. A thorough review of all the circuit court opinions that have discussed *Rosenberger* reveals a pattern similar to the Supreme Court’s approach. Lower courts most fre-

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rather than a judgment about whether the Legal Services Corporation had sought to foster an exchange of diverse viewpoints.

<sup>192</sup> 530 U.S. 793 (2000).

<sup>193</sup> *Id.* at 801–03.

<sup>194</sup> *Id.* at 835 n.19.

<sup>195</sup> *Id.* at 828.



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quently cite *Rosenberger* as standing for general propositions that are not unique to *Rosenberger*. Courts have also cited *Rosenberger* for several ideas that are specific to the case. For instance, courts often turn to *Rosenberger* when assessing the constitutional differences between government and private speech as well as how courts should understand the exclusion of religious perspectives from a forum. Many courts have also discussed the language in *Rosenberger* that lies at the heart of the nondiscrimination principle; however, the bulk of the opinions have not taken the next step of applying the principle outside of the forum context. Finally, several cases merit particular attention because they have at least entertained whether a nondiscrimination principle, as discerned from *Rosenberger*, is widely applicable.

The first and most obvious truism for which courts have cited *Rosenberger* is the evil of viewpoint discrimination in all fora.<sup>196</sup> Since at least 1983, when the Supreme Court decided *Perry*, the presumptive unconstitutionality of viewpoint discrimination in any forum has been clear.<sup>197</sup> Consequently, *Rosenberger* broke no new ground in this respect. On the other hand, at least some judges have cited *Rosenberger* for a variation on the theme of viewpoint neutrality. *Rosenberger* observed that “exclusion of several views . . . is just as offensive to the First Amendment as exclusion of only one.”<sup>198</sup> For example, the Sixth Circuit cited this language in striking down a state agency’s policy of prohibiting “controversial” advertising on public transportation, including a union’s message. Despite the agency’s willingness to exclude both pro- and anti-union speech, the court described this as viewpoint discrimination.<sup>199</sup> The fact that most courts do not invoke *Rosenberger* for

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<sup>196</sup> See, e.g., *Wigg v. Sioux Falls Sch. Dist.*, 49-5, 382 F.3d 807, 813 (8th Cir. 2004); *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 622 (4th Cir. 2002); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 566 (7th Cir. 2001); *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350 (5th Cir. 2001); *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536, 540, 542 (6th Cir. 2001).

<sup>197</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

<sup>198</sup> *Rosenberger*, 515 U.S. at 831.

<sup>199</sup> *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 361–62 (6th Cir. 1998); see also *Gen. Media Commc’ns, Inc. v. Cohen*, 131 F.3d 273, 290 (2d Cir. 1997) (Parker, J., dissenting) (citing the same language from *Rosenberger* and concluding that “[i]f multiple voices are silenced, the debate is simply skewed in multiple ways”).

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such a proposition is unsurprising because the exclusion of multiple viewpoints might shade into subject-matter exclusions, which can be permissible in some fora. Frequent citation to this passage in *Rosenberger* would thus blur the already tenuous line between viewpoint and subject-matter distinctions.

The second reason courts often cite *Rosenberger* concerns the requirements of a limited public forum. While having to remain viewpoint neutral, the government may exclude certain subject matters from a limited public forum if the exclusions are reasonable in light of the character of the forum.<sup>200</sup> Again, the idea is not unique to *Rosenberger*, but lower courts often draw on *Rosenberger*'s succinct discussion of limited public fora.<sup>201</sup>

Third, courts frequently cite language in *Rosenberger* noting the murky distinction between subject-matter and viewpoint discrimination.<sup>202</sup> To borrow an example from Judge Reinhardt, astrology might be a subject matter about which astrologers have unique and divergent views. Alternatively, it might be a viewpoint within the larger subject matter of the study of the heavens, such that exclusion of astrology would entail viewpoint discrimination.<sup>203</sup>

The notion of an imprecise boundary between viewpoints and subject matters is one that courts and commentators have long discussed.<sup>204</sup> *Rosenberger*'s acknowledgment of the point is fairly unremarkable, but *Rosenberger* did address an important manifestation of the problem: is "religion" a subject matter or a viewpoint? In nearly every instance, religion will be a viewpoint under *Rosenberger*. After all, this question was at the heart of the debate between Justice Kennedy, for the majority, and Justice Souter, in dissent. As several lower courts have noted, though, the majority left

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<sup>200</sup> *Rosenberger*, 515 U.S. at 829.

<sup>201</sup> See, e.g., *Justice For All v. Faulkner*, 410 F.3d 760, 766 n.7 (5th Cir. 2005); *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 280 (3d Cir. 2004); *Goulart v. Meadows*, 345 F.3d 239, 249–50 (4th Cir. 2003); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999); *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1297 (7th Cir. 1996).

<sup>202</sup> See, e.g., *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 150 (2d Cir. 2004); *PMG Int'l Div. LLC v. Rumsfeld*, 303 F.3d 1163, 1171 (9th Cir. 2002); *Gen. Media Commc'ns*, 131 F.3d at 281; *Grossbaum*, 100 F.3d at 1298.

<sup>203</sup> *Giebel v. Sylvester*, 244 F.3d 1182, 1188 n.10 (9th Cir. 2001).

<sup>204</sup> See, e.g., Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. Rev.* 1713, 1751 (1987); see also Greenawalt, *supra* note 14, at 700–01.

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open the remote possibility that religion, as an entire subject matter, could be excluded from a forum;<sup>205</sup> however, excluding religion as a subject matter is very difficult. In virtually every forum—even a limited or nonpublic forum—someone will almost always be able to address a secular topic within the purview of the forum from a religious perspective. Thus, religion will be a viewpoint, according to the logic of *Rosenberger*, in nearly every forum.<sup>206</sup>

As discussed in Part III, one of *Rosenberger*'s principal innovations is the recasting of *Rust v. Sullivan* as a government speech case. According to this approach, courts must now assess who is speaking—governmental or private entities. Lower courts have drawn on the language in *Rosenberger* indicating that the requirement of viewpoint neutrality obtains only when the government funds private speakers. When the government seeks to convey its own message, it does not have to remain viewpoint neutral.<sup>207</sup> Al-

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<sup>205</sup> See, e.g., *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1216 (11th Cir. 2004); *DiLoreto*, 196 F.3d at 969–70; *Summum v. Callaghan*, 130 F.3d 906, 917–18 (10th Cir. 1997). These courts have relied on language in *Rosenberger* indicating that religion, as a subject matter, could be excluded from a forum:

By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.

*Rosenberger*, 515 U.S. at 831.

<sup>206</sup> In only one case has a court thoroughly parsed *Rosenberger* and concluded that a forum had properly excluded religion as a subject matter. The Eleventh Circuit in *Bannon* concluded that an elementary school mural was a nonpublic forum. *Bannon*, 387 F.3d at 1217. At issue was whether prohibition of a student's overtly religious contribution was an acceptable subject-matter restriction in pursuit of a legitimate pedagogical purpose. The court decided that, in contrast to *Rosenberger*, the student in *Bannon* sought to communicate an inherently religious message rather than foster a "discussion of secular topics from a religious perspective." *Id.* at 1216. A Ninth Circuit case, *DiLoreto*, also purported to decide that religion had properly been excluded as a subject matter from a limited public forum. *DiLoreto*, 196 F.3d at 969–70. At issue was the exclusion of an advertisement displaying the Ten Commandments at a high school baseball game. Although the court said that the excluded subject matter was religion as such, the court's language indicates that the excluded subject matter was actually advertisements that did not solicit business. If this assessment of *DiLoreto* is correct, then *Bannon* is the only lower court decision to find that religion was not a viewpoint for purposes of public forum analysis.

<sup>207</sup> See, e.g., *Chiras v. Miller*, 432 F.3d 606, 612–13 (5th Cir. 2005); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 792 (4th Cir. 2004); *Brown v. Armenti*, 247 F.3d 69, 74–75 (3d Cir. 2001); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013–

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though this inquiry might be misguided, particularly when government funding schemes have no communicative elements, lower courts have faithfully hewed to the dichotomy between government and private speakers.

Among the most interesting ideas for which lower courts have cited *Rosenberger* is what this Note has argued is the first step in finding a broad nondiscrimination principle in *Rosenberger*. Specifically, *Rosenberger* rejected the idea that the government could exclude religion from a public forum in order to avoid a potential Establishment Clause violation. “To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. . . . There is no Establishment Clause violation in the University’s honoring its duties under the Free Speech Clause.”<sup>208</sup> Several lower courts have cited this portion of *Rosenberger*, which indicates that remaining viewpoint neutral toward religion is consistent with the Establishment Clause.<sup>209</sup> This is the critical first step in locating a nondiscrimination principle in *Rosenberger* because it means that the government may not discriminate against religion unless an actual Establishment Clause violation is imminent. The second step, though, involves applying these principles outside of the forum context. While lower courts have faithfully applied this holding from *Rosenberger*, the overwhelming majority of lower courts have done so only in the context of public fora.

In two rare lower court cases, judges have actually addressed whether *Rosenberger* announced a broad nondiscrimination principle. The Ninth Circuit explicitly rejected such a principle, and a Fourth Circuit panel did not adopt a dissenting judge’s broad reading of *Rosenberger*. Probably the most intriguing case to assess *Rosenberger*’s implications for Free Exercise jurisprudence is the

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14 (9th Cir. 2000); *Knights of the Ku Klux Klan v. Curators of Univ. of Mo.*, 203 F.3d 1085, 1094 n.11 (8th Cir. 2000).

<sup>208</sup> *Rosenberger*, 515 U.S. at 845–46.

<sup>209</sup> See, e.g., *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 530 (3d Cir. 2004); *Summum*, 130 F.3d at 921; *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 220 (2d Cir. 1997) (Cabrane, J., concurring in part and dissenting in part); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1280 (10th Cir. 1996); *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 63 F.3d 581, 593–94 (7th Cir. 1995).

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Ninth Circuit's opinion in *Gentala v. City of Tucson*.<sup>210</sup> The court concluded that the city of Tucson, Arizona, properly declined to provide lighting and sound equipment for a National Day of Prayer event in order to avoid an Establishment Clause violation, even though the city had provided such services for nonreligious events.<sup>211</sup> Speaking through Judge Berzon, the court noted the axiom that government does not violate Free Exercise rights by denying a subsidy to a religious organization.<sup>212</sup> It then distinguished *Rosenberger* on the ground that *Rosenberger* did not turn in any way on the Free Exercise Clause: "if the failure to subsidize a religious activity . . . violated the Free Exercise Clause, the [Supreme] Court would have said so in *Rosenberger* and written a very different, and much shorter, opinion."<sup>213</sup> *Gentala* argued that the Free Exercise Clause, though admittedly within the letter of the Supreme Court's opinion in *Rosenberger*, played little if any role in the Court's assessment of Free Speech and Establishment Clause interests. The Ninth Circuit consequently rejected the idea that *Rosenberger* could stand for a broad nondiscrimination principle.

The other opinion that grappled with the possible expansiveness of *Rosenberger* is Judge Wilkinson's dissent in *Columbia Union College v. Clarke*.<sup>214</sup> At issue was the Sellinger program, which Maryland had established in order to aid private colleges. In order to be eligible for educational funding, colleges could not be "pervasively sectarian." Most of the Fourth Circuit's analysis turned on Columbia Union College's eligibility. In a dissenting opinion, though, Judge Wilkinson argued that since the funds provided by the Sellinger program were generally available, application of the public forum doctrine was appropriate in accordance with *Rosenberger*.<sup>215</sup> Although Judge Wilkinson said that the Sellinger program was in fact a limited public forum, this assertion seems imprecise because Maryland had not created a forum for the dissemination of ideas. Instead, the public forum analysis would have been appropriate only by way of analogy and on the strength

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<sup>210</sup> 244 F.3d 1065 (9th Cir. 2001) (en banc).

<sup>211</sup> Id. at 1067–68.

<sup>212</sup> Id. at 1081 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983)).

<sup>213</sup> Id. at 1082.

<sup>214</sup> 159 F.3d 151 (4th Cir. 1998).

<sup>215</sup> Id. at 170 (Wilkinson, C.J., dissenting).

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of the fact that Maryland had made funds generally available, as the Supreme Court concluded that the University of Virginia had done in *Rosenberger*. Judge Wilkinson's conclusion that a state is obligated to distribute generally available funds in a viewpoint-neutral manner seems justified in light of *Rosenberger*. Nevertheless, his analysis was in dissent, placing him in a distinct minority of judges and scholars who have been willing to embrace the broad implications of *Rosenberger*.

In many ways, lower court opinions have paralleled the Supreme Court's treatment of *Rosenberger*. Most courts have cited *Rosenberger* only for general propositions about the public forum doctrine. Others have noted the enduring dichotomy between government and private speech. While several courts have observed that the command of viewpoint neutrality is not inconsistent with the dictates of the Establishment Clause, courts have been unwilling to apply this logic outside of the public forum context. In fact, only two opinions have seriously engaged the idea that *Rosenberger* might have announced a nondiscrimination principle against religion that would apply to all government funding schemes. The Ninth Circuit explicitly rejected such an approach, and Judge Wilkinson's willingness to embrace a nondiscrimination principle was confined to a dissenting opinion. Lower courts thus seem to have internalized the cabining of *Rosenberger*.

### 3. *The Future of Rosenberger*

The Supreme Court has signaled its unwillingness to extend the logic of *Rosenberger* beyond the public forum context, and lower courts have proceeded in almost lock step. Thus, it does not seem far-fetched to assert that *Davey* confirmed the cabining of *Rosenberger*. Despite this categorical assertion, there is reason to believe that a nondiscrimination principle may eventually find its way back into the Court's jurisprudence. Justice Thomas's dicta in *Mitchell v. Helms* and Justice Scalia's dissent in *Davey* indicate those Justices' willingness to embrace such a principle. Furthermore, then-Judge Alito's opinion in *Child Evangelism* might indicate his inclination toward a more robust interpretation of the Free Exercise Clause.<sup>216</sup>

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<sup>216</sup> See *Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 530 (3d Cir. 2004); see also *supra* note 209 and accompanying text.

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If the Court does eventually move toward a nondiscrimination principle, what remains unclear is the extent to which the principle would coexist with the theory of “play in the joints” and the funding cases. As indicated earlier, the competing lines of precedent do stand in some tension, but they are not contradictory; rather, they provide meaningful checks on one another. If the Court embraced a nondiscrimination principle in this light, its jurisprudence would not necessarily shift dramatically. At this point, though, such inquiries are premature and entirely speculative.

#### CONCLUSION

This Note has argued that the Supreme Court in *Rosenberger* appeared to announce a broad principle of nondiscrimination with respect to religion. *Rosenberger* was a unique vehicle for the Court to stake such a claim, because the case involved a government funding scheme. Subsequent Supreme Court and lower court opinions have nonetheless cabined *Rosenberger* as a public forum opinion, with *Davey* providing final confirmation that *Rosenberger* does not in fact stand for any broader principle.

Through a close analysis of the three relevant lines of precedent—public forum, “play in the joints,” and government funding cases—this Note has sought to determine the robustness of those precedents and their interactions with one another. As a general matter, the government enjoys wide discretion when it chooses to fund, or not to fund, particular programs. *Davey* confirmed such discretion while also endorsing, for the first time in an actual holding, the theory of “play in the joints.” The public forum cases, at least in the immediate aftermath of *Rosenberger*, would have indicated that a nondiscrimination principle might have functioned as a check on this otherwise unlimited discretion; however, courts have refused to extend the reach of the public forum doctrine.

The three lines of precedent offer different modes of analysis and often look in different directions, but they are not inconsistent. Although some scholars have viewed *Davey* as making an inevitable choice between contradictory doctrines, this Note has argued that the three lines of precedent can coexist. If a nondiscrimination principle exists in the context of funding cases, it would apply only when the government has created a generally available benefit. Such a nondiscrimination principle would then serve as a minimally

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intrusive check on the state's power to fund projects of its choice. But at least for now the Court has struck the balance in favor of deference to state funding decisions, irrespective of any differential treatment of religion, effectively cabining *Rosenberger*.