

Function Follows Form: *Locke v. Davey's* Unnecessary Parsing

Susanna Dukupil

I. Introduction

As parents and legislators struggle to implement school choice programs around the country, they wage war on two key battlegrounds: in the court of public opinion and in real courts. In the court of public opinion, school choice is a political winner: Clear majorities of educational consumers oppose heavy-handed bureaucratic control of the educational system. In judicial courts, school choice has also won several key victories, even at the Supreme Court level, but some laws and court decisions still pose obstacles to school choice's implementation.

As the fight continues, private parochial schools remain at the center of the debate. Choice supporters argue that when the government awards public vouchers to students on the basis of need and merit, those students and their parents should have the right to use that scholarship at a religious institution. Opponents of school choice argue that the Establishment Clause of the Constitution, and the principle of church/state separation that it secures, bars those students from using taxpayer dollars to study at religiously affiliated institutions. Given government's domination of education, the argument all too often masks a naked political agenda: the perpetuation of state power over the educational marketplace.

*Locke v. Davey*¹ is a case at the heart of that debate. In the fall of 1999, Joshua Davey, a Washington State resident, enrolled at Northwest College in Kirkland, Washington, eager to train for the ministry. Thanks to his good grades in high school, and because his family met certain income requirements, he had earned a Promise Scholarship from the state of Washington. The state, however, forced

¹124 S. Ct. 1307 (2004).

Davey to forego his award simply because he decided to study theology. In the state of Washington's view, using public funds to pay for theology studies violates the freedom of conscience of its taxpayers.

Washington's articulated position made little sense as the state applied it. In practice, the state excluded from its scholarship program only those students who openly declared their intent to major in a program defined by the college or university as theology. Scholarship recipients could take theology classes, redeem their awards at a college where every class is taught from a Christian perspective, or study comparative religion without any threat to their funding. Scholarship recipients just could not major in theology taught from the perspective of religious truth

Despite the disconnect between theory and practice, Washington believed its constitution required it to exclude theology majors from the Promise Scholarship. The state pointed to Article I, section 11 of its constitution, which provides, in relevant part:

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 . . .²

That provision, said the state, mandated Davey's exclusion from the scholarship program.

Article I, section 11 of the Washington constitution is similar to provisions found in thirty-six other state constitutions. Interpreted broadly, such provisions permit—indeed, require—states to single out religious instruction from otherwise available public benefits. In other words, they specifically disadvantage religious education options for scholarship recipients, a power in deep conflict with a core principle of nondiscrimination established by the federal Constitution. Consider the Free Exercise,³ Establishment,⁴ and Free Speech Clauses⁵ of the First Amendment. The Supreme Court has held that the Free Exercise Clause prohibits the government from intentionally

²Wash. Const. art. I, § 11.

³U.S. Const. amend. I, cl. 1.

⁴U.S. Const. amend. I, cl. 2.

⁵U.S. Const. amend. I, cl. 3.

singling out religion for disfavor.⁶ The Establishment Clause provides that government regulations may “neither advance[] nor inhibit[] religion.”⁷ In interpreting the Free Speech Clause, the Court has held that where the state funds a wide variety of speakers, it may not exclude religious speakers.⁸ Together, those precedents reflect a strong “neutrality principle,” which bars discriminatory efforts by states to single out, and penalize, persons who otherwise freely choose to pursue educational ends dictated by their religious beliefs.

Washington administered the Promise Scholarship in a way that discriminated against Davey because of his intent to study theology. As such, the state’s scholarship program violates the First Amendment’s neutrality principle. Davey’s suit gave the Court an opportunity to affirm the neutrality principle it has consistently articulated over the last decade. Sadly, the Supreme Court missed that opportunity and upheld Washington’s exclusion of theology majors from its scholarship program. Worse still, the Court’s opinion gave short shrift to many key issues in the case, obscuring the contours of the neutrality principle. As a result, the threat of state discrimination against individual religion-based choices looms over the educational marketplace.

Part II, below, briefly discusses the facts of the *Locke* case. Part III outlines how the Washington constitution violates the federal Constitution’s principle of religious neutrality. Part IV engages in a critical examination of the Court’s opinion in *Locke*. Part V explains that despite the flaws in the opinion, it can be held to its facts to minimize damage to the neutrality principle.

II. The Background of *Locke v. Davey*

A. The Promise Scholarship Program

On first impression, one would think that Washington’s Promise Scholarship program respects students’ freedom of educational choice. After all, the program is a classic example of aid awarded on neutral criteria—a feature that typically satisfies the Establishment Clause of the federal Constitution. To be eligible, a student must

⁶See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542–43 (1993).

⁷*Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (emphasis added).

⁸*Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829–30, 837 (1995).

- graduate in the top 15 percent of a Washington state high school graduating class;
- have a family income of no more than 135 percent of the state's median income;
- and enroll at least half time at an accredited postsecondary institution within the state.⁹

Students who meet those criteria are at liberty to use their scholarships at any accredited college or university in the state.¹⁰

The Promise Scholarship has one caveat: Students who pursue a degree in "theology" (as defined by the individual school) cannot receive the award.¹¹ This provision disqualified Joshua Davey from the program. Davey had met the academic and income requirements for the Promise Scholarship and enrolled at Northwest College, a private religious institution. He intended to enter the ministry, so he declared a double major in Pastoral Ministries and Business Management. Because Northwest College's system of course classifications considers Pastoral Ministries a major in "theology," however, Davey could not receive his scholarship.¹²

Technically, Davey could have taken advantage of some loopholes in the program that might have preserved his award while allowing him to study for the ministry. He could have enrolled half time at Northwest College to study Pastoral Ministries and then enrolled half time at another accredited college where he might have used his scholarship to study Business Management.¹³ Or, he could have declared only the Business Management major at Northwest College and taken the same theology courses as electives. Still, even though he could have found a way around the restriction, the fact remains that the Promise Scholarship program placed an extra burden on him solely because of his desire to train for the ministry. Indeed,

⁹Wash. Admin. Code § 250-80-020(12) (2004).

¹⁰See Wash. Admin. Code § 250-80-020(13) (2004).

¹¹See Wash. Admin. Code § 250-80-020(12)(g) (2004) ("(12) 'Eligible student' means a person who: . . . (g) is not pursuing a degree in theology."). A separate statute also holds that "[n]o aid shall be awarded to any student who is pursuing a degree in theology." See Wash. Rev. Code Ann. § 28B.10.814 (West 2004).

¹²See Wash. Admin. Code § 250-80-020(12)(g) (2004).

¹³The statute allows a student to receive a Promise Scholarship if he "[e]nrolls at least half time in an eligible postsecondary institution in the state of Washington." Wash. Admin. Code § 250-80-020(12)(f) (2004).

given that the Promise Scholarship program permits students in qualifying majors to keep their scholarships while taking the exact same theology classes as electives, the program seems arbitrary: It unfairly penalizes *only* those students brash enough to announce a belief in the subject matter they study.¹⁴

B. The Blaine Amendments and the Washington Constitution

Washington argued that the statutory provision excluding theology majors like Davey from the scholarship program was rooted in Article I, section 11 of the state's constitution:

Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. 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.¹⁵

Article I, section 11 and its kin have a dubious lineage. The provision was enacted in the late nineteenth century when an anti-immigrant movement swept the country in reaction to substantial immigration from Central, Eastern, and Southern Europe. That sentiment found political expression in the Know-Nothing Party, which supported efforts to suppress funding for the Catholic schools attended by many of these immigrant children.¹⁶ Simultaneously, the publicly

¹⁴*Supra* note 13.

¹⁵Wash. Const. art. I, § 11.

¹⁶See generally Philip Hamburger, *Separation of Church and State* (2002). See also Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* 153 (1999) (noting that Blaine and others like him "employ[ed] constitutional language, invok[ed] patriotic images, [and] appeal[ed] to claims of individual rights. All these ploys would serve to disguise the real business that was at hand: undermining the viability of schools run by religious minorities to prop up and perpetuate a publicly supported monopoly of government-run schools.").

funded “common schools” actively promoted Protestant values,¹⁷ and marginalized immigrant children who did not conform to a “mainstream” Protestant ethic.¹⁸

The atmosphere of hostility to Catholic immigrants led to the proposal of a federal constitutional amendment designed to codify the nativist’s attempt to suppress Catholicism. A leading nativist, Maine Senator James Blaine, introduced the amendment in 1875. The so-called Blaine Amendment provided:

[n]o State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.¹⁹

The amendment failed, but perhaps as many as thirty-three different territories added similar language to their state constitutions in the wake of that amendment.²⁰ In fact, support for the Blaine Amendment was so strong that the federal government required many territories, including Washington, to include these provisions in their state constitutions as a prerequisite for admission to the Union. The federal Enabling Act of 1889, which authorized the Washington Territory to draft a state constitution as a step toward statehood, required the Washington territorial legislature to insert a provision in its proposed constitution for maintaining—per the “Blaine

¹⁷R. Freeman Butts, *The American Tradition in Religion and Education* 118 (1950). Horace Mann, the founder of the common school movement, believed that religion—Protestant religion—was essential to teaching moral values. See Horace Mann, *Life and Works: Annual Reports of the Secretary of the Board of Education of Massachusetts for the Years 1845–1848*, at 292 (1891) (“But it will be said that this grand result in practical morals is a consummation of blessedness that can never be attained without religion, and that no community will ever be religious without a religious education.”).

¹⁸See Eric Treene, *The Grand Finale Is Just the Beginning: School Choice and the Coming Battle over Blaine Amendments 6–7* (2002), available at <http://www.blaineamendments.org/scholarship/FedSocBlaineWP.html.pdf>.

¹⁹Lloyd Jorgenson, *The State and the Non-Public School, 1825–1925*, at 138–39 (1987).

²⁰See Treene, *supra* note 18, at 3.

Amendment"—public schools free from “sectarian” control.²¹ Article I, section 11 of the Washington constitution seems to follow this model.²²

The Supreme Court has recognized that the nativism underlying state Blaine Amendments is due a hard second look. As the plurality opinion of *Mitchell v. Helms*²³ put it,

[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow Consideration of the[se] amendment[s] arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic” This doctrine, born of bigotry, should be buried now.²⁴

C. Summary of the *Locke v. Davey* Litigation

Faced with the loss of his scholarship, Davey sued state officials to recover the amount of his award, plus damages, alleging that Washington had impermissibly discriminated against him in his freedom to make educational choices. He challenged the Promise Scholarship program’s statutory exclusion of “theology” majors

²¹Enabling Act, ch. 180, § 4, 25 Stat. 676–77 (1889).

²²Article IX, section 4 of the Washington constitution is perhaps the most direct result of this mandate, although it is not at issue in this case. It reads: “All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.” Wash. Const. art. IX, § 4.

Article I, section 11, however, follows the same tradition. To be sure, the link between the Blaine Amendment movement and Article I, section 11 of the Washington constitution (the provision at issue in *Locke*) is somewhat conjectural. Article I, section 11 does not use the code word “sectarian” and hence does not have a firm textual link to the language of the original Blaine Amendment. Nonetheless, the Washington Supreme Court has consistently interpreted Article I, section 11 to have the effect that a Blaine Amendment would—depriving students of aid because those students attend religious schools. See, e.g., *Visser v. Nooksack Valley School Dist.*, 207 P.2d 198 (Wash. 1949); *Witters v. Commission for the Blind*, 771 P.2d 1119 (Wash.), cert. denied, 493 U.S. 850 (1989). Although the legislative history of Article I, section 11 does not conclusively prove that these provisions were adopted in response to the Blaine Amendment-inspired requirements of the 1889 Enabling Act, see Br. Amicus Curiae of Legal Historians and Law Scholars on Behalf of Petitioners Gary Locke, et al., *Locke v. Davey*, 124 S. Ct. 1307 (2004) (No. 02-1315), available at 2002 U.S. Briefs LEXIS 1315, at *28 (July 17, 2003); it is just as difficult to disprove the connection, given the scanty evidence available.

²³530 U.S. 793 (2000).

²⁴*Id.* at 828–29.

from participation. His challenge rested on four provisions of the U.S. Constitution: the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment,²⁵ and the Equal Protection Clause of the Fourteenth Amendment.²⁶ As described in greater detail below, Davey argued that each of those provisions prevents Washington from discriminating against scholarship recipients (Article I, section 11 notwithstanding).

The district court granted summary judgment for the state of Washington. On appeal, the Ninth Circuit found for Davey, holding that the state had unconstitutionally excluded religion from an otherwise neutral program and therefore had impermissibly singled out Davey's religiously motivated educational choices for discriminatory treatment.²⁷ The Supreme Court reversed, Chief Justice William Rehnquist holding for all but Justices Antonin Scalia and Clarence Thomas that Washington had a permissible interest in preventing tax funds from being used to support "the ministry."²⁸ As described in greater detail below, Rehnquist constructed an opinion that upheld the Promise Scholarship program on the narrowest possible grounds, effectively confining *Locke* to its facts.

III. Fundamental Principles

Davey should have prevailed easily in his suit. Washington's Promise Scholarship program plainly conflicted with the principles of religious neutrality and nondiscrimination toward religious choice that undergird the First Amendment. Part A examines the religious neutrality principle in general. Part B explains how the exclusion of theology majors from the Promise Scholarship program

²⁵The First Amendment reads, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech" U.S. Const. amend. I.

²⁶The Fourteenth Amendment reads, in relevant part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

²⁷See *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002).

²⁸*Locke v. Davey*, 124 S. Ct. 1307, 1315 (2004).

offends the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment.

A. Neutrality Theory and Individual Choice: An Overview

Over the past two decades, in a series of school choice and school voucher cases, the Supreme Court has enunciated a constitutional theory of religious tolerance: the neutrality principle. The Court has held that the state may award educational aid to students based on religion-neutral criteria even when those students use that aid at religious schools. Neutrality theory dates all the way back to 1947, when the Supreme Court decided the first case in which the Establishment Clause applied to the states.²⁹ In that case, *Everson v. Board of Education*,³⁰ the Court upheld a government program that reimbursed parents for the cost of transporting their children to school, whether public or parochial, because the aid went to parents and children, not to the schools.³¹ This holding, and others following this reasoning, facilitate the parents' ability to exercise their Constitutional right to direct the education of their children.³²

In the last twenty years, the Court has expanded on *Everson* to uphold a number of government-sponsored educational programs involving private educational choice.³³ *Mueller v. Allen*³⁴ began the recent trend by upholding a tax deduction for parents of schoolchildren for textbook expenses. Even though a majority of deductions went to parents of sectarian school students, the Court found the program constitutional because sectarian schools only received tax dollars as a result of parents' independent choices to send their children to those schools.³⁵

²⁹See *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947).

³⁰*Supra* note 29.

³¹See 330 U.S. at 18.

³²See *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925).

³³See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

³⁴463 U.S. 388 (1983).

³⁵*Id.* at 399 (“It is also true, however, that under Minnesota’s arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children.”).

Similarly, in *Witters v. Washington Department of Services for the Blind*³⁶ (the case most relevant to *Locke*), the Court considered a program instituted by the state of Washington that sponsored vocational training for the visually handicapped. The petitioner, Witters, would have been eligible for aid under the terms of the program, but the state commission denied him the aid because he would have used it to study to become a minister at a Christian college.³⁷ The Supreme Court upheld Witters' freedom to choose under the federal Constitution because (1) the state made aid generally available, regardless of the vocational institution's status as public, private, secular, or religious; (2) the program did not surreptitiously try to fund "religion"; (3) the program offered no incentive to study at sectarian institutions; and, crucially, (4) the decision to support religion through a student's vocational training choice resulted from the choice of the student, not the state.³⁸ Accordingly, the Court held that Witters had a right to use his award for theological study.

In *Zobrest v. Catalina Foothills School District*,³⁹ the Court upheld a deaf student's right to use an interpreter provided to him under the Individuals with Disabilities Education Act at a Roman Catholic high school.⁴⁰ *Zobrest* recited the *Mueller-Witters* principle: The Constitution allows students and parents to use state aid at religious institutions when the state has awarded that aid to individual children based on neutral criteria. Similarly, *Agostini v. Felton*⁴¹ concluded that state-funded teachers could help disadvantaged children with remedial studies at religious schools. The Court held the aid was constitutional because it "does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement [with religion]."⁴² In *Mitchell v. Helms*,⁴³ the Court upheld a program providing state-funded computers and instructional materials to students at religious schools. The plurality

³⁶474 U.S. 481 (1986).

³⁷*Id.* at 483–84.

³⁸*Id.* at 487–88.

³⁹509 U.S. 1 (1993).

⁴⁰*Id.* at 3.

⁴¹521 U.S. 203 (1997).

⁴²*Id.* at 234.

⁴³530 U.S. 793 (2000).

found the program constitutional because government aid did not result in government indoctrination and did not create any special incentive for religious education.⁴⁴ Justice O'Connor concurred, but on narrower grounds.⁴⁵

This "neutrality principle"—the notion that individual aid recipients can use neutrally awarded aid at the school of their choice—culminated in *Zelman v. Simmons-Harris*.⁴⁶ The fruition of years of effort, *Zelman* struck a firm blow for the neutrality principle. Even though the decision was 5–4, the majority employed broad language (though narrower than the plurality's in *Mitchell*⁴⁷) to uphold the state's funding program. Chief Justice Rehnquist, writing for the Court, stated that "where a government aid program is neutral with respect to religion, and provides assistance to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge."⁴⁸

Together, those cases have established that the federal Constitution does not require an otherwise neutral public benefit program to discriminate against educational choice. Yet, Article I, section 11 of the Washington constitution directs otherwise. As interpreted by the Washington Supreme Court, that provision distorts school choice programs that award aid on neutral criteria—such as household income, achievement, or need for a particular type of assistance—by preventing otherwise qualified recipients from using those awards to pursue a course of study of their choice. For example, in *Witters v. Washington Department of Services for the Blind*,⁴⁹ the United States Supreme Court unanimously held that allowing a blind man to use state vocational training aid (awarded on the basis of his disability) to attend a seminary did not violate the federal Establishment

⁴⁴*Id.* at 809–14.

⁴⁵*Id.* at 837–38 (O'Connor, J., concurring).

⁴⁶536 U.S. 639 (2002).

⁴⁷See Clint Bolick, *School Choice: Sunshine Replaces the Cloud*, 2001–2002 *Cato Sup. Ct. Rev.* 149, 160–61 (2002).

⁴⁸*Zelman*, 536 U.S. at 652.

⁴⁹474 U.S. 481 (1986).

Clause.⁵⁰ But on remand, the Washington Supreme Court held that Article I, section 11 forbids that very use.⁵¹

Locke, following *Zelman*, takes the next logical step. Although the Establishment Clause plainly allows neutrally awarded funding to go to religious institutions and courses of study as a result of the private choices of the recipients, *Locke* questions whether the Free Exercise Clause requires the state to include those choices in its funding scheme. If so, then the Free Exercise Clause would trump the contrary provisions of the Washington State constitution.⁵²

Supporters of Blaine Amendments, however, argue that even though federal law allows states to provide aid to students who choose to study at religious institutions, states retain the option to forbid it. Yet, that proposition contrasts sharply with the Supreme Court's interpretation of the Free Exercise, Establishment, and Free Speech Clauses, which combine to argue that the neutrality principle is a federal constitutional *mandate*.⁵³

B. The Neutrality Principle and the Religion Clauses

The First Amendment has two clauses protecting religious freedom: the Free Exercise Clause and the Establishment Clause. The Free Exercise Clause forbids laws "prohibiting the free exercise" of religion.⁵⁴ It operates in conjunction with the Establishment Clause,

⁵⁰*Id.* at 489–90.

⁵¹*Witters v. Commission for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989) ("[O]ur state constitution prohibits the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree.").

⁵²See U.S. Const. art. VI ("This Constitution . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

⁵³The Equal Protection Clause similarly commands neutrality toward religion. See *Niemotko v. Maryland*, 340 U.S. 268, 284 (1951) (Frankfurter, J., concurring) ("To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of law forbidden by the Fourteenth Amendment."); *Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("The Religion Clauses . . . and the Equal Protection Clause as applied to religion all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not to affect one's legal rights or duties or benefits.").

⁵⁴U.S. Const. amend. I, cl. 2.

which prohibits government from making laws “respecting an establishment of religion.”⁵⁵ The Court, rightly, has interpreted both provisions to ban state efforts to single out religious choice or the exercise of religious conscience for special burdens, disabilities, or exclusions.

1. *The Free Exercise Clause*

Justice Scalia’s opinion for the majority in *Employment Division, Department of Human Resources of Oregon v. Smith*⁵⁶ sets forth the modern rule for evaluating claims under the Free Exercise Clause: Where a law is facially neutral and generally applicable, and that law incidentally burdens religious exercise, the state need not show a compelling interest and narrowly tailored means to justify it.⁵⁷ This principle allows the government broad latitude to enact laws that may, as a secondary or tertiary effect, burden religious exercise.

But, the principle has limits. The Supreme Court has held that if a government policy singles out a religion or a religious practice for disfavor, it violates the Free Exercise Clause. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,⁵⁸ for example, the Court struck down a municipal ordinance that generally permitted the slaughter of animals, but placed a special prohibition on the slaughter of animals in religious rituals.⁵⁹ The Court held that the statute was designed to discriminate against the Santeria religion in which animal sacrifice plays an important ritual role.⁶⁰ Thus, the Court subjected the statute to “strict scrutiny”⁶¹ under the Free Exercise Clause: The statute had to serve a “compelling state interest” and be “narrowly tailored” to that interest, burdening religion as little as possible.

The *Lukumi* Court focused on the fact that the ordinance, without mentioning Santeria by name, allowed all animal slaughter *except* ritual slaughter.⁶² In other words, the Court looked past the plain

⁵⁵U.S. Const. amend. I, cl. 1.

⁵⁶494 U.S. 872 (1990).

⁵⁷*Id.* at 878–79.

⁵⁸508 U.S. 520 (1993).

⁵⁹See *id.* at 527–28, 547.

⁶⁰*Id.* at 531–32.

⁶¹*Id.* at 531–33. “A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.” *Id.* at 546.

⁶²*Id.* at 536. The ordinance made an exception for kosher slaughter. *Id.*

language of the statute to its operation to determine that it discriminated against the Santeria religion. The statute in *Locke*, by contrast, was not even facially neutral—the discrimination against “theology” students is written into the statute governing the program.⁶³ Moreover, the state interpreted the theology exclusion to cover only those degree programs that taught religion from a perspective of ultimate truth. Comparative religion studies, for example, qualified for state aid. Thus, Washington first singled out “theology,” then interpreted that word even more narrowly to single out that subset of theology majors who actually believe the material.

The most significant differences between the two cases are (1) that in *Lukumi*, the law in question targeted one particular religion—Santeria—while here, Washington has targeted religion generally; and (2) in *Lukumi*, the law in question made a particular religious exercise illegal, while here, Washington merely excluded theology from a funding program, leaving Davey and other theology majors free to believe or worship however they wished. But those distinctions should not compel a different result: As the *Lukumi* Court said, “At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons”⁶⁴

Lukumi stands for the proposition that the Free Exercise Clause bars discriminatory prohibitions on religious practice. But in *McDaniel v. Paty*⁶⁵ the Court went further. The *McDaniel* Court condemned the exclusion of clergy from generally available public benefits.⁶⁶ In that case, the Court struck a Tennessee statute disqualifying ministers or priests from serving as delegates to the state’s constitutional convention.⁶⁷ Although the law did not prevent *McDaniel* from holding any religious belief or performing any religious practice per se, the Court found that Tennessee had conditioned holding office on the relinquishment of a right (being a minister) in violation of the

⁶³Wash. Rev. Code Ann. § 28B.119.010(8).

⁶⁴508 U.S. at 532 n.86.

⁶⁵435 U.S. 618 (1978).

⁶⁶*Id.*

⁶⁷Although thirteen of the states had adopted this English practice in the early days of the nation’s history, most of them later abandoned it. See *id.* at 622–25.

Free Exercise Clause.⁶⁸ McDaniel could not simultaneously be a minister and hold office—just as Davey could not simultaneously train for the ministry and receive his scholarship. The Supreme Court has plainly stated that such a forced trade violates the Free Exercise Clause. Together, *McDaniel* and *Lukumi* underscore that the state may not single out religion for disfavor, either by directly prohibiting a religious practice or by denying an otherwise available benefit.

2. *The Establishment Clause*

The Establishment Clause also mandates neutrality toward religion. The second prong of the classic tripartite test, articulated in *Lemon v. Kurtzman*,⁶⁹ for evaluating Establishment Clause claims requires that a law's "principal or primary effect must be one that neither advances *nor* inhibits religion. . . ."⁷⁰ Thus, discrimination in either direction violates the neutrality principle.

Washington's Promise Scholarship program improperly "inhibits" religion by placing theology studies at a disadvantage relative to secular courses of study. Consider *Witters* and *Mitchell*: In those cases, the Court upheld aid against an Establishment Clause challenge because the aid created no *incentive* to pursue religious instruction and therefore did not "advance" religion. In *Locke*, the Promise Scholarship creates a strong *disincentive* for recipients to pursue majors the state views as insufficiently secular. Indeed, Joshua Davey himself reported that several of his classmates opted to change their majors once they discovered the state would not fund the one of their choosing.⁷¹ If creating an *incentive* that favors religion improperly "advances" religion under the Establishment Clause, then a program that creates a *disincentive* for certain religious choices should also unconstitutionally "inhibit" religion.

The state of Washington, by contrast, argues that Article I, section 11 merely protects "taxpayers' consciences"—that is, the hypothetical interest of some taxpayers to avoid paying for religious instruction—by preventing tax dollars from "supporting" religion.

⁶⁸*Id.* at 626.

⁶⁹403 U.S. 602 (1971).

⁷⁰*Id.* at 612. Similarly, the endorsement test bars government from expressing endorsement or disapproval of religion. See, e.g., *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring).

⁷¹Author's telephone interview with Joshua Davey (May 21, 2004).

Whether the state should fund any student's education is an open question, but once the taxpayers choose to establish a program of general support, that program cannot exclude theology majors. Washington's argument fails for two reasons. First, the Supreme Court has held that when the state awards aid on neutral criteria, as the Promise Scholarship does, that neutrality alone is enough to protect the taxpayer conscience.⁷² Second, the taxpayers' conscience is hardly at issue here. The money for the Promise Scholarship goes to *students*, not to schools or institutions. Once the state funds become a part of the student's personal funds, on the understanding that the student is free to choose his course of study, the taxpayers' interests end. The general preferences of a transitory majority should not permit the state to discriminate against some students' choices. Thus, Washington cannot reasonably argue that Article I, section 11 furthers the goals of the Establishment Clause by requiring discrimination against religion.

C. *The Free Speech Clause*

Washington's Promise Scholarship program is also suspect under the Free Speech Clause of the First Amendment. The program plainly implicates speech. The Free Speech Clause addresses expressive conduct, and declaring a major is precisely that. As the Ninth Circuit explained, "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."⁷³ Because choosing a major is expressive conduct, the guarantees of the Free Speech Clause apply to the Promise Scholarship program.

In addition, the way the Promise Scholarship is structured also should trigger First Amendment protection for scholarship recipients. The Supreme Court first unfurled the applicable test, "forum analysis," in *Widmar v. Vincent*.⁷⁴ In that case, the Court held that a public university's provision of facilities for student group meetings creates a "forum"—a government-sponsored enclave for speech in which the government may not disfavor any speaker's viewpoint.

⁷²See *Board of Regents v. Southworth*, 529 U.S. 217, 233 (2000) (holding that neutrality toward private speech sufficed to protect the consciences of those who object to the activities funded).

⁷³*Davey v. Locke*, 299 F.3d 748, 755 (9th Cir. 2002).

⁷⁴454 U.S. 263 (1981).

In *Widmar*, the University of Missouri barred a religious student group from using facilities otherwise available to students, triggering a free speech challenge.⁷⁵ The Court held that the exclusion discriminated against the religious group based on the content of its speech. Thus, the restriction failed First Amendment "strict scrutiny."⁷⁶ *Widmar's* bearing on *Locke* is clear: Assuming that the Promise Scholarship qualifies as a "forum," *Widmar* implies that Washington cannot justify discrimination against theology majors.⁷⁷

Fourteen years after *Widmar*, the Court expanded on this forum analysis in *Rosenberger v. Rectors and Visitors of the University of Virginia*.⁷⁸ *Rosenberger* held that when a public university awards funds based on neutral criteria to a wide variety of speakers, the government creates a neutral conduit for private speech, and it cannot then selectively deny funding for certain viewpoints simply because the government does not endorse their content.⁷⁹

Critical to the forum analysis, however, is whether the state of Washington has funded its own speech or whether it has created a forum. When the state is the speaker, it has discretion to make content-based choices, and "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."⁸⁰

Moreover, a broad funding scheme alone does not necessarily create a forum. In *United States v. American Library Association* (hereinafter *ALA*),⁸¹ the Supreme Court considered whether Congress could, as a condition of receiving federal funds, mandate that libraries install filters to prevent minors from viewing pornography.⁸² The Court upheld the mandate. A plurality of the Court reasoned that

⁷⁵*Id.* at 264.

⁷⁶*Id.* at 269–70.

⁷⁷Significantly, the Court also found that Missouri had no Establishment Clause interest in excluding the religious group. *Id.* at 276. By analogy, then, if choosing a major is expressive conduct protected by the First Amendment in a forum created by the state of Washington, the state also has no Establishment Clause interest in excluding theology majors.

⁷⁸515 U.S. 819 (1995).

⁷⁹*Id.* at 833–34.

⁸⁰*Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

⁸¹539 U.S. 194 (2003).

⁸²*Id.* at 199.

internet access in public libraries is not a “forum” because the library sought to make available to the public only information it considered valuable.⁸³ Put simply, the public libraries in *ALA* were not a “forum” because they exercised editorial control over the materials in the library and did not intend to facilitate the speech of publishers generally. *ALA* suggests that a forum exists only where the funding is used to facilitate speech *generally*. By contrast, where the funded program exhibits a certain degree of editorial control over sponsored speech, no forum exists, and the government may pick and choose among the content of the speech it sponsors.

Widmar, *Rosenberger*, and *ALA* suggest the following rule for *Locke*: If the state of Washington provides scholarships based on neutral criteria to students enrolled in programs in which the government or an intermediary that disburses the scholarships retains no editorial control, then Washington may not selectively discriminate against some of those students because of the views they espouse.⁸⁴ Put another way, the key question is whether Washington State funded a program that facilitated a diverse set of private viewpoints, or whether the state funded a program in which the sponsorship of a particular speech—e.g., the declaration of a major—was subject to the state’s discretion.

In *Locke*, the state of Washington provided scholarships to *all* graduating seniors in the state who met certain achievement and income criteria. By providing those scholarships for any course of study (except one), the state has facilitated expressive conduct. Unlike the state-funded librarians in *ALA*, who must constantly exercise judgment over the material in the public libraries, Washington retains no editorial control over the instruction that Promise Scholarship recipients receive. Nor, for that matter, does the funding program anticipate that other intermediaries who receive and disburse the funding will exercise editorial control. To the contrary, the Promise Scholarship presumes that individuals who qualify will use the funding to pursue their own diverse academic interests. The exclusion of funding for the “theology” choice is the exception that

⁸³*Id.* at 206–07.

⁸⁴*Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833–34 (1995).

proves the rule. Thus, under *Rosenberger*, the Court should view this exclusion with suspicion.⁸⁵

IV. The Supreme Court Departs from Principle

The majority in *Locke* departed from the neutrality principle established by the Court's prior holdings. Part A summarizes the key points of the Supreme Court's argument. Part B discusses the argument's weaknesses.

A. Summary of the Majority Opinion in Locke v. Davey

Chief Justice Rehnquist, writing for the majority, upheld the Promise Scholarship program in an opinion notably short on discussion of previous holdings but long on "historical" analysis. The Court did not deny that the program discriminated against Davey based on religion. Rather, it held that because states since the founding had prohibited the use of taxes to support clergy, Washington State could exclude theology majors from the Promise Scholarship program. "Since the founding of our country," wrote Rehnquist, "there have been popular uprisings against procuring taxpayer funds to support church leaders."⁸⁶ Moreover, the Court added, the "burden" on Davey imposed by the funding exclusion is "relatively minor"⁸⁷ and "mild[]." ⁸⁸ Those reasons led the Court to reject Davey's challenges under the Free Exercise Clause.

⁸⁵When the government funds its own speech, the Supreme Court has held that the government may discriminate on the basis of content without violating the First Amendment. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (noting that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program"). That rationale, however, is not applicable to the Promise Scholarship because that program funds a broad array of expression based on neutral criteria, then creates a content-based exception. Moreover, even if one views the Promise Scholarship from the government-as-speaker rubric, the government may not create subsidies with a "coercive effect," engage in "invidious viewpoint discrimination," or infringe on other constitutional rights. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998). Even through the government-speaker lens, the Promise Scholarship still should be unconstitutional because it coercively creates a disincentive to study theology and singles out religion for disfavor.

⁸⁶*Locke v. Davey*, 124 S. Ct. 1307, 1313 (2004).

⁸⁷*Id.* at 1315.

⁸⁸*Id.* at 1312.

In reaching its conclusion, the Court made a number of suspect analytical choices. First, in applying the Court's previous Free Exercise Clause jurisprudence, the Court failed to address the *degree* of scrutiny that must be applied to the state's departure from the neutrality principle. Second, and closely related, the Court appears to have abandoned the "least restrictive means" test—a test that prohibits discrimination when other *nondiscriminatory* options are available to the state to achieve the same goal. Third, the Court selectively quotes from the historical record in a way that distorts the import of that record. Fourth, the Court fails to address in any meaningful way the free speech arguments advanced by Davey. Together, these failures combine to make for a particularly weak, at times incoherent, and unconvincing majority opinion.

B. The Weakness of the Majority's Analysis

1. Level of Scrutiny and the Least Restrictive Means Test

The Court's first failure lies with the level of scrutiny applied to the state's funding classification. In *Lukumi*, the majority held that "[a] law burdening religious practice that is not neutral must undergo the most rigorous of scrutiny."⁸⁹ Because the Promise Scholarship provides that students receiving the award cannot pursue a degree in theology, the statute is not even facially neutral. Thus, one would expect the Court to apply "strict scrutiny." Yet the Court punts. It never squarely identifies the appropriate level of scrutiny for Davey's free exercise claims, much less applies the strict scrutiny mandated by *Lukumi*.

Given that the facial discrimination written into the Promise Scholarship program is impossible to ignore, the lapse is hard to explain. As Justice Scalia rightly notes in dissent, the state has exacted a penalty *solely* because of a student's chosen course of study.⁹⁰ One senses that the Court deemed the strict scrutiny test inconvenient: If the Court had applied strict scrutiny, as *Lukumi* requires, the state would have had to supply a "compelling" interest for its discrimination and would have had to prove that the state had employed the least restrictive means toward that compelling goal. As the Supreme Court has stated elsewhere, "Requiring a State to demonstrate a

⁸⁹*Id.* at 1315–16 (Scalia, J., dissenting).

⁹⁰*Id.* at 1316.

compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."⁹¹ The state would not have been able to meet that demand. As Scalia noted, the state's interest is "a pure philosophical preference" that "has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context."⁹²

To be sure, the majority observed in a footnote that the state's only interest was avoiding funding of the clergy, and the state would not have unlimited ability to exercise such preferences.⁹³ But the majority's rule has no logical end. Could Washington State exclude pastors from having library cards to ensure that public money does not sponsor sermon preparation? Could it prohibit pastors from using public highways, or redraw bus routes to avoid churches?

By dispensing with strict scrutiny, the *Locke* majority immunizes its opinion from a key objection: that less restrictive alternatives *are* available to the state to fulfill its interest in zealous protection of taxpayer conscience. Under *Lukumi's* strict scrutiny standard, the Court is supposed to employ the "least restrictive means" test, which requires the state to show that there are no means of pursuing the state goal that would not entail discrimination against religious conscience or religious choice.⁹⁴

The Court gestured toward the least restrictive means test by arguing that the burden "imposed by the restriction on scholarships was not materially significant" and, indeed, was far "milder" than the one considered in *Lukumi* or *McDaniel*. But no one can deny that the state's discrimination created a burden in fact. As Justice Scalia notes in dissent, "[w]hen the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit . . . it [burdens religion] no less than if it had imposed a special tax."⁹⁵ In other words, withdrawing the scholarship is a meaningful form of discrimination.

⁹¹See, e.g., *Boerne v. Flores*, 521 U.S. 507, 534 (1997).

⁹²*Locke*, 124 S. Ct. at 1318.

⁹³*Id.* at 1314 n.5.

⁹⁴See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542-43 (1993).

⁹⁵*Locke*, 124 S. Ct. at 1316 (Scalia, J., dissenting).

Moreover, the burden of the discrimination *is* significant. To be sure, footnote four of the majority opinion commends the state's suggestion that Promise Scholars, to avoid being inconvenienced, may pursue secular and devotional theology degrees at two separate universities.⁹⁶ But even if this "alternative" were hypothetically possible, adding an extra university to the undergraduate experience certainly imposes an extra burden on the devotional theology student not borne by any secular student. Davey did not explore whether it actually would be possible to enroll at two schools simultaneously, but the institution nearest Northwest College, the University of Washington, was a good half-hour away.⁹⁷ Enrolling in and traveling between two colleges would certainly have had a significant and negative impact on his undergraduate experience. Moreover, some four-year colleges will not award a degree unless the last two years are spent in residency at that college. The Court's conclusion that this burden is "relatively minor" is remarkably unconvincing.⁹⁸

But even so, the Court's speculation about the degree of burden imposed on Davey is beside the point. The strict scrutiny test does not turn on the Court's assessment of the *degree* of discrimination, but on whether *any* discrimination is permitted. Fidelity to that principle requires the Court to consider not whether the discrimination is "burdensome" but whether there are less restrictive means other than discrimination that can promote the same goal. Here the goal advanced in support of the Promise Scholarship is, ostensibly, to zealously avoid giving any state support to religion. Yet the state could have pursued that end through means that did not discriminate against Davey's religiously motivated choices, a point Justice Scalia underscored in dissent:

⁹⁶*Id.* at 1313 n.4.

⁹⁷Author's telephone interview with Joshua Davey (May 21, 2004).

⁹⁸This forced choice underscores the close relationship between Davey's scholarship and *McDaniel*, discussed above. *McDaniel* stands for the proposition that the state cannot deny a minister qua minister an otherwise available benefit; the state cannot force a person to choose between a government benefit and his religious beliefs. Alarming, the Court—in order to evade this clear precedent—baldly asserts that the Promise Scholarship "does not require students to choose between their religious beliefs and receiving a government benefit." Locke, 124 S. Ct. at 1312–13. That statement cannot possibly be true, as scholarship recipients like Davey who feel a religious calling to major in theology must choose between that calling and their \$3,000.

Function Follows Form: Locke v. Davey's Unnecessary Parsing

There are any number of ways [Washington State] could respect both its unusually sensitive concern for the conscience of the taxpayers *and* the Federal Free Exercise Clause. It could make the scholarships redeemable only at public universities (where it sets the curriculum) [and, presumably, can decline to offer degrees in devotional theology], or only for select courses of study [such as, presumably, math or science]⁹⁹

Either option would allow the state to create a scholarship program that does not facially discriminate against religion while remaining true to its zealous respect for the taxpayers' conscience. But once the government decides to enact a broad program to facilitate educational choice, discrimination against particular students' choices is not an option.

2. "*Play in the Joints*"

Chief Justice Rehnquist, writing for the majority, begins the analysis by citing the principle that "there is room for play in the joints" between the Establishment Clause and the Free Exercise Clause.¹⁰⁰ Generally speaking, the Establishment Clause limits the *benefits* government can confer on religion, and the Free Exercise Clause limits the *burdens* government can place on religion. The Constitution does not limit the state to accommodating religion only as the Free Exercise Clause requires.¹⁰¹ Conversely, states need not provide as much aid to religious schools or students as the Establishment Clause would permit.

Rehnquist is certainly correct that, in principle, not everything allowed by the Establishment Clause is required by the Free Exercise Clause and vice versa. But, that principle must be interpreted consistently with the parallel principle of nondiscrimination, as established by *Lukumi*, *McDaniel*, and progeny. To be sure, these cases are in tension with some early cases in the equal protection context.¹⁰² But *Lukumi* and *McDaniel* postdate those authorities and in any event get the principle right: that if the state "neutrality" required by the

⁹⁹Locke, 124 S. Ct. at 1317 (Scalia, J., dissenting).

¹⁰⁰*Id.* at 1311 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970)).

¹⁰¹See, e.g., Michael W. McConnell, Religious Participation in Public Programs: Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 182 (1992).

¹⁰²See, e.g., *Norwood v. Harrison*, 413 U.S. 455 (1973).

Free Exercise and Establishment Clauses is to mean anything, it must mean that states cannot discriminate on the basis of religion. The state, in order to remain zealously “neutral” with respect to educational choices, may choose not to award any scholarships, award scholarships for specific disciplines (such as math or science), or award scholarships only for study at state universities. It may not, however, award scholarships on need- and merit-based criteria, then exclude an otherwise eligible student for choosing to pursue religious studies. *Locke* stands in tension with that principle. “Play in the joints” does not mean that states have flexibility to *discriminate* against students’ religiously motivated educational choices.

Justice Scalia, in dissent, rightly argues as much: “A municipality hiring public contractors may not discriminate *against* blacks or *in favor* of them; it cannot discriminate a little bit each way and then plead ‘play in the joints’ when haled into court.”¹⁰³ Here, the state could have established a program that comports with its view of separation of church and state without infringing on the rights of ministry students. What it could not do is discriminate against a religiously motivated choice in a general state aid program. The “play in the joints” principle is a poor substitute for strict scrutiny, and a weak cover for the Court’s refusal to consider Washington’s less restrictive alternatives. That refusal is a serious departure from the constitutional principle of nondiscrimination.

3. *Historical Tradition*

Turning from the abstract to the concrete, the Court argues that citizens have opposed taxpayer support of religion—particularly support of ministers—since the nation’s founding, and the Washington constitution merely expresses that sentiment.¹⁰⁴ Yet the Court misunderstands the history it cites. Even though many founding-era state constitutions contain language similar to that of Article I, section 11, those provisions did not intend to authorize discrimination against ministers, much less discrimination against students’ educational choices in a school choice program.

To be sure, Thomas Jefferson and James Madison believed compelled-taxpayer support for religion was an infringement on conscience. In *A Bill for Establishing Religious Freedom*, Jefferson wrote,

¹⁰³*Locke*, 124 S. Ct. at 1317 (Scalia, J., dissenting).

¹⁰⁴*Id.* at 1313–14.

Function Follows Form: Locke v. Davey's Unnecessary Parsing

That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern.¹⁰⁵

And Madison famously stated in his *Memorial and Remonstrance Against Religious Assessments*:

Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.¹⁰⁶

A number of scholars consider those statements to reflect a belief among the Founders that no taxpayer dollars should ever support religion, even as part of an otherwise neutral funding scheme. But as Douglas Laycock has noted, Jefferson's and Madison's writings decried a proposal before the Virginia legislature to single out Christian churches for a subsidy.¹⁰⁷ They do not entail the more extreme position—that government may discriminate against “religious” persons when making public funds available generally for citizens to use according to their own designs.

The Court cites the fact that in the late eighteenth century many states had formal provisions against using tax funds to support the ministry. Tracing the history of such prohibitions, the Court notes eight states with formal exclusions in their constitutions near the time of the founding.¹⁰⁸ To be sure, many of the Founders opposed affirmative state subsidies for religious training. But their opposition

¹⁰⁵Thomas Jefferson, A Bill for Establishing Religious Freedom, 12 June 1779, in 5 *The Founders' Constitution* 77 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹⁰⁶James Madison, *Memorial and Remonstrance Against Religious Assessments*, 20 June 1785, in 5 *The Founders' Constitution*, *supra* note 105, at 82.

¹⁰⁷See Douglas Laycock, *The Origins of the Religion Clauses of the Constitution: “Nonpreferential” Aid to Religion: A False Claim about Original Intent*, 27 *Wm. & Mary L. Rev.* 875, 895–99 (1986) (explaining that Jefferson, Madison, and the eighteenth-century voters supported no aid to religion over proposals for “nonpreferential” aid to all Christian churches).

¹⁰⁸Locke, 124 S. Ct. at 1313–14.

did not extend to the exclusion of ministers from a broader public-aid program. Rather, they were opposed simply to special subsidies for the clergy. Unlike with the established churches of yore, the aid program in *Locke* created a broad-based scholarship awarded on neutral criteria. As Scalia observed, the majority identified no examples of states singling out ministers for exclusion from public benefits.¹⁰⁹ Thus, the majority builds an argument on an illusory historical foundation, devoid of a single on-point example.

4. *Free Speech*

The Court's analysis of free speech is particularly weak. Footnote three summarily addresses, in a span of two paragraphs, the arguments against the Promise Scholarship program's religious classification under the Free Speech and Equal Protection Clauses.¹¹⁰ Citing *American Library Association*, the Court finds that "the Promise Scholarship Program is not a forum for speech. 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.'"¹¹¹ The Court offered no additional discussion as to why the Promise Scholarship was or was not a funding forum.

Without more, the reader can but speculate whether *Locke* portends a narrower interpretation of a limited public forum, or amounts simply to the refusal to find a forum in the context of college scholarships. Certainly, the effect of the Promise Scholarship is to promote a diversity of views by funding a wide variety of individuals pursuing their own personal, and therefore diverse, educational choices. Does the Court believe that in establishing the funding scheme the state must *intend* to facilitate "diverse" speech before First Amendment protections apply? Does the Court believe that the University of Virginia in *Rosenberger* had that intent? Why did the Court believe that Washington State did not have that intent as well as the desire to bring more low-income persons into higher

¹⁰⁹*Id.* at 1317 n.1.

¹¹⁰*Id.* at 1312 n.3.

¹¹¹*Id.* at 1312 n.2 (quoting *United States v. American Library Association*, 539 U.S. 194, 206 (2003)).

education? The Court's failure to distinguish funding education generally and speech specifically further obscures the definition of protected speech in a funding context.

5. *Anti-Catholic Bigotry and Blaine Amendments*

In footnote seven the Court dismisses the argument that anti-Catholic bigotry influenced the drafting of Washington's constitution.¹¹² Because the Court believes that Article I, section 11 does not have a clear textual connection with the original Blaine Amendment, it concludes that the Blaine Amendment question "is simply not before us."¹¹³ *Locke*, then, does not touch the Blaine Amendments and the impact of anti-Catholic animus on their constitutionality.

At one level, the Court's observation misses the point. Even if there is no perfectly clear historical evidence that Article I, section 11 qualifies as a "Blaine" Amendment, the provision has the effect of one. The history of the Blaine Amendments—both their origins and subsequent applications by many state courts—underscores that Blaine-like provisions are troublesome and may well provide a cover for religious intolerance and bigotry. That reason alone suggests these provisions should be considered suspect.

Nonetheless, *Locke's* minimalist analysis has a redeeming virtue. Given the paucity of records surrounding the drafting of Washington's constitution and the inconclusive textual evidence, Article I, section 11 arguably did not present the strongest case for a challenge to state-level Blaine Amendments. A better case for such a challenge would have involved documented legislative history linking the drafting and insertion of the relevant provision to known anti-Catholic forces and a pattern of subsequent discriminatory interpretation. Such evidence could exist in a state with a well-established history of conflict between Protestants and Catholics in the late nineteenth century. The Court, by ducking the question entirely, has saved the battle over the Blaine Amendments for another day when both sides can marshal better proof.

V. A Narrow Decision, a Lost Opportunity

The majority opinion treads carefully, going no further than absolutely necessary to reach its conclusion. The Court decided the case

¹¹²*Locke*, 124 S. Ct. at 1314 n.7.

¹¹³*Id.*

almost entirely on the ministry-funding theory and gave no indication of a willingness to extend its holding to other categories of discrimination. By declining to find a forum within the scope of *Rosenberger*, the Court stemmed the potential for erosion of the neutrality theory. Without a forum, the Court's reasoning cannot weaken the First Amendment protections of *Rosenberger* in other factually dissimilar cases. By avoiding strict scrutiny, the Court circumnavigated the implication that a state can create a "compelling" interest that would warrant violation of the federal Constitution simply by constitutionalizing that interest under its own constitution. By dismissing the Blaine Amendment question, the Court saved that issue, too, for another day. Limiting the holding to the funding of ministerial training at the postsecondary level also steers clear of issues related to school choice at the primary and secondary levels.

Despite the Court's careful machinations, the potential for damage to future school choice cases remains. Although the Court focused on ministerial funding, it basically approved a state's power to enforce constitutional provisions that broadly restrict the flow of state dollars to "religious" persons, even when those dollars only incidentally benefit religion as a result of individual choices. Scalia's dissent perfectly highlights the flaws in the majority's reasoning. Although the opinion was narrowly drawn, the Court still tore a small, carefully edged hole in the neutrality fabric woven by years of precedents. As Scalia presciently concludes, "[h]aving accepted the justification in this case, the Court is less well equipped to fend it off in the future."¹⁴ The damage is certainly greatest to programs like Washington's that promote choice in higher education, but school choice opponents will no doubt attempt to extend the holding to the primary and secondary levels.

Still, the narrowness of the holding offers some comfort to those who want to restrict government's power to discriminate. First, Washington's program singled out only theology majors. Viewed through one lens, that presents perhaps the clearest case of discrimination short of singling out Buddhists or asking scholarship recipients to refrain from church attendance. A broader exclusion, seemingly, would have even less chance of success. The Court, however, relied fairly heavily on the fact that Washington allowed recipients

¹⁴*Id.* at 1320.

to attend religious colleges and take religious classes in finding a lack of discrimination. From that vantage point, the Court might not look so favorably on using a state Blaine Amendment to exclude all religious schools or certain schools that are “too religious” from a voucher plan serving students at nonpublic schools.

Second, the Court’s reliance on historical tradition offers another means of narrowing *Locke*’s scope. Here, the Court identified a long history of avoiding the funding of ministers dating back to the founding. Yet no similar tradition exists of avoiding the funding of religious education of primary and secondary school students. To the contrary, America’s public schools inculcated Protestant religious values for decades. Thus, based on history, *Locke*’s holding should remain confined to ministerial education.

Third, the real showdown over Blaine Amendments still looms in the distance. In the meantime, school choice advocates should argue for a narrow interpretation of state constitutional provisions posing barriers to school choice. More important, they should encourage state legislatures to eliminate those barriers entirely.

The narrowness of the opinion aside, Scalia plainly has the better of the argument. Excluding would-be ministers from a broad-based scholarship program simply because they choose to pursue a religious calling burdens educational choice and liberty of religious conscience. Of the five Promise Scholarship students in Davey’s entering class who wanted to study theology at Northwest College, at least three, and perhaps four, opted to change their major rather than forego the money.¹¹⁵ Davey was the fifth. In fact, Davey ultimately changed his major to Religion and Philosophy (also considered a theology major) and went to law school instead of the seminary. Although faith remains an integral part of Davey’s life and career, he may never become a church pastor.¹¹⁶ Against what has the state actually protected the taxpayers? Moreover, to the person of faith, any career can be a type of religious calling, and any life path can and should involve ministry to others. Further, ministry students may not necessarily major in theology. The formulaic exclusion of theology majors does not functionally protect the taxpayer’s conscience in the manner the state intended.

¹¹⁵ Author’s telephone interview with Joshua Davey (May 21, 2004).

¹¹⁶ *Id.*

In reality, a strong neutrality principle *advances* the goals the state of Washington sought to promote. The current law enmeshes the state in often close calls about which programs do and do not constitute “theology.” Even though the state has delegated the lion’s share of that responsibility to the colleges themselves, it still must act as the final arbiter of the meaning of “theology,” a term Justice Thomas rightly points out is ambiguous. With the help of individual colleges, the state must decide when reading Saint Augustine is philosophy and when it is theology. That is surely not the role the Founders had in mind for the state.

Plainly, Joshua Davey had the Promise that the state of Washington sought to promote. He has just completed his first year at the Harvard Law School, is active on one of its leading journals, and, not surprisingly, is interested in religious liberty issues.¹¹⁷ Sadly, by green-lighting discrimination against Davey, the Court has given states a freer hand in enacting measures that may burden all citizens’ freedom of religious choice. Fortunately, the Court has not (yet) mandated state discrimination against religiously motivated educational choices. In the wake of *Locke*, the best protection against that threat now is the vigilance—and action—of each state’s citizens.

¹¹⁷*Id.*