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Unifying the First Amendment: Free Exercise, the Provision of Subsidies, and a Public Forum Equivalent

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UNIFYING THE FIRST AMENDMENT: FREE EXERCISE, THE PROVISION OF SUBSIDIES, AND A PUBLIC FORUM EQUIVALENT

INTRODUCTION

The problem with constructing categories of thought is that doing so causes one to ignore the interrelationships between the categories that one constructs.[1] For instance, the respective precedents of the Free Speech and Free Exercise Clauses have developed separately over time and have diverged, especially with respect to the provision of subsidies.[2] In the free speech arena, the law of public subsidies is more permissive than the law of regulation, in certain contexts.[3] As discussed below, the same is not true in the area of free exercise.[4] In deciding *Locke v. Davey*,[5] the United States Supreme Court had the opportunity to check the premises from which it was operating in order to return a measure of consistency to these related categories of constitutional law.[6]

The majority opinion in *Locke* represented an attempt by the Court to do just that—to align free speech and free exercise case law as they relate to the provision of subsidies. In *Locke*, the State of Washington revoked a Promise Scholarship that it had given to Joshua Davey after it became aware that Davey decided to major in devotional theology. The *Locke* majority implicitly incorporated the analysis pervasive in free speech case law wherein the Court affords greater deference to governmental decisionmaking when it involves the provision of subsi-

1. Noted constitutional scholar Erwin Chemerinsky made this point in a speech at DePaul University College of Law (Apr. 1, 2004).

2. Throughout this article, use of the term "subsidies" will be in reference to federal or state government expenditures.

3. *See, e.g.*, Regan v. Taxation with Representation of Wash., 461 U.S. 540, 546 (1983) (rejecting the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State" (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959))). *See also infra* notes 59–81 and accompanying text. Throughout this article, the term "regulation" refers to the outright prohibition by government of certain activities.

4. The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I.

5. Locke v. Davey, 124 S. Ct. 1307 (2004).

6. They are related because both are First Amendment clauses phrased in nearly identical language.

dies.[7] The inclination to synchronize the two bodies of law is proper, as the two clauses are so similar in structure.[8] Nonetheless, the ultimate result reached by the *Locke* majority is legally incorrect when one considers the body of First Amendment jurisprudence in its entirety. Instead, the Washington Promise Scholarship Program cannot satisfy strict scrutiny and must fail. Analogizing to the body of free speech subsidy law necessarily compels a consideration of the facts underlying *Locke* using a framework resembling the free speech public forum analysis.

Part II of this Note gives a brief overview of the school subsidy movement and constitutional case law that is relevant to it.[9] Part III will argue for applying the Free Speech Clause concept of a public forum in the Free Exercise Clause analysis of school subsidy programs.[10] Part IV will consider the possible ramifications of the *Locke* decision for other variations of school subsidy programs.[11] Part V concludes that applying a free speech public forum analysis to the Free Exercise Clause would bring consistency to the First Amendment treatment of subsidies.[12]

II. BACKGROUND

This section addresses the state of the law regarding content-based restrictions on school voucher programs. First, this section discusses the genesis and growth of the school voucher movement. This section also discusses Supreme Court case law concerning the Establishment Clause, the Free Speech Clause, and the Free Exercise Clause in relation to the provision of subsidies.[13] Finally, this section details the case of *Locke v. Davey*.

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7. *See generally* Rust v. Sullivan, 500 U.S. 173 (1991); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983).

8. *See infra* notes 221–224 and accompanying text.

9. *See infra* notes 13–154 and accompanying text.

10. *See infra* notes 155–308 and accompanying text.

11. *See infra* notes 309–358 and accompanying text.

12. *See infra* notes 359–361 and accompanying text.

13. When a government subsidy program implicates religious belief or religious speech, it raises concern under not only the Free Speech Clause but also the Establishment Clause and the Free Exercise Clause. *See generally* Vernadette Ramirez Broyles, *The Faith-Based Initiative, Charitable Choice, and Protecting the Free Speech Rights of Faith-Based Organizations*, 26 HARV. J.L. & PUB. POL'Y 315 (2003).

A. Recent History of the School Voucher Movement

Professor Milton Friedman, who first used the term "voucher" in this context in a 1955 article,[14] often receives credit for the idea behind the school choice movement.[15] He argued that the system of public funding for schools should be opened to private schools, in order to further the interests of competition and economic efficiency.[16] The notion did not truly gain momentum, however, until the late 1980s.[17] Supporters saw vouchers as an opportunity to alleviate the deteriorating state of education in many American inner cities.[18] Today, several states have enacted a school choice program in one form or another.[19]

In recent years, school subsidy programs have become a national issue. President George W. Bush made school choice a salient feature of his party's platform during the 2000 presidential election.[20] After promoting the initiative in his legislative agenda, the President achieved recent success when the House and Senate both passed an appropriations bill that included fourteen million dollars a year for private school tuition grants to schoolchildren in the District of Columbia.[21] As a result, the federal government will now subsidize private schools for the first time. Since school subsidy programs most often include the allocation of funds to religious schools, the programs

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14. Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123, 127 (Robert A. Solo ed., 1955). Friedman argued that the government could "require a minimum level of education which they could finance by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on 'approved' educational services." *Id.*

15. Joseph P. Viteritti, *School Choice: The Threshold Question*, 75 ST. JOHN'S L. REV. 251, 252 (2001).

16. *Id.*

17. *See* JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 57 (1999) (noting that President Ronald Reagan submitted voucher bills to Congress in 1983, 1985, and 1986).

18. *See* Mary Mitchell, *A Path Out of Black Males' Crisis: School Choice*, CHI. SUN-TIMES, Oct. 21, 2003, at 14 (stating that "if public schools aren't good enough for the children of politicians like Dick Durbin, Jesse Jackson and members of the state and national teachers union, why are they good enough for poor black children?") (quoting *Chicago Defender* advertisement).

19. *See* MINN. STAT. ANN. § 124D.03 (West 2003); NEB. REV. STAT. ANN. §§ 79-238, 79-241, 79-605 (Michie 2002); FLA. STAT. ANN. § 1002.38 (West 2003); OHIO REV. CODE ANN. § 3313 (Anderson 2003).

20. *See Party Platform, Section Three, Education and Opportunity: Leave No American Behind* (2000), *at* http://www.rnc.org/About/PartyPlatform/default.aspx?Section=3 (pledging support for then-Governor Bush's education reform policies, which would "[a]ssist states in closing the achievement gap and empower needy families to escape persistently failing schools by allowing federal dollars to follow their children to the school of their choice").

21. *See* Spencer S. Hsu & Justin Blum, *D.C. School Vouchers Win Final Approval*, WASH. POST, Jan. 23, 2004, at A2.

inherently raise questions regarding government's favor or disfavor of religion under the Establishment Clause and the Free Exercise Clause.[22]

B. *Establishment Clause Jurisprudence*

A statute that facially implicates religion raises concern under both religion clauses of the First Amendment. The Establishment Clause of the First Amendment, which has been applied to the states through the Fourteenth Amendment,[23] provides that, "Congress shall make no law respecting an establishment of religion . . . ."[24] As Dean Kathleen Sullivan of Stanford Law School suggests, "Establishment Clause controversies do not arise today over flagrant examples of clearly forbidden official sectarianism."[25] Instead, today's Establishment Clause concerns tend to be much more nuanced, requiring a careful examination of the appropriate kind and amount of support the federal and state governments may provide to religious institutions.[26]

1. *State Preference of One Religion over Another*

In a number of cases, the Court has upheld the receipt of state funds by religious institutions if the schools receive the funding through a neutral government program that distributes aid to groups or citizens without reference to religion.[27] An important element con-

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22. *See* Colleen Carlton Smith, Note, Zelman*'s Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs*, 89 VA. L. REV. 1953, 1968–69 (2003). Smith argues that both clauses might limit the flexibility of state decision makers in fashioning such programs:

> In the Establishment Clause context, states may be accused of crafting school choice programs that promote secularism, thereby establishing nonreligion. On the Free Exercise side of the equation, however, states may be accused of selectively excluding religious schools, thereby impermissibly burdening religious liberty.

Id.

23. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (stating that "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

24. U.S. CONST. amend. 1.

25. Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449, 451 (2000).

26. *Id.*

27. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (upholding, against a First Amendment challenge, reimbursements to parents for their children's transportation expenses to both public and private schools); Mueller v. Allen, 463 U.S. 388 (1983) (upholding a Minnesota statute allowing parents limited tax deductions on the tuition and transportation expenses incurred in sending their children to nonpublic schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (upholding the provision of a language interpreter by the local school district to a student attending Catholic school); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that the Establishment Clause did not prohibit inclusion of an otherwise eligible

sistent throughout these cases is that the programs channel governmental funding through a private intermediary, which then allocates the money as a matter of individual choice.[28]

A more basic and longer established principle of Establishment Clause jurisprudence maintains that a state may not by law favor one religion or religious belief over another.[29] Over the years, the Court has reinforced this principle in a series of cases. First, in the two following cases, the Court reversed state actions under statutes that resulted in the disparate treatment of different religious groups.

a. *Niemotko v. Maryland* and *Fowler v. Rhode Island*

The Court began to develop the principle that government must afford equal treatment to religious groups with two cases in the early 1950s. The first, *Niemotko v. Maryland*,[30] involved a group of Jehovah's Witnesses that held a religious meeting in a public park without a permit.[31] The city had no formal requirements or standards governing the issuance of the permit.[32] Following the city's customary practice, however, the group requested permission to use the park from the Park Commissioner.[33] The Commissioner refused.[34] The group then filed a written request with the City Council, but again its request was denied.[35] After the group held its meeting without a permit, two of the group's leaders were arrested and convicted of disorderly conduct.[36] After the appellate court declined to review the conviction, the United States Supreme Court reviewed the trial court's decision.[37] The Court took issue with the particulars of the system and found it to be a prior restraint on the freedoms of speech and religion.[38] Writing for the Court, Justice Frederick Vinson found

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evangelical Christian magazine in a student activities program funded with mandatory student fees).

28. *See* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 740 (1976) (upholding a state grant program, MD. ANN. CODE, art. 77A, §§ 65–69 (1975), that awarded annual grants to private colleges, even if religiously affiliated, on the understanding that the funds would not be used for sectarian purposes); Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (upholding a statute, N.Y. EDUC. LAW § 791 (1967), that required the state to distribute free secular textbooks to all schoolchildren in both public and private schools).

29. *See infra* notes 30–53 and accompanying text.

30. 340 U.S. 268 (1951).

31. *Id.* at 269.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 270.

36. *Niemotko*, 340 U.S. at 270.

37. *Id.*

38. *Id.* at 273. A prior restraint is when the government stops activity before it occurs.

that the reason why local officials denied the Jehovah's Witnesses a permit was because local officials disliked the population and their views.[39] Such discrimination was necessarily barred by the religion clauses of the First Amendment.[40]

Similarly, in *Fowler v. Rhode Island*,[41] the police arrested a Jehovah's Witness minister for speaking at a religious meeting in a public park, which violated a city ordinance.[42] In application, the ordinance protected the church services of Catholics and Protestants in the same park.[43] The Court found that fact fatal, saying the ordinance "plainly shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one."[44] For Rhode Island officials to interpret the statute in this asymmetrical way manifested a serious contravention of governmental authority. The Court stated:

> [I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers. They cover a wide range and have as great a diversity as the Bible or other Holy Book from which they commonly take their texts. To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.[45]

By applying the statute in such a way as to prefer certain religions over others, the state violated the religion clauses of the First Amendment.[46]

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39. *Id.* at 272.

40. *Id.*

41. 345 U.S. 67 (1953).

42. *Id.* at 67. The ordinance provided that:

> No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.

Id.

43. *Id.* at 67–68.

44. *Id.* at 69.

45. *Id.* at 70.

46. *Fowler*, 345 U.S. at 70.

b. *Epperson v. Arkansas*

In a later case, *Epperson v. Arkansas*,[47] the Court extended the principle requiring the equal treatment of disparate religious groups, developed in *Niemotko* and *Fowler*, to require the equal treatment by government of disparate religious beliefs.[48] In *Epperson*, the Court invalidated an Arkansas law that prohibited teachers in public schools from teaching the theory of evolution.[49] The law violated the Establishment Clause by giving primacy to one religious belief—the Christian understanding of creationism—over all others.[50] Writing for a unanimous court, Justice Abe Fortas indicated that government

> must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion . . . .[51]

Finding this prohibition "absolute," the Court declared that the states may not adopt programs that aid or prefer one religious belief over another.[52] In short, the Court in *Epperson* expanded the reasoning it developed in *Niemotko* and *Fowler* to prohibit the differential treatment by government of disparate religious beliefs.

Thus, the Establishment Clause provides that government must extend equal treatment both to disparate religious groups and religious beliefs. Often, in cases that address issues of religious speech, courts must balance the demands of the Establishment Clause with individual rights under the Free Speech Clause.[53]

C. *Free Speech Clause Jurisprudence*

Also pertinent to the constitutionality of school subsidy programs are a series of free speech cases. The First Amendment to the Constitution proclaims that, "Congress shall make no law . . . abridging the

47. 393 U.S. 97 (1968).

48. *Id.* at 104 (stating that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion") (citation omitted).

49. *Id.* at 109. The statute made it unlawful for any teacher "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals." *Id.* at 98–99.

50. *Id.* at 107–09.

51. *Id.* at 103–04.

52. *Id.* at 106.

53. See Timothy K. Hall, Note, *Constitutional Conflict: The Establishment Clause Meets the Free Speech Clause in* Lamb's Chapel v. Center Moriches Union Free School District, 45 MERCER L. REV. 875, 877 (1994) (stating that "a potential conflict exists between the Establishment Clause and the Free Speech Clause when religious groups seek to use public facilities for religious purposes").

freedom of speech."[54] Although the language of the Amendment itself is extremely broad, the Court has continuously held that free speech is not absolute.[55] However, the Court has given the Free Speech Clause great weight in the context of preventing both the federal and state governments from proscribing speech on the basis of its content or viewpoint,[56] a principle that has been evident since the Court first began expanding First Amendment freedoms in the early twentieth century. A more recent jurisprudential development is the Court's treatment of restrictions on free speech in conjunction with subsidy programs.[57] Even in the following free speech subsidy cases, however, where the Court exhibited considerable deference toward governmental decisionmaking, the Court continued to scrutinize more closely those laws that contained viewpoint discrimination.[58]

1. Regan v. Taxation with Representation of Washington

Beginning in the early 1980s, the Court began to demonstrate great deference to governmental decisionmaking within a subsidy program. In *Regan v. Taxation with Representation of Washington*,[59] for instance, the Treasury Department denied tax-exempt status to Taxation With Representation of Washington (TWR), a nonprofit organization.[60] The Internal Revenue Code provision allowed charity organizations to claim a tax exemption,[61] but prohibited groups engaged in substantial lobbying, such as TWR, from doing so.[62] Justice William Rehnquist, writing for a unanimous Court, noted that TWR could continue to receive the benefit if it separated its lobbying function from its charity function by setting up two distinct organizations.[63]

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54. U.S. CONST. amend. I. The First Amendment was incorporated through the Fourteenth Amendment to bind the states beginning with *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

55. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (stating that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"); Chaplinski v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

56. *See* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959) (holding that a state may not deny a license to a film because it advocates adultery and finding that the "First Amendment's basic guarantee is of freedom to advocate ideas"); Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (holding that a city may not proscribe pornography subordinating women while allowing for other types of pornography).

57. *See infra* notes 59–95 and accompanying text.

58. *See infra* notes 68 and 81 and accompanying text.

59. 461 U.S. 540 (1983).

60. *Id.* at 542.

61. *See* 26 U.S.C. § 501(c)(3) (1994).

62. *Regan*, 461 U.S. at 544.

63. *Id.*

The constitutionality of the provision turned on whether compelling this separation of functions "penaliz[ed]" TWR for lobbying.[64] Because the provision did not deny TWR the right to receive support for its non-lobbying activities, but only refused to fund lobbying, the Court upheld the statute.[65]

The tax provision represented Congress's choice to confer a benefit upon one activity to the exclusion of another.[66] In supporting Congress's ability to subsidize one activity over another, the Court explained that "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation."[67] The Court stated, however, that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim[ ] at the suppression of dangerous ideas.'"[68] While the Court demonstrated that it would be deferential toward governmental decisionmaking involving the provision of subsidies, it reserved the right to scrutinize more closely subsidy laws that contained viewpoint discrimination.[69] The Court continued to demonstrate its deference in the following case.

2. Rust v. Sullivan

Extending the principle enunciated in *Regan*, the Court later displayed the same deference to the government's subsidy choices in a major abortion funding decision. In *Rust v. Sullivan*,[70] the Court upheld regulations limiting the ability of federal funding recipients to engage in abortion-related activities, such as counseling.[71] Under the regulations, a Title X project generally could not promote the use of abortion as a method of family planning.[72] The Court reasoned that

64. *Id.* at 545. TWR lobbied for what its membership considered to be "the 'public interest' in the area of federal taxation." *Id.* at 541.

65. *Id.* at 546 (citing Cammarano v. United States, 358 U.S. 498 (1959)) (holding that the First Amendment did not require Congress to subsidize lobbying).

66. *Id.* at 548–49.

67. *Id.* at 549–50 (citing Harris v. McRae, 448 U.S. 297, 316 (1980)). Prior to *Harris*, the Court decided *Maher v. Roe*, 432 U.S. 464 (1977). Both cases laid the groundwork for the Court's deferential approach to conditions placed on government funding within the free speech context. A "condition" refers to a restriction that the government places on the dispersal of funds from a subsidy program.

68. *Regan*, 461 U.S. at 548 (citing *Cammarano*, 358 U.S. at 513 (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958))).

69. *See id.* at 549 (stating that most governmental subsidy decisions are "a matter of policy and discretion not open to judicial review").

70. 500 U.S. 173 (1991).

71. *Id.* at 178.

72. *Id.* at 180. Title X of the Public Health Services Act provides federal funding for family planning services. *Id.* at 178.

the Government is "entitled to define the limits of" a program that it subsidizes.[73] As such, the Government was "not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized."[74] As a result, the condition could not be considered a "penalty" on speech, and was therefore upheld under minimal scrutiny.[75] The decision in *Rust* served to reinforce the Court's position that the government has a discretionary right not to fund certain activities.[76]

3. National Endowment for the Arts v. Finley

The Court has generally maintained a deferential posture throughout free speech subsidy cases, but has also evidenced a willingness to forgo deference where viewpoint discrimination is present. In *National Endowment for the Arts v. Finley*,[77] the Court upheld a provision of the National Endowment for the Arts and Humanities Act[78] against a free speech challenge. The provision required that the National Endowment for the Arts "consider[ ] general standards of decency and respect for the diverse beliefs and values of the American public" in determining which projects should receive federal funding.[79] Respondents argued that the provision constituted facial viewpoint discrimination because it rejected any artistic speech that failed to respect mainstream values or offended conventional notions of decency.[80] Although the Court disagreed, finding the provision facially valid, Justice Sandra Day O'Connor expressed the majority's view that the provision could be unconstitutional in application because "even in the provision of subsidies, the government may not 'aim[ ] at the suppression of dangerous ideas.'"[81]

4. Rosenberger v. Rector & Visitors of University of Virginia

Twice in the 1990s the Court abandoned its deferential posture in the face of viewpoint discrimination. In one of those cases, *Rosenber-*

73. *Id.* at 194.

74. *Id.* at 196.

75. *Rust*, 500 U.S. at 193.

76. *Id.* at 194 (explaining that "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect").

77. 524 U.S. 569 (1998).

78. *Id.* at 572 (citing 20 U.S.C. § 954 (2000)).

79. *Id.* (quoting 20 U.S.C. § 954(d)(1) (2000)).

80. *Id.* at 580.

81. *Id.* at 587 (quoting *Regan*, 461 U.S. at 550). *See also supra* note 56 and accompanying text.

ger v. Rector & Visitors of University of Virginia,[82] a University of Virginia program paid for the printing costs of student-run publications out of the general student activities fund. The University decided to withhold funding for one particular student newspaper because it "'primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality.'"[83] The students challenged the University's decision, claiming that the exclusion of their theological viewpoint was a violation of their freedom of speech. The Court held that, by adopting a generally available funding program for the purpose of supporting private student speech, the University created a "metaphysical" public forum that prevented it from denying access to student organizations based on the content or viewpoint of the students' expression.[84] Interestingly, the Court also rejected the University's argument that the central issue was not the denial of access to facilities, but rather the permissible denial of funding.[85] In *Rosenberger*, then, the Court enunciated its position that the exclusion of a religious group from a state-run program on the basis of the group's religious beliefs constitutes impermissible viewpoint discrimination.[86]

5. Lamb's Chapel v. Center Moriches Union Free School District

Today's Court has buttressed the position that the exclusion of religious speech on the basis of its religious content comprises viewpoint discrimination in violation of the Constitution. In *Lamb's Chapel*,[87] for instance, a local school board issued rules and regulations for the use of school property, including one providing that "'the school premises shall not be used by any group for religious purposes.'"[88] The school district then denied a church access to school premises to exhibit for public viewing a film series that dealt with family issues from a religious perspective.[89]

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82. 515 U.S. 819 (1995).

83. *Id.* at 825 (internal citation omitted).

84. *Id.* at 830.

85. *Id.* at 832–35. Had the issue been merely the denial of funding, then the Court might have been more deferential, as it had in *Regan* and *Rust*.

86. *Id.* at 835 (declaring that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity").

87. 508 U.S. 384 (1993).

88. *Id.* at 387 (citation omitted).

89. *Id.* at 388–89. The films showed lectures by Doctor James Dobson, a licensed psychologist, professor, author, and radio commentator. *Id.* at 388. The lectures addressed topics such as parenting, conflicts in marriage, parent/child relationships, and family values. *Id.* at 387–88. They generally addressed the undermining influences in today's culture, which "could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage." *Id.* at 388.

After finding that the state had created a limited public forum, the Court contemplated whether the state's exclusion of that category of speech was reasonable and viewpoint neutral. The Court held that the exclusion constituted viewpoint discrimination because the church was denied access solely because "the presentation would have been from a religious perspective."[90] The film series dealt with a subject that was otherwise permissible, but was excluded because it dealt with that subject from a religious standpoint.[91] The Court found this to be viewpoint discrimination and, therefore, the state was required to justify its regulation with a compelling state interest.[92] Rejecting the state's argument that its interest in avoiding an Establishment Clause violation was a compelling one, the Court declared that, "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."[93] Thus, the state could not justify its viewpoint discrimination, and the Court declared the state action unconstitutional.[94]

Subsidy programs that affect religious speech raise concern under both the Free Speech Clause and the Free Exercise Clause. Generally, the program may discriminate against religion, thereby violating the Free Exercise Clause as well as the Free Speech Clause "as a form of viewpoint discrimination against religion."[95]

D. Free Exercise Clause Jurisprudence

A statute that facially implicates religion necessarily raises concerns under the Free Exercise Clause of the First Amendment. The Free Exercise Clause, extended to the states by virtue of the Fourteenth Amendment, provides that, "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ."[96] Again, Dean Kathleen Sullivan notes that "free exercise controversies rarely arise from the overt suppression of religious practices. Catholics are no longer tarred and feathered by angry mobs nor

90. *Lamb's Chapel*, 508 U.S. at 393–94.

91. *Id.* at 394.

92. *Id.*

93. *Id.* at 395.

94. *Id.* at 397.

95. Rita-Anne O'Neill, Note, *The School Voucher Debate After* Zelman: *Can States Be Compelled to Fund Sectarian Schools Under the Federal Constitution?*, 44 B.C. L. REV. 1397, 1399 n.8 (2003).

96. U.S. CONST. amend. I (emphasis added).

Mormons driven over mountains into exile."[97] As evident in the following cases, most controversies are not as straightforward.

1. Cantwell v. Connecticut

One of the early free exercise cases, *Cantwell v. Connecticut*,[98] further developed the general distinction between religious belief and religious action that the Court had previously announced.[99] In *Cantwell*, three Jehovah's Witnesses went door to door selling books on religious subjects and soliciting contributions.[100] The three men were arrested and ultimately convicted under a state statute that prohibited the solicitation of money for religious causes.[101] The State Supreme Court upheld the convictions, and held that the statute was constitutional as "an effort by the State to protect the public against fraud and imposition in the solicitation of funds for what purported to be religious, charitable, or philanthropic causes."[102]

Upon review by the United States Supreme Court, Justice Owen Roberts defined the scope of the First Amendment as "embrac[ing] two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[103] While

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97. Sullivan, *supra* note 25, at 451.

98. 310 U.S. 296 (1940).

99. *See* Reynolds v. United States, 98 U.S. 145 (1878). The Court upheld a federal law making bigamy a crime in the territories as applied to convict a Mormon man who claimed that polygamy was his religious duty. In upholding the statute, the Court announced a general distinction between religious beliefs, which were immune from regulation, and actions, which could be regulated or proscribed altogether. *Id.* at 166. In Justice Morrison Waite's words, "[l]aws are made for the government of actions, and while [the state] cannot interfere with mere religious belief and opinions, they may with practices." *Id.* Applying this distinction to the facts of the case, the Court found that the man could not cite his religious belief to avoid prosecution for the crime because to do so would, "permit every citizen to become a law unto himself." *Id.* at 166–67.

100. *Cantwell*, 310 U.S. at 301.

101. The statute stated:

> No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both.

Id. at 301–02.

102. *Id.* at 302.

103. *Id.* at 303–04.

it would be permissible for the State to prohibit solicitation generally, the Court took issue with the particulars of the system, which vested authority in the Secretary of the Public Welfare Council.[104] If he determined that a cause was religious in nature, he could withhold his approval for the issuance of a license.[105] As a result, the Court found that

> to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.[106]

Under the Court's reasoning in *Cantwell*, the government generally may not interfere in matters of religious belief,[107] so that "many different types of life, character, opinion and belief can develop unmolested and unobstructed."[108]

2. United States v. Ballard

Four years later, in *United States v. Ballard*,[109] the Court asserted that the government may not punish citizens' expression of religious belief that it finds to be false.[110] In that case, the defendants were charged with mail fraud after sending letters to individuals soliciting both money and participation in their religion.[111] The jury convicted the defendants after the trial judge instructed the jury that it was only to determine whether the defendants had a good faith belief in their religious convictions, and not to determine the truth of any of the defendants' religious beliefs.[112] The Court upheld the instruction withholding from the jury questions of the truth of religious beliefs, emphasizing that "[m]an's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views."[113] The Court maintained its principle that the government cannot intrude into matters of religious belief.

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104. *Id.* at 305–06.
105. *Id.* at 305.
106. *Cantwell*, 310 U.S. at 307.
107. *Id.* at 303.
108. *Id.* at 310.
109. 322 U.S. 78 (1944).
110. *Id.* at 88.
111. *Id.* at 79.
112. *Id.* at 81.
113. *Id.* at 86–87.

3. Church of the Lukumi Babalu Aye v. City of Hialeah

Finally, in *Church of the Lukumi Babalu Aye v. City of Hialeah*,[114] the Court held that a Florida city ordinance prohibiting animal sacrifice contravened the Free Exercise Clause.[115] Writing for the Court, Justice Anthony Kennedy reasoned that since the ordinance was neither neutral nor of general application, and was not passed to protect a compelling government interest, it could not pass constitutional muster.[116] The way that Florida officials interpreted and applied the statute clearly evidenced a purpose to burden a single religious faith.[117] Finding that the city passed the ordinance with this specific church in mind, Justice Kennedy noted, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[118] The Court found that although the law was not facially discriminatory, it constituted covert suppression of particular religious beliefs.[119] Taken together, *Cantwell*, *Ballard*, and *Lukumi* represent the principle that, under the Free Exercise Clause, state governments may not compel adherence to a certain religious belief.[120]

The following principles were known to the Supreme Court before it heard *Locke v. Davey*. First, the Establishment Clause requires government to provide equal treatment to disparate religious groups and religions.[121] Second, under the Free Speech Clause, the Court will demonstrate great deference toward government subsidy decisions, unless those decisions include some form of viewpoint discrimination.[122] Third, the Free Exercise Clause prohibits government from intruding into personal matters of religious belief.[123] It was unclear at the time how the Court would reconcile these somewhat conflicting principles.

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114. 508 U.S. 520 (1993).

115. *Id.* at 547.

116. *Id.* at 546–47.

117. *Id.* at 542. The ordinance was directed at practitioners of the Santeria faith, who regularly engaged in the ritual of animal sacrifice. The court determined that the "ordinances 'ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.' This precise evil is what the requirement of general applicability is designed to prevent." *Id.* at 545–46 (citation omitted).

118. *Id.* at 533.

119. *Lukumi*, 508 U.S. at 542.

120. *See also* Torcaso v. Watkins, 367 U.S. 488 (1961) (invalidating a provision of the Maryland Declaration of Rights that required all holders of public office to declare their belief in the existence of God).

121. *See supra* notes 23–53 and accompanying text.

122. *See supra* notes 54–95 and accompanying text.

123. *See supra* notes 96–120 and accompanying text.

E. Subject Opinion: Locke v. Davey

The Court encountered facts in *Locke v. Davey* that required it to apply these precedents to the State of Washington's school subsidy program. Washington awarded Joshua Davey a "Promise Scholarship" under a program whereby the state partially funded higher education for qualified students.[124] To be eligible, the student must graduate in the top fifteen percent of her high school class, have a family income that is equal to or less than 135 percent of the state's median, and attend an accredited public or private university, college or other accredited post-secondary institution in the state of Washington.[125] Davey was selected for the Scholarship and enrolled at Northwest College, an accredited institution affiliated with the Assemblies of God.[126] Davey, intending to become a cleric, declared a double major in Pastoral Ministries and Business Management and Administration.[127] The Pastoral Ministries major is designed to prepare students for a career as a Christian minister, and consists of classes taught from the viewpoint that the Bible represents truth.[128]

The Washington Constitution reads: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . ."[129] The Washington enabling statute provides that "no aid shall be awarded to any student who is pursuing a degree in theology."[130] Northwest College "determined that majors in Pastoral Ministries are pursuing a degree in theology, so it could not certify Davey's eligibility."[131] As a result, Davey had to choose between foregoing the scholarship money available to him and continuing in his chosen course of studies.[132] He decided to pursue his chosen major and, consequently, he did not receive scholarship funds.[133]

Davey sued the state, claiming that Washington's statutory and constitutional prohibitions on the use of state funds for religious instruction violate the rights of free exercise and free speech guaranteed by the Washington Constitution, as well as his rights under the Federal

124. Davey v. Locke, No. C00-61R, 2000 U.S. Dist. LEXIS 22273, at *2–3 (W.D. Wash. Oct. 5, 2000).

125. *Locke*, 124 S. Ct. at 1310 (citing WASH. ADMIN. CODE § 250-80-020(12) (2004)).

126. Davey v. Locke, 299 F.3d 748, 751 (9th Cir. 2002).

127. *Id.*

128. *Id.*

129. *Locke*, 124 S. Ct. at 1310 (citing WASH. CONST. art. 1, § 11 (2002)).

130. *Id.* (citing WASH. REV. CODE § 28B.10.814 (West Supp. 1997)).

131. *Davey*, 299 F.3d at 751.

132. *Id.*

133. *Davey*, 2000 U.S. Dist. LEXIS 22273, at *4.

Free Exercise, Establishment, and Free Speech Clauses.[134] The state defended on the ground that it did not prohibit Davey from pursuing religious studies but simply declined to fund them. The state also asserted that funding for religious instruction is barred by state law and the state constitutional provision regarding the separation of church and state. Finally, the state contended that refusing to award aid to students pursuing a degree in theology is reasonably related to the bar in the Washington Constitution. Both parties moved for summary judgment, which the district court granted in the state's favor.[135] Davey appealed to the United States Court of Appeals for the Ninth Circuit.[136] A divided panel of the Court of Appeals overruled the district court, holding that the state policy denying a Promise Scholarship to an otherwise qualified student simply because he decides to pursue a degree in theology infringes upon his federal right to the free exercise of religion.[137]

The Supreme Court granted certiorari[138] and reversed the Ninth Circuit's ruling. Since the Court had only in 2002 held that school subsidies were constitutional, the question of whether a state could place conditions on those subsidies was one of first impression. Chief Justice Rehnquist, writing for the majority, determined that the state program of scholarship assistance, which prohibited the use of scholarships for the pursuit of degrees in devotional theology, did not violate the Free Exercise Clause.[139] The Court rejected Davey's argument that the statute was presumptively unconstitutional because it was not facially neutral with respect to religion. Instead the Court reasoned that the state's disfavor of religion

> is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.[140]

The Court also rejected the view advocated by the dissent that generally available benefits constitute "part of the baseline against which burdens on religion are measured,"[141] and found that the scholarships

134. *Id.*

135. *Id.* at *26.

136. *Davey*, 299 F.3d at 752.

137. *Id.* at 760.

138. Locke v. Davey, 538 U.S. 1031 (2003).

139. *Locke*, 124 S. Ct. at 1315.

140. *Id.* at 1312–13 (citation omitted).

141. *Id.* at 1316 (Scalia, J., dissenting). The majority aptly summarized Justice Scalia's argument as follows: "Because the Promise Scholarship Program funds training for all secular profes-

were generally available only for "training for secular professions" and that "training for religious professions and training for secular professions are not fungible."[142] Instead, the Court found that the state was simply exercising its interest in avoiding an establishment of religion by creating a formal prohibition against "using tax funds to support the ministry."[143] In short, Justice Rehnquist placed this fact scenario within the "play in the joints" between the Establishment Clause and the Free Exercise Clause,[144] and determined that allowing students to use state scholarships to pursue a degree in devotional theology was one of those "actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[145]

Instead of finding evidence of the state's hostility toward religion, the Court concluded that the state had demonstrated considerable effort to include religion—by permitting use of the scholarships at accredited religious schools and even permitting students to take non-devotional theology courses.[146] The Court concluded that the "State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden"[147] on the free exercise rights of those in Davey's position.

Justice Antonin Scalia dissented. He argued that the state violated the Free Exercise Clause by excluding persons from benefits available to all solely on the basis of religion.[148] Deriding the standardless majority decision[149] and its novel "play in the joints" approach,[150] Justice Scalia advocated an understanding of the religion clauses as demanding neutrality and noted that Davey sought only equal treatment.[151] He further observed that the majority found no interest of the state to

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sions, Justice Scalia contends the State must also fund training for religious professions." *Id.* at 1313.

142. *Id.* at 1313.

143. *Id.* at 1314.

144. Chief Justice Rehnquist used the term "play in the joints" to refer to instances involving "state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*, 124 S. Ct. at 1311.

145. *Id.* at 1311.

146. *Id.* at 1314–15.

147. *Id.* at 1315.

148. *Id.* at 1316 (Scalia, J., dissenting).

149. *Id.* at 1318 (observing that "the [majority] opinion is devoid of any mention of standard of review").

150. *Locke*, 124 S. Ct. at 1317 (discussing the majority's "principle of 'play in the joints'. . . . I use the term 'principle' loosely, for that is not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives.").

151. *Id.* at 1316–17.

be compelling, and as a result, the state could not justify its facial discrimination against religion.[152]

Justice Clarence Thomas joined Justice Scalia's dissent, but wrote separately to indicate that, although the parties agreed for purposes of litigation that a degree in theology means a degree that is "devotional in nature or designed to induce religious faith," the Washington statute did not define "theology."[153] Under the usual definition of the term "theology," then, the statute could be understood to exclude from eligibility those students who pursued "the study of theology from a secular perspective as well [as those who studied theology] from a religious one."[154]

III. Analysis

This section describes the ways in which the Supreme Court is gradually coming to terms with school subsidy programs as constitutional under the religion clauses of the First Amendment. It also suggests that analogizing to free speech case law is useful in order to analyze the constitutionality of school subsidy programs under the Free Exercise Clause. In addition, this section argues for the development under the Free Exercise Clause of a constitutional concept equivalent to that of the public forum found in Free Speech Clause jurisprudence.

A. A Court Coming to Terms with School Subsidies

In *Zelman v. Simmons-Harris*,[155] the Court held that the provision of school subsidies to religious schools did not violate the Establishment Clause in certain circumstances. The Ohio legislature had enacted the Scholarship Program, among other initiatives, to remedy the educational "crisis."[156] The Court upheld the government subsidy program because it neutrally provided benefits to a broad class of citizens defined without reference to religion, and the aid that ultimately flowed to religious institutions did so as a result of the genuinely independent choices of aid recipients.[157]

The *Zelman* decision, however, left unanswered questions concerning the types of conditions that states may impose on school subsidy

152. *Id.* at 1318.
153. *Id.* at 1320–21 (Thomas, J., dissenting).
154. *Id.* at 1321.
155. 536 U.S. 639 (2002).
156. *Id.* at 708.
157. *Id.* at 651.

programs without violating the Constitution.[158] *Locke* presented the Court with precisely that issue for resolution.

1. *School Subsidy Programs Generally Raise No Establishment Clause Concerns*

The majority and the dissenters in *Locke* agreed that the Federal Establishment Clause would not prohibit Washington from permitting students to apply a state scholarship toward their pursuit of a degree in devotional theology.[159] Moreover, even the State of Washington did not argue before the Court that doing so would violate the Federal Establishment Clause.[160] As such, the fact situation of *Locke v. Davey* posed no Establishment Clause problem,[161] and instead raised concerns under the Free Exercise Clause.[162]

2. *Is There a Role for Free Exercise in the School Subsidy Context?*

The First Amendment issue remaining for the Court to consider in *Locke* was the relationship between school subsidy programs and the Free Exercise Clause. The Supreme Court decided the case on Davey's free exercise claim alone, as the district court had rejected his establishment and free speech claims, and the Ninth Circuit had ruled for Davey solely on the basis of the Free Exercise Clause claim.[163]

According to prevailing Free Exercise Clause precedent, the Court is to apply strict scrutiny when reviewing any law that facially implicates religion.[164] In deciding whether a law is constitutional under the Free Exercise Clause, the Court "must begin with its text, for the min-

158. For instance, the Ohio statute challenged in *Zelman* included a provision stating that, as a condition of receiving state funding, participating schools could not "teach hatred of any person or group on the basis of . . . religion." *Locke*, 124 S. Ct. at 1310 (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (West 2003)). The majority opinion did not mention the provision. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

159. *See Locke*, 124 S. Ct. at 1311–12 (stating that "there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology, . . . and the State does not contend otherwise.") (citations omitted); *see also Locke*, 124 S. Ct. at 1317 (Scalia, J., dissenting) (agreeing, noting that "[t]he establishment question *would not even be close*").

160. *Id.* The Ninth Circuit rejected the state's argument, finding that "the proceeds (approximately $1,500 in Davey's year) may be used for any education-related expense, including food and housing; application to religious instruction is remote at best." Davey v. Locke, 299 F.3d 748, 760 (2002).

161. *See id.*

162. The Ninth Circuit held that for the state to deny Davey a Promise Scholarship for which he was otherwise qualified solely because he decided to major in devotional theology infringed his right to the free exercise of his religion. Davey v. Locke, 299 F.3d 748, 760 (9th Cir. 2002).

163. *Davey*, 299 F.3d at 760 (9th Cir. 2002).

164. *See* Employment Div. v. Smith, 494 U.S. 872, 886 (1990) (stating that "[j]ust as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly

imum requirement of neutrality is that a law must not discriminate on its face."[165] Under the Court's free exercise jurisprudence, the fact that the challenged law relates to the provision of subsidies is simply irrelevant. The Court has, in numerous instances, applied strict scrutiny in holding that a state may not condition the availability of a benefit on an individual's willingness to forgo conduct required by his religion.[166] The Court's invocation of strict scrutiny does not bode well for the challenged law, because a "law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."[167]

For instance, in *McDaniel v. Paty*,[168] a provision of the state constitution provided that "no Minister of the Gospel, or priest of any denomination whatever" could serve as a state legislator, and a similar statute prohibited them from serving as delegates to the Tennessee constitutional convention.[169] After finding that the right to free exercise encompassed the right to be a minister, the Supreme Court stated that "McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other."[170] The Court applied strict scrutiny and found that the state's bona fide purpose of attempting to separate church and state did not justify its unconstitutional facial discrimination against religion.[171]

Likewise, in *Church of the Lukumi Babalu Aye v. City of Hialeah*,[172] the Court found that a Florida city ordinance prohibiting animal sacrifice contravened the Free Exercise Clause.[173] Writing for the Court, Justice Kennedy reasoned that since the ordinance was neither neutral nor of general application, strict scrutiny was appropriate.[174] The application of the statute clearly evidenced a purpose to burden one re-

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scrutinize governmental classifications based on religion"); *see also* McDaniel v. Paty, 435 U.S. 618, 628 (1978).

165. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538, 565 (1993) (stating that when "religious practice is being singled out for discriminatory treatment," the challenged government restriction must undergo the most "rigorous scrutiny").

166. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (asserting that state laws burdening religious freedom "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); *see also* Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd., 450 U.S. 707 (1981).

167. *Lukumi*, 508 U.S. at 546.

168. 435 U.S. 618 (1978).

169. *Id.* at 621.

170. *Id.* at 626.

171. *Id.* at 628.

172. 508 U.S. 520 (1993).

173. *Id.* at 547.

174. *Id.* at 546–47.

ligious faith.[175] Finding that the city passed the ordinance with this specific church in mind, Justice Kennedy declared that the law was not neutral.[176] Moreover, it was a covert attempt to suppress particular religious beliefs.[177]

As Justice Thomas noted, under established free exercise case law, "Justice Scalia's application of our precedents is correct."[178] Justice Scalia's dissent represented a sound legal treatment of these precedents as they related to the facts in *Locke*. Since the law discriminated against religion on its face, he applied strict scrutiny and found that the government failed to establish a compelling state interest to justify its action.[179] The only state interest he could locate was "a pure philosophical preference: the state's opinion that it would violate taxpayers' freedom of conscience *not* to discriminate against candidates for the ministry."[180] Since this interest was by no means compelling to him, Justice Scalia would have invalidated the law.[181]

Chief Justice Rehnquist's reasoning in *Locke* was flawed because he applied something less than strict scrutiny to a law that facially implicated religion.[182] Chief Justice Rehnquist rejected Davey's argument that the Washington statute was presumptively unconstitutional under *Lukumi* because the statute was not sufficiently neutral with respect to religion.[183] To do so, he claimed, "would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning."[184] This argument proves disingenuous, however, because there is no free exercise case upon which the Chief Justice can rely in order to demonstrate that the Court should apply something less than strict scrutiny

175. *Id.* at 542. The ordinance was directed at practitioners of the Santeria faith, who engaged in ritual animal sacrifice. *Id.* at 535. The court held that the "ordinances 'have every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.' This precise evil is what the requirement of general applicability is designed to prevent." *Id.* at 545–46 (quoting Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring)).

176. *Lukumi*, 508 U.S. at 533.

177. *Id.* at 542.

178. *Locke*, 124 S. Ct. at 1321 (Thomas, J., dissenting).

179. *Id.* at 1318 (Scalia, J., dissenting).

180. *Id.*

181. Justice Scalia argued that the state failed to justify the statute with a compelling interest, as it must do under strict scrutiny. *Id.* The Court has suggested that the state's interest in avoiding an Establishment Clause violation could possibly qualify as compelling. *See* Widmar v. Vincent, 454 U.S. 263, 271 (1981). However, that defense was not available to the state in *Locke*, where both parties and all the Justices agreed that the program did not raise Establishment Clause concerns. *See supra* notes 159–160.

182. *Locke*, 124 S. Ct. at 1315.

183. *Id.* at 1312.

184. *Id.*

to review a subsidy law that facially implicates religion.[185] The tradition within Free Exercise Clause doctrine that provides for lesser scrutiny is best evidenced by language in *Lyng v. Northwest Indian Cemetery Protective Association*:[186] The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[187]

This language, however, provides no support for Chief Justice Rehnquist's position because it refers to the lesser scrutiny that the Court now applies to laws that have only the incidental effect of burdening religion.[188] Such minimal scrutiny has never been held to apply in cases where the law at issue facially discriminates on the basis of religion.[189] As Justice Scalia indicated in dissent, that line of cases does not apply to *Locke*, since "[d]iscrimination *on the face of a statute* is something else."[190] In any event, Chief Justice Rehnquist's approach was an unexplained departure from prior Free Exercise Clause precedent, and one that can only be justified by going beyond established free exercise case law and analogizing to the Court's Free Speech Clause jurisprudence.[191]

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185. As Justice Scalia wrote in dissent, "The Court offers no authority for approving facial discrimination against religion simply because its material consequences are not severe." *Locke*, 124 S. Ct. at 1318 (Scalia, J., dissenting).

186. 485 U.S. 439 (1988). The *Lyng* Court contemplated whether the Free Exercise Clause prohibited the government from allowing harvesting on national forest land that American Indian tribes traditionally used for religious purposes. *Id.* at 441. The Court held that it did not, because the program was neutral, had only an incidental effect on the tribes' religious practice, and had no tendency to coerce individuals into acting contrary to their religious beliefs. *Id.* at 450–51.

187. *Lyng*, 485 U.S. at 451 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963)).

188. *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990) (declaring that "it is a permissible reading of the text to say that if prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended").

189. *See id.* at 886; *Lukumi*, 508 U.S. at 546; *McDaniel*, 435 U.S. at 645.

190. *Locke*, 124 S. Ct. at 1318 (Scalia, J., dissenting).

191. Chief Justice Rehnquist departed from the Court's standard application of strict scrutiny to laws that implicated religion on their face. *See supra* note 164. This departure can only be explained by resort to free speech case law because the logical cornerstone of Chief Justice Rehnquist's opinion—the declaration that the "State has merely chosen not to fund a distinct category of instruction"—comes directly from free speech case law. *Locke*, 124 S. Ct. at 1313; *see also* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (holding that the government can, without violating the Constitution, choose to fund one activity to the exclusion of another); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 546 (1983) (holding that the government can, without violating the Constitution, choose not to pay for lobbying).

3. *Looking to Free Speech Jurisprudence for Guidance*[192]

Locke v. Davey is not a free speech case. Initially, Davey brought a free speech claim against the state of Washington, but the district court rejected that argument.[193] Even though the free speech claim was not before the Supreme Court, the Court explicitly clarified in a footnote that it would not analyze school subsidy programs under the Free Speech Clause, since the purpose of giving scholarships to private schools is generally to promote education and not to facilitate private speech.[194] Nonetheless, Chief Justice Rehnquist's majority opinion implicitly relies on certain free speech subsidy cases to reach its result, as discussed below.[195]

The fulcrum of the *Locke* majority's analysis is that the Washington statute does not infringe upon Davey's free exercise rights because the "State has merely chosen not to fund a distinct category of instruction."[196] Chief Justice Rehnquist cites no authority for that proposition,[197] as no prior free exercise case employed such reasoning.[198] The lack of citation by the Chief Justice is particularly conspicuous in light of the Ninth Circuit's extensive treatment of these free speech subsidy

192. Rights protected by the Free Exercise Clause are intimately related to rights protected by the Free Speech Clause. Indeed, Professor Mark Tushnet suggests that "contemporary constitutional doctrine may render the Free Exercise Clause redundant." Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 73 (2001). Professor Tushnet contends that the protection the Free Exercise Clause provides today is also afforded by the First Amendment rights to free speech and free association.

193. Davey v. Locke, No. C00-61R, 2000 U.S. Dist. LEXIS 22273, at *20 (W.D. Wash., Oct. 5, 2000) (indicating that "[t]he purpose of the Scholarship was not to subsidize student speech or to invite expression of a diversity of viewpoints, but simply to pay for educational expenses").

194. *See Locke*, 124 S. Ct. at 1313 (noting that "[t]he purpose of the Promise Scholarship Program is to assist students from low- and middle-income families with the cost of postsecondary education, not to 'encourage a diversity of views from private speakers.'" (quoting United States v. Am. Library Ass'n, 539 U.S. 194, 206 (2003))).

195. Chief Justice Rehnquist incorporated the reasoning of free speech cases such as *Regan*, *Rust*, and *Finley*. *See Locke*, 124 S. Ct. at 1313. The Court often encounters and contemplates the separate clauses of the First Amendment in conjunction with one another. *See* Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons From* Lamb's Chapel, 24 N.M. L. REV. 1, 2 (1994) (discussing how, due to a proliferation of religion and speech claims, "courts have wound through a maze of First Amendment doctrine over the past two decades against the backdrop of a Supreme Court in ideological flux. The Religion and Free Speech Clauses have generated sharp interpretive disagreements among Supreme Court Justices.").

196. *Locke*, 124 S. Ct. at 1313. The district court came to the same conclusion, noting that, "[l]ike each of his other constitutional arguments, Davey's reliance on *McDaniel* mistakenly presumes that he has a right to have Washington fund his religious instruction. He does not . . . ." Davey, 2000 U.S. Dist. LEXIS 22273, at *16.

197. *Locke*, 124 S. Ct. at 1313.

198. The *Lyng* Court employed this reasoning, but in an inapplicable context. *See supra* notes 186–189 and accompanying text.

cases in its *Davey* opinion.[199] Regardless, the Chief Justice's *Locke* argument tracks language used in a series of free speech subsidy cases beginning with the abortion funding decisions.[200]

Representative of the abortion funding cases is *Rust v. Sullivan*,[201] where the Court upheld regulations limiting the ability of federal funding recipients to engage in abortion-related activities, such as counseling.[202] In *Rust*, the condition the government placed on the dispersal of funds affected only the speech of government employees working within the program created by the subsidy. The Court itself later interpreted the *Rust* rationale as applying only to cases involving "governmental speech," so that "viewpoint-based funding decisions can be sustained in instances in which the government itself is the speaker, . . . or instances, like *Rust*, in which the government used private speakers to transmit information pertaining to its own program."[203] Since the government disbursed public funds to create the Title X program, the government can permissibly take reasonable steps to control the dissemination of its desired message.[204]

Rust cannot be convincingly compared to *Locke*. In *Locke*, the condition placed on the dispersal of funds affected the activities of individuals within the scope of the government program, but none of those individuals were government employees or working in furtherance of a government purpose.[205] In the school subsidy situation, there is no nexus between the dispersal of funds by the government and the ultimate use of those funds by individuals.[206] In upholding the Scholarship Program as one of "true private choice," the *Zelman* Court found crucial the emphasis in previous Establishment Clause cases that aid recipients were "empowered to direct the aid to schools or institutions of their own choosing."[207] Since those acting under the

199. *Davey*, 299 F.3d at 752.

200. *See* Rust v. Sullivan, 500 U.S. 173 (1991); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

201. 500 U.S. 173 (1991).

202. *Id.* at 178.

203. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001).

204. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

205. Instead, the affected individuals in *Locke* were the students.

206. The *Zelman* Court held that the channeling of funds through private individuals ends the government's involvement for purposes of an Establishment Clause analysis: The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. *Zelman*, 536 U.S. at 652. *See also infra* note 238 and accompanying text.

207. *Zelman*, 536 U.S. at 651.

government program are not government actors,[208] the rationale from *Rust* cannot apply.

The other seminal free speech subsidy case is *Regan v. Taxation with Representation of Washington*.[209] Like *Rust*, *Regan* addresses the government's decision not to fund a category of speech.[210] The law evidenced Congress's choice to grant tax deductions for contributions made to veterans' groups that engage in lobbying, while denying that favorable status to other groups pursuing lobbying efforts.[211] Unlike *Rust*, however, *Regan* did not concern the government in its role as speaker. The governmental distinction in *Regan* was based on the status of the speakers—veterans organizations as opposed to all others—and not a distinction based on the content or message of those groups' speech.[212] As such, the government was appropriating funds to further its own policy, and the "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[213]

Together, *Rust* and *Regan* represent the proposition that the government may selectively appropriate funds to advance its own policies.[214] As the Court later explained, "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."[215] Using this approach, the Court applies strict or intermediate scrutiny if it finds that the condition placed on the subsidy operates as a penalty on speech, and alternatively applies rational basis review if it finds that there is no such penalty. *Rust* demonstrates the deference the Court will give to government speech.[216]

Regan and *Locke* are not cases involving government speech, but the Court chose in both instances to defer to the governmental sub-

208. *See* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 716 (1997) (stating that "[p]rivate schools redeeming vouchers are not . . . receiving 'state money' . . . . A necessary premise of the constitutional validity of such arrangements is that schools whose students bring government-provided financial assistance, made available on a religion-neutral basis, have not lost one iota of their private capacity.").

209. 461 U.S. 540 (1983).

210. In *Rust*, the government chose not to fund abortion counseling. *See Rust*, 500 U.S. at 194. In *Regan*, the government chose not to fund (through tax exemptions) the lobbying activities of non-profit groups. *See Regan*, 461 U.S. at 544 (acknowledging that a "tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income").

211. *Regan*, 461 U.S. at 546.

212. *Id.* at 548.

213. *Id.* at 549.

214. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001).

215. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

216. *Rust*, 500 U.S. at 187.

sidy decision.[217] The *Regan* decision, then, seemingly provides some precedent for the Court's decision in *Locke*.[218] Essentially, the *Regan* decision reveals that the Court will allow the government more latitude in restricting conduct through the dispersal of funds than by outright regulation. In his majority opinion in *Locke*, Chief Justice Rehnquist used a similar analysis. He derived this principle from Free Speech Clause case law,[219] and concluded that the principle should have a counterpart within Free Exercise Clause case law.[220]

This conclusion is consistent with the language of the First Amendment. The Free Speech Clause and the Free Exercise Clause are structurally identical, with the former reading, "Congress shall make no law respecting an establishment of religion, or *prohibiting* the free exercise thereof . . ."[221] and the latter reading, "Congress shall make no law . . . *abridging* the freedom of speech."[222] Both are negative by their terms—they limit the actions that government may take against the rights of its citizens.[223] It appears that no violation can arise under the text of the Amendment until the government somehow diminishes or restricts the respective constitutional right. As such, there should be a principle within Free Exercise Clause jurisprudence comparable to that expressed in Free Speech Clause jurisprudence, whereby the law of public subsidies is more permissive than the law of regulation.[224]

Chief Justice Rehnquist recognized the constitutional mandate for such consistency, and his *Locke* opinion marked a step in that direction.[225] His analysis ultimately missed the mark, however, because he

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217. *Regan*, 461 U.S. at 550; *Locke*, 124 S. Ct. at 1313.

218. *Regan* is an example of the deferential treatment the Court gives to subsidy programs. *Regan*, 461 U.S. at 550. However, it is not analogous to *Locke* because the case did not involve viewpoint discrimination.

219. *See supra* notes 201–216.

220. This conclusion explains Chief Justice Rehnquist's reasoning that the "State has merely chosen not to fund a distinct category of instruction," in a Free Exercise Clause case. *See Locke*, 124 S. Ct. at 1313.

221. U.S. CONST. amend. I (emphasis added).

222. *Id.*

223. *See* Gerald MacCallum, *Negative and Positive Freedom*, *in* LEGISLATIVE INTENT AND OTHER ESSAYS ON LAW, POLITICS, AND MORALITY 85 (Marcus G. Singer & Rex Martin eds., 1993).

224. The difference between the two clauses in relation to the provision of subsidies, of course, is that the Constitution provides a counterbalance, namely the Establishment Clause, to the Free Exercise Clause, while the same is not true for the Free Speech Clause. Brian J. Serr, *A Not-So-Neutral "Neutrality:" An Essay on the State of the Religion Clauses on the Brink of the Third Millennium*, 51 BAYLOR L. REV. 319, 337 (1999). The public forum analysis described below, however, provides for this difference. *See infra* notes 268–272 and accompanying text.

225. *Locke* aligned free exercise subsidy law with the generally deferential approach the Court takes in free speech subsidy law.

did not consider all of the free speech subsidy cases in comparison to *Locke*.[226] Although *Locke* is decidedly not a free speech case, and such cases did not control its outcome, a full review of free speech subsidy case law is imperative to understanding the relationship between school subsidy programs and the Free Exercise Clause.[227]

B. *An Alternative Approach: Constructing a Free Exercise Concept Equivalent to the Free Speech Public Forum*[228]

Instead of *Rust* and *Regan*, the free speech subsidy cases most germane to the facts presented in *Locke* are the public forum decisions.[229] Again, the *Locke* majority found that the school subsidy program did not establish a public forum because the "purpose of the Promise Scholarship Program is to assist students from low and middle-income families with the cost of postsecondary education, not to "'encourage a diversity of views from private speakers.'"[230] Still, the Court has previously indicated that the limited public forum cases are instructive in subsidy cases.[231] The purpose here is not to say that the public forum cases control *Locke*,[232] but rather to determine whether

226. In *Locke*, the Court did not account for the principle in free speech law wherein the Court will more closely scrutinize governmental decision making involving the provision of subsidies when it includes viewpoint discrimination. *See supra* notes 56, 86, and 94 and accompanying text.

227. Such an analysis is imperative because the free speech subsidy cases that Chief Justice Rehnquist failed to consider adequately, namely *Rosenberger* and *Lamb's Chapel*, are those that recognize the long-established free speech principle that governmental viewpoint discrimination must be strictly scrutinized, even when it occurs in conjunction with the provision of subsidies. *See supra* notes 56, 86, and 94 and accompanying text.

228. At least one scholar has analyzed the Court's application of the public forum concept to religious speech in the context of public schooling. *See generally* Salomone, *supra* note 195. Professor Salomone criticizes the Court's use of the public forum doctrine and advocates a more fact-sensitive approach for addressing the right to use public property for private expression. *See id.* at 26. However, the article addresses the public forum doctrine only as it operates in the free speech arena; Professor Salomone does not suggest the construction of an equivalent constitutional principle in the free exercise arena.

229. For purposes of this Note, the two most relevant decisions are *Rosenberger* and *Lamb's Chapel*. *See supra* notes 56, 86, and 94 and accompanying text.

230. *Locke*, 124 S. Ct. at 1313 (quoting United States v. Am. Library Ass'n, 539 U.S. 194, 206 (2003)).

231. *Velazquez*, 531 U.S. at 544 (stating "[a]s this suit involves a subsidy, limited forum cases such as *Perry*, *Lamb's Chapel* and *Rosenberger* may not be controlling in a strict sense, yet they do provide some instruction").

232. *See Davey*, 299 F.3d at 755. The Court used a public forum analysis because

> [w]e do not believe *Rosenberger* can be distinguished so readily. While the funding in *Rosenberger* did involve student *publications* (except for religious publications), funding students' education (except for students pursuing religious education) is not much different. Expressive conduct, creative inquiry, and the free exchange of ideas are what the educational enterprise is all about. So is pursuing a course of study of one's own choice.

the free speech public forum cases contribute to our understanding of the relationship between school subsidies and the Free Exercise Clause, and whether a concept equivalent to the free speech public forum framework can operate effectively within Free Exercise Clause case law. Two public forum decisions are highly relevant for this purpose.

The first pertinent case, *Rosenberger*,[233] does not control the outcome in *Locke*.[234] Although the condition in *Rosenberger* implicated religion,[235] the Court officially decided the case on free speech instead of free exercise grounds. Since the *Locke* Court could not have argued persuasively that Washington state was "expend[ing] funds to encourage a diversity of views from private speakers"[236] in creating its school subsidy program, the state arguably did not open a limited public forum. It is, however, possible to extend the public forum concept beyond the boundaries of the Free Speech Clause. Whereas the state establishes a public forum under the Free Speech Clause to facilitate private speech within the confines of the subsidized program, an equivalent concept under the Free Exercise Clause would apply to those instances in which the government facilitates private action within the confines of the subsidized program.

In *Locke*, for instance, the state's purpose in creating the Promise Scholarship Program was "simply to pay for educational expenses."[237] In doing so, the state facilitated private action within the program by allowing individual recipients of the scholarship to apply the funds toward the educational pursuit of their choice. Indeed, the *Zelman* Court held that school subsidy programs could only be constitutional if they were "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[238] Thus, Washington's Promise Scholarship Program facilitates private action, namely the pursuit of a degree in higher education, within the confines of the subsidized program.[239]

Id.

233. 515 U.S. 819 (1995).

234. *But see* Brief for Respondent at 35, Locke v. Davey, 124 S. Ct. 1307 (2004) (No. 02-1315).

235. In *Rosenberger*, the state allowed for the payment of printing costs for various student publications, but denied payment for one group whose paper "primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality." *Rosenberger*, 515 U.S. at 823.

236. *Id.* at 834.

237. Davey v. Locke, No. C00-61R, 2000 U.S. Dist. LEXIS 22273, at *20 (W.D. Wash. Oct. 5, 2000).

238. *Zelman*, 536 U.S. at 649.

239. *See Davey*, 2000 U.S. Dist. LEXIS 22273, at *20.

Once the government opens a public forum, the necessities of restricting the forum to the limited and legitimate purposes for which it was created may justify the government in limiting access to the forum to particular groups or for the discussion of particular topics.[240] The government may not exclude a certain class of speech on a basis that is not "reasonable in light of the purpose served by the forum."[241] The Court will draw a distinction between subject matter discrimination, "which may be permissible if it preserves the purposes of that limited forum," and viewpoint discrimination, "which is presumed impermissible when directed against speech otherwise within the forum's limitations."[242]

By incorporating these principles into a conceptual equivalent under the Free Exercise Clause, one can construct a framework for determining when the governmental exclusion of religion would violate the Free Exercise Clause. The government may limit participation in the subsidized program to appropriate individual actions, consistent with the program's overall policy. However, the exclusion by the government of particular individual actions within the government-funded program must be reasonable in light of the purpose served by the program.[243] The purpose of Washington's Promise Scholarship Program was "'to help ease the financial burden' of 'the costs associated with college.'"[244] It is difficult to see how drawing a distinction between undergraduate majors generally and an undergraduate major in devotional theology could reasonably further the state interest in making the cost of college education more affordable.[245]

Even assuming *arguendo* that the law's distinction was reasonable in light of the purpose the program was designed to serve, the law would still be presumptively unconstitutional, as discussed below. Under the free speech public forum analysis, the government's distinction must not constitute viewpoint discrimination.[246] The Court has acknowledged that the distinction between content and viewpoint

240. *Rosenberger*, 515 U.S. at 829 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

241. *Cornelius*, 473 U.S. at 804–06.

242. *Rosenberger*, 515 U.S. at 830.

243. *See Cornelius*, 473 U.S. at 806 (stating that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral").

244. Brief for Respondent at *2, Locke v. Davey, 124 S. Ct. 1307 (2004) (No. 02-1315).

245. *Cornelius*, 473 U.S. at 806.

246. *Rosenberger*, 515 U.S. at 830; *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 49 (1983).

discrimination "is not a precise one."[247] As public forums in free speech case law must be viewpoint neutral, any analogous concept under the Free Exercise Clause would necessarily demand neutrality with regard to religion. A discussion of certain free speech public forum cases illustrates the relationship between religion and this content discrimination–viewpoint discrimination dichotomy.[248]

The case which addresses this issue most directly is *Lamb's Chapel*.[249] There, the Court held that the exclusion of a church from using public school facilities constituted viewpoint discrimination because the church was denied access solely for the reason that "the presentation would have been from a religious perspective."[250] The film series[251] addressed a subject that was otherwise permissible, namely family issues, but the school board chose to exclude it because it addressed that issue from a religious perspective.[252] The Court found this to be viewpoint discrimination and, therefore, had to be justified by a compelling state interest.[253] As in *Lamb's Chapel*, the Court in *Rosenberger* found that the governmental distinction constituted viewpoint discrimination.[254] In *Rosenberger*, the very terms of the university prohibition

> [did] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted. . . .[255]

in the University's decision to withhold funding. In that respect, the government action constituted viewpoint discrimination, not content discrimination, and the state therefore needed to justify its restriction with a compelling state interest.[256]

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247. *Rosenberger*, 515 U.S. at 831. Justice Kennedy went on to note that religious thought and discussion constituted a viewpoint, even though, in his opinion, the formulation was "something of an understatement" and would be better understood as "a comprehensive body of thought." *Id.*

248. *Rosenberger* and *Lamb's Chapel* represent the Court's fundamentally different approach to governmental decisionmaking within the subsidy context when it involves discrimination against religious viewpoints.

249. 508 U.S. 384 (1993).

250. *Id.* at 393–94.

251. *See supra* note 89.

252. *Lamb's Chapel*, 508 U.S. at 394.

253. *Id.*

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

255. *Id.*

256. *Id.* at 838.

The definition of religious viewpoint discrimination that the Court developed in *Rosenberger* and *Lamb's Chapel* is essential to establishing whether the Washington Promise Scholarship Program violated the Free Exercise Clause. The free speech public forum cases permit state-sponsored subject matter discrimination, since the government creating the forum must have the ability to limit the forum's scope.[257] These cases, however, do not allow the government to engage in viewpoint discrimination where the government provides a forum for discussion of a given subject matter except from a particular perspective.[258] The restrictions placed by the government on religious groups in both *Lamb's Chapel* and *Rosenberger* facilitated the general discussion of a given subject, but excluded any deliberation on that subject from a religious viewpoint.[259]

In *Locke*, Washington did not exclude religion as a "general subject matter,"[260] which would qualify as content discrimination. On the contrary, as Chief Justice Rehnquist wrote, "the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits."[261] Under the program, the state permitted students to attend pervasively religious schools, if accredited by the state, as well as to take devotional theology courses. Rather, the program disqualified from eligibility only those students who pursued majors in theology that were "devotional in nature or designed to induce religious faith."[262] As in *Lamb's Chapel*, there was no indication that a student would have been excluded from eligibility "for any reason other than the fact that the [major] would have been [taught] from a religious perspective."[263] The program, designed "simply to pay for educa-

257. *Id.* at 829 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)). *See also Cornelius*, 473 U.S. at 806 (clarifying that the government may not exclude a certain class of speech on a basis that is not "reasonable in light of the purpose served by the forum").

258. For instance, the state may provide space in a public library to citizens for an open discussion at a certain time. It could reasonably limit the subject matter to be discussed. The state could hold a "family issues" discussion section at 8:00 p.m. on Wednesday nights. That would constitute subject matter discrimination and would be permissible. The state could not, however, hold a "family issues" discussion section at that time, but exclude those citizens who wished to speak on that topic from a religious perspective. The reason is that doing so would constitute impermissible viewpoint discrimination.

259. *Lamb's Chapel*, 508 U.S. at 393–94; *Rosenberger*, 515 U.S. at 831.

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

261. *Locke*, 124 S. Ct. at 1314.

262. *Id.* at 1310.

263. *Lamb's Chapel*, 508 U.S. at 393–94. Of course, a student could have been excluded from eligibility for not meeting the academic, income, and enrollment requirements. These restrictions, however, are reasonable in light of the program's purpose.

tional expenses,"[264] had an incredibly broad scope in regard to subject matter—students could apply the scholarships to any intellectual pursuit within higher education, apart from a course of studies in devotional theology. The Court's standard for the neutral treatment of religion, introduced in *Lamb's Chapel* and *Rosenberger*, demands that, when the government opens up a program to encourage such a broad scope of private actions,[265] it cannot then enact a viewpoint-discriminatory restriction to limit individuals's private actions.[266]

In both *Lamb's Chapel* and *Rosenberger*, the Court applied strict scrutiny, explaining that it would uphold viewpoint-discriminatory restrictions if the government could demonstrate that it had a compelling state interest.[267] In both cases, the respective states argued that their compelling state interest was the separation of church and state and, in both cases, the Court found the argument unpersuasive.[268] Especially now, in the wake of *Zelman*, this argument fails, as Chief Justice Rehnquist indicated in *Locke*:

> Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology and the State does not contend otherwise.[269]

Justice Scalia agreed in dissent, saying, "[t]he establishment question *would not even be close*."[270] Although "a State has a compelling state interest in not committing *actual* Establishment Clause violations," the Court has "never inferred from this principle that a state has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns."[271] Therefore,

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264. Davey v. Locke, No. C00-61R, 2000 U.S. Dist. LEXIS 22273, at *20 (W.D. Wash. Oct. 5, 2000).

265. In short, the state funds a wide range of private actions—"training for all secular professions"—but excludes one category of private action—"training for religious professions." *Locke*, 124 S. Ct. at 1313.

266. *See also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001) (reasserting that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint").

267. *See Lamb's Chapel*, 508 U.S. at 394; *Rosenberger*, 515 U.S. at 839.

268. *Rosenberger*, 515 U.S. at 845 (concluding that "[t]o obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint"); *Lamb's Chapel*, 508 U.S. at 394 (disposing of the Establishment Clause defense "on the ground that the posited fears of an Establishment Clause violation are unfounded").

269. *Locke*, 124 S. Ct. at 1311–12 (internal citation omitted).

270. *Id.* at 1317 (Scalia, J., dissenting).

271. *Id.* at 1318.

in *Locke*, the Establishment Clause defense would not suffice to justify the law because the state had no compelling interest in separating church and state in the context of a school subsidy program that channels funding through the independent choices of scholarship recipients.[272] As a result, the state would have no justification for its action and the viewpoint discrimination could not stand.

By analyzing *Locke* within a framework comparable to that of the free speech public forum cases, it becomes clear that the result reached by Justice Scalia is correct as a matter of constitutional consistency.[273] His decision fully aligned free exercise with free speech jurisprudence with respect to the provision of subsidies.[274] Justice Scalia recognized the general deference that the Court gives to governmental decisionmaking, but also incorporated the heightened scrutiny that the Court applied to viewpoint discrimination in the subsidy context.[275] In fact, although Justice Scalia was careful not to cite any free speech case law or to analogize to the public forum decisions, the reasoning he employed in his dissenting opinion translated the free speech public forum analysis into free exercise terms.[276]

First, Washington State created a program to facilitate private action toward making college education more affordable for its citizens. Justice Scalia described this as "a generally available public benefit, whose receipt is conditioned only on academic performance, income, and attendance at an accredited school."[277] Under free speech public forum analysis, then, the state may limit the program in ways that are reasonable in light of the program's general purpose.[278] Justice Scalia conceded as much, saying that Washington "could make the scholarships redeemable only at public universities (where it sets the curriculum), or only for select courses of study. Either option would replace a program that facially discriminates against religion with one that just happens not to subsidize it."[279] The fact that Washington "has then carved out a solitary course of study for exclusion: theology"[280] is not reasonable in light of the general purpose of attempting to make the

272. *See Zelman*, 536 U.S. at 649. The Court stated: "Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their choosing. Three times we have rejected such challenges." *Id.*

273. *See supra* notes 221–224 and accompanying text.

274. *See supra* note 225.

275. *See supra* notes 249–266 and accompanying text.

276. *See generally Rosenberger*, 515 U.S. 831; *Lamb's Chapel*, 508 U.S. 385.

277. *Locke*, 124 S. Ct. at 1316.

278. *See Cornelius*, 473 U.S. at 806.

279. *Locke*, 124 S. Ct. at 1317.

280. *Id.* at 1316.

cost of college education more affordable for the state's citizens. The difference between theology and any other major, then, has no bearing on the cost of college education; there is no causal relationship between the limitation on, and the purpose of, the program.[281]

Second, under the public forum analysis, the state can limit individual action within the program by using content-based distinctions, but not by using viewpoint-based distinctions.[282] Justice Scalia explained that the statute was facially viewpoint-discriminatory, as "[n]o field of study but religion is singled out for disfavor in this fashion."[283] In his terms, the prohibition against viewpoint discrimination translated into a principle mandating governmental neutrality between religion and non-religion.[284] Justice Scalia illustrated that Davey "seeks only equal treatment–the right to direct his scholarship to his chosen course of study, a right every other Promise Scholar enjoys."[285] His understanding of the First Amendment compelled as much: "If the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones."[286] This understanding of the Free Exercise Clause comports with the principle, enunciated in *Lamb's Chapel* and *Rosenberger*, that governmental exclusion of religion constitutes viewpoint discrimination.[287] Although Justice Scalia's dissent substantially comports with public forum analysis,[288] he failed to cite to any of the free speech public forum cases, with the result that he left many of his strongest arguments without authority.[289]

In all likelihood, this omission reveals Justice Scalia's reluctance, discussed below, to expand public forum analysis beyond its current boundaries. In at least one case, *Legal Services Corp. v. Velazquez*, Justice Scalia's dissent expressed his narrow interpretation of the public forum doctrine.[290] There, he found that the act did not create a

281. *See id.* (Scalia, J., dissenting) ("No field of study but religion is singled out for disfavor in this fashion.").

282. *Rosenberger*, 515 U.S. at 830.

283. *Locke*, 124 S. Ct. at 1316.

284. *Id.* at 1317 (Scalia, J., dissenting) (stating that "the Religion Clauses demand neutrality").

285. *Id.* at 1316 (emphasis omitted).

286. *Id.* at 1317. The neutrality approach rests on the idea that the religion clauses of the First Amendment are meant primarily to promote religious liberty, rather than to protect a division between church and state. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15.

287. *See supra* note 259 and accompanying text.

288. *See supra* notes 276–286 and accompanying text.

289. The argument most conspicuous for its lack of authority is Justice Scalia's contention that "[w]hen the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured." *Locke*, 124 S. Ct. at 1316 (Scalia, J., dissenting).

290. *Velazquez*, 531 U.S. at 549–63 (Scalia, J., dissenting).

public forum because, "[f]ar from encouraging a diversity of views, it has always . . . 'placed restrictions on its use of funds.'"[291] In that opinion, he also re-articulated the approach to free speech subsidy cases that he had previously developed in his *National Endowment for the Arts v. Finley* concurrence.[292] In that case, the Court upheld a statutory provision that required the NEA to "consider[ ] general standards of decency and respect for the diverse beliefs and values of the American public" in determining which projects should receive federal funding.[293] An examination of that concurrence in relation to *Locke* demonstrates that, like Chief Justice Rehnquist, Justice Scalia is inconsistent in applying his approach to the First Amendment and the provision of subsidies.[294]

In his *Finley* concurrence, Justice Scalia found that the restriction constituted both content and viewpoint discrimination.[295] Nevertheless, he found the restriction constitutional because, in his interpretation, subsidy schemes do not implicate First Amendment rights.[296] Justice Scalia argued that a textualist reading of the First Amendment does not allow for protection from viewpoint discrimination in the provision of subsidies.[297] As the language of the Amendment reads that "'Congress shall make no law . . . *abridging* the freedom of speech,'"[298] he argued, the governmental choice to deny a subsidy never raises First Amendment concerns because such a denial does not "abridge"[299] the freedom of speech. In that particular case, then, "those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute."[300] He later clarified that the denial of subsidies could indirectly abridge speech, but only if the funding scheme is "manipulated" to have a "coercive effect" on those who do not hold the subsidized position.[301]

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291. *Id.* at 553 (citations omitted).

292. 524 U.S. 569 (1998).

293. *Finley*, 524 U.S. at 580.

294. *See Finley*, 524 U.S. at 590–600 (Scalia, J., concurring); *but see Locke*, 124 S. Ct. at 1315–20 (Scalia, J., dissenting).

295. *Finley*, 524 U.S. at 590 (Scalia, J., concurring) (concluding that the provision "establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.").

296. *Id.* at 595–96.

297. *Id.* at 599.

298. *Id.* at 595 (citing U.S. CONST. amend. I).

299. *Id.*

300. *Id.*

301. *Finley*, 524 U.S. at 587 (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)).

As such, Justice Scalia has in the past advocated minimum rationality review for government subsidy programs that facially implicate free speech rights, absent some coercion that would rise to the level of actual "abridgment" of speech.[302] Contrasting this position with the result he reached in *Locke* reveals the inconsistency: Justice Scalia would apply strict scrutiny to government subsidy programs that facially implicate free exercise rights and minimum rationality review to government subsidy programs that facially implicate free speech rights.[303] To achieve consistency, Justice Scalia would have to apply minimum rationality review to government subsidy programs that implicate free exercise rights, absent a showing of coercion that would rise to the level of an actual "prohibition" of religion.[304] At this point his reasoning in *Locke* unraveled, as he advanced no viable argument that the Washington statute coerced Davey into abandoning his religion. Justice Scalia argued:

> Even if there were some threshold quantum-of-harm requirement, surely Davey has satisfied it. The First Amendment, after all, guarantees *free* exercise of religion, and when the State exacts a financial penalty of almost $3,000 for religious exercise–whether by tax or by forfeiture of an otherwise available benefit–religious practice is anything *but* free.[305]

This line of reasoning, however, is indistinguishable from the argument Justice Scalia rejected in *Finley*, where he found no "abridgment" of speech because the person remained free to engage in speech, only absent government funding.[306] Under this flawed analysis, the same is true in *Locke*: there is no "prohibition" of free exercise because the government merely chose not to fund Davey's pursued course of study. The fact that in *Locke* Justice Scalia emphasized the *free* in "free exercise" is as unpersuasive as the Court's emphasis on the *free* in "free speech" in *Finley*.[307] As demonstrated above,[308] a better solution to the inconsistency between the two bodies of case law would be to fully incorporate the free speech public forum analysis into an equivalent principle under the Free Exercise Clause.

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302. *Id.* at 596 (citation omitted).

303. *Locke*, 124 S. Ct. at 1319 (Scalia, J., dissenting).

304. *Finley*, 524 U.S. at 596 (Scalia, J., concurring).

305. *Locke*, 124 S. Ct. at 1319 (Scalia, J., dissenting).

306. *Finley*, 524 U.S. at 596 (Scalia, J., concurring).

307. *Id.* at 595 (Scalia, J., concurring).

308. *See supra* notes 276–286 and accompanying text.

IV. IMPACT

The analysis applied by the *Locke* majority for understanding the relationship between the Free Exercise Clause and the provision of subsidies is much broader than the one advocated in this Note. The *Locke* decision establishes a precedent that could be understood to uphold any law that facially implicates the right to free exercise, so long as the law establishes a subsidy program. The governing principle in the opinion—that Davey's free exercise rights had not been "prohibited"[309]—could apply across the board in the subsidy context. It is necessary to consider the ramifications that the holding could have in other areas within the school subsidy context, particularly implications for pervasively sectarian schools and school voucher programs that contain viewpoint discriminatory provisions.

A. The Viability of State Aid to Pervasively Sectarian Schools—the Next Question for the Court to Answer?

After the *Locke* decision, the next logical issue for the Court to answer is whether a state may give funds to schools that are overtly religious in character. For instance, suppose a state created a generally available scholarship program similar in all respects to the one in Washington, except that it prohibited the use of the scholarships at a pervasively sectarian school, or any school that integrates religious principles into all subjects taught at the school. Colorado recently enacted the nation's first college-level voucher program, and in doing so prohibited "pervasively sectarian" schools from participating.[310] Under a public forum-like analysis, that law would be presumptively unconstitutional because it excludes religion from the general subsidy program in a way that constitutes viewpoint discrimination under *Lamb's Chapel* and *Rosenberger*.[311] As in those cases, the state would not have a compelling state interest to justify the exclusion because there is no countervailing Establishment Clause concern.

Under the *Locke* decision's logic, the Court could determine that the state merely decided not to fund a distinct category of schools, and thus violated no free exercise rights.[312] Such a result, however, would run contrary to the seemingly diminishing significance of the "perva-

309. *Locke*, 124 S. Ct. at 1317 n.1.

310. *See* Associated Press, *Nation's First College Voucher Program OK'd* (May 10, 2004), http://www.cnn.com/2004/EDUCATION/05/10/college.vouchers/index.html (explaining that, under the program, "money can go to religious schools, as long as they are not 'pervasively sectarian'").

311. *Lamb's Chapel*, 508 U.S. at 394; *Rosenberger*, 515 U.S. at 831.

312. *Locke*, 124 S. Ct. at 1313.

sively sectarian" factor in religion clause jurisprudence generally.[313] In a recent Establishment Clause case, Justice Thomas, writing for the Court, indicated that such a factor is now of little or no import.[314] Thus, under the logic of *Locke*, the Court would allow states to treat "pervasively sectarian" schools differently from other religious schools under the Free Exercise Clause, even though the Court has acknowledged that there is virtually no material difference between the two types of schools under its Establishment Clause analysis.[315] In addition to impacting the constitutionality of state aid to pervasively sectarian schools, the *Locke* decision imperils the free exercise of religion by allowing governments to include religious viewpoint discrimination as part of subsidy programs.[316]

B. Applying Locke *to the Question Unanswered in* Zelman

Well before the events of September 11th[317] established religious hatred as a topic of frequent discussion, the Ohio legislature considered the issue while establishing the Pilot Project Scholarship Program (Scholarship Program), the state's school voucher system.[318] In response to the educational crisis[319] in the Cleveland public schools, a federal district court placed the entire school district under direct state control in 1995.[320] The legislature enacted the Scholarship Program, among other initiatives, to remedy the educational crisis.[321] As a condition of receiving state funding, however, participating schools could not "teach hatred of any person or group on the basis of . . . religion."[322] As was apparent from the text of the statute, the state hoped

313. The Court has used the term "pervasively sectarian" in reference to an institution whose secular purposes and religious mission were inextricably intertwined. Bowen v. Kendrick, 487 U.S. 589, 621 (1988) (internal citation omitted).

314. *See* Mitchell v. Helms, 530 U.S. 793, 826 (2000). Justice Thomas declared that:

> One of the dissent's factors deserves special mention: whether a school that receives aid (or whose students receive aid) is pervasively sectarian. The dissent is correct that there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. But that period is one that the Court should regret, and it is thankfully long past.

Id.

315. *Compare Locke*, 124 S. Ct. at 1319, *with Bowen*, 487 U.S. at 621.

316. *See Locke*, 124 S. Ct. at 1316 (Scalia, J., dissenting) (stating that the majority opinion "sustains a public benefit program that facially discriminates against religion").

317. *See* Serge Schmemann, *U.S. Attacked; President Vows to Exact Punishment for 'Evil'*, N.Y. TIMES, Sept. 12, 2001, at A1.

318. Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002).

319. For more than a generation, the city's schools had been among the worst in the nation. *Id.* at 644.

320. *See* Reed v. Rhodes, 1 F. Supp. 2d 705 (N.D. Ohio 1995).

321. *See generally id.*

322. *Zelman*, 536 U.S. at 645 (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (West 2003)).

to encourage the principle of religious inclusion among the participating schools.[323]

In its recent decision, *Zelman v. Simmons-Harris*,[324] the Supreme Court upheld Ohio's Scholarship Program because it was a neutral program of general applicability and channeled funds through an intermediary—namely, the children's parents.[325] The Court held that Ohio's program did not offend the Establishment Clause.[326] Dissenting in *Zelman*, Justice David Souter presciently observed that the "hatred" provision in the Ohio Scholarship Program carries with it the possibility of discriminatory application that would raise First Amendment concerns.[327] He suggested that the provision, "could be understood (or subsequently broadened) to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others, if they want government money for their schools."[328] In the corresponding footnote, he cited to examples of mainstream religious doctrines that could conceivably be interpreted as constituting "hatred of any person or group on the basis of . . . religion,"[329] such as:

> Christian New Testament (2 Corinthians 6:14) (King James Version) ("Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?"); The Book of Mormons (2 Nephi 9:24) ("And if they will not repent and believe in his name, and be baptized in his name, and endure to the end, they must be damned; for the Lord God, the Holy One of Israel, has spoken it"); Pentateuch (Deut. 29:19) (The New Jewish Publication Society Translation) (for one who converts to another faith, "[t]he LORD will never forgive him; rather will the LORD's anger and passion rage against that man, till every sanction recorded in this book comes down upon him, and the LORD blots out his name from under heaven"); The Koran 334 (The Cow. Ch. 2:1) (N. Dawood transl. 4th rev. ed. 1974) ("As for the unbelievers, whether you forewarn them or not, they will not have faith. Allah has set a seal upon

323. At least two scholars have found the same legislative purpose to be apparent: "the regulation of messages of intolerance or hatred for religious . . . groups is bound up with education for citizenship in a liberal, inclusive democracy." Ira Lupu & Robert Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 979 (2003).

324. 536 U.S. 639 (2002).

325. *Id.* at 663.

326. *Id.*

327. *Zelman*, 536 U.S. at 713–14 (Souter, J., dissenting).

328. *Id.* at 713.

329. *Id.* (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (West Supp. 2002)).

> their hearts and ears; their sight is dimmed and a grievous punishment awaits them").[330]

Concededly, the school district superintendent has not to date denied funding to any participating school, religious or otherwise, on the basis of the "hatred" provision, but it is indisputable that under the statute he has the authority to do so.[331] As Justice Souter suggests, a superintendent may at some point utilize that authority to deny or revoke the registration of a Christian, Mormon, Jewish, or Muslim school, each of which could conceivably and not unreasonably be deemed as a school that "teach[es] hatred of any person or group on the basis of . . . religion."[332] The question that follows, then, is whether an application of this provision to revoke funding would violate the Free Exercise Clause.

The Free Exercise Clause generally prohibits governmental regulation of religious beliefs.[333] The Court has held that government may neither compel affirmation by an individual of an adverse belief nor discriminate against individuals because they hold religious views that the government or majority disfavors.[334] *Fowler* enunciated the principle that government must restrain the impulse "to approve, disapprove, classify, regulate, or in any manner control" religious belief.[335] Central to the development of this doctrine has been the fundamental distinction between belief and action.[336] As such, religious beliefs are

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330. *Id.* at 713 n.24 (Souter, J., dissenting). Amici curiae made a similar point. *See* Brief of Amici Curiae Council on Religious Freedom et al. at 28–29, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779) (noting that "[m]any faith traditions teach some form of exclusivity—that their religion is the only truth or is the best expression of truth and that some other religions are wrong"). Scholars have made the same observation. *See* Aviam Soifer, *The Scholarship of Sanford Levinson: Secular Sectarianism, Perilous Neutrality*, 38 TULSA L. REV. 755, 765 (2003) (asserting that "the 'us' and 'them' of a good deal of religious belief may blur into 'teaching hatred,' at least within the perception of a disgruntled student, parent, or teacher or a taxpayer unsympathetic with the teachings of a particular religion").

331. *Zelman*, 536 U.S. at 713-14 (Souter, J., dissenting). "The state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any of the provisions of division (A) of this section." *Id.* (citing OHIO REV. CODE ANN. § 3313.976(B) (West 2003)).

332. *Zelman*, 536 U.S. at 713 (Souter, J., dissenting) (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (West Supp. 2002)).

333. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Sherbert v. Verner, 374 U.S. 398, 402 (1963); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

334. *See* Torcaso v. Watkins, 367 U.S. 488 (1961); Fowler v. Rhode Island, 345 U.S. 67 (1953).

335. *Fowler*, 345 U.S. at 69–70.

336. *See* Reynolds v. United States, 98 U.S. 145 (1878). Of course, government can at times prohibit conduct based on religion as well, if "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert*, 374 U.S. at 403.

immune from regulation, whereas action based on religious beliefs can be reasonably regulated by the state.[337]

In the realm of religious belief cases, *Ballard* is the Court's seminal decision.[338] There, the Court's language amounts to an almost absolute preclusion of government participation in the sphere of the spiritual. Indeed, the Court asserted that "[m]an's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views."[339] If Ohio completely prohibited the teaching of "hatred of any person or group on the basis of . . . religion," it would not involve the performance of physical acts, but only the beliefs advanced by the religions.[340] As a result, the preclusion would be unconstitutional under *Ballard* and its progeny because in application it would intrude upon those religious beliefs.[341]

The Court's holding in *Locke*, however, suggests that states can make such distinctions in their subsidy programs and avoid the reach of the Free Exercise Clause.[342] Chief Justice Rehnquist attempted to limit the scope of the majority's holding, writing "the only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands."[343] The arguments that "[t]he State has merely chosen not to fund a distinct category of instruction,"[344] and that no free exercise violation has arisen because Davey's free exercise rights have not been "prohibited,"[345] apply with equal force to any subsidy law that implicates free exercise rights. Justice Scalia claimed that the majority's holding "has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context."[346] With the holding in *Locke*, the Court proved Justice Scalia correct by failing to provide a limiting principle with which to discern the viability of myriad types of governmental conditions within the school subsidy context. Appar-

337. *See generally Reynolds*, 98 U.S. 145; Jacobson v. Massachusetts, 197 U.S. 11 (1905); Prince v. Massachusetts, 321 U.S. 158 (1944); Cleveland v. United States, 329 U.S. 14 (1946).

338. *See supra* notes 109–113 and accompanying text.

339. United States v. Ballard, 322 U.S. 78, 87 (1944).

340. *See Zelman*, 536 U.S. at 713 (Souter, J., dissenting).

341. *See supra* note 108 and accompanying text.

342. *See Locke*, 124 S. Ct. at 1313 (stating that "[t]he State has merely chosen not to fund a distinct category of instruction").

343. *Id.* at 1314 n.5.

344. *Id.* at 1313.

345. *Id.* at 1314.

346. *Id.* at 1318 (Scalia, J., dissenting).

ently any such limit to the logic of the *Locke* decision will require further development.

C. *Resorting to the Establishment Clause as an Alternative Approach*

In *Locke*, the Court made clear that it would neither examine conditions placed on school subsidy programs under the Free Speech Clause, nor would it examine such conditions under the Free Exercise Clause.[347] Only the Establishment Clause, then, remains for the Court to use in scrutinizing such conditions. This is fitting, as the provision of subsidies has normally been the realm of Establishment Clause analysis.[348]

Differential treatment by government among religions raises Establishment Clause concerns.[349] Generally, the Court has interpreted the two religion clauses together to mean that "the state may neither favor nor disfavor religion. A law targeting religious beliefs as such is never permissible."[350] As the conditions in the Colorado and Ohio statutes above are expressly directed at religious beliefs, they raise Establishment Clause concerns. Under the Establishment Clause, any constitutional violation exists within the entitlement itself, extended to one group but not the other. The Establishment Clause question is whether the state, by creating these conditions, is coercing parents into sending their children to certain religious schools over others. This is similar to the question in *Zelman* of whether Ohio was coercing parents into sending their children to religious schools over non-religious ones.[351]

Restrictions that the government includes in its subsidy program could be used to create an Establishment Clause violation. *Lukumi*,[352] as well as earlier cases,[353] stands for the principle that a statute may improperly discriminate against religion in its application

347. *Id.* at 1313–15.

348. Thomas McCoy & Gary Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249, 262 (1986) ("According to current doctrine that distinguishes between the two religion clauses, governmental benefits to religion are subject to challenge under the establishment clause."). *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983).

349. *See* Epperson v. Arkansas, 393 U.S. 97 (1968).

350. Davey v. Locke, 299 F.3d 748, 752 (9th Cir. 2002). Two commentators have acknowledged that the two clauses should be read in conjunction. *See* McCoy & Kurtz, *supra* note 348, at 256 (stating "the free exercise clause and the establishment clause should be read and applied as a single conceptual unit, a single constitutional restriction on government").

351. *Zelman*, 536 U.S. at 655–56.

352. 508 U.S. 520 (1993).

as well as on its face.[354] These statutes could satisfy the coercion requirement[355] necessary to violate the Establishment Clause if states employed them in such a way as to purposefully discriminate against one religion, or to favor certain religions.[356] Moreover, any vague standards in statutes or broad discretion granted to state officials, both of which could facilitate an arbitrary application of the statute, would also raise constitutional problems.[357] For instance, in *Zelman*, the Ohio Scholarship Program granted too much authority to the State Superintendent to determine what constituted "hatred," thereby allowing the state to intrude into matters of religious belief.[358] It is precisely this type of government power, exercised in order to enshrine certain religious beliefs over others, against which the Establishment Clause was designed to protect.

V. CONCLUSION

As the Free Speech and Free Exercise Clauses are structural parallels,[359] the constitutional text compels a jurisprudential consistency between the two with respect to the provision of subsidies. Neverthe-

353. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Cantwell v. Connecticut, 310 U.S. 296 (1940); United States v. Ballard, 322 U.S. 78 (1944).

354. *See* Sherbert v. Verner, 374 U.S. 398, 423 (1963). ("Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area." (citations omitted)).

355. *See* Lee v. Weisman, 505 U.S. 577, 604 (1992) ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.").

356. *See* Niemotko v. Maryland, 340 U.S. 268, 272 (1951) (observing that "the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views"); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) (stating that "a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one.").

357. *See Niemotko*, 340 U.S. at 272. The officials were governed only by "an amorphous 'practice,' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power." *Id.* at 271–72. *See also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). The Court invalidated on freedom of speech and freedom of the press grounds a New York state statute that allowed for the banning of films that were found to be "sacrilegious." *Id.* at 505–06. Justice Tom Clark stated that the application of the statute raised the specter of constitutional problems of religion, as "the state has no legitimate interest in protecting any or all religions from views distasteful to them." *Id.* at 505. In practice, even "the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another" when making decisions based on the broad standard "sacrilegious." *Id.*

358. *See* Brief of Amici Curiae Council on Religious Freedom et al. at 28–29, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779) (asserting "[w]hat constitutes teaching hate, of course, is very subjective and lends itself to biased judgments").

359. *See supra* notes 221–224 and accompanying text.

less, there was a marked disconnect to that effect between the Court's free exercise and free speech jurisprudence before the *Locke v. Davey* decision. After *Locke*, the disconnect remains, albeit in different form. Writing for the majority, Chief Justice Rehnquist attempted to reconcile the two bodies of case law by implicitly incorporating the reasoning of earlier free speech subsidy cases into a free exercise decision.[360] However, by neglecting the cases most germane to the school subsidy situation, the public forum cases, his attempt failed.[361] The development under the Free Exercise Clause of a concept akin to the free speech public forum analysis would bridge this jurisprudential gap and bring consistency to the Court's treatment of the First Amendment with respect to the provision of subsidies.

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360. *See supra* notes 196–224 and accompanying text.

361. *See supra* notes 230–272 and accompanying text.

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