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I would like to thank Professors Martin S. Flaherty, Abner S. Greene, Robert J. Kaczorowski, and Russell G. Pearce for their advice and guidance on the preparation of this Comment. This Comment is dedicated to my family for their constant love, support and encouragement.

COMMENT

Rosenberger v. Rector & Visitors of the University of Virginia: The Myth of the Content Neutral Establishment Clause

Mark Daniel Salzberg*

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money.[1]

INTRODUCTION

In *Rosenberger v. Rector & Visitors of the University of Virginia*,[2] the University of Virginia ("University") provided the backdrop for a battle of Constitutional proportions.[3] On one hand, the University's attempt to maintain a separation of church and State reflected the struggle against state establishment of religion, personified by the University's founder, Thomas Jefferson.[4] On the other

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1. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2535 (1995) (Souter, J., dissenting).

2. 115 S. Ct. 2510 (1995).

3. *See* Note, *The Supreme Court, 1994 Term-Leading Cases*, 109 HARV. L. REV. 10, 210 (1995) [hereinafter *Viewpoint Discrimination*] ("The [University] served as the battleground for the latest conflict between two mighty constitutional titans: the Free Speech and the Establishment Clauses.").

4. *See, e.g.*, Michael J. McManus, *Religious Freedom Case Heard in Court*, FRESNO BEE, Mar. 4, 1995, at A13 ("Over the august, high-ceilinged chamber of the U.S. Supreme Court this week, the ghost of Thomas Jefferson hovered. A few blocks away . . . are his word's from Virginia's Act Establishing Religious Freedom . . . ."). The third

hand, the petitioners' challenge of a government policy which denied benefits based on a speaker's message embodied the principles which culminated in the fight to secure free expression.[5] In decid-

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President's gravestone, standing on a hill in nearby Monticello, commemorated his role as founder of the University, and author of both the Declaration of Independence and Virginia's Act Establishing Religious Freedom. *See* VA. CODE ANN. § 57-1 (Michie 1995); *see also* Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. REV. 1, 28 n.170 (1994) (citations omitted) (describing the epithets on Jefferson's gravestone); Justice William H. Rehnquist, *Thomas Jefferson and His Contemporaries*, 9 J.L. & POL. 595 (1993) (discussing Jefferson).

Jefferson made clear his desire that the University allow religious groups access to University facilities without granting direct aid to their attempts to promote a religious message. Letter from Thomas Jefferson to Doctor Thomas Cooper, Nov. 2, 1822, *reprinted in* JEFFERSON: MAGNIFICENT POPULIST (Martin A. Larson, ed. 1984) (*cited with approval in* Brief *Amicus Curiae* of Americans United for Separation of Church and State, American Jewish Committee, and Anti-Defamation League, in Support of Respondents at 21-22, Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329) [hereinafter *Amicus* Brief]). In a letter, Jefferson wrote:

> In our annual report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of encouraging the different religious sects to establish, *each for itself*, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have free use of our library, and every other *accommodation* we can give them; preserving, however, their *independence* of us and of each other.

Id. (emphases added). It seems that nearly all Establishment Clause battles lead to the invocation of Jefferson's name. *See, e.g.*, William Van Alstyne, Comment, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 787 (1984) ("I do not know whether Mr. Jefferson would have been surprised, but I believe he would have been disappointed.").

5. *See, e.g., Religious Liberty: Hearings Before the Senate Committee on the Judiciary*, 104th Cong., 1st Sess. (Sept. 12, 1995) (statement of Ronald W. Rosenberger) *available in* LEXIS, Nexis Library ALLNEWS file. Rosenberger noted:

> When I started at the [University] . . . I expected to find a great forum for debate. I imagined myself sitting on the grass of Mr. Jefferson's historic Lawn having philosophical discussions about the meaning of life, the best forms of government . . . . And this did happen. I found that students had even organized themselves into hundreds of extracurricular organizations according to their varying interests.
>
> I also found, however, that these student groups were not always treated equitably . . . . I found that some viewpoints and perspectives were barred from setting up a booth in the marketplace of ideas due to a misunderstanding of what the First Amendment requires.

Id.; *see also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)

ing *Rosenberger* the Supreme Court was thus forced to construct a hierarchy among two First Amendment rights: the Free Speech Clause[6] and the Establishment Clause.[7]

The petitioner, Ronald Rosenberger, was a student at the University who helped form an organization named Wide Awake Productions ("WAP").[8] WAP's members were University students who believed that none of the student-run publications provided a forum for their viewpoint; accordingly, WAP's editors published a journal to inject their perspective into the campus-wide debate.[9] WAP published three issues and distributed 5,000 copies of each issue to the University's students, free of charge.[10] In order to offset the cost of publishing, WAP sought funding from the University's Student Activities' Fund ("SAF").[11] WAP's members, following standard procedure under the SAF's guidelines, submitted a budget request and awaited approval.[12] After a lengthy process, however, the University denied the funding.[13]

The University based its decision on the journal's content.[14] It examined WAP's publication, *Wide Awake: A Christian Perspective at the University of Virginia* ("*Wide Awake*") and found that the journal contained an invocation of religious—specifically Christian—themes.[15] In particular, the school noted that WAP's mem-

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("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary.").

6. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

7. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."); *see also Rosenberger*, 115 S. Ct. at 2525 (O'Connor, J., concurring) ("This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities.").

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

9. Brief for the Petitioners at 6, Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329) [hereinafter Petitioner's Brief].

10. Rosenberger v. Rector & Visitors of the Univ. of Va., 18 F.3d 269, 272 (4th Cir. 1994).

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

12. *Id.*

13. *Id.*

14. *Id.*

15. *Rosenberger*, 18 F.3d at 272; *see also Rosenberger*, 115 S. Ct. at 2534-35

bers created *Wide Awake* to "challenge Christians to live in word and deed according to the faith they proclaim."[16] The University thus concluded that underwriting *Wide Awake* would constitute direct funding of a religious message.[17] The Supreme Court, however, had previously interpreted the Establishment Clause to prohibit the government from directly funding a religious entity.[18] Consequently, the University denied the request and Rosenberger, as a member of WAP, brought suit in federal court.[19]

Rosenberger based his petition on the Free Speech Clause.[20] He posited that the University could not refuse funding to an otherwise eligible student organization on the basis of the group's viewpoint.[21] He further noted that the Supreme Court had prohibited the government from making decisions based on the content of a speaker's message.[22] Consequently, he argued that the University's denial of funding discriminated against WAP's members solely due to their religious viewpoint.[23] He suggested that WAP, as a student organization, could receive University funding because the SAF

(Souter, J., dissenting) (examining the contents of *Wide Awake* and finding it to be "the straightforward exhortation to enter into a relationship with G-d as revealed in Jesus Christ . . . .") (alteration added).

16. *Rosenberger*, 115 S. Ct. at 2534 (citations omitted).

17. *Id.* at 2515; *see also Amicus* Brief at 1 (arguing that "AT A FUNDAMENTAL LEVEL, THE ESTABLISHMENT CLAUSE PROHIBITS GOVERNMENT FUNDING OF RELIGIOUS SPEECH AND EXHORTATION").

18. *See, e.g.*, Everson v. Board of Ed. of the Township of Ewing, 330 U.S. 1, 15-16 (1947) ("The 'establishment of religion' clause . . . means at least this . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . to teach or practice religion.").

19. *Rosenberger*, 115 S. Ct. at 2515-16.

20. *See* Petitioner's Brief at 15 (arguing that "THE SPEECH AND PRESS CLAUSES FORBID A PUBLIC UNIVERSITY FROM DENYING FUNDING TO AN OTHERWISE ELIGIBLE STUDENT PUBLICATION SOLELY BECAUSE OF ITS RELIGIOUS VIEWPOINT").

21. *See, e.g.*, Petitioner's Brief at 2 ("This case involves the refusal of the [University] to subsidize the printing costs of a student publication, called [*Wide Awake*], solely and expressly because the viewpoint articulated in the publication is religious.").

22. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (holding that the government may not regulate speech based on "hostility—or favoritism—towards the underlying message expressed").

23. *See* Petitioner's Brief at 2.

distributed aid through a neutral government entitlement program;[24] WAP qualified for state aid as a student organization, regardless of its religious viewpoint.[25]

The federal courts thus faced a conundrum: the University was required to obey the Establishment Clause which guaranteed the separation of church and State, but was prohibited from analyzing a student organization's message to ensure that SAF funding did not underwrite religion.[26] Broadly, Rosenberger's suit was a battle between two clauses within the First Amendment.[27] Both the district court[28] and the Fourth Circuit Court of Appeals[29] ruled that the Establishment Clause—and not the Free Speech Clause—was the controlling doctrine and upheld the University's determination.[30] The Supreme Court, however, agreed with Rosenberger and applied the Free Speech Clause to prohibit the University from making such content based distinctions.[31] In so doing, the Court treated

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24. A neutral government entitlement program is created by the government, without reference to religion, in order to aid the general public. *See* Thomas R. McCoy, *A Coherent Methodology for the First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1340-41 (1995). Neutral government programs, although designed to promote secular objectives, often overlap with religious organizations when religious groups seek inclusion in order to procure funding from the program. *Id.* at 1340-43; *accord* Michael W. McConnell, *"G-d is Dead and We Have Killed Him!:" Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163, 177 (1993) (alteration added in title) ("With the rise of the welfare-regulatory state, the spheres of religion and government were no longer distant and distinct . . . the state extended its regulatory jurisdiction over broad aspects of life that formerly had been private and frequently religious . . . .").

25. Petitioner's Brief at 22 (arguing that "THE ESTABLISHMENT CLAUSE DOES NOT BAR RELIGIOUS SPEAKERS AND PUBLICATIONS FROM PARTICIPATING IN PUBLIC BENEFITS ON AN EQUAL AND NONDISCRIMINATORY BASIS.").

26. *See* McCoy, *supra* note 24, at 1342-43.

27. *Viewpoint Discrimination*, *supra* note 3, at 210 (arguing that the *Rosenberger* controversy involved both the Free Speech Clause and the Establishment Clause). *But see* Luba L. Shur, *Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest*, 81 VA. L. REV. 1665, 1720 (1995) ("The Establishment Clause is *Rosenberger*'s red herring. The battle at rock bottom does not hinge on church/state relations, but on whether the judiciary can displace a university's academic judgments at the request of . . . discontents . . . .").

28. Rosenberger v. Rector & Visitors of the Univ. of Va., 795 F. Supp. 175 (W.D. Va. 1992).

29. *Rosenberger*, 18 F.3d 269.

30. *Rosenberger*, 795 F. Supp. at 183-84; 18 F.3d at 287-88.

31. *Rosenberger*, 115 S. Ct. at 2516-17.

religion as a viewpoint like any other.[32] Consequently, the Court ruled that the University had violated WAP's members' Free Speech rights and could no longer exclude such religious viewpoints from the SAF's neutral entitlement program.[33]

The *Rosenberger* decision both legitimizes and ensures government sponsorship of religious proselytization.[34] Although the Court merely struck down a public university's funding guidelines, in a larger sense, *Rosenberger* undermines the fundamental protections afforded by the Establishment Clause.[35] Federal[36] and state[37] regulations, such as those promulgated by the University, treat funding differently depending on whether the recipient is a religious or a secular organization.[38] Although Rosenberger claimed that *Wide*

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32. *See id.* at 2517-18; *cf.* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1616-19 (1993) (arguing that religious belief is different than its secular counterpart); Michael W. McConnell, *Accommodation of Religion*, 1995 SUP. CT. REV. 1, 15 (1995) (arguing that religious claims "differ from secular moral claims both because the state is constitutionally disabled from disputing the truth of the religious claim and because it cannot categorically deny the authority on which such a claim rests").

33. *Rosenberger*, 115 S. Ct. at 2516-20. The Court ruled that the government could not exclude religious organizations from participating in such programs as long as the program was designed to neither help nor hinder religion. *Id.* at 2521-22.

34. The verb "proselytize" is defined as "to induce someone to convert to one's faith" or "to recruit someone to join one's party, institution or cause . . . ." MERRIAM WEBSTER DICTIONARY 586 (1994); *see also Rosenberger*, 115 S. Ct. at 2533 (Souter, J., dissenting) ("The Court today, for the first time, approves the direct funding of core religious activities by an arm of the State.").

35. As one commentator explained:

> [T]he negative bar against establishment of religion implies the affirmative "establishment" of a civil order for the resolution of public moral disputes. Agreement on such a secular mechanism was the price of ending the war of all sects against all. Establishment of a civil public order was the social contract produced by religious truce.

Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992).

36. *See, e.g.*, 15 C.F.R. §§ 2301.5(d)(2)(xvi), 2301.22(d) (1994) (Federal Communications Commission's regulations barring funding for sectarian programming). *See generally* Fordham Univ. v. Brown, 856 F. Supp. 684 (D.D.C. 1994) (a Catholic University sued Commerce Department for refusal to fund radio tower construction on the ground that public regulations forbid subsidies to sectarian entities).

37. *See, e.g.*, *Rosenberger*, 18 F.3d at 271 n.2 (the University, an arm of the state of Virginia, has guidelines which prohibit funding for religious activities).

38. *See, e.g.*, *id.* at 286 ("Direct monetary subsidization of religious organizations and

Awake's purpose was merely to ensure a Christian viewpoint in the campus-wide debate,[39] its practical effect was to spread the gospel:[40] WAP's members distributed the publication, free of charge, throughout campus in order "to encourage students to consider what a personal relationship with Jesus Christ means."[41] WAP's use of a journal as a medium for expression is constitutionally significant because it allowed a sectarian organization to "piggyback" a religious message on public funds, thus creating the possibility of continued government sponsorship of religious proselytization.[42]

This Comment argues that the Supreme Court erred by applying the Free Speech Clause's content neutral doctrine in *Rosenberger*. Moreover, by using such an analysis, the Court fundamentally undermined the protections guaranteed by the Establishment Clause. Part I discusses the Supreme Court's Establishment Clause jurisprudence through two competing interpretations and precedent. Part I also examines the Court's development of a content neutral analysis of the Free Speech Clause. Finally, Part I analyzes a line of "hybrid cases" in which the Court applied both the Free Speech and Establishment Clauses. Part II discusses the *Rosenberger* controversy through its various stages of development: at the University, through the federal courts, and to its resolution by the Supreme Court. Part III argues that the *Rosenberger* decision resulted in *sub-silentio* changes of Establishment Clause doctrine, and offers two theories to support the University's decision not to subsidize *Wide Awake*. Finally, this Comment concludes that, by breaking

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projects, however, is a beast of an entirely different color . . . . [T]he 'potential for political divisiveness related to religious belief and practice' would be aggravated if the University were to fund . . . *Wide Awake*.") (citations omitted).

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

40. *Id.* at 2535 (Souter, J., dissenting) ("The subject is not the discourse of the scholar's study or the seminar room, but the evangelist's mission station and the pulpit.").

41. *Id.* at 2534.

42. *Cf. id.* at 2551 (Souter, J., dissenting). Justice Souter concluded:

> [M]y apprehension is whetted by Chief Justice Burger's warning in Lemon v. Kurtzman: "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."

Id. (citations omitted).

new ground in *Rosenberger*, the Supreme Court has undermined the Establishment Clause's guarantee of a separation of church and State which has successfully guarded religious liberty in the United States for over two hundred years.

I. THE FIRST AMENDMENT

A. *The Establishment Clause*

"Congress shall make no law respecting an establishment of religion . . . ."[43]

1. Two Rival Visions of the Establishment Clause: Separationism and Accommodationism

Two theories[44] have evolved in the twentieth century to provide alternate interpretations of the Establishment Clause.[45] The first theory, known as separationism, was advanced by Justice Black in *Everson v. Board of Education*.[46] This school of thought, emanat-

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43. U.S. CONST. amend. I, cl. 1.

44. While numerous judges have proposed their own theories to govern adjudication of Establishment Clause questions, accommodation and separation are at the theoretical heart of the debate. *See* Charles Roth, Rosenberger v. Rector: *The First Amendment Dog Chases Its Tail*, 21 J.C. & U.L. 723, 745-49 (1995) (differentiating between "accommodationism" and "separationism" as strains of thought). These theories operate at opposite poles, thus allowing judges to find their position between the two. *See infra* part II.D.2 (discussing Justice O'Connor's *Rosenberger* concurrence); Roth, *supra*, at 749-50 (delineating alternate tests proposed by Justices Kennedy and O'Connor prior to *Rosenberger*).

45. "Although the Establishment Clause's 'opaque' language provides the basis for church-state separation, the Supreme Court has yet to reach a consensus on how to interpret the language of the Clause itself." John E. Burgess, Recent Development, 47 VAND. L. REV. 1939, 1957 (1994) (citations omitted). While much of the debate has raged within the courts, such terms as the "separation of church and state" have become ingrained in the national consciousness and are debated by lawyers and lay people alike. *See* Robert S. Peck, *The Threat to the American Idea of Religious Liberty*, 46 MERCER L. REV. 1123, 1127-28 (1995) (describing the Republicans' attempt to propose a school prayer amendment in order to limit the Supreme Court who had "made G-d unconstitutional") (alteration added); Ira C. Lupu, *Reconstructing The Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991) ("For almost fifty years, judges, constitutional scholars, and informed citizens have been drawn to the blinkered view that the First Amendment's religion clauses involve the separation of church and state.").

46. 330 U.S. 1 (1947); *see, e.g.*, J. Woodford Howard Jr., *The Robe and the Cloth:*

ing from the writings of Thomas Jefferson and Roger Williams,[47] protects the body politic and religion from one another by creating separate spheres for the two because "religious societies are most genuine when their supporters arise from responding hearts and minds unassisted as well as undeterred by government."[48] The second theory, known as accommodationism, was articulated by then Associate Justice Rehnquist in his dissenting opinion in *Wallace v. Jaffree*.[49] Accommodationism holds that the government may affirmatively aid religion, and is precluded only from establishing a national church or favoring one sect over another.[50]

a. Separationism

In *Everson*, the Supreme Court faced a challenge to the Establishment Clause: whether New Jersey could authorize its local school districts to subsidize childrens' bus rides to sectarian schools.[51] Justice Black, writing for the majority, interpreted the Establishment Clause in a way with which even the dissenting Justices were willing to agree.[52] He began with a historical survey

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The Supreme Court and Religion in the United States, 7 J.L. & POL. 481, 494-95 (1991) (discussing the theme of separationism in *Everson*).

47. *See* Howard, *supra* note 46, at 484 (describing separationism).

48. Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 625 (1995); *see also* Steven D. Smith, *Separatism and the "Secular": Reconstructing The Disestablishment Decision*, 67 TEX. L. REV. 955, 1016 (1989) (The purpose of separationism is to "protect the state from control or corruption by the church and to guard the church against control or corruption by the state."). This principle, also known as voluntarism, "comes from the separationist insistence that an authentic church must be a voluntary church." Esbeck, *supra*, at 625.

49. 472 U.S. 38 (1985); *see also* John Gay, Bowden v. Kendrick: *Establishing a New Relationship Between Church and State*, 38 AM. U. L. REV. 953, 954 (1989) (explaining accommodationism).

50. *See* Gay, *supra* note 49, at 956 n.20.

51. *Everson*, 330 U.S. at 3. Justice Black noted that "[t]hese church schools give their students . . . regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith." *Id.* The appellant was a taxpayer who brought suit under the theory that the reimbursement violated both the Federal and New Jersey Constitutions. *Id.* at 3-4. Although the appellant framed a due process issue, Justice Black explained that he would decide the case on the Establishment Clause question. *Id.* at 7-8.

52. LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 150-51 (1994). Levy concluded:

The dissenting justices in the *Everson* case, while disagreeing with the majority

of religious persecution both in Europe and in the colonies.[53] This intolerance, Justice Black believed, led many of the Founding Fathers to support the idea that individual liberty would best thrive "under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions . . . ."[54] In fact, he argued that this principle was the impetus behind James Madison and Thomas Jefferson's fight against a tax to support an established church and for adopting the Virginia Bill for Religious Liberty.[55] Justice Black applied this interpretation of the Establishment Clause to the states through his often quoted statement:

> The "establishment of religion" clause of the First Amendment 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

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on the question of whether the "wall of separation" had in fact been breached by the practice at issue, concurred with the majority on the historical question of the intentions of the framers and the meaning of the establishment clause.

Id.

53. *Everson*, 330 U.S. at 8-11. Justice Black noted:

> With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted the Jews.

Id. at 9.

54. *Id.* at 11. A commentator wrote, "[the Establishment Clause] protects individuals from compulsory financial support of other people's religion through the tax system-not because such support will coerce conversion, but because it will cause profound divisiveness and offense." Sullivan, *supra* note 35, at 209-10.

55. *Everson*, 330 U.S. at 13 (citations omitted) ("That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . ."). In support of the separationist position, Madison wrote his Memorial and Remonstrance in which he argued that "true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind . . . ." *Id.* at 12 (citations omitted). A commentator noted that "Madison wrote of a world separable into two spheres: the religious and the secular." Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 757-58 (1993) (construing RICHARD BERNSTEIN, ARE WE TO BE A NATION: THE MAKING OF THE CONSTITUTION 69 (1987)).

> institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and State."[56]

Consequently, a judge's role was to separate government policies that provide for the general public from those designed to support religious institutions.[57]

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56. *Everson*, 330 U.S. at 15-16 (citations omitted). Justice Black incorporated these rights through a two-step process: he posited that (1) this understanding of religious liberty was the proper interpretation of the First Amendment, and (2) the Fourteenth Amendment applied these rights against the state. *Id.* at 13-15.

Professor Tribe has noted that there are two fundamental principles underlying this debate: voluntarism and separationism. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1160-61 (2d ed. 1988). As applied to the Establishment Clause, voluntarism was to ensure that "the advancement of a church would come only from the voluntary support of its followers and not from the political support of the state. Religious groups, it was believed, should prosper or perish on the intrinsic merit of their beliefs and practices." *Id.*; *see also* Donald A. Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development, Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968) (describing voluntarism). Working in accord with voluntarism is separationism:

> The state should not become involved in religious affairs [and] . . . sectarian differences should not be allowed unduly to fragment the body politic. Implicit in this ideal of mutual abstinence was the principle that under no circumstance should religion be financially supported by public taxation . . . .

TRIBE, *supra*, at 1161. The separation principle thus "operated in both directions; it was meant to keep religion from entangling with the state as well as to keep churches free from the state influence that would have been the inevitable concomitant of state financial support." Van Alstyne, *supra* note 4, at 777. "Voluntarism, then, was the principle of personal choice. Separatism was the principle of non-entanglement." *Id.* at 778. Taken together, Professor Tribe wrote, these principles form a coherent approach to the religion clauses. TRIBE, *supra*, at 1161.

57. *Everson*, 330 U.S. at 14; *see also* Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 843 (1995) ("Distinctions between the religious and the secular can surely be made; indeed, such distinctions are assumed if the First Amendment's Religion Clauses are to have meaning at all."); *see also* Peck, *supra* note 45, at 1152 (arguing that the Establishment Clause requires line drawing to determine proselytization for "when instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry. The difficulty of the inquiry does not, however, immunize it from judicial scrutiny, for nothing less than the vindication of the American idea of religious liberty is at stake.") (citations omitted); Greene, *supra* note 32, at 1618 ("Barring interpretation of the term 'religion' risks negating the Establishment and

Justice Black then turned to the New Jersey program.[58] He explained that while the program helped children reach church schools (possibly even assisting some who would not have otherwise attended), State power was neutrally administered as it neither helped nor handicapped a religious entity.[59] He likened the New Jersey aid program to government services such as police and fire protection that the State dispensed to both secular and sectarian institutions.[60] As a result, he believed that the "high and impregnable" wall between church and State had not been breached.[61]

Justice Jackson dissented,[62] arguing that the separationist undertones of the majority's opinion conflicted with its holding which allowed government support of religious education.[63] Justice Rutledge dissented separately,[64] stating that the Establishment

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Free Exercises Clauses as barriers to government action, for we would have no way of knowing when such action is legitimate and when it is not.").

58. *Everson*, 330 U.S. at 16. The New Jersey statute, cited in *Everson*, authorized its local school districts to contract for the transportation of school children to and from school. *Id.* at 3 n.1 (construing N.J. REV. STAT., Cum. Sup., tit. 18, c. 14, § 8). The appellee township had reimbursed parents for the cost of sending their children to private schools, both sectarian and secular, on regular buses operated by the local transportation system. *Id.* The appellant, a district taxpayer, brought suit challenging the school Board's practice of reimbursing parochial students' parents. *Id.* at 3-4.

59. *Id.* at 17-18.

60. *Id.*

61. *Id.* at 18.

62. *Id.* (Jackson, J., dissenting). Justice Frankfurter joined Justice Jackson's dissent. *Id.* at 28.

63. *Id.* at 19. Jackson likened the majority's decision to "Julia who, according to Byron's reports, 'whispering "I will ne'er consent," consented.'" *Id.* Justice Jackson believed that the issue could be stated as whether it was "constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination." *Id.* at 21. He explained that the function of the church schools was to indoctrinate the young children as compared with the public schools which were organized around the principle of strict neutrality towards religion. *Id.* at 21-24. Justice Jackson therefore felt that aid to the school was no different than aid to the church itself. *Id.* at 24. In addition, he criticized the majority's holding for ignoring the religious test on which the plan operated. *Id.* at 24-25. He explained that "[a] policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society." *Id.* at 25. The New Jersey program, he explained, only reimbursed Catholic schools and thus impermissibly favored one religion over all others. *Id.*

64. *Id.* at 28. (Rutledge, J., dissenting). Justices Frankfurter, Jackson and Burton joined Justice Rutledge's dissent. *Id.*

Clause's purpose was to "create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[65] He believed that the New Jersey statute breached this wall because it forced taxpayers to support religion.[66]

According to Historian Leonard Levy, the *Everson* Court unanimously embraced the separationist view that the Establishment Clause barred State funding of religious groups, even where the aid was impartially and equitably administered.[67] This analysis authorizes the government to scrutinize all eligible beneficiaries' speech to ensure that sectarian organizations do not receive State funds; while Separationists concede that this process, if applied to non-religious speech, would violate the Free Speech Clause, they argue that such an "asymmetrical treatment is an unavoidable feature of the unique demands of the Establishment Clause."[68] Underlying separationism are thus two coterminous views: (1) religious enti-

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65. *Id.* at 31-32. Justice Rutledge then turned to a number of historical sources including the debate for religious freedom in Virginia. *Id.* at 33-34. He determined that the Establishment Clause "broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws the use of public funds for religious purposes." *Id.* at 33.

66. *Id.* at 44. Justice Rutledge stated:

> [T]he test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own. Today as then the furnishing of "contributions of money for the propagation of opinions which he disbelieves" is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end.

Id. at 44-45. He explained that the reimbursement, underwritten by citizens of all denominations, helped children get religious training and thus was impermissible. *Id.* at 45.

67. LEVY, *supra* note 52, at 151. Levy noted that the sole difference between Justice Black and the dissenters was determining whether the New Jersey program had breached the wall. *Id.* at 150-51.

68. *See* Sullivan, *supra* note 35, at 213 (arguing that the Establishment Clause requires the government to scrutinize speech); *see also* Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174, 186 (1986) (arguing that "it is not the role of government to provide a forum for the interchange of private religious views"); *cf. id.* at 189 (arguing that separationists believe that the opposite of religion is anti-religion, while accommodationists believe that the opposite of religion is non-religion).

ties must prosper or perish, not through the political support of the State, but based on the voluntary patronage of its adherents and the intrinsic merits of their beliefs,[69] and (2) sectarian organizations and the government must remain independent of one another.[70] This framework divides society into two independent spheres—church and State—with each operating exclusively within its own domain.[71]

Until 1985, the Court accepted this interpretation of the Establishment Clause.[72] In 1985, however, Justice Rehnquist struck a new chord.[73]

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69. *See* TRIBE, *supra* note 56, at 1160-61; Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 UTAH L. REV. 895, 910 (1987) (discussing voluntarism).

70. *See* TRIBE, *supra* note 56, at 1161 (describing separation principle).

71. *See* Esbeck, *supra* note 48, at 630; *see also Developments in the Law-Religion and the State*, 100 HARV. L. REV. 1606, 1635-36 (1987) [hereinafter *Developments in the Law*] (explaining that separation "would require government and religion to occupy strictly autonomous spheres, both to protect religion from the 'wilderness of the world' and to preserve civic unity from sectarian divisiveness") (citations omitted); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 249-50 (1994).

72. *See, e.g.*, School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373, 381 (1985) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . to teach or practice religion." (citing *Everson*, 330 U.S. at 15-16)); Mueller v. Allen, 463 U.S. 388, 400 (1983) ("The Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches."); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("[T]he three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity.") (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)).

73. *See* Lupu, *supra* note 71, at 238 ("Justice Rehnquist did not persuade a majority in [*Jaffree*], but he did succeed in casting doubt on what had been the official history of the Establishment Clause and in suggesting that an alternative possessed a respectable claim to historical legitimacy as well."); *see also* Peck, *supra* note 45, at 1123 (noting the rise in accommodationism); Lupu, *supra* note 45, at 556 ("The constitutional era in which separationism is the dominant theme appears to be over."). This new view won adherence by sitting Justices in the 1980s and 1990s (i.e., Rehnquist, Scalia and Kennedy) at roughly the same time as a new campaign, promoted by those interested in introducing religion into the public schools, began. *See* Peck, *supra* note 45, at 1123. Litigators established a strategy which sought "to avoid traditional Establishment Clause concerns by emphasizing the ostensible private status of the religious speaker in a public setting, minimizing the actual involvement of public authority, and framing the issue as one implicating only freedom of speech." *Id.* at 1123-24. The Court decided *Rosenberger* according to this Free Speech approach. *See infra* part II.D.1 (the Court's opinion in *Rosenberger*).

b. Accommodationism

In 1985, the Supreme Court addressed whether an Alabama statute authorizing a daily period of silence for meditation or prayers in public schools violated the Establishment Clause.[74] The Court, in *Wallace v. Jaffree*,[75] held that the state's purpose in enacting the statute was "an effort to return voluntary prayer" to the public schools.[76] The Court explained that the Alabama statute was a legislative endorsement of religion and thus violated the Establishment Clause's principle of government neutrality towards religion.[77] As a result, the Court struck down the statute.[78]

Justice Rehnquist dissented and noted that "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."[79] Rehnquist thus questioned the prevailing Establishment Clause interpretation set forth by Justice Black in *Everson*.[80] He did so in two ways: first, he explained that the

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74. Wallace v. Jaffree, 472 U.S. 38, 38, 40 nn.2, 3 (1985) (construing ALA. CODE §§ 16-1-20.1, 20.2 (Supp. 1984)).

75. 472 U.S. 38 (1985).

76. *Id.* at 56-57.

77. *Id.* at 60.

78. *Id.* at 61. Justices Powell and O'Connor both concurred in the judgment, noting that a moment of silence would pass constitutional muster under the Establishment Clause. *Id.* at 66 (Powell, J., concurring); *id.* at 67 (O'Connor, J., concurring) ("Nothing in the United States Constitution as interpreted by this Court . . . prohibits public school students from voluntarily praying at any time before, during, or after the schoolday."). Chief Justice Burger dissented and noted:

> The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect . . . . The statute "endorses" only the view that the religious observances of others should be tolerated and where possible, accommodated.

Id. at 89-90 (Burger, C.J., dissenting). Justice White also dissented and complimented Justice Rehnquist on his conception of the Establishment Clause. *Id.* at 90-91 (White, J., dissenting) ("Against [Justice Rehnquist's] history, it would be quite understandable if we undertook to reassess our cases dealing with . . . the Establishment Clause.").

79. *Id.* at 92 (Rehnquist, J., dissenting).

80. *See id.* at 91-92; *see also supra* notes 51-72 and accompanying text (discussing *Everson*).

philosophies of Madison, and not Jefferson, were relevant in adjudicating Establishment Clause challenges; and, second, he interpreted Madison's actions and writings in an alternate manner than Justice Black had.[81]

First, Justice Rehnquist minimized Jefferson's influence in the passage of the Establishment Clause.[82] Rehnquist noted that Jefferson was not present for the Bill of Rights' ratification and that his involvement in the debate surrounding the enactment of the religion clauses was limited.[83] As a result, he explained that Madison's intent was controlling.[84] Second, Justice Rehnquist emphasized different portions of Madison's contribution to the church-State debate than Justice Black had.[85] Rather than concentrate on Madison's separationist rhetoric, Justice Rehnquist analyzed the Congressional debate over ratification of the Bill of Rights and found that:

> It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of the government between

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81. *See Jaffree*, 472 U.S. at 91-92.

82. *See id.* at 92.

83. *Id.* Justice Rehnquist pointed out that:

> Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Id. But see James M. Dunn, *Neutrality and the Establishment Clause in* EQUAL SEPARATION 55, 57-58 (Paul J. Weber ed., 1990) ("Is it possible to imagine the gathering that gave us the First Amendment without the hovering presence of Jefferson?").

84. *Jaffree*, 472 U.S. at 92.

85. *Compare Everson*, 330 U.S. at 12 (Black, J.) (Madison's writing that "no person, either believer or non-believer, should be taxed to support a religious institution of any kind . . . .") (citations omitted) *with Jaffree*, 472 U.S. at 98 (Rehnquist, J., dissenting) (Madison saw the First Amendment as "designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of the government between religion and irreligion.").

religion and irreligion.[86]

Consequently, Justice Rehnquist asserted that the government could aid all religions so long as the aid was given evenhandedly and the government refrained from establishing a national church.[87] To buttress his viewpoint, Rehnquist located instances in early United States history where the Government accommodated religion.[88] Justice Rehnquist thus concluded that the "'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."[89]

Accommodationists accept Justice Rehnquist's theory and argue that the government should allow religious entities to participate in government programs on equal terms with their secular counter-

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86. *Jaffree*, 472 U.S. at 98. Justice Rehnquist explained that Madison's more separatist views, expressed during the debate leading to the enactment of Virginia's Statute of Religious Liberty, were not carried "onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights." *Id.* at 98-99. A commentator noted that "[w]hatever may have been Madison's view of church-state relations in the smaller, homogeneous jurisdiction of Virginia, the position he took in Congress in propounding an Establishment Clause was based firmly on the theory of religious pluralism parallel to that espoused in *The Federal Papers*." McConnell, *supra* note 32, at 20. Under this interpretation, Madison believed that the federal government should encourage a multiplicity of religious factions in order to prevent one from gaining control; it would not be necessary, therefore, to preclude religions from receiving state funding so long as the program did not distinguish among sects. *Id.* at 19-20

87. *Jaffree*, 472 U.S. at 99.

88. *Id.* at 99-105 (discussing government encouragement of religion in, for instance, The Northwest Ordinance, Thanksgiving Proclamations, Indian treaties and education). Some commentators have noted that "early generations of American statesmen [did not interpret] the establishment clause as precluding government . . . from using religious means to achieve secular ends that they thought in the public interest." Cord & Ball, *supra* note 69, at 897.

89. *Jaffree*, 472 U.S. at 107. Leonard Levy has proposed that Justice Rehnquist rephrased Justice Black's famous statement to read:

> The establishment of religion clause of the First Amendment means this: Neither can pass laws which aid one religion or prefer one religion over another. No tax can be levied to support any religious activities or institutions unless apportioned in some equitable form and without discrimination in any form or degree . . . . The very phrase "wall of separation between Church and State" is ambiguous and misleading.

LEVY, *supra* note 52, at 152.

parts.[90] Underlying accommodationism is a willingness to open the public arena to both secular and religious participants.[91] Accommodationists argue that government should welcome religion into the "mix of beliefs and associations in the community," and protect religious opinion equally with its secular counterparts.[92] They believe that State interaction with religious institutions is legitimate as long as government does not show preferences among sects.[93] Consequently, religious institutions may receive benefits from generally applicable programs designed to provide aid to broad classes without reference to religion.[94] Although this view did not persuade a majority in *Jaffree*, Justice Rehnquist's theory has continued to grow in acceptance among the sitting Justices.[95]

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90. *See* Michael W. McConnell, *The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?*, 32 CATH. LAW. 187, 188-89 (1989).

91. *See* ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 53 (1990). Adams and Emmerich have noted that:

> While the public square can develop into a field of conflict between religious views and symbols, religious differences, like political discord, are not an evil per se; indeed, if expressed in a tolerant manner, they manifest a healthy democracy. In contrast to the separationists who would resolve this problem by excluding religion altogether, the solution most consistent with our historical commitment to religious liberty and free speech is to welcome religious expression.

Id.; *see also* Cord & Ball, *supra* note 69, at 904 (arguing that religion should be returned to the political process); Lupu, *supra* note 71, at 249 ("[S]eparationism has a doctrine of secular privilege at its heart; the public arena is for secular argument only. The case for equal access for religious argument and practice challenges the hegemony of secular ideology in the public square.").

92. *See* McConnell, *supra* note 32, at 14 ("Religion is under no special disability in public life; indeed, it is at least as protected and encouraged as any other form of belief and association-in some ways more so.").

93. Cord & Ball, *supra* note 69, at 920; *see also Jaffree*, 472 U.S. at 99.

94. *See* A.E. Dick Howard, *The Wall of Separation: The Supreme Court as Uncertain Stonemason*, *in* RELIGION AND THE STATE-ESSAYS IN HONOR OF LEO PFEFFER 85, 102 (James E. Wood, Jr. ed., 1985) ("Political equality for religious groups requires that they be able to participate in and have access to the benefits of government programs on the same terms as other groups."); *see also* Rena M. Bila, Note, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1549 (1995).

95. *See* Lupu, *supra* note 71, at 238 ("Justice Rehnquist did not persuade a majority in *Wallace*, but he did succeed in casting doubt on what had been the official history of the Establishment Clause . . . .") (citations omitted); *see also* Esbeck, *supra* note 48, at 591 (noting that the Supreme Court is midstream in replacing "an older regime focused

2. Establishment Clause Precedent

Since 1947,[96] the Supreme Court's Establishment Clause jurisprudence has included two doctrines. First, the Court has prohibited the government from funding core religious activities. Second, the Court has allowed a religious organization to receive benefits as a result of an independent third party's choice.

a. Prohibition of Government Funding for Core Religious Activities

When deciding an Establishment Clause challenge, the Supreme Court has first inquired whether the government program directly aided a religious organization in performing its core sectarian functions.[97] The Court has held that such subsidies impermissibly breach the "wall of separation" between church and State.[98] While there are numerous Supreme Court decisions which have enunciated the principle that the government cannot fund proselytization,[99] *Lemon v. Kurtzman*[100] created the "modern test" for evaluating whether a statute or government policy violates the Establishment Clause.[101]

In *Lemon*, the Court reviewed two state programs, one from Rhode Island and one from Pennsylvania, on the grounds that each

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on *separationism* with a new regime based on *equality*").

96. Joseph M. McMillan, Note, Zobrest v. Catalina Foothills School District: *Lowering the Establishment Clause Barrier in School-Aid Controversies*, 39 ST. LOUIS U. L.J. 337, 342 (1994) ("Contemporary Establishment Clause jurisprudence begins with the Supreme Court's 1947 decision in [*Everson*].") (citation omitted).

97. *See, e.g.*, *Everson*, 330 U.S. at 16 ("New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.").

98. *See, e.g.*, *id.* ("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.").

99. *See, e.g.*, *id.*; *see also* Bowen v. Kendrick, 487 U.S. 589, 609-10 (1988); School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985); Wolman v. Walter, 433 U.S. 229, 254 (1977); Meek v. Pittenger, 421 U.S. 349, 364-65 (1975); Committee for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 770-72 (1973); Hunt v. McNair, 413 U.S. 734, 743 (1973).

100. 403 U.S. 602 (1971).

101. Burgess, *supra* note 45, at 1959.

violated the Establishment Clause.[102] The Rhode Island statute authorized state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools.[103] The Pennsylvania statute reimbursed non-public schools for their expenditures for teachers' salaries, textbooks, and other secular instructional materials.[104]

The Court began by announcing three "principle evils" against which the Establishment Clause was created to protect: (1) sponsorship, (2) financial support, and (3) active government involvement in religious activity.[105] Rather than promulgate rigid rules to govern the relationship between church and State, the Court instead sought to develop a flexible standard which would examine the "character and purposes" of the benefitted institutions, the nature of the State aid, and the resulting relationship between government and religion.[106] The Court applied these standards and found that both programs resulted in an impermissible degree of entanglement between government and religion.[107]

The Court then turned to the Rhode Island program and noted that when the government funded parochial schools, the result was an entanglement of church and State due to the schools' religious character.[108] The Court differentiated a permissible grant of neutral

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102. *Lemon*, 403 U.S. at 606.

103. *Id.* at 607 n.1 (construing R.I. GEN. LAWS ANN. § 16-15-1 *et seq.* (Supp. 1970)). The program limited participating teachers' salaries and required that they teach only subjects which were offered in the state's public schools. *Id.* at 607-08. Furthermore, a teacher had to agree in writing not to teach a course in religion during such time as he or she received state money. *Id.* at 608.

104. *Id.* at 609 n.3 (construing PA. STAT. ANN., Tit. 24, §§ 5601-09 (Supp. 1971)). Similar to the Rhode Island statute, the Pennsylvania statute required that a school seeking reimbursement had to offer certain courses including: mathematics, modern foreign languages, physical science, and physical education. *Id.* at 609-10.

105. *Id.* at 612 (citing *Walz*, 397 U.S. at 668). It was at this point that the Court announced the now famous *Lemon* test: "First, 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 entanglement with religion.'" *Id.* at 612-13 (citations omitted).

106. *Id.* at 615.

107. *Id.*

108. *Id.* at 620. The Court accepted the district court's finding that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." *Id.* at 616 (citation omitted). Furthermore, the Supreme Court agreed that the system served

aid, such as secular textbooks, from the type of aid which the Rhode Island program granted, because the Rhode Island teachers could inject their religious viewpoints into all subjects, secular or religious.[109] As a result, the Court concluded that the government would need to monitor the program to ensure that proselytization did not occur.[110]

Similarly, the Court noted that Pennsylvania would need to monitor sectarian schools receiving State aid to ensure that the participating schools did not spend government funds to teach religion.[111] Further, the Court held that the Pennsylvania statute was defective because it provided aid directly to religious schools.[112] Underlying this discussion was the Court's determination that such programs would impermissibly place religious groups in opposition to one another to receive government aid.[113] Consequently, the Court rejected both programs.[114]

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as a "powerful vehicle for transmitting the Catholic faith to the next generation." *Id.* at 616 (citation omitted).

109. *Id.* at 617. While the Court was willing to accept, albeit after much discussion, that teachers could successfully bleach all religious character out of their lesson plans, the Court explained that the government would nonetheless have to watch the teacher to ensure that the status quo continued. *Id.* at 618-19 ("Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.").

110. *Id.* at 619.

111. *Id.* at 620-21.

112. *Id.* at 621. The Court explained the difficulties inherent in direct grants to religious organizations: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." *Id.* (citations omitted).

113. *Id.* at 623 ("Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.").

114. *Id.* at 625. The Court closed by noting that "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Id.* Justice Douglas, in a lengthy concurrence, stated that the Court's inquiry for potential Establishment Clause violations is not solely to determine the legislative purpose of the program; rather the second step is to ensure that "the end result—the effect—is not an excessive government entanglement with religion." *Id.* at 627 (Douglas, J., concurring) (citing *Walz*, 397 U.S. at 674).

Two years later, the Court continued to articulate its opposition to direct funding of religion. In *Hunt v. McNair*,[115] the Court was faced with a challenge to South Carolina's statutory system which subsidized higher educational institutions' financing of construction and renovations, so long as the facility was not used for sectarian instruction.[116] The Court applied the *Lemon* test and upheld the program.[117] The majority noted, however, that:

> 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.[118]

The Court found that neither of the proscribed ills existed in *Hunt*, as: (1) there was no information on the record to indicate that the college's operations were primarily sectarian, and (2) the projects which received government aid would not be used for religious purposes.[119] In determining whether there was a risk of government entanglement in religious activities, the Court inquired whether the recipient of government aid was an instrument of religious indoctrination.[120] Finding that it was not, the Court allowed the program to stand.[121]

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115. 413 U.S. 734 (1973).

116. *Id.* at 735-36 (construing South Carolina Educational Facilities Authority Act, S.C. CODE ANN. § 22-41 *et seq.* (Supp. 1971)).

117. *Id.* at 741-49. The Court applied the first prong of the *Lemon* test and found that the purpose of the statute was manifestly secular. *Id.* at 741-42. The Court then applied the second prong to find that the primary effect of the legislation was neither to advance nor inhibit religion after determining that the College was not primarily a sectarian institution and that all government financed buildings were subject to the prohibition against religious use. *Id.* at 742-45. Finally, the Court applied the third prong and found that there was little fear of government entanglement in religious day-to-day activities. *Id.* at 745-49.

118. *Id.* at 743.

119. *Id.* at 743-45 ("What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student admission, and that only 60% of the college student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina.").

120. *Id.* at 746.

121. *Id.* at 748-49. Justice Brennan, joined by Justices Douglas and Marshall, dis-

Next, in *School District of the City of Grand Rapids v. Ball*,[122] the Court applied the prohibition against direct funding of core religious functions and invalidated two programs in which taxpayer money financed classes for nonpublic school students.[123] The Court, relying on *Everson*, stated, "[n]o 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."[124] The majority noted the potential for religion to cause divisiveness in society and reasoned that the judiciary should protect citizens' rights to worship according to their own conscience, while requiring the government to remain neutral among religions, and between religion and irreligion.[125]

Applying the *Lemon* test, the Court held that the programs

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sented and stated: "[t]he Establishment Clause forbids far more than payment of public funds directly to support sectarian institutions. It forbids any official involvement with religion, whatever its form, which tends to foster or discourage religious worship or belief." *Id.* at 754 (Brennan, J., dissenting).

122. 473 U.S. 373 (1985).

123. *Id.* at 397-98. The two programs at issue were: the Community Education Program and the Shared Time Program. *Id.* at 375. In the Shared Time Program, the state offered classes at non-public schools during the course of the school day in subjects such as remedial math. *Id.* The teachers were employees of the public school system, although a number of them had previously taught in the non-public schools to which they were assigned. *Id.* at 376. In the Community Education Program, the state sponsored classes in non-public schools at the conclusion of the school day. *Id.* The Court found that the students attending these programs were the same students who attended the non-public schools during the day. *Id.* at 378. In fact, the Court noted, "[t]here is no evidence that any public school student has ever attended a . . . class in a non-public school" as forty of the forty-one schools in which this program operated were sectarian institutions. *Id.* The district court found that although the program's purpose was secular, its effect was to impermissibly advance religion; the Court of Appeals affirmed. Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 546 F. Supp. 1071 (W.D. Mich. 1983), *aff'd*, 718 F.2d 1389 (6th Cir. 1983) (*cited in Ball*, 473 U.S. at 375, 381).

124. *Ball*, 473 U.S. at 381 (quoting *Everson*, 330 U.S. at 15-16).

125. *Id.* at 382. The Court explained further:

> Only in this way can we "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" and "sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma."

Id. (citing Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

impermissibly advanced religion.[126] It stated that "[a]lthough Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-sponsored indoctrination into the beliefs of a particular religious faith."[127] The Court explained that when a religious organization receives government subsidies, the judiciary must distinguish between impermissible funding which contributes a "direct and substantial" advantage to religion, and permissible aid which provides an "indirect and incidental" benefit to a sectarian entity.[128] The Court found both programs to be constitutionally infirm, due to the risk that teachers would use government funding to teach their sectarian institutions' messages.[129] The Court explained that, unlike permissible secular aid,[130] the current programs could result in the direct and substantial advancement of the sectarian enterprise.[131] Consequently, the programs were unconstitutional.[132]

Finally, in *Bowen v. Kendrick*,[133] the Court allowed a government program to provide funding to religious organizations upon finding that the sectarian entities were not using the aid to promote

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126. *Id.* at 382-97. The Court accepted the district court's finding that the government's purpose in creating the programs was manifestly secular. *Id.* at 383. As for the second prong, the Court found that the public programs operating in religious schools could impermissibly advance religion in three different ways: first, the programs' teachers could either "intentionally or inadvertently inculcat[e] particular religious tenets or beliefs"; second, the programs could "provide a crucial symbolic link between government and religion"; and, third, the programs would provide a subsidy to "the primary religious mission of the institutions affected." *Id.* at 384-85.

127. *Id.* at 385 (citations omitted). The Court continued, "[s]uch indoctrination, if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State, while at the same time tainting the resulting religious beliefs with a corrosive secularism." *Id.*

128. *Id.* at 394 (citations omitted).

129. *Id.* at 388.

130. *Id.* at 393. An example of permissible secular aid to a sectarian institution can be found in Wolman v. Walter, 443 U.S. 229, 241-44 (1977), in which the Court upheld a state program which provided diagnostic services to non-public schools. The Court found little risk that the schools would employ government money for religious educational purposes. *See id.*

131. *Ball*, 473 U.S. at 396-97.

132. *Id.* at 397.

133. 487 U.S. 589 (1988).

a religious message.[134] The Court examined the Adolescent Family Life Act ("AFLA") in which Congress had integrated the activities of secular and sectarian organizations in order to limit adolescent pregnancies.[135] The Court applied the *Lemon* test and upheld the AFLA.[136] In deciding whether the AFLA had the primary effect of advancing religion, the Court determined what limits to place on a religious entity participating in a neutral government program.[137] While noting that religious institutions need not be quarantined from neutral State aid, the Court cautioned that direct government aid could not have the primary effect of advancing religion.[138] The Court explained that there was no evidence to show that the AFLA advanced any pervasively sectarian institutions' religious mission.[139] The Court further noted that although religious organizations were authorized to accomplish many non-religious tasks, such tasks were not converted into religious activities solely because sectarian organizations accomplished them.[140] Finally, the Court remanded the case to determine whether the AFLA's funds were being used for improper purposes such as aid to pervasively sectarian institutions.[141]

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134. *Id.* at 610-612.

135. *Bowen*, 487 U.S. at 593-97 (construing 42 U.S.C. § 300z to z-10 (1982 & Supp. IV) (current version at 42 U.S.C. § 300z to z-10 (1995))). Appellees challenged AFLA's constitutionality arguing that it violated the First Amendment both on its face and as applied. *Id.* at 597.

136. *Id.* at 602. First, the Court found that Congress was "motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy and parenthood." *Id.* (citations omitted). Second, the Court found that the Act did not have the primary effect of advancing religion. *Id.* at 604-15. Finally, the Court found that AFLA did not lead to an excessive government entanglement with religion. *Id.* at 615-17.

137. *Id.* at 608-11.

138. *Id.* at 609. The Court then looked to the *Hunt* case for the proposition that "[a]id 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 . . . ." *Id.* at 610 (citing *Hunt*, 413 U.S. at 743). It found that "nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions." *Id.*

139. *Id.* at 610-12.

140. *Id.* at 612-13.

141. *Id.* at 620-21.

Justice O'Connor concurred and stated that while she agreed with the dissenters that "any use of public funds to promote religious doctrine violates the Establishment Clause,"[142] she did not believe that the record contained instances of such impermissible uses of funds.[143] She explained that the case should be remanded to the district court to determine whether such abuses were occurring.[144] Justice Kennedy, joined by Justice Scalia, concurred with the majority and argued that when the Court determines whether a statute violates the Establishment Clause "as applied," the question is not "whether the entity is of a religious character, but how it spends its grant."[145]

b. Funding of Religious Entities through Independent Third-parties

A second relevant principle in the adjudication of Establishment Clause challenges is determining whether the sectarian institution received aid as a result of private choice or government action. This principle recognizes that a State "may issue a paycheck to one of its employees, who may then donate all or part of that paycheck

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142. *Id.* at 622-23 (O'Connor, J., concurring).

143. *Id.*

144. *Id.* at 623-24. Justice O'Connor remarked that "appellees may yet prevail on remand, and I do not believe that the Court's approach entails a relaxation of the 'unwavering vigilance that the Constitution requires against any law "respecting an establishment of religion."'" *Id.* at 623 (citations omitted).

145. *Id.* at 624-25 (Kennedy, J., concurring). Justice Blackmun, however, responded:

> Justice Kennedy joined by Justice Scalia, would further constrain the district court's consideration of the evidence as to how grantees spent their money, regardless of whether the grantee could be labeled "pervasively sectarian" . . . . This statement comes without citation to authority and is contrary to the clear import of our cases . . . . Not surprisingly, the Court flatly rejects Justice Kennedy's suggestion, observing that "it will be open to appellees on remand to show that ALFA aid is flowing to grantees that can be considered 'pervasively sectarian' religious institutions."

Id. at 652 n.16 (Blackmun, J., dissenting) (citations omitted). Justice Blackmun instead argued that the statute impermissibly advanced religion and should be struck down without a remand. *Id.* at 635-53. A commentator noted that "[w]hile Justice Blackmun espouses the traditional interpretation of 'no aid to religion,' [the majority] embraces the revisionist interpretation of affirmative aid to religion." Gay, *supra* note 49, at 979; *see also infra* part II.D.1 (discussing the Court's opinion in *Rosenberger*, which allowed religious organizations to receive aid from a neutral government program).

to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary."[146]

In *Mueller v. Allen*,[147] the Court was faced with a Minnesota plan which allowed taxpayers to deduct certain educational expenses incurred when their children attended private schools.[148] The Court, guided by the *Lemon* test, upheld the plan.[149] It explained that "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject."[150] The Court further explained that public funds reached sectarian institutions solely through the private choices of parents rather than due to direct government funding.[151] Consequently, the Court found that religious organizations would not be competing against one another for state aid.[152] As a result, the Court upheld the plan.[153]

Next, in *Witters v. Washington Department of Services for the*

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146. Witters v. Washington Dep't. of Serv. for the Blind, 474 U.S. 481, 486-87 (1986); *see also* Esbeck, *supra* note 48, at 618 ("Equality is the operative principle when government benefits are directed to all individuals without regard to religion, who are given complete freedom of choice regarding how they may 'spend' that benefit.").

147. 463 U.S. 388 (1983).

148. *Id.* at 390 (construing MINN. STAT. § 290.09, Subd. 22, (1982) (repealed 1987)). The deduction was limited to "'tuition, textbooks and transportation' of dependents attending elementary or secondary schools." *Id.* at 391.

149. *Id.* at 394-404; *see also* McMillan, *supra* note 96, at 359 ("[The Court] began by noting the tentative nature of the [*Lemon* test] . . . . Despite its reservation about the merits of [the *Lemon* test], the Court applied [it] to the facts at hand."). First, the Court found that the legislature did not pass the statute specifically to fund religious organization, but rather to "defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend . . . ." *Mueller*, 463 U.S. at 395. Second, the Court found that the benefits flowed primarily to the parents and not the institutions. *Id.* at 399-402. Finally, the Court explained that there was no substantial fear of entanglement except in determining whether the deductions were legitimate. *Id.* at 403.

150. *Mueller*, 463 U.S. at 399.

151. *Id.*

152. *Id.* at 399-400.

153. *Id.* at 403. Justice Marshall, joined by Justices Brennan, Blackmun and Stevens, dissented on the grounds that the program had the "direct and immediate effect of advancing religion." *Id.* at 404-05 (Marshall, J., dissenting).

Blind,[154] the Court held that the Establishment Clause did not preclude Washington state from subsidizing a blind petitioner's education under a state vocational rehabilitation assistance program in his studies at a Christian college.[155] The Court applied the *Lemon* test and found that the sole issue was whether the extension of aid to the petitioner was a direct subsidy to the religious organization.[156] The Court explained that the government provided the funding to the student who then transferred the aid to an institution of his or her choice.[157] The Court distinguished the Washington state program from the one struck down in *Ball*, where the Court held that aid, purportedly benefiting students, was actually subsidizing religion.[158] In so doing, the Court noted that Witters, unlike the students in *Ball*, exercised private choice on where to spend his subsidy and thus the program did not act as a conduit to fund religion.[159] Consequently, the Court held that the program did not impermissibly advance religion.[160]

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154. 474 U.S. 481 (1986).

155. *Id.* at 482 (construing WASH. REV. CODE § 74.16.181 (1981) (repealed 1983)). The petitioner, suffering from a progressive eye condition, was a student at the Inland Empire School of the Bible at which he was preparing for a career in the church. *Id.* at 483. He was eligible for aid under the Washington statute which sought to provide funding for the visually handicapped. *Id.* at 483. The Washington Commission for the Blind (the government entity which distributed the funds) denied the petitioner aid on the grounds that "[t]he Washington State constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas." *Id.* (citations omitted) (alteration in original). A state hearings examiner upheld the ban "in light of the State Constitution's prohibition against the state directly or indirectly supporting a religion." *Id.* at 484 (citation omitted). The Superior Court affirmed on similar grounds. *Id.* The Washington Supreme Court, however, applied the *Lemon* test and affirmed based on the Federal Constitution. 689 P.2d. 53, 55 (Wash. 1984).

156. *Witters*, 474 U.S. at 485-89. The Court resolved the first prong by stating "all parties concede the unmistakably secular purpose of the Washington program. That program was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services . . . ." *Id.* at 485-86.

157. *Id.* at 487.

158. *Id.* at 487 n.4; *see also supra* notes 122-32 and accompanying text (discussing *Ball*).

159. *Witters*, 474 U.S. at 488.

160. *Id.* at 489. Justice Powell, in a concurrence joined by Chief Justice Burger and Justice Rehnquist, explained that: "*Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the [*Lemon* test], because any aid to religion

Finally, in *Zobrest v. Catalina Foothills School District*,[161] the Court allowed government funding to reach a religious entity through an independent third-party's choice.[162] The Court judged whether the Individuals with Disabilities Education Act ("IDEA") and its Arizona counterpart violated the Establishment Clause by providing a translator to accompany a student to a sectarian school.[163] At the outset, the Court noted that both *Mueller* and *Witters* stood for the proposition that neutral government programs were not subject to an Establishment Clause challenge solely because sectarian institutions received an attenuated financial benefit.[164] The Court explained that the Arizona program provided no

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results from the private choices of individual beneficiaries." *Id.* at 490-91 (Powell, J., concurring) (citations omitted). Justice O'Connor concurred and added, "[t]he aid to religion at issue here is the result of the petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Id.* at 493 (O'Connor, J., concurring) (citations omitted).

161. 113 S. Ct. 2462 (1993).

162. *Id.* at 2469.

163. *Id.* at 2464 (construing 20 U.S.C. §§ 1400-1485 (currently codified at U.S.C. §§ 1400-1491) (1994 & Supp. I 1995)) and ARIZ. REV. STAT. ANN. § 15-761 to -772 (1991) (currently codified as ARIZ. REV. STAT. ANN. § 15-761 to -772 (1995))). The Petitioner, deaf since birth, sought to attend a Roman Catholic High School in Tucson, Arizona, and requested, pursuant to IDEA and its Arizona counterpart, that the respondent school district provide him with a sign language interpreter to accompany him to classes as was provided when the petitioner had attended public school. *Id.* Acting according to the counsel of both the County Attorney and the State Attorney General, the school district refused to provide for the interpreter on the assumption that it would violate the Constitution. *Id.* The petitioner subsequently brought suit under 20 U.S.C. § 1415(e)(4)(a) which grants federal district courts jurisdiction to all questions arising out of the IDEA. *Zobrest*, 113 S. Ct. at 2464. The Court of Appeals for the Ninth Circuit upheld the district court's conclusion that providing the interpreter would violate the Establishment Clause. *Zobrest*, 963 F.2d 1190 (9th Cir. 1992).

164. *Zobrest*, 113 S. Ct. at 2466-67. A commentator noted:

> In discussing *Mueller* and *Witters* as precedent, the [Court] identified two factors determinative of the outcomes in those cases. Both factors were also present in *Zobrest*. The first of these was the "class of beneficiaries" factors . . . . The assistance dispensed under the provisions of the IDEA was "aid not to schools but to individual handicapped children." The second factor linking this case to *Mueller* and *Witters* was the choice issue. In the view of the Court, the IDEA does not on its own put government employees into sectarian institutions, but it does allow the parents to exercise that option in their use of the assistance that it provides.

McMillan, *supra* note 96, at 373.

financial incentive for a parent to send his or her child to sectarian schools, and concluded that the interpreter's presence on sectarian school grounds was wholly a result of the parents' private choice.[165] The Court distinguished *Ball* on the grounds that: (1) the IDEA did not relieve sectarian schools of costs they would have otherwise borne in educating their students, and (2) the sign-language interpreters, unlike teachers or guidance counselors, objectively transmitted the students' surroundings.[166] Consequently, the Court noted that the school district could provide the petitioner with the interpreter without violating the Establishment Clause.[167]

B. *The Free Speech Clause*

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[168]

While many consider the Free Speech Clause to guarantee be a fundamental freedom under the United States' Constitutional scheme,[169] the Supreme Court has struggled in determining the

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165. *Zobrest*, 113 S. Ct. at 2467-68.

166. *Id.* at 2468-69.

167. *Id.* at 2469. Justice Blackmun, joined by Justices Stevens, O'Connor and Souter in part I of his dissent, noted that the case should have been remanded on the grounds that there was no need to pass judgment on the constitutionality of an issue when there were alternate grounds on which to decide the controversy. *Id.* (Blackmun, J., dissenting). In part II, Justice Blackmun, joined only by Justice Souter, stated that "[a]t Salpointe, where the secular and the sectarian are 'inextricably intertwined,' governmental assistance to the educational function of the school necessarily entails governmental participation in the school's inculcation of religion." *Id.* at 2472. He explained that this violated the well-established principle that proscribed the potential use of government funding for the transmission of sectarian messages. *Id.* at 2473. He distinguished *Mueller* and *Witters* by stating that those cases ended with a disbursement of funds or the lessening of a tax, while the case at bar involved "ongoing, daily and intimate governmental participation in the teaching and propagation of religious doctrine." *Id.* at 2474. Blackmun concluded that religious autonomy was best served by leaving religion independent from the State. *Id.* at 2474-75.

168. U.S. CONST. amend. I.

169. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Justice Brandeis noted:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile . . . and that this should be a fundamental

contours of its application.[170] In the 1970s and 1980s, both liberal and conservative justices endorsed an analysis predicated on content neutrality.[171] Content neutrality requires laws and regulations to be "viewpoint neutral."[172] Under this analysis, the government can neither favor the proponents nor opponents of a particular argument.[173] Consequently, any attempt to differentiate a speaker based on the content of his or her message is held to be presumptively invalid.[174]

The Supreme Court first applied the content neutral analysis in *Police Department of Chicago v. Mosley*.[175] In *Mosley*, the petitioner challenged a municipal ordinance which prohibited all demonstrations within 150 feet of public schools, except when such

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principle of the American government.

Id.; *see also* Stacey J. Rappaport, Note, *Rules of the Road: The Constitutional Limits of Restricting Indecent Speech on the Information Superhighway*, 6 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 301 (1995) (arguing that government can only limit speech in narrow circumstances).

170. *See* Viktor Mayer-Schonberger & Teree E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law*, 18 B.C. INT'L & COMP. L. REV. 59, 67 (1995) ("The majority of the Court has not yet settled upon a defining ideology to justify the veneration it accords to free speech.") (citations omitted); *see also* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991) ("The doctrinal web surrounding the free speech clause of the first amendment is one of the most complicated and confusing in constitutional law.").

171. *See* Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439 (1995) ("Free speech issues in recent years have commanded a rare judicial consensus, uniting Justices from Brennan to Scalia."); *see also* George G. Size & Glenn R. Britton, *Is there Hate Speech?:* R.A.V. *and* Mitchell *in the Context of First Amendment Jurisprudence*, 21 OHIO N.U. L. REV. 913, 914 (1995).

172. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (noting that the government cannot regulate speech based on "hostility—or favoritism—towards the underlying message expressed"); *see also* Size & Britton, *supra* note 171, at 914-15 (explaining content neutrality).

173. *See* Mayer-Schonberger & Foster, *supra* note 170, at 72 ("[T]he Court avoids direct contact with content as if it were a hot iron. The words themselves, and the ideas they communicate, are simply not the determinative factor examined by the Court in appraising content-based regulations.").

174. Size & Britton, *supra* note 171, at 914-15.

175. 408 U.S. 92 (1972); *see also* Size & Britton, *supra* note 171, at 915 (explaining that *Mosley* was "the leading case enunciating the content neutrality approach . . . .").

picketing was peaceful and part of a labor dispute.[176] The Court struck down the ordinance on the grounds that it made an impermissible distinction between labor picketing and other peaceful picketing.[177] While the Court ultimately decided the case based on the Equal Protection Clause of the Fourteenth Amendment,[178] it noted that the Free Speech Clause was significant in the analysis.[179] The Court found that the ordinance described permissible picketing on the basis of its subject matter: peaceful picketing was prohibited unless the demonstrators were voicing a particular viewpoint.[180] The Court noted that "[t]he operative distinction [was] the message

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176. *Mosley*, 408 U.S. at 92-93 (construing CHICAGO, ILL., MUNICIPAL CODE, c. 193-1(i) (1968)). The appellant peacefully carried a sign which read, "Jones High School practices black discrimination. Jones High School has a black quota." *Id.* at 93. Upon they city's passage of the statute, the petitioner brought suit seeking declaratory and injunctive relief, pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983. *Mosley*, 408 U.S. at 93-94. While the district court granted a directed verdict dismissing the complaint, the Seventh Circuit reversed on the grounds that the ordinance was overbroad as it "prohibited even peaceful picketing next to a school . . . ." *Id.* at 94 (citations omitted).

177. *Mosley*, 408 U.S. at 94.

178. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws"). When applying the Equal Protection Clause, the Court examines whether there is an appropriate governmental interest which is furthered when similarly situated groups are treated differently. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 75-77 (1971).

179. *Mosley*, 408 U.S. at 94-95. The Court stated:

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . . There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

Id. at 96.

180. *Id.* at 95. The Court further noted:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Id. at 95-96 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

on [the] sign."[181] Consequently, the Court struck down the ordinance under the Equal Protection Clause.[182]

Next, in *Carey v. Brown*,[183] the Court continued the process of integrating content neutrality into the Free Speech Clause from its origins within the Equal Protection Clause.[184] The Court was faced with an Illinois law which prohibited the picketing of dwellings, except when the residence was the place of employment involved in a labor dispute.[185] The Court found that the ordinance regulated expressive conduct falling under the First Amendment's preserve, and noted that it accorded preferential treatment to views on a certain subject while restricting all others.[186] The Court struck down the law, holding that it was constitutionally indistinguishable from the one invalidated in *Mosley*.[187]

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181. *Id.* at 95.

182. *Id.* at 101-02. One commentator concluded that, "[i]n [*Mosley*], the Court clearly announced the first amendment's antipathy for content discrimination and, less clearly, described what content discrimination meant . . . . [T]he best interpretation of the case is that the Court's concern about content discrimination extended beyond discriminatory government purposes." Williams, *supra* note 170, at 624 (citations omitted).

183. 447 U.S. 455 (1980).

184. *See id.*; *see also* Size & Britton, *supra* note 171, at 916 ("[*Carey*] thus completed the migration of content neutrality from its equal protection origins to its independent existence in free speech law.").

185. *Carey*, 447 U.S. at 457 (construing ILL. REV. STAT., ch. 38, § 21.1-2 (1977)). The appellants participated in a peaceful demonstration in front of the Mayor of Chicago's home in order to protest his alleged failure to support school busing programs directed towards improving integration of the city's schools. *Id.* They were arrested and subsequently pled guilty to unlawful residential picketing. *Id.* The appellants brought suit in Federal Court alleging that the state statute was unconstitutional, but the United States District Court for the Northern District of Illinois denied all relief. 462 F. Supp. 518 (N.D. Ill. 1978). The Court of Appeals for the Seventh Circuit reversed on the grounds that the statute, both on its face and as applied, violated the Equal Protection Clause. 602 F.2d 791 (7th Cir. 1979).

186. *Carey*, 447 U.S. at 459-63. In a footnote, the Court explained that while the Illinois statute discriminated on the basis of the speaker's subject matter rather than his particular viewpoint, "[t]he First Amendment's hostility to content-based regulations extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 462 n.6 (citing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1979)).

187. *Id.* at 461. The Court cited to *Mosley* to illustrate that both ordinances violated the Equal Protection Clause and First Amendment. *Id.* at 462-63. Justice Stewart joined the majority's opinion and reasoned that while the Court's opinions in *Carey* and *Mosley*

Lastly, in *R.A.V. v. City of St. Paul*,[188] the Court applied the content neutral analysis to the First Amendment.[189] The Court invalidated a city ordinance which prohibited individuals from placing symbols which they knew, or had reasonable grounds to know, would arouse "anger, alarm or resentment" on the basis of race, color, creed, religion, or gender.[190] The Court noted that while content based regulations were presumptively invalid, such restrictions were acceptable in limited areas such as defamation and obscenity because the Court must interpret content to proscribe the speech.[191] Within such categories, however, the government may not regulate speakers based on "hostility—or favoritism—towards

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invoked the Equal Protection Clause, both cases explicated the "basic meaning" of the Free Speech Clause. *Id.* at 471 (Stewart, J., concurring). Stewart noted that:

> [W]hile a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, and may even forbid altogether such use of some of its facilities; what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression.

Id. at 471-72 (citations omitted) (emphasis in original).

188. 505 U.S. 377 (1992).

189. *See id.* at 391; *see also* Size & Britton, *supra* note 171, at 920-21.

190. *R.A.V.*, 505 U.S. at 380 (construing ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)). The respondent city of St. Paul charged the petitioner under this statute for allegedly burning a cross in the yard of an African-American family. *Id.* The trial court found the ordinance to be overbroad and impermissibly content based and dismissed the count. *Id.* at 380. The Minnesota Supreme Court, however, reversed on the grounds that the ordinance prohibited only Chaplinsky-type "fighting words," *see* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), a type of expression to which First Amendment protections do not extend. *In re* Welfare of R.A.V., 464 N.W.2d 507, 510-11 (Minn. 1991).

191. *R.A.V.*, 505 U.S. at 383. The Court explained that the government could not proscribe such areas of speech solely based on content, even if First Amendment protections did not extend to these types of speech. *Id.* at 386. Some commentators have noted:

> Although [the Court] begins by acknowledging areas squarely outside of content neutral analysis, such as libel and obscenity, this in no way hinders [the Court] in [its] objective, which is nothing less than to make content neutrality the governing wheel of free press/free speech law. Rather, [the Court] proceeds ahead to develop an overall theory of First Amendment law under the rubric of content neutral analysis.

Size & Britton, *supra* note 171, at 921-22 (citations omitted).

the underlying message expressed."[192]

Turning to the city ordinance, the Court held that it was facially unconstitutional on two grounds.[193] First, the Court explained that the ordinance protected Free Speech rights unless an individual expressed himself about a topic proscribed by the ordinance.[194] If, for example, a speaker sought to provoke a group not listed by the ordinance, he or she could employ "abusive invective, no matter how vicious or severe . . . ."[195] The speaker, however, could not use such expression when decrying a classification enumerated in the ordinance.[196] As a result, the Court found that St. Paul had placed special prohibitions on speakers expressing views on "disfavored subjects."[197]

Second, the Court explained that the ordinance discriminated according to a speaker's viewpoint.[198] The Court noted that the ordinance would outlaw both sides of the debate from employing certain symbolic speech such as racial epithets.[199] The ordinance did not prohibit, however, those arguing in favor of tolerance from using "'fighting words' that do not invoke race, color, creed or religion."[200] The result was that the ordinance limited the available language for racist individuals, but would allow free reign to those arguing in favor of tolerance.[201] Consequently, the Court struck

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192. *R.A.V.*, 505 U.S. at 386. The Court further noted that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *Id.* at 388. In addition, the government may regulate speech based on its potential secondary effects. *Id.* at 389. Such bases "refute the proposition that the selectivity of the restriction is 'even arguably "conditioned upon the sovereign's agreement with what a speaker may intend to say."'" *Id.* at 390 (citations omitted).

193. *Id.* at 391-96.

194. *Id.* at 391-92.

195. *Id.* at 391. The Court explained that the ordinance did not preclude an individual from using "fighting words" on the basis of political affiliation, union membership or homosexuality. *Id.*

196. *Id.* at 392.

197. *Id.* at 391.

198. *Id.*

199. *Id.*

200. *Id.* at 391-92.

201. *Id.* at 391. The Court noted that:

One could hold up a sign saying, for example, that all "anti-Catholic bigots" are

down the ordinance.[202]

C. *The "Hybrid" Cases*

> "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech, or of the press . . . ."[203]

The Supreme Court has combined the Free Speech and Establishment Clauses and overturned government regulations prohibiting religious entities access to public fora. In so doing, the Court developed the principle that once the government opened a forum for general public use, it could not exclude sectarian groups.[204]

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misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.

Id. at 391-92.

202. *Id.* at 396. The Court closed by noting, "[l]et there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.* at 396. A commentator summed up, "*R.A.V.* is consistent with traditional First Amendment analysis . . . . The Court . . . advised that government regulation of fighting words must be viewpoint-neutral and cannot be aimed solely at racist speech." Gaumer, *supra* note 4, at 17 (citations omitted).

Justice White concurred, explaining that the ordinance regulated protected speech. *R.A.V.*, 505 U.S. at 397-98 (White, J., concurring). He explained that the Court's approach of categorizing speech as within and outside the First Amendment's protections "has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need." *Id.* at 400. He criticized the majority for applying content neutral restrictions to non-protected speech. *Id.* at 400-01; *see also* Williams, *supra* note 170, at 619 (arguing that the rise of content-neutrality has ignored independent lines of free speech doctrine).

Justice Stevens, in a separate concurrence, noted that "content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment." *Id.* at 420 (Stevens, J., concurring). He explained that the scope of the First Amendment was determined by the content of the speech, for whether or not expression falls into a "protected" or "unprotected" category is determined, at least in part, by its content. *Id.* at 421. He noted that the Court's decision to presumptively invalidate content-based regulation of speech would wreak "havoc in an area of settled law." *Id.* at 425. Consequently, Stevens would have upheld the ordinance had it not been overbroad. *Id.* at 436.

203. U.S. CONST. amend. I.

204. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 272-74 (1981); *see also* Esbeck,

These cases vary in the types of fora and speech involved.

In *Widmar v. Vincent*,[205] the Court granted a religious organization equal access to a public university's facilities.[206] The Court examined a University of Missouri at Kansas City ("UMKC") policy which, while encouraging student activities, excluded a religious organization named Cornerstone from conducting its meetings on campus-owned property.[207] The Court explained that because UMKC had created an open forum, it could not deny Cornerstone's members access to UMKC facilities based on the content of their speech; to do so presumptively violated the students' Free Speech rights.[208] Consequently, the Court inquired whether UMKC could justify its policy by demonstrating it to be: (1) necessary to serve a compelling State interest, and (2) narrowly tailored to achieve that end.[209]

The Court held that UMKC's Establishment Clause defense did not constitute a compelling State interest.[210] The Court noted that while a public university's obligation to comply with the Establishment Clause was a compelling interest, UMKC could allow religious organizations "equal access" to public facilities without vio-

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supra note 48, at 617 ("Equality as a rule of law is the norm when it comes to private speech of religious content. When the speech takes place on public property, or as the cases say, 'speech in a public forum,' equal access is the rule.").

205. 454 U.S. 263 (1981).

206. *Id.* at 277.

207. *Id.* at 265. The Court noted that Cornerstone was "an organization of evangelical Christian students from various denominational backgrounds . . . . A typical Cornerstone meeting included prayers, hymns, Bible commentary, and discussion of religious views and experiences." *Id.* at 265 n.2. Eleven members of the organization brought suit in federal court alleging that UMKC's discrimination against religious activity violated their First and Fourteenth Amendment rights. *Id.* at 266. The district court, upon cross-motions for summary judgment, found the regulations to be required by the Establishment Clause as "the State could not provide facilities for religious use without giving prohibited support to an institution of religion." Chess v. Widmar, 480 F. Supp. 907, 915-16 (W.D. Mo. 1979). The Court of Appeals for the Eighth Circuit reversed, holding that the University's regulation was content based for which it could not find a compelling interest. 635 F.2d 1310, 1315-20 (8th Cir. 1980).

208. *Widmar*, 454 U.S. at 268-69.

209. *Id.* at 270.

210. *Id.* at 276-77.

lating the *Lemon* test.[211] The Court reasoned that Cornerstone's presence in UMKC's open forum was an incidental benefit which did not impermissibly advance religion.[212] The Court explained that: (1) access does not confer "any imprimatur of state approval" of religion, and (2) the broad class of both religious and non-religious speakers able to use the forum would render it essentially secular.[213] Consequently, the Court struck down the prohibition.[214]

Next, in *Board of Education of the Westside Community Schools v. Mergens*,[215] the Court allowed a religious organization equal access to a public high school's facilities.[216] The Court overturned the City of Omaha's Westside School District's ("Westside") policy which denied students the opportunity to form

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211. *Id.* at 271. The Court explained that the first and third prongs were easily met as the open forum policy "would have a secular purpose and would avoid entanglement with religion." *Id.* at 271-72 (citations omitted).

212. *Id.* at 274. In a footnote, the Court noted:

> As the dissent emphasizes, the Establishment Clause requires the State to distinguish between "religious" speech—speech, undertaken or approved by the State, the primary affect of which is to support an establishment of religion—and "nonreligious" speech—speech, undertaken or approved by the State, the primary affect of which is not to support an establishment of religion. This distinction is required by the plain text of the Constitution. It is followed in our cases.

Id. at 271 n.9.

213. *Id.* at 274-75; *see also* Susan Ehrmann, Note, Lamb's Chapel v. Center Moriches Union Free School District: *Creating Greater Protection for Religious Speech Through the Illusion of Public Forum Analysis*, 1994 WIS. L. REV. 965, 978-79 (1994) (explaining that the Court held an open access policy would further free speech rights without implicating the Establishment Clause).

214. *Widmar*, 454 U.S. at 277. Justice Stevens filed a concurring opinion in order to emphasize the importance of academic freedom of public universities and to decry the majority's use of the term compelling state interest. *Id.* at 277-281 (Stevens, J., concurring). He noted that a university may look into a speaker's content in order to determine whether or not the subjects are relevant for an academic debate; it may not, however, "allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted." *Id.* at 280. He concurred with the judgment because he believed that the record disclosed no danger of potential Establishment Clause violations. *Id.* at 280-81. Justice White dissented, arguing that he believed "the States to be a good deal freer to formulate policies that affect religion in divergent ways than [did] the majority." *Id.* at 282 (White, J., dissenting).

215. 496 U.S. 226 (1990).

216. *Id.* at 252-53.

a Christian Club.[217] The Court explained that when a public school granted access to a non-curriculum related student group, the Equal Access Act ("Act") mandated that it had created a "limited open forum."[218] The Court concluded that, pursuant to the Act, the school was prohibited from denying access to any organization based on the "religious, political, philosophical, or other content of the speech at such meetings."[219] The Court found that Westside had created a "limited open forum" and that its exclusion of the respondents, due to the religious content of their speech, violated the Act.[220]

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217. *Id.* at 232. Respondents were students at a secondary school in Omaha, Nebraska and were permitted to join and form student groups and clubs which met at the close of the school day. *Id.* at 231. The petitioners sought to establish a club whose "purpose would have been, among other things, to permit the students to read and discuss the Bible, to have fellowship, and to pray together." *Id.* at 232. The administration denied the request and the students brought suit in the United States District Court in the District of Nebraska seeking declaratory and injunctive relief. *Mergens*, No. CV 85-0-426, slip op. (D. Neb. 1988). The district court entered judgment for the school on the rationale that Westside did not constitute a "limited open forum" as all of its clubs were tied to the school's educational function. *Id.* The Eighth Circuit reversed, explaining that the school district had instituted a limited public forum and that the school district's decision to exclude the respondents thus discriminated against the respondents' viewpoint. 867 F.2d 1076, 1078-79 (8th Cir. 1989).

218. *Mergens*, 496 U.S. at 235 (construing the Equal Access Act ("Act"), 20 U.S.C. §§ 4071-74 (1984) (currently codified at 20 U.S.C. §§ 4071-74 (1994 & Supp. I 1995)). In 1984, Congress passed the Act, which provides, in pertinent part:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical or other content of the speech at such meetings.

20 U.S.C. § 4071(a); *see also* Leah Gallant Morgenstein, Board of Education of Westside Community Schools v. Mergens: *Three "R's" + Religion = Mergens*, 41 AM. U. L. REV. 221, 234-37 (1991) (discussing the Equal Access Act). After much debate, the Court decided that "the term 'noncurriculum related student group' is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school." *Mergens*, 496 U.S. at 235.

219. *Mergens*, 496 U.S. at 235 (quoting 20 U.S.C. § 4071(a)). The Court noted, "even if a public secondary school allows only one 'noncurriculum related student group' to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time." *Id.* at 236.

220. *Id.* at 246-47.

The Court next considered whether the Establishment Clause provided a rationale for Westside's exclusion of the Christian Club.[221] The Court noted that it had applied the *Lemon* test in *Widmar* and granted a religious organization access to a public forum.[222] Consequently, the Court reasoned that Westside's policy would not impermissibly advance religion because: (1) the children would not perceive that Westside endorsed the Club's religious message due to the difference between "*government* speech endorsing religion, which the Establishment Clause forbids," and private speech endorsing religion which the Free Speech Clause protects; (2) the Act limited the presence of teachers and mandated that the meetings be held during noninstruction time; and (3) the proposed club was one of a broad spectrum of activities present in the district.[223] Consequently, the Court determined that the Act did not have the primary effect of advancing religion.[224]

Finally, in *Lamb's Chapel v. Center Moriches Union Free School District*,[225] the Court allowed a church to show a religious film in a public school.[226] The Court noted that the respondent

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221. *Id.* at 247.

222. *Id.* at 248 (citing *Widmar*, 454 U.S. at 271-75 (applying the *Lemon* test)); *see also* Ehrmann, *supra* note 213, at 985 ("*Mergens* was consistent with *Widmar* in categorizing constraints on religious expression as content-based.").

223. *Mergens*, 496 U.S. at 250-52.

224. *Id.* at 252-53. Justice Kennedy, joined by Justice Scalia, concurred, noting that as long as government does not give "direct benefits to religion in such a degree that it in fact 'establishes a [State] religion or religious faith, or tends to do so,'" the proper test is to determine whether the government coerced religious activity in any way. *Id.* at 260 (Kennedy, J., concurring) (citations omitted). Justice Kennedy was critical of the plurality's endorsement test and noted that "no constitutional violation occurs if the school's action is based upon a recognition of the fact that membership in a religious club is one of many permissible ways for a student to further his or her own personal enrichment." *Id.* at 261. Justice Marshall, joined by Justice Brennan, concurred, arguing that the majority's decision was correct, but noting that, as this case falls in the intersection between the Free Speech and Establishment Clauses, the district had to take specific steps in order to avoid the appearance of endorsing the religious organization. *See id.* at 263-64 (Marshall, J., concurring). Finally, Justice Stevens dissented on the grounds that the majority had misconstrued the statute and unnecessarily limited the discretion of every public school in determining whether to permit access to non-curriculum groups. *Id.* at 271 (Stevens, J., dissenting).

225. 113 S. Ct. 2141 (1993).

226. *Id.* at 2149. The petitioner was an evangelical church who sought permission to use school facilities in order to show a film series based on a traditional Christian perspective. *Id.* at 2144-45. Upon its second denial, the Church brought suit in federal

school district's decision to allow outside groups use of school property created a "general public forum"; as a result, the school district could not allocate space based on approval of a group's message.[227] The Court found that the petitioner's films were permissible outside of their religious viewpoint.[228] Consequently, the Court held that the school district's exclusion was solely due to the films' content and thus violated of the church members' Free Speech rights.[229]

The Court explained that permitting a sectarian organization to use government property under an "open access" policy would pass the *Lemon* test.[230] The Court noted that the film: (1) would not be shown during school hours, (2) would not appear to have been sponsored by the school, and (3) would be open to the general public, not solely church members.[231] As a result, the Court found "no realistic danger" that the members of the community would believe that the school district endorsed the church.[232] The Court

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court challenging the denial as a violation of the Freedom of Speech and Assembly Clauses, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clauses of the Fourteenth Amendment. *Lamb's Chapel*, 770 F. Supp. 91, 92 (E.D.N.Y. 1991). The district court granted summary judgment for the school district, noting that the denial in this case was viewpoint neutral and thus permissible as the district had not opened its facilities to any competing religious groups; the Second Circuit affirmed in all respects. *Id.* at 92, 98-99, *aff'd*, 959 F.2d 381 (2d Cir. 1992).

227. *Lamb's Chapel*, 113 S. Ct. at 2147-48. The Court found it irrelevant that all religions were treated equally by the school district for "the critical question [is] whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* at 2147.

228. *Id.*

229. *Id.* at 2147-49.

230. *Id.* at 2148. The Court noted that the government program had a secular purpose, did not have the primary effect of advancing religion, and did not foster an excessive entanglement with religion. *Id.*

In a footnote, Justice White, the author of the majority opinion and a well-known critic of the *Lemon* test, responded to Justice Scalia's concurrence: "While we are somewhat diverted by Justice Scalia's evening at the cinema, we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it may be to some, has not been overruled. This case . . . presents no occasion to do so." *Id.* at 2148 n.7 (citations omitted).

231. *Id.* at 2148.

232. *Id.*

concluded that the Establishment Clause did not constitute a compelling interest to prohibit the organization from participating in the public forum.[233]

II. *ROSENBERGER V. RECTOR & VISITORS OF THE UNIVERSITY OF VIRGINIA*

A. *Facts: from Genesis to the Federal Courts*

The University of Virginia ("University") established a Student Activities Fund ("SAF") in order to grant financial support to affiliated student organizations.[234] At the time of Rosenberger's suit, the SAF collected a mandatory fee from every full time student.[235] Although the University was responsible for the SAF's operation, the University's Student Council ("Student Council") allocated money to organizations whose purpose was consistent with the University's educational mission.[236] To procure funds from the SAF, a group had to first pass minimal standards and become a

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233. *Id.* Justice Kennedy added a concurrence in which he took issue with the Court's use of the term "endorsing religion" which he explained "cannot suffice as a rule of decision consistent with our precedents and our traditions in this part of our jurisprudence." *Id.* at 2149 (Kennedy, J., concurring). Justice Scalia, joined by Justice Thomas, concurred and decried the majority's invocation of the *Lemon* test:

> Like 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 . . .
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.

Id. at 2149-50 (Scalia, J., concurring) (citations omitted). Justice Scalia concluded, "I would hold, simply and clearly, that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not signify state or local embrace of a particular religious sect." *Id.* at 2151. One commentator has noted, "[a]lthough *Lamb's Chapel* stands for the proposition that religious groups are entitled to equal access to school facilities once school districts permit after-hours use of their property, it does not indicate what religious activities would exceed permissible bounds." Burgess, *supra* note 36, at 1983 (citations omitted).

234. Rosenberger v. Rector & Visitors of the Univ. of Va., 795 F. Supp. 175, 177 (W.D. Va. 1992).

235. *Id.*

236. *Id.*

Contracted Independent Organization ("CIO").[237] As a CIO, a group was then given access to University facilities, such as meeting rooms and computer terminals, but received no funding.[238]

In order to receive funding, a student group was required to clear a second hurdle: it had to submit a detailed request to the Student Council in which the group demonstrated its eligibility under the Student Council's guidelines.[239] A CIO could appeal a funding denial to the full Student Council and, in the event of a second denial, to the University's Student Activities Committee which was chaired by a designee of the Vice President for Student Affairs.[240]

In 1990, the Petitioners established WAP to publish *Wide Awake*.[241] WAP acquired CIO status soon after its formation.[242] WAP's editors committed the journal to a two-fold mission: (1) "to challenge Christians to live, in word and deed, according to the faith they proclaim" and (2) "to encourage students to consider

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237. *Id.*

> There are four general criteria for CIO status: (1) at least fifty-one percent of the group's members must be students; (2) the group's officers must all be full-time, fee-paying students; (3) the group must keep an updated copy of its constitution on file with the University; and (4) the group must sign an anti-discrimination disclaimer.

Id. at 177 n.1.

238. *Id.* at 177. A standard agreement between a CIO and the University states that University benefits provided to the groups "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities." Rosenberger v. Rector & Visitors of the Univ. of Va., 18 F.3d 269, 270-71 (4th Cir. 1994).

239. *Rosenberger*, 795 F. Supp. at 177. The guidelines prohibit funding for fraternities and sororities, political and religious organizations, and those groups whose membership is exclusionary in nature. *Id.* The guidelines similarly prohibit expenditures by approved groups for: (1) honoraria or similar fees; (2) religious activities; (3) social entertainment and related expenses; (4) philanthropic contributions and activities; and (5) political activities. *Rosenberger*, 18 F.3d at 271. The guidelines define a religious organization as a group "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity," and a religious activity as an activity "which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." *Id.* at 271 n.2.

240. *Rosenberger*, 18 F.3d at 271.

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

242. *Id.*

what a personal relationship with Jesus Christ means."[243] As Justice Souter noted in his dissent, WAP's editors fulfilled their mission by publishing numerous articles imploring readers to follow St. Paul's exhortation and accept salvation through Jesus Christ.[244] An example of WAP's contents includes the following passage:

> When you get to the final gate, the Lord will be handing out boarding passes, and He will examine your ticket. If, in your lifetime, you did not request a seat on His Friendly Skies Flier by trusting Him and asking Him to be your pilot, then you will not be on His list of reserved seats (and the Lord will know your not). You will not be able to buy a ticket then; no amount of money or desire will do the trick. You will be met by your chosen pilot and flown straight to Hell on an express jet (without air conditioning or toilets, of course).[245]

In addition, *Wide Awake* contained articles with messages such as "'Go into all the world and preach the good news to all creation.' (Mark 16:15) The Great Commission is the prime-directive for our lives as Christians . . . ."[246] WAP's editors published three issues of *Wide Awake* and distributed approximately 5,000 copies of each issue free of charge.[247]

WAP's editors submitted their first and only request for funding in 1991, seeking reimbursement from the SAF to offset the $5,862.00 publishing cost for *Wide Awake*.[248] The Student Council's appropriation committee denied the request, explaining that WAP was a religious activity for which the University could not allocate funding.[249] The committee noted, however, that WAP's CIO status guaranteed the organization full and equal access to

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243. *Id.*

244. *Id.* at 2534 (Souter, J., dissenting). "The masthead of every issue bears St. Paul's exhortation, that '[t]he hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed. Romans 13:11.'" *Id.*

245. *Id.* (citations omitted).

246. *Id.*

247. *Rosenberger*, 18 F.3d at 272.

248. *Rosenberger*, 795 F. Supp. at 177.

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

University facilities, including the right to distribute issues on campus.[250] WAP's editors appealed to the full Student Council, arguing that the organization had satisfied the relevant SAF guidelines and that the denial of funding violated the U.S. Constitution.[251] The Student Council affirmed the funding denial without comment.[252] WAP's editors next appealed to the University's Student Activities Committee which, in a letter from Associate Dean Ronald J. Stump, affirmed the two previous decisions.[253]

B. *The District Court*

Ronald Rosenberger, as a member of WAP, brought suit against the University in the Western District of Virginia.[254] He argued that the SAF's classification of "religious activities" violated WAP's members' rights under the U.S. Constitution,[255] the Virginia Constitution,[256] and the Virginia Act for Religious Freedom.[257]

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250. *Rosenberger*, 18 F.3d at 273.

251. *Id.*

252. *Id.*

253. *Id.* at 274.

254. Rosenberger v. Rector & Visitors of the Univ. of Va., 795 F. Supp. 175, 178 (W.D.Va. 1992). Rosenberger sought:

> (1) a declaratory judgment that the guidelines' prohibition against the funding of 'religious activities' violated their rights under the United States Constitution, the Virginia Constitution, and the Virginia Act for Religious Freedom; (2) a permanent order enjoining the Rector and Visitors from promulgating any proscription against the funding of [*Wide Awake*] on the basis of the content or viewpoint of its members' speech in *Wide Awake*; (3) compensatory damages of at least $5,862.00, the sum of SAF funds unconstitutionally denied Wide Awake Productions; and (4) an order awarding Wide Awake Productions reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

Rosenberger, 18 F.3d at 275.

255. *Id.* at 274-75 nn.13, 15, 18 (citing U.S. CONST. amend. I, cl. 2 (Free Exercise Clause); U.S. CONST. amend. I, cl. 3 (Free Speech and Press Clause); U.S. CONST. amend. XIV § 1, cl. 4 (Equal Protection Clause)).

256. *Rosenberger*, 18 F.3d at 275 nn. 14, 16, 19 (citing VA. CONST. art. I, § 12, cls. 2, 3 ("any citizen may freely speak, write, and publish his sentiments on all subjects . . . . [T]he General Assembly shall not pass any law abridging the freedom of speech or of the press."); VA. CONST. art. I, § 16, cls. 2, 6 ("all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . . [The General Assembly] shall not . . . confer any peculiar privileges or advantages on any sect or denomination . . . ."); VA. CONST. art. I, § 11, cl. 3 ("the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged . . . .")).

257. *Id.* at 275 n.17 (citing VA. CODE ANN. § 57-1 (Michie 1985 & Supp. 1993)).

Count one of Rosenberger's complaint alleged that the guidelines resulted in the SAF's denial of funding which unlawfully: (1) deprived WAP's members of government benefits solely due to their viewpoint, and (2) excluded WAP's members from the SAF's limited public forum.[258] Count two argued that the University's denial discriminated against WAP's members based on their religious beliefs and expression in *Wide Awake*.[259] Count three maintained that the guidelines denied WAP's members benefits which other students and CIOs—including those engaged in other religious speech and activities—had received.[260] Both Rosenberger and the University moved for summary judgment as the issues were of Constitutional interpretation, not material fact.[261]

The district court ruled for the University on all three counts.[262] First, the court held that the SAF constituted a non-public forum,[263] rather than a limited public forum.[264] The court found the funding denial to be reasonable based on the University's explanations that it: (1) had limited funds to disburse, and (2) sought to obey the federal and state constitutional mandates of neutrality towards religion.[265] The court distinguished the present case from *Widmar*, finding a difference between funding and access.[266] The court noted that "[t]he present case might very well be resolved in [the

258. *Id.* at 274.

259. *Id.* at 275.

260. *Id.*

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

262. *Id.* at 178-84.

263. *Id.* at 181. A "nonpublic forum" exists when there is "public property which is not 'by tradition or designation a forum for public communication.'" *Id.* at 178 (quoting Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983)). The government may limit access to such a forum through restrictions so long as they are "reasonable and are not an effort to suppress expression merely because the public officials oppose the speaker's view." *Id.* at 178 (citations omitted).

264. *Id.* at 178-81. A limited public forum is property "which the state has opened for use by the public even if it was not required to create the forum in the first place." *Id.* at 178 (citing *Perry*, 460 U.S. at 45). "A state may only restrict access to limited public fora if such a restriction is narrowly drawn to effectuate a compelling state interest." *Id.* (citation omitted).

265. *Id.* at 181.

266. *Id.*

plaintiff's] favor if the University had denied CIO status to WAP."[267] Consequently, the court held that the guidelines did not result in content or viewpoint discrimination.[268] In addition, the district court noted that the University's effort to avoid an Establishment Clause violation constituted a compelling state interest which outweighed the minimal burden placed on WAP's members' free exercise of religion.[269] Finally, the court rejected Rosenberger's Equal Protection Claims on the grounds that there was no evidence that the University intended to discriminate against WAP.[270]

C. *The Fourth Circuit*

Rosenberger appealed the SAF guidelines' prohibition on the funding of "religious activities" to the Court of Appeals for the Fourth Circuit.[271] First, he argued that the proscription denied government benefits to WAP's members based on their viewpoint, thus violating their Free Speech rights.[272] Second, he contended that the guidelines discriminated against WAP's members in contravention of the Equal Protection Clause of the Fourteenth Amendment[273] in two ways: (1) the guidelines denied WAP's members benefits which other CIOs engaged in religious speech received, and (2) the guidelines neither served a compelling state interest nor were narrowly tailored enough to avoid entanglement concerns

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267. *Id.*

268. *Id.* 181-82. The court pointed to Justice Stevens' *Widmar* concurrence: "In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials . . . . [I]n encouraging students to participate in extracurricular activities, they necessarily make decisions concerning the content of those activities." *Id.* at 182 (quoting *Widmar*, 454 U.S. at 278 (Stevens, J., concurring)).

269. *Id.* at 182-83.

270. *Id.* at 183.

271. Rosenberger v. Rector & Visitors of the Univ. of Va., 18 F.3d 269, 276-77 (4th Cir. 1994). The court explained that as neither party subsequently litigated the district court's grant of summary judgment with respect to the state-law theories of recovery, the court would consider the claims abandoned and therefore would not disturb the lower court's holdings. *Id.* at 276 (citing Shopco Distrib. Co. v. Commanding Gen., 885 F.2d 167, 170 n.3 (4th Cir. 1989)).

272. *Id.* at 277.

273. U.S. CONST. amend XIV, § 1, cl. 4 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws").

without infringing upon WAP's fundamental rights.[274]

The Fourth Circuit first examined the alleged violation of the Free Speech and Press Clause.[275] The Court explained that while the First Amendment prohibits government encroachment on the rights of expression, the Free Speech Clause is not a promise that the federal government will subsidize "every garrulous member of the American populace."[276] The court noted, however, that when the government chooses to subsidize speech, funding decisions based on the content of a speaker's message are impermissible.[277] The court found that the SAF was an open forum and that the guidelines discriminated against WAP's members by forcing them either to discontinue their constitutionally protected religious expression or forgo funding.[278] Consequently, the court held that the guidelines violated the Free Speech Clause.[279]

In order to sustain the guidelines, however, the court inquired whether the University's regulations: (1) served a compelling state

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274. *Rosenberger*, 18 F.3d at 277.

275. *Id.* Rather than reinitiate the limited public forum vs. nonpublic forum dichotomy, the court chose to analyze the case at bar "under the line of authority dealing with content-based discrimination relating to government-generated benefits or burdens." *Id.* at 287. The court explained that the public forum cases "have taken 'forum' in a fairly literalistic way involving physical space, and we do not see how it advances the jurisprudence to wrench that word out of its accepted form to encompass this type of case already subject to First Amendment scrutiny." *Id.*

276. *Id.* at 277. The court noted that the University had accorded WAP's members full access to University facilities in accordance with *Widmar*, 454 U.S. at 277, and that access precluded the petitioners from making a claim that the University placed a "per se unconstitutional prior restraint upon their freedom actually to speak or to publish their views by denying them equal access to University facilities." *Rosenberger*, 18 F.3d at 278. Similarly, the court explained that, had the University chosen not to fund any extracurricular activities, WAP would have no cause of action. *Id.* (construing Healy v. Jones, 408 U.S. 169, 182 n.8 (1972)). Rosenberger thus based his cause of action on the claim that "once the Rector and Visitors have chosen to promulgate guidelines governing the allocation of funds that support student speech among competing student interests, such guidelines cannot condition funding awards on the content or viewpoint of a prospective recipient's speech." *Id.* at 279.

277. *Rosenberger*, 18 F.3d at 280-81 (citing a number of cases supporting this proposition including Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 382 (1985) and Everson v. Board of Educ. of Ewing Twnshp., 330 U.S. 1, 18 (1947)).

278. *Id.* at 281.

279. *Id.*

interest, and (2) were narrowly tailored to achieve that end.[280] To make such a determination, the court applied the *Lemon* test,[281] examining whether avoiding the creation of an establishment of religion at the University constituted a compelling interest.[282] First, the court held that the University's decision to deny government subsidies to religious groups was not motivated by an impermissible purpose.[283] Second, the Court explained that the guidelines did not inhibit religion because WAP's members had full access to the University's facilities and thus could inject their ideas into the community-wide debate.[284] The Court noted, however, that funding WAP would constitute state sponsorship of religious belief.[285]

In addition, the court held that government aid to a pervasively sectarian journal would result in excessive entanglement between government and religion.[286] The court explained that funding WAP would send "an unmistakably clear signal that the [University] supports Christian values and wishes to promote the wide promulgation of such values."[287] The court differentiated between incidental[288] and direct[289] government subsidies to religious institutions and

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280. *Id.* (citations omitted).

281. *Id.* at 282. In a footnote, the Court stated that although it realized that a number of Supreme Court Justices were opposed to a continued application of the *Lemon* test, *e.g. Lamb's Chapel*, 113 S. Ct. 2141 (Scalia, J., concurring), "the three-pronged *Lemon* test . . . is the only coherent [Establishment Clause] test a majority of the Court has ever adopted . . . . For purposes of the Establishment Clause question presented here, therefore, we are bound to consider *Lemon* governing precedent." *Rosenberger*, 18 F.3d at 282-83 n.30 (citations omitted).

282. *Rosenberger*, 18 F.3d at 282 (construing *Widmar*, 454 U.S. at 271).

283. *Id.* at 283-84. The court noted that SAF's goal was to provide support for student organizations related to the University's educational purpose and that the University could thus exclude *Wide Awake*. *Id.*

284. *Id.* at 285.

285. *Id.* at 285-86. The court explained that government support of a publication so clearly engaged in the propagation of religious doctrine would constitute an Establishment Clause violation. *Id.* at 285.

286. *Id.*

287. *Id.* at 286.

288. The court cited *Zobrest*, 113 S. Ct. 2462, *Widmar*, 454 U.S. 263, and Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), to explain that when the government creates an open forum to which all groups are invited, sectarian organizations may receive government grants as the state may not discriminate against such groups based on the content of their speech. *Rosenberger*, 18 F.3d at 286.

found that funding WAP would initiate competition for subsidies among religious groups.[290] The court held that the regulations were narrowly tailored because the guidelines' prohibition of funding religious activities applied to all religions.[291]

Finally, the court upheld the district court's grant of summary judgment on the Equal Protection Claim explaining that there was no evidence on the record that discriminatory intent motivated the University to deny funding to WAP.[292] Rosenberger subsequently appealed to the Supreme Court.

D. *The Supreme Court*

1. The Majority Opinion

The Supreme Court's majority opinion, written by Justice Kennedy,[293] approached *Rosenberger* as a potential Free Speech violation rather than as an Establishment Clause violation.[294] The Court

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289. *Rosenberger*, 18 F.3d at 286 ("Direct monetary subsidization of religious organizations and projects, however, is a beast of an entirely different color.").

290. *Id.* The court noted that "[t]he possibility of a continuing annual appropriation for the benefit of a single religion carries the potential for seriously divisive political consequences at the [University]." *Id.* The court, following *Everson*, looked to history to explain that civil strife often resulted when religious sects competed in order to attain political and religious supremacy through the support of government. *Id.* (construing *Everson*, 330 U.S. at 8-9).

291. *Id.* at 286-87.

292. *Id.* at 288. Under Washington v. Davis, 426 U.S. 229, 239 (1976), a plaintiff must show both discriminatory intent and disparate impact. The record did not contain evidence of discriminatory intent and the court did not consider the question of disparate impact. *Rosenberger*, 18 F.3d at 288.

293. Chief Justice Rehnquist, Justices Scalia, O'Connor and Thomas joined the majority. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2513 (1995).

294. *Id.* at 2516; *see also id.* at 2525 ("There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."). *But cf. infra* part II.D.4 (Justice Souter's dissenting opinion holds the Establishment Clause violation dispositive). The Court granted certiorari on the question: "Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious." *Rosenberger*, 115 S. Ct. at 2521. One commentator remarked:

> Particularly noteworthy is the Court's reliance on free speech grounds and free speech doctrines. If the publication singled out to be denied a subsidy had dealt

began by noting that "the government may not regulate speech based on its substantive content or the message it conveys."[295] Citing *R.A.V.*, the Court explained that when the government targets a particular speaker's viewpoint rather than a general subject matter, the First Amendment violation is "all the more blatant."[296] The Court noted that the government has the right to preserve its own property,[297] but must make only reasonable exclusions once it opens a limited public forum.[298]

Arguing that the SAF is a forum "more in a metaphysical than in a spatial or geographic sense," the Court compared the present case to *Lamb's Chapel*.[299] The Court noted that, in *Lamb's Chapel*, the government could not prohibit sectarian entities from gaining access to government facilities.[300] The Court applied this principle to *Rosenberger* and explained that, although the SAF did not physically exclude religious speakers, it impermissibly disfavored student organizations with religious viewpoints.[301] Similarly, the Court

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> with a political message or had undertaken to criticize the teaching in the English Department . . . there is no doubt that the Court's analysis in terms of impermissible viewpoint bias would have raised hardly a murmur. But the publication here was religious, and the Establishment Clause was invoked to raise possibly competing constitutional values.

Charles Freid, *Foreward: Revolutions?*, 109 HARV. L. REV. 13, 68-69 (1995).

295. *Rosenberger*, 115 S. Ct. at 2516 (citing *Mosley*, 408 U.S. at 96).

296. *Id.* ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology . . . is the rationale for the restriction.") (construing R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)); *see also supra* notes 188-202 and accompanying text (discussing the Court's opinion in *R.A.V.*).

297. *Rosenberger*, 115 S. Ct. at 2516 (construing *Lamb's Chapel*, 113 S. Ct. at 2146).

298. *Id.* at 2516-17 (construing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 804-06 (1985)). The Court further explained that in order to determine whether the state's exclusion of a class of speech is legitimate, it must differentiate between content discrimination "which may be permissible if it preserves the purposes of that limited forum," and viewpoint discrimination "which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 2517.

299. *Id.* (construing *Lamb's Chapel*, 113 S. Ct. 2141 (1993)); *see supra* notes 225-33 and accompanying text (discussing the Court's holding in *Lamb's Chapel*).

300. *Rosenberger*, 115 S. Ct. at 2517 (construing *Lamb's Chapel*, 113 S. Ct. at 2145).

301. *Id.* The Court drew parallels between the fact patterns of *Rosenberger* and

applied *Widmar*[302] and concluded that when the SAF reimbursed third-party contractors on behalf of private speakers, the University could not silence selected viewpoints.[303] Finally, the Court rejected the University's attempt to economically distinguish access from funding.[304] Instead, the Court explained that the University could not justify otherwise impermissible viewpoint discrimination based on scarcity.[305] For these reasons, the Court held that the guidelines' impermissible effect of limiting the petitioner's free speech

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Lamb's Chapel. *See id.* at 2518. The Court noted that: (1) both WAP and the church group in *Lamb's Chapel* "would have been qualified as a social or civic organization, save for [their] religious purposes"; and (2) both the University and the school district "pointed to nothing but the religious views of the group as the rationale for excluding its message . . . ." *Id.*

In addition, the Court criticized the dissent which maintained that no viewpoint discrimination existed because the guidelines prohibited funding for all religious speech. *Id.* The Court explained that this assertion "reflects an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech." *Id.* Instead, the Court held that inclusion of both theistic and atheistic viewpoints is constitutionally mandated by the Free Speech Clause in order to avoid skewing the debate. *Id.*

302. 454 U.S. 263 (1981); *see supra* notes 205-14 and accompanying text (discussing the Court's holding in *Widmar*).

303. *Rosenberger*, 115 S. Ct. at 2519. The Court was responding to the University's citation of Rust v. Sullivan, 500 U.S. 173 (1991), and Widmar v. Vincent, 454 U.S. 263 (1981), for the proposition that a public university has discretion in determining the allocation of funding. *Rosenberger*, 115 S. Ct. at 2518-19. The Court explained that in both *Rust* and *Widmar*, the government was distributing "public funds to private entities to convey a governmental message," and thus could "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.* at 2519. In *Rosenberger*, however, the University created the SAF as a forum to encourage a diverse exchange of ideas from a range of private speakers. *Id.* In such a case, the Court held, the University could not prohibit speech based on the speakers' viewpoints. *Id.* (citations omitted).

304. *Rosenberger*, 115 S. Ct. at 2519-20. The University argued that the "funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not." *Id.* at 2519.

305. *Id.* at 2519-20. The court explained:

> Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.

Id. at 2519-20.

mandated that they be struck down.[306]

The Court next considered the potential Establishment Clause violation.[307] It began by announcing that the general principle controlling adjudication under the Establishment Clause was neutrality.[308] The Court cited *Everson* and its progeny[309] for the proposition that when the government follows neutral criteria and distributes aid in an even-handed manner, the list of recipients can include religious entities.[310] The Court, reasoning that the SAF's purpose was to create a forum of diverse viewpoints at the University, noted that the government program at issue was neutral towards religion.[311] Consequently, it held that the University could subsidize *Wide Awake* as a journal of student expression rather than as a forum for Christian viewpoints.[312] The Court distinguished the SAF from a tax directly levied for the support of a church by explaining that the students paid the fee in order to subsidize all student expression regardless of its viewpoint.[313] A forbidden tax,

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306. *Id.* at 2520. The Court explained that the two vital First Amendment speech principles at stake were the dangers in: (1) "granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them"; and (2) the chilling effect this process would have on individual thought and expression. *Id.* The Court stated that the second was particularly dangerous in a university setting because of its role at the center of intellectual thought. *Id.* The Court explained that the guidelines' prohibition on funding publications that "primarily promote or manifest a particular belief in or about a deity or an ultimate reality," had the potential, if read broadly to exclude essays from Karl Marx, Bertrand Russell, and John-Paul Sartre. *Id.* ("Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections.").

307. *Id.* at 2520. The Court noted "[t]hat the University itself no longer presses the Establishment Clause claim is some indication that it lacks force; but as the Court of Appeals rested its judgment on the point and our dissenting colleagues would find it determinative, it must be addressed." *Id.* at 2521.

308. *Id.*

309. *Id.* at 2521-22 (citing Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 114 S. Ct. 2481 (1994); Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983)).

310. *Id.*

311. *Id.* at 2522 ("There is no suggestion that the University created [the SAF] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause.").

312. *Id.*

313. *Id.* The Court, relying on Keller v. State Bar of Cal., 496 U.S. 1 (1990), chose

however, would collect money for the sole purpose of directly supporting a sectarian institution and would therefore violate the Establishment Clause.[314] The government's neutrality was further illustrated by the fact that the University had specifically disassociated itself from WAP's speech.[315] The Court reasoned that there was no Establishment Clause violation because WAP's speech was private and no student would reasonably believe that the University supported the religious message.[316]

The Court next addressed the principle which the dissent and lower courts deemed controlling:[317] that the Establishment Clause precluded the University from making direct money payments to sectarian institutions.[318] The Court explained that it was significant that no public funds ever reached WAP; instead the University paid the printer directly.[319] In fact, the Court noted that when the State grants access to a sectarian institution, the government must pay for general costs such as air-conditioning and heating, as well as costs specific to the enterprise.[320] Accordingly, the Court compared the University funding WAP to *Widmar* and *Lamb's Chapel* where

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not to reach the question of whether an objecting student has a "First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe." *Rosenberger*, 115 S. Ct. at 2522. In addition, the Court explained that the CIOs could only withdraw money from the SAF for purposes within the University's educational mission which "is a far cry from a general public assessment designed and effected to provide financial support for a church." *Id.*

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

315. *Id.* at 2523.

316. *Id.* at 2522-23 (citing Pinette v. Capitol Square Rev. and Advisory Bd., 115 S. Ct. 2440, 2448 (1995)). Similarly, the Court argued that there was little chance of coercion or endorsement. *Id.* (citing Lee v. Weissman, 505 U.S. 577 (1992)).

317. *Rosenberger*, 795 F. Supp. at 183; 18 F.3d at 286-87; 115 S. Ct. at 2538 (Souter, J., dissenting).

318. *Rosenberger*, 115 S. Ct. at 2523.

319. *Id.* ("We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity.").

320. *Id.* The Court questioned the dissent by arguing that the focus should not be on the fact that money is being spent by the government; rather it should be on the nature of the benefit received. *See id.* Any less, the Court concluded, would force the Court to overrule *Widmar*, *Mergens* and *Lamb's Chapel*, for in each case the government's grant of access to private organizations resulted in the spending of government funds. *Id.*

school districts provided religious organizations with access to classrooms.[321] The Court thus concluded that a public school may either operate a facility to which students have access, or pay a third-party contractor to operate the facility on its behalf.[322]

Finally, the Court noted that if the dissenting opinion became law, the Court would be required to scrutinize the content of potentially religious speech to determine whether the speaker could receive government funding.[323] Such a process, the majority argued, would raise the specter of government censorship and would place the Court in a position for which its competence was questionable.[324] Consequently, the Court concluded "[t]here is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."[325]

2. Justice O'Connor's Concurrence

Justice O'Connor explained that the *Rosenberger* controversy was at the intersection of two fundamental principles of constitutional adjudication: government neutrality towards the free exchange of ideas and the prohibition of state funding of religious activities.[326] In instances when such bedrock principles conflict, O'Connor explained, it is not possible to resolve the conundrum by relying on categorical rules; instead, a judge must sift through the details of the case and determine whether the challenged program offends the Establishment Clause.[327] Justice O'Connor explained that the Court's role is to draw lines based on the situation because such a process allows the Court to reach the correct result.[328] She

321. *Id.*

322. *Id.* at 2524. The Court concluded that the benefits accorded to WAP were incidental to "the government's provision of secular services for secular purposes," as printing is a general necessity of student life. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 2525.

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

327. *Id.* at 2525-26.

328. *Id.* at 2526 ("Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types.") (citations omitted). O'Connor's explanation plausibly was in direct response to the majority's closing contention that the Court should not categorize speech. *See id.* at 2524-25 (Opinion of the Court) (arguing that the Court should not be in the role of scrutinizing speech).

noted that in both *Witters*[329] and *Everson*[330] the Court undertook the proper analysis and decided the case based on the facts on the record.[331]

Justice O'Connor identified four specific considerations which led her to conclude that subsidizing *Wide Awake* would not constitute government endorsement of the journal's religious message.[332] First, she explained that any reader of *Wide Awake* would realize that the publication was independent from the University.[333] This was because the CIO agreement: (1) stated that all student organizations were independent of the University, and (2) required all funded publications to contain a disclaimer explicitly stating that University was in no way responsible for the organization.[334] Second, the SAF's procedure for distributing financial assistance ensured that the money would only be used for permissible purposes.[335] Third, the SAF funded many other organizations, thus mak-

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329. 474 U.S. 481 (1986). Justice O'Connor explained that the Court in *Witters* "resolved the conflict between the neutrality principle and the funding prohibition, not by permitting one to trump the other, but by relying on the elements of choice peculiar to the facts of that case. . . ." *Rosenberger*, 115 S. Ct. at 2526 (O'Connor, J., concurring in part and concurring in judgment) (construing *Witters*, 474 U.S. at 493). She noted that the Court in *Witters* allowed a sectarian organization to receive government funds because: (1) the aid to religion was the result of a petitioner's private choice, and (2) no reasonable observer could infer that the State was endorsing a religious practice or belief. *Id.* (construing *Witters*, 474 U.S. at 493).

330. 330 U.S. 1 (1947). Justice O'Connor remarked that the *Everson* decision "reflected the need to rely on careful judgment—not simple categories—when two principles, of equal historical and jurisprudential pedigree, come into unavoidable conflict." *Rosenberger*, 115 S. Ct. at 2526 (O'Connor, J., concurring in part and concurring in judgment).

331. *Rosenberger*, 115 S. Ct. at 2526.

332. *Id.* at 2526-27.

333. *Id.*

334. *Id.*

335. *Id.* at 2527. Justice O'Connor noted that in order for a student organization to receive financial assistance, it had to submit disbursement requests for the SAF's approval; in the event that the SAF agreed that funding the organization comport with its guidelines, it payed the funds directly to the third party vendor (such as the printer in *Rosenberger*). *Id.* At no time, therefore, did any funding go directly to the organization's coffers. *Id.* O'Connor found this relevant because it ensured that any government funding to WAP was "used only to further the University's purpose in maintaining a free and robust marketplace of ideas . . . ." *Id.* Furthermore, this limitation made the case "analogous to a school providing equal access to a generally available printing press (or other physical facilities), and unlike a block grant to religious organizations." *Id.* (citations

ing it unlikely that any student would perceive that the University endorsed WAP's message.[336] Finally, Justice O'Connor noted that an objecting student could challenge the SAF for compelling him or her to pay for speech with which he or she disagrees.[337] Subject to these factors, Justice O'Connor joined the majority's decision that the University had violated Rosenberger's Free Speech rights by denying funding based on *Wide Awake*'s content.[338]

3. Justice Thomas' Concurrence

Justice Thomas announced that while he fully agreed with the majority, he wrote separately in order to challenge the dissent's historical analysis.[339] He explained that the guiding principle in Establishment Clause jurisprudence is neutrality towards religion; the government is free to aid religion so long as it does not prefer one faith over another.[340] Consequently, Justice Thomas posited

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omitted).

336. *Id.* There were fifteen other magazines and newspapers at the University which contained a "wide array of non-religious, anti-religious and competing religious viewpoints in the forum . . . ." *Id.* Justice O'Connor differentiated this case from *Pinnette*, "where religious speech threaten[ed] to dominate the forum." *Rosenberger*, 115 S. Ct. at 2527 (construing *Pinette*, 115 S. Ct. at 2451 (O'Connor, J., concurring)).

337. *Rosenberger*, 115 S. Ct. at 2527.

338. *Id.* at 2528. O'Connor noted that:

> The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in the Establishment Clause jurisprudence . . . . When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified.

Id.

339. *Id.* (Thomas, J., concurring). As the purpose of this Comment is not to examine the historical underpinnings of both the majority and dissent, but rather to analyze doctrinal shifts in *Rosenberger*, this Comment will extract only the guiding principles from the Thomas-Souter debate.

340. *Id.* at 2528-29; *see also* ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 20-23 (1982); Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569, 590-91 (1984). Justice Thomas examined the alternate view, as espoused in Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim about Original Intent*, 27 WM. & MARY L. REV. 875 (1986), that "the Establishment Clause forbids not only government preferences for some religious sects over others, but also government preferences for religion over irreligion."

that sectarian organizations may participate on equal footing with their secular counterparts in all neutral government programs.[341] Furthermore, he explained that the government could not differentiate between allowing religious entities access to facilities and funds.[342] Justice Thomas thus concluded that the SAF was compelled to allow WAP to compete with all other student organizations for State aid.[343]

4. Justice Souter's Dissent

Justice Souter, in his dissent joined by Justices Stevens, Ginsburg, and Breyer,[344] began by noting that the dispositive issue was not whether the University violated Rosenberger's Free Speech rights, but instead whether the University could fund WAP without violating the Establishment Clause.[345] Justice Souter analyzed *Wide Awake*'s articles and showed the publication to be not a journal from a religious perspective, but rather a "straightforward exhortation to enter into a relationship with G-d as revealed in Jesus Christ . . . . It is nothing other than the preaching of the word, which . . . is what most branches of Christianity offer those called to the religious life."[346] He explained, however, that the Establishment

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Rosenberger, 115 S. Ct. at 2529 (citations omitted). Justice Thomas rejected Laycock's explanation and instead found "much to commend [in] the former view." *Id.*

341. *Rosenberger*, 115 S. Ct. at 2532. Thomas further noted that the Establishment Clause "does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants." *Id.* (citations omitted).

342. *Id.* at 2531. This was in response to the dissent's contention that access and funding for religious entities constitutes different questions. *See id.* at 2545-46 (Souter, J., dissenting). Justice Thomas applied the dissent's no-aid principle to include the possibility that a church would not receive aid from the fire or police departments and thus concluded that "[i]f churches may benefit on equal terms with other groups [for aid from the fire department] they may also benefit on equal terms [at the University]." *Id.* at 2532.

343. *Id.* at 2533.

344. *Id.* (Souter, J., dissenting).

345. *Id.* at 2533-34.

346. *Id.* at 2534-35 (citations omitted) (alteration added). Souter noted:

> These are not the words of "student news, information, opinion, entertainment, or academic communicatio[n] . . ." (in the language of the University's funding criterion) but the words of "challenge [to] Christians to live, in word and deed, according to the faith they proclaim and . . . to consider what a personal relationship with Jesus Christ means" (in the language of [*Wide Awake*'s] founder).

Clause prohibits the use of public funds to subsidize religious proselytization.[347] In addition, he noted that where the Court allowed funding to an institution with both secular and sectarian functions, it sought an assurance that the activities were separated and that funding reached only the secular branch and not the religious.[348] He posited that the majority failed to apply the aforementioned principles due to its belief that WAP's mission was merely to provide a point of view rather than to proselytize.[349] As a result, Justice Souter concluded that the majority correctly stated a body of law regarding government funding of religious entities, but ultimately misapplied it.[350]

Justice Souter next explained that when a sectarian organization applied for government funding, a reviewing judge must look beyond the program's neutrality and ensure that State funds do not support a core religious activity.[351] Justice Souter explained that evenhandedness was relevant, however, on the margins of the Establishment Clause where the activity was not a core religious function.[352] He reasoned that cases such as *Mueller*,[353] *Witters*,[354]

> The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit.

Id. (citations omitted).

347. *Id.* at 2535. Justice Souter subsequently employed sources such as James Madison's Memorial and Remonstrance Against Religious Assessments to explain the historical grounding of the principle against direct government funding of religion. *Id.* at 2535-36. Justice Thomas wrote to counter this analysis. *Id.* at 2528 (Thomas, J., concurring).

348. *Id.* at 2539 (construing, among others, Bowen v. Kendrick, 487 U.S. 589, 614-15 (1988) (upholding ALFA on the ground that funds cannot be used by the grantees in a way as to advance religion); Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 746-48, 755, 759-61 (1976) (plurality opinion) (upholding general aid program restricting funds for secular activities only); Hunt v. McNair, 413 U.S. 734, 742-45 (1973) (upholding general revenue program excluding facilities used for religious purposes)).

349. *Id.* at 2539-40.

350. *Id.* at 2540.

351. *Id.* ("[T]he Establishment Clause forbids a State from hiding behind the application of formally neutral criteria and remaining studiously oblivious to the effects of its actions . . . . [N]ot all State policies are permissible under the Religion Clauses simply because they are neutral in form") (citing *Pinette*, 115 S. Ct. at 2440 (O'Connor, J., concurring in part and concurring in judgment)).

352. *Id.* at 2540-41. Justice Souter included the following types of neutral government programs as acceptable: "Would it be wrong to put out fires in burning churches, wrong to pay the bus fares of students on the way to parochial schools, wrong to allow a grantee of special education funds to spend them at a religious college?" *Id.* at 2541.

and *Zobrest*,[355] support the proposition that the neutrality of the government program was not dispositive; instead, the Court found it relevant that the funding reached the religious organizations as a result of personal choice on the part of the third party recipient.[356] Justice Souter therefore concluded that the University's guidelines reflected these core principles of Establishment Clause jurisprudence.[357]

Justice Souter subsequently proposed three rationales why University payments to the printer rather than to WAP nonetheless constituted impermissible government sponsorship of religion.[358] First, he explained that there was no difference between funding the printer or WAP.[359] He noted that in *Witters*, *Mueller*, and *Zobrest*, the Court found the government programs constitutional because the money reached the religious organization solely as a result of the independent third party's choice.[360] In the present case, however, the printer could only apply the funds towards *Wide Awake*'s printing costs and did not have discretion to use the University's money for any other purpose.[361] He thus concluded that

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He explained that funding such activities in no way promotes the core religious functions of any such religious organization. *Id.*

353. 463 U.S. 388 (1983); *see also supra* notes 147-53 and accompanying text (discussing *Mueller* case).

354. 474 U.S. 481 (1986); *see also supra* notes 154-60 and accompanying text (discussing *Witters* case).

355. 509 U.S. 1 (1993); *see also supra* notes 161-67 and accompanying text (discussing *Zobrest* case).

356. *Rosenberger*, 115 S. Ct. at 2541-42 (Souter, J., dissenting) ("Thus, our holdings in these cases were little more than extensions of the unremarkable proposition that '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 without religious barrier . . . .'") (citations omitted).

357. *Id.* at 2544 ("[T]he University perfectly understood the primacy of the no-direct funding rule over the evenhandedness principle when it drew the line short of funding 'any activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality.' App. to Pet. for Cert., 66a.").

358. *Id.* at 2544-47.

359. *Id.* at 2544-45.

360. *Id.* at 2544.

361. *Id.* at 2545 ("The formalism of distinguishing between payment to [*Wide Awake*] so it can pay an approved bill and payment of the approved bill itself cannot be the basis of a decision of Constitutional law.").

Witters and its progeny did not apply as, given the structure of the University's payments, the government directly subsidized a core religious function.[362]

Second, Justice Souter questioned the majority's application of *Widmar*, *Mergens*, and *Lamb's Chapel*.[363] He explained that these cases were justified by the rationale that the government cannot deny a speaker, solely based on the content of his or her speech, use of the proverbial street corner.[364] Such cases were not applicable to the issue of funding, however, because access to a street corner is not analogous to a grant of government benefits; indeed, such an extension would provide new economic benefits to religious organizations despite the prohibition on direct aid.[365] Finally, notwithstanding his belief that the SAF constituted a tax, Justice Souter explained that the corrupting effect of government support did not turn on whether the Government's own money was derived from taxation or gift or the sale of public lands.[366] He thus concluded that the majority's decision forcing the University to pro-

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362. *Id.*

363. *Id.* at 2545-46.

364. *Id.* at 2546. Justice Souter noted that there were limitations to the *Lamb's Chapel* rationale:

> The religious speaker's use of the room passed muster as an incident of a plan to facilitate speech generally for a secular purpose . . . . But each case drew ultimately on unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist or the Hare Krishna like any other speaker in a public forum. It was the preservation of free speech on the model of the street corner that supplied the justification going beyond the requirement of evenhandedness.

Id. at 2545-46 (Souter, J., dissenting).

365. *Id.* at 2546.

366. *Id.* at 2547. Justice Souter was responding to Justices Kennedy and O'Connor whom he believed to have recast the scope of the Establishment Clause. *Id.* at 2546-47. In particular, he was critical of Justice O'Connor's attempt to distinguish *Rosenberger* from Establishment Clause precedent on the grounds that the prohibition on direct aid did not apply to the SAF because the University's fund was not a tax and was thus outside the purview of the Establishment Clause. *Id.* He noted that whether or not the fund constituted a tax was not the issue; rather, the Court must determine whether any government program violated either of the dual objectives of the Establishment Clause which are to "protect individuals and their republics from the destructive consequences of mixing government and religion [and] to protect religion from a corrupting dependence on support from the Government." *Id.* at 2547 (citations omitted).

vide WAP with government funding violated the Establishment Clause.[367]

In the second part of his dissent, Justice Souter explained that while the Establishment Clause prohibited WAP's funding, he felt compelled to comment on the majority's Free Speech analysis.[368] He explained that the Court's prohibition on viewpoint discrimination was designed to prevent the government from "skewing public debate."[369] Such discrimination occurs when the government allows one speaker to express his views, but prohibits others who would naturally be expected to respond.[370] Justice Souter found that the University was not engaging in such discrimination because the guidelines excluded all speech manifesting a belief in an ultimate deity; this prohibition applied to all religions as well as to anyone (such as agnostics and deists) who might take a viewpoint on a religious issue.[371] He thus concluded that the guidelines did not skew the debate either for or against religion.[372] Finally, he

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367. *Id.*

368. *Id.* Justice Souter noted:

> Given the dispositive effect of the Establishment Clause's bar to funding [*Wide Awake*], there should be no need to decide whether in the absence of this bar the University would violate the Free Speech Clause by limiting funding as it has done . . . . But the Court's speech analysis may have independent application, and its flaws should not pass unremarked.

Id. (citation omitted).

369. *Id.* at 2548.

370. *Id.* at 2549. Justice Souter argued that the government cannot aid only one side in a public debate, for "if the government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well." *Id.*

371. *Id.* at 2549-50. Justice Souter explained that if the guidelines were either written or applied solely to deny funding for (1) evangelical Christian organizations, or (2) organized religions (such as Muslims, Jews, and Buddhists as well as Christians), it would skew the debate in favor of agnostics and deists. *Id.* at 2549. The guidelines, however, denied funding to any group that manifests a belief "about" a deity or ultimate reality, and thus excluded funding of the entire subject of religion. *Id.*

372. *Id.* at 2550. Justice Souter took issue with the Court's statement that the regulations would stifle student thought by allowing the University to ban funding. *Id.* at 2549-50. While Justice Souter did not expect that the regulations would be interpreted as broadly as the Court had prophesied, Justice Souter noted that such an application would not constitute viewpoint discrimination because:

> If a University wished to fund no speech beyond the subjects of pasta and cookie preparation, it surely would not be discriminating on the basis of some-

distinguished the present case from *Lamb's Chapel* by explaining that the regulations in *Lamb's Chapel* banned religious speech, while allowing its anti-religious counterpart.[373] The SAF's guidelines, however, prohibited University sponsorship for all sides involved in the religious debate.[374] Consequently, Justice Souter noted that he would have upheld the Guidelines under a Free Speech analysis as well.[375]

III. THE SUPREME COURT SHOULD HAVE UPHELD THE UNIVERSITY'S DETERMINATION THAT FUNDING WAP VIOLATED THE ESTABLISHMENT CLAUSE'S MANDATED SEPARATION OF CHURCH AND STATE

The Supreme Court's decision to apply a content neutral Free Speech analysis in *Rosenberger* reflected its acceptance of accommodationism and fundamentally undermined the Establishment Clause's guarantees.[376] Consequently, the Court held that the government, when operating a neutral entitlement program, must subsidize all eligible organizations, including religious entities.[377] Conversely, Justice Souter's decision to employ an Establishment Clause analysis reflected his adherence to separationism as a guiding principle in adjudicating First Amendment disputes.[378] As dis-

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> one's viewpoint, at least absent some controversial claim that pasta and cookies did not exist. The upshot would be an instructional universe without higher education, but not a universe where one viewpoint was enriched above its competitors.

Id. at 2550.

373. *Id.* (construing *Lamb's Chapel*, 113 S. Ct. at 2144).

374. *Id.* ("If [the SAF's guidelines amount] to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.").

375. *Id.* at 2550-51.

376. *See id.* at 2513-25; *see also supra* part II.D.1 (discussing the Court's opinion in *Rosenberger*); *supra* part I.A.1.b (discussing accommodationism).

377. *See Rosenberger*, 115 S. Ct. at 2521-22 (holding that the University must fund WAP because the SAF was a neutral government program which distributed aid in an evenhanded manner); *see also* Bila, *supra* note 94, at 1549 (explaining that accommodationists believe that religious institutions may receive government funds from a neutral government program).

378. *See Rosenberger*, 115 S. Ct. at 2533-51; *see also supra* part II.D.4 (discussing Justice Souter's dissenting opinion in *Rosenberger*); *supra* part I.A.1.a (discussing

cussed below, this Comment argues that it is only through Justice Souter's approach, and not the Court's, that the Supreme Court will ensure the vitality of the Establishment Clause's "wall of separation" between church and State.[379]

A. *The Court's Opinion Fails to Ensure an Adequate Separation of Church and State as Guaranteed by the Establishment Clause*

The Court's holding in *Rosenberger* eliminated many of the fundamental protections afforded by the Establishment Clause.[380] The decision allowed WAP to receive government funding from a neutral benefit program and thus mandated that the government accommodate religious viewpoints.[381] In addition, the Court, for the first time, interpreted the Establishment Clause to permit government funding of proselytization.[382]

1. Accommodationism as a Guiding Principle

The Court's decision in *Rosenberger* reflects its acceptance of accommodationism in adjudicating disputes between church and State.[383] With its determination that an analysis under the Free Speech Clause—not the Establishment Clause—was dispositive,[384] its review of the SAF's guidelines according to a content neutral standard,[385] and its Establishment Clause analysis,[386] the Court treat-

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separationism).

379. *Compare Rosenberger*, 115 S. Ct. at 2521-22 (government may aid a religious entity through a neutral government program) *with Everson*, 330 U.S. at 15-16 (arguing for a "wall of separation" between church and State).

380. *See Rosenberger*, 115 S. Ct. at 2535 (Souter, J., dissenting) (arguing that the Establishment Clause would not allow the government to support proselytization).

381. *See id.* at 2521-22 (Opinion of the Court) (holding that when the government follows neutral criteria the list of recipients can include religious entities); *see also supra* part II.D.1 (Court's opinion in *Rosenberger*); *supra* part I.A.1.b (discussing accommodationism).

382. *See Rosenberger*, 115 S. Ct. at 2513-25; *see also supra* part II.D.1 (discussing the Court's opinion in *Rosenberger*); *supra* part I.A.1.a (examining Establishment Clause precedent precluding funding for core religious functions).

383. *See Rosenberger*, 115 S. Ct. at 2513-25; *see also supra* part II.D.1 (discussing the Court's opinion in *Rosenberger*); *supra* part I.A.1.b (discussing accommodationism).

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

385. *Id.* at 2516-17.

386. *Id.* at 2520-25.

ed WAP's religious message no differently than secular speech.[387] The result is that the government, acting through a neutral entitlement program, may now fund proselytization.[388]

a. Battle of the Clauses

Accommodationists argue that courts should apply the same standards when the government interacts with either secular or sectarian organizations.[389] In *Rosenberger*, the Supreme Court was forced to decide between applying the Free Speech Clause and the Establishment Clause to interpret the SAF's failure to fund WAP.[390] Under an Establishment Clause analysis, the Court would have upheld the University's determination if it found *Wide Awake*'s content to be predominantly religious.[391] This analysis would have allowed the government to differentiate between religious and non-religious viewpoints in order to prevent State aid to core sectarian functions.[392] Under a Free Speech analysis, however, the Court judged the SAF's refusal to fund WAP under the same criteria used for non-religious student organizations.[393] The Court thus prohibited the State from differentiating between sectarian and secular viewpoints and instead held that the government must allocate funding irrespective of religion.[394] The effect of this approach was that the Free Speech Clause pre-empted the Establishment Clause.[395]

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387. *See id.* at 2521-22 (explaining that when the government disburses aid in an even-handed manner, the list of recipients can include religious entities); *see also supra* part II.D.1 (discussing the Court's opinion in *Rosenberger*); McConnell, *supra* note 90, at 188-89 (explaining that the government may aid religion through neutral entitlement programs).

388. *See Rosenberger*, 115 S. Ct. at 2521-23.

389. *See supra* part I.A.1.b (discussing accommodationism).

390. *Compare Rosenberger*, 115 S. Ct. at 2524-25 (Opinion of the Court) (arguing that the Free Speech Clause is dispositive) *with id.* at 2533-34 (Souter, J., dissenting) (arguing that the Establishment Clause is dispositive).

391. *See id.* at 2534-35 (Souter, J., dissenting). Justice Souter examined *Wide Awake*'s content and found it to be a religious publication. *Id.*

392. *See id.* at 2534 (Souter, J., dissenting).

393. *See id.* at 2516 (Opinion of the Court) (The Court refused to determine whether *Wide Awake*'s message was religious).

394. *See id.* at 2520.

395. *See id.* at 2524-25.

b. Free Speech Analysis

The theory of accommodationism also holds that the public arena is open to both religious and secular viewpoints.[396] In his dissent, Justice Souter explained that the University did not skew the campus-wide debate either in favor of or against religion as the SAF's guidelines prohibited funding for all organizations manifesting a belief in an ultimate deity.[397] The Court, however, determined that the University could not remove religious beliefs from the forum without skewing the debate.[398] Instead, the Court explained that all secular subjects had corresponding viewpoints which were both religious and secular.[399] The Court thus rejected the notion that religion could be removed from the public sphere; rather, it accepted the accommodationist view that secular and religious ideas compete equally in the public arena.[400]

c. The Establishment Clause

The theory of accommodationism further allows religious entities to compete for funding from neutral government programs equally with their secular counterparts.[401] The Court held that funding WAP would not violate the Establishment Clause because the University did not create the SAF to advance religion or differentiate among sects.[402] It reasoned that when the government followed neutral criteria and distributed aid in an evenhanded manner, the list of recipients of government money could include sectarian organizations.[403]

The Court's inquiry did not consider the purpose for which the sectarian institution would use the government money; rather, it

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396. *See* McConnell, *supra* note 32, at 14 (arguing that religion is an equal actor in society).

397. *Rosenberger*, 115 S. Ct. at 2549-50 (Souter, J., dissenting).

398. *See id.* at 2518 (opinion of the Court).

399. *Id.*

400. *See id.* (holding that inclusion of both religious and secular viewpoints is mandated by the Free Speech Clause); *see also* McConnell, *supra* note 32, at 14 (arguing that the public arena should be open to both secular and religious participants).

401. *See* Howard, *supra* note 46, at 102.

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

403. *Id.*

focused on the construction and administration of the government program.[404] Under the Court's analysis, government spending is prohibited only when the State designed the program to: (1) directly support a religious entity, or (2) differentiate among religious sects.[405] The Court's definition of government neutrality, therefore, accommodates religious groups by allowing them to receive funds from neutrally administered government programs.[406]

d. Potential Ramifications

In *Rosenberger*, the Court applied the Free Speech Clause and held that the University, by creating the SAF, had assumed an obligation to fund eligible student organizations without reference to their viewpoints.[407] The question remains, however, whether this decision represents the ascendancy of accommodationism in Establishment Clause jurisprudence, or if the Court's rationale is limited to the facts of *Rosenberger*.

Justice Rehnquist's dissenting opinion in *Jaffree* proclaimed that government could aid all religions so long as the aid was given evenhandedly and government refrained from establishing a national church.[408] The Court's opinion in *Rosenberger* allowed the University to fund WAP because the SAF was a neutral entitlement program.[409] The next test of the Establishment Clause, however, could be from a religious organization seeking aid from a federal entitlement program.[410] In such a case, the religious entity would

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404. *See id.* at 2521-22; *see also* Bila, *supra* note 90, at 1549 (explaining that religious organizations may receive funding from neutral government programs).

405. *See Rosenberger*, 115 S. Ct. at 2521-22; *see also* LEVY, *supra* note 52, at 152 (explaining the limitations that accommodationists place on the aid to religion).

406. *See Rosenberger*, 115 S. Ct. at 2521-22; *see also* Bila, *supra* note 90, at 1549 (explaining that religious organizations may receive funding from neutral government programs).

407. *Rosenberger*, 115 S. Ct. at 2521-22.

408. Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting); *see also* LEVY, *supra* note 52, at 152 (interpreting Justice Rehnquist's *Jaffree* dissent).

409. *Rosenberger*, 115 S. Ct. at 2521-22.

410. *Cf.* Fordham Univ. v. Brown, 856 F. Supp. 684 (D.D.C. 1994). WFUV, Fordham University's radio station, applied for a federal grant in order to partially underwrite the cost of building a radio tower. *Id.* at 688. The U.S. Commerce Department denied the request on the grounds that WFUV broadcasted a two-hour mass every Sunday, and noted that WFUV would not receive government funding unless it discontinued the

surely argue that, under *Rosenberger*, a religious group may receive funding from a neutral government program.[411] Although then-Associate Justice Rehnquist did not persuade a majority in *Jaffree*, the Court might heed his advice and abandon Jefferson's "wall of separation" between church and State.[412]

Alternatively, the *Rosenberger* decision may not constitute an acceptance of accommodationism. Justice O'Connor provided the crucial fifth vote in *Rosenberger*, but rejected the application of categorical rules when the Establishment and Free Speech Clauses collide; rather, she explained that a judge must undertake a fact-specific inquiry to determine whether the program violates the Establishment Clause.[413] Under this analysis, a neutral government program which aided religion could be constitutionally infirm for a number of reasons, including: (1) the general population had reason to believe that the government endorsed the religious message;[414] (2) the organization used the money for an impermissible purpose;[415] or (3) members of the general population were required

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practice. *Id.* at 689-90. The district court upheld the government's determination. *Id.* at 705. In December, 1994, however, the Commerce Department reversed its policy and allowed the grant as Fordham's lawyers prepared an appeal to the district court's decision. *See* Thomas J. Lueck, *In U.S. Policy Change, Fordham Radio Station to Get Grant*, N.Y. TIMES, Dec. 21, 1995, at B4. Larry Irving, the administrator of the federal grant program, explained that the Commerce Department would allow grants if they resulted in "some attenuated or incidental benefit to sectarian interests." *Id.* While he conceded that the policy change would "give grant applicants greater flexibility," he maintained his opposition to funding stations where religious broadcasting is "the essential thrust of the grant's purpose." *Id.*

411. *See Rosenberger* 115 S. Ct. at 2521-22 (explaining that a religious group may receive government funding from a neutral government program).

412. *See Jaffree*, 472 U.S. at 107 (arguing that Jefferson's "wall of separation" is based on unsupported history and should be abandoned); *see also* Lupu, *supra* note 71, at 238 (explaining that although Justice Rehnquist's *Jaffree* dissent did not persuade a majority, accommodationism was growing in strength); *cf. Rosenberger*, 115 S. Ct. at 2551 (Souter, J., dissenting) (explaining his apprehension that "in constitutional adjudication some steps, which when taken were thought to approach the 'verge,' have become platform for yet further steps") (citations omitted).

413. *Rosenberger*, 115 S. Ct. at 2525-26 (O'Connor, J., concurring).

414. *See id.* at 2526-27 (explaining that a *Wide Awake* reader would see the publication's independence from the University).

415. *See id.* at 2527 (explaining that the SAF's manner of distribution of the funds ensured WAP would use government money only for permissible purposes).

to underwrite a religious message with which they disagreed.[416] In addition, while the Court based its *Rosenberger* decision on an application of the Free Speech Clause,[417] commentators have argued that the Court might reach a different result in a subsequent Establishment Clause challenge involving funding to religious schools instead of speech.[418] Consequently, accommodationism's hegemony is unclear.[419]

2. The Court Misapplied Establishment Clause Precedent Allowing, for the First Time, Government Funding of Religious Proselytization

The Court applied the hybrid Free Speech-Establishment Clause line of cases to find that the University could not deny funding based on WAP's viewpoint.[420] Similarly, the Court noted that government money could reach religious entities through an independent third-party's choice and held that aid to *Wide Awake* was permissible because the University paid the printer.[421] Underlying this analysis of precedent, the Court accorded religious organizations treatment equal to their secular counterparts.[422] Consequently, the Court misapplied the existing case law, and, for the first time,

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416. *See id.* (explaining that an objecting student could challenge the SAF for compelling her to underwrite a religious view with which she disagreed).

417. *See id.* at 2513 (holding that the Free Speech discussion is dispositive).

418. *See Analysis of Supreme Court Decision in* Rosenberger v. Rector & Visitors of the Univ. of Va. (Americans United for Separation of Church and State, Washington, D.C.), June 29, 1995 at 2-3. The organization noted:

> *Rosenberger* is a very narrow decision that should cause little harm to Establishment Clause jurisprudence. Significantly, the Court majority viewed the case as involving a free speech controversy, not a religious funding issue. The majority opinion throughout relies on free speech cases as authority and does not discuss or distinguish the Court's public funding decisions regarding aid to religious institutions.

Id.

419. *See Viewpoint Discrimination*, *supra* note 3, at 210 ("Although this neutrality principle will help clarify Establishment Clause jurisprudence, the field remains in disarray . . . .").

420. *See Rosenberger*, 115 S. Ct. at 2516-18 (discussing *Lamb's Chapel*).

421. *Id.* at 2523 (explaining that government money never directly reached WAP's coiffeurs).

422. *See* McConnell, *supra* note 90, at 188-89 (explaining that religion should compete equally with its secular counterparts).

upheld government funding of religious proselytization.[423]

a. The Hybrid Cases

The Court relied on cases ensuring equal access for religious organizations both in its Free Speech[424] and Establishment Clause discussions.[425] In its examination of the alleged Free Speech violation, the Court found that the University's failure to fund WAP violated the Free Speech Clause.[426] It reached this conclusion by interpreting cases such as *Lamb's Chapel* in which the Court struck down regulations denying religious groups access to public facilities.[427] The Court held that viewpoint discrimination was impermissible both for access and funding as the State must allocate resources regardless of a recipient's message.[428]

In both *Rosenberger* and *Lamb's Chapel* an instrumentality of the government rejected an otherwise eligible organization based on that entity's religious viewpoint.[429] The constitutional similarities between the two cases, however, end there: in *Lamb's Chapel*, a sectarian organization sought access to public facilities, while in *Rosenberger*, a religious group sought funding to publish a journal.[430] The Court nonetheless applied the principles underlying *Lamb's Chapel* to *Rosenberger* and found that the University violated WAP's members' Free Speech rights.[431]

The Court's analysis in *Rosenberger* over-extended the *Lamb's*

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423. *See Rosenberger*, 115 S. Ct. at 2533 (Souter, J., dissenting) ("The Court, today, for the first time, approves direct funding of core religious activities by an arm of the State.").

424. *See id.* at 2517-18 (the Court's Free Speech analysis).

425. *See id.* at 2523-24 (the Court's Establishment Clause analysis).

426. *Id.* at 2517-18.

427. *Id.* at 2518 (construing *Lamb's Chapel*, 113 S. Ct. at 2146-49).

428. *Id.* at 2519-20.

429. *See id.* at 2519; *see also Lamb's Chapel*, 113 S. Ct. at 2144-45.

430. *Compare Lamb's Chapel*, 113 S. Ct. at 2144-45 (church seeks access to show religious films) *with Rosenberger*, 115 S. Ct. at 2515 (religious organization seeks government funding).

431. *Compare Lamb's Chapel*, 113 S. Ct. at 2147-49 (holding that the school district discriminated against the Church on the basis of its speech) *with Rosenberger*, 115 S. Ct. at 2519 (holding that the University discriminated against WAP on the basis of its speech).

Chapel rationale.[432] In *Lamb's Chapel*, the Court interpreted the Free Speech Clause to require the government to allow religious groups access to public facilities.[433] In *Rosenberger*, however, the Court granted financial benefits to religion despite the Establishment Clause's prohibition of direct funding of core religious functions.[434] The Court thus accommodated religion by applying the same analysis to both access and funding for religious organizations.[435]

The Court's second invocation of the access cases occurred in its Establishment Clause analysis.[436] The Court noted that a school acts by spending money, and found "no difference in logic or principle" between a school operating a facility itself, or paying an outside contractor to do so.[437] The Court applied this rationale on the assumption that WAP's members could have used the University's facilities to copy *Wide Awake*.[438] While University policy allowed CIOs access to facilities such as computer terminals and meeting rooms, funding was reserved for groups approved by the Student Council.[439] WAP, as a CIO, did not receive University funding.[440] Consequently, the Court's decision to underwrite

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432. *See Rosenberger*, 115 S. Ct. at 2550 (Souter, J., dissenting).

433. *See Lamb's Chapel*, 113 S. Ct. at 2146-49.

434. *See Rosenberger*, 115 S. Ct. at 2546 (Souter, J., dissenting) (noting that *Lamb's Chapel* could not be applied to include funding without "admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid").

435. *See* McConnell, *supra* note 90, at 188-89 (explaining that accommodationism allows religious entities to compete equally with their secular counterparts); *see also Lamb's Chapel*, 113 S. Ct. at 2146-49 (holding that the school district could not make decisions about funding based on viewpoint); *Rosenberger*, 115 S. Ct. at 2519 (holding that the University could not make funding decisions based on viewpoint).

436. *Rosenberger*, 115 S. Ct. at 2523-24.

437. *Id.* at 2524.

438. *See id.* at 2523-24. The Court compared the University funding WAP to the *Lamb's Chapel* school district providing classrooms to a religious organization. *Id.* at 2523. In *Lamb's Chapel*, the church would have received access but for the school district's improper refusal based on content-discrimination. *Lamb's Chapel*, 113 S. Ct. at 2146-49. In *Rosenberger*, however, WAP, as a CIO, was not guaranteed University funding. *See Rosenberger*, 795 F. Supp at 177.

439. *Rosenberger*, 795 F. Supp. at 177.

440. *See Rosenberger*, 18 F.3d at 273. The Student Council, despite denying fund-

WAP's printing costs elevated WAP's status under University guidelines from a CIO to a funded organization.[441]

b. Government Funding Reached Religious Entities Through Independent Third Parties' Choices

The Court in *Rosenberger* reasoned that funding the printer rather than WAP would remove Establishment Clause concerns.[442] This conclusion misapplied *Mueller* in which the Court held that independent third parties could give government money to religious organizations if the donation was a private choice.[443] For *Mueller* to apply, the recipient of government funds must: (1) be independent of the funded religious entity, and (2) have discretion over the grant.[444]

The *Rosenberger* Court held that providing funds to the printer rendered the aid acceptable under the Establishment Clause.[445] While the printer was independent of a religious entity, it did not have discretion to apply University funds to publish another student organization's work, nor could it make changes in *Wide Awake*'s content.[446] The Court thus rewrote the *Mueller* line of cases by removing the word "independent," and held that the government

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ing, noted that WAP's CIO status guaranteed full access to University facilities and the right to distribute issues throughout campus. *Id.*

441. *See Rosenberger*, 795 F. Supp. at 177 (a CIO does not receive funding); *see also Rosenberger*, 115 S. Ct. at 2525 (University must fund WAP).

442. *See Rosenberger*, 115 S. Ct. at 2523 ("We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity.").

443. *See* Mueller v. Allen, 463 U.S. 388, 399 (1983); *see also supra* notes 147-53 and accompanying text (discussing *Mueller*); Esbeck, *supra* note 48, at 618 ("Equality is the operative principle when governmental benefits are directed to all individuals without regard to religion, who are given complete freedom of choice regarding how they may 'spend' that benefit.") (citation omitted).

444. *See Mueller*, 463 U.S. at 399 (explaining that the Minnesota plan is constitutional because the funds reached sectarian institutions through the private choices of parents); *see also Rosenberger*, 115 S. Ct. at 2544-45 (Souter, J., dissenting) (arguing that correct application of *Mueller* would require the printer to exercise discretion).

445. *Rosenberger*, 115 S. Ct. at 2523.

446. *See Rosenberger*, 115 S. Ct. at 2545 (Souter, J., dissenting) (arguing that the printer does not have discretion over the grant); *see also* Mueller, 463 U.S. at 399 (holding that the program was constitutional because the money reached a sectarian entity as a result of an independent third party's choice).

would fulfill its Establishment Clause obligations by directing the funds to a third party, even if that third party has no discretion in spending the money.[447]

Although WAP's members may never have actually "touched" the money, the University's funding system allowed them to decide where to spend the grant.[448] In *Mueller*, the Court reasoned that government funding of a sectarian organization was permissible because the original recipient of funds was independent of government and religion.[449] In *Rosenberger*, WAP exercised discretion in where to spend the government grant.[450] WAP, unlike the parents in *Mueller*, was a religious organization.[451] The Court's misuse of the *Mueller* paradigm, therefore, failed to justify government funding of a religious organization.

c. Direct Funding of a Religious Organization

In *Rosenberger*, WAP sought University funding to publish a journal in order to "encourage students to consider what a personal relationship with Jesus Christ means."[452] In *Ball*, however, the Court held that the government could not fund an organization which would use the money to indoctrinate others into the beliefs of a religious faith.[453] The Establishment Clause, as interpreted in *Ball*, thus prohibits WAP's use of government funding for proselytization.[454] Consequently, the Court should have denied the aid.

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447. *Compare Rosenberger*, 115 S. Ct. at 2523 (opinion of the Court) (holding that government aid was not direct because money went through the printer) *with Mueller*, 463 U.S. at 399-400 (upholding aid because the parents, an independent entity, directed it to religion).

448. *See Rosenberger*, 115 S. Ct. at 2515.

449. *See Mueller*, 463 U.S. at 399-400 (explaining that the parents were independent third parties).

450. *See Rosenberger*, 115 S. Ct. at 2515.

451. *Compare id.* (describing WAP's religious mission) *with Mueller*, 463 U.S. at 399-400 (parents are independent of religion).

452. *Rosenberger*, 115 S. Ct. at 2515 (citation omitted).

453. School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985).

454. *See Rosenberger*, 115 S. Ct. at 2533 (Souter, J., dissenting) (noting that the Court had never before allowed government money to underwrite proselytization); *see also Ball*, 473 U.S. at 397 (holding that the government may not fund an organization and thus substantially advance the sectarian enterprise).

B. *Justice Souter's Dissenting Opinion Ensures an Adequate Separation of Church and State as Mandated by the Establishment Clause*

Justice Souter's dissenting opinion in *Rosenberger* correctly argued that the Court had undermined many of the fundamental protections guaranteed by the Establishment Clause.[455] He would have allowed government to create a higher "wall of separation" between religion and society so that religion would be advanced only due to its ability to draw adherents.[456] He was thus unwilling to join the Majority's opinion which, he believed, permitted government to underwrite proselytization.[457]

1. Separationism as a Guiding Principle

Justice Souter's dissent in *Rosenberger* reflects his acceptance of separationism in adjudicating disputes between church and State.[458] Justice Souter's determination that an Establishment Clause analysis was dispositive,[459] his explanation of the government neutrality required towards religion,[460] and his Free Speech analysis[461] treated WAP's religious speech differently than the speech of the organization's secular counterparts.[462]

a. Battle of the Clauses

Separationists argue that when the government aids a sectarian organization, the Establishment Clause mandates that courts apply a different analysis to religious and secular beneficiaries.[463] Justice

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

456. *See id.* (arguing that the government cannot underwrite proselytization); *see also* TRIBE, *supra* note 56, at 1160-61 (explaining that voluntarism and separatism combine to form an ideology that religious advancement would come as a result of its ability to draw followers without use of government financing).

457. *See Rosenberger*, 115 S. Ct. at 2535 (Souter, J., dissenting).

458. *See id.*; *see also* LEVY, *supra* note 52, at 151 (explaining that separationism prohibits government aid to religion).

459. *Rosenberger*, 115 S. Ct. at 2533-34 (Souter, J., dissenting).

460. *Id.* at 2540.

461. *Id.* at 2547-2551.

462. *See id.* at 2540 (arguing that even under a neutral program, government could not fund core religious activity); *see also* Sullivan, *supra* note 35, at 212-13 (arguing that the government may place prohibitions on religious speech which would violate the First Amendment if applied to non-religious speech).

463. *See* Sullivan, *supra* note 35, at 212-13; *see also supra* part I.A.1.a (discussing

Souter stated that the Establishment Clause was dispositive in *Rosenberger* and explained that an examination of *Wide Awake*'s contents showed that its authors had devoted the journal to proselytizing.[464] By inspecting the journal's content, Justice Souter did not analyze *Wide Awake* under the same criteria used for a secular journal; instead, he examined the publication to determine whether it was secular and thus eligible for a government subsidy.[465] Justice Souter thus did what the majority would not do: he scrutinized *Wide Awake* for religious content.[466] Justice Souter, therefore, would have prohibited government sponsorship of proselytization and ensured that religion advanced solely on its ability to gain adherents.[467]

b. Neutrality

Separationists believe that the Establishment Clause prohibits government aid, even if impartially and equitably administered, that supports proselytization.[468] In *Rosenberger*, Justice Souter explained that the SAF, a neutral government program, could not fund WAP because of *Wide Awake*'s religious content.[469] He reasoned that the Establishment Clause prohibited the University from relying on a program's neutrality to avoid its responsibility of ensuring that State aid did not subsidize religion.[470] Consequently, Justice Souter's opinion would require WAP to succeed or fail based on the strength of its message rather than through government support. This rationale is similar to the principle Justice

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separationism).

464. *Rosenberger*, 115 S. Ct. at 2534-35 (Souter, J., dissenting).

465. *See id.*; *see also* Sullivan, *supra* note 35, at 212-13 (arguing that the Establishment Clause mandates a different analysis than a corresponding Free Speech Clause inquiry).

466. *Compare Rosenberger*, 115 S. Ct. at 2516-17 (opinion of the Court) (holding that the University may not base funding decisions on a student organization's viewpoint) *with id.* at 2535 (Souter, J., dissenting) (arguing that the government must not advance religion).

467. *See id.* at 2535; *see also* Cord, *supra* note 69, at 910 (arguing that religion, as a matter of conscience, should not receive state funding).

468. LEVY, *supra* note 52, at 151; *see also supra* part I.A.1.a (discussing separationism).

469. *Rosenberger*, 115 S. Ct. at 2535 (Souter, J., dissenting).

470. *See id.*

Black espoused in *Everson*.[471] Justice Souter's view thus ensures that religion would remain a private choice for every citizen, thereby outside the purview of government support.

c. Free Speech Analysis

Separationism requires that the government distinguish religious viewpoints from their secular counterparts and apportion each into their respective sphere.[472] Justice Souter noted that the SAF's guidelines eliminated funding for all viewpoints manifesting a belief about religion.[473] He reasoned that the University did not discriminate against religion by subsidizing those opposed to religion while silencing religious advocates; rather, it prohibited funding for both sides of the debate.[474] Underlying this belief are two coterminous views: (1) an objective observer can cluster religious viewpoints and separate them from the secular sphere of debate,[475] and (2) secular subjects do not automatically have a corresponding religious viewpoint.[476] Justice Souter would thus allow the University to subsidize a public sphere for secular viewpoints, but not underwrite for debates regarding ethereal concerns.[477]

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471. *See* Everson v. Board of Ed. of Ewing Township, 330 U.S. 1, 15-16 (1947); *see also supra* notes 51-72 (discussing *Everson*).

472. *See* Underkuffler-Freund, *supra* note 57, at 843 ("Distinctions between the religious and the secular can surely be made; indeed, such distinctions are assumed if the First Amendment's religion clauses are to have any meaning at all."); *see also* Teitel, *supra* note 55, at 757-58 ("Madison wrote of a world separable into two spheres: the religious and the secular.").

473. *Rosenberger*, 115 S. Ct. at 2549 (Souter, J., dissenting).

474. *Id.* at 2549-50.

475. *See id.* (arguing that the SAF guidelines prohibit University support of religious and anti-religious messages and thus prohibit funding to both sides of the debate); *see also* Peck, *supra* note 45, at 1152 (arguing that the Establishment Clause requires line drawing to determine proselytization).

476. *See Rosenberger*, 115 S. Ct. at 2549-50 (Souter, J., dissenting) (arguing that the SAF's exclusion of all groups manifesting a belief in an ultimate deity would require the University to prohibit funding for religious and anti-religious organizations only, thereby exempting student groups which do not discuss religion).

477. *See id.* (arguing that it is permissible to prohibit funding to all groups manifesting a belief about religion); *see also* Esbeck, *supra* note 48, at 630 (arguing that society may operate with "exclusive spheres . . . for the institutions of church and State. Each is to operate independent of the other and in its own domain.").

2. Justice Souter Correctly Applied Establishment Clause Precedent to Find that Aid to WAP was Impermissible

The controlling principle in Justice Souter's Establishment Clause analysis was that government could not subsidize a core religious function.[478] As a result, he argued, the University could not subsidize WAP.[479] Justice Souter further noted that WAP's funding was not justified by either: (1) the cases in which the Court applied a hybrid Free Speech-Establishment Clause analysis,[480] or (2) the principle that government can fund religion through an independent third party's choice.[481] Underlying this analysis was the principle that religion should advance based on its ability to draw adherents.[482]

a. Direct Funding of a Core Religious Function

Justice Souter began by noting that the Establishment Clause's primary purpose was to prohibit government subsidization of core religious functions.[483] He concluded that it was impermissible for the University to support *Wide Awake* as the journal's purpose was to proselytize.[484] Justice Souter was thus unwilling to allow government to underwrite a religious message; rather, religion would be advanced by voluntary supporters rather than State support.[485]

b. The Hybrid Cases

The greatest area of disagreement between the majority and dissent was the applicability of the hybrid line of cases.[486] Justice Souter noted that government could not deny a religious entity access to a neutral forum.[487] He argued that this analogy ended,

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478. *See Rosenberger*, 115 S. Ct. at 2535 (Souter, J., dissenting).

479. *Id.* at 2547.

480. *Id.* at 2545-46.

481. *Id.* at 2540-42.

482. *See, e.g., id.* at 2535 (prohibiting government aid for proselytizing); *see also* Gianella, *supra* note 56, at 517.

483. *Rosenberger*, 115 S. Ct. at 2535 (Souter, J., dissenting).

484. *Id.* at 2539.

485. *See id.*; *see also* TRIBE, *supra* note 56, at 1160-61 (describing voluntarism).

486. *Compare Rosenberger*, 115 S. Ct. at 2517-18 (opinion of the Court) *with id.* at 2545-46 (Souter, J., dissenting).

487. *Id.* at 2545 (Souter, J., dissenting).

however, when a religious organization sought government funding.[488] He reasoned that the Free Speech Clause mandated that the government allow religious groups to express their views on a street corner, while the Establishment Clause prohibited sectarian organizations from receiving funding.[489] The controlling principle, therefore, was that the Establishment Clause trumped the Free Speech Clause for funding issues. Consequently, Justice Souter held that the University could not subsidize WAP without violating the prohibition on funding core religious functions.[490]

c. Funding of Religious Entities through Independent Third Parties

Justice Souter explained that the Court held in *Mueller*, *Witters*, and *Zobrest* that an independent third party could aid a religious organization as the aid was not emanating directly from the government.[491] This principle, he argued, did not implicate the ban on government funding because individuals were merely exercising their First Amendment rights to support a religious organization.[492] He distinguished this rationale from *Rosenberger* on the ground that the University's printer was not truly an independent third party; rather, the printer took orders from WAP.[493] As a result he concluded that the aid in question constituted impermissible direct government support of a religious organization.[494]

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488. *Id.* at 2545-47.

489. *See id.* at 2547 (arguing that the street corner analogy does not apply to funding because it would be extending a new economic benefit to religion despite the prohibition on direct aid); *see also* Sullivan, *supra* note 35, at 209-13 (arguing that the Establishment Clause's prohibition on funding for religious speech places a limit on the government that would otherwise violate the Free Speech Clause).

490. *Rosenberger*, 115 S. Ct. at 2544 (Souter, J., dissenting).

491. *Id.* at 2541-42.

492. *Id.*

493. *Id.* at 2545.

494. *Id.*

C. *The Court's Decision to Apply the Free Speech Clause's Content Neutral Doctrine Undermined the Establishment Clause's Guaranteed Separation of Church and State*

The Majority's application of a content neutral Free Speech analysis is troubling because it undermines the Establishment Clause's fundamental protections. The Court should adopt an alternative test in order to ensure the continued separation of church and State. One option is to hold that the Establishment Clause analysis is dispositive in cases where a petitioner employs the Free Speech Clause to challenge a denial of government funds based on religious viewpoint. The second option, more specific to *Rosenberger*, is to prohibit the government from funding proselytization through the media.

1. Battle of the Clauses Revisited

The premise underlying Justice O'Connor's concurrence was correct: *Rosenberger* stood at the intersection of two First Amendment principles.[495] The Court's decision of which clause to apply ultimately dictated whether or not it would sustain the SAF's guidelines.[496] Both the district court and the Fourth Circuit held that the Establishment Clause allowed the University to examine *Wide Awake*'s content in order to prevent government funding of proselytization.[497] The Supreme Court, however, applied a Free Speech Clause analysis which precluded the University from basing its funding decisions on *Wide Awake*'s viewpoint.[498]

The reason for the divergent results was the Supreme Court's application of a content neutral Free Speech analysis.[499] The content neutral doctrine, consistent with its origins in the Equal Protection Clause, precludes the government from differentiating among speakers due to their messages.[500] This test was designed to create

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

496. *Compare id.* (opinion of the Court) (arguing that "[t]here is no Establishment Clause violation in the University honoring its duties under the Free Speech Clause") *with id.* at 2547 (Souter, J., dissenting) (arguing that the majority's decision forcing the University to provide WAP with government funding violated the Establishment Clause).

497. *Rosenberger*, 795 F. Supp. at 183-84; 18 F.3d at 287-88.

498. *Rosenberger*, 115 S. Ct. at 2525.

499. *Id.* at 2516-17.

500. *See id.*; *see also* Reed v. Reed, 404 U.S. 71, 75-77 (1971) (holding that the

a level playing field in the realm of ideas by granting all speakers the same rights in the forum.[501]

Religion, however, is a viewpoint unlike its secular counterparts.[502] The government must make distinctions between secular and sectarian messages and prohibit funding for religious speech.[503] This process, though it would violate the Free Speech Clause if applied to non-religious speech, is required by the Establishment Clause.[504] It is therefore inappropriate to include religion in an analysis which: (1) prohibits the government from differentiating among speakers based on the content of their message, and (2) accords all viewpoints equal entitlement to government funds.[505] This, however, is exactly what the Court did in *Rosenberger*.[506] The Court's decision to apply a content neutral Free Speech Clause analysis thus eviscerated the Establishment Clause of an independent meaning.

Under an Establishment Clause analysis the Court must undertake a special inquiry if there is a possibility that government funding could aid a core religious function.[507] This process: (1) allows the government to differentiate among speakers according to their viewpoint in order to determine sectarian entities, and (2) precludes the government from funding religion.[508] Under this method of

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government must treat similarly situated groups similarly and differently situated groups differently); Size & Britton, *supra* note 171, at 915-16 (explaining the Equal Protection origins of content neutrality).

501. *See generally* Size & Britton, *supra* note 171, at 914-15.

502. *See* Greene, *supra* note 32, at 1616-17.

503. *See Everson*, 330 U.S. at 14 (holding that the Judge's role is to separate government policies which provide for the general welfare from those designed to support religion); *see also* Freund, *supra* note 57, at 843 ("Distinctions between the religious and the secular surely can be made; indeed, such distinctions are assumed if the First Amendment's Religion Clauses are to have meaning at all.").

504. *See* Sullivan, *supra* note 35, at 212-13.

505. *See id.* (arguing that religion must be treated differently than its secular counterparts); *see also* Size & Britton, *supra* note 171, at 916-17 (arguing that any attempt to distinguish speakers based on the content of their speech will be presumptively invalid).

506. *See Rosenberger*, 115 S. Ct. at 2516-17.

507. *See, e.g., Everson*, 330 U.S. at 14.

508. *See id.*; *see also* Greene, *supra* note 32, at 1618 ("Barring interpretation of the term 'religion' risks negating the Establishment and Free Exercise Clauses as barriers to governmental action, for we would have no way of knowing when such action is legiti-

adjudication, the Government would fulfill its responsibilities under the Establishment Clause.

The Court should have decided *Rosenberger* under the Establishment Clause. For future cases, the Court should consider: (1) the philosophy of separationism as espoused in *Everson* which requires religion to be funded only by its adherents,[509] and (2) the existing case law which precludes the government from funding core religious functions.[510] Under these criteria, the Court would uphold a program that provides funding to a religious entity so long as an independent third party donated the aid.[511] Likewise, the Court would uphold a government policy that provided a sectarian organization access to public fora so long as a reasonable observer would not construe state support of the religious message.[512] This test would ensure the separation of church and State.

The difference between *Rosenberger* and *Lamb's Chapel* illustrates how this model protects the Establishment Clause without abridging rights under either the Free Speech or Free Exercise Clause. In *Lamb's Chapel*, a school district created a general program in which private speakers presented their viewpoints in a public forum.[513] The risk of a potential Establishment Clause violation was minimal as the government merely granted the religious organization access to a public facility.[514] In *Rosenberger*, however, the Establishment Clause violation was more palpable: a religious organization sought to secure government funds to proselytize.[515] The Establishment Clause, as interpreted by prior case law, dictated that a government subsidy to a core religious function was impermissible.[516] The University's act of funding the printer thus

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mate and when it is not.").

509. *See Everson*, 330 U.S. at 15-16.

510. *See supra* part I.A.2.a (outlining the case law holding that the government may not subsidize religion).

511. *See, e.g., Witters*, 474 U.S. at 487 (upholding the program because religion is funded as a result of the choice of an independent third party).

512. *See, e.g., Rosenberger*, 115 S. Ct. at 2526 (O'Connor, J., concurring).

513. *Lamb's Chapel*, 113 S. Ct. at 2144.

514. *See id.* at 2148.

515. *See Rosenberger*, 115 S. Ct. at 2515.

516. *See, e.g., Ball*, 473 U.S. at 381.

constituted such a violation.

2. The Establishment Clause and the Media

An alternative ground on which the Court could have upheld the University's determination was by prohibiting government funding of religious proselytization through the media. Such a restriction would preserve the Establishment Clause's central policy of prohibiting direct government funding of religious messages.[517] It would not allow the government to subsidize sectarian organizations' process of employing the media to spread their religious messages.

Under this proposed test, the University's funding of WAP's printer is impermissible. The aid has the effect of allowing a religious group to "piggy-back" its message on government money. In the aftermath of *Rosenberger*, WAP's members can merely deliver *Wide Awake* to the printer where government funds will subsidize its mass production.[518] Upon completion, WAP's members can distribute the paper throughout campus so that students might read it and be encouraged "to consider what a personal relationship with Jesus Christ means."[519] The journal, like a radio or television broadcast, is free of charge and easily accessible to all students.[520] The government subsidy thus allows WAP's members to take their message to the doorstep of all University students and thus constitutes an impermissible advancement of religion.

Government sponsored proselytization through the media violates two corresponding principles underlying the Establishment Clause. The first is separationism as delineated in *Everson*.[521] By allowing WAP to use government funds, the Court has: (1) brought a religious group's message into the public sphere, and (2) helped spread the gospel to other parties. The second principle is voluntarism which holds that the advancement of religion should

517. *See Everson*, 330 U.S. at 14-15.

518. *See Rosenberger*, 115 S. Ct. at 2515.

519. *Id.*

520. *Id.*

521. *See Everson*, 330 U.S. at 14-16; *see also* TRIBE, *supra* note 56, at 1161 (describing separationism).

occur on the basis of an individual's decision to adhere to religious tenets.[522] By forcing the University to fund WAP, the Court has ensured that *Wide Awake* will appear in the public forum so long as one member of the group produces and distributes the paper. This violates the heart of the Establishment Clause, which requires all religious groups to succeed or fail according to their ability to draw adherents.[523] Instead, government support of proselytization through the media impermissibly strengthens religion from public coffers.

CONCLUSION

Rosenberger v. Rector & Visitors of the University of Virginia represents the continuation of a new trend in the adjudication of Establishment Clause challenges. The Court's opinion accommodated religion by applying a content neutral Free Speech analysis which treated religion no differently than its secular counterparts. The ramifications of this decision are troubling both due to the majority's application of doctrine and its mistreatment of Establishment Clause precedent. In dissent, however, Justice Souter applied the Establishment Clause and argued that subsidizing WAP would constitute government sponsorship of religious proselytization. The Court should have adopted Justice Souter's analysis in order to ensure the vitality of the "wall of separation" between church and State. The Court's failure to do so has undermined a fundamental protection which has successfully guarded religious liberty in the United States for over two hundred years.

522. *See* Van Alstyne, *supra* note 4, at 778 (noting that voluntarism is the principle of personal choice).

523. *See id.*