Rosenberger v. Rector & Board of Visitors of the University of Virginia: A Battle between Establishment Clause Principles and First Amendment Clauses Further Weakens the Wall of Separation

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Recommended Citation
D. M. Murray, Rosenberger v. Rector & Board of Visitors of the University of Virginia: A Battle between Establishment Clause Principles and First Amendment Clauses Further Weakens the Wall of Separation, 46 DePaul L. Rev. 569 (1997)
Available at: https://via.library.depaul.edu/law-review/vol46/iss2/7

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ROSENBERGER V. RECTOR & BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA: A BATTLE BETWEEN ESTABLISHMENT CLAUSE PRINCIPLES AND FIRST AMENDMENT CLAUSES FURTHER WEAKENS THE WALL OF SEPARATION

INTRODUCTION

Since the first case in which the United States Supreme Court seriously contemplated using the Establishment Clause\(^1\) to strike down government action,\(^2\) the Court has charted a nomadic course through its Establishment Clause jurisprudence. Examples of the confusion that this inconsistency has caused are replete in Establishment Clause cases. As one commentator noted:

Large property tax exemptions for churches are appropriately secular and nonentangling while small-scale tax “credit” schemes reimbursing parents of private school children for some portion of secular educational expenses have too great a religious “effect.” “Deduction” schemes (as subtly distinguished from “credit” schemes) nonetheless have [withstood] [E]stablishment [C]lause challenge. The Court has held direct financial grants to religious schools unconstitutional when intended to be used as salary supplements for teachers or when used for maintenance and repair of buildings, but it has also held construction grants constitutional where the buildings involved were restricted to “secular uses.” The Court has found it unconstitutional for a state to reimburse private religious schools for the cost of textbooks and instructional materials, but it is constitutional for a state to permit parents of children attending private schools to take a tax deduction for the same expenses or for the state to loan the textbooks directly to the students.\(^3\)

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1. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.
Much of this dizzying array of Establishment Clause inconsistency is owed to the Court’s misapplication of the neutrality principle and the direct-funding prohibition. In *Rosenberger v. Rector & Board of Visitors of the University of Virginia*, the Court continued its unpredictable pattern, holding that the University of Virginia must make its mandatory student fees available to a student organization publishing a religious magazine. In what Justice O’Connor deemed a “collision” between neutrality and direct funding, neutrality won.

The *Rosenberger* case involved two competing concepts—the once absolute prohibition of directly funding religious institutions and the permissible neutral extension of benefits to religious organizations. Part I of this Note begins by identifying these two principles by reference to the landmark decision in *Everson v. Board of Education*, a decision that allowed a state to pay for transportation to religious schools because the aid was given under religion-neutral criteria. Part I then traces the development of what the Court deems to be unconstitutional direct aid to religion, as contrasted with what the Court deems to be indirect aid that neutrally and incidentally benefits religious organizations. Specifically, Part I discusses several cases that have failed the Establishment Clause test announced in *Lemon v. Kurtzman* and, therefore, constituted direct aid to religion. Part I concludes with an overview of three dominant models of neutrality that have found their way into Establishment Clause jurisprudence and have been used to uphold funding programs that benefited religion.

351, 353 (1995) (noting that the Court’s Establishment Clause cases “are often logically incomprehensible . . . [and] irreconcilable from one case to the next”).

4. See infra notes 72-108 and accompanying text (discussing three models of neutrality which have emerged from the Court’s Establishment Clause case law).

5. See infra notes 29-58 and accompanying text (developing what the Court deems to be prohibited direct funding of religion through an analysis of three significant Establishment Clause cases).


7. Id. at 2522-23, 2525. The Court reached the Establishment Clause issue because the university argued that it was necessary to bar the magazine from funding in order to avoid an establishment of religion. Id. at 2520-21.

8. Id. at 2528 (O’Connor, J., concurring).


10. See infra notes 21-27 and accompanying text (discussing the *Everson* decision).

11. See infra notes 29-58 and accompanying text (discussing the direct-funding prohibition); see also School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985) (holding that a school district’s funding programs were no different than a direct cash subsidy to a religious school).

12. See infra notes 72-108 and accompanying text (discussing three different models of neutrality used by the Court).

13. See infra notes 29-31, 38-42 and accompanying text (discussing the *Lemon* decision).

14. See infra notes 72-108 and accompanying text.
The majority and dissenting opinions in *Rosenberger* continued the Court's trend of using the direct-funding and neutrality principles as opposing absolutes. Part II discusses the use of direct funding and neutrality in the majority, dissenting, and concurring opinions in *Rosenberger*. Part III begins by proffering that the Court's use of direct funding and neutrality as opposing absolutes was misguided in that both " absolutes" stem from the same constitutional mandate—religious neutrality. Part III concludes that the presence of a Free Speech right in Establishment Clause cases significantly reduces the showing of neutrality required to uphold a funding statute. While the Court's misapplication of the direct-funding and neutrality principles makes the Court's analysis of the Establishment Clause confusing, Part IV concludes that *Rosenberger*'s most significant impact will be upon the Court's treatment of the relationship between the Free Speech and Establishment Clauses of the First Amendment.

I. Background

A. Everson v. Board of Education—Laying the Groundwork for Direct Funding and Neutrality

In what was perhaps the first case in modern Establishment Clause jurisprudence, Justice Black eloquently penned the principle known as the "wall of separation" between Church and State:

The "establishment of religion" . . . means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . . In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State.”

Despite these strict words, Justice Black proceeded to open a "neutrality" door in this theoretical wall, noting that although the government must be cautious not to have state-established churches, the

15. See infra notes 152-210 and accompanying text (breaking the decisions into a discussion of direct funding and neutrality).
16. See infra notes 152-210 and accompanying text.
17. See infra notes 211-48 and accompanying text.
18. See infra notes 249-84 and accompanying text (arguing that the Free Speech right caused the Court's Establishment Clause analysis to be less rigorous).
19. See infra notes 213-36 and accompanying text.
20. See infra notes 285-91 and accompanying text.
prohibition is not meant to disallow extending government benefits to all citizens on an equal basis. In other words, the Establishment Clause "does not require the state to be [religion's] adversary." Using this rationale, the majority in Everson upheld a New Jersey statute authorizing local school districts to expend money for school bus transportation for children attending religious schools. The Court recognized that by upholding the funding statute, the possibility existed that some children might attend sectarian schools who would not have attended absent the free bus service.

Everson identified two concepts which form the foundation of the anti-establishment principle. In a constitutional area with "few absolutes," the Court has used one of these principles as a rallying cry: the government may not directly fund religion nor religious institutions. Similarly, neutrality, the second concept which Everson identified, had an enormous impact on the Court's Establishment Clause decisions.

Before delving into the application of these two principles in the Rosenberger decision, it is necessary to trace their development through the Court's Establishment Clause case law. To clarify what constitutes direct funding, the following subsection discusses several cases in which aid to religious institutions has been deemed to be direct, as opposed to aid that incidentally benefits a religion. Subsection C, in contrast, discusses cases in which the Court held that aid to reli-

22. Id. at 16.
23. Id. at 18. The Court has continued to be wary of the potentially hostile treatment that religion, religious ideas, and religious organizations can receive as a result of what the government believes is required by the Establishment Clause. See, e.g., Board of Educ. v. Grumet, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring) ("The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion."); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense."); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (noting that with total separation "state and religion would be aliens to each other—hostile, suspicious, and even unfriendly").
24. Everson, 330 U.S. at 3, 18. Under the authority of the statute, funds were provided for transportation to and from Catholic schools as well as public schools. Id. at 3. The Court compared this bus service to protecting children from traffic hazards, patrolling school grounds with police, providing fire protection, and allowing the religious schools to use public sewage systems. Id. at 17-18.
25. Id. at 17.
26. See, e.g., School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985) ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.").
27. See, e.g., Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (permitting the neutral extension of vocational assistance to a blind person studying at a private Christian college).
gion was neutral and, therefore, constitutional, and assimilates the cases into three models of neutrality used by the Court throughout the years. ²⁸

B. The Direct-Funding Prohibition

Justice Black's warning against direct funding abounds throughout the Court's Establishment Clause jurisprudence. The seminal case in which the Court invalidated this kind of "direct support" was *Lemon v. Kurtzman,*²⁹ in which Chief Justice Burger, writing for the majority, penned what is now dubiously known as the "Lemon test."³⁰ Chief Justice Burger described the test in the following manner: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"³¹

Between 1973 and the early 1990's, the Court used the *Lemon* test as the focal point of its Establishment Clause decisions.³² Since 1992, however, the Court has become uneasy with the inflexibility which results from strict adherence to the *Lemon* test.³³ While the *Lemon* test as a stringent, three-part Establishment Clause test has proven to

²⁸. See infra notes 72-108 and accompanying text.
²⁹. 403 U.S. 602 (1971).
³⁰. See infra notes 285-86 (listing a sampling of the academic commentary generated by the *Lemon* decision).
³¹. *Lemon,* 403 U.S. at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (citations omitted)). Although *Lemon* clearly articulated the three-prong test for the first time, the *Lemon* test is more accurately a synthesis of separate policy considerations used in the Court's prior decisions. In *School Dist. of Abington Township v. Schempp,* 374 U.S. 203 (1963), the Court used the following two-step test to evaluate government action: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Id.* at 222. In *Walz,* the Court examined the purpose and effect of the governmental action at issue. 397 U.S. at 669-72. In addition, the Court added a third step to its Establishment Clause analysis which assessed the resultant "degree" of government involvement with religion to ensure that "the end result—the effect—is not an excessive government entanglement with religion." *Id.* at 674. Thus, while the "test" is now known as the "*Lemon* test," the First Amendment policies which the test purported to articulate were recognized long before *Lemon.*

³². In 1992, Justice Blackmun noted that between 1971 and 1992, only one of the Court's thirty-one Establishment Clause cases was decided without reference to the basic principles described in *Lemon.* Lee v. Weisman, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., dissenting) (referring to Marsh v. Chambers, 463 U.S. 783 (1983)).
be unworkable,\(^3\)\(^4\) that underlie the test will continue to be used to demarcate what is constitutional aid to religion and what is prohibited establishment of religion. Analyzing the Court's application of the *Lemon* test in its case law lends insight into what the Court deems to be unconstitutional direct funding of religion. Three cases in particular—*Lemon*, *Aguilar v. Felton*,\(^3\)\(^\,\)\(^6\) and *School District of Grand Rapids v. Ball*\(^3\)\(^7\)—provide insight into the types of funding programs the Court has deemed to provide too direct of a benefit to religion to pass constitutional muster.

At issue in *Lemon* were two similar state-aid plans: a Rhode Island program which provided salary supplements to private school instructors teaching wholly secular courses,\(^3\)\(^8\) and a Pennsylvania program which reimbursed private schools for teachers' salaries, books, and other teaching materials used for secular classes.\(^3\)\(^9\) The Court found that both statutes violated the test's third prong because their "very nature [was] apt to entangle the state in details of administration."\(^4\)\(^0\) In regard to the Rhode Island statute, the Court found that the administration of the religious schools in the state could not be separated from the religious functions of the schools without substantial government supervision.\(^4\)\(^1\) Similarly, in discussing the Pennsylvania statute, the Court found that the nature of the Pennsylvania private schools was so permeated by religion that excessive government involvement would be required to ensure that state aid went only to secular activities.\(^4\)\(^2\) Thus, both statutes were struck down as unconstitutional violations of the Establishment Clause.

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34. Justice Scalia's concurrence in *Lamb's Chapel* provides an oft-quoted condemnation of the *Lemon* test: "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and... attorneys..." 508 U.S. at 398 (Scalia, J., concurring). Justice Scalia noted that when the Court "wish[es] to strike down a practice it forbids, [the Court] invoke[s] *Lemon*,” and "when [the Court] wish[es] to uphold a practice it forbids, [the Court] ignore[s] it entirely." *Id.* at 399.

35. For purposes of this Note, the two policies that underly the *Lemon* test are the desire to neither advance nor inhibit religion and the goal to keep government involvement with religion to a minimum. *See Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963).

39. *Id.* at 609-11.
40. *Id.* at 615 (citing *Walz*, 397 U.S. at 695). Ironically, although the Court framed its “test” as a three-part inquiry, the Court passed over the second prong of the test because the third prong of the test was so clearly violated. *See id.* at 613-14.
41. *See id.* at 615, 619-20.
42. *See id.* at 621-22.
In two companion cases decided in 1985, the Court struck down aid schemes which involved the use of federal funds to send public school instructors to teach courses at private schools. In *Aguilar v. Felton*, the city of New York used federal funds to pay public school teachers to teach courses such as remedial reading, remedial math, and English as a second language to "educationally deprived children from low-income families." In holding the provision unconstitutional, the majority found that the "critical elements of . . . entanglement" were evident. First, the aid was used in a "pervasively sectarian environment" in schools that the Court of Appeals had characterized as "[having as their] substantial purpose the inculcation of religious values." Second, excessive monitoring was required to keep the religious element out of the classrooms.

*Aguilar's* companion case, *School District of Grand Rapids v. Ball*, used the effects test, and not the entanglement test, to strike down two statutes similar to the scheme considered in *Aguilar*. The School District of Grand Rapids' Shared Time program financed "remedial" and "enrichment" programs by providing public school teachers and leasing private school classrooms; similarly, its Community Education program offered secular courses not available at the private schools and leased classrooms from the schools in which the courses were taught. None of the participants in the program were public-school

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45. *Id.* at 404, 406. The classes were all taught at parochial schools. *Id.* at 406.
46. *Id.* at 412.
47. *Id.*
48. *Id.* at 406 (quoting *Felton v. Secretary, United States Dep't of Educ.*, 739 F.2d 48, 68 (2d Cir. 1984)). Both the majority and the Court of Appeals were characterizing the individual institutions as opposed to the entire class of recipients. Only 13.2% of the students eligible to receive funds in 1981-82 attended private schools. *Id.* The Court found that the schools subject to controversy were primarily sectarian because they were controlled by churches, compelled students to attend church exercises, and favored admitting students of their own denomination. *Id.* at 412.
49. *Id.* The monitoring to which the Court referred involved sporadic unannounced visits from supervisors and program coordinators. *Id.* at 407. The classrooms were also cleared of all religious symbols and the individual teachers were instructed to avoid involvement with religious activities. *Id.* In his dissent, Justice Rehnquist noted that the no-entanglement test often creates a "'Catch-22' paradox . . . whereby aid must be supervised to ensure no entanglement but the supervision itself . . . [can] cause an entanglement." *Id.* at 420-21 (Rehnquist, J., dissenting).
51. *Id.* at 375-76. Several of the teachers were actually former employees of the religiously affiliated schools at which they were being paid to teach. *Id.* at 376.
52. *Id.* at 376-77. Some of the courses offered were home economics, Spanish, drama, and nature appreciation. *Id.* Again, many of the teachers were employees or former employees of the particular religiously affiliated school at which they taught. *Id.* at 377.
Forty of the forty-one schools at which the classes were held were characterized as "pervasively sectarian" by the majority. Thus, the Court found that the programs created a "symbolic link between government and religion" and thereby ruled that Lemon's effects prong was violated. The Court viewed the Michigan programs as "indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause." While this discussion of Lemon, Aguilar, and Ball provides only a cursory review of the direct-funding prohibition, the cases illustrate that the Court has been primarily concerned with two aspects of funding programs. First, funding schemes are deemed to be direct when the recipients of aid are predominantly sectarian in nature. Second, funding of activities with both religious and nonreligious purposes is deemed to flow directly to the religious activities of the organizations if the government cannot, without some degree of certainty, deter-

53. Id. at 378.

54. Id. at 379. The Court found that "a substantial portion of [the schools'] functions [were] subsumed in the religious mission." Id. (quoting Americans United for Separation of Church & State v. School Dist. of Grand Rapids, 546 F. Supp. 1071, 1084 (W.D. Mich. 1982)). Parents of the children enrolled in these schools either had to be members of the schools' particular faith or to pledge to have their children taught in accordance with the faith's teachings. Id. The regular curriculum at many of the schools included prayers and attendance at religious services. Id. at 384 n.6 (citing School Dist. of Grand Rapids, 546 F. Supp. at 1080-84).

55. Id. at 385. The Court's effects analysis indicated that a program's theoretical—as opposed to actual—effect can also run afoul of Lemon. See id. at 388-89 (declining to look for actual evidence of religious indoctrination, using as a substitute the possible or potential results). The Court refers to this "symbolic link" as an endorsement of religion. Id. at 397. Since the Ball decision, the "endorsement test" has reappeared sporadically in the Court's Establishment Clause jurisprudence. See, e.g., Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995); Allegheny County v. ACLU, 492 U.S. 573 (1989); Wallace v. Jaffree, 472 U.S. 38 (1985) (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668 (1984).

Violations of the Lemon test's effects prong also invalidated the state-aid schemes at issue in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), and Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973). In Levitt, the Court determined that reimbursements for testing expenses were "direct money grant[s]" to religious schools because the money could be used for state-prepared as well as teacher-prepared tests and could possibly have "inculcated[d] students in the religious precepts of the sponsoring Church." Levitt, 413 U.S. at 474-77, 480. Similarly, in Nyquist, repair and tuition grants to private schools were deemed to be unconstitutional because they potentially could be used for sectarian purposes, and because the financial support used for secular purposes necessarily left the private schools more funds to be used for religious purposes. See Nyquist, 413 U.S. at 779-83.


57. See, e.g., Meek v. Pittenger, 421 U.S. 349, 364 (1975) (invalidating part of an aid program in which a majority of schools eligible to receive aid were religiously affiliated).
mine to which purpose the benefit accrues. The remainder of Part I discusses three models of neutrality that the Court has used to cancel out what otherwise would be deemed the direct funding of religion.

C. The Neutrality Door

In contrast to the "direct aid" cases discussed above, the Court has used a neutrality door through which a state can pass through the "wall of separation," and thereby provide indirect aid to religious institutions. The neutrality concept recognized in Everson has largely appeared in the Court's Establishment Clause cases as one or more of three models of neutrality: (1) neutrality, as determined by the ability to easily separate an institution's secular functions from its sectarian functions; (2) neutrality, in that government benefits to religious institutions are insulated—in most cases, by way of an individual's free choice; and (3) neutrality, as evidenced by the diversity of the class receiving the government aid.

In the cases that follow, laws that directly advance or inhibit religion are distinguished from laws that are neutral towards religion, while incidentally providing some degree of assistance or preference to religious organizations. Funding programs which are neutral to religion are the only constitutional means by which a state can provide financial aid to religion. The first subsection below identifies the traditional neutrality doctrine by comparing two early cases in which neutrality was discussed. In the second subsection, the author groups neutrality cases into three "models" of neutrality which have dominated the Court's Establishment Clause case law.

I. The Traditional Neutrality Doctrine

Defining "neutrality" seems relatively simple; however, it is not. Two cases, one from the 1970's and one from the 1980's, developed the notion of what constitutes a neutral aid scheme that incidentally

58. See, e.g., id. at 361-63 (finding that "the direct loan of instructional material and equipment had the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools [receiving the aid]").

59. These models of neutrality are based upon what this author believes was the dominant showing of neutrality in each cited case. The three models are not intended to be an exhaustive list of factors that the Court uses to determine whether a religious-aid statute is neutral. Further, the cases in the following subsections are intended only to be representative of the dominant factor of "neutrality" discussed by the Court in each opinion. Other indicia of neutrality were considered by the Court in each case.

60. See infra notes 72-87 and accompanying text.

61. See infra notes 88-98 and accompanying text.

62. See infra notes 99-108 and accompanying text.
benefits religion. In *Walz v. Tax Commission*, Chief Justice Burger began the majority opinion with the instruction that the Establishment Clause was intended to be "productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Chief Justice Burger recognized that neutrality as a rigid Establishment Clause test would be difficult to control, but because religion has an important place in the "pluralism of American society," religious organizations should not be afforded unequal treatment. Thus, in evaluating a property tax exemption given to religious organizations that used property solely for religious worship, the Court considered a number of factors including the purpose of the exemption and the exemption's equal treatment of different religious groups. Ultimately, the exemption was characterized as "simply sparing the exercise of religion from the burden [of property taxes]."

In contrast, the Court in *Larson v. Valente* struck down a Minnesota statute as an impermissible preference of some religious groups over others. In his majority opinion, Justice Brennan reiterated *Walz*’s theme of "benevolent neutrality," noting that the "clearest command" of the Establishment Clause is that one religious group must not be preferred over another, nor may religion be preferred over nonreligion. At issue was a statute that required certain religious organizations to adhere to stringent registration and reporting requirements—only groups that solicited more than fifty percent of their funds from nonmembers were subject to the statute’s requirements. The Court reasoned that when any such preference of some religious organizations over others occurs, or when religion is preferred to nonreligion, the program in question is suspect and is not likely to pass Establishment Clause review.

Taken together, *Walz* and *Larson* formulate the principle known as "religious neutrality." Throughout their analysis, the Court developed

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64. Id. at 669; see also Robert T. Miller & Ronald B. Flowers, Toward Benevolent Neutrality: Church, State, and the Supreme Court (3d ed. 1987) (discussing this "benevolent neutrality" in the context of the Supreme Court’s case law).
65. 397 U.S. at 669, 687-89.
66. See id. at 678-80, 687-89.
67. Id. at 673.
68. 456 U.S. 228 (1982).
69. Id. at 244.
70. Id. at 230.
71. See id. at 246. Interestingly, the majority in *Larson* averred that a strict scrutiny-like review of the statute, instead of the *Lemon* test, should be used in cases in which laws are not neutral to religion. See id. at 252.
and approved the notion of permissible state accommodations of religion on a neutral basis. The following subsections trace this principle of neutrality through several of the Court’s Establishment Clause decisions. In different cases, the Court has looked to different indicia to determine whether an aid program acts to advance or inhibit religion. The following subsections group several cases dealing with funding programs according to the dominant models of neutrality used by the Court to find the programs at issue constitutional.

2. Separability of Sectarian and Secular Functions

One model of neutrality, which the Court has relied upon in its Establishment Clause case law, is the ease of separability between the religious functions and nonreligious functions of a benefited religious institution. Long before Everson was decided, the Court used this model of neutrality to uphold aid to a corporation which, despite being entirely composed of members of a Roman Catholic sisterhood, was limited by its corporate charter to the wholly secular purpose of operating a charitable hospital.

The Court continued to use the separability model of neutrality after Everson. In 1971, a plurality used the Lemon test in Tilton v. Richardson to uphold a federal grant program for the construction of “academic facilities” at private colleges, including some church-related schools. The Act authorizing the grants included a restriction that the facilities not be used for any religious purpose. The four colleges in question in Tilton were controlled by Roman Catholic organizations and performed “admittedly religious functions.” The Court, however, upheld the grant program because the secular use to which the funds were put was easily separated from religious indoctrination. In addition, the Court found that the risk of excessive gov-

72. See supra notes 21-27 and accompanying text (discussing the Everson decision).
74. 403 U.S. 672 (1971).
75. Id. at 675, 689.
76. Id. at 675. The Act prohibited funding for “any facility used or to be used for sectarian instruction or as a place for religious worship, or... any facility which... is used or to be used primarily in connection with any part of the program of a school or department of divinity...” Id. (quoting Higher Education Facilities Act of 1963, 20 U.S.C. § 751(a)(2)(1964 ed., Supp. V)). The facilities at issue in Tilton were two libraries, a language laboratory, a science building, and a performing arts building. Id. at 681.
77. Id. at 686-87.
78. See id. at 681 (finding “no evidence that religion seep[ed] into the use of any of these facilities”).
ernment entanglement was de minimis due to the fact that it was a “one-time, single-purpose construction grant.”

Two years later, in *Hunt v. McNair*, a South Carolina taxpayer brought an action challenging a state statute which authorized a financing transaction that benefited a Baptist college. In its application for financial aid, the college specified that it needed revenue bonds totaling $1,250,000 to fund short-term financing of capital improvements and to complete a dining facility on campus. Justice Powell articulated the separability model of neutrality in this way:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

Thus, because the secular functions of the benefited colleges were easily separable from their religious affiliation, the statute was upheld.

The Court has also used the separability-of-functions model of neutrality to uphold funding to nonpublic schools in the form of books and other services and to review the provision of funds given to private schools for counseling and educational services related to adolescent sexuality and pregnancy. In effect, the entanglement prong of

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79. *Id.* at 688.
80. 413 U.S. 734 (1973).
81. *Id.* at 735-36. The college stood to receive a lower interest rate from state-issued bonds than if the college had financed the project privately. *Id.* at 739. The statute included a term prohibiting funding of “any facility used or to be used for sectarian instruction or as a place of religious worship or any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination.” *Id.* at 736-37 (quoting S.C. CODE ANN. § 22-41.2(b) (Supp. 1971)).
82. *Id.* at 738.
83. *Id.* at 743.
84. See *id.* at 749; *see also* Roemer v. Board of Pub. Works, 426 U.S. 736, 737 (1976) (holding that state subsidies to private schools were constitutional because the schools were not “pervasively sectarian” and were largely autonomous from their religious affiliates).
85. Wolman v. Walter, 433 U.S. 229 (1977). Regarding certain therapeutic services provided by an Ohio statute, the Court noted that the services would be performed at public schools, in public centers, or in mobile units not located on private school grounds. *Id.* at 245. Because of this location, the “pervasively sectarian atmosphere of the church-related school” was not present and, therefore, the provision of the services would neither impermissibly advance religion nor excessively entangle the state in religion. *Id.* at 247-48. However, the Court did invalidate the loan of instructional materials and field trip transportation in *Wolman* because the provision of secular material directly related to the educational function of the religious schools. *Id.* at 254. Therefore, it constituted direct aid to the “religious mission that [wa]s the only reason for the schools' existence.” *Id.* at 250 (quoting Meek v. Pittenger, 421 U.S. 349, 366 (1975)). The Court was unable to distinguish this aid from a cash grant. *Id.* at 251.
86. Bowen v. Kendrick, 487 U.S. 589 (1988). Significantly, the Court recognized the overlap of Church goals with State goals that often exists in the real world. *Id.* at 604 n.8. The Court remanded the case to the district court to consider whether the “aid has been used to fund
the *Lemon* test appears to be based, at least in part, upon this model of neutrality.\(^8^7\) However, like the entanglement prong of *Lemon*, the separability-of-functions model of neutrality is a rather malleable beast in that the amount of religious permeation, or lack thereof, required to fit within this model of neutrality is imprecise.

### 3. Individual Choice: Insulating the Government Aid

A second model of neutrality which the Court has used to uphold benefits to religious institutions is based upon the notion that, while the government cannot directly subsidize religion, the Establishment Clause is not violated when an individual takes money given to him or her by the government and passes it on to a religious organization. Such was the case in *Witters v. Washington Department of Services for the Blind*,\(^8^8\) where the Court upheld the State of Washington's extension of vocational assistance to a blind person studying to become a pastor, missionary, or youth director at a private Christian college.\(^8^9\) The Court noted that the program was made available generally without regard to the sectarian-nonsectarian nature of the institution benefited.\(^9^0\) Because the statute provided aid directly to the student who then gave it to the educational institution, the aid was available regardless of the recipient's choice of schools and, therefore, was constitutional.\(^9^1\) Further, the Court emphasized that the program "create[d] no financial incentive for students to undertake sectarian education."\(^9^2\)

\(^8^7\) In *Lemon v. Kurtzman*, 403 U.S. 602, 615-20 (1971), the Court struck down a Rhode Island statute that primarily aided Catholic schools which were "permeated by religion." The schools were located near parish churches, religious education was considered part of their overall education process, and two-thirds of the teachers were nuns. *Id.*

\(^8^8\) 474 U.S. 481 (1986).

\(^8^9\) *Id.* at 489; see also *Mueller v. Allen*, 463 U.S. 388, 390-92 (1983) (upholding a Minnesota law allowing taxpayers to deduct certain educational expenses, even though the vast majority of those tax deductions went to parents whose children attended sectarian schools). In *Mueller*, the Court found determinative that all parents could deduct educational expenses whether their children attended public or nonpublic schools, and that the public funds only became available to the sectarian schools as a result of "numerous private choices of individual parents of school-age children." *Id.* at 396-97, 399.

\(^9^0\) *Witters*, 474 U.S. at 487.

\(^9^1\) *Id.* at 486-89.

\(^9^2\) *Id.* at 488. The Court also emphasized that the decision to benefit the sectarian institutions was a product of private decisions. "For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all
The Court utilized the individual-choice model of neutrality most recently in *Zobrest v. Catalina Foothills School District*.\(^9\) In *Zobrest*, a five-Justice majority found constitutional the provision of an interpreter for a deaf sectarian school student under the Individuals with Disabilities Education Act (IDEA).\(^4\) Both parties stipulated that it was impossible to separate the religious from the nonreligious functions of the school.\(^5\) However, the fact that this statute distributed funds to individuals based upon their status as "handicapped," a religion-neutral qualification, was found to be determinative.\(^6\) Because the benefit to the secular school was a result of the individual parents' decision and all money was awarded according to neutral criteria, the IDEA was held constitutional.\(^7\) The Court distinguished the provision of funds for an interpreter from a direct funding of religion by noting first, that paying for an interpreter was not a direct subsidy to the religious school, and second, that the school was not relieved of any expense it would otherwise have had to pay to educate its students.\(^8\)

*Zobrest* and *Witters* demonstrate how the Court has relied upon the individual-choice model of neutrality to uphold funding schemes which benefit religious institutions. In effect, the Court has found that individual choice somehow acts to insulate the government aid from the religiously affiliated recipients. Like the separability-of-functions model, the individual-choice model of neutrality rests on the same policy that the entanglement prong of the *Lemon* test was designed to protect—it takes the government out of funding decisions which aid religion.

4. **Diversity of Recipient Class**

In the past several terms, the Court has focused on another model of neutrality in which the diversity of the recipient class is used to
gauge neutrality. Such was the case in *Lamb's Chapel v. Center Moriches Union Free School District* where the Court unanimously held that a school district violated Lamb's Chapel's Free Speech right by allowing after-hours access of school buildings to nonreligious programs while denying similar access to religious programs. The school district's argument that allowing religious groups to use the facilities would constitute an Establishment Clause violation and, therefore, justified the infringement on Free Speech, was dismissed. The Court resolved that the fact that the property had been used repeatedly by a variety of organizations dispelled any fear of an Establishment Clause violation.

A similar situation was addressed in *Board of Education of the Westside Community Schools v. Mergens*. In *Mergens*, a high school board's policy denied a student religious group access to school property during non-school hours. In striking down the school board policy, the Court emphasized the fact that there were many student groups at the school representing a variety of interests.

In both *Lamb's Chapel* and *Mergens*, the Court concluded that a policy of neutrality, gauged by the diversity of the class receiving government aid, created no serious danger of an Establishment Clause violation. In effect, this model of neutrality utilizes the same policy

99. This is not meant to insinuate, however, that the diversity of the recipient class as a model of neutrality is a novel idea. Cf. Wolman v. Walter, 433 U.S. 229, 234 (1977) (noting that of 720 chartered nonpublic schools, all but 29 were sectarian, and more than 92% of the nonpublic school students attended schools of one particular denomination); Meek v. Pittenger, 421 U.S. 349, 364 (1975) ("[O]f the 1,320 nonpublic schools... that... qualify for aid... more than 75% are church-related or religiously affiliated.").

100. 508 U.S. 384 (1993).

101. *Id.* at 394. The decision reversed a New York appellate court's holding that a school could not bar a student bible club from using the facilities that the school opened to other groups for a variety of purposes. *Id.* at 391. The petitioners, Lamb's Chapel and its pastor, applied for and were twice denied permission to use the school facilities to show a six-part film series containing lectures from Doctor James Dobson. *Id.* at 387. The subject of the lectures was Dr. Dobson's "views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early age." *Id.* at 388.

102. *Id.* at 395.

103. *Id.* at 396.


105. *Id.* at 231. The religious club in question, headed by the respondent, Bridget Mergens, submitted that reading the Bible, discussing the Bible, and praying together was part of its purpose. *Id.* at 232.

106. *Id.* at 252. The Court used this fact to infer that the policy had a primarily secular effect. *Id.* The Court also noted that more entanglement might occur by attempting to prevent religious speech by monitoring the meetings than would occur by simply allowing the meetings to take place. *Id.* at 253.

107. The model of neutrality used in *Lamb's Chapel* and *Mergens* probably has its beginnings in a Supreme Court case decided in 1981. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court
questions as the effects prong of Lemon. Moreover, it appears that the diversity-of-recipient-class model of neutrality would be satisfied if the theoretical (i.e. not actual) recipients of state aid were diverse.

II. Subject Opinion: Rosenberger v. Rector & Board of Visitors of the University of Virginia

As the survey of the United States Supreme Court’s Establishment Clause jurisprudence in Part I illustrates, several models of “neutrality” have eroded the “wall of separation” over the past four decades. Funding programs in which the beneficiary institution’s character is easily separable into religious, versus nonreligious, functions have been deemed neutral. Similarly, aid schemes in which religious institutions are benefited only as a result of individual decisions have been found to be neutral. Now, the Court’s dominant reading of “neutrality” seems to be shifting to a model based upon the diversity of the class receiving aid. However, until Rosenberger v. Rector & Board of Visitors of the University of Virginia, no direct-funding scheme had ever been held constitutional, regardless of the model of neutrality employed by the Court.

In Rosenberger, neutrality was used to validate what appeared to be a direct-funding scheme. The University of Virginia used a fund composed of mandatory student fees to help support various student groups. However, out of fear of violating the Establishment Clause, the university denied funding to the petitioner’s religious student organization. In a five-to-four decision, the Court found

held that facilities opened for use by student groups could not be closed to religious student groups without a violation of the students’ Free Speech rights. Thus, because access to facilities was granted to “a broad class of nonreligious as well as religious speakers,” the Court upheld the university policy. Id. at 274.

108. See, e.g., Mergens, 496 U.S. at 252-53 (determining that aid available to a variety of student groups constituted a secular effect).
110. See supra notes 72-87 and accompanying text (discussing funding to religious institutions for nonreligious programs).
111. See supra notes 88-98 and accompanying text (discussing the permissibility of state funding, regardless of individual choices to benefit religion).
112. See supra notes 99-108 and accompanying text (explaining the Court’s recent application of this concept of neutrality).
114. See id. at 2533 (Souter, J., dissenting) (noting that “the majority’s opinion . . . acts to approve the direct funding of a religious institution”).
115. Id. at 2514.
116. Id. at 2515-16.
117. The majority in Rosenberger was composed of Justices Kennedy, Scalia, O’Connor, Thomas, and Chief Justice Rehnquist. Justices Souter, Ginsburg, Stevens, and Breyer formed the dissent. Justices O’Connor and Thomas filed separate, concurring opinions.
that the university had infringed upon this organization's Free Speech right by refusing it access to the funds. More significantly, the majority found that despite the possibility that the religious group would receive direct funding as a result of its holding, there was no risk of an Establishment Clause violation.

The following subsections discuss Rosenberger's majority and dissenting opinions, as well as Justice O'Connor's concurrence. This section begins by introducing the factual and procedural background of the case. The Court's opinions then are broken down into two topics: direct funding and neutrality. The dissent found the direct nature of the funding in Rosenberger determinative. In contrast, both the majority opinion and Justice O'Connor's concurrence relied on neutrality, and the apparent indirectness of the funding scheme, to rule that the university had to provide the student group with funding. As this discussion of Rosenberger develops, it becomes less clear where the absence of direct funding ends and where the presence of neutrality begins.

A. Factual and Procedural Background

At the University of Virginia, a student organization must cross three hurdles to receive money from the Student Activities Fund ("SAF"), which is funded by a mandatory, fourteen-dollars-per-semester fee imposed upon each full-time student. First, the group must register with the university as a Contracted Independent Organization ("CIO"), a status which is available to any group composed

118. See infra notes 249-84 and accompanying text (positing that the presence of a Free Speech claim in Rosenberger had a significant impact upon the Court's Establishment Clause analysis).

119. See infra notes 213-36 and accompanying text (arguing that the distinction between direct funding and neutrality has created much confusion because of the Court's all-too-sweeping utterances).

120. Generally speaking, there were two issues which the district court, appellate court, and U.S. Supreme Court were forced to address. The first issue revolved around the classification of the student funds as a public, nonpublic, or limited public forum. The second issue was whether the University of Virginia's interest in avoiding an Establishment Clause violation was sufficient to justify the abridgement of the petitioners' Free Speech right.

Justice Thomas also filed a concurring opinion discussing the Establishment Clause issue. Rosenberger, 115 S. Ct. at 2528-33 (Thomas, J., concurring). However, Justice Thomas' opinion dealt primarily with a historical analysis of the Establishment Clause and is beyond the scope of this Note. Thus, Justice Thomas' concurrence is not discussed.

121. See infra notes 163-66, 171-78, 181-83 and accompanying text.

122. See infra notes 152-210 and accompanying text (explaining the differences in approach to direct funding and neutrality between Justice Souter's dissent, the majority, and Justice O'Connor's concurring opinion).

primarily of students and whose managing officers are full-time students. Fraternities and sororities, political and religious organizations, and any group whose membership is exclusionary are denied CIO status.

Once designated a CIO, the group must prove that it fits into one of the particular categories of CIOs which are eligible to apply for funding from the SAF. In all, eleven categories of student groups are permitted to seek payment from the SAF based upon their relationship to the "educational purpose of the University of Virginia." Among those groups which received funding from the SAF prior to the Rosenberger decision were the Muslim Student Association, the Jewish Law Students Association, and the C.S. Lewis Society.

Finally, the student council, subject to review by a faculty body, distributes SAF funds to eligible CIOs according to the funding guidelines issued by the Rector and Board of Visitors of the University of Virginia. All payments from the SAF are made directly to creditors of the student groups, as opposed to the groups themselves.

Wide Awake Productions ("WAP") was formed in 1990 by the petitioner, Ronald Rosenberger, and became a CIO shortly thereafter. As a CIO, WAP could use university facilities, including meeting rooms and computers. Significantly, by granting WAP the status of CIO, the student counsel necessarily did not deem WAP to be a "religi-
A religious organization,” described in the funding guidelines as “an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.”

As a CIO, WAP was eligible to, and did, apply for funding from the SAF for its publication, Wide Awake: A Christian Perspective at the University of Virginia (“Wide Awake”). However, both the student council and its faculty advisory board denied WAP its funding, based entirely upon their classification of Wide Awake as a “religious activity.”

A “religious activity,” as defined in the funding guidelines, was any activity which “primarily promotes or manifests a particular belief in or about a deity or ultimate reality.”

Having exhausted all options in the university’s system, Ronald Rosenberger, the founder and president of WAP, first brought suit in the federal district court for the Western District of Virginia in 1992. There, the court upheld the restriction against funding religious activities, ruling that access to the SAF was a nonpublic forum upon which the university had imposed reasonable restrictions.

One of the

133. Rosenberger, 115 S. Ct. at 2515.

134. Id. The paper applied as a media group communicating “student news, information, opinion, entertainment, or academic communications...” Id. at 2514. Media groups are one of eleven categories of organizations eligible to apply for SAF funds. Id. Three issues of Wide Awake were published prior to applying for funding or the instigation of suit, and approximately 5,000 copies were distributed free of charge to the university population. Rosenberger, 795 F. Supp. at 177. A total of fifteen student publications were funded by the SAF during the 1990-91 academic year. Rosenberger, 115 S. Ct. at 2515.

135. Rosenberger, 115 S. Ct. at 2515. Religious activities are one of several types of student activities for which the guidelines prohibit funding. The guidelines also specify that political and philanthropic activities, activities jeopardizing the university’s tax-exempt status, payments of honoraria, and social entertainment cannot receive funding. Id. at 2514.

136. Id. at 2519. WAP’s paper, Wide Awake, has a proclaimed two-fold mission: “to challenge Christians to live, in word and in deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.” Id. Members of WAP acknowledged that the magazine was to provide “a Christian perspective on both personal and community issues.” Id. WAP’s first published issue addressed racism, crisis pregnancy, stress, prayer, and C.S. Lewis’ ideas about evil and free will, and also contained reviews of religious music. Id. The second and third issues of the magazine included articles about homosexuality, Christian mission work, and eating disorders. Id.

137. Rosenberger, 795 F. Supp. at 175.

138. Id. at 183. While an analysis of the infringement upon WAP’s Free Speech right is beyond the scope of this Note, a brief review of the analysis which a Free Speech issue receives is in order. While the First Amendment provides that “Congress shall make no law [abridging] the freedom of speech,” the United States Supreme Court has consistently held that restraints on free expression may be “permitted for appropriate reasons.” See, e.g., Elrod v. Burns, 427 U.S. 347, 360 (1976).

In Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 44 (1983), the Court stated that what constitutes “appropriate” restrictions on expression necessarily depends upon what type of expression is being suppressed and where the expression is taking place. Accordingly, in public fora, defined as “places which by long tradition or by government fiat have been devoted
"reasonable justifications" which the district court found was the university's interest in maintaining a proper separation of Church and State. However, the court merely noted that the university's judgment regarding the possible Establishment Clause violation was reasonable and declined to second-guess the university's restriction.

On appeal, the Fourth Circuit affirmed the district court's decision, although on different grounds. In contrast to the district court, the Fourth Circuit found that the University's speech discrimination was content-based and, therefore, addressed the Establishment Clause issue in its search for a compelling interest to justify the discrimination. Using the Lemon test, the Fourth Circuit found that had the university not excluded WAP from funding, it would have violated both the effects and entanglement prongs of the Lemon test. In its
analysis, the appellate court averred that the latter was "most plainly implicated in this case."145

Thus, more than three years after first applying for funding from the University of Virginia, Ronald Rosenberger and WAP petitioned the United States Supreme Court for certiorari on the following question: "[w]hether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in a student activities fund."146

In a five-to-four decision, the United States Supreme Court reversed the Fourth Circuit's holding.147 Writing for the majority, Justice Kennedy began his analysis by determining that the SAF was a limited public forum148 and that the prohibition of funding religious activities unconstitutionally barred access to this forum based upon viewpoint.149 The majority rejected the university's claim that denying funding to the paper was necessary to comply with the Establishment Clause and held that providing WAP with funding would not be an establishment of religion.150

would not only be "politically divisive," but would also "send an unmistakably clear signal" that the university supported and promoted the message which Wide Awake purveyed. Id. at 286. For a more comprehensive review of the Lemon test and its underlying principles, see supra notes 29-42 and accompanying text.

145. Rosenberger, 18 F.3d at 285.


147. Id.

148. Id. at 2517-20. The majority held that the SAF was a limited public forum, although "more in a metaphysical than in a spatial or geographical sense." Id.; see supra note 138 for a discussion of why the Court's characterization of the student fund as a limited public forum was important to its Free Speech analysis.

149. The majority's characterization of the university's Free Speech discrimination was pertinent to its decision. See infra notes 249-84 and accompanying text (positing that this Free Speech claim had a substantial impact on the majority's Establishment Clause analysis). In contrast to the Fourth Circuit's ruling that the discrimination was content-based, which is permissible at times in limited public fora, the majority found that the university had employed viewpoint-based discrimination, which is presumptively impermissible even in limited public fora. Rosenberger, 115 S. Ct. at 2517. Acknowledging that the demarcation between content and viewpoint discrimination is far from precise, the majority relied on an analogy to Lamb's Chapel to find that the university's discrimination was the latter. Id. at 2517-18. Thus, Justice Kennedy turned to the university's Establishment Clause argument to determine whether complying with the Constitution's prohibition against establishing religion justified the petitioners' speech deprivation. Id. at 2520-21.

150. Rosenberger, 115 S. Ct. at 2524. Although the Court granted certiorari on the issue of whether the Establishment Clause justified the university from barring WAP access to the SAF, the majority stated that the argument "lacked force." Id. at 2521. However, the issue seems more debatable than the majority gives credit, as both concurrences addressed only that issue, and the dissent would have found the issue dispositive. See infra notes 152-210 and accompanying text (analyzing the majority opinion, dissent, and Justice O'Connor's concurrence in terms of neutrality and direct funding).
The following subsections break the majority, concurring, and dissenting opinions in *Rosenberger* into a discussion of direct funding and neutrality. As the next subsections reveal, it was not always clear when the majority and dissenting opinions were discussing neutrality and when the opinions were discussing direct funding. Both the majority and the dissent used the terms "neutrality" and "direct funding" as opposing absolutes. Only Justice O'Connor's concurrence treated the two "absolutes" as one unified requirement of "religious neutrality," which this Note proffers is the correct analysis.  

**B. Is Rosenberger a Direct Funding Case?**

At first blush, the funding of WAP, now mandated by the holding in *Rosenberger*, appears to be the type of direct funding of religion which Justice Black so adamantly prohibited in *Everson*. In fact, Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer joined, writing for the *Rosenberger* dissent, began and ended his analysis of the Establishment Clause issue by asserting that the majority opinion effectively approved the direct funding of a religious activity. Thus, according to the dissent, the possibility of university funds reaching WAP's hands struck at the "heart of the prohibition of establishment." Of course, the majority did not agree with the dissenters' characterization of the SAF as a direct funding of religion. Writing for the majority, Justice Kennedy found at least three ways to distinguish funds which would flow to WAP from direct funding. 

The majority's first distinction was based upon the perception that the university was merely a conduit through which students pass money to other students' activities. Inherent in this theory was the notion that the objective of the SAF was "to open a forum for speech and to support various student enterprises ... in recognition of the diversity and creativity of student life." Recognizing that the

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151. See infra notes 213-36 and accompanying text (arguing that relying solely on the religious neutrality of a funding scheme, based upon the value of neither inhibiting nor advancing religion, is the proper analysis).  
152. See supra notes 21-58 and accompanying text (discussing both *Everson* and the direct-funding prohibition in more detail).  
154. Id. at 2547.  
155. Id. at 2538.  
156. See supra note 117 (identifying the Justices which joined in the majority opinion).  
158. See, e.g., id. at 2522 (arguing that the SAF's only purpose was to redistribute the student fees).  
159. Id.
mandatory student fees were exactions upon the students. Justice Kennedy distinguished this program from a "general tax" based upon the limited use to which the funds could be put. Therefore, Justice Kennedy cautioned readers not to view Rosenberger as "addressing an expenditure from a general tax fund."

The dissent disagreed that the SAF and mandatory student fees were distinguishable from a general tax. Justice Souter saw the mandatory student fees as identical, at least in substance, to a tax assessment used directly to aid religion. The mandatory nature of the student fees carried all the indicia of a general tax, according to Justice Souter. The dissent then noted that the majority's distinction from a general tax was actually irrelevant. According to Justice Souter, using even non-tax revenues would violate one of the Establishment Clause's "dual objectives" by contributing to "a corrupting dependence on support from the [g]overnment." Therefore, Justice Souter submitted that direct aid to religion is unconstitutional regardless of the source of the funds.

A second way in which Justice Kennedy and the majority distinguished the potential payments to WAP from direct funding was that by making payments directly to third parties—as opposed to making them to WAP, itself—the university somehow insulated itself from the transaction. In this respect, Justice Kennedy drew an analogy to two Establishment Clause cases, Widmar and Mergens. Both Widmar and Mergens held that opening meeting rooms for sectarian groups and activities would not establish religion, even though gov-

160. The majority refused to address whether each student had a right to demand a return of their contribution to the SAF if they did not subscribe to the opinion of the funded organizations. Id.

161. Id. This distinction was necessary because, according to the majority, a tax levied for the direct aid of a church would "run contrary to Establishment Clause concerns dating from the earliest days of the Republic." Id.

162. Id.

163. Id. at 2538 (Souter, J., dissenting). The Fourth Circuit agreed with the dissenters' characterization of the funding. See Rosenberger v. Rector & Bd. of Visitors of the Univ. of Va., 18 F.3d 269, 286 (4th Cir. 1994) (noting that direct monetary subsidization of religious organizations is "a beast of an entirely different color," as compared to direct non-monetary aid).

164. Rosenberger, 115 S. Ct. at 2538 (Souter, J., dissenting).

165. Id. at 2547. The Establishment Clause's other objective, according to the dissent, is to "protect individuals and their republics from the destructive consequences of mixing government and religion." Id.

166. Id. at 2546-47.

167. Justice O'Connor averred that this type of indirect payment ensured that the funds were used only for activities consistent with the university's purpose of maintaining a "free and robust marketplace of ideas." Id. at 2527 (O'Connor, J., concurring).

168. Id. at 2523; see supra note 107 (discussing Widmar); supra notes 104-07 and accompanying text (discussing Mergens).
ernment money might be used for the "upkeep, maintenance, and repair of the facilities attributed to those uses." According to Justice Kennedy, there was no practical difference between a school using its funds to operate a facility to which all students have access and paying third parties to operate the facility for the school.

Justice Souter, writing for the dissent, rejected the argument that funneling the funds through the printer chosen by WAP somehow insulated the university's action. The dissent argued that the facts in Rosenberger were not readily analogous to the forum-access cases because the SAF was not a traditional forum. Further, Justice Souter distinguished Witters, Mueller, and Zobrest from Rosenberger in that the choice to benefit religion in those cases was made by an independent third-party standing between the government and the religious institution. Here, the third-party printer was not making the decision whether to print a secular or nonsecular magazine. Instead, the printer received money solely "because of its contract to print a message of religious evangelism at the direction of [WAP]."

Undaunted in its quest to distinguish the SAF funding from direct funding, Justice Kennedy and the majority proffered a third reason why Rosenberger should not be viewed as a direct funding case. According to Justice Kennedy, WAP was not even a religious organization, "at least [not] in the usual sense of that term as used in [the Court's] case law." The majority found the magazine to be merely a publication through which ideas—albeit ideas that conformed to a particular faith—were passed to the student body.

Not surprisingly, the majority's characterization of Wide Awake did not escape criticism from the dissenting justices. Finding the Wide Awake magazine to be nothing less than "straightforward exhortation

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170. Id. at 2524. The majority went on to note that perhaps the latter is better as it avoids possible entanglement problems which might arise when a government entity operates the facility. Id.
171. Id. at 2546 (Souter, J., dissenting). According to the dissent, the analogy "breaks down entirely" because there is "no traditional street corner printing provided by the government on equal terms to all comers." Id.
172. Id.
173. See supra notes 88-92 and accompanying text (discussing the Witters decision).
174. See supra note 89 (discussing the Mueller decision).
175. See supra notes 93-98 and accompanying text (discussing the Zobrest decision).
176. Rosenberger, 115 S. Ct. at 2544-45 (Souter, J., dissenting).
177. Id. at 2545.
178. Id.
179. Id. at 2524.
180. Id.
to enter into a relationship with God as revealed in Jesus Christ,\textsuperscript{181} Justice Souter asserted that the SAF funding of \textit{Wide Awake} would be "the direct subsidization of preaching the word [which] is categorically forbidden under the Establishment Clause."\textsuperscript{182} Justice Souter implored the majority to explore more thoroughly the nature of \textit{Wide Awake}, using several excerpts from the magazine's first three issues to conclude that \textit{Wide Awake} constituted "nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life."\textsuperscript{183}

Justice O'Connor's view on the direct, versus indirect, nature of the SAF funding landed squarely between Justice Souter's and Justice Kennedy's opinions. Justice O'Connor referred to the case as "[lying] at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities."\textsuperscript{184} While she declined to piece the facts of the case into simple categories,\textsuperscript{185} Justice O'Connor subtly expressed her opinion that the funding of WAP would at least approach a forbidden direct funding of religion.\textsuperscript{186} However, Justice O'Connor also noted that the possibility of the students receiving a refund of their fees, if they did not want their money to go to religious organizations, provided a potential basis for distinguishing the case from other direct-funding cases.\textsuperscript{187}

Why is it that the classification of \textit{Rosenberger} as a direct, versus indirect, funding case was so important? The answer to this question determined whether and to what extent neutrality was considered by

\textsuperscript{181}. \textit{Id.} at 2535 (Souter, J., dissenting). The Fourth Circuit agreed with Justice Souter's characterization, noting that "[e]ven \textit{Wide Awake}'s physical appearance draws attention to its religious posture: the Christian symbol of the Cross, lying in a dark oval field, is printed at the top of each page; another Cross marks the end of each contribution." \textit{Rosenberger v. Rector \\& Bd. of Visitors of the Univ. of Va.}, 18 F.3d 269, 273 (4th Cir. 1994).

\textsuperscript{182}. \textit{Rosenberger}, 115 S. Ct. at 2535 (Souter, J., dissenting).

\textsuperscript{183}. \textit{Id.}

\textsuperscript{184}. \textit{Id.} at 2525; see infra notes 232-36 and accompanying text (arguing that Justice O'Connor was the only Justice to recognize that the two principles are not opposing absolutes; rather, they are two terms used to describe the same value of religious neutrality).

\textsuperscript{185}. \textit{Rosenberger}, 115 S. Ct. at 2526 (O'Connor, J., concurring).

\textsuperscript{186}. See \textit{id.} at 2526-27 (arguing that while payments will be made to WAP as a result of the holding, four factors led to the conclusion that the SAF funding would not convey a message of endorsement to the student body).

\textsuperscript{187}. \textit{Id.} at 2527. Justice O'Connor referred to the split that currently exists in the lower courts with regard to the possibility that such a pro-rata refund would be available. \textit{Id. Compare Smith v. Regents of the Univ. of Cal.}, 4 Cal. 4th 843, 863 (1993) (ordering a refund of mandatory student fees to students objecting to the political and ideological activities for which their fees were used), \textit{with Hayes County Guardian v. Supple}, 969 F.2d 111, 123 (5th Cir. 1992) (disallowing a refund for fees used to operate a student-run newspaper because of a university's "important educational purpose" and "narrowly tailored means of advancing" the purpose).
the Justices.\textsuperscript{188} If the SAF funding was deemed direct, as the dissent argued, the Establishment Clause would be violated if any money was passed from the SAF to WAP—the inquiry would end there. However, because the majority found the SAF funding to be something less than direct, funding WAP did not violate the Establishment Clause as long as it was neutral. The next section discusses the role which neutrality played in the \textit{Rosenberger} majority opinion and Justice O'Connor's concurrence, highlighting that the neutrality and direct-funding principles were often used in the opinions interchangeably.

\section{C. The Different Roles of Neutrality in Rosenberger}

As the previous subsection discussed, the \textit{Rosenberger} majority took pains in distinguishing the SAF funding of WAP from a forbidden, direct-funding case.\textsuperscript{189} Justice Kennedy primarily relied upon the same elements to determine that eliminating the "religious activities" restriction from the SAF funding guidelines made them neutral. The majority's reasoning seemed to be based largely upon the individual-choice and diversity-of-recipient-class models of neutrality identified and discussed in Part I of this Note.\textsuperscript{190}

The rationale of the individual-choice model—insulation from the funding decision\textsuperscript{191}—was used by Justice Kennedy to conclude that the university effectively separated itself from the message which \textit{Wide Awake} (and other publications) conveyed.\textsuperscript{192} Thus, according to Justice Kennedy, the university insured that "no public funds flow di-

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\textsuperscript{188} \textit{Compare Rosenberger}, 115 S. Ct. at 2523 (positing that absent direct funding, the Court has never held the neutral extension of benefits to be an establishment of religion), \textit{with id.} at 2544 (Souter, J., dissenting) (arguing that "evenhandedness" alone has never been enough to validate a state funding of religion).

\textsuperscript{189} \textit{See supra} notes 152-83 and accompanying text (grouping the majority's direct-funding distinction into three separate arguments, and reviewing the dissenting opinion in the same manner).

\textsuperscript{190} \textit{See supra} notes 88-108 and accompanying text (discussing these two models of neutrality as applied in prior Establishment Clause cases). The majority may have, however, also touched upon the separability model. \textit{See Rosenberger}, 115 S. Ct. at 2522 (arguing that WAP was seeking money for its role as a student journal, as opposed to seeking funding to support its Christian viewpoint).

\textsuperscript{191} \textit{See supra} notes 88-98 and accompanying text (tracking the individual-choice model of neutrality through several of the Court's Establishment Clause cases).

\textsuperscript{192} \textit{Rosenberger}, 115 S. Ct. at 2523. Justice Kennedy phrased this part of his analysis more in terms of lack of endorsement than of the presence of the individual-choice model of neutrality. \textit{See id.} (arguing that the university had not "wilfully fostered or encouraged" the impression that the university sponsors or endorses the magazine's message). However, the same principles apply to the individual-choice model of neutrality as to the so-called "endorsement test." \textit{See supra} notes 88-98 and accompanying text (detailing the individual-choice model of neutrality).
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rectly to WAP’s coffers” by paying outside printers directly for their services.193 Therefore, because the university took no part in the decision on how the SAF funds were used, the state aid was neutral, and the university’s elimination of the religious-activities restriction did not violate the Establishment Clause.194

The majority also used the diversity-of-recipient-class model of neutrality195 in support of its argument that the funding guidelines would be neutral absent the religious-activities restriction.196 As Part III suggests, the majority’s use of this neutrality model appeared to be related to the presence of the petitioners’ Free Speech claim.197 In any event, Justice Kennedy argued that the religious-activities restriction had to be removed in order for the funding guidelines to be neutral toward religion and not discriminatory.198

Justice O’Connor’s concurrence went further than the majority opinion in addressing the neutrality of the funding guidelines. Instead of implicitly referring to neutrality through the direct-funding analysis as the majority did, Justice O’Connor cited several factors in support of her argument that the guidelines would be neutral absent the religious-activities restriction.199 Justice O’Connor also used terms more familiar to the direct-funding issue as support for the neutrality of the SAF.200

Justice O’Connor relied primarily on two factors to determine that the religious-activities restriction had to be removed to ensure scrupulous neutrality. First, she argued that the independence between the paper and the university ensured that no message of endorsement would be received by the public.201 Justice O’Connor found this independence in both the lack of the university’s control over student groups and the university’s requirement that a disclaimer be included in every correspondence from a student group.202 The disclaimer to

194. Id.
195. See supra notes 99-108 and accompanying text (reviewing this model of neutrality as used in two recent Supreme Court decisions).
196. See Rosenberger, 115 S. Ct. at 2524 (noting that “[t]he [u]niversity provides funding services to a broad spectrum of student newspapers qualified as CIO’s by reason of their officers and membership”).
197. See infra notes 249-84 and accompanying text (positing that the presence of a Free Speech claim significantly lessens the neutrality needed to find a funding scheme constitutional).
199. Id. at 2526-28 (O’Connor, J., concurring).
200. Id. at 2527-28 (citing the possibility of refunds and the payments to third-parties in her neutrality analysis); see supra notes 184-87 and accompanying text (discussing these elements as they pertain to Justice O’Connor’s analysis of the direct-funding issue).
202. Id.
which Justice O'Connor referred stated that "[a]lthough this organization has members who are University of Virginia students (faculty) (employees), the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions."\(^{203}\)

Justice O'Connor also found neutrality in the number and diversity of different viewpoints represented at the university.\(^{204}\) Indeed, *Wide Awake* competed with fifteen other magazines and newspapers for advertising and readership, including publications with religious, nonreligious, and even antireligious viewpoints.\(^{205}\) For example, the SAF supported *The Yellow Journal*, which often targeted Christianity as a subject of its satire, and *Al Salom*, a publication to "promote a better understanding of Islam to the university community."\(^{206}\) Therefore, Justice O'Connor opined that the religious-activities restriction could be removed without creating a perception of government endorsement.\(^{207}\) Thus, the independence between the university and its student groups and the diversity of the recipient class were the primary indicia of neutrality upon which Justice O'Connor relied.\(^{208}\)

While both the dissent and majority used the principles and terminology of neutrality and direct funding throughout their opinions, both the majority and dissenting opinions read as if the two concepts were opposing absolutes. This type of analysis is consistent with the Court's prior case law in that no funding scheme has ever been deemed to be both direct and neutral.\(^{209}\) Only Justice O'Connor's concurrence considered the two principles in unison, refusing to treat direct funding and neutrality as mutually exclusive concepts.\(^{210}\) As Part III posits, much of the Court's inconsistency could be resolved by acknowledging that not only are the two concepts related, they are, in fact, based upon the same objective and should be combined to form one standard. Part III also revisits the models of neutrality discussed above, concluding that the Free Speech claim present in *Rosenberger* reduced the extent to which neutrality was considered in regard to the Establishment Clause issue.

\(^{203}\) *Id.* at 2527 (O'Connor, J., concurring).
\(^{204}\) *Id.*
\(^{205}\) *Id.*
\(^{206}\) *Id.*
\(^{207}\) *Id.*
\(^{208}\) *Id.* at 2526-27.
\(^{209}\) *See supra* notes 29-108 and accompanying text (discussing the direct-funding prohibition, the neutrality principle, and their application in the Court's prior case law).
\(^{210}\) *See infra* notes 232-36 and accompanying text (noting that Justice O'Connor did not dwell on the terminology of "direct funding," relying instead on a neutrality analysis).
III. Analysis—The Relationship Between Direct Funding and Neutrality in *Rosenberger* and Beyond

This Note began by reciting a lengthy passage from another commentator's observation of the inconsistency that has permeated throughout the Court's Establishment Clause jurisprudence. Much of this inconsistency is due to the Court's misapplication of the neutrality and direct-funding principles. As the majority and dissenting opinions in *Rosenberger* demonstrate, the point at which direct funding ends and neutrality begins is not always entirely clear. However, by ceasing to use neutrality and direct funding as opposing absolutes and combining them into one religious-neutrality principle, the decision in *Rosenberger* becomes more clearly correct.

### A. A Case for Limiting the Use of the Terms "Direct Funding" and "Neutrality"

Direct funding and neutrality can be seen as "two sides of the same coin." In *Rosenberger*, funding that was characterized as neutral was deemed to be indirect in Justice O'Connor's concurrence, while funding that was indirect was deemed to be neutral in Justice Kennedy's majority opinion. Similarly, the dissent characterized the funding as unconstitutional because it was direct, while the majority found the funding to be constitutionally indirect. Too often, the Court and commentators speak of neutrality and direct funding as mutually exclusive concepts. To the contrary, both principles, in fact, have the same goal: maintaining the delicate balance between the objective of preventing state intrusion into religious matters and the reality that total separation of Church and State is impossible.

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211. See supra note 3 and accompanying text.
212. See supra notes 152-83 and accompanying text (discussing the majority's arguments for distinguishing this case from direct-funding cases and the dissent's response to these arguments).
213. In his article proposing to reformulate the *Lemon* standards into an Equal Protection-like analysis, Michael A. Paulsen makes a similar argument in regard to the tension between the two religion clauses, proffering that the two clauses are actually "but two sides of the same coin, a coin which represents the same 'value' in our constitutional democracy—religious freedom." Paulsen, supra note 3, at 313.
214. See supra notes 184-88, 199-208 and accompanying text (discussing Justice O'Connor's concurring opinion in detail).
216. See supra notes 152-55, 163-66, 171-78, 181-83 and accompanying text (discussing the dissenting opinion in detail).
217. See supra notes 156-62, 167-70, 179-80 and accompanying text (discussing the majority opinion in detail).
218. See supra notes 63-71 and accompanying text (noting that the traditional neutrality doctrine was based upon the premise that religion should be neither advanced nor inhibited).
Both the majority and the dissent took great steps to distinguish and analogize, respectively, the SAF funding in *Rosenberger* from the direct funding of religion.\(^{219}\) Why is it that the classification of *Rosenberger* as a direct, versus indirect, funding case was so important? The truth of the matter is that it should not be important, as overreliance on the distinction can lead to some absurd results.

For example, at the University of Virginia, groups obtaining CIO status are permitted to use university computers and equipment.\(^{220}\) Thus, it follows that if the university owned photocopiers and printing presses, WAP, as a CIO, would be allowed to mass produce its magazine on this equipment. On the other hand, a strict reading of the direct-funding prohibition would not allow the university to pay the bills that WAP incurred if it used an outside printer instead.\(^{221}\) Such an illogical conclusion typifies the inconsistency in the Court’s Establishment Clause jurisprudence.\(^{222}\)

An argument can be made that access and funding are qualitatively different matters. In *Walz*,\(^{223}\) Justice Brennan distinguished a direct subsidy from a tax exemption in that only a subsidy involves “the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole.”\(^{224}\) A similar distinction can be made between access and funding; access, like an exemption, involves no money transfer and assists the recipient only passively.\(^{225}\) Arguably, access is even less similar to funding because access transfers no financial benefit to the recipient.\(^{226}\) Thus, the argument goes, direct funding cannot be permitted because it actively involves the government in religious activity, while indirect assistance, via “access,” is permissible because it furnishes only passive assistance to reli-

\(^{219}\) See supra notes 152-83 and accompanying text (for a detailed analysis of the majority and dissenting opinions).

\(^{220}\) *Rosenberger* v. Rector & Bd. of Visitors of the Univ. of Va., 115 S. Ct. 2510, 2514 (1995).

\(^{221}\) Note that this is the conclusion that the dissent advocated. *Id.* at 2546-47 (Souter, J., dissenting).

\(^{222}\) See supra note 3 and accompanying text (noting the apparently incoherent pattern of the Court’s case law).

\(^{223}\) See supra notes 63-67 and accompanying text (discussing the *Walz* decision).


\(^{225}\) But see Carolyn Wiggin, Note, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 YALE L.J. 2009, 2022 (1994) (noting that a “stark distinction between granting access to a public fora as space and granting money for the speech within that space is superficial”).

tion. However, why should the government be allowed to do something indirectly which it cannot do directly?

If one disregards the active, versus passive, nature of the university's assistance to WAP in *Rosenberger* and, instead, concentrates only upon religious neutrality, the decision squares with the underlying principle of the Establishment Clause—neither advancement nor inhibition of religion. Upon reading the majority opinion, one must consider whether the potential neutral extension of benefits to WAP was the motivating factor behind Justice Kennedy's relentless attempt to characterize the funding as indirect. In contrast, in his analysis of the neutrality doctrine, Justice Souter made the argument that evenhandedness alone has never been enough to uphold a government action which benefits sectarian institutions. However, by overreliance on the fancy buzzword of "direct funding," the dissent lost sight of the fact that both groups of Justices were actually developing the same constitutional principle—religious neutrality.

Justice O'Connor's concurrence, unlike the majority and dissent, did not dwell on the "direct," versus "indirect," nature of the SAF funding. Instead, she relied upon the religious neutrality of the uni-

227. This is essentially the argument that the Court has relied on in upholding benefits to religion in access cases. For example, in the *Lamb's Chapel* decision, the Court stated that by providing access, "any benefit to religion or the Church would have been no more than incidental." *Id.* at 395; see *supra* notes 100-03, 107 and accompanying text (discussing *Lamb's Chapel* more fully). Similarly, in *Widmar v. Vincent*, 454 U.S. 263, 272 n.12 (1981), the Court distinguished the absence of a benefit to religion under an access policy from the financial benefit that the church-related colleges would have received under the twenty-year restriction on religious use struck down in *Tilton*. See *supra* note 107 (discussing the *Widmar* holding); *supra* notes 74-79 and accompanying text (discussing the *Tilton* decision).

228. See *supra* notes 63-71 and accompanying text (noting that the traditional neutrality doctrine was intended to insure that religion is neither advanced nor inhibited).

229. See *supra* notes 156-62, 167-70, 179-80 and accompanying text (discussing Justice Kennedy's majority opinion in detail).

230. *Rosenberger v. Rector & Bd. of Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2540 (1995) (Souter, J., dissenting). Justice Souter used several congressional statutes to illustrate that Congress reads the Court's Establishment Clause jurisprudence to mean that direct funding cannot be done even if the application is evenhanded. *Id.* at 2544 n.9 (quoting, inter alia: 20 U.S.C. § 1062(b) "no grant may be made under this chapter for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity"; 20 U.S.C. § 1132i(c) "no project assisted with funds under this subchapter shall ever be used for religious worship or a sectarian activity or for a school or department of divinity"; and 29 U.S.C. § 776(g) "no funds provided under this subchapter may be used to assist in the construction of any facility which is or will be used for religious worship or any sectarian activity").


232. See *supra* notes 184-88, 199-208 and accompanying text (discussing Justice O'Connor's concurring opinion in detail).
versity's action as a means to determine that no endorsement of religion would occur if WAP received university funds. Justice O'Connor stressed that Establishment Clause issues can only be resolved by a fact-specific, case-by-case analysis of the impact that the aid has upon religion. Thus, Justice O'Connor recognized that the terms "direct funding" and "neutrality" are not competing concepts but, instead, work together to protect the same value. Through the years, the Court has lost track of this principle due to the Justices' all-too-human need to group cases into convenient categories. Justice O'Connor's concurrence in Rosenberger provides an analysis consistent with the one underlying absolute of the Establishment Clause—religious neutrality.

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233. See supra notes 184-88 and accompanying text (discussing specifically the factors Justice O'Connor relied on in finding neutrality).


235. See supra notes 29-108 and accompanying text (representing this author's all-too-human attempt to break the Court's decision into direct-funding and neutrality cases).

236. The same principles at work in this religious neutrality can be seen in other commentators' proposals to use Equal Protection as at least a guiding principle in Establishment Clause jurisprudence. See, e.g., Timothy L. Hall, Religion, Equality, and the Difference, 65 Temp. L. Rev. 1, 83-85 (1992) (discussing the role of equality and the Equal Protection Clause in Establishment Clause jurisprudence); Paulsen, supra note 3, at 311 (proposing to reformulate the Lemon standards into an Equal Protection-like analysis); Matthew S. Steffey, Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement, and Church Autonomy, 75 Marq. L. Rev. 903, 909 n.18 (1992) ("Much of the Court's precedent can, in fact, be understood as enforcing principles of equality closely aligned with equal protection principles."); Joseph Tussman & Jacobus tenBroek, The Equal Protection of Laws, 37 Cal. L. Rev. 341, 380-81 (1949) ("One of the chief criticisms of the Court's current interpretation is that it fails to read the [Establishment] Clause merely as a prohibition against preferential or 'unequal' treatment of religions. Thus, critics of the Court in effect maintain that the First Amendment, as it deals with religion, must be read as if it were an equal protection clause.").

An Equal Protection-like analysis was used by Justice Harlan in Walz, which was decided before the Court had begun to overuse and over rely on the buzzwords of "direct funding" and "neutrality." Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring); see supra notes 63-67 and accompanying text (discussing the Walz decision and its impact on Establishment Clause jurisprudence).

The Court has also used the language of Equal Protection in other Establishment Clause cases. See, e.g., United States v. Lee, 455 U.S. 252 (1982) (searching for a "compelling state interest" and the "least restrictive means" to carry out that interest); Gillette v. United States, 401 U.S. 437, 454 (1971) (upholding a statute because it was "tailored broadly enough that it reflect[ed] valid secular purposes"); see also Everson v. Board of Educ., 330 U.S. 1, 5 n.2 (1947) (noting that a New Jersey statute excluding payment to "private schools run for profit" could have been susceptible to an Equal Protection challenge). An analysis similar to the Court's Equal Protection analysis has also been used in the Free Exercise domain. See, e.g., McDaniel v. Paty, 435 U.S. 618, 643 (1978) (White, J., concurring) (opting to use the Equal Protection Clause to invalidate a law barring clergy from public office instead of the Free Exercise Clause).
B. Lemon’s Contribution to a Unified Standard

Although the three-part Establishment Clause test announced in *Lemon* may no longer be a viable test, a review of the policies underlying *Lemon*’s effects prong provides considerable support for eliminating the direct-funding terminology and advocating a religious-neutrality analysis. The effects prong of *Lemon* requires that the primary effect of government action neither “advance[] nor inhibit[] religion.” However, almost without exception, the Court has read the word “inhibit” out of the second prong of *Lemon*. Putting the word “inhibit” back into the effects test supports relying solely upon religious neutrality in Establishment Clause issues.

In *Rosenberger*, the university’s guidelines provided funding for a variety of organizations, which expressed a variety of different views. Thus, after the Court’s holding in *Rosenberger*, WAP will be eligible to receive funds along with many other student groups, both secular and sectarian in nature. Such a diverse class of recipients cannot be seen to “advance” religion. However, the contrary holding would have placed WAP at a distinct disadvantage as compared with other student groups. Therefore, had the Court affirmed the Fourth

237. See supra notes 29-31, 38-42 and accompanying text (discussing the *Lemon* decision).
238. Commentators have noted that the purpose prong of the *Lemon* test is a mere formality for Establishment Clause cases for the practical reasons that statutes often have more than one purpose, and that no legislature or governing body would be uneducated enough to propose (or admit) a purpose of inhibiting or advancing religion. See William B. Peterson, “A Picture Held Us Captive”: Conceptual Confusion and the *Lemon* Test, 137 U. PA. L. REV. 1827, 1830-49 (1989) (positing that the purpose prong should be eliminated due to the difficulty in ascertaining purpose). Government action has only been held to violate the purpose prong in three cases. See *Edwards v. Aguillar*, 482 U.S. 578, 585-89 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).
240. In fact, only one case has struck down an “inhibiting” government action. See *Larson v. Valente*, 456 U.S. 228 (1982) (finding discrimination and a violation of the Establishment Clause where a Minnesota statute imposed certain registration and reporting requirements upon only religious organizations that solicited more than 50% of their funds from nonmembers).
242. Id. at 2522.
243. The Fourth Circuit recognized the possibility that denying funds to WAP had the effect of inhibiting religion. However, according to the Fourth Circuit, religion was not inhibited since WAP was granted access to campus facilities and had already proven it could publish its magazine without funding. *Rosenberger v. Rector & Bd. of Visitors of the Univ. of Va.*, 18 F.3d 269,
Circuit's holding, the effect would have "inhibited" religion in the most classical sense, thereby violating Lemon's effects prong. By relying on the policies underlying Lemon's effects prong, as originally created, the Rosenberger decision would have made more sense and, therefore, support would have been gained for using religious neutrality as the only guide.

A critique of the policies underlying Lemon's entanglement prong provides further support for dispensing with the direct-funding terminology.\(^2\) The Lemon Court measured the level of entanglement by three considerations: "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."\(^3\) As Rosenberger demonstrates, delving into the character of the recipient can lead to some very different results.\(^4\) Further, the characterization of the nature of the SAF funding as direct, versus indirect, left the majority and the dissent in Rosenberger at an impasse.\(^5\) With this in mind, how can we expect our legislature, courts, and school boards to determine when they are providing the forbidden "direct funding" of religion? A policy of strict religious neutrality would eliminate this uncertainty caused by the direct-funding prohibition and Lemon's entanglement prong.\(^6\)

By concentrating solely on this principle of religious neutrality, instead of dwelling on the passive, versus active, nature of the SAF funding, a much more logical decision could have been issued in Rosenberger. Why was the university's funding restriction unconstitutional? Because the university singled out "religious activities" as less worthy of funding than other similar activities. And why is the elimi-

\(^2\) See supra notes 152-83 and accompanying text (exploring the different characterizations given to Wide Awake by the dissenting Justices and the majority). Perhaps the difficulty in separating the religious from nonreligious aspects of WAP leads to the conclusion that the separability-of-functions model of neutrality has fallen into disfavor among the current Justices.\(^7\)

\(^3\) See supra notes 152-83 and accompanying text.\(^8\) See, e.g., Aguilar, 473 U.S. at 420-21 (Rehnquist, J., dissenting) (noting that the no-entanglement test often creates a "'Catch-22' paradox whereby aid [paid] must be supervised to ensure no entanglement but the supervision itself...[can] cause an entanglement").
nation of the "religious activities" prohibition not an establishment of religion? Because it neither inhibits nor advances a single religion or religion in general. As a result of the Rosenberger decision, sectarian, secular, and even antireligious activities can compete on equal footing for access to the SAF.

C. The Effect that a Free Speech Claim Has upon Religious Neutrality

Despite the confusion created by the Court's overreliance on the direct-funding prohibition in Rosenberger, the majority's opinion suggests that only a limited showing of neutrality is needed in Establishment Clause cases involving a Free Speech claim. Only one of the models of neutrality seemed to be present in Rosenberger, while two of the traditional neutrality models appeared to be patently offended. As Justice Souter and the dissent noted, Wide Awake magazine constituted "nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life." Indeed, the point at which the religious proselytizing ends, and expressing an opinion with a religious viewpoint begins, is nearly impossible to identify. Is this

249. Perhaps the Court's reluctance to find an Establishment Clause violation is due in part to the current Court's high regard for the Free Speech Clause. See Charles Fried, Forward: Revolutions?, 109 Harv. L. Rev. 13, 69 (1995) ("For more than two decades, the Court has been taking an increasingly libertarian and uncompromising line of freedom of speech—perhaps defending in the empire of the mind the last bastion of an individualism that could not resist the onslaught of communitarian thinking in matters more material and economic.") (citations omitted).

250. See supra notes 72-108 accompanying text (separately discussing the Court's Establishment Clause case law in terms of three dominant models of neutrality).

251. Rosenberger v. Rector & Bd. of Visitors of the Univ. of Va., 115 S. Ct. 2510, 2535 (1995) (Souter, J., dissenting). Upon perusing the first three issues of Wide Awake circulated prior to suit, one can see that Justice Souter's characterization of the magazine is not without support. While a complete survey of the magazines' content is not necessary for the purposes of this Note, the following presents a sampling of excerpts found to be significant by Justice Souter: "The masthead of every issue bears St. Paul's exhortation, that 'the hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed.'"; "Go into all the world and preach the good news to all creation."; "The Great Commission is the prime-directive for our lives as Christians."; "Racism is a disease of the heart, soul, and mind, and only when it is extirpated from the individual consciousness and replaced with the love and peace of God will true personal and communal healing begin." Id. at 2534-35 (citations omitted).

252. The Rosenberger majority would apparently agree with this argument. See Rosenberger, 115 S. Ct. at 2522 (noting the difficulty in characterizing the magazine as religious, or simply religiously inspired). When Justice Souter joined Justice Blackmun's dissenting opinion in Zobrest v. Catalina Foothills School District, the dissent voiced a similar objection to the majority's decision as Justice Souter did in Rosenberger. 509 U.S. 1, 18 (1993) (Blackmun, J., dissenting). In Zobrest, the dissent was adamant in insisting that the Establishment Clause was violated because "[t]he two functions of secular education and advancement of religious values or beliefs
not the antithesis of the separability model of neutrality? Not relying on the lack of separability alone, the dissent argued that the individual-choice model of neutrality was not present in Rosenberger either, in that a third-party printer received SAF funds solely “because of its contract to print a message of religious evangelism at the direction of Wide Awake.” Thus, it seems that the only model of neutrality present in Rosenberger was the diversity-of-recipient-class model.

In cases in which a Free Speech claim was not present, the diversity-of-recipient-class model of neutrality was not enough to make aid to religion constitutional. Several cases in which the Court struck down the use of otherwise neutral funds for religious purposes involved government programs that were generally available to a spectrum of recipients. In Meek, the Court invalidated a Pennsylvania law that sought to extend to parochial schools instructional materials and equipment that were being made available to public schools as well. Similarly, Hunt and Tilton involved large funding programs that were available to public and private, including church-related, colleges alike. Moreover, the funds involved were used for “a wide variety” of educational projects. However, neither the diversity of the recipient class nor the neutral purpose of the grants effected the constitutional ban on using the grant monies for religious purposes. Taking the analysis a step further, had the diversity of the recipient class been determinative in cases like Everson, Bradfield, and Mueller,

[were] inextricably intertwined.” Id. Indeed, the interpreter provided to a deaf student attending a sectarian school communicated “the material covered in religion class, the nominally secular subjects that [were] taught from a religious perspective, and the daily Masses [which the student would attend].” Id. at 19; see also supra notes 93-98 and accompanying text (discussing Zobrest’s majority opinion).

253. See supra notes 72-87 and accompanying text (demonstrating that the Court has used the ease of separability of sectarian versus secular functions of a religious organization as one of its dominant models of neutrality).

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

255. See supra notes 99-108 and accompanying text (showing that the Court placed significant emphasis on this model of neutrality in two of its recent cases).


258. See supra notes 80-84 and accompanying text (discussing Hunt v. McNair).

259. See supra notes 74-79 and accompanying text (discussing Tilton v. Richardson).

260. Hunt v. McNair, 413 U.S. 734, 741-42 (1973); Tilton v. Richardson, 403 U.S. 672, 676-77 (1971). In Hunt, revenue bonds under the state Educational Facilities Authority were available to all institutions of higher education, public and private alike. 413 U.S. at 736-37. While no numbers were provided in Tilton, theoretically all of the nation’s colleges and universities, excluding sectarian institutions, were eligible for funding. 403 U.S. at 676-77.

261. Tilton, 403 U.S. at 675.

262. See supra notes 21-27 and accompanying text (discussing Everson v. Board of Educ.).
the Court’s discussion of the secular uses to which the funds were put would have been superfluous.

The United States Supreme Court decided two cases in which a Free Speech right conflicted with a potential Establishment Clause violation in the past decade before the *Rosenberger* case. In both cases, the Free Speech right prevailed over a potential Establishment Clause violation. A Free Speech right appeared to affect the Court’s decisions in *Lamb’s Chapel* and *Mergens*; in both cases, the Court reconciled the competing constitutional claims by concluding that a policy of neutrality, based solely upon the diversity-of-recipient-class model, created no serious danger of an Establishment Clause violation. From the majority’s opinion in *Rosenberger*, it is clear that the petitioners’ Free Speech right significantly decreased the showing of neutrality needed to deem the funding constitutional.

Focusing on a Free Speech right, as opposed to a possible Establishment Clause violation, deemphasizes the particular application at hand and emphasizes the effect of the program as a whole. Thus, the separability-of-functions and the individual-choice models of neutrality are not necessary to ensure neutrality when funding involves a protected Free Speech right. The diminished need to substantiate a funding scheme’s neutrality is evidenced by the majority decision in *Rosenberger*, in which Justice Kennedy provided very little support for his assertion that the SAF’s funding of WAP would be neutral. In fact, aside from the misapplication of the direct-funding prohibition noted in the previous subsection, the only support for neutrality which Justice Kennedy proffered was the diversity-of-recipient-class model.

More support can be drawn from the fact that, while the Court invalidated the religious-activities funding restriction, it did not comment on the propriety of the standard that “religious organizations” could not become CIOs. By limiting its discussion in this way, the

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263. See *supra* note 73 and accompanying text (discussing the *Bradfield* decision and how the Court used the model of neutrality).

264. See *supra* note 89 (discussing the *Mueller* decision in more detail).


266. See *supra* notes 100-03, 107 and accompanying text (discussing the *Lamb’s Chapel* decision in detail).

267. See *supra* notes 104-06 and accompanying text (discussing *Mergens*).


269. See *supra* notes 190-98 and accompanying text (noting that the majority of Justice Kennedy’s neutrality discussion focused on the same elements as his direct-funding discussion).

270. See *supra* notes 134-36 and accompanying text (discussing the prohibition of funding for CIO activity characterized as “religious activity”); *supra* note 125 and accompanying text (noting
majority implied that aid to religion needs only a limited showing of neutrality when a Free Speech right is present, while the Court maintained a stricter standard of neutrality in Establishment Clause cases not involving a Free Speech right.

The Rosenberger decision continued the Court's trend toward using a less vigorous Establishment Clause analysis in cases involving a Free Speech right. In Rosenberger, the university used its resources to facilitate a broad and diverse array of private speech. This "marketplace of ideas" acted as a buffer against the establishment of religion because no single religion was favored and religion was not favored over nonreligion. That is, the variety of religious messages expressed justified what might otherwise have been an Establishment Clause violation. The fact that the majority opinion discussed the petitioners' Free Speech claim at length, before even reaching its abbreviated Establishment Clause discussion, lends additional support to the impact which the petitioners' Free Speech right had in Rosenberger.

that "religious organizations" were among those groups which could not be given CIO status at the university).

271. Note, however, that the religious free speech in question must be private speech, not government speech. The Mergens Court drew a marked distinction between government speech endorsing religion and a person's private speech endorsing religion, finding that while the former is prohibited, the latter is not. Mergens, 496 U.S. at 250. The Rosenberger majority noted the same distinction in regard to the SAF funding guidelines, commending the university's recognition of the difference between government speech and private speech endorsing religion, with only the latter being permissible. Rosenberger, 115 S. Ct. at 2522.

272. Rosenberger, 115 S. Ct. at 2514.

273. Michael W. McConnell, the attorney for WAP, made the disadvantage of excluding speech with a religious viewpoint from funding explicit in oral argument:

Your Honor, if their [WAP's] viewpoint were secular, they're certainly entitled to write a magazine saying, this is our viewpoint, and you should share that viewpoint. Animal rights groups are doing exactly that. Feminist groups are doing precisely that. Every other group is permitted to proselytize, which I'd just like to note is nothing but an ugly word for persuade, which is just exactly what the Free Speech Clause is designed to protect.


274. The majority touched upon this notion in its analysis of the petitioner's Free Speech claim noting that "[i]f the topic of debate is, for example, racism, then [the] exclusion of several views on that problem is just as offensive to the First Amendment as [the] exclusion of only one." Rosenberger, 115 S. Ct. at 2518. The Rosenberger majority did not extend this rationale to the religious perspective. However, the Court has recognized that religious groups are an important part of the "pluralism of American society" and, along with other groups such as literary and historical groups, contribute to the diversity of viewpoint in society. Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970).


276. Id. at 2521-22.
Rosenberger was unique in that government aid was transferred directly to the religious groups, while both Lamb's Chapel and Mergens merely involved granting religious groups access to facilities on even terms with nonreligious groups. Establishment Clause cases such as Lamb's Chapel, Mergens, and, most recently, Rosenberger, which involve Free Speech, lend themselves to a more forgiving review of the Establishment Clause issue than do cases which do not involve a competing Free Speech right. Thus, Rosenberger has established that the current Court will not require as strong of a showing of neutrality when a Free Speech right is at issue.

One could take the argument a step further, asserting the possibility that even if the diversity-of-recipient-class model of neutrality is not present, no Establishment Clause violation will be found so long as the guidelines for determining which groups receive the benefit of the government decision are facially neutral. Support for this argument might be gleaned from Capitol Square Review & Advisory Board v. Pinette, 277 a case decided by the Court in the same term in which Rosenberger was decided. In Pinette, at issue was an Ohio statute opening a ten-acre, state-owned plaza "for use by the public . . . for free discussion of public questions . . . or for activities of a broad public purpose." 278 A variety of different unattended displays were permitted in the square, including a lighted Christmas tree and a menorah. 279 However, the Ohio Ku Klux Klan was denied its request to erect a cross in the square solely because the board feared an "official endorsement" of Christianity in violation of the Establishment Clause. 280 In a seven-to-two decision, the Court held that the exclusion of the Ku Klux Klan's cross could not be justified on Establishment Clause grounds. 281 Justice O'Connor deemed Pinette a more difficult case to decide than Rosenberger because of the threat that religious speech would dominate the forum. 282 Thus, the Ku Klux Klan's Free Speech right may have trumped an Establishment Clause violation in Pinette 283 without any showing of the diversity-of-recipient-class model of neutrality.

278. Id. at 2444 (citing OHIO ADMIN. CODE § 128-4-02(a)(1994)).
279. Id.
280. Id. at 2445-46.
281. Id. at 2442.
282. Id. at 2527 (O'Connor, J., concurring).
283. A similar argument has been made in regard to the Constitution's religion clauses, and, therefore, is not unthinkable. Professor Laurence Tribe argues that accommodation should prevail over establishment because "[s]uch dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1201 (2d ed. 1988). In contrast,
The Court's increasing reluctance to find an Establishment Clause violation in cases in which a Free Speech right is involved follows the reality that many of the concerns which led to the drafting of the Establishment Clause are no longer present in modern times.284 It is unlikely that President Clinton will declare the Protestant faith as the national religion of the United States; it is also unlikely that Buddhists or Jews will be demoted to the status of second-class citizens. In contrast, the right to freely express one's opinion remains an issue which is central to modern-day jurisprudence. This author applauds the Court's decision in Rosenberger as a step in the right direction as far as the relationship between the Free Speech and Establishment Clauses is concerned. However, Part IV represents this author's attempt to warn against an automatic trumping of the Establishment Clause by the Free Speech Clause. No standard can be absolute in the area of constitutional law.

IV. IMPACT

The Court's decision in Rosenberger seems to indicate that, at the very least, a government program benefiting religious Free Speech, in conjunction with nonreligious and even antireligious speech, will almost certainly pass constitutional muster. One must consider, in the area of constitutional law particularly, the risk of misinterpreting and misusing what was a narrow holding into a broad constitutional theory. Take, for example, the Lemon test, the overbroad application of which has been both criticized285 and praised286 by commentators and

284. For a discussion of the historical context in which the Establishment Clause was drafted, see Rosenberger, 115 S. Ct. 2528-33 (Thomas, J., concurring); id. at 2535-37 (Souter, J., dissenting); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1987).


used and avoided by the Court.\textsuperscript{287} In \textit{Lemon}, Chief Justice Burger predicted the impact that the decision seems to have had: "in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."\textsuperscript{288}

Whether the Court's decision in \textit{Rosenberger} is indicative of a greater accommodation of religion or of a more libertarian view of the Free Speech clause by the Court remains to be seen. Certainly, the holding in \textit{Rosenberger}, which, in essence, forced the University of Virginia to pay the printing costs of a magazine advocating the Christian religion, has the potential to be misused and overextended in much the same way as the \textit{Lemon} test has been. If \textit{Rosenberger} was the first step towards signaling the Court's reluctance to use the Establishment Clause when a Free Speech claim is present, \textit{Pinette},\textsuperscript{289} which involved a public, as opposed to a limited public, forum may have been the second step.

Perhaps \textit{Rosenberger} will be more significant for the questions it left unanswered than for the Establishment Clause guidance that it provided. For example, the Court did not strike down the prohibition against funding religious organizations, as opposed to religious viewpoints, from the university's funding guidelines.\textsuperscript{290} Thus, the question remains whether the Court's rather liberal standard of neutrality used to assess a case of viewpoint discrimination also applies when only content-based speech discrimination is involved.

The Court also failed to include in its neutrality analysis the significance of the potential that, even with religiously neutral funding standards, large religions might threaten to dominate the forum. This problem can be illustrated by looking at the SAF funding guidelines subsequent to the \textit{Rosenberger} decision. Absent the religious-activities restriction, all funding decisions at the University of Virginia will be based upon the following criteria: (1) the size of the organization; (2) the financial self-sufficiency of the group; and (3) the university-

\textsuperscript{287} See \textit{supra} notes 32-35 and accompanying text.
\textsuperscript{288} \textit{Lemon} v. \textit{Kurtzman}, 403 U.S. 602, 624 (1971).
\textsuperscript{289} See \textit{supra} notes 277-83 and accompanying text (discussing the \textit{Pinette} case).
\textsuperscript{290} Presumably, this means that a group of young Mormons that attend the University of Virginia and call themselves the "Young Mormon Coalition" (a "religious organization") who publish a magazine which is general in nature, but that is written from a religious perspective, could not receive SAF funding; conversely, the same group, if it called itself the "Young People for a Better World" (a nonreligious organization, with a "religious viewpoint") could receive funding if it published the same magazine.
wide benefit of the activity. With the "new" funding guidelines at the University of Virginia, less-populated faiths appear to be at a distinct disadvantage to the larger religions. Is this not the very vice which the Establishment Clause was intended to prevent? In the future, the Court will have to address the constitutionality of neutral government aid to religion whose benefits are distributed unevenly between religions because of the sizes of the religious sects.

CONCLUSION

Chief Justice Burger once stated that "[t]he considerable internal inconsistency in the [Court's Establishment Clause jurisprudence] derives from what, in retrospect, may have been too sweeping of utterances . . . that seemed clear in relation to the particular cases but have limited meanings as general principles." The confusing manner in which the United States Supreme Court handled the direct-funding and neutrality principles in *Rosenberger v. Rector & Board of Visitors of the University of Virginia* provides considerable credence to this notion. While the Court's decision seemed to conform to the value of religious neutrality upon which the Establishment Clause was constructed, the Court's decision would have made more sense had the Court used just one standard—religious neutrality. More significantly, the *Rosenberger* decision continues the Court's trend of allowing a Free Speech right to alter its Establishment Clause analysis. In effect, *Rosenberger* has taken most of the teeth from the Establishment Clause in challenges to government-aid schemes that affect a Free Speech right.

*D. Michael Murray*

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