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Taking It Out of Neutral: The Application of Locke's Substantial Interest Test to the School Voucher Debate

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I. Introduction

> *That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?*[1]

So wrote James Madison in his *Memorial and Remonstrance Against Religious Assessments*, in opposition to a tax used to pay Christian teachers.[2] The Supreme Court has looked to the works of both Madison and Thomas Jefferson for guidance on interpreting the Establishment Clause.[3] Relying on those works, the Court wrote that "[t]he First Amendment has erected a wall between church and state. . . . [That] must be kept high and impregnable."[4] So it is surprising that in the same case in which it articulated a policy of strict separation, the Court found that a state could reimburse parents of parochial school students for the cost of transportation.[5]

Throughout the past half-century, changes in thought about separation of church and state have evolved via debate regarding religion and state-funded education.[6] During that time, the Supreme Court heard numerous Establishment Clause challenges to government programs allowing recipients to direct educational materials or aid to religious schools.[7] Believing that the

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1. James Madison, *Memorial and Remonstrance Against Religious Assessments (1785)*, *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, app. 65–66 (1947) (Rutledge, J., dissenting).

2. *See* Everson v. Bd. of Educ., 330 U.S. 1, 11–12 (1947) (discussing Madison's opposition to the proposed law).

3. *See id.* at 13 (addressing the roles that Madison and Jefferson had in crafting the First Amendment).

4. *Id.* at 18.

5. *See id.* (stating that the challenged program did not violate the First Amendment).

6. *See* Klint Alexander, *The Road to Vouchers: The Supreme Court's Compliance and the Crumbling of the Wall of Separation Between Church and State in American Education*, 92 KY. L.J. 439, 447 (2004) (discussing the development of the "modern era of Establishment Clause doctrine" and its focus on public education).

7. *See id.* at 447–61 (discussing the history of the Supreme Court's Establishment Clause jurisprudence in the area of education).

Establishment Clause no longer poses a serious obstacle to state aid to religious schools,[8] some proponents of school choice programs argue that excluding religious schools from government aid programs violates the Free Exercise Clause.[9] Proponents also argue that some state provisions requiring the exclusion of religious schools from government aid programs are tainted with anti-Catholic animus and may violate the First Amendment.[10]

Recent Free Exercise decisions, which emphasized the idea of neutrality towards religion,[11] supported the argument that state restrictions on sectarian educational funding violate the Free Exercise Clause.[12] School choice proponents hoped the Supreme Court would extend the neutrality principle into the school funding context and disallow programs that excluded religious schools.[13] The Supreme Court, however, delivered a serious blow to their arguments in *Locke v. Davey*.[14] The decision addressed the application of the Free Exercise Clause to a postsecondary scholarship program[15] and may foreshadow how the Court would decide a Free Exercise challenge to a school aid program that excludes religious schools.[16]

Although the implications of *Locke* for the school aid debate are not obvious,[17] the Court's decision indicates that it will allow the states room within the Religion Clauses to structure school aid programs.[18] The Court,

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8. *See infra* Part II.B (discussing Establishment Clause cases).

9. *See, e.g.*, Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 170–71 (2003) (arguing that denying benefits such as school vouchers to those who engage in religious activities might violate the Free Exercise Clause).

10. *See, e.g.*, Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry By Opponents of School Choice*, 59 N.Y.U. ANN. SURV. AM. L. 413, 414 (2003) (arguing that state constitutional provisions known as "Blaine amendments" were adopted as a result of anti-Catholic animus and that some interpretations of these amendments violate the First Amendment).

11. *See infra* Part II.C (discussing recent Free Exercise cases).

12. *See* Ira C. Lupu & Robert W. Tuttle, *Hitting the Wall*, LEGAL TIMES, Mar. 15, 2004, at 68 (noting that recent decisions requiring neutral treatment of religion in the provision of benefits supported such an argument).

13. *See id.* (stating that those who hoped the Court would invalidate all such state restrictions rested their hope on an extension of the neutrality principle).

14. *See infra* Part III.A (discussing the *Locke* decision).

15. *See* Locke v. Davey, 540 U.S. 712, 715–17 (2004) (describing the Promise Scholarship Program at issue).

16. *See* Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 187 (2004) (noting that "decisions applying [*Locke*] have extended it to elementary and secondary education").

17. *See infra* Part III.B (discussing *Locke*'s impact on school aid challenges).

18. *See Locke*, 540 U.S. at 719 (discussing the "play in the joints" between the two

without addressing the neutrality principle, concluded that the Promise Scholarship Program made a distinction that the federal Constitution allows.[19] Thus, the decision indicates that the Free Exercise Clause does not require absolutely neutral funding of similar religious and secular pursuits. The state of Washington could constitutionally condition a scholarship on the recipient's willingness to forgo a degree in devotional theology.[20] The decision's reasoning will allow the Court to reject an unconstitutional condition analysis for state school funding programs that devote all of their resources to secular schools.[21] Thus, the exclusion of religious schools from school aid programs does not by itself violate the Free Exercise Clause.[22]

This Note both applies the Court's reasoning in *Locke* in the school aid context and addresses whether *Locke*'s analysis is appropriate. Part II provides background material on the school voucher debate, recent Establishment Clause cases involving government aid to religious schools, and Free Exercise jurisprudence.[23] Part III analyzes the *Locke* decision and concludes that, after *Locke*, the Court is unlikely to invalidate a school aid program that excludes religious schools.[24] Part V addresses the appropriateness of extending *Locke*'s analysis to school aid cases and concludes that extending the analysis is appropriate.[25] As will be discussed, the neutrality principle does not work in the school funding context because it is impossible to arrive at a demonstrably neutral solution to the funding debate and neutrality would not serve the purposes of the Free Exercise Clause.[26] Thus, *Locke*'s analysis, rather than neutrality, is an appropriate governing principle.[27] Part V concludes that the

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Religion Clauses, which recognizes that some state actions are permitted by the Establishment Clause but not required by the Free Exercise Clause).

19. *See id.* at 721 (stating that devotional theology degrees are fungible from other degrees and that treating them differently did not indicate "hostility toward religion").

20. *See id.* at 725 (upholding the Promise Scholarship Program).

21. *See infra* Part IV (discussing the Court's invocation of conditional funding language in *Locke* and important conditional funding cases).

22. *See infra* Part V.D (arguing that, absent indications of animus, the Free Exercise Clause allows a state to exclude sectarian schools from school aid programs).

23. *See infra* Part II (discussing the school voucher debate, Establishment Clause cases, and Free Exercise Clause cases).

24. *See infra* Part III.B (discussing the potential outcome of a school aid case after *Locke*).

25. *See infra* Part V (discussing why *Locke*'s reasoning applies in the school aid context).

26. *See infra* Part V.C (addressing the problems with a neutrality approach to Free Exercise challenges to aid programs).

27. *See infra* notes 296–98 and accompanying text (arguing that *Locke*'s reasoning should be extended to school aid challenges).

goals of the Free Exercise Clause are better served by condemnation of only those funding programs that exhibit animus towards religion.[28]

II. Background on the Constitutional Issues Surrounding School Voucher Cases

A. The School Voucher Debate

Historically, public education and religion were not strictly separate.[29] Throughout the nineteenth century and well into the twentieth century, public education was infused with Protestant values.[30] Although schools tried to avoid sectarianism by catering to the common practices of all the Protestant sects, public education included Bible reading, prayer, and other religious observance.[31] By the early twentieth century, however, the Protestant stronghold in America was significantly weakened.[32] This development, and the emerging secularism of the American public, led to a "post-Protestant America . . . [which felt] antipathy for aid to religious schools."[33]

During the middle of the twentieth century, numerous Protestant groups emerged in opposition to government funding of sectarian schools and advocated a policy of strict separation of government and religion.[34] The Supreme Court also adopted this position. In 1947, a majority of the Court agreed that

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[35]

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28. *See infra* Part V.D (discussing why the Court should be concerned with animus towards religion in school funding cases).

29. *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297 (2001) ("For most of its history, public education in America had been . . . unmistakably Protestant.").

30. *See id.* at 297–99 (discussing the Protestant influence on public education).

31. *See id.* at 297–98 (discussing Protestant practices in religious schools).

32. *See id.* at 306 (stating that "the identification of America as a specifically Protestant nation was becoming harder and harder to maintain").

33. *Id.* at 312.

34. *See id.* at 313–14 (discussing Protestant groups that opposed public funding for sectarian schools).

35. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98

The dissent disagreed with the outcome of the case but agreed with the strict separation principles reflected in the quoted language.[36]

Despite this strong language, the Court has not consistently taken a strict separation approach to school aid cases.[37] In fact, the Court has approved aid to religious schools in numerous forms, including payment for a sign-language interpreter used at a Catholic school[38] and tax deductions for parents of parochial school students for expenses relating to tuition, textbooks, and transportation.[39] More recently, the Court has moved towards broadly allowing public funds to be used at religious schools, approving neutral aid programs that include religious schools as long as private choice by recipients breaks the connection between the government and funding of religious education.[40]

Court decisions regarding the constitutionality of government aid to religious schools have had a major impact on the "school choice" debate.[41] School choice is "the idea that parents should have a great deal more say than they have traditionally [had] over where their children attend school."[42] School voucher programs are school choice schemes that would make public tax money available for use towards private schools.[43] Some voucher programs, like the one in place in the Milwaukee Public School District, include private sectarian schools.[44] Cleveland offers a similar voucher program.[45] The

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U.S. 145, 164 (1878)).

36. *See id.* at 26 (Jackson, J., dissenting) (arguing that the constitutional freedom from government support of religion "was set forth in absolute terms, and its strength is its rigidity"); *id.* at 31–32 (Rutledge, J., dissenting) (stating that the purpose of the Establishment Clause "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion").

37. *See* Laycock, *supra* note 16, at 164 (stating that "the no-aid principle never completely triumphed").

38. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 14 (1993) (holding that the Establishment Clause does not bar a state from providing a deaf student who attends a religious school with an interpreter).

39. *See* Mueller v. Allen, 463 U.S. 388, 390–91 (1983) (holding that the Establishment Clause permitted Minnesota to grant a tax deduction to parents for parochial school expenses).

40. *See infra* Part II.B (discussing the Supreme Court's Establishment Clause jurisprudence).

41. *See infra* notes 90–93 and accompanying text (discussing potential constitutional challenges to school aid programs that exclude religious schools).

42. Harry Brighouse, *School Vouchers, Separation of Church and State, and Personal Autonomy*, *in* NOMOS XLIII: MORAL AND POLITICAL EDUCATION 244, 244 (Stephen Macedo & Yael Tamir eds., 2002).

43. *See id.* (describing school voucher plans).

44. *See id.* at 244–45 (discussing the Milwaukee Private Choice Program).

45. *See id.* at 246 (noting that the Cleveland Scholarship and Training Program includes religious schools).

Cleveland program was challenged by taxpayers on the ground that it violated the Establishment Clause of the United States Constitution.[46] The Supreme Court rejected the argument.[47]

In the wake of the decision regarding the Cleveland program, the issue is now whether school voucher programs that provide funding for private school tuition are constitutionally required to include religious schools in their benefits.[48] School voucher advocates are planning to use various constitutional arguments to challenge state bans on funding for religious schools.[49] They argue that "if [state constitutions] go too far in protecting against the establishment of religion . . . they violate both the free exercise and free speech clauses of the First Amendment."[50] Though the Supreme Court has not yet addressed the constitutionality of excluding religious schools from voucher programs,[51] it has addressed a similar issue in the context of higher education in a case involving the exclusion of devotional theology degrees from a scholarship program.[52] The case, which is discussed in Part III, sheds some light on how the Court would approach a school voucher case and indicates that the Court is likely to uphold a school aid program that excludes religious schools.[53]

B. Establishment Clause Background

A brief introduction illustrates the Court's changing treatment of state aid programs as dictated by its evolving interpretation of the Establishment

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46. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 639 (2002) (addressing an Establishment Clause challenge to the Cleveland school choice program).

47. *See id.* at 663 (holding that the Ohio Pilot Project Scholarship Program did not violate the Establishment Clause); *infra* notes 74–78 and accompanying text (discussing *Zelman*).

48. *See* Laycock, *supra* note 16, at 173 (discussing a possible discrimination claim when a state funds private, secular education but not private, religious education).

49. *See* Tony Mauro, *Voucher Issue Likely to Return to High Court*, NAT'L L.J., Aug. 5, 2002, at A6 (describing school voucher advocates' planned attacks on state provisions banning funding for religious schools).

50. *Id.*

51. *See* Berg, *supra* note 9, at 161 (stating that "the next constitutional question [is]: whether a state's exclusion of religious schools from a voucher program . . . [is] a form of anti-religious discrimination").

52. *See* Locke v. Davey, 540 U.S. 712, 715 (2004) (addressing a Free Exercise challenge to a university scholarship program that did not permit the scholarship to be put towards devotional theology degrees).

53. *See infra* Part III (discussing the case and how it affects the chances of a successful challenge to a voucher program that excludes religious schools).

Clause.[54] This subpart is not meant to present a complete history of the Establishment Clause—that task lies beyond the scope of this Note.[55] A few basic points established here are necessary to understand this Note's analysis of the *Locke* decision.[56] Because this Note focuses on Free Exercise challenges to school aid programs, most of the cases that are discussed involve such programs.

The Supreme Court's approach to the Establishment Clause[57] has been in flux since 1947.[58] That year, the Court decided the first case of "the modern era of Establishment Clause doctrine."[59] In *Everson v. Board of Education*,[60]

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54. *See* Jeffries & Ryan, *supra* note 29, at 290 (stating that "change is underway" and that the Court's "no-aid policy is faltering").

55. *See generally* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002) (discussing the modern Establishment Clause); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986) (looking at historical evidence relating to the Establishment Clause to determine the Framers' intent and rejecting the view that the Framers did not intend to allow nonpreferential aid to religion); Steve Gey, Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981) (engaging in a critical analysis of the Court's Establishment Clause jurisprudence and suggesting a strict neutrality approach).

56. *See infra* Part III.B (analyzing *Locke*).

57. U.S. CONST. amend. I.

58. *See* Jeffries & Ryan, *supra* note 29, at 283 (exploring the development of Establishment Clause jurisprudence from a political perspective and stating that "the Court and the nation [are] in the midst of a sea-change that ultimately will contradict past practice as clearly and fully as *Brown* rejected *Plessy*"); *see generally* Alexander, *supra* note 6, at 447–62 (tracing the Supreme Court's increasing acceptance of state aid to sectarian schools through the development of a neutrality standard).

59. Alexander, *supra* note 6, at 447; *see also* Mitchell v. Helms, 530 U.S. 793, 807 n.4 (2000) (plurality opinion) (discussing the application of the Establishment Clause to government aid programs benefiting religious schools and stating that "[c]ases prior to *Everson* discussed the issue only indirectly").

60. Everson v. Bd. of Educ., 330 U.S. 1 (1947). A New Jersey taxpayer had challenged, under both the New Jersey and United States Constitutions, a state statute that allowed a local school board to reimburse parents for the cost of transporting their children to parochial schools. *Id.* at 3–4. The Supreme Court initially rejected a due process claim that the tax was being used for a private purpose. *Id.* at 5–7. The opinion primarily addressed the argument that the payments constituted state support of religion in violation of the First Amendment. *Id.* at 7–8. Both the majority and dissenting opinions reviewed the history surrounding the adoption of the First Amendment. *Id.* at 11–13; *id.* at 31–43 (Rutledge, J., dissenting). Despite having found that the First Amendment "erected a wall between church and state," the Court held that the New Jersey statute did not cause an establishment of religion. *Id.* at 18. The majority reasoned that the statute established a neutral, general aid program that protected the welfare of children and was made available regardless of recipients' religious beliefs, and that cutting off religious organizations or practitioners from general welfare law is "obviously not the purpose of the First Amendment." *Id.* at 16–18. The Court held that the New Jersey law was valid. *Id.* at 18. The dissent agreed that "the [First] Amendment forbids any appropriation, large or small, from

the Court strictly applied the principle of separation of church and state to a taxpayer's challenge of a government aid program.[61] The Court cited to James Madison's *Memorial and Remonstrance Against Religious Assessments*[62] and declared that "[n]either a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another."[63]

The *Everson* Court established the interpretation used in school aid cases until the late 1960s when the Court developed the *Lemon* test.[64] The *Lemon* test requires that a law: (1) "have a secular legislative purpose;"[65] (2) have a "principal or primary effect . . . that neither advances nor inhibits religion;"[66] and (3) "not foster 'an excessive government entanglement with religion.'"[67] The test represented a movement away from the Court's strict application of separation of church and state principles and towards an approach that focused on the likelihood that aid would be diverted towards a religious use.[68]

From about 1968 through the early 1980s, the Court used the *Lemon* test to analyze the constitutionality of school aid programs.[69] Although the Court continued to apply the *Lemon* test, it has adopted a neutrality standard to ensure that "any aid going to a religious recipient only has the effect of furthering . . . [a] secular purpose."[70] Neutral aid is "aid that is offered to a broad range of groups or persons without regard to their religion."[71] Justice O'Connor

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public funds to aid or support any and all religious exercises." *Id.* at 41 (Rutledge, J., dissenting). It disagreed with the majority's general welfare argument, characterizing it as a "fallacy." *Id.* at 52 (Rutledge, J., dissenting). The dissent believed that declaring that the funds served a public purpose did not remove the ban on aid to religious organizations and found that the statute at issue clearly provided such aid. *Id.* at 44, 52 (Rutledge, J., dissenting).

61. *See id.* at 18 ("The First Amendment has erected a wall between church and state."); Alexander, *supra* note 6, at 448 (describing the case as preserving strict separation of church and state); Jeffries & Ryan, *supra* note 29, at 285 (stating that in *Everson* both the majority and dissent found the Establishment Clause to stand for strict separation of church and state).

62. *See Everson*, 330 U.S. at 11 (noting that Madison argued that "no person . . . should be taxed to support a religious institution of any kind").

63. *Id.* at 15.

64. *See* Alexander, *supra* note 6, at 449–53 (discussing the development of the *Lemon* test and its role in eroding the "no aid to religion" rule).

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

66. *Id.*

67. *Id.* at 613 (citation omitted).

68. *See* Alexander, *supra* note 6, at 449–53 (discussing cases that addressed the "divertibility" issue in the context of elementary and secondary school aid programs).

69. *See id.* at 448–54 (describing the Court's approach to school aid cases from 1968 through the 1980s).

70. *See* Mitchell v. Helms, 530 U.S. 793, 807–10 (2000) (plurality opinion) (applying the *Lemon* test and using neutrality to satisfy the effects prong).

71. *Id.* at 809.

recognized that the Court's "treatment of neutrality . . . [has come] close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school aid programs."[72] The Court also has emphasized that "private choice"—that is, allowing recipients to decide where to use program funds—helps to ensure satisfaction of *Lemon*'s effects prong.[73]

In *Zelman v. Simmons-Harris*,[74] the Court embraced the principle that state aid programs may provide aid to religious schools as long as private individuals have a "genuine and independent private choice" to direct such aid to religious or nonreligious schools as they see fit.[75] This case stated the formal principles by which school aid programs will be judged: true private choice and neutrality.[76] Offering a simpler approach to an area that previously had been doctrinally complex, *Zelman* established that a state could include sectarian schools in aid programs if it adhered to these principles.[77] This result

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72. *Id.* at 837 (O'Connor, J., concurring).

73. *See id.* at 811 (stating that "neutrality and private choices together eliminated any possible attribution to the government").

74. Zelman v. Simmons-Harris, 536 U.S. 639 (2002). *Zelman* involved a taxpayer challenge to Ohio's Pilot Project Scholarship Program. *Id.* at 648. The program provided tuition assistance for eligible students to attend a participating public or private school. *Id.* at 644–45. The choice of school was left to the student's parents. *Id.* at 645. The program also paid for tutors for those students who chose to remain in public school. *Id.* The taxpayers claimed that the program violated the Establishment Clause by creating the perception of government endorsement of religion. *Id.* at 654. The taxpayers also argued that, even if the program does not create a perception of government endorsement of religion, Ohio's program did not offer a genuine choice between religious and secular private schools. *Id.* at 658. The challengers cited the fact that 96% of the voucher recipients attended religious schools. *Id.* The Court rejected the first argument by noting that a reasonable person would not think that a program that allowed funds to reach religious schools as a result of genuine private choice bears "the *imprimatur* of government endorsement." *Id.* at 655. The Court rejected the second argument by considering the full range of options available to voucher recipients in determining whether the program offered parents a genuine choice. *Id.* at 655–56. The Court found that the program did provide genuine private choice by considering, in addition to the schools participating in the voucher program, the number of students enrolled in alternative community schools, alternative magnet schools, and public schools with tutorial assistance. *Id.* at 659.

75. *Id.* at 652–53 (upholding the Cleveland program because it was a program of "true private choice" and emphasizing the program's neutrality towards religion).

76. *See* Berg, *supra* note 9, at 156–57 (stating that the basic idea of *Zelman* is that neutrality and true private choice break the link between advancement of religion and the government); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 515 (2004) (stating that, under *Zelman*, "neutrality is assigned singular importance").

77. *See* Berg, *supra* note 9, at 162 ("*Zelman*'s analysis suggests that it will be relatively easy for a voucher program that includes religious schools to satisfy the Establishment Clause.").

raised the following question: If states can provide aid to religious schools by adhering to the principles of *Zelman*, can states constitutionally deny aid to these schools?[78]

The *Zelman* decision sparked a wave of litigation challenging the exclusion of religious elementary and secondary schools from aid programs.[79] Many states' constitutions include provisions that bar religious schools from participating in aid programs.[80] The strong language of *Zelman* and other Supreme Court cases has implied that states have little, if any, Establishment Clause related interest in excluding religious schools from state aid programs.[81] State provisions requiring the exclusion of religious schools are defended as protecting antiestablishment interests.[82] However, the principles of neutrality and true private choice may have invalidated this defense.[83] School voucher advocates are prepared to challenge school voucher programs that exclude religious schools by questioning the validity of "Blaine amendments," which they claim were passed under a cloud of anti-Catholic animus.[84] Some proponents have argued more generally that states must

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78. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 829 (2000) (plurality opinion) (upholding a law providing educational materials and equipment to public and private schools, including religious schools, and stating that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it"); Berg, *supra* note 9, at 173 (arguing that withholding benefits from a person who would use it at a religious school is a penalty on religious exercise and, therefore, violates the Free Exercise Clause).

79. *See, e.g.*, Mauro, *supra* note 49 (discussing voucher advocates' plans to challenge state constitutional provisions that prohibit government aid to religious schools); *see also* Colleen Carlton Smith, Note, Zelman*'s Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs*, 89 VA. L. REV. 1953, 1956–67 (2003) (discussing post-*Zelman* challenges to school voucher and tuition programs).

80. *See* Berg, *supra* note 9, at 167–68 (discussing various types of state bans on aid to religious schools).

81. *See* Alexander, *supra* note 6, at 478 (questioning whether the Establishment Clause is relevant in judging the constitutionality of aid programs).

82. *See, e.g.*, Davey v. Locke, 299 F.3d 748, 760 (9th Cir. 2002) (upholding a recipient's Free Exercise challenge to the Washington Promise Scholarship Program), *rev'd*, 540 U.S. 712 (2004). Washington defended the program based on its interest in "not appropriating or applying money to religious instruction." *Id.* at 759.

83. *See id.* at 760 (emphasizing that under the Promise Scholarship Program money goes to religious institutions only as a result of private choice, highlighting *Zelman*'s focus on neutrality and true private choice, and finding that no reasonable person could find that the state was supporting a religious establishment).

84. *See* Mauro, *supra* note 49 (discussing state Blaine amendments and school voucher advocates' plans to challenge them).

allow recipients to use vouchers at religious schools if they are available for use at private schools.[85]

The Blaine Amendment was proposed by Congressman James G. Blaine in 1875 and was intended to prevent all government funding of sectarian schools.[86] Although the Senate did not pass the Amendment, many states adopted their own version of the Blaine Amendment.[87] In fact, many states were forced to adopt such constitutional provisions as a prerequisite to admission into the Union.[88] These amendments are claimed to be tainted with anti-Catholic animus because they were intended to prevent Catholics from securing public funding for Catholic schools.[89]

School voucher advocates claim that the state "Blaine amendments" are unconstitutional under the Free Exercise and Equal Protection Clauses.[90] They argue that these provisions are invalid because they fail the neutrality requirement and because they inhibit religious beliefs and practices.[91] They also argue that the provisions should be subject to strict scrutiny because they disfavor religion, a suspect classification.[92] This analysis would require a state to come up with a compelling interest for the resulting discrimination, something voucher proponents believe states cannot do.[93] This Note, however, does not explore the validity of these claims. The issue is important because the invalidity of a state "Blaine amendment" could result in the invalidation of state aid programs excluding religious schools, even if these programs otherwise are valid under the Free Exercise Clause.

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85. *See* Berg, *supra* note 9, at 152 (arguing that "[i]f a state makes vouchers available for use at private schools, it must authorize their use at religious schools as well").

86. *See* Luke A. Lantta, *The Post-*Zelman *Voucher Battleground: Where to Turn After Federal Challenges to Blaine Amendments Fail*, LAW & CONTEMP. PROBS., Summer 2004, at 213, 215–16 (describing the Amendment as exploiting public concerns over government funding of sectarian schools and religious practices in the public system).

87. *See* Gall, *supra* note 10, at 423 (discussing adoption of Blaine amendments and like provisions by the states).

88. *See id.* at 423 (discussing adoption of Blaine amendments and like provisions by the states).

89. *See id.* at 420–24 (discussing the anti-Catholic animus that spurred the federal and state Blaine amendments).

90. *See, e.g.*, Lantta, *supra* note 86, at 221–22 (discussing potential federal constitutional challenges to state Blaine amendments).

91. *See, e.g.*, *id.* (discussing potential First Amendment challenges to state Blaine amendments).

92. *See, e.g.*, *id.* at 222 (discussing proposed Equal Protection challenges to state Blaine amendments).

93. *See id.* (stating that some voucher advocates do not believe that states could produce compelling reasons for excluding religious schools).

C. Recent Free Exercise Jurisprudence

An introduction to the Free Exercise Clause is helpful because this Note references the ideals of neutrality and general applicability, as used by the Court in Free Exercise cases. The main point one should take from this discussion is that, at least before *Locke*, commentators largely agreed that these ideals separated those laws that would generally survive Free Exercise scrutiny from those that would be subject to a compelling interest test.[94] Because this Note focuses on the likely outcome of a Free Exercise challenge to a state aid program that excludes religious schools,[95] it cites to the Court's current doctrinal framework.

The Court's Free Exercise jurisprudence has moved towards a focus on facial neutrality towards religion.[96] Clearly, a law is not neutral if its purpose is to inhibit or deter religious activity.[97] In *Employment Division, Department of Human Resources v. Smith*,[98] the Court held that the Free Exercise Clause does

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94. *See* David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 212 (1997) ("Where the Court finds a law to be both neutral and generally applicable, it will not apply strict scrutiny to the law's impact on religious exercise."); Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 864 (2001) (stating that a law that is neutral and generally applicable will generally be upheld and a law that fails to meet either ideal will have to survive strict scrutiny).

95. *See infra* Parts III & IV (discussing the possible outcome of a Free Exercise challenge to a school aid program that does not allow religious schools to participate).

96. *See* Lupu & Tuttle, *supra* note 12 (noting that the neutrality principle has recently controlled cases involving challenges under the Free Speech Clause, the Establishment Clause, and the Free Exercise Clause).

97. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (describing how the Court determines whether a law is neutral towards religion).

98. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990). In *Smith*, Smith and Black were fired by a private employer for using a hallucinogen as part of a ceremony at their Native American Church, and Oregon subsequently denied them unemployment compensation. *Id.* at 874. Smith and Black argued that the Free Exercise Clause protected them from having to follow any generally applicable law when observance of the law would require (or forbid) acts their religion forbids (or requires). *Id.* at 878. The Court distinguished other cases denying the applicability of general laws to religious objectors because each case involved, in addition to a Free Exercise issue, a second constitutional right that was being infringed upon. *Id.* at 881–82. Finding that the law did not regulate religious beliefs but instead regulated conduct in general, the Court refused to exempt respondents from the application of the law because of their religious convictions. *Id.* at 882. The respondents also argued that their claim should be evaluated under the balancing test established in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Id.* at 883. Under this test, "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Id.* The Court distinguished those cases where it applied the *Sherbert* test, noting that they involved individual assessments performed by the government; in such cases, the government may not deny individualized assessments to individuals facing "religious hardship" without compelling

not excuse an individual from compliance with "a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[99] Thus, as long as a law is neutral with respect to religion and generally applicable, the government does not need to show a compelling interest justifying the law's effect on religion.[100] Justice O'Connor has recognized the weight that the Court gave to the neutrality of the prohibitory law at issue and has argued that "[t]here is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience."[101]

At the same time, a law that is not neutral with respect to religion or a law that burdens religion and is not generally applicable might require a compelling government interest, and if so, it will have to be narrowly tailored to that interest.[102] The Supreme Court case that established this proposition, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[103] involved the Church's

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justification. *Id.* at 884 (citations omitted). The Court declined to extend the test to situations involving generally applicable laws. *Id.* at 884–85. Therefore, the Court found that Oregon may deny respondents unemployment compensation if their dismissal was based on violation of the peyote law. *Id.* at 890.

99. *Id.* at 879 (quotations omitted).

100. *See id.* at 883–85 (rejecting petitioners' claim that the government cannot force an individual to obey a generally applicable law that offends his religious beliefs unless the government shows a compelling interest in enforcing the law).

101. *Id.* at 901 (O'Connor, J., concurring).

102. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (stating the compelling government interest test should be applied to laws that are not neutral or generally applicable).

103. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). In response to the petitioner Church's attempt to establish a church of the Santeria faith in Hialeah, the city council adopted three ordinances intended to prevent the ritual sacrifice of animals within the city. *Id.* at 527–28. The ordinances prohibited the killing, slaughtering, or sacrifice of animals in any type of ritual. *Id.* at 527. The ordinances exempted slaughtering by "'licensed establishment[s]' of animals 'specifically raised for food purposes.'" *Id.* at 527–28. They also permitted slaughter in areas zoned for slaughterhouses and for the sale of small quantities of hogs or cattle. *Id.* at 528. According to the Court, a law that fails to satisfy either the neutrality or general applicability requirement of *Smith* must be supported by a compelling government interest and be narrowly tailored to achieve that interest. *Id.* at 531–32. The Court began its analysis by looking at the neutrality of the ordinances. *Id.* at 533. It found that, although a law that is not facially neutral always lacks a permissible objective, a facially neutral law also might impermissibly target religion. *Id.* at 533–34. The Court concluded that the purpose of the ordinances was to suppress the Santeria religion. *Id.* at 534. The Court then looked to the government's justifications for the ordinances and found that, while its interests in public health and preventing cruel treatment of animals were legitimate, these goals could have been pursued in ways that did not so fully inhibit the practice of Santeria. *Id.* at 538. The Court considered the general applicability requirement to determine whether the ordinances selectively burdened

Free Exercise challenge to laws that the city had passed with the purpose of prohibiting the Church from practicing Santeria within Hialeah.[104] The Court indicated that a law that is not facially neutral with respect to religion will be subject to strict scrutiny to ensure that it does not violate the right to free exercise;[105] the Court also stated that, even if a law is facially neutral, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[106] The Court was not clear, however, as to whether the compelling interest test will be applied absent an "object . . . to infringe upon or restrict practices because of their religious motivation."[107] The federal circuits have split on whether *Lukumi* requires an object to infringe upon religious practice before a law must be supported by a compelling government interest, and the Supreme Court has not addressed this split.[108]

Together, *Smith* and *Lukumi* illustrate the Court's current approach to Free Exercise challenges. Generally, the government may infringe on a protected activity through a general, nontargeted law; the government may not, however, infringe on protected activities through laws that are nonneutral, laws that are not generally applicable, or laws with a direct purpose and effect of inhibiting the protected activity.[109] The latter group of laws may be required to meet a compelling interest test.[110] In the Free Exercise context, however some courts

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only religiously motivated behaviors. *Id.* at 543–44. The Court found that these ordinances clearly failed the general applicability prong because they were underinclusive as to protecting the public health and preventing animal cruelty and burdened only conduct relating to the worship of Santeria. *Id.* at 543–46. The Court applied strict scrutiny and found that the laws were not narrowly tailored to the ends they were designed to achieve and, therefore, the laws were held invalid. *Id.* at 546–47.

104. *Id.* at 526–28.

105. *See id.* at 533 (stating that a law that is not neutral is invalid unless it advances a compelling state interest and is narrowly tailored to advance that interest).

106. *Id.* at 534.

107. *Id.* at 533.

108. *See* Derek D. Green, Note, *Does Free Exercise Mean Free State Funding? In* Davey v. Locke, *the Ninth Circuit Undervalued Washington's Vision of Religious Liberty*, 78 WASH. L. REV. 653, 665–68 (2003) (discussing the circuit split on whether *Lukumi* requires an object to suppress religion).

109. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 233 (1985) ("[W]e simply observe that . . . [the law's] original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues . . . to have that effect. As such, it violates equal protection . . . ."); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) ("Though the law itself be . . . impartial in appearance . . . if it is applied and administered by public authority with an evil eye and an unequal hand . . . between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution.").

110. *See* Duncan, *supra* note 94, at 851 (summarizing the Court's approach to Free

will not apply the compelling interest test unless the object of the law was to inhibit religion.[111]

III. Locke v. Davey

A. The Decision

In *Locke*,[112] the state of Washington, in accordance with its constitution, denied a general scholarship to a student intending to pursue a degree in devotional theology.[113] The Court reversed the Ninth Circuit,[114] which had followed *Lukumi* to determine that because the law was not facially neutral towards religion it had to be narrowly tailored to achieve a compelling interest.[115] The Ninth Circuit decided that the state's antiestablishment interests were not compelling and held that the program was unconstitutional.[116]

Lukumi arguably stood for the proposition that a law that is not neutral "must be justified by a compelling governmental interest."[117] In *Locke*, the Court did not address whether the law was neutral or generally applicable.[118] In

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Exercise claims after *Smith* and *Lukumi*).

111. *See supra* note 108 and accompanying text (addressing this plausible interpretation of *Lukumi*).

112. Locke v. Davey, 540 U.S. 712 (2004). Davey brought a claim challenging Washington's Promise Scholarship Program under the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 718. The program offered scholarships to eligible high school graduates but did not allow the scholarship to be put towards devotional theology degrees. *Id.* at 716. Religiously affiliated postsecondary schools could participate if qualified. *Id.* The Court's analysis focused on the Religion Clauses, specifically on the Free Exercise Clause. *Id.* at 718–19. The Court rejected Davey's claim that the Court should presume the law unconstitutional under *Lukumi* because it was not facially neutral with respect to religion. *Id.* at 720. The Court proceeded to look at the state's interest in denying the scholarship for devotional theological studies. *Id.* at 721–23. The Court concluded that "[t]he State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars." *Id.* at 725. Given these two findings, the Court upheld the Promise Scholarship Program. *Id.*

113. *See id.* at 717 (explaining that the Promise Scholarship was not to be used for degrees in devotional theology).

114. *See id.* at 718 (reversing the Ninth Circuit's holding).

115. *See* Davey v. Locke, 299 F.3d 748, 753, 759–60 (9th Cir. 2002) (applying *Lukumi* and the compelling interest test), *rev'd* 540 U.S. 712 (2004).

116. *See id.* at 760 (finding that Washington's interest was not compelling).

117. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). *See supra* notes 102–08 and accompanying text (discussing *Lukumi*).

118. *See Locke*, 540 U.S. at 720 (declining to extend *Lukumi*).

fact, the Court refused to extend *Lukumi*'s presumption of unconstitutionality in the face of a nonneutral law, stating that the "State's disfavor of religion (if it can be called that) is of a far milder kind" than the disfavor in *Lukumi*.[119] Instead, the Court was concerned with whether the program "suggest[ed] animus towards religion."[120] This result is not entirely inconsistent with *Lukumi*, if the purpose of the neutrality inquiry was to determine whether the law had an object to target religion for unfavorable treatment.[121]

Rather than apply a compelling interest test, the Court looked at the states' historical prohibitions on "using tax funds to support the ministry."[122] The majority concluded that, without a presumption of unconstitutionality, a substantial state interest was sufficient to justify any minor burdens on religious exercise.[123] Thus, the Court established that the program fell within the "play in the joints" where the Establishment Clause would allow inclusion of devotional theology degrees, but inclusion was not compelled by the Free Exercise Clause because of the state's historic and substantial interest in excluding such degrees.[124]

The *Locke* case is similar to a case that would arise from a challenge to a school aid program that excludes religious schools. *Locke* indicates that the Court might not extend a presumption of unconstitutionality to such a program unless the program indicated a purpose to suppress religion.[125] The opinion is not entirely clear as to how the substantial interest component fits in,[126] but it appears that in a challenge to a state funding decision that excludes religious recipients, a state will have to point to a substantial interest, either to avoid

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119. *Id.* at 720.

120. *Id.* at 725.

121. *See* Katie Axtell, Note, *Public Funding for Theological Training Under the Free Exercise Clause: Pragmatic Implications and Theoretical Questions Posed to the Supreme Court in* Locke v. Davey, 27 SEATTLE U. L. REV. 585, 613 (2003) (stating that "a free exercise inquiry . . . [focuses] on how non-neutral laws prohibit religious observers' belief or practice"); *infra* notes 283–84 and accompanying text (suggesting that *Lukumi* was concerned with official targeting of religion with intent to suppress).

122. *Locke*, 540 U.S. at 723.

123. *See id.* at 725 (upholding the Promise Scholarship Program).

124. *See id.* ("If any room exists between the two Religion Clauses, it must be here.").

125. *See id.* (concluding that the Washington Promise Scholarship Program was not constitutionally suspect given the state's historic and substantial interest and the lack of a suggestion of animus towards religion).

126. *See* Laycock, *supra* note 16, at 173 ("[T]he Court relied on this [historic and substantial] interest to conclude that the . . . refusal to fund was not presumptively unconstitutional . . . and then relied on the same interest to justify the discrimination under the . . . more deferential standard that applied . . . .").

Lukumi's presumption of unconstitutionality or to dispel any indication of animus toward religion.[127]

B. Locke*'s Impact on School Aid Challenges*

The use of a substantial interest test puts some burden on a state to defend its funding decisions.[128] A state's justification will likely relate to a historical interest in avoiding government establishment of religion.[129] Applying the decision in the school aid context requires an understanding of which religiously-affiliated activities present historical and substantial establishment concerns such that the government can constitutionally draw distinctions within funding programs.[130] For example, the Court may require only a tenuous connection to historical establishment concerns, in which case avoiding government support of sectarian schools clearly relates to a historic and substantial interest and the state will receive the leeway granted in *Locke*.[131] Also, the opinion offered no insight on how changes in the Court's interpretation of federal and state establishment clauses might affect what concerns are considered historic or substantial.

The *Locke* decision was narrowly written in that the Court focused its analysis on the particular exclusion at issue, the exclusion of devotional theology majors.[132] The Court stated that "training for religious professions and training for secular professions are not fungible" and that preparing to lead a congregation is "essentially a religious endeavor."[133] The Court believed that devotional theology is something so distinct from other studies that states constitutionally could treat devotional theology studies differently from other

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127. *See* Lupu & Tuttle, *supra* note 12 (stating that "[t]o enjoy the deference recognized by the Court in *Locke*, a state will need to show that its funding restriction arises from a concern similar to Washington's ban").

128. *See id.* (discussing how a state would go about defending a free exercise challenge to a program that excludes religious recipients).

129. *See id.* (stating that in defending a Free Exercise challenge to a school aid program, a state will point to historical prohibitions on religious funding and the *Locke* decision).

130. *See* Jennifer G. Hickey, *Faithfully Upholding the Law*, INSIGHT ON THE NEWS, Jan. 5, 2004, at 14 (stating that "[t]he impact of *Locke v. Davey* will be determined by how broad or how narrow the court . . . tailors its opinion").

131. *See* Lupu & Tuttle, *supra* note 12 (wondering what interests will meet the *Locke* test and afford the government the deference of *Locke*).

132. *See* Locke v. Davey, 540 U.S. 712, 721 (2004) (limiting its analysis to the different treatment received by those training to enter the ministry).

133. *Id.*

studies.[134] Essentially, the Court viewed the purpose of such studies to be preparation for the ministry.[135] This view led the Court to consider the states' historic interests in prohibiting tax dollars from being used to support the clergy; this is the basis upon which the Court sustained the Promise Scholarship Program.[136]

The Court's analysis did not offer a broad understanding of the areas in which states may possess substantial antiestablishment concerns. It is possible to argue that states do not have either a historic or a substantial antiestablishment interest in excluding religious schools from aid programs. Indeed, many public schools continued to incorporate Protestant values through the middle of the twentieth century.[137] This weighs against any argument of a historical interest in not funding schools of a religious character.[138] Additionally, some commentators have wondered whether the Court's recent school aid decisions have left room for legitimate establishment concerns related to such programs.[139] If the Court has removed any establishment concerns surrounding school aid programs that are neutral and allow true private choice, does a state have a substantial interest in structuring aid programs to exclude religious schools? The Court has repeatedly used language indicating that it sees no Establishment Clause issues when these conditions are present.[140]

A challenger to a school aid program that excludes religious institutions might draw support from Court cases that appear to reject government aid diverted towards religious schools as an area that may present substantial

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134. *See id.* ("That a State would deal differently with religious education for the ministry than with education for other callings is a product of [the] views [embodied in the United States and state constitutions] . . . .").

135. *See id.* (describing majoring in devotional theology as "[t]raining . . . to lead a congregation").

136. *See id.* at 721–23 (comparing majoring in devotional theology to a religious calling and tracing historic prohibitions against the use of taxes to support the ministry).

137. *See supra* notes 29–33 and accompanying text (discussing the Protestant practices that were incorporated into public schooling).

138. *See* Laycock, *supra* note 16, at 184–85 (arguing that the historical interest against funding the clergy would not apply to the exclusion of sectarian schools from school voucher programs that pay for secular private education and arguing that there is no historical tradition of refusing to fund education involving religious content).

139. *See* Alexander, *supra* note 6, at 478 ("[T]he question remains whether the Establishment Clause is even relevant in determining the constitutionality of government aid to religious schools.").

140. *See id.* at 478 (questioning the existence of Establishment Clause concerns); *infra* notes 141–50 and accompanying text (addressing the Supreme Court's rejection of any Establishment Clause implications of properly structured school aid programs).

antiestablishment concerns. The plurality opinion in *Mitchell v. Helm*[141] suggested that excluding sectarian elementary and secondary schools from aid programs might be unconstitutional.[142] In *Mitchell*, the Court had to decide whether Chapter 2, a government aid program, had the effect of advancing religion.[143] This question required the Court to decide whether Chapter 2 either "result[ed] in religious indoctrination by the government"[144] or "define[d] its recipients by reference to religion."[145] Its decision that the program did not advance religion rested on the principles of true private choice and neutrality.[146] According to the Court:

> If aid to schools, even "direct aid," is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any "support of religion."(citations omitted)[147]

The Court decided that if the government offers aid to a wide variety of schools, it is not responsible for any religious indoctrination but is instead furthering a common secular purpose.[148] The Court also stressed that private

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141. Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion). *Mitchell* involved a challenge to an aid program known as Chapter 2 as implemented in Jefferson Parish, Louisiana. *Id.* at 801–02. Chapter 2 provided federal funds "for the acquisition and use of instructional and educational materials," to be distributed to participating elementary and secondary schools through local educational agencies. *Id.* at 802 (quoting 20 U.S.C. § 7351(b)(2) (1994)). Both public and private schools, including religious schools, could participate in the program and the aid was to be distributed equitably between students in both types of schools. In Jefferson Parish, for the fiscal year 1986–87, only five of forty-six participating private schools had no religious affiliation. *Id.* at 803. The Court held that "Chapter 2 is not a law respecting the establishment of religion." *Id.* at 835. The Court's decision rested on its belief that "Chapter 2 does not result in governmental indoctrination, because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents . . . and does not provide aid that has an impermissible content." *Id.* at 829.

142. In a footnote, the Court admitted that that exclusion of religious schools from Chapter 2 might raise Free Exercise questions. *Id.* at 835 n.19.

143. *See id.* at 808 (stating that there was no issue over whether Chapter 2 had a secular purpose or whether it created excessive entanglement and, thus, only the law's effect was in dispute).

144. *Id.*

145. *Id.*

146. *See id.* at 809–10 (discussing how neutrality and private choice in a government aid program severs any connection between government and the religious message of any participating private schools).

147. *Id.* at 816.

148. *See id.* at 809–10 (discussing how a neutral and generally applicable aid program furthers a secular purpose).

choice ensures neutrality and relieves the government of responsibility for where the aid eventually goes.[149] The Court similarly rejected the possible perception of government endorsement of religion in *Zelman*.[150]

In the *Mitchell* plurality opinion, Justice Thomas wrote that "the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status,"[151] and that excluding pervasively sectarian schools from otherwise permissible aid programs violates certain Court doctrines.[152] Justice Thomas has indicated that exclusion of sectarian elementary and secondary schools from state aid programs is religious discrimination.[153] One could argue that Justice Thomas's position is true to the Court's recent Establishment Clause jurisprudence, as the Court has negated all historically recognized antiestablishment reasons for excluding religious schools from state aid programs.[154]

Justice O'Connor challenged this argument in her *Mitchell* concurrence. Justice O'Connor disagreed with the plurality that neutrality should take on singular importance.[155] She also disagreed with the proposition that the Establishment Clause is not violated when sectarian schools divert aid towards

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149. *See id.* at 811 (stating that "private choice[] help[s] to ensure neutrality, and neutrality and private choices together eliminate[] any possible attribution to the government").

150. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002) (stating that "no reasonable observer would think a neutral aid program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement").

151. *Mitchell*, 530 U.S. at 828 (plurality opinion).

152. *See id.* at 829 (indicating that hostility to pervasively sectarian schools developed from anti-Catholic bias).

153. Justice Thomas joined Justice Scalia's dissenting opinion in *Locke*. Locke v. Davey, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting). The justices would have found the denial of the scholarship to constitute religious discrimination. *Id.* That only two justices joined in the dissent suggests that, if the court were to address a Free Exercise challenge to an exclusionary school aid program a majority of the Justices would not apply this dicta from *Mitchell* that such an exclusion is automatically invalid. *See* Laycock, *supra* note 16, at 185–86 (stating that "[*Locke*] is likely to lead to a more general principle that all religious programs and institutions can be excluded from funding programs"). Still, the language of the *Mitchell* opinion is an accurate depiction of the Court's current Establishment Clause jurisprudence, which nullifies any establishment concerns relating to programs that satisfy the requirements of neutrality and true private choice.

154. *See supra* notes 81–83 and accompanying text (discussing whether states' provision of aid to sectarian schools raises concerns in the wake of cases like *Mitchell* and *Zelman*).

155. *See Mitchell*, 530 U.S. at 838–39 (O'Connor, J., concurring) (asserting that neutrality had previously been one of several factors used by the Court to determine Establishment Clause challenges to school aid programs).

religious uses.[156] Even after *Zelman*, it is unclear whether possible diversion of government aid will play a decisive role in future Establishment Clause cases.[157] If these are potential areas of concern, then the Court has not extinguished all establishment issues surrounding school aid for sectarian schools.

If the Court does allow the exclusion of religious schools based on Establishment Clause concerns, it will have to reconcile its decision with cases such as *Rosenberger v. Rector and Visitors of the University of Virginia*[158] and *Lamb's Chapel v. Center Moriches Union Free School District*,[159] which addressed the government's ability to exclude religious recipients from government-created public forums for speech.[160] In both of these cases, the Court rejected Establishment Clause defenses to free speech claims.[161] In *Rosenberger*, the Court relied on the principle of neutrality to find that the use of student funds to pay for a religiously-focused publication did not pose any

156. *See id.* at 837–38 (O'Connor, J., concurring) (arguing that "the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents").

157. *See* Anthony T. Kovalchick, *Educational Aid Programs Under the Establishment Clause: The Need for the U.S. Supreme Court to Adopt the Rule Proposed by the* Mitchell *Plurality*, 30 S.U. L. REV. 117, 149 (2003) (arguing that the Court should not follow O'Connor's distinction between direct and indirect aid, which would require that courts ensure that direct aid is not diverted for religious uses).

158. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842 (1995). See *infra* notes 216–27 and accompanying text for a discussion of *Rosenberger*.

159. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993). *Lamb's Chapel* involved a Free Speech challenge to a school district's refusal to allow a church group to show a video on school premises that were otherwise available for use by the community. *Id.* at 386–87. Pursuant to a New York state law, the School District allowed "social, civic and recreational meetings and entertainments" to be held on school property. *Id.* at 386 (citing N.Y. EDUC. LAW § 414(c) (McKinney 1988 & Supp. 1993)). The Lamb's Chapel Church had requested use of the school facilities to show a film series taking Christian perspectives. *Id.* at 387–88. The School District, in order to comply with a state court decision, would not allow the school property to be used for religious purposes. *Id.* at 387. Thus, it did not permit Lamb's Chapel to use the facilities. *Id.* at 388–89. The Court found that the school district had denied use of the facilities because of the religious nature of the films. *Id.* at 394. The Court held that the denial violated the First Amendment. *Id.* The government could not favor certain viewpoints by exclusion of others. *Id.* The Court also rejected the district's Establishment Clause defense. *Id.* at 395. It found that there was no real risk that the public would perceive such use as government endorsement of religion. *Id.*

160. *See infra* notes 216–27 (discussing *Rosenberger*'s Free Speech analysis).

161. *See Rosenberger*, 515 U.S. at 842 (rejecting the University's Establishment Clause defense); *Lamb's Chapel*, 508 U.S. at 395 (rejecting the District's Establishment Clause defense).

threat of violating the Establishment Clause.[162] This argument is analogous to the one that a challenger to a school aid program could credibly make.[163]

There are two ways to distinguish *Rosenberger* and *Lamb's Chapel* from a suit challenging a school aid program that excludes religious schools. The key distinction is that both are free speech cases and both decisions rest on the principle that the government may not differentiate between speakers on the basis of their viewpoints.[164] In *Locke*, the Court rejected a free speech challenge to the Promise Scholarship Program, finding it was not a forum for speech.[165] If the Promise Scholarship Program is not a forum for speech, then a school aid program is unlikely to be a forum for speech.[166]

Rosenberger and *Lamb's Chapel* are also distinguishable because in those cases the Court was concerned with whether including the religious activities within the programs at issue would violate the Establishment Clause.[167] In *Locke*, the Court allowed Washington to defend the Promise Scholarship Program based on a substantial Establishment Clause-related interest rather than requiring the state to show that funding devotional theology degrees would violate the Establishment Clause or even its own constitution.[168] Thus, under *Rosenberger* and *Lamb's Chapel*, the government had a higher burden to carry.

The overall effect of *Locke* on Free Exercise challenges to school aid programs will not become clear until the Court applies its new analysis in future challenges. It is unlikely that a challenge to a government aid program

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162. *See Rosenberger*, 515 U.S. at 840–42 (finding that the neutrality of the disputed program would prevent any perception that the State was supporting religious viewpoints).

163. *See supra* note 141–50 and accompanying text (discussing the principles of neutrality and true private choice, which a challenger could argue to negate an Establishment Clause defense).

164. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995) (finding that the program at issue violated the Free Speech Clause); *Lamb's Chapel*, 508 U.S. at 393–94 (finding that the District had violated the First Amendment by excluding a presentation from a public forum solely on the basis of its religious viewpoint).

165. *See* Locke v. Davey, 540 U.S. 712, 720 n.3 (2004) (stating that "the Promise Scholarship Program is not a forum for speech").

166. A university is arguably closer to a forum for speech than an elementary or secondary school. *See Rosenberger*, 515 U.S. at 840 (stating that "student expression is an integral part of the University's educational mission").

167. *See id.* at 845–46 (requiring the University of Virginia to include publications taking a religious viewpoint in a student funding program because it would not violate the Establishment Clause); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394–95 (1993) (finding that there is no Establishment Clause defense for excluding a religious viewpoint from a public forum if the inclusion of that point of view would not violate the Establishment Clause).

168. *See Locke*, 540 U.S. at 719 (finding that Washington could, under the Federal Constitution, allow the Promise Scholarship to be used for degrees in devotional theology).

that excludes all religious institutions can succeed,[169] unless the program exhibits "animus toward religion."[170] Much of the reasoning that led the Court to sustain the program in *Locke* is equally applicable to all school aid programs. The Court did not extend *Lukumi*'s presumption that a law is unconstitutional when it is not facially neutral with respect to religion.[171] Instead, it found that the disfavor of religion was mild compared to criminal or civil sanctions.[172] The disfavor of religion in a school voucher case is also mild when compared to criminal or civil sanctions. The Court also stated that "religious instruction is of a different ilk"[173] and that a state may choose to fund one type of instruction without funding a different type of instruction.[174] The instruction provided at religious elementary and secondary schools is arguably distinctive from secular instruction because many of these schools incorporate religion into all aspects of education.[175] Finally, the history of the Establishment Clause and cases like *Everson*[176] establish some historic state interest in not funding religious schooling.[177]

Locke also demonstrates that the government does not unconstitutionally inhibit free exercise when it funds nonreligious activities without funding similar religious activities.[178] The Court could extend *Locke*'s reasoning to hold that as long as the state has a legitimate interest for excluding religious activities[179] from a

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169. *See* Lupu & Tuttle, *supra* note 12 (asserting that "*Locke* gives states significant freedom to fashion independent policies of church-state relations"); *infra* Parts V.C–D (discussing why *Locke*'s analysis should be expanded into the school voucher context).

170. *See* Locke v. Davey, 540 U.S. 712, 725 (2004) (finding that the Promise Scholarship Program did not exhibit any animus toward religion).

171. *See id.* at 720 (declining to extend *Lukumi*'s presumption of unconstitutionality for laws that are not facially neutral with respect to religion).

172. *See id.* (declining to extend *Lukumi*'s presumption of unconstitutionality for laws that are not facially neutral with respect to religion).

173. *Id.* at 723.

174. *See id.* at 721 ("The State has merely chosen not to fund a distinct category of instruction.").

175. *See* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 391 (1985) (stating that "the parochial school's total operation serves to fulfill both secular and religious functions concurrently, and the two cannot be completely separated") (quoting Donald A. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 574 (1968)).

176. *See supra* notes 60–63 and accompanying text (discussing Everson v. Bd. of Educ., 330 U.S. 1 (1947)).

177. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions.").

178. *See infra* notes 192–97 and accompanying text (highlighting the conditional funding language used in *Locke*).

179. This analysis applies only to programs that fund an activity and deny funding for that activity when it is religiously-affiliated. It does not apply to programs that deny otherwise

funding program and the exclusion is not based on animus, the exclusion is constitutional because of the insignificance of any burden. In *Locke*, after discussing the government interest involved, the Court stated that "[f]ar from evincing . . . hostility toward religion . . . we believe that the . . . Program goes a long way toward including religion in its benefits."[180] The Court may have only been looking for a justification demonstrating that the state did not act with discriminatory intent. Therefore, an Establishment Clause concern, even one that relates to action that the Establishment Clause clearly does not prohibit, like giving aid to religious schools, should suffice as long as it is not pretext. The validity of this interpretation depends, in part, on the Court's interpretation of what the Free Exercise Clause requires.[181] Parts IV and V address this interpretation of *Locke* and its potential application in school voucher cases.[182]

IV. Burdens on Fundamental Constitutional Rights

A. Conditional Funding and Locke

An unconstitutional condition question "[is] said to emerge whenever government conditions a benefit it is not obligated to provide on waiver of a constitutional right."[183] At its base, the question is whether "carrying out the act threatened may be unconstitutional even though the state is constitutionally permitted not to advance the offer in the first place."[184] In other words, when can the government make a benefit available and deny it to those who exercise a particular constitutional right?[185] While the doctrine has the laudable purpose of preventing the government from "do[ing] indirectly what it may not do directly,"[186] neither the courts nor scholars have been able to approach a consensus on how the doctrine should be applied.[187]

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available funding based on a recipient's adherence to a set of religious beliefs. In the school aid context, individuals may still practice any religion and receive aid for secular education.

180. Locke v. Davey, 540 U.S. 712, 724 (2004).

181. *See supra* Part II.C (discussing the Court's current interpretation of the Free Exercise Clause).

182. *See infra* Parts IV & V (discussing the conditional funding analysis).

183. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 8 (2001).

184. *Id.* at 19.

185. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (defining the unconstitutional condition doctrine).

186. *Id.*

187. *See id.* (stating that there is confusion on how to apply the unconstitutional condition

The Court has stated that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without . . . funding an alternative program."[188] A statute will, however, be subject to strict scrutiny if it "interfere[s] with the exercise of a fundamental right."[189] The unconstitutional conditions doctrine has been put forth by voucher advocates as one potential argument for invalidating state voucher programs that exclude religious schools.[190] This is a key argument for voucher advocates because the doctrine "is the primary method by which the Court distinguishes permissible denials of benefits from impermissible denials."[191]

In *Locke*, the Court indicated that government funding that excludes religious organizations falls into the permissible funding category. The Court recognized that *Lukumi* could be understood to mean that a criminal law "is presumptively unconstitutional because it is not facially neutral with respect to religion."[192] However, the Court refused to extend that reasoning to cover the situation in *Locke*.[193] The Court referred to devotional theology as a "distinct category of instruction"[194] and stated that the Promise Scholarship Program excluded such degrees because they are so distinct from other kinds of degrees.[195] The Court upheld the exclusion of devotional theology degrees because the exclusion did not indicate "animus toward religion"[196] and the burden on religion was "relatively minor."[197] One question raised by *Locke* is whether this reasoning is applicable to a Free Exercise challenge to a school aid program. In other words, is the facial neutrality principle equally inapplicable to voucher cases? If it is, then a voucher program that excludes religious schools does not impose an unconstitutional condition on free exercise rights, and the program will be valid unless it violates the Free Exercise Clause in some other way. This question can be addressed after a discussion of a few significant conditional funding cases.

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doctrine); *see also* Berman, *supra* note 183, at 3 ("The persistent challenge . . . has been to articulate some coherent or at least intelligible principles or tests.").

188. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

189. Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547 (1983).

190. *See* Berg, *supra* note 9, at 172 ("Challengers argue that the exclusion of religious-school choices from a voucher program is an unconstitutional condition . . . .").

191. *Id.* at 171.

192. Locke v. Davey, 540 U.S. 712, 720 (2004).

193. *See id.* (stating that applying the rule from *Lukumi* "would extend . . . [that] line of cases well beyond . . . their reasoning").

194. *Id.* at 721.

195. *Id.*

196. *Id.* at 725.

197. *See Locke*, 540 U.S. at 725 (finding that the Promise Scholarship Program is constitutional even though it may place some burden on religious recipients).

B. Conditional Funding Cases

1. Sherbert v. Verner

In *Sherbert v. Verner*,[198] the issue was whether the State of South Carolina violated the appellant's First Amendment right to free exercise by denying her unemployment compensation benefits because, in accordance with her religious beliefs, she would not accept work on Saturdays.[199] Appellant was a Seventh-Day Adventist who had been fired from her job at a textile mill for her refusal to work on Saturdays.[200] The South Carolina Employment Security Commission denied her unemployment benefits based on a provision disqualifying claimants who refused suitable work without good cause.[201]

The Supreme Court reasoned that the disqualification would be constitutional either if it did not infringe on the appellant's right to free exercise or if any incidental burden on her free exercise could be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."[202] The Court stated that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[203] This statement presents the basic idea of unconstitutional condition analysis. The Court found that the appellant's right to free exercise had been burdened because she was left with a choice of either following her beliefs and being denied benefits or violating her own religious beliefs.[204] The Court also found that the state offered no compelling interest to justify the burden.[205] The Court held that the state's actions violated the Free Exercise Clause.[206] The holding suggested that even if the government is under no obligation to fund a person's constitutional rights, a denial of funding may create an unconstitutional infringement on constitutional rights.[207]

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198. Sherbert v. Verner, 374 U.S. 398 (1963).

199. *Id.* at 399–401.

200. *Id.* at 399.

201. *Id.* at 400–01.

202. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

203. *Id.* at 404.

204. *See id.* (explaining why the disqualification burdened the appellant's free exercise of her religious beliefs).

205. *See id.* at 406–07 (stating that no compelling state interest had been advanced by South Carolina to "justif[y] the substantial infringement of appellant's First Amendment right").

206. *See id.* at 410 ("Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.").

207. *But see* Sullivan, *supra* note 185, at 1435–37 (arguing that cases like *Sherbert*, in

2. Harris v. McRae

In *Harris v. McRae*,[208] the plaintiffs argued that the Hyde Amendment, which denied federal funding for medically necessary abortions, impinged upon their protected liberty interest in deciding to terminate a pregnancy.[209] The Court rejected this argument because the Hyde Amendment "place[d] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather . . . encourages alternative activity deemed in the public interest."[210] The Court declined

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which the Supreme Court has found a penalty on a constitutional right, "have left a limited legacy"). In *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the Court reviewed the *Sherbert* holding and clarified its scope. *Id.* at 882–85. According to *Smith*, the *Sherbert* compelling interest test for benefits denials that burdened religious exercise was suited for "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884. The Court declined to use the test to require exemptions from generally applicable criminal laws. *Id.* It interpreted *Sherbert* to mean that where a benefit program already provides individual exemptions, the state must have a compelling interest for not allowing exemptions for religious reasons. *Id.* Justice Scalia was acutely aware of the potential impact of a ruling allowing individuals to claim exemption from generally applicable laws meant to prevent "socially harmful conduct." *Id.* at 885. The opinion did not address the appropriate test for government action that falls within the extremes represented by *Sherbert* and *Smith*. *Id.* at 884–85. It did, however, distinguish free speech cases, stating that a compelling interest test serves to "produce[] . . . an unrestricted flow of contending speech . . . [which is a] constitutional norm[]." *Id.* at 886.

208. Harris v. McRae, 448 U.S. 297 (1980). The Court addressed two issues. The first issue was "whether Title XIX requires a State that participates in the Medicaid program to fund the cost of medically necessary abortions for which federal reimbursement is unavailable." *Id.* at 301. If there was no such requirement, the second issue was whether the denial of funding for some medically necessary abortions would violate either due process or equal protection under the Fifth Amendment, or the Religion Clauses. *Id.* The case had developed into a class action suit "on behalf of all pregnant and potentially pregnant women eligible for Medicaid who wish to have medically necessary abortions, and of all authorized providers of abortions for such women." *Id.* at 306. On the first issue, the Supreme Court reasoned that because Title XIX was a program of "cooperative federalism," it did not intend for a participating State to fund any service for which federal funds are unavailable. *Id.* at 308–09. The Court held that, absent contrary legislative intent, "Title XIX does not require a participating State to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment." *Id.* at 311. On the second issue, the plaintiffs argued that the Hyde Amendment, which denied federal funding for medically necessary abortions, impinged upon their protected liberty interest in deciding to terminate a pregnancy. *Id.* at 312. The Court rejected this argument, finding that the Hyde Amendment "place[d] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather . . . encourages alternative activity deemed in the public interest." *Id.* at 315. The Court did not consider whether the asserted interest, the freedom to choose to terminate a pregnancy for health reasons, was a central "constitutional liberty." *Id.* at 316. It relied on the idea that the government "need not remove those [obstacles] not of its own creation." *Id.*

209. *Id.* at 312.

210. *Id.* at 315.

to consider whether the asserted interest, the freedom to choose to terminate a pregnancy for health reasons, was a "constitutional liberty" as defined in prior cases.[211] Instead, it found that the government "need not remove those [obstacles] not of its own creation."[212] The Court's reasoning rested on the fear that requiring such funding would require the government to subsidize every fundamental right.[213]

The Court distinguished its holding in *Sherbert* because in that case the law required a broad disqualification from benefits for engaging in constitutionally-protected activity; *McRae*, the Court noted, involved a refusal to subsidize the activity.[214] The Court indicated that a disqualification is broad when the benefit denied is unrelated to the exercise of a fundamental right, like in *Sherbert*, where the government was funding the cost of unemployment.[215]

3. Rosenberger v. Rector and Visitors of University of Virginia

In *Rosenberger v. Rector and Visitors of University of Virginia*,[216] the issue was whether the University had violated the free speech and free exercise rights of a group of students who were denied reimbursement for printing costs from a student activities fund because its publication was considered a "religious activity."[217] The Supreme Court held that the denial

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211. *Id.* at 316.

212. *Id.*

213. *See id.* at 318 (arguing that just because the government may not prohibit certain activities does not mean that it should have an obligation to fund those activities).

214. *Id.* at 317 n.19.

215. *See id.* (distinguishing *McRae* from *Sherbert*).

216. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995). The University allowed access to its facilities to student organizations that received "Contracted Independent Organization" (CIO) status. *Id.* at 823. The petitioners' group, Wide Awake Productions, received CIO status. *Id.* at 826. Some CIOs were eligible to receive funding from a student activities fund, which was intended to foster educational activities within the University. *Id.* at 824. Funding could be allotted to, among others, "student news, information, opinion, entertainment, or academic communications media groups." *Id.* at 824 (internal quotations omitted). Excluded from funding were religious activities, which included petitioners' publication, Wide Awake. *Id.* at 825–27. The issue was whether the University had violated students' free speech and free exercise rights by denying Wide Awake Productions reimbursement for printing costs because its publication was considered a "religious activity." *Id.* at 827. The Supreme Court held that the denial violated the students' constitutional right to free speech. *Id.* at 837. The Court concluded that the University had created a public forum through the student activities fund and that the University had engaged in viewpoint-based discrimination by rejecting an otherwise acceptable publication because of its religious perspective. *Id.* at 830–31. The Court rejected the University's Establishment Clause defense. *Id.* at 845–46.

217. *Id.* at 827.

violated the students' constitutional right to free speech.[218] The Court concluded that the University had created a public forum through the student activities fund and that the University had engaged in viewpoint-based discrimination by rejecting an otherwise acceptable publication because of its religious perspective.[219]

According to the *Rosenberger* Court, an individual's speech may be restricted when the government is using that speaker to convey a governmental message or policy determination but may not be restricted when the government action is intended to "encourage private speech."[220] The Court concluded that the student activities fund was intended to encourage private speech rather than convey its own message because the University took measures to ensure that the points of view of student organizations were not considered the views of the University.[221] Thus, the University was discriminating on the basis of viewpoint.[222]

The Court rejected the University's Establishment Clause defense.[223] The Court noted that the program was neutral with respect to religion and stated that it had previously "rejected the position that the Establishment Clause even justifies . . . a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."[224] It found that the student activities fund was not at all similar to a general assessment used to support a church or particular religious sect.[225] The Court also highlighted that the funds would not go to any religious institution[226] and that any benefit to religion would be "incidental to the government's provision of secular services for secular purposes."[227]

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218. *Id.* at 837.

219. *Id.* at 830–31.

220. *Id.* at 833.

221. *Id.* at 834–35.

222. *See id.* at 834 ("The University's regulation now before us . . . has a speech-based restriction as its sole rationale and operative principle.").

223. *See id.* at 845–46 ("To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint.").

224. *Id.* at 839.

225. *See id.* at 840–41 (finding that the student activity fee "is a far cry from a general public assessment designed and effected to provide financial support for a church").

226. *See id.* at 842 ("We do not confront a case where . . . the government is making direct money payments to an institution or group that is engaged in religious activity.").

227. *Id.* at 843–44.

V. Rejecting Unconstitutional Condition Analysis: Why the Neutrality Principle Should Not Be Extended to School Voucher Cases

A. Introduction

A review of the unconstitutional conditions cases shows that the Court has no firm doctrinal basis for its decisions.[228] As the discussion of the cases shows, the Court has often relied on fact-based distinctions between the cases rather than invoking established doctrine. For example, *Employment Division, Department of Human Resources v. Smith*[229] and *McRae* both distinguished *Sherbert* based on differences between the types of laws or benefits involved.[230]

Locke's reasoning for finding a constitutional condition arguably went along the following lines: Neutrality is not an appropriate standard for determining the constitutionality of the Promise Scholarship Program,[231] the state has come forward with an interest in denying funding for devotional theology degrees,[232] and the program does not reflect "animus towards religion,"[233] and therefore, the program is constitutional.[234] The question is whether the conditional funding analysis from *Locke* should be extended to school voucher cases. The answer depends, in part, on the relationship between neutrality and conditional funding.

This Note argues that the Court should extend its reasoning in *Locke*[235] to school voucher cases. Neutrality is not the appropriate standard for deciding school funding cases brought under the Free Exercise Clause. States arguably have a nondiscriminatory reason for excluding religious schools from government aid programs that could dispel an accusation of animus toward

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228. *See supra* note 187 and accompanying text (addressing the lack of a satisfactory mode of analysis for unconstitutional conditions cases).

229. *See supra* note 207 (discussing Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) and how it distinguished *Sherbert*).

230. *See supra* notes 214–15 and accompanying text (discussing how the Court distinguished *Sherbert* from *McRae*).

231. *See supra* notes 192–93 and accompanying text (discussing *Locke*'s treatment of the neutrality principle).

232. *See* Locke v. Davey, 540 U.S. 712, 722–23 (2004) (discussing the state's interest in not funding degrees in devotional theology). It is possible to interpret the Court's "substantial interest" analysis as intending to show a legitimate state interest that rules out a motivation of animus toward religion. *See supra* notes 179–81 and accompanying text (addressing this possibility).

233. *Id.* at 725.

234. *See id.* (finding the challenge to the program could not be sustained).

235. *See supra* notes 231–34 and accompanying text (discussing the reasoning behind the Court's conditional funding analysis in *Locke*).

religion.[236] Therefore, absent affirmative proof of animus, the government should be able to differentiate between the two distinct goods that are secular and sectarian education and advance secular education without violating the Free Exercise Clause.[237] The next section discusses the central role that neutrality plays in finding an unconstitutional condition.[238] This Note will then try to demonstrate that excluding religious schools from voucher or school aid programs does not automatically violate the Free Exercise Clause because the neutrality principle does serve the Free Exercise Clause's true purpose.[239]

B. Neutrality and Conditional Funding

One potentially useful principle for distinguishing between constitutional and unconstitutional conditions is neutrality. A condition is unconstitutional if the distinction is one the government should be prohibited from drawing.[240] Neutrality may provide a useful basis for distinguishing abortion cases from

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236. In *Locke*, the Court looked to historical prohibitions on funding the ministry to find a "substantial state interest" in not funding devotional theology degrees. *See* Locke v. Davey, 540 U.S. 712, 722–23 (2004) (quoting various state prohibitions on funding the ministry). It is unclear how the Court intends to use the "historic and substantial state interest" factor from *Locke* in future cases. *Id.* at 725. An argument can be made that the Court should not find states' interests in excluding religious schools from voucher programs to be substantial. *See supra* Part III.B (discussing how the reasoning in *Locke* would apply to a school voucher cases and exploring ways to argue that denying funding to religious schools would serve no substantial state interest). It may be that the Court was only concerned with corroborating its finding of lack of animus. Prohibitions on funding religious schools arguably provide a legitimate interest for excluding religious schools from government funding programs. *See* Berg, *supra* note 9, at 167 (discussing state provisions that bar aid to sectarian schools). In addition, states can point to Establishment Clause jurisprudence that espoused a "no aid to religion" philosophy to argue that their actions were taken due to an adoption of that philosophy, not antireligious motivation. *See* Alexander, *supra* note 6, at 448 (noting the strict interpretation of "no aid to religion" formerly used by the Court).

237. *See, e.g.*, Smith, *supra* note 79, at 1978 (discussing the Supreme Court's "fairly weak" approach to enforcing the Free Exercise Clause and stating that "[a]bsent discriminatory intent, the political branches may decide whether they wish to permit government assistance for religious activities").

238. *See infra* Part V.B (discussing the relationship between neutrality and the unconstitutional condition doctrine).

239. *See infra* Part V.C (arguing that neutrality should not govern Free Exercise challenges to school aid programs that exclude religious schools and arguing that, under the appropriate test, such programs do not necessarily violate the Free Exercise Clause).

240. *See* Sullivan, *supra* note 185, at 1506 (stating that the unconstitutional conditions doctrine "bars redistribution of constitutional rights as to which government has obligations of evenhandedness").

speech cases.[241] The government is under no constitutional mandate to treat abortion and childbirth neutrally.[242] However, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another."[243] Because of this neutrality requirement, the government may not open a forum for speech and selectively cut out one particular point of view.[244] In the abortion context, the government may choose between funding two entirely different services.[245] It follows that, in the school voucher context, one question to be asked is whether the government may fund private education and selectively cut out funding for religious schools. The answer to this question depends on whether the government may favor secular education over sectarian education. If school funding cases are governed by the neutrality principle, then the government may not favor one activity over the other.

Professor Douglas Laycock argues that the "government should be substantively neutral toward religion."[246] Substantive neutrality means that the government should "[n]either encourage[] [n]or discourage[] religious belief or disbelief, practice or nonpractice, observance or nonobservance."[247] According to Laycock, "[m]inimizing the influence of government maximizes the freedom to make religious choices."[248] To Laycock, *Locke* was an easy case; the government was being nonneutral by treating unfavorably a devotional activity, and therefore, the program was discriminatory.[249]

One flaw Laycock finds in the Court's opinion is the conditional funding analogy it draws with abortion cases like *McRae*.[250] The analogy is flawed, he says, because "[t]he right to choose abortion is a right to be free of undue

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241. *See* Laycock, *supra* note 16, at 176 (arguing against the outcome in *Locke* and stating that "because the Court has never required [the] government to be neutral toward abortion, the implicit analogy to abortion is fundamentally flawed").

242. *See* Rust v. Sullivan, 500 U.S. 173, 192–93 (1991) ("[T]he government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'" (quoting Maher v. Roe, 432 U.S. 464, 474 (1977))).

243. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

244. *See id.* at 829 ("The government must abstain from regulating speech when the specific . . . perspective of the speaker is the rationale for the restriction.").

245. *See Rust*, 500 U.S. at 192–93 (discussing the government's prerogative to choose between advocating childbirth or abortion).

246. Laycock, *supra* note 16, at 160.

247. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990).

248. Laycock, *supra* note 16, at 160–61.

249. *See id.* at 171–72 (arguing that the Promise Scholarship Program was a clear violation of the *Smith* and *Lukumi* line of cases).

250. *See id.* at 176–77 (criticizing the Court for applying abortion cases to religious liberty cases).

burdens; the right to religious liberty is a right to government neutrality."[251] Under this argument, the condition in *Locke* is unconstitutional because it is based on a distinction the government may not draw.[252]

C. Rejecting Neutrality

The Court has been wary of obligating the government to fund individuals in the exercise of their constitutional rights.[253] In fact, the Court rarely finds a condition attached to a funding program to be unconstitutional.[254] One situation in which the Court will find an unconstitutional condition is when a funding program favors one right over another in an area where the government is required to act neutrally.[255] Professor Laycock argues "that the government should be substantively neutral toward religion" and that the program at issue in *Locke* did not meet this requirement.[256] Thus, Laycock would place *Locke* with the free speech line of cases, in the sense that government neutrality is required.[257]

Professor Frank S. Ravitch has identified various problems created by the neutrality principle.[258] Ravitch writes that the Supreme Court has made the ideal of "formal neutrality" the driving principle in cases involving government

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251. *Id.* at 177.

252. *See id.* (arguing that the condition in *Locke* was unconstitutional because the government "cannot make a value judgment that secularism is better than religious faith").

253. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 194 (1991) (stating that finding it unconstitutional for the Government to ban the use of federal funds by programs that perform or advise on abortions "would render numerous Government programs constitutionally suspect"); Harris v. McRae, 448 U.S. 297, 318 (1980) ("To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman . . . .").

254. *See* Laycock, *supra* note 16, at 175 (stating that most funding cases are not found to present an unconstitutional condition).

255. *See* Sullivan, *supra* note 185, at 1506 (stating that the unconstitutional conditions doctrine "bars redistribution of constitutional rights as to which government has obligations of evenhandedness").

256. *See* Laycock, *supra* note 16, at 160–61 (stating that "[t]he government's conduct failed this neutrality test in . . . [*Locke*]"). One could argue that since one of the Court's concerns in *Locke* seemed to be whether strict neutrality was the governing principle, Laycock's position is begging the question.

257. *See id.* at 199 ("Under a strong neutrality rule, the state could not cut funds to religious private education without also cutting funds to secular private education.").

258. *See generally* Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489 (2004) (discussing the neutrality principle).

aid to religious schools.[259] He defines formal neutrality as a "focus[] on the facial neutrality of government action, and on the role private choice plays in directing government aid to religious entities in the aid context."[260] This principle has become central in both Establishment Clause and Free Exercise Clause cases.[261] Professor Laycock's "substantive neutrality"[262] differs from the Court's formal neutrality but still suffers from similar shortcomings.[263]

Ravitch criticizes neutrality as being too simplistic to be a guiding principle in a complex area of the law.[264] He finds it to be too simplistic because absolute neutrality is an impossible ideal.[265] One of Ravitch's main points is that determining the neutrality of a program requires a neutral baseline from which to judge the effects of the program;[266] the problem, as defined by Ravitch, is that a neutral baseline simply does not exist.[267] For the Court to conclude that neutral treatment requires equal treatment, it must assume "that religion has no special status," such that including religiously-oriented organizations in funding programs will lead to neutrality.[268] The result of equal treatment can, however, be nonneutral because extending a benefit to religion may actually tend to favor religious activity over nonreligious activity, though this determination is often a difficult one to make.[269] The crux of Ravitch's argument is that:

> Since there is no neutral foundation or baseline that can be used to prove that something is "truly" neutral, neutrality is nothing more than a

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259. *Id.* at 491–93 (discussing the Court's adoption of formal neutrality in Establishment Clause and Free Exercise Clause cases).

260. *Id.* at 493.

261. *See supra* Parts II.B–C (discussing recent Establishment and Free Exercise cases).

262. *See supra* note 247 and accompanying text (defining substantive neutrality).

263. *See* Ravitch, *supra* note 258, at 505 ("[W]hile Professor Laycock may have made a wise choice among potential baselines, his choice and the resulting baseline are no more neutral than the Court's formal neutrality.").

264. *Id.* at 495–96 (advocating the view that "a . . . simple principle can never be applied to a state of things which is the reverse of simple") (quoting Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 2 (1961)).

265. *Id.* at 498–502 (explaining why neutrality is an ideal that cannot be achieved).

266. *See id.* at 502 (stating that "[e]ven though each construction [of neutrality] relies on a baseline that is not provably neutral, each has a value because people take solace in the notion of neutrality").

267. *See id.* at 493 ("There is no independent neutral truth or baseline to which [claims of neutrality] can be tethered.").

268. *Id.* at 501.

269. *See id.* at 516 (stating that "neutrality is especially dangerous because the Court would simply be placing the label of neutrality on analysis that is neither neutral nor likely to lead to 'neutral' results and using the label to validate its approach").

> buzzword and a dangerous one at that, because it implies that the supposedly neutral approach should be taken more seriously because it is actually neutral.[270]

One problem with the neutrality principle as conceived by Laycock is that his method for assuring a "neutral" result will not necessarily lead to such a result in all cases. Laycock argues for "substantive neutrality," which requires the government to "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[271] As Ravitch points out, however, extending funding to religious schools may actually favor religious schools, depending on the situation.[272] It is possible that the inclusion of religious schools in a government aid program may skew parents' incentives toward sending their children to a religious school. This could result from a high volume of religious schools or a perception that religious schools offer certain advantages, such as strict disciplinary control.[273] Such a program could encourage religious practice or observance. Thus, the neutrality approach may not be as effective a standard as its proponents believe.

There may be deeper problems with the neutrality standard, in that it may not distinguish school funding programs that violate the Free Exercise Clause as the current Court understands it.[274] *Smith* appeared to stand for the proposition that a law may prohibit a religious activity as long as the purpose of the law is not to specifically target religion.[275] *Lukumi* adhered to *Smith*'s focus on the purpose of a law and also condemned laws that target religious beliefs.[276]

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270. *Id.* at 517.

271. Laycock, *supra* note 16, at 160.

272. *See supra* note 264–70 and accompanying text (discussing Ravitch's criticism that a so-called neutral approach will not always lead to a "neutral" result).

273. *See* Berg, *supra* note 9, at 157 (stating that families may choose religious schools because of the school's "disciplinary policies").

274. At least two pre-*Locke* student notes suggest that the Free Exercise Clause's primary concern is not neutrality, but rather laws that force people to act against their religious beliefs. *See* Axtell, *supra* note 121, at 612 (stating that "[t]he neutrality required in the free exercise analysis is that the *object* of the law is not to prohibit, hinder, or burden religious practices or belief; whether the law is viewpoint neutral is not within the analytical framework of the Free Exercise Clause"); Smith, *supra* note 79, at 1983 (arguing that neutrality is not "the paramount constitutional value protected by the Free Exercise Clause").

275. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878 (1990) (stating that a general tax is valid "if prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect").

276. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation . . . it is invalid . . . .") (citations omitted).

Together these cases focused on laws that regulate religious beliefs or have a purpose to suppress religion.[277]

It is not clear that the incidental harm to religious beliefs that might result from the exclusion of religious schools from voucher programs is the type of harm to religious beliefs that the Free Exercise Clause was intended to prevent.[278] The Court has emphasized that an incidental burden on religion may be acceptable.[279] In a government funding case, the government is not preventing citizens from holding any religious beliefs. Potential recipients are free to forgo government benefits and pursue their religious beliefs. In fact, the Court has previously recognized that "government regulation that indirectly . . . calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action . . . that criminalizes religiously inspired activity . . . ."[280]

Furthermore, the Court has drawn a clear distinction between religious belief and religious practice.[281] A voucher program that excludes religious schools arguably inhibits religious practice rather than religious belief because the "penalty" is for conduct, not for holding a particular belief. If the program does not regulate religious beliefs, the only Free Exercise concern that a voucher program would seem to implicate is the prohibition on government actions that are taken with intent to suppress religious practice.[282]

Lukumi indicated that the neutrality principle serves as a proxy for nondiscriminatory purposes. According to the *Lukumi* Court, "[t]here are . . . many ways of demonstrating"[283] an intent to suppress religion, and "[t]o determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face."[284]

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277. *See* Duncan, *supra* note 94, at 856 (stating that "[t]he *Smith* opinion was based in part on the discredited distinction between religious belief and conduct").

278 *See* Bowen v. Roy, 476 U.S. 693, 703 (1986) (describing a claim that it is unconstitutional for the government to require a person to have a Social Security Number to receive government benefits as "far removed from the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause").

279. *See, e.g., Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535 ("[A]dverse impact will not always lead to a finding of impermissible targeting.").

280. *Bowen*, 476 U.S., at 706.

281. *See* Duncan, *supra* note 94, at 856 (stating that, under *Lukumi*, "the right of religious belief and profession does not include the right to engage in religiously motivated conduct") (citing *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878–79 (1990)).

282. *See supra* notes 276–79 and accompanying text (discussing the types of laws the Free Exercise Clause has been interpreted to prohibit).

283. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

284. *Id.*

However, *Locke* did not rest its decision on the principle that *Lukumi* requires a showing of motive as well as neutrality.[285] Instead, the Court found that the reasoning behind *Lukumi*'s conclusion was inapplicable.[286]

Lukumi involved a criminal law.[287] Requiring facial neutrality for criminal laws might serve two purposes. A criminal prohibition that singles out religious activity for the imposition of a criminal penalty is unlikely to be necessary to achieve any substantial interest.[288] Additionally, it is reasonable to infer intent to discriminate from a law that singles out a particular religion for punishment.[289] Neutrality does not serve the same role in the school voucher context. States may have legitimate reasons for excluding religious schools from voucher programs, reasons unrelated to any discriminatory intent.[290] Additionally, Establishment Clause-related interests often cannot be pursued in a way that does not single out religious activities.[291] Arguably, the Free Exercise Clause's main concern is that the government act without an intent to suppress religion or target religious beliefs.[292] The Free Exercise Clause does not require equal funding for both secular and sectarian schools. Therefore, neutrality, as conceived by Professor Laycock,[293] is not the appropriate standard for determining the constitutionality—under the Free Exercise Clause—of a school aid program. Therefore, the condition an exclusionary voucher program places on religious exercise is not by itself unconstitutional.

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285. *See* Locke v. Davey, 540 U.S. 712, 720 (2004) (rejecting presumption of unconstitutionality).

286. *See id.* (finding that applying the *Lukumi* presumption would extend that idea beyond the reasoning of *Lukumi*).

287. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 528 (noting that the ordinance violations were punishable by fines and imprisonment).

288. *See id.* at 546–47 (stating that "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling").

289. *See id.* at 538 (stating that it is reasonable to find "that a law which visits 'gratuitous restrictions' on religious conduct seeks . . . to suppress the conduct because of its religious motivation") (quoting McGowan v. Maryland, 366 U.S. 420, 520 (1961)) (Frankfurter, J., concurring).

290. *See supra* note 236 (considering legitimate interests a state may have in excluding religious schools from voucher programs).

291. For example, a state may have an interest in not funding degrees in devotional theology.

292. *See supra* notes 276–79 and accompanying text (considering the protections the Free Exercise Clause provides, as interpreted by the various Supreme Court cases).

293. *See supra* notes 246–62 and accompanying text (discussing Professor Laycock's argument for substantive neutrality towards religion).

An appropriate justification for upholding the burden placed on religion by exclusionary voucher programs is that nonneutrality does not indicate a Free Exercise violation. Neutrality should not be required. Neutrality is a sensible principle for deciding Free Exercise challenges to criminal laws, but it does not make sense as a standard for deciding school funding cases. Without the neutrality principle, Laycock's argument against analogizing funding cases to abortion cases loses its force.[294]

The unconstitutional condition argument has been put forth by school choice advocates as a way to challenge programs that exclude religious schools.[295] The *Locke* Court declined to use the neutrality analysis set forth in *Lukumi* and found that the condition placed on scholarship recipients' free exercise was constitutional, as long as the program did not suggest animus towards religion.[296] Thus, *Locke* apparently affirms the argument that neutrality is not "the paramount constitutional value protected by the Free Exercise Clause."[297] This Note argues that the reasoning in *Locke* is equally applicable to school voucher cases because the neutrality principle should not be extended to these cases. Neutrality is inappropriate because states may be pursuing legitimate interests when they exclude religious schools from voucher programs.[298] If the focus of a Free Exercise inquiry is to determine a purpose to suppress religion, these interests must be weighed in the determination. Therefore, the only time that such a program should be held unconstitutional is when a challenger can show that the program was created with intent to inhibit religion.

D. Endorsing a Focus on Animus Towards Religion

The Court in *Locke* was right to focus on "animus towards religion"[299] in the face of the state's legitimate interest in excluding devotional theology

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294. *See supra* notes 246–49 and accompanying text (discussing Professor Laycock's unconstitutional condition argument).

295. *See* Berg, *supra* note 9, at 172 ("Challengers argue that the exclusion of religious-school choices from a voucher program is an unconstitutional condition . . . .").

296. *See* Locke v. Davey, 540 U.S. 712, 720, 725 (2004) (declining to extend *Lukumi* and stating that the minor burden on scholar recipients was constitutional because of the state's interest and because nothing about the program suggested animus towards religion).

297. Smith, *supra* note 79, at 1983.

298. *See supra* note 236 and accompanying text (discussing the states' legitimate interests in excluding religious schools from voucher programs).

299. Locke v. Davey, 540 U.S. 712, 725 (2004)

degrees from the Promise Scholarship Program.[300] In cases involving criminal prohibitions, neutrality may be used as a proxy for a purpose to suppress religious practice.[301] In funding cases, however, lack of neutrality does not indicate the type of burden on religion that the Free Exercise Clause was intended to prevent.[302] Furthermore, neutrality is a flawed standard that might not lead to a neutral result in funding cases.[303]

A state may be motivated either by its own establishment concerns[304] or an interest in promoting the benefits of secular education to exclude religious schools from a voucher program. These interests are not evidence of animus towards religion. The exclusion cannot be presumed to be discriminatory and therefore unconstitutional. Lack of neutrality is insufficient to establish intent to suppress religion. Instead, a challenger will have to point to actual evidence of animus towards religion. This standard appears to strike an appropriate balance between the state's legitimate interests and a religious practitioner's right not to be discriminated against. The Court's focus on animus may make challenges to state "Blaine amendments" the best option for school voucher advocates challenging exclusionary voucher programs.[305]

A test that requires proof of animus towards religion would be used to determine whether the purpose of a law was to suppress religious practice. An animus towards religion might be demonstrated by evidence in a law's legislative history.[306] Lack of any rational or legitimate reason for distinctive treatment of religious activities would also be indicative of animus towards religion.[307] Animus might be indicated by a law that is overinclusive, in that it

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300. *See id.* (noting "the historic and substantial state interest at issue").

301. *See supra* notes 283–84 and accompanying text (analyzing the Court's use of neutrality in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).

302. *See supra* notes 290–92 and accompanying text (arguing that in the funding context nonneutrality does not suppress religious beliefs or indicate intent to target religious practice).

303. *See supra* notes 266–70 and accompanying text (discussing why neutrality may not lead to a "neutral" result).

304. For an Establishment Clause related concern to be legitimate should not mean that the action taken by the state is compelled by the Establishment Clause. The Establishment Clause was written with an eye towards denying the government "all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." Everson v. Bd. of Educ., 330 U.S. 1, 11 (1947).

305. This Note does not address the validity of state amendments that are alleged to reflect antireligious animus. *See supra* notes 86–89 and accompanying text (discussing "Blaine amendments").

306. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–42 (1993) (investigating the legislative history of the ordinances at issue to determine their objective).

307. *See id.* at 536 (noting that the ordinances' distinctive treatment of religion supported

burdens religious practice to a degree that is not necessary to achieve the law's objectives.[308] An underinclusive law that does not prohibit equally harmful nonreligious conduct might also indicate animus towards religion.[309]

VI. State-Sponsored Public Schools[310]

Since the 1920s, parents have had the option of sending their children to private religious schools at their own expense while states offered free public and therefore secular education.[311] The logic of the neutrality argument could lead to the conclusion that state-funded private education is nonneutral and treats religious activity unfavorably. The Supreme Court has indicated that there is no constitutional right to a free public education.[312] So, arguably, a state's decision to fund secular public education disfavors religious activity to the same degree as a voucher program that excludes religious schools. The government is essentially conditioning assistance on the condition that recipients forego a religious education.

Yet the Court has never ruled that free public education creates an unconstitutional condition.[313] The implication is that state provision of public education and public education alone does not violate the Free Exercise Clause. If this is the case, then the result in the school voucher context should be no different. Funding secular private schools and not funding sectarian private schools is no different than providing free secular public education and not free sectarian public education.

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the Court's finding that the ordinances were intended to suppress religion).

308. *See id.* at 542 (finding that the ordinances were intended to suppress religion, in part, because the laws prohibited more religious conduct than the laws' allegedly legitimate ends should have required).

309. *See id.* at 543–45 (discussing how the challenged ordinances were underinclusive for the City of Hialeah's alleged purposes).

310. I would like to thank Professor Ronald J. Krotoszynski for pointing me toward this argument.

311. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (holding unconstitutional a law that compelled parents to send their children to public schools on the basis that it interfered with parents' liberty rights under the Fourteenth Amendment).

312. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1972) ("Education . . . is not among the rights afforded explicit protection under our Federal constitution . . . [n]or do we find any basis for saying it is implicitly protected.").

313. *See* Norwood v. Harrison, 413 U.S. 455, 462 (1973) ("In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise.").

VII. Discriminatory Religious Schools[314]

Another problem with opening voucher programs to religious schools relates to how the states should deal with schools that engage in religiously-motivated discrimination.[315] Arguably, a state may not, in the provision of state services that are not generally available, indirectly violate the mandate that state-operated schools may not discriminate on the basis of race.[316] This proposition would seem to bar states from giving any form of aid to discriminatory sectarian schools. In fact, some state voucher programs that are currently in place prohibit aid to schools that do not comply with a policy of nondiscrimination.[317]

If the states may not extend funding to schools whose religious tenets support discrimination, the natural consequence will be that religion-inclusive voucher programs will be limited to the inclusion of more conventional religious institutions. The result would be nonneutral disfavor of religious groups that are not socially-accepted. Such nonneutral treatment is arguably more invidious than a state's decision to withhold all religious funding. This point merely adds to the argument for leaving funding decisions to the states. The voucher context is one in which it seems that someone will be left feeling slighted. Rather than leaving the Supreme Court to read the Constitution against one group or the other, the issue is best left to the states.

VIII. Conclusion

Locke placed boundaries on the facial neutrality principle developed in *Lukumi*. Rather than deciding the case based on the facial neutrality of the program involved, the Court considered the state's substantial interest in not

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314. I would like to thank Professor Ronald J. Krotoszynski for pointing me toward this argument.

315. *See* Berg, *supra* note 9, at 208–20 (discussing conditions that states might try to impose on religious school eligibility). Professor Berg argues that some of these conditions may work a "penalty" on religious choice. *Id.* at 211–12.

316. *See Norwood*, 413 U.S. at 464–65 (noting that by giving tangible aid in any form to a discriminatory religious school Mississippi was aiding the operation of that organization and finding that such funding was prohibited by the principle that the state may not indirectly engage in racial discrimination).

317. *See, e.g.*, OHIO REV. CODE ANN. § 3313.976(A)(4) (Anderson 2005) (stating that no private school may receive aid unless it "does not discriminate on the basis of race, religion, or ethnic background"); *id.* § 3313.976(A)(6) (stating that no private school may receive aid unless it "does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion").

funding devotional theological studies and the absence of animus toward religion.[318] Though it is not entirely clear whether a state would have a substantial interest in excluding religious schools from voucher programs,[319] *Locke* may indicate the Court's intention to allow states to decide whether to fund religious activities.[320] A school voucher program can enjoy this deference if a state can argue that *Lukumi*'s presumption of unconstitutionality should likewise not be extended to such programs.[321]

This Note argues that *Locke*'s reasoning extends to the school voucher context.[322] It demonstrates that the neutrality principle is unworkable because it does not serve the same purpose in the school voucher context that it served in *Lukumi*.[323] In light of this and the states' interests in not funding religious education, funding distinctions based on religious activities do not necessarily create a burden cognizable under the Free Exercise Clause. Therefore, such distinctions cannot be said to create an unconstitutional condition.

The major issue remaining after *Locke* is how the Court will interpret the substantial interest requirement and whether states can show a substantial interest in excluding religious schools from voucher programs.[324] The position the Court ultimately takes may well be dictated by federalism concerns and a desire to leave funding decisions to the states. Clearly, there is some tension between the requirements of the Free Exercise Clause and Establishment Clause concerns. In an area where the burden on religion created by the denial of vouchers for those who would use them at religious schools is minor (in the sense that religious practice is not restricted in any way,) it may be wise to leave funding decisions to the states' discretion. The Establishment Clause developed because of a belief that no money should be paid from the government to religious institutions[325] and the states should have some leeway

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318. *See supra* Part III.A (discussing the *Locke* opinion).

319. *See supra* Part III.B (discussing how the Court might address a school voucher challenge after *Locke*).

320. *See* Locke v. Davey, 540 U.S. 712, 721 (2004) (recognizing the legitimate reasons for a state to act differently toward religious education as compared with other types of education).

321. *See supra* notes 295–98 and accompanying text (stating that school voucher cases should be decided like *Locke* if *Lukumi*'s presumption is not extended into that area).

322. *See supra* Part V (arguing that *Locke* should be extended to school voucher cases).

323. *See supra* Part V.C (arguing that the neutrality principle does not apply in the school voucher context).

324. *See supra* Part III.B (discussing the application of the substantial interest requirement in the school voucher context).

325. *See supra* note 1 and accompanying text (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, at 65–66 (1947)).

to enforce this philosophy as they see fit. States should not have to abandon their own antiestablishment interests merely because the Supreme Court has gradually weakened the Federal Constitution's Establishment Clause.