A LOST OPPORTUNITY TO SWEETEN THE LEMON OF ESTABLISHMENT CLAUSE JURISPRUDENCE: AN ANALYSIS OF *ROSENBERGER v. RECTOR & VISITORS OF THE UNIVERSITY OF VIRGINIA*

INTRODUCTION

> *The three-pronged Lemon test . . . is the only coherent [Establishment Clause] test a majority of the Court has ever adopted. . . . Lemon has never been overruled or its test modified.*[1]

Although it is true, as stated by Justice Powell, that the Lemon test has not been overruled nor modified,[2] it has been sharply criticized by both conservative and liberal minded commentators "as not providing a useful framework for Establishment Clause analysis."[3] This criticism and the seemingly haphazard application of the Lemon test to Establishment Clause jurisprudence[4] spawned hopes that the Supreme Court would clarify its Establishment Clause jurisprudence[5] when it recently adjudicated the case, *Rosenberger v. Rector & Visitors of the University of Virginia.*[6] Instead of adding a measure of clarity to its Establishment Clause jurisprudence, however, the Court neither applied nor overruled the Lemon test. Rather, the Court chose to ignore the test completely.[7] The Court's fragmented 5-4 decision failed to even mention the Lemon test despite its prominence in the Fourth Circuit's adjudication of the case.[8] Such a "slaying by silence"[9] only exacerbates the confusion that already exists in the Establishment Clause arena.

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1 Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring). The Establishment Clause of the First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

2 For a discussion of the Lemon test, see *infra* Part I.

3 Carole F. Kagan, *Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 634 (1995).

4 For a discussion of the inconsistent application of the Lemon test, see *infra* Part I.B.

5 *See, e.g.*, Rena M. Bila, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1580 (1995) ("[T]he Court is presented with yet another opportunity to modify its application of the Lemon test and to bring establishment clause jurisprudence into line."); Jay Alan Sekulow et al., *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351, 359 (1995) ("Rosenberger v. Rector [sic] of the University of Virginia demonstrates that, in light of the logical inconsistencies of Lemon, a new test for interpreting the Religion Clauses is needed. Perhaps the Court will view Rosenberger as 'the proper case . . . to bring (its) Establishment Clause jurisprudence back to . . . the proper track.'" (quoting Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring)).

6 115 S. Ct. 2510 (1995).

7 Neither the majority opinion, written by Justice Kennedy, nor the two concurring opinions written by Justices O'Connor and Thomas, nor the dissenting opinion written by Justice Souter ever mentioned the Lemon test or repudiated it.

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

9 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, 1677 (1995) (In reference to the Court's avoidance of the Lemon test, Shur asks: "Is the *Lemon* beast to be silently slayed?").

Although agreeing that *Rosenberger* was correctly decided, this Note argues that the Court's apparent abandonment of the Lemon test as a benchmark for Establishment Clause analysis leaves lower courts, legislatures, and public policy officials with insufficient guidance by which to evaluate contemplated policies. Such policy makers justifiably desire a degree of concrete guidance that will enable them to assess their policy's vulnerability to an Establishment Clause challenge. The Court's decision fails to provide such guidance and will likely spawn, rather than quell, future Establishment Clause litigation.

This Note examines the *Rosenberger* decision in light of the Court's failure to apply the Lemon test. Part I provides an overview of the Lemon test as first articulated in *Lemon v. Kurtzman*,[10] followed by a sampling of the critical commentary and confusion that has surrounded the Court's application and disregard of the test in recent years. Part II provides a synopsis of the facts and procedural history that ultimately led to the Court's grant of certiorari in *Rosenberger*. Particular emphasis is placed on the Fourth Circuit's application of the Lemon test. Part III addresses the Supreme Court's analysis and its ultimate reversal of the Fourth Circuit's decision. Part III principally focuses on the Court's rationale for holding that the University of Virginia policy of funding student activities would not violate the Establishment Clause if the University were to fund *Wide Awake*, the avowedly Christian-oriented magazine published by the petitioner, Ronald W. Rosenberger. Part IV discusses the current state of Establishment Clause jurisprudence in light of the *Rosenberger* decision. Part V proposes a modified Lemon test that incorporates the neutrality principle that informed the majority's analysis. The modified test sets forth a suggested methodology for future Establishment Clause analysis and is designed to satisfy the Court's concerns regarding the avoidance of government hostility to religion while simultaneously meeting the need for a pragmatic test for use not only by the courts but by public policy officials as well.

I. THE LEMON TEST

A. THE THREE PRONGS OF LEMON

In its early interpretation of the Establishment Clause, the Supreme Court adopted a separationist view of the Establishment Clause stating that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the

[10] 403 U.S. 602 (1971).

slightest breach."[11] To provide a sense for the concrete proscriptions necessitated by the "wall of separation," the Court further stated:

> 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 over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[12]

Despite the harsh separationist tones, the Court cautioned that the "[First] Amendment requires the State to be a neutral in its relations with groups of religious believers and non-believers; it does not require the State to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them."[13]

As an outgrowth of this separationist way of thinking,[14] the Court developed the Lemon test, a three-prong test, for application to Establishment Clause challenges.[15] In delineating the test, the Court acknowledged the difficulty in attempting to provide a bright line of any magnitude which would facilitate Establishment Clause jurisprudence.[16] The intent, as articulated by the Court, was to "draw lines with reference to 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.'"[17] The three-prong test comprises the following areas of inquiry: (1) examination of the legisla-

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[11] Everson v. Board of Educ. of Ewing, 330 U.S. 1, 18 (1946). The "wall" referred to the words of Thomas Jefferson regarding "a wall of separation between Church and State." 8 WRITINGS OF THOMAS JEFFERSON 113 (H. Washington ed. 1861).

[12] *Everson*, 330 U.S. at 15-16.

[13] *Id.* at 18.

[14] Kagan, *supra* note 3, at 630.

[15] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[16] *Id.* at 612 ("Candor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law. The language of the Religion Clauses of the First Amendment is at best opaque.").

[17] *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

tive purpose of the statute or public policy being challenged; (2) examination of the "principal or primary effect" of the statute or public policy; and (3) determination of the extent of government entanglement with religion that results from implementation of the statute or public policy.[18] Essentially, the statute or policy in question will be held an unconstitutional violation of the Establishment Clause if the court determines affirmatively any of the following: (1) the purpose of the governmental action is nonsecular—enacted to aid or promote religion; (2) the primary effect of the governmental action is either to aid or promote religion, or inhibit religion, even if the action survives analysis under the first prong; or (3) the governmental action results in excessive entanglement with religion.[19]

A review of *Lemon v. Kurtzman* shows how the Court first applied the test to an Establishment Clause challenge. *Lemon* involved challenges to the constitutionality of Rhode Island and Pennsylvania statutes providing state aid to Catholic elementary and secondary schools.[20] Pennsylvania's statutory program authorized financial support, via reimbursement, to nonpublic elementary and secondary schools for the cost of teachers' salaries, textbooks, and instructional materials in secular subjects only.[21] Rhode Island's statutory scheme authorized direct payment of a 15% annual salary supplement to teachers in nonpublic elementary schools.[22]

In an attempt to avoid constitutional infirmities, the Rhode Island statute required that teachers eligible for the supplement only teach subjects also offered in public schools.[23] The statute also required the teachers to use only those teaching materials used in public schools.[24] As an additional precaution, the statute required the teachers to agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements."[25] The Pennsylvania legislature likewise drafted its statute so as to avoid an Establishment Clause viola-

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18 *Id.* at 612-13.

19 *Id. See also* Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1351-52 (1995). *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56-57 (1985) (holding that Alabama's school prayer and meditation statute violated the secular purpose prong); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985) (holding that a Community Education program had the primary effect of advancing religion); Aguilar v. Felton, 473 U.S. 402, 409 (1985) (holding that New York City's scheme for use of Title I funds violated the excessive entanglement prong).

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

21 *Id.* at 606-07. Support was limited to mathematics, modern foreign languages—Latin, Hebrew, and classical Greek were excluded—physical science, and physical education. *Id.* at 610.

22 *Id.* at 607.

23 *Id.* at 608.

24 *Id.*

25 *Id.*

tion. The statute conditioned eligibility for reimbursement of nonpublic school expenditures, including teachers' salaries, textbooks, and instructional materials, on schools maintaining prescribed accounting procedures that differentiated expenditures for secular and nonsecular educational services.[26] To ensure proper compliance with the statutory dictates, the statute authorized state audit of the schools' records .[27] As a final precaution, the statute prohibited reimbursement for any course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."[28] Despite the legislatures' extensive efforts to avoid an Establishment Clause violation, the Court struck down the statutes as unconstitutional.[29]

Applying the first prong of what has become known as the Lemon test, the Court examined the legislative history of the challenged statutes and determined that the legislatures enacted the statutes "to enhance the quality of the secular education in all schools covered by the compulsory attendance laws."[30] Finding nothing to undermine the stated statutory purposes, the Court accorded the legislatures "appropriate deference," finding that the purpose complied with Lemon's first prong.[31]

The Court bypassed the second-prong analysis[32] and in so doing stated that "[w]e need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses."[33] Rather, the Court was content to rest its analysis on the third prong of Lemon.[34] By failing to analyze the statutes under the second prong, however, the Court left in doubt both the importance and meaning of this part of the Lemon test.[35]

As a prelude to the Court's analysis of entanglement of government and religion under the third prong, the Court made clear that under Establishment Clause jurisprudence, total separation between church and state is neither possible nor required.[36] Recognizing that "some relationship between government and religious organizations is inevitable," the Court cited "[f]ire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws" as examples of permissible contact.[37] Forecasting the difficulty associated with attempt-

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26 *Id.* at 609-10.
27 *Id.* at 610.
28 *Id.*
29 *Id.* at 607.
30 *Id.* at 613.
31 *Id.*
32 *Id.*
33 *Id.* at 613-14.
34 *Id.* at 614.
35 Kagan, *supra* note 3, at 631.
36 *Lemon*, 403 U.S. at 614.
37 *Id.*

ing to draw a bright line regarding what is and is not excessive entanglement, the Court stated, "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[38]

To determine whether the government entanglement with religion was excessive, the Court required examination of "the character and purposes of the institutions that are benefitedö by the governmental policy, "the nature of the aidö provided by the State, "and the resulting relationship between the government and the religious authority."[39] Applying this methodology of analysis to the circumstances in *Lemon*, the Court stated that "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.ö[40]

The Court first cited the extent of religious activities prevalent at those schools that were to benefit from the statutory provisions—principally Roman Catholic schools—which led the state legislatures to mandate governmental controls and surveillance by state officials to ensure that state aid support only secular education.[41] The Court then noted that the particular form of aid, direct monetary supplement of teachers' salaries in Rhode Island and monetary reimbursement of salaries in Pennsylvania, enhanced the entanglement problem due to the need for surveillance to ensure that the teachers receiving aid did not advance religion in their classes.[42] Specifically, the Court surmised that "[w]ith the best of intentions such a teacher [in a parochial school] would find it hard to make a total separation between secular teaching and religious doctrine.ö[43] The Court recognized that such potential dangers required a "comprehensive, discriminating, and continuing state surveillance . .o to ensure that [the statutory safeguards required for aid eligibility] are obeyed and the First Amendment . . . respected."[44] Contrasting the aid proposed in the form of teachers salaries to the aid provided to parochial schools in the form of secular textbooks, the Court noted that while a textbook can be inspected once to ensure the content will not promote religion, a teacher "cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of

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38 *Id.*

39 *Id.* at 615.

40 *Id.* at 614.

41 *Id.* at 616.

42 *Id.* at 616-22.

43 *Id.* at 618-19. The Court also noted the potential effect that pervasive religious authority within the schools has on the ability of the teachers to separate the religious from the purely secular aspects of education. *Id.* at 617.

44 *Id.* at 619.

the limitations imposed by the First Amendment."[45] The need for surveillance of the teachers, termed "prophylactic contacts" by the Court, would involve "excessive and enduring entanglement between state and church."[46]

Under the Pennsylvania statutory scheme, the Court highlighted the dangers inherent in providing state financial aid directly to the church-related schools as contrasted with providing aid to either parents of students or students themselves.[47] The Court characterized this danger as follows: "'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.'"[48] The Court further cautioned that "[t]he history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance."[49] The Court found such a problem in the statutory provision for the state's authority to inspect church-related schools' financial records to ensure compliance with separation of secular and religious expenditure requirements.[50] It characterized such entanglements as an "intimate and continuing relationship between church and state."[51] The Court concluded that "while some involvement and entanglement are inevitable, lines must be drawn."[52] The line drawn by the Court struck down the two statutes.[53]

B. CRITIQUE OF LEMON

Although the twenty-five-year-old Lemon test remains alive in Establishment Clause cases,[54] it has not escaped scathing criticism. Five of the current Justices on the Supreme Court have expressed concerns with the test, either in substance or in application.[55]

Justice O'Connor, in discussing the efficacy of the Lemon test, stated, "[i]t once appeared that the Court had developed a workable stan-

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45 *Id.*
46 *Id.*
47 *Id.* at 621.
48 *Id.* at 621 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970)).
49 *Id.*
50 *Id.* at 621-22.
51 *Id.* at 622.
52 *Id.* at 625.
53 *Id.*
54 *See supra* text accompanying note 1.
55 Sekulow, *supra* note 5, at 358. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 718-201 (1994) (O'Connor, J., concurring); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia J., concurring, joined by Thomas, J.); County of Allegheny v. ACLU, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, White, & Scalia, JJ.); Wallace v. Jaffree, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting).

dard by which to identify impermissible government establishments of religion. . . . Despite its initial promise, the Lemon test has proved problematic.[56] She then recommended that "the standards announced in *Lemon* . . . be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment.[57] Justice Rehnquist's characterization of the Lemon test is even more critical. After providing a historical perspective on the adoption of the Establishment Clause,[58] he stated, "the Lemon test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. . . . The three-part test has simply not provided adequate standards for deciding Establishment Clause cases . . . [e]ven worse, the Lemon test has caused this Court to fracture into unworkable plurality opinions.[59] Justice Scalia has gone so far as to characterize the Lemon test as being "[l]ike some ghoul in a late-night horror movie that . . . stalks our Establishment Clause jurisprudence.[60] He recommended the outright abandonment of the Lemon test because it has made "such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held constitutional."[61] Equally critical is Justice Kennedy in asserting that he does "not wish to be seen as advocating, let alone adopting, [the Lemon] test as [the Court's] primary guide.[62]

Beyond the criticism that members of the Court have leveled at the Lemon test, the Court's general jurisprudence of Establishment Clause cases has received criticism from within and without the Court. As stated by Jay Alan Sekulow, Chief Counsel of the American Center for Law and Justice, "the Court's religious freedom cases are often logically incomprehensible . . . . The reasoning suffers from a lack of intelligible

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56 *Wallace*, 472 U.S. at 68 (O'Connor, J., concurring). *Wallace v. Jaffree* involved a challenge to the constitutionality of an Alabama school prayer and meditation statute. The Court held that the statute authorizing a daily period of silence in public schools for meditation or voluntary prayer was an endorsement of religion lacking any clearly secular purpose and, thus, was a law respecting the establishment of religion in violation of the Establishment Clause. *Id.* at 56-61.

57 *Id.* at 68-69.

58 Chief Justice Rehnquist, in his dissent in *Wallace v. Jaffrey*, provided a detailed historical overview of the adoption of the Establishment Clause in which he discussed the proposed wording of the clause from both the House and Senate in 1789 and the intent of James Madison, as supported by Madison's advocacy for the clause. *Id.* at 91-104.

59 *Id.* at 110 (Rehnquist, J., dissenting).

60 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (permitting school property to be used for the presentation of all views on an issue except those views dealing with the issue from a religious standpoint amounted to unconstitutional viewpoint discrimination).

61 Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

62 County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part).

consistency and constitutional congruency."[63] Justice Rehnquist, in his dissenting opinion in *Wallace v. Jaffree*, provided case examples highlighting the difficulty the Court has encountered in applying the Lemon test in a manner which "yields principled results":

> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them non-reusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.[64]

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63 *See* Sekulow, *supra* note 5, at 353. *See also* Kevin T. Baine, *Education Litigation: Prospects for Change*, 35 CATH. LAW. 283, 287 (1994) ("[T]he Supreme Court has decided a series of education cases that, read together, simply defy comprehension.").

64 Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (footnotes and citations omitted). For an attempted defense concerning the seeming inconsistency of the Court's decisions, see *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 21 (1993) (Blackmun, J., dissenting) in which Justice Blackmun states, "[a]lthough the Court generally has permitted the provision of 'secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school,' it has always proscribed the provision of benefits that afford even 'the opportunity for the transmission of sectarian views.'" (quoting Meek v. Pittenger, 421 U.S. 349, 364 (1975); Wolman v. Walter, 433 U.S. 229, 244

Justice Scalia, in a concurring opinion joined by Justice Thomas, characterized one of the difficulties associated with the Court's use of the Lemon test; he wrote, "[w]hen we wish to strike down a practice it [Lemon] forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs 'no more than helpful signposts.'"[65]

Despite the appreciable condemnation of the Lemon test, "Lemon lives on,"[66] and "the Court remains fragmented in its Establishment Clause analysis."[67] Recently, however, it appears that the majority of the Court has embraced the concept of neutrality as a bedrock principle of Establishment Clause jurisprudence.[68] The majority of the Court has interpreted neutrality as requiring that the government maintain a position of neutrality between religion and irreligion, as well as among religions.[69] "In trying to attain the goal of neutrality, however, the Court has not been able to enunciate any consistent test which would strike the proper balance."[70]

Commentators embracing the goal of neutrality in Establishment Clause jurisprudence have also criticized the Lemon test "as hostile to religion" stating that "[i]n an effort to avoid entanglement with religion, religious bodies are discriminatorily denied public benefits which would otherwise be available."[71] Professor Stephen Carter argues that Lemon's interpretation of the Establishment Clause has resulted in state avoidance of and/or discrimination against the religious component of our society.[72] Despite this pointed criticism, however, and his view that Lemon is "impossible to apply," Carter admits that "it is far from clear what should be put in its [Lemon's] place."[73]

The analysis of the Lemon test, thus, returns full circle with the acknowledgment that "[t]he Court . . .has never repudiated Lemon,"[74] and the recognition that "the basic framework of Lemon still informs the

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(1977)). Blackmun sees such a distinction as somewhat fine, but intimates that "'lines must be drawn.'" *Id.* at 22 (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 398 (1985)).

65 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 389 (Scalia, J., concurring) (citations omitted) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

66 Sekulow, *supra* note 5, at 355.

67 Kagan, *supra* note 3, at 621.

68 Kagan, *supra* note 3, at 629.

69 *Id.* Justices Scalia, Thomas, and Rehnquist, however, do not embrace the goal of neutrality between religion and irreligion. *See, e.g., Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring); Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 732 (1994) (Scalia, J., dissenting).

70 Kagan, *supra* note 3, at 630.

71 *Id.* at 643.

72 STEVEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 111-23 (1993).

73 *Id.* at 114.

74 Kagan, *supra* note 3, at 634.

majority's Establishment Clause jurisprudence."[75] Furthermore, Lemon is the only test that has attracted a majority of the modern Court.[76]

The stage was thus set in the summer of 1995 for the Court to re-examine the Lemon test and provide a measure of clarity to the Establishment Clause arena, resolving the "inherent confusion [that] reigns in lower courts."[77] *Rosenberger v. Rector & Visitors of University of Virginia* provided such an opportunity.

II. *ROSENBERGER*: THE ROAD TO THE SUPREME COURT

A. FEDERAL DISTRICT COURT OF THE WESTERN DISTRICT OF VIRGINIA

In September, 1990, Ronald W. Rosenberger, an undergraduate student at the University of Virginia, along with other undergraduate students, established an unincorporated association known as Wide Awake Productions (WAP).[78] WAP was granted official recognition by the University as a Contracted Independent Organization (CIO).[79] As a recognized CIO, WAP was given certain rights, such as the use of meeting rooms and computer terminals, and the right to apply for student activity fee funds.[80] As a condition of being granted CIO status, WAP signed a standard CIO agreement specifying that "benefits provided to the groups [CIOs] by the University 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."[81]

WAP, through the efforts of its student members, published a non-profit journal entitled *Wide Awake: A Christian Perspective at the University of Virginia* ("*Wide Awake*").[82] Wide Awake is admittedly written from a "religious perspective" in keeping with WAP's constitution that states, "the purpose of the organization is to: (1) publish a magazine of philosophical and religious expressions; (2) facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian view-

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75 *Id.* at 632.

76 *Id.* at 630.

77 Sekulow, *supra* note 5, at 368. *See also Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751(1994) (Scalia, J., dissenting) (addressing the problems associated with the Court choosing to ignore Lemon, at will, while lower courts remain constrained by Supreme Court precedent to apply the Lemon test).

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

79 *Id.*

80 Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 270 (4th Cir. 1994).

81 *Id.* at 270-71.

82 *Id.* at 272.

points; and (3) provide a unifying focus for Christians of multicultural backgrounds."[83] WAP is not, however, affiliated with any particular religious organization.[84]

After publishing three issues of *Wide Awake* and distributing approximately 5,000 copies of each issue, free of charge, to campus students, WAP, in January of 1991, submitted application to the University Student Council Appropriation Committee for funding to cover the journal's publication costs of $5,862.00.[85] The University Student Council Appropriations Committee is a subcommittee of the Student Council responsible for the allocation of Student Activities Fund (SAF) monies to CIOs.[86] The Student Council, under the authority of the Rector and Board of Visitors ("the Board") of the University, disburses funds to those CIOs that meet funding eligibility requirements as set forth in the SAF Guidelines, promulgated by the Board.[87] Payments from SAF funds are made directly to the CIO's creditors, not to the CIO itself.[88] The source of monies for the SAF fund is a mandatory fee collected from each full-time University student.[89]

The SAF Guidelines "charge the Student Council with administering the SAF 'in a manner consistent with the educational purpose of the University as well as with State and Federal law.'"[90] Several categories of student organizations, including religious organizations and organizations engaged in religious activities, are prohibited from obtaining SAF funds.[91] The Guidelines define a "religious activity" as "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or ultimate reality."[92] In keeping with the dictates of the Guidelines, the Chairman of the Student Council denied the funding request following the Appropriations Committee's determination that the publi-

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83 *Rosenberger*, 795 F. Supp. at 177, n.3.

84 Daniel G. Schmedlen, Jr. et al., *Annual Fourth Circuit Review for the Civil Practitioner*, 52 WASH. & LEE L. REV. 471, 570 (1995).

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

86 *Id.*

87 *Id.*

88 Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 271 (4th Cir. 1994).

89 Harvard Law Review Association, *Free Speech and Press Clause and Establishment Clause—Student Activities Funds—Fourth Circuit Upholds University's Refusal to Consider Religious Organizations for Student Activities Funding*, 108 HARV. L. REV. 507, 508 (1994). The SAF Statement of Purpose, as published in the Guidelines, is as follows: "The purpose of the student activity fee is to provide financial support for student organizations that are related to the educational purpose of the University of Virginia. As a required student fee, the monies collected by the University for funding student activities are public funds which must be administered in a manner consistent with the educational purpose of the University as well as with state and federal law." *Rosenberger*, 795 F. Supp. at 180.

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

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

92 *Rosenberger*, 18 F.3d at 271, n.2.

cation of *Wide Awake* constituted a religious activity.[93] WAP pursued all administrative rights to appeal available within the University.[94] Having failed to secure a reversal of the Student Council's initial determination of ineligibility, WAP filed suit in Federal District Court in the Western District of Virginia on July 11, 1991.[95]

Rosenberger's complaint set forth three constitutional challenges to the SAF Guidelines' exclusion of religious activities from funding.[96] The claims were focused on the Guidelines' exclusion of religious activities from funding, not on the University's refusal to fund WAP specifically.[97] Count One of the complaint alleged:

> the guidelines' proscription of SAF funding for the publication costs of *Wide Awake* violated the Free Speech and Free Press Clause of the First Amendment to the United States Constitution . . . (1) by unlawfully depriving the members of Wide Awake Productions of government benefits solely because of the content and viewpoint of their speech in *Wide Awake*; and (2) by illegally excluding the members of Wide Awake Productions from the 'limited public forum' created by the Rector and Visitors' establishment of the SAF and promulgation of the funding guidelines.[98]

Count Two of the complaint alleged:

> the guidelines' denial of SAF funding to 'religious activities' violated the Free Exercise Clause of the First Amendment to the Federal Constitution . . . by discriminating in the granting of a government benefit based upon (1) the religious content of the expression in *Wide Awake*; and (2) the religious character, or affiliation of the members of Wide Awake Productions.[99]

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

94 *Id.*

95 *Id.*

96 *Rosenberger*, 18 F.3d at 274. In addition to the claims predicated upon the alleged violation of the Federal Constitution, plaintiffs appended alternate and supplemental claims under the provisions of Article I of the Constitution of Virginia and the Virginia Act for Religious Freedom. *Id.* Because the state law claims were not pursued on appeal, they will not be discussed.

97 *Id.*

98 *Id.* *See* U.S. CONST. amend. I, cl. 3 ("Congress shall make no law . . . abridging the freedom of speech, or of the press . .e ."). Count One of the complaint also challenged the Guidelines' "definitions for allocating SAF funds to CIOsñ as being unconstitutionally vague and unlawfully overbroad. *Rosenberger*, 18 F.3d at 274-75.

99 *Id.* at 275. Count Two also alleged the defendant failed "to give reasonable accommodation to the plaintiffs' religious beliefs.ñ *Id.*

Count Three of the complaint alleged that "the guidelines' prohibition against subsidizing 'religious activit(ies),' coupled with the Rector and Visitors' denial of SAF funds to Wide Awake Productions, violated the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution."[100]

Rosenberger sought: (1) declaratory judgment that the Guidelines' prohibition against funding religious activities violated WAP's constitutional rights; (2) a permanent injunction against the Rector and Visitors from denying funding to WAP; (3) awarding of compensatory damages of at least $5,862.00; and (4) an order awarding WAP reasonable costs and attorneys' fees.[101] The parties agreed that there were no material facts at issue and each sought summary judgment as a matter of law.[102]

The district court ordered summary judgment in favor of the University of Virginia, dismissing all plaintiffs' claims.[103] In so ordering, the district court reasoned that the student activities fund was a nonpublic forum, not a limited public forum, as urged by plaintiffs.[104] The court

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[100] *Id.* *See* U.S. CONST. amend. XIV, §1, cl. 4 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."). Count Three was specifically subdivided into the following contentions:

> (1) that the guidelines 'den(ied) plaintiffs the benefits to which other students and CIOs are entitled' by unconstitutionally discriminating against Wide Awake Productions on the basis of the content or viewpoint of its members' speech and association; and (2) that the guidelines unconstitutionally discriminated against the plaintiffs' religious speech 'by denying [them] the benefits that other students and CIOs engaged in religious speech and activities receive and have received. . . . '

Rosenberger, 18 F.3d at 275 (alteration in original).

Plaintiffs maintained that the alleged viewpoint and religious-based discrimination was neither justified by a compelling state interest, nor narrowly tailored to achieve "whatever minimal interest" the University might have in refusing to fund student religious activities. *Id.* In support of their claim of discrimination, plaintiffs noted that for the academic year 1990-91, 343 student organization were recognized as CIOs. Of these 343 groups, 135 applied for SAF funding, and 118 were awarded SAF monies. Included within the 118 funded activities were 15 student publications, as well as the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society. *Id.* at 271.

[101] *Rosenberger*, 18 F.3d at 271.

[102] *Id.* at 276.

[103] Rosenberger v. Rector & Visitors of Univ. of Va., 795 F. Supp. 175, 184 (W.D. Va. 1992).

[104] *Id.* at 180. The characterization of the SAF as either a nonpublic or limited public forum affects the degree of scrutiny the court will apply to determine whether the government's (University's) policy violates the Constitution. "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 (quoting Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983)). Access to a limited public forum may only be restricted by the State if the restriction is "drawn to effectuate a compelling state interest." *Id.* A nonpublic forum "consists of public property which is not 'by tradition or designation a forum for public communication.'" *Id.* (quoting *Perry*, 460 U.S. at 46). Access to a nonpublic forum "can be limited by restrictions which are 'reasonable and [are] not an effort to suppress expression merely because the public officials oppose the speaker's views.'" *Id.* (quoting Cornelius v.

stated that "consistent, purposeful exclusion of certain groups [religious organizations, political groups, fraternities, etc.] indicates that the SAF is indeed a nonpublic forum."[105]

Following its determination that the SAF was a nonpublic forum, the court analyzed the Guidelines to determine whether the restrictions imposed on religious activities were reasonable or reflective of an effort to suppress expression based on University opposition to the particular views espoused by WAP.[106] With regard to the University's assertion that the Guidelines' restrictions on funding of religious activities were justified due to the state and federal constitutional mandate regarding neutrality toward religion, the court stated, "it is not the province of this court to second guess the legal judgments made by the University. So long as the University's Establishment Clause fears are reasonable, the Guideline restriction must stand."[107] The court, therefore, found that, as a matter of law, the "Guidelines are reasonable and do not violate any of the plaintiff's constitutional rights."[108] The court also found that the limitations imposed by the Guidelines did not result in viewpoint discrimination.[109]

In response to Rosenberger's claim that the denial of SAF funds to WAP impermissibly burdened WAP's free exercise of religion, the court held that the minimal burden placed on WAP must be balanced with the University's compelling state interest to avoid a violation of the Establishment Clause. The net result of the balancing was a finding that the court was unable "to identify any burden of constitutional magnitude that ha[d] been imposed on the plaintiffs."[110]

The final issue addressed by the court was plaintiffs' contention that they had been denied equal protection of the laws because other religious groups had been given SAF monies.[111] The court found no evidence of discriminatory intent with regard to the decision to deny SAF funds to WAP and, therefore, dismissed Rosenberger's equal protection claim.[112]

NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 800 (1985)) (alteration in original).

105 *Id.* at 180.

106 *Id.* at 181.

107 *Id.*

108 *Id.* at 182.

109 *Id.* at 181.

110 *Id.* at 182 ("WAP is unable to point to any facts making their burden unique from other CIOs which have been denied SAF monies.").

111 *Id.* at 183.

112 *Id.* Both disparate effect and discriminatory intent must be shown in order to prevail on an equal protection claim that challenges a facially neutral statute. *Id.*

B. FOURTH CIRCUIT COURT OF APPEALS

Rosenberger filed appeal with the Fourth Circuit Court of Appeals contending that "the Guidelines' proscription of SAF funding for 'religious activities' violates the Free Speech and Press Clause of the First Amendment (1) by depriving them [WAP] of government benefits based solely on the content and viewpoint of their speech in Wide Awake, and (2) by excluding them from the 'limited public forum' represented by the SAF."[113] A second issue on appeal involved Rosenberger's contention that the Guidelines' prohibition against subsidizing "religious activities," coupled with the University's denial of SAF funds to WAP, violated the Equal Protection Clause of the Fourteenth Amendment.[114]

In support of the above contentions, Rosenberger argued "that once the Rector and Visitors [had] 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."[115] He maintained that the University's denial of SAF funding based on classification of WAP as a "religious activity" constituted discrimination in contravention of the First Amendment due to the Guidelines' implicit condemnation of the content and viewpoint of the speech in Wide Awake.[116] Such content and viewpoint discrimination Rosenberger characterized as a prior restraint on speech that must be struck down as unconstitutional.[117]

In addressing these contentions, the Fourth Circuit first held that the publication of religious speech in *Wide Awake* did fall within the protection of the Free Speech and Press Clause.[118] Having deemed Rosenberger's speech in *Wide Awake* constitutionally protected, the Fourth Circuit then assessed whether or not the University, through enforcement of its Guidelines, imposed an unconstitutional condition upon the exercise of the protected speech.[119] The court concluded that the University's policy effectively served as "a prior restraint on University subsidization of all forms of religious expression in which a CIO might engage."[120] As such, the court held that "when funds are made available to CIOs generally, they must be distributed in a viewpoint-neutral manner."[121]

Although the Fourth Circuit found that the University's refusal to permit funding of "religious activities" placed a presumptively unconsti-

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113 Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 277 (4th Cir. 1994).
114 *Id.* *See* U.S. CONST. amend. XIV, § 1, cl. 4.
115 *Rosenberger*, 18 F.3d at 279.
116 *Id.*
117 *Id.*
118 *Id.* at 280.
119 *Id.*
120 *Id.*
121 *Id.* at 280-81.

tutional condition upon access to government benefits (SAF funding) in violation of the Free Speech and Press Clause, the Guidelines were nonetheless upheld under a compelling state interest analysis.[122] The University claimed a compelling interest in maintaining strict separation of church and state as mandated by the Establishment Clause.[123] It argued that funding of "religious activities" would be a direct violation of the Establishment Clause.[124] The court agreed that avoidance of an Establishment Clause violation could be characterized as compelling.[125]

To determine whether offering WAP an equal opportunity to compete for SAF funding would be incompatible with the Establishment Clause, the court analyzed application of the Guidelines under the Lemon Test.[126] First, the court examined the purpose behind the University's adoption of the Guidelines under the first prong of the Lemon test.[127] To do so, the court examined the Guidelines' Student Activity Statement of Purpose which specified, "[t]he purpose of the student activity fee is to provide financial support for student organizations that are related to the educational purpose of the University of Virginia."[128] Funds collected via the mandatory student fee were thus to be "administered in a manner consistent with the educational purpose of the University as well as with state and federal law."[129] The funding guidelines further "proscribed funding of 'religious activities' on the ground that such activities 'do not relate to the educational purpose of the University.'"[130] The court found the University's purpose in denying SAF funding to "religious activities" consistent with a facially secular legislative purpose—compliance with the University of Virginia's educational mission.[131] The Guidelines' proscription against funding of "religious activities" was, thus, deemed permissible under the purpose analysis of Establishment Clause jurisprudence.

The court's analysis then shifted to examination of the Guidelines in light of the second prong of the Lemon Test—the effects prong. Under effects analysis, a court determines whether the primary effect of the policy in question is to inhibit or advance religion.[132] The court rested its analysis under this prong on three primary factors: (1) the University had not attempted to ban publication of *Wide Awake*; rather, the Univer-

122 *Id.* at 287.
123 *Id.* at 281-82.
124 *Id.* at 282.
125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.* at 283.
129 *Id.*
130 *Id.* at 284.
131 *Id.*
132 *Id.* at 285.

sity supported its publication through access to University meeting and printing facilities;[133] (2) the University's refusal to subsidize *Wide Awake* directly through payment of its printing costs did not inhibit religion;[134] and (3) awarding SAF monies to *Wide Awake* would be viewed as state sponsorship and therefore advancement of Christianity.[135]

In light of the above factors, the Fourth Circuit concluded that "[u]sing public funds to support a publication [*Wide Awake*] so clearly engaged in the propagation of particular religious doctrines would constitute a patent Establishment Clause violation."[136] As such, the court held that the primary effect of SAF funding of *Wide Awake* publication costs would be advancement of religion—forbidden by the second prong of the Lemon Test.[137]

Analysis of the Guidelines in light of the third prong of the Lemon Test proved dispositive for the Fourth Circuit's decision to uphold the constitutionality of the Guidelines in the face of Establishment Clause challenge. Under the third prong, a court assesses "whether the guidelines' prohibition of funding for 'religious activities' fosters an excessive government entanglement with religion.ö[138] The court recognized that Supreme Court precedent has sanctioned awards of direct nonmonetary benefits to religious groups when the government body has created an open fora and when other similarly situated organizations were invited.[139] The court stated, "[d]irect monetary subsidization of religious organizations and projects, however, is a beast of an entirely different color.ö[140]

The court further stated, "[a] proper respect for the Establishment Clause compels the Rector and Visitors to pursue a course of 'neutrality' toward religion. Yet providing SAF monies to defray the publication costs of *Wide Awake* inevitably would advance *Wide Awake's* Christian mission."ö[141] Due to *Wide Awake's* pervasive devotion to the "discussion and advancement of anavowedly Christian theological and personal phi-

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133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.* ("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.ñ) (quoting Justice Powell in Hunt v. McNair, 413 U.S. 734, 743 (1973)).

137 *Id.*

138 *Id.*

139 *Id.* at 286 (citing Widmar v. Vincent, 454 U.Se263 (1981)) (holding that a state university which opens its facilities to registered student groups may not deny equal access to a registered student group requesting access to those facilities for religious worship or discussion).

140 *Id.*

141 *Id.*

losophy," the court found that subsidization of the publication would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values."[142] The court viewed this prospect as impermissible excessive entanglement of the University with religion and thus held that the University had successfully proven the existence of a compelling state interest justifying the promulgation of the Guidelines and consequent exclusion of WAP from SAF funding.[143] The court went on to hold that the Guidelines were narrowly tailored to achieve the compelling state interest.[144]

With respect to Rosenberger's contention that the Guidelines' prohibition against funding of "religious activities" violated the Equal Protection Clause, the court summarily dismissed the claim due to Rosenberger's failure to contest the district court's finding that no evidence existed to indicate that the University's denial of funding was the product of discriminatory intent.[145]

III. THE SUPREME COURT REVERSES THE FOURTH CIRCUIT BUT IGNORES LEMON

A. CERTIORARI GRANTED

The Fourth Circuit's decision essentially pitted the strength of the Free Speech and Press Clause against the strength of the Establishment Clause and "sanctioned a violation of the Free Speech and Press Clause" in order to avoid an Establishment Clause violation.[146] Although the Fourth Circuit justified its decision on the basis of a compelling interest in avoiding an "establishment of religion" violation, the question remained as to whether a state has a similarly strong compelling interest in avoiding a free speech violation.[147] Had the Fourth Circuit considered the compelling interest in avoiding a free speech violation, it would have been caught in a circular analysis of competing compelling interests.[148] Because the Free Speech and Establishment Clauses were enacted simultaneously as part of the First Amendment, it is difficult to believe that the

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142 *Id.*

143 *Id.*

144 *Id.* at 286-87. In order to survive strict scrutiny, the Guidelines had to meet the requirement of narrow tailoring. The court, thus, examined the Guidelines to ensure they were not broader than necessary to avoid an offense under the Establishment Clause. *Id.*

145 *Id.* at 288. The court stated, "[t]o establish an equal protection violation, a plaintiff must show discriminatory intent as well as disparate effect." Rosenberger failed to show discriminatory intent. *Id.*

146 Harvard Law Review Association, *supra* note 89, at 512.

147 Charles Roth, Comment, *Rosenberger v. Rector: The First Amendment Dog Chases Its Tail*, 21 J.C. & U.L. 723, 740 (1995).

148 *Id.*

Framers intended for the clauses to be incompatible. As stated in Petitioner's Brief to the United States Supreme Court, "[i]t would be odd, indeed, if the various clauses of the First Amendment were so inconsistent that enforcement of one required violation of another."[149] Nonetheless, the Fourth Circuit's holding implicitly acknowledged that the Establishment Clause trumps the Free Speech Clause.[150]

In the wake of the Fourth Circuit's decision, the Supreme Court, on October 31, 1994, granted certiorari to decide "[w]hether 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."[151] Unlike the Fourth Circuit, however, the Supreme Court failed to even mention the Lemon test in its analysis.[152] Instead, the Supreme Court, in a 5-4 decision, focused on the "neutrality" of the Guidelines in ultimately reversing the Fourth Circuit and holding that the Establishment Clause would not be offended by funding of WAP through the Student Activity Funds.[153] The *Rosenberger* decision has been heralded by some as a "significant step in the Supreme Court's move away from traditional [separationist] establishment clause jurisprudence and toward a principle of neutrality."[154]

B. ESTABLISHMENT CLAUSE ANALYSIS

As a threshold issue, the Court determined that the University, through application of its Guidelines in denying SAF monies to WAP, violated WAP's right of free speech as guaranteed by the First Amend-

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149 Brief for Petitioners at 24, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329). Petitioners also stated that the Fourth Circuit's decision "puts the Establishment Clause on a collision course with the rest of the First Amendment. It strips religious speakers of the constitutional protection accorded to secular perspectives and points of view. It condones discrimination against - not neutrality toward - religion. . . . This is a highly implausible reading of the First Amendment." *Id.*

150 Roth, *supra* note 147, at 740.

151 Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2521 (1995). This Note focuses primarily on the Establishment Clause aspects of the Supreme Court's analysis. Though it will address the holding of the Court with respect to its analysis under the Free Speech and Press Clause, it will not provide a detailed analysis of the Court's reasoning. For a more detailed discussion regarding the Free Speech aspects of the case, see *id.* at 2516-20.

152 *Lemon v. Kurtzman* is quoted by Justice Souter, but not in relation to the Lemon test. *Rosenberger*, 115 S. Ct. at 2551 (Souter, J., dissenting).

153 *Id.* at 2524. Justice Kennedy authored the majority opinion of the Court. Justices Rehnquist, O'Connor, Scalia, and Thomas joined in the majority opinion. Justices O'Connor and Thomas each filed concurring opinions. Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined.

154 Kevin Foster O'Shea, *Religion in the Schools: A Consensus Emerges*, NAT'L L. J., Nov. 6, 1996, at A19.

ment.[155] The Court identified the University's decision to deny funding to WAP as viewpoint discrimination stating, "[h]aving offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints."[156]

The Court heavily relied on the precedential value of *Lamb's Chapel* in its finding of viewpoint discrimination.[157] *Lamb's Chapel* involved a challenge to a school district policy which allowed use of school facilities after school hours by a wide variety of social, civic, and recreational groups, but which denied use of the same facilities by groups for religious purposes.[158] Specifically, the school district rejected a request from a group seeking to show a religious-oriented film series on family values and child-rearing.[159] The Court held that the denial of access to facilities, solely because the film dealt with the subject from a religious standpoint, violated the Free Speech Clause of the First Amendment.[160] In so doing, the Court stated, "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[161]

The University attempted, unsuccessfully, to distinguish *Lamb's Chapel* as an access to facilities case, not a funding of speech case.[162] They argued that "content-based funding decisions are both inevitable and lawful,"[163] and that "funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not."[164] The Court, finding the University's arguments unavailing, stated, "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity."[165]

Having thus agreed with the Fourth Circuit that WAP's right of free speech had been violated, the Court addressed the respective parties' contentions regarding the question of whether the free speech violation

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155 *Rosenberger*, 115 S. Ct. at 2520.

156 *Id.* at 2517-19.

157 *Id.* at 2517-18.

158 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 387-390 (1993).

159 *Id.* at 389.

160 *Id.* at 394.

161 *Id.*

162 Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2518 (1995); Brief for Respondents at 14, *Rosenberger*, 115 S. Ct. 2510 (No. 94-329) ("*Lamb's Chapel* involved access to facilities, not funding of speech. The difference is crucial.").

163 *Rosenberger*, 115 S. Ct. at 2518.

164 *Id.* at 2519.

165 *Id.* The Court's reasoning hinged on the crucial distinction that when the state is the speaker, it may make content-based choices regarding funding. However, when the message being conveyed is that of a private entity (WAP), the state may not discriminate in funding based on viewpoint. *See id.* at 2518-19.

should be excused by the necessity of complying with the Establishment Clause.[166] Conspicuously absent from the University's brief on the merits, however, was any concerted advocacy regarding the danger of an Establishment Clause violation if the Fourth Circuit's holding were to be overturned.[167] In fact, despite having argued at every stage of litigation, including its opposition to certiorari, that extending SAF funding to *Wide Awake* would violate the Establishment Clause, the University simply abandoned that argument at the Supreme Court level.[168] Instead, the University contended that "'[t]he fundamental objection to petitioners' [Rosenberger's] argument is not that it implicates the Establishment Clause but that it would defeat the ability of public education at all levels to control the use of public funds.'"[169] The Supreme Court, nonetheless, addressed the Establishment Clause issue because the Fourth Circuit rested its judgment on the state's compelling interest in avoiding an Establishment Clause violation and also because the dissenting members of the Court viewed the issue as determinative.[170]

Rosenberger argued for the Court to adopt an "overarching principal of neutrality" in its analysis of a potential Establishment Clause violation.[171] In arguing for greater clarity in the Court's Establishment Clause jurisprudence, Rosenberger stated, "[t]he time has come for this Court to make clear: the Establishment Clause does not require, and must not be used to justify discrimination against any person or group on the basis of the religious character of their speech, ideas, or motivation."[172] In support of this position, Rosenberger cited Justice O'Connor's concurrence in *Board of Education of Kiryas Joel Village School District* which states, "[t]he Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion. . . . The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools."[173]

To provide a framework from which to gauge neutrality, Rosenberger offered:

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166 *Id.* at 2520.

167 *Id.* at 2520-21. *See also* Brief for Respondents at 27 n.17, *Rosenberger*, 115 S. Ct. 2510 (No. 94-329) ("Respondents do not think it necessary to address the hypothetical question whether the Establishment Clause would permit government aid to religion in this context.").

168 *Rosenberger*, 115 S. Ct. at 2520-21; Reply Brief for Petitioners at 1, *Rosenberger*, 115 S. Ct. 2510 (No. 94-329).

169 *Rosenberger*, 115 S. Ct. at 2521 (quoting Brief for Respondents at 29, *Rosenberger*, 115 S. Ct. 2510 (No. 94-329)).

170 *Id.* Justice Souter's dissent is unequivocal in its call for affirmance of the Fourth Circuit's holding. *Id.* at 2533.

171 Oral Argument of Michael W. McConnell on Behalf of the Petitioners at 11-12, *Rosenberger*, 115 S. Ct. 2510 (No. 94-329).

172 Brief for Petitioners at 31, *Rosenberger*, 115 S. Ct. 2510 (No. 94-329).

173 512 U.S. 687, 717 (1994) (O'Connor, J., concurring).

> in determining whether distribution of a benefit is 'neutral' toward religion, the court must examine the range of eligible beneficiaries under the terms of the program. If the benefit 'is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end,' then the program is neutral; but if religious organizations are singled out for special benefits, or the eligibility criteria are 'skewed towards religion' then the program is not neutral.[174]

This "test" of neutrality allows for the allocation of an expansive array of public benefits including the possibility of direct payment to religious organizations or activities[175]—a possibility vehemently contested by the dissenting Supreme Court justices.[176]

Rosenberger's advocacy for adoption of a neutrality principle largely prevailed. As articulated by the Court, "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."[177] The Court recognized that the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[178] Relying on *Lamb's Chapel*,[179] *Widmar v. Vincent*,[180] and *Board of Education of Westside Community Schools (District 66) v. Mergens*,[181] the

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174 Reply Brief for Petitioners at 14-15, *Rosenberger*, 115 S. Ct. 2510 (No. 94-329) (quoting Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14-15 (1989); Witters v. Dep't of Soc. Svcs., 474 U.S. 481, 488 (1986)).

175 *Id.*

> In making this determination [neutrality determination], it doesn't matter what the public benefit in question may be (tax breaks, police and fire service, access to facilities, tuition tax credits, money for vocational education, bus rides, or whatever). All benefits (even meeting rooms) entail some cost to the taxpayer and confer some advantage on the user. Nor does it matter how 'religious' the recipient is, so long as it conforms to the neutral, generally applicable terms of the program.

Id.

176 *Rosenberger*, 115 S. Ct. at 2533 (Souter, J., dissenting) (arguing against direct monetary aid to religion or religious activities).

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

178 *Id. See also* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994); Witters v. Dep't of Soc. Svcs., 474 U.S. 481, 487-88 (1986); Mueller v. Allen, 463 U.S. 388, 398-99 (1983); Widmar v. Vincent, 454 U.S. 263, 274-75 (1981).

179 508 U.S. 384 (1993). For a synopsis of the case and its applicability, see *supra* notes 158-61 and accompanying text.

180 454 U.S. 263 (1981) (holding that a state university may not exclude religious groups from access to generally available facilities for use by registered student groups on the basis of the Establishment Clause).

181 496 U.S. 226 (1990) (holding that a public secondary school may not deny a voluntary student Christian club equal access to school facilities for meetings, and that approval of such access does not violate the Establishment Clause).

Court rejected the proposition that the Establishment Clause "even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.'"[182]

With "neutrality" as its standard by which to assess an Establishment Clause challenge, and not the Lemon test,[183] the Court examined the guidelines to determine whether or not they would meet the test of neutrality. Framing its analysis was the Court's contention that assurance against prohibited governmental actions requires inquiry into the purpose and object of the challenged governmental action, as well as the practical details of the program's operation.[184] The Court first inquired into the University's purpose in establishing its Guidelines for distribution of SAF monies and deemed the program neutral toward religion, finding no reason to believe that the University created the Guidelines to advance religion.[185] Inquiry into the practical details of the operation of the Guidelines also confirmed for the Court that the Guidelines, if used to fund WAP, would still maintain a standard of neutrality.[186] Critical to this assessment was the characterization of WAP, not as a religious organization, although it was involved in religious activities, but as an organization which met the Guidelines' category for "student news, information, opinion, entertainment, or academic communications media groups.'"[187] WAP was one of fifteen such groups, all of diverse editorial viewpoints, eligible for funding in the 1990 school year.[188] Additionally, the Court noted that WAP did not seek funding due to its Christian editorial viewpoint; rather, it sought funding as a student journal.[189]

The Court, further supporting its finding of neutrality of the guidelines, labeled as critical the difference "'between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'"[190] Due to efforts taken by the University to prevent the views of CIOs from being attributed to the University, the Court found "no real likelihood" that the religious speech found in *Wide Awake*

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182 Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2522 (1995).

183 *Id.* at 2521-24. The Court emphasizes the requirement of neutrality of governmental programs when facing an Establishment Clause challenge; the Lemon test is not even mentioned in the Court's analysis. *Id.*

184 *Id.* at 2521.

185 *Id.* at 2522.

186 *Id.* at 2522-25.

187 *Id.* at 2522.

188 *Id.*

189 *Id.*

190 *Id.* at 2522-23 (quoting Board of Educ. of Westside Community Schs. (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990)).

would be considered either endorsed or coerced by the University.[191] The Court did, however, recognize that "special Establishment Clause dangers [exist] where the government makes direct money payments to sectarian institutions."[192] In a somewhat superficial manner, the Court disposed of this concern simply by asserting that "no public funds flow directly to WAP's coffers."[193] That is, payment from the Student Activities Fund was given directly to the CIO's contracted printer, not to the student organization itself.

The Court's analogy of the funding of third-party contractors for printing services to funding of school-owned printing facilities for use by student groups proved more compelling.[194] Under the authority of *Widmar*, *Mergens*, and *Lamb's Chapel*,

> a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral . . . basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall.[195]

As such, the Court found "no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf."[196] Requiring a university to forfeit any economies which might be gained by making use of third-party contractors for printing of student journals and provide printing services itself in order to avoid an Establishment Clause viola-

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191 *Id.* at 2523. *See also* Reply Brief for Petitioners at 2, *Rosenberger*, 115 S. Ct. 2510 (No. 94-329) ("Under the University's own Guidelines and Contract with CIOs, student groups receiving SAF funds are not agents or employees of the University, are not part of the curriculum, are not under the control of the University, and thus plainly fall on the 'private' rather than the 'governmental' side of [the line between government and private speech]."); Brief for Petitioners at 3, *Rosenberger* (No. 94-329) (stating that the University's CIO agreement stipulates that benefits provided to student groups by the University "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.").

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

193 *Id.*

194 *See id.* at 2523-24.

195 *Id.* at 2523.

196 *Id.* at 2524.

tion would amount to mere formalism.[197] Ultimately, the Court determined that if the Establishment Clause were read to require the prohibition of government expenditures whenever those funds "pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled"—a consequence the majority was unwilling to endorse.[198]

To limit the potential breadth of the holding, the Court, in dictum, specified that "if the State pays a church's bills it is subsidizing it," and such an abuse must be guarded against.[199] This potential danger was quickly dismissed with respect to WAP, however, due to WAP's status as a student journal, not a religious institution or religious organization.[200]

The Court concluded its analysis by identifying the potential danger of censorship of student journals with a religious editorial viewpoint if the Establishment Clause were read to require a denial of funding in this case.[201] The majority characterized this "specter of governmental censorship" as imperiling the very sources of free speech and expression at the University.[202] As stated by the Court, "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses."[203] In language reminiscent of analysis under the third prong of the Lemon test—the excessive entanglement prong—the Court stated, "official censorship would be far more inconsistent with the Establishment Clause than would governmental provision of secular printing services on a religion-blind basis. . . . Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases."[204]

The Court's holdings and embracing of the neutrality principle were summed up as follows:

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197 *Id.*

198 *Id.* at 2523.

199 *Id.* at 2524.

200 *Id.*

201 *Id.* ("Were the dissent's view [requiring a denial of funding] to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content.").

202 *Id.*

203 *Id.* at 2520. *See also* Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (characterizing the public university as "peculiarly 'the market place of ideas'") (quoting Healy v. James, 408 U.S. 169, 180 (1972)).

204 *Id.* at 2524.

> To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. [Such] viewpoint discrimination . . .was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.[205]

C. THE EFFECT OF JUSTICE O'CONNOR'S CONCURRING OPINION

Justice O'Connor, although joining the majority opinion written by Justice Kennedy, wrote a concurring opinion that, due to the Court's 5-4 split on this case, effectively limits the precedential value of the case by narrowing the holding to the specific facts presented by *Rosenberger*.[206] She characterized the case as lying "at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities."[207] In discussing the principle of neutrality, she identified it, in both form and effect, as one hallmark of the Establishment Clause.[208] Competing for recognition with the principle of neutrality, she recognized the axiom that "'[p]ublic funds may not be used to endorse the religious message.'"[209]

According to O'Connor, resolution of the conflict of the "two bedrock principles" requires "sifting through the details [of the case] and determining whether the challenged program offends the Establishment Clause."[210] She continued in reasoning that "[t]he nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's [majority's] decision."[211] Rather, fine lines must be drawn based on the specific facts of the case.[212] In attempting to draw those

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205 *Id.* 2524-25.

206 *Contrast* O'Shea, *supra* note 154 (the "Rosenberger decision means that the First Amendment's establishment clause no longer rules out the provision of government benefits to religious groups if the same benefits are provided to secular groups.").

207 Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct., 2510, 2525 (1995) (O'Connor, J., concurring).

208 *Id.*

209 *Id.* (quoting Bowen v. Kendrick, 487 U.S. 589, 642 (1988) (Blackmun, J., dissenting); Bowen v. Kendrick, 487 U.S. at 622 (O'Connor, J., concurring). *See also Rosenberger*, 115 S. Ct. at 2535-37 (Souter, J., dissenting).

210 *Id.* at 2525-26.

211 *Id.* at 2526.

212 *Id.*

lines, Justice O'Connor set forth four conditions specific to the facts of *Rosenberger* which she relied on in her decision to join in the majority opinion. They are as follows: (1) "the student organizations, at the University's insistence, remain strictly independent of the University;"[213] (2) "financial assistance is distributed in a manner that ensures its use only for permissible purposes . . . ensur[ing] that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas;"[214] (3) "assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message;"[215] and (4) the possibility exists that an objecting student could opt out of the requirement to pay the full student activity fee.[216]

Justice O'Connor concluded by cautioning that "[t]he Court's decision . . . neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence."[217]

IV. ESTABLISHMENT CLAUSE JURISPRUDENCE AFTER *ROSENBERGER*

A. COURT'S ENDORSEMENT OF THE NEUTRALITY PRINCIPLE

The *Rosenberger* decision makes clear two points: (1) a majority of the Court supports application of the neutrality principle to Establishment Clause jurisprudence; and (2) the Court, without repudiating the Lemon test, continues to avoid application of the test to Establishment Clause challenges.

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213 *Id.* O'Connor highlighted the importance of the agreement between the University and the CIOs requiring that the student organizations include a disclaimer in all correspondence and publications that clearly specifies that the student organization is independent of the University and that the University is not responsible for the student organization's contracts, acts or omissions. *Id.* at 2527.

214 *Id.* (citing this as a feature which distinguishes the funding program from a block grant to a religious organization).

215 *Id.* (placing reliance on the fact that fifteen other magazines of widely divergent viewpoints are published by student groups (CIOs) at the University).

216 *Id.* at 2527-28.

> [w]hile the Court does not resolve the question here, the existence of such an opt-out possibility not available to citizens generally, provides a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding.

Id. (citations omitted).

217 *Id.* at 2528. Justice O'Connor further cautioned that "[e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test." *Id.* (quoting Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2499 (1994)) (O'Connor, J., concurring in part and concurring in judgment).

Unfortunately, while singing the praises of neutrality in the Establishment Clause arena, the Court has failed to enunciate any consistent test.[218] Thus, the question arises: What exactly is meant by "neutrality" and how is it to be applied in the Establishment Clause context? No uniform answer seems readily apparent, thus, leaving lower courts, legislatures, and public policy officials in the dark once again concerning their ability to properly evaluate contemplated policies that may infringe upon the Establishment Clause.

As a threshold matter, debate exists among commentators and members of the Court concerning the concept of neutrality required by the Establishment Clause.[219] The two central competing viewpoints are as follows: (1) the Establishment Clause prohibits "governmental preferences for some religious faith over others";[220] and (2) the Establishment Clause prohibits "not only government preferences for some religious sects over others, but also government preferences for religion over irreligion."[221]

Justice Thomas supports the former view.[222] Chief Justice Rehnquist likewise supports the former view as evidenced by his dissent in *Wallace v. Jaffree* in which he states:

> [t]he Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. . . . States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion.[223]

Justice Scalia agrees that the Establishment Clause merely prohibits the endorsement of an official state religion and does not subscribe to the

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218 Kagan, *supra* note 3, at 630. *See also* McCoy, *supra* note 19, at 1336 ("Most recently, the Court has consciously avoided articulating any standard or 'test' in finding that a governmental action violates the Establishment Clause."). *See, e.g., Kiryas Joel*, 512 U.S. 687 (1994); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Lee v. Weisman, 505 U.S. 577 (1992).

219 *See Rosenberger*, 115 S. Ct. at 2529-30 (Thomas, J., concurring) (discussing disagreement among legal commentators and citing Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting)).

220 *Rosenberger*, 115 S. Ct. at 2529 (Thomas, J., concurring).

221 *Id.*

222 *Id.*

223 472 U.S. at 113 (Rehnquist, J., dissenting).

view that it forbids governmental preference of religion over irreligion.[224]

The view prohibiting governmental preference of religion over irreligion, however, is the accepted view of the majority of the Court.[225] Essentially, "'[c]ivil power must be exercised in a manner neutral to religion,' neither favoring 'one religion to another (n)or religion over irreligion.'"[226] Civil power may not be used to handicap religion either.[227] As such, hostility to religion is forbidden.[228] The concept of "no hostility to religion" is most clearly exemplified in Establishment Clause challenges in which religious groups are excluded from government benefits programs that are available to a broad class of participants.[229] As stated by Chief Justice Rehnquist, the Court has

> never said that 'religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.' For if the Establishment Clause did bar religious groups from receiving general government benefits, then 'a church could not be protected by the police and fire department, or have its public sidewalk kept in repair.' . . . [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establish-

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224 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397-98 (1993) (Scalia, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting).

225 School Dist. of Abington v. Schempp, 374 U.S. 203, 216 (1963) (stating that the Court has "rejected unequivocally the contention that the Establishment Clause forbids only government preference of one religion over another"). *See also Rosenberger*, 115 S. Ct. at 2537 (Souter, J., dissenting) (stating, in reference to Justice Thomas's advocacy for the view that the Establishment Clause only forbids governmental preference of one religion over religion, "Justice Thomas wishes to wage a battle that was lost long ago, for 'this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another'") (citing School Dist. of Abington v. Schempp, 374 U.S. 203, 216 (1963)).

226 Kagan, *supra* note 3, at 621 (quoting Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994)).

227 Everson v. Board of Educ. of Ewing, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them.").

228 *See Kiryas Joel*, 512 U.S. 687, 717 (1994) ("The Establishment Clause does not demand hostility to religion."); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (specifying that the Constitution forbids hostility toward any religion); Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.").

229 *See, e.g., Lamb's Chapel*, 508 U.S. 384, 395 (1993); Board of Educ. of Westside Community Schs. (Dist. 66) v. Mergens, 496 U.S. 226, 252 (1990); Texas Monthly v. Bullock, 489 U.S. 1, 14-15 (1989); Witters v. Washington Dep't of Soc. Svcs., 474 U.S. 481, 487-88 (1986); Widmar v. Vincent, 454 U.S. 263, 269 (1981).

> ment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.[230]

Analysis of *Rosenberger* establishes that it is insufficient to merely assert that the majority of the Court conclusively adopted a principle of neutrality in Establishment Clause jurisprudence in which the government program or action in question will be upheld provided it meets the test of "no governmental preference of one religion over another or preference of religion over irreligion." Justice O'Connor, whose concurrence was necessary to achieve a majority opinion, effectively narrowed the scope of the holding and the strength of the Court's collective endorsement of neutrality.[231] While arguing against fostering a message of "hostility" toward religion, O'Connor cautioned against the prospect of sending a message of "endorsement" of religion in its decision.[232] She also expressed concern regarding the potential violation of the Establishment Clause's prohibition against direct state funding of religious activities.[233] As previously discussed,[234] she distinguished the circumstances found in *Rosenberger* from a case involving direct state funding or the potential for perception of endorsement of religion.[235] The tenor of her concurrence is unmistakable: Neutrality should inform the Court's Establishment Clause jurisprudence; however, neutrality alone is insufficient to overcome the prohibition against direct funding of religious activities.

The above caveats to the concept of neutrality, as envisioned by Justice O'Connor, leave for resolution the question of what test should lower courts, legislatures, and public policy officials apply to ensure that their "facially neutral" government program will pass Justice O'Connor's scrutiny. An assessment of the reasoning applied by Justice Kennedy in his majority opinion provides instructive guidance. Although Kennedy avoided even the mention of the Lemon test in his analysis of *Rosenberger*, his reasoning can nonetheless be viewed as a "de facto" invocation of the principles animating the Lemon test.[236]

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230 Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (quoting Bowen v. Kendrick, 487 U.S. 589, 609 (1988); Widmar v. Vincent, 454 U.S. 263, 274-75 (1981)).

231 *See Rosenberger*, 115 S. Ct. at 2525-28 (O'Connor, J., concurring). *See also* Kagan, *supra* note 3, at 632-33 (stating that "the vote upon which the Court's Establishment Clause majority rests belongs to Justice O'Connor. . . . [H]ers is the fifth vote needed by Justices Rehnquist, Scalia, Kennedy and Thomas to discard the Lemon test. . . . However, . . n Justice O'Connor has consistently sided with the separationists even as she calls for Lemon's demise.") (footnote omitted).

232 *Rosenberger*, 115 S. Ct. at 2525-27 (O'Connor, J., concurring).

233 *Id.*

234 *See supra* text accompanying notes 210-17.

235 *Rosenberger*, 115 S. Ct. at 2526 ("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.").

236 *See infra* Part IV.B.

B. KENNEDY INVOKES DE FACTO LEMON TEST

In seeking to ensure neutrality toward religion, Justice Kennedy stated, "we [the Court] must in each case inquire first into the *purpose* and *object* of the governmental action in question and then into the *practical details of the program's operation.*"[237] Such an inquiry, although designed to ensure neutrality of the government program, is strongly reminiscent of the analysis mandated by the three prongs of the Lemon test.[238] Inquiry into the "purpose and object of the governmental action in question" is virtually identical to the inquiry conducted under the first prong of the Lemon test, which, likewise, requires an inquiry into the purpose of the governmental action.[239] Whether the inquiry is performed under the title of "first prong of Lemon" or under the guise of a neutrality inquiry, the effect is to ensure that the governmental program was not established to advance religion. The inquiry must yield a secular purpose for the program in question. Kennedy found that the purpose and object of the SAF guidelines passed muster under a neutrality analysis.[240]

Inquiry into the "practical details of the program's operation" invokes both the second prong (the primary effects prong) and the third prong (the excessive entanglement prong) of Lemon. Under this aspect of Kennedy's "neutrality" analysis, Kennedy found that the program, due to its manner of implementation, would neither result in endorsement nor coercion of religion by the University.[241] Had the Court applied the second prong of Lemon, it would have had to determine whether the program would have the primary effect of either advancing or inhibiting religion.[242] Such an inquiry requires that the state's program neither endorse nor coerce religion, for endorsement or coercion would result in the impermissible advancement of religion. To rule out such endorsement or coercion, the "practical details of the program" would require examination—much the same as was required under the neutrality analysis.

Continuing his analysis of the practical details of the program's operation, Kennedy evaluated the "specter of governmental censorship" that would arise if the University were allowed to discriminate against WAP based on the content of *Wide Awake*.[243] Invoking the language of the excessive entanglement prong of Lemon, Kennedy stated, "official censorship would be far more inconsistent with the Establishment

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237 *Rosenberger*, 115 S. Ct. at 2521 (emphasis added).

238 *See supra* Part I (addressing the Lemon test).

239 Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

240 *Id.* at 2522.

241 *Id.* at 2522-23.

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

243 *Rosenberger*, 115 S. Ct. at 2524.

Clause's dictates than would governmental provision of secular printing services on a religion-blind basis. . . . Such inquiries [into the content of publications] would tend inevitably to entangle the State with religion in a manner forbidden by our cases."[244]

When viewed in its entirety, Kennedy's majority opinion effectively incorporates the three prongs of the Lemon test under the rubric of neutrality analysis. Kennedy, like O'Connor, however, appended a caveat to his trumpeting of the neutrality principle by distinguishing the facts of *Rosenberger* from a case involving "direct monetary payment to a sectarian institution."[245]

The above analysis of both the majority opinion and Justice O'Connor's opinion leads to two questions that will be addressed in turn: (1) Why, when the Court has seemingly applied a de facto Lemon test analysis, was the Lemon test so adamantly avoided?; and (2) Can the Lemon test be salvaged, in such a way as to incorporate the concerns articulated in the *Rosenberger* opinion, to provide greater clarity and predictability to future Establishment Clause jurisprudence?

C. THE HEART OF THE COURT'S OPPOSITION TO LEMON

Before delving into any specifics concerning how to modify and salvage the current Lemon test, the underlying premise for the opposition to the test must be understood.[246] Principally, the Lemon test, as currently applied, is seen as hostile to religion[247]—directly counter to the Court's goal of neutrality. "In an effort to avoid entanglement with religion, religious bodies are discriminatorily denied public benefits which would otherwise be available [were it not for analysis under the Lemon test]."[248] Such hostility is patently manifest in the Court's application of the current Lemon test in *Aguilar v. Felton*.[249]

Aguilar involved an Establishment Clause challenge to New York City's use of federal funds under Title I of the Elementary and Secondary Education Act of 1965.[250] Title I authorized the Secretary of Education to provide financial assistance to local educational institutions to meet the needs of educationally deprived children from low-income fami-

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244 *Id.*

245 *See id.* at 2523.

246 *See supra* Part I.B. (providing a critique of the Lemon test).

247 *See e.g.*, CARTER *supra* note 72, at 111-13; Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 717-18 (1994); Aguilar v. Felton, 473 U.S. 402, 421-31 (1985) (O'Connor, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 673 (1984); Zorach v. Clauson, 343 U.S. 306, 314 (1952).

248 Kagan, *supra* note 3, at 643.

249 473 U.S. 402 (1985).

250 *Id.* at 404. Title I was codified at 20 U.S.C. § 2701 (1994). *Aguilar*, 473 U.S. at 406 n.1.

lies.[251] Funding eligibility criteria included (1) the children involved in the educational program must be educationally deprived;[252] (2) "the children must reside in areas comprising a high concentration of low-income families";[253] and (3) "the programs must supplement, not supplant, programs that would exist absent funding under Title I."[254]

Funds for instructional services provided under the Title I program had been used by the City of New York to benefit parochial students on parochial school premises for nineteen years prior to the Establishment Clause challenge.[255] In 1981-1982, only 13.2% of the students eligible to receive funds were enrolled in private schools.[256] To benefit these students, programs were conducted that included remedial reading, remedial mathematics, English as a second language, and guidance services.[257] These programs were conducted by regular employees of public schools who had volunteered to teach in the parochial schools.[258]

In an attempt to avoid Establishment Clause difficulties, the teachers were directed "to avoid involvement with religious activities that are conducted within the private schools and to bar religious materials in their classrooms."[259] Furthermore, all instructional material and equipment funded under Title I was used only in the Title I programs at the schools.[260] Interaction between the public school teachers as volunteers and private school personnel was to be kept to a minimum.[261] And, the parochial school administrators were required to sanitize the classrooms used by the Title I teachers of any religious symbols.[262] Lastly, unannounced supervisory visits were conducted monthly to ensure compliance with the Title I requirements designed to prevent Establishment Clause violations.[263]

The Court applied the Lemon test to New York City's implementation of the Title I program and struck down the program as unconstitutional.[264] The holding principally rested on the Court's analysis under the excessive entanglement prong of Lemon. Specifically, the Court found that "the supervisory system established by the City of New York

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251 *Id.*
252 *Id.* at 405.
253 *Id.* (footnote omitted).
254 *Id.* at 405-06 (footnote omitted).
255 *Id.* at 406.
256 *Id.*
257 *Id.*
258 *Id.*
259 *Id.* at 407.
260 *Id.*
261 *Id.*
262 *Id.*
263 *Id.*
264 *Id.* at 410-14.

inevitably results in the excessive entanglement of church and state."[265] The Court recognized that separation of church and state does not mandate absence of all contact; however, "the detailed monitoring and close administrative contact required to maintain New York City's Title I program" were seen as producing "'a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize.'"[266] Such contact the Court viewed as "permanent and pervasive state presence" in sectarian schools.[267]

The majority decision in *Aguilar* was strongly opposed by Chief Justice Burger and Justices Rehnquist and O'Connor.[268] Chief Justice Burger characterized the tragedy of the Court's decision in stating, "today's decision will deny countless schoolchildren desperately needed remedial teaching services funded under Title I."[269] He laid the blame for the result on "the Court's obsession with the criteria identified in *Lemon v. Kurtzman*."[270] In addressing the supposed neutrality of the Court's decision, he stated:

> The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience, or history. Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.[271]

Justice Rehnquist noted the Catch-22 paradox that the Court had created: in order to avoid entanglement, the aid must be supervised; however, the supervision itself is held to cause entanglement.[272] This Catch-22 prevented the City from meeting "an entirely secular need."[273]

Justice O'Connor was equally pointed in her dissent. She first asserted that the Title I legislation as well as New York City's implementation of the funding available under Title I were solely designed to serve a secular purpose—to provide special educational assistance to disadvantaged children who would not otherwise receive it.[274] She also found the

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265 *Id.* at 409.

266 *Id.* at 414 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

267 *Id.* at 413.

268 *See id.* at 419-31 (Burger, C.J., dissenting, joined by Rehnquist & O'Connor, JJ.).

269 *Id.* at 419.

270 *Id.* (finding that the Court's invocation of the Lemon test "has led to results that are 'contrary to the long-range interests of the country'") (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 400 (1985)).

271 *Id.* at 420.

272 *Id.* at 420-21.

273 *Id.* at 421.

274 *Id.* at 422-23.

contention that religion would be advanced by the New York City program unsupportable by the facts of the case.[275] Providing a historical perspective, she stated, "[i]n 19 years there has never been a single incident in which a Title I instructor 'subtly or overtly' attempted to 'indoctrinate the students in particular religious tenets at public expense.' "[276]

She characterized the majority decision as resting on the theory "that public school teachers who set foot on parochial school premises are likely to bring religion into their classes, and that the supervision necessary to prevent religious teaching would unduly entangle church and state."[277] This theory she viewed as an exaggeration of the degree of supervision necessary to prevent public school teachers from inculcating religion into their classes.[278] Such a theory, she believed, ignored that the public teachers are "professional educators who can and do follow instructions not to inculcate religion in their classes."[279] Accordingly, Justice O'Connor concluded that "an objective observer of the implementation of the Title I program in New York City would hardly view it as endorsing the tenets of the participating parochial schools."[280]

Reflecting her overall dissatisfaction with the third prong of the Lemon test, Justice O'Connor specified that "[p]ervasive institutional involvement of church and state may remain relevant in deciding the effect of a statute which is alleged to violate the Establishment Clause, but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute."[281] Her criticism echoed that of noted commentator Professor Choper who attributes the chaos of Establishment Clause jurisprudence to the entanglement prong.[282]

V. PROPOSAL FOR A MODIFIED LEMON TEST

A. PROPOSED TEST

This Note will now address the question previously posed:[283] "Can the Lemon test be salvaged, in such a way as to incorporate the concerns articulated in the *Rosenberger* opinion, to provide greater clarity and predictability to future Establishment Clause jurisprudence?"

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275 *Id.* at 424.

276 *Id.* (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985)).

277 *Id.* at 421.

278 *Id.* at 425.

279 *Id.*

280 *Id.*

281 *Id.* at 431 (citations omitted).

282 Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681 (1980).

283 *See supra* Part IV.B.

The preceding sections regarding the Court's embracing of the neutrality principle, the Court's application of the neutrality principle in *Rosenberger*, and the concerns presented by dissenting Justices in *Aguilar* provide a backdrop from which to tailor a modified Lemon test. The proposed test is designed to accomplish three goals in keeping with what this Note asserts to be the critical concerns expressed by the majority of the Court: (1) avoid the lock-step formality of the current Lemon test that has resulted in decisions characterized as hostile to religion; (2) incorporate the Court's goal of neutrality between religions and between religion and irreligion; and (3) account for the countervailing consideration of the prohibition of direct funding of religious activities or institutions. To accomplish the above goals, the proposed test recommends a modification of the second and third prongs of Lemon.

The modified test retains the tripartite structure of the current test. The first prong in which the governmental action is assessed to ensure that the program or statute was adopted in light of a secular purpose[284] is not altered in the modified test. The Court has generally defined a nonsecular purpose as one which is designed to either aid or inhibit religion.[285] "[I]t seems clear that, unless a law is proven to be predicated entirely or almost entirely on nonsecular purposes," the program in question passes constitutional muster under first-prong analysis.[286] More simply, if the legislature or governmental body is motivated in its adoption of the statute or program in question by a desire to provide deliberate aid to religion or to deliberately disadvantage religion, then the program is per se unconstitutional.[287]

Upholding the governmental program under first-prong analysis, although necessary, is not a sufficient condition for safeguarding the program in the wake of an Establishment Clause challenge. Despite adoption of the program for an entirely secular purpose, the program in question may still fail to survive Establishment Clause scrutiny due to a violation of either the second or third prong of the Lemon test.

Under the current second prong of Lemon, the primary effect of the governmental program must neither advance nor inhibit religion.[288] The second prong retains vitality within the proposed modified Lemon test; however, the means to properly apply the second prong must be specified

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284 *See* Lemon v. Kurtzman, 403 U.S., 602, 612 (1971).

285 Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 911 (1987) (citing as examples, Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970); School Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963)).

286 *Id.* at 909.

287 *See* McCoy, *supra* note 19, at 1352 (addressing the unconstitutionality of deliberate aid to religion).

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

to eliminate confusion and to guard against hostility to religion. Fashioning the second prong so as to guard against hostility to religion is crucial to ensuring a blending of the Lemon test with the principle of neutrality articulated by the Court in *Rosenberger*.

As evidenced by the Fourth Circuit's application of the second prong in *Rosenberger*, the governmental program will be seen as having the effect of advancing religion if the effect is analyzed from an "as applied" perspective.[289] Focusing exclusively "on the religious component of any activity . . . inevitably lead[s] to its invalidation under the Establishment Clause."[290] The chief problem associated with an "as applied" analysis is that any inadvertent aid to or potential advancement of religion can be characterized as governmental endorsement of religion. Under the current second prong, such endorsement is forbidden as a favoring of religion over irreligion.[291]

Under the proposed second prong, the effects of the program in question should be based on an assessment of the program as a whole, not from an "as applied" perspective wherein the effects of the challenged program are viewed very narrowly.[292] Thus, a governmental program, adopted for a legitimate secular purpose, that incidentally benefits religion, should not automatically be struck down for violation of the second prong of Lemon. Rather, when the program is designed to benefit a broad class of participants,[293] some of which may include religious

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289 Rosenberger v. Rectors & Visitors of Univ. of Va., 18 F.3d 269 (4th Cir. 1994). The Fourth Circuit chose to look at the effects of funding of *Wide Awake* in isolation. Viewed in isolation, funding of *Wide Awake* will certainly be seen as an advancement of religion. Viewed with respect to the wide variety of organizations that receive SAF funding, the decision to fund would be seen as a neutral decision. *Id. See also* Kagan, *supra* note 3, at 645 (specifying that an "as applied" analysis under the second prong leads to the unwarranted conclusion of advancement of religion).

290 Lynch v. Donnelly, 465 U.S. 668, 680 (1984).

291 *See id.* at 688 (O'Connor, J., concurring) (specifying that to determine whether a statute advances or inhibits religion, the Court must ask whether the action has the effect of endorsing religion). According to Justice O'Connor, an endorsement of religion sends a "message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, and favored members of the political community." *Id.*

292 *See* Brief for Petitioners at 42, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (No. 94-329) ("Rather than examine whether a general program has 'the practical effect of aiding religion in this particular case,' the court must look to the nature and consequences of the program viewed as a whole.'") (quoting Witters v. Washington Dep't of Soc. Svcs., 474 U.S. 481, 492 (1986)) (Powell, J., concurring).

293 *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (requiring school district to provide an interpreter for a deaf student attending Catholic high school and stating, "[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' . . . that service does not offend the Establishment Clause") (quoting *Witters*, 474 U.S. at 488); Texas Monthly v. Bullock, 489 U.S. 1, 14-15 (1989) ("In so far as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular

organizations or activities, the program will be upheld under the modified second prong. Analysis of the program in light of the extent of the participant class incorporates the Court's articulated desire to ensure neutrality of government programs and avoid hostility to religion. Accordingly, the second prong should read as follows: *The primary effect of the statute or governmental program must neither aid nor inhibit religion. The effects analysis is to be conducted from the vantage point of the effects as a whole, not the effects as applied uniquely to a particular situation. Where the beneficiaries of the program encompass a broad class of participants, the effects prong will not be violated by unintended benefit*[294] *to a religious organization or activity.*

Upholding the principle of neutrality through validation of a program that benefits a broad class of participants alleviates endorsement concerns; however, it does not necessarily eliminate potential entanglement concerns. Under the third prong of Lemon, excessive entanglement between religion and government is forbidden.[295] Specifically, a governmental program which requires "continued governmental supervision to ensure that religion is not advanced . . . constitutes excessive entanglement."[296]

Entanglement concerns are most acutely present when the government-sponsored aid is in the form of direct monetary aid to sectarian organizations. Direct funding, by its very nature, is capable of being channeled to a variety of uses, some of which may impermissibly advance religion and thereby indicate government endorsement of religion. In such instances, monitoring of the use of the aid is designed to ensure compliance with the secular purpose of the government program.[297] Unfortunately, as discussed by Justice Rehnquist in *Aguilar*, such monitor-

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end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause."). *See also Rosenberger*, 115 S. Ct. at 2532 (Thomas, J., concurring) ("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." (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)); Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990); Witters v. Washington Dep't of Soc. Svcs., 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983)); Bila, *supra* note 5, at 1575 ("A statute that is generally applicable to a broad class would remain constitutional even if religion also benefits. . *e.* A statute, however, that solely benefits religion would be unconstitutional.").

294 Professor McCoy of Vanderbilt University Law School stated, "[i]n our modern welfare state characterized by government provided health care, education, job training, transportation, and minimum family incomes, inadvertent assistance to religious institutions or individuals engaged in religiously motivated conduct is inevitable." McCoy, *supra* note 19, at 1342.

295 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

296 Bila, *supra* note 5, at 1576.

297 *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 408-14 (1985).

ing is itself violative of the excessive entanglement prong, regardless of the salutary purpose of the governmental program.[298]

To avoid this Catch-22 scenario—whereby the governmental program will only survive Establishment Clause scrutiny if use of aid under the program is monitored for compliance with the intended purpose of the program, although such monitoring is itself violative of the Establishment Clause—the entanglement prong must be modified. First, the principle of neutrality that has been built into the second prong of the modified test must be safeguarded. As such, the third prong should only be invoked when a monitoring requirement exists, and monitoring for compliance should be limited to situations involving direct monetary aid.

In the absence of direct monetary aid, scrutiny of the governmental program under the first two prongs of the modified Lemon test is sufficient to ensure that (1) the program was adopted for a secular legislative purpose, and (2) the program is applied in an effects-neutral manner—neither advancing nor inhibiting religion. The critical inquiry, for assessment of a program that does not involve direct monetary aid to a religious organization, is determination of the class of participants who are potential recipients of the aid scheme. When a broad class of participants enjoys the benefits of the program in question, the potential for the governmental program to be seen as an endorsement of one religion over another or of religion over irreligion is negated. However, in a case involving direct monetary aid, the aid, even if distributed to a broad class of participants, is subject to potential misuse by the religious participants.[299] Such a misuse of funds could be viewed as endorsement of a religion and, therefore, requires monitoring of the use of the funds as well as inquiry to determine whether the monitoring by the government results in excessive entanglement between government and religion.

To ensure that the Court's concerns regarding such blatant hostility to religion are accounted for while simultaneously ensuring that the principle of no direct monetary funding of religious institutions is not com-

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298 *See id.* at 420-21e

299 Justice Thomas argued that the form of aid, direct monetary subsidy or in-kind subsidy, should not affect the assessment of the governmental program subject to Establishment Clause challenge. He stated, "[t]he constitutional demands of the Establishment Clause may be judged against either a baseline of 'neutrality' or a baseline of 'no aid to religion,' but the appropriate baseline surely cannot depend on the fortuitous circumstances surrounding the form of aid." *Rosenberger*, 115 S. Ct. at 2532-33 (Thomas, J., concurring). As discussed in Part III of this Note, however, both the majority and Justice O'Connor were careful to distinguish the Rosenberger facts from a case of direct monetary aid to a religious organization. *See supra* Part III. Petitioners in *Rosenberger* also argued in favor of elimination of the entanglement prong in stating, "for agencies of the government to extend benefits neutrally to all, without regard to religion, eliminates any need for the 'entanglement' that can arise when government scrutinizes student conduct and attempts to determine which activities are 'religious.'" Brief for Petitioners at 38, *Rosenberger*, 115 S. Ct. 2510 (No. 94-329). Petitioners' argument, however, ignored the principle of no direct monetary aid to religious organizations.

pletely abolished, a balancing test is required within the entanglement prong.[300] Initially, an inquiry should be conducted to determine if an alternative aid scheme exists that meets the secular purpose of the governmental program without requiring monitoring for compliance.[301] If such an alternative exists, then the current program must be struck down due to excessive entanglement concerns.[302]

Unfortunately, a viable alternative that satisfies both the secular purpose and the need to avoid excessive entanglement through monitoring may not be available. In such circumstances, the importance of the secular purpose of the program must be balanced against an evaluation of the degree of risk[303] that the direct monetary aid poses to impermissibly advancing religion. Such a balancing will require line drawing on a case-by-case basis—a function well suited to the Court.[304] This balancing allows the Court to guard against excessive entanglement while simultaneously guarding against lock-step formalism which results in hostility to religion. When the secular purpose is deemed to be of sufficient import to outweigh a slight chance of misuse of aid, the requirement for monitoring can be foregone to enable the principle of neutrality to prevail. Conversely, when the prospect of misuse of aid is high, the requirement for monitoring would be deemed sufficiently important to require guarding against the endorsement of religion, thereby, outweighing the secular purpose.

In summary, the proposed modified Lemon test is as follows:

1. Assess the governmental program in question to ensure that it was adopted consistent with a secular legislative purpose.

2. Assess the primary effect of the governmental program to ensure that it neither aids nor inhibits religion. The effects analysis is to be conducted from the vantage point of the effects as a whole, not the effects as applied uniquely to a particular situation. Where the beneficiaries of the program encompass a broad class of participants, the

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300 Professor McCoy proposed a balancing test for use in all Establishment Clause challenges involving unintended aid or apparent endorsement of religion to determine if the unintended effect is too much to be permitted under the Establishment Clause. *See* McCoy, *supra* note 19, at 1374-76. The balancing test this Note proposes is limited to situations involving monitoring requirements due to direct monetary funding of a religious organization.

301 *Id.* at 1375.

302 *Id.* at 1375-76.

303 *Walz v. Tax Comm'n.*, in speaking of the entanglements prong, states, "[t]he test is inescapably one of degree. . . . the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." 397 U.S. 664, 674-75 (1970).

304 *See* Lee v. Weisman, 505 U.S. 577, 598 (1992) ("Our jurisprudence in this area is of necessity one of line drawing."). *See also* Irwin v. Gavit, 268 U.S. 161, 168 (1925) (Justice Holmes stated, "[n]either are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law.").

effects prong will not be violated by unintended benefit to a religious organization or activity.

3. Assess the risk of excessive entanglement of government and religion if, and only if, the governmental program involves direct monetary aid to religious organizations or activities requiring monitoring to guard against misuse of funds.

a. Determine if an alternative scheme exists that would enable accomplishment of the secular purpose motivating the program while eliminating the need for monitoring the use of the aid.

b. If no such alternative exists, then balance the importance of the secular purpose with the degree of risk that direct aid poses to impermissibly advancing religion.

B. APPLICATION OF THE MODIFIED LEMON TEST

To test the efficacy of the proposed Lemon test, this Note will apply the test to *Rosenberger*. The modified test will also be applied to *Aguilar* because of the criticism this case received due to the Court's use of the current Lemon test. Lastly, the modified test will be applied to the facts of *Zobrest v. Catalina Foothills School District* due to the Court's complete avoidance of Lemon in deciding that case.

1. *Application of Modified Lemon to* Rosenberger

In analyzing the University of Virginia's Guidelines regarding SAF funding of student organizations under the modified Lemon test, the first step is to determine whether or not the funding guidelines were adopted consistent with a secular purpose. Both the Fourth Circuit and the Supreme Court found that the secular purpose requirement was satisfied.[305] Because the first prong of the modified test is identical to the current first prong of Lemon, the University Guidelines, likewise, survive modified first-prong analysis.

Under the second prong of the modified Lemon test, the funding guidelines must be examined to ensure that their primary effect is to neither aid nor inhibit religion. The Fourth Circuit, in its analysis, chose to address the issue from the perspective of: If the funding guidelines were to allow funding of *Wide Awake*, would the effect be to aid religion?[306] The Fourth Circuit concluded that such funding would be "state

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[305] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 283-84 (4th Cir. 1994) ("It is clear from the SAF's statement of purpose that the funding guidelines were motivated primarily, if not entirely, by a legitimate secular purpose—the advancement of the University of Virginia's educational mission."); Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2522 (1995) ("There is no suggestion that the University created [the funding guidelines] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause.").

[306] *Rosenberger*, 18 F.3d at 285.

sponsorship—and therefore advancement—of religious belief.ö[307] Unfortunately, the Fourth Circuit's analysis of the funding of *Wide Awake* in isolation from analysis of the effects of the funding program viewed in its entirety within the University of Virginia provides a distorted conclusion regarding the effects of the funding. Undoubtedly, aid provided to a student group that publishes a religiously oriented journal will be perceived as aiding religious belief, if scrutiny of the effects of the funding is limited to scrutiny of the one publication. However, the modified second prong of Lemon requires that the effects analysis "be conducted from the vantage point of the effects as a whole, not the effects as applied uniquely to a particular situation. [And] [w]here the beneficiaries of the program encompass a broad class of participants, the effects prong will not be violated by unintended benefit to a religious organization or activity."[308]

The University Guidelines afforded funding to a broad class of participants.[309] Such funding of a broad class insulates the governmental program from objective perceptions of governmental endorsement of religion. An informed observer who recognized the purpose behind the adoption of the funding guidelines—to further the educational mission of the University—and who viewed the diversity of the publications being supported by SAF funding would be unable to logically conclude that the University was endorsing a particular religion.[310] Thus, funding of *Wide Awake* by SAF funds does not violate the modified second prong of Lemon. Rather, it preserves the principle of neutrality by avoiding a ban on funding a religious activity that, in the wake of the availability of funding for anti-religious and secular journals, would send a message of hostility to religion.

Under the modified third prong of Lemon, the excessive entanglement inquiry need only be pursued if the aid being provided to a religious activity or institution involves direct monetary aid that could be impermissibly used. Here, the aid is provided directly to a third-party contractor for printing expenses. This funding scheme effectively pre-

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307 *Id.*

308 *See supra* Part V.A.

309 *See* Brief for Petitioners at 4-5, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (No. 94-329) (specifying that 118 student organizations received funding during the 1990-91 academic year; of these 118 organizations, 15 publications, "representing a wide range of differing perspectives on issues of concern to the student body, received funding"; further specifying, "[t]he record shows that the University funds student organizations that express a variety of ideological viewpoints, including but not limited to viewpoints which are inconsistent with or antagonistic to various religious beliefs.").

310 *See Rosenberger*, 115 S. Ct. at 2527 (O'Connor, J., concurring) ("Given this wide array of non-religious, anti-religious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical.").

vents WAP from using the aid for an impermissible purpose. Thus, the funding guidelines survive third-prong scrutiny as well. As such, under the modified Lemon test, funding of WAP through SAF funds would not violate the Establishment Clause because: (1) the funding guidelines were adopted consistent with a secular purpose; (2) the primary effect of the funding, in light of the broad class of participants receiving funding, neither aids nor inhibits religion; and (3) an excessive entanglement inquiry is unnecessary due to the absence of direct monetary aid to a religious organization or activity.

To further demonstrate the efficacy of the modified Lemon test, the facts of *Rosenberger* will be altered slightly. Specifically, the funding guidelines, rather than providing direct payment for printing expenses to the third-party contractor, will be altered so as to provide direct payment to the student organization for use in covering printing costs. Under this fact modification, the first-prong and second-prong inquiries remain the same. However, the third-prong inquiry changes because now there is an issue of direct monetary aid which must be addressed.

Such direct monetary aid would require University monitoring of the use of the aid to ensure that the funds provided are used in a manner consistent with the secular purpose. This very monitoring, however, implicates the problem of excessive entanglement of government and religion. Under the modified third prong of Lemon, the first step requires that the Court consider whether any alternative schemes exist that would facilitate accomplishment of the secular purpose and eliminate the monitoring requirement. Obviously such a solution exists—that being the actual procedure of direct payment to the printer as third-party contractor as opposed to direct payment into the "coffers" of WAP. Thus, the Court would be required to strike down direct funding of WAP as a violation of the Establishment Clause under the excessive entanglement prong of modified Lemon.

2. *Application of Modified Lemon to* Aguilar

As previously discussed,[311] the Court's decision in *Aguilar*, striking down New York City's use of federal funds to provide remedial instruction to students of both sectarian and nonsectarian schools, provides an example of how application of the current Lemon test results in a violation of the neutrality principle, now embraced by the Court. Analysis of *Aguilar* under the modified Lemon test, however, would result in upholding New York City's use of the Title I funds.

Under the first prong of the modified test, the program being challenged would meet the requirement of having been enacted pursuant to a

311 *See supra* Part IV.C.

secular purpose—that purpose being to "distribute financial assistance to local educational institutions to meet the needs of educationally deprived children from low-income families."[312] Analysis of the program under the second prong of the modified test, likewise, leads to upholding the program in the face of Establishment Clause challenge. "Of [the] students eligible to receive funds in 1981-1982, 13.2% were enrolled in private schools. Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn and 8% were enrolled in Hebrew day schools."[313] Clearly, with only 13.2% of the eligibility pool for funding consisting of private schools, there exists a broad class of participants in the Title I program. As stated in the second prong of the modified test, "[w]here the beneficiaries of the program encompass a broad class of participants, the effects prong will not be violated by unintended benefit to a religious organization or activity."[314]

Because the aid is in the form of direct monetary aid, the excessive entanglement prong of the modified Lemon test must be considered. The Court "relie[d] entirely on the [current] entanglement prong of Lemon to invalidate the New York City Title I program."[315] Specifically, the Court cited the supervisory system, established by the City to guard against inculcation of religion by the public school teachers in their classes, as resulting in the excessive entanglement of church and state.[316]

Under the modified excessive entanglement prong, the first step requires examination of alternate means that would accomplish the secular purpose—here, providing disadvantaged children remedial instruction—while simultaneously eliminating the need for State monitoring of the use of the aid provided. A possible alternate scheme that would not require monitoring to avoid entanglement of church and state due to religious inculcation by the public school teachers in the parochial school classroom would be to offer the remedial instruction to parochial students, but provide the instruction in public school facilities. Unfortunately, the record in *Aguilar*

> demonstrates that New York City public school teachers offer Title I classes on the premises of parochial schools solely because alternative means to reach the disadvantaged parochial school students—such as instruction for

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312 Aguilar v. Felton, 473 U.S. 402, 404 (1985). *See also id.* at 423 (O'Connor, J., dissenting) ("Whether one looks to the face of the statute or to its implementation, the Title I program is undeniably animated by a legitimate secular purpose.").

313 *Id.* at 406.

314 *See supra* Part V.A.

315 *Aguilar*, 473 U.S. at 426 (O'Connor, J., dissenting).

316 *Id.* at 409.

> parochial school students at the nearest public school, either after or during regular school hours—were unsuccessful.[317]

Having no alternative scheme available, the next step within the modified entanglement prong inquiry is to "balance the importance of the secular purpose with the degree of risk that direct aid poses to impermissibly advancing religion."[318] The importance of the secular purpose in *Aguilar* is unquestioned. For nineteen years the Title I program helped impoverished schoolchildren "overcome learning deficits, improv[e] their test scores, and receiv[e] a significant boost in their struggle to obtain a thorough education and the opportunities that flow from it."[319] To be balanced against this benefit to schoolchildren, particularly, and to society, in general, is the degree of risk posed by allowing public school teachers to teach secular subjects in parochial school classrooms. Affording great substance to this risk is difficult to justify given the nineteen year history of the program in which there "ha[d] never been a single incident in which a Title I instructor 'subtly or overtly' attempted to 'indoctrinate the students in particular religious tenets at public expense."[320] Thus, the theory that public school teachers, as professionals, "(most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school" is untenable.[321] At most, the risk is minimal. Accordingly, the balancing of the importance of the secular purpose against the risk imposed by the program in the absence of monitoring to guard against excessive entanglement concerns results in the purpose trumping the risk of the aid being used to impermissibly advance religion.

Thus, application of the modified test reveals the following: (1) the Title I program was enacted consistent with a secular purpose; (2) New York City's plan for the use of the Title I funding makes the funds available to a broad class of participants on a religion neutral basis and, as such, has neither the primary effect of advancing nor inhibiting religion; and (3) the importance of the program to enhancing the educational opportunities for disadvantaged children outweighs the potential risk of an excessive entanglement of church and state resulting from the placement of public school teachers in parochial classrooms to provide remedial instruction in secular subjects.

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317 *Id.* at 423 (O'Connor, J., dissenting).

318 *See supra* Part V.A.

319 *Aguilar*, 473 U.S. at 425 (O'Connor, J., dissenting).

320 *Id.* at 424 (O'Connor, J., dissenting).

321 *Id.* at 431 (O'Connor, J., dissenting).

As such, New York City's use of Title I funds, under a modified Lemon analysis, would be upheld as constitutional in the face of an Establishment Clause challenge. This result comports with the principle of neutrality, yet does not ignore the dangers of direct funding of religious organizations or activities.

3. *Application of Modified Lemon to Zobrest*

Subsequent to *Aguilar*, the Court displayed a greater reluctance to invoke the Lemon test in its analysis of Establishment Clause issues.[322] To further demonstrate the efficacy of the modified Lemon test, the test will be applied to the facts of *Zobrest*.

Zobrest v. Catalina Foothills School District involved a suit by a deaf child and his parents to compel a school district to provide the child with a sign-language interpreter to accompany him to classes at a Roman Catholic high school.[323] Zobrest claimed that the Individuals with Disabilities Education Act (IDEA)[324] required the school district to provide such an interpreter.[325] Up to the time of the request for an interpreter to accompany him to high school, the deaf child had benefitted from the services of an interpreter in public school.[326] Following a decision by the Arizona Attorney General stating, "providing an interpreter on the [sectarian] school's premises would violate the United States Constitution," the district court granted summary judgment in favor of the school district on the ground that "the interpreter would act as a conduit for the religious inculcation of James [the deaf child]—thereby, promoting James' religious development at government expense."[327] The Ninth Circuit Court of Appeals, applying the current Lemon test, affirmed the district court's decision.[328] In so doing, the Ninth Circuit found that the IDEA has a clear secular purpose: "to assist States and Localities to provide for the education of all handicapped children."[329] Within its second-prong analysis, however, the Ninth Circuit determined that provision of an interpreter in a sectarian school, under the authority of the IDEA, "would have the primary effect of advancing religion and would thus run afoul of the Establishment Clause."[330] The court was concerned about

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322 *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995); Board of Educ. of Kiryas Joel Village Sch. Dist., 512 U.S. 687 (1994); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

323 *Zobrest*, 509 U.S. at 4.

324 20 U.S.C. §§ 1400-1491 (1994).

325 *Zobrest*, 509 U.S. at 4.

326 *Id.* The child had attended a school for the deaf from grades one through five and public school from grades six through eight. *Id.*

327 *Id.* at 4-5 (internal quotation marks omitted).

328 *Id.* at 5.

329 *Id.* (quoting 20 U.S.C. § 1400(c) (1994)).

330 *Id.*

the perception of endorsement or "joint sponsorship" of the sectarian school's activities.[331]

The Supreme Court, without invoking the Lemon test nor even mentioning the test, reversed the Ninth Circuit's decision.[332] In its reasoning, the Court stated, "[t]he service at issue . . . is part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends."[333] The Court also stressed that the government-paid interpreter would only be present in a sectarian school due to the private decision of the child's parents.[334] In continuing with the theme of neutrality as a guide, the Court stated, "[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' it follows . . . that provision of that service does not offend the Establishment Clause."[335] Ultimately, the Court concluded:

> The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education.[336]

Zobrest provides a case example wherein the Court clearly and purposefully avoided discussion of the Lemon test; however, the case can be easily decided, consistent with the Court's views on neutrality, through application of the modified Lemon test. The secular purpose of the IDEA has already been established.[337] Under modified second-prong analysis, the provision of a sign-language interpreter would not offend the Establishment Clause due to the availability of the service to a broad class of participants. The primary effect of the IDEA, if allowed to provide funding for interpreters to benefit students attending sectarian school, cannot logically be seen as advancing or promoting religion in light of the general availability of the benefit to sectarian and nonsectarian recipients, as well as availability to all sects. In denying the services to students attending sectarian schools, however, a message of

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331 *Id.*

332 *Id.* at 6.

333 *Id.* at 10.

334 *Id.*

335 *Id.* (quoting Witters v. Washington Dep't of Soc. Svcs., 474

336 *Id.* at 13-14.

337 *See supra* note 329 and accompanying text.

hostility, rather than neutrality, is sent regarding religion. Accordingly, the program at issue would pass muster under the modified second-prong.

Turning to the third prong, the inquiry is not required because direct monetary aid is not being provided to the sectarian institution. Rather, aid is being provided to the parents of the deaf student. "[U]nder the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers."[338]

C. EFFICACY OF THE MODIFIED LEMON TEST

Application of the proposed modified Lemon test to not only *Rosenberger* and a factually modified *Rosenberger* hypothetical, but also to *Aguilar* and *Zobrest* evidences the efficacy of the test for future Establishment Clause jurisprudence. The modified test effectively incorporates the Supreme Court's goal of neutrality between religions and between religion and irreligion. It simultaneously provides a principled methodology for considering the potential endorsement and entanglement concerns inherent in governmental schemes that result in direct monetary aid to religious organizations or activities. The balancing of interests that must be conducted under the third prong of the modified test if an alternative aid scheme is unavailable will enable the courts to properly safeguard the principle of neutrality and avoid the lock-step formalism that can result in hostility to religion. In so doing, however, the courts retain the discretion to strike down direct monetary aid schemes that result in excessive governmental entanglement that is not outweighed by the secular purpose of the governmental program at issue. The greatest benefit that adoption of the proposed test would provide, however, is provision of a methodology of analysis in Establishment Clause cases that can not only be applied by courts, but also by legislatures and public policy officials contemplating promulgation of a policy that may be subject to Establishment Clause challenge.

CONCLUSION

Rosenberger v. Rector & Visitors of the University of Virginia provided the Supreme Court with an opportunity to clarify its Establishment Clause jurisprudence through a refinement of the Lemon test. The Court chose to ignore Lemon in its decision and thus lost a valuable opportunity. As a result, lower courts, legislatures, and public policy officials continue to be left with inadequate guidance regarding Establishment Clause issues.

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338 *Zobrest*, 509 U.S. at 10.

Analysis of Justice Kennedy's majority opinion, coupled with the effect of Justice O'Connor's concurring opinion, however, enables development of a modified Lemon test that not only embraces the Court's articulated desire to ensure neutrality between religions and between religion and irreligion, but also addresses the Court's concerns regarding direct funding of religious activities and organizations. This Note presents such a modified test. Adoption of the proposed test will benefit lower courts that continue to struggle with application of the current Lemon test and the lack of clear direction provided by the Supreme Court in the Establishment Clause arena. The modified test will prove equally instrumental in enabling legislatures and public policy officials to properly craft governmental programs and aid schemes that will survive Establishment Clause challenge.

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† Robert L. Kilroy is a 1997 graduate of the Cornell Law School. I owe a debt of gratitude to Marianne Perciaccante, Elisabeth Schreuer, and Conrad Wolan for their assistance in editing this Note. Most importantly, I want to thank my wife, Deb, and my daughter, Shauna, for their support during my writing of this Note.