

State Funding of Devotional Studies: A Failed Jurisprudence that has Lost Its Moorings

by Mark Strasser*

I. INTRODUCTION

The Court's attitude toward the public funding of devotional studies can best be described as ambivalent.¹ Not long ago, devotional studies were viewed as one of the few kinds of study that the State clearly could not fund. Then, the Court did an about-face, implying that public funding of devotional studies does not violate constitutional guarantees, because that kind of study cannot be distinguished for constitutional purposes from other kinds of permissibly funded areas of study. Still more recently, the Court changed course yet again, suggesting that states may but need not refuse to fund such studies, reverting to the position that there is something about devotional studies that distinguishes it from other kinds of study for constitutional purposes, while nonetheless reaffirming that this area of study is not so different that the Establishment Clause bars its being funded, at least indirectly. While the most recently articulated position seems to be a kind of compromise that neither prohibits nor requires states to provide funds for devotional studies, this newest formulation of the parameters of the Establishment Clauses is neither stable nor satisfying. The Court's current position will likely undergo yet another transformation, making the constitutional limitations and protections in this area even murkier and more confusing.

II. THE CONFUSED AND CONFUSING JURISPRUDENCE REGARDING THE MINISTRY AND MINISTERIAL STUDIES

The trilogy of cases involving public funding of higher education—*Tilton v. Richardson*,² *Hunt v. McNair*,³ and *Roemer v. Board of Public Works*⁴—suggests that public funding of devotional study is barred by the Constitution. *McDaniel v.*

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¹ In *Locke v. Davey*, 540 U.S. 712 (2004), the Court described such studies as involving “degrees that are devotional in nature or designed to induce religious faith.” *Id.* at 716 (citation omitted). The Court also made clear that a “pastoral ministries degree is devotional.” *Id.* at 717. See also Carlos S. Montoya, *Constitutional Developments*, *Locke v. Davey and the “Play in the Joints” between the Religion Clauses*, 6 U. PA. J. CONST. L. 1159, 1161 (2004) (“While Washington’s statutes, rules, and regulations do not define the term ‘degree in theology,’ both parties conceded that ‘the statute simply codifies the State’s constitutional prohibition on providing funds to students to pursue degrees that are devotional in nature or designed to induce religious faith.’”) (citation omitted).

² 403 U.S. 672 (1971).

³ 413 U.S. 734 (1973).

⁴ 426 U.S. 736 (1976).

*Paty*⁵ suggests that the Constitution precludes states from viewing the clergy with a jaundiced eye, and *Witters v. Washington Department of Services for the Blind*⁶ implies that ministerial studies are no different from other kinds of studies for Establishment Clause purposes. *Rosenberger v. Rector and Visitors of the University of Virginia*⁷ goes at least one step farther, seemingly precluding the State from refusing to fund religious expression when other kinds of expression are funded. Then, *Locke v. Davey*⁸ seems to reverse course, adopting a kind of intermediate position that neither affirms the *Tilton-Roemer* line nor the *Witters-Rosenberger* position. While one might have hoped that the Court would have offered a careful exposition explaining why its recent view best captures the relevant jurisprudence, the Court does no such thing, making the current jurisprudence even more confusing than it had previously been.

A. The Tilton-Roemer Line of Cases

Tilton involved a challenge to the Higher Education Facilities Act of 1963,⁹ which authorized construction grants to religiously affiliated colleges and universities.¹⁰ The opinion offered a test to determine whether the funding passed muster, focusing on whether the Act “reflect[ed] a secular legislative purpose,”¹¹ whether “the primary effect of the Act [was] to advance or inhibit religion,”¹² and whether the “administration of the Act foster[ed] an excessive entanglement with religion.”¹³

The *Tilton* Court dispensed with the purpose prong rather quickly, finding that Congress’s desire to expand opportunities for the growing number of young men and women seeking a higher education was a legitimate secular purpose.¹⁴ In rejecting that the primary effect prong had been violated, the Court emphasized that the schools had introduced evidence that they were not attempting to proselytize or indoctrinate students.¹⁵ The challenge to the Act could not be sustained, precisely because the evidence indicated that the main purpose of these institutions was to provide their students with a secular education, the fact that

⁵ 435 U.S. 618 (1978).

⁶ 474 U.S. 481 (1986).

⁷ 515 U.S. 819 (1995).

⁸ 540 U.S. 712 (2004).

⁹ See *Tilton v. Richardson*, 403 U.S. 672, 674 (1971).

¹⁰ *Id.* at 676 (“We are satisfied that Congress intended the Act to include all colleges and universities regardless of any affiliation with or sponsorship by a religious body.”).

¹¹ *Id.* at 678.

¹² *Id.*

¹³ *Id.* The Court also considered whether the implementation of the Act inhibited the free exercise of religion, rejecting that the taxpayers who objected to this use of their tax dollars were thereby somehow suffering “coercion directed at the practice or exercise of their religious beliefs.” See *id.* at 689.

¹⁴ *Id.* at 679.

¹⁵ *Id.* at 687.

each of the institutions had religious ties notwithstanding.¹⁶ The *Tilton* Court implicitly suggested that it would have reached a different result had there been persuasive evidence that the schools at issue were primarily devoted to religious instruction.¹⁷

As far as the entanglement prong was concerned, the Court cited several factors to support its conclusion that this prong was not violated by the program at issue. First, the Court noted that college students are not particularly impressionable and are “less susceptible to religious indoctrination,”¹⁸ suggesting that the skepticism of college students is a bulwark against attempts to indoctrinate or proselytize, and that this barrier has constitutional weight.¹⁹ Second, the Court pointed out that because religious indoctrination was not the primary purpose of these schools,²⁰ there was less of a risk that state monies would in fact be used to fund religious activities.²¹ Because of this reduced risk, there was less of a need for close surveillance, which would reduce the required entanglement between church and state.²²

The *Tilton* Court cited two additional reasons to believe that the entanglement prong had not been violated. First, the funds at issue here were for religiously neutral facilities,²³ and second, the government aid was a single-purpose, one-time grant.²⁴

In analyzing the differing prongs, the *Tilton* Court emphasized in various ways that the funds would not be supporting religious instruction. Had the State funds been supporting devotional studies, the *Tilton* Court would presumably have reached a much different result.

*Hunt v. McNair*²⁵ involved a South Carolina program assisting colleges and universities in the constructing, financing, and refinancing of projects.²⁶ The *Hunt* Court analyzed the program in terms of its purpose and primary effect, and in terms of whether it would foster excessive government entanglement with religion.²⁷ The first prong was easily met, because the State’s purpose was clearly secular.²⁸

¹⁶ *Id.*; see also Michael A. Vaccari, *Public Purpose and the Public Funding of Sectarian Educational Institutions: A More Rational Approach after Rosenberger and Agostini*, 82 MARQ. L. REV. 1, 30 (1998) (noting that in *Tilton*, the “Court viewed higher education’s predominant mission as providing a secular education”).

¹⁷ *Tilton*, 403 U.S. at 686–88.

¹⁸ *Id.* at 686.

¹⁹ *Id.*

²⁰ *Id.* at 687.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 688.

²⁴ *Id.*

²⁵ 413 U.S. 734 (1973).

²⁶ See *id.* at 736.

²⁷ *Id.* at 741 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

²⁸ *Id.*

The second prong, namely, whether the primary effect of the program was to promote religion,²⁹ involved a more complicated analysis. As an initial matter, guidance was required with respect to when the primary effect of a program would count as promoting religion. The Court explained that aid has a primary effect of advancing religion when: (1) it goes to a pervasively religious institution, where a substantial portion of the school's functions promote its religious mission, or (2) the funds are used to support "specifically religious activity,"³⁰ even when the school is otherwise primarily sectarian. Thus, when analyzing whether this prong had been violated, the focus is not on the effect of a program as a general matter, but on the effect of the program with respect to the challenged allocation. For example, grant monies going to a pervasively sectarian program would not be immunized from constitutional review merely because other monies from that same funding source had also gone to secular programs. As the *Hunt* Court explained, "[t]o identify 'primary effect,' we narrow our focus from the statute as a whole to the only transaction presently before us."³¹

The *Hunt* Court examined whether the Baptist College of Charleston was pervasively sectarian.³² Because there was no basis in the record to conclude that the College was significantly oriented "towards a sectarian rather than a secular education,"³³ and because the monies could not be used to construct buildings that would be used for religious purposes,³⁴ the Court concluded that the funding at issue passed constitutional muster. The *Hunt* Court implied, however, that the funding would not have passed muster had it been used to promote religious activity.³⁵

At issue in *Roemer v. Board of Public Works*³⁶ was the constitutionality of a Maryland program awarding annual grants to private colleges and universities, including some that were religiously affiliated.³⁷ The funds were restricted so that they could only be used for non-sectarian purposes.³⁸ Indeed, institutions that primarily awarded seminary or theological degrees were simply not eligible for the grants.³⁹

The *Roemer* Court examined the challenged program in light of the three-pronged test used in the previous cases.⁴⁰ However, because there had been no challenge to the finding below that the purpose of the program was secular,⁴¹ the

²⁹ *Id.* at 742.

³⁰ *Id.* at 743.

³¹ *Id.* at 742.

³² *See id.* at 743–44.

³³ *Id.* at 744.

³⁴ *Id.*

³⁵ *See id.* ("Nor can we conclude that the proposed transaction will place the Authority in the position of providing aid to the religious as opposed to the secular activities of the College.").

³⁶ 426 U.S. 736 (1976).

³⁷ *See id.* at 740 (noting that private institutions of higher learning in Maryland would be eligible as long as they met the relevant criteria).

³⁸ *See id.* at 739.

³⁹ *Id.* at 741–42.

⁴⁰ *Id.* at 754.

⁴¹ *See id.*

Court focused its attention on the primary effect of the program and on whether the program fostered excessive church-state entanglement.⁴²

When analyzing the primary effects prong, the Court rejected the reduction-of-opportunity-cost theory of Establishment Clause jurisprudence. Basically, that theory recognizes that when sectarian institutions expend monies on secular activities, they must bear opportunity costs in that they must forego the opportunity of spending those monies on sectarian activities. When the State provides support for secular services, however, monies are thereby freed up for sectarian pursuits.⁴³ The reduction-of-opportunity-cost theory of Establishment Clause jurisprudence suggests that whenever the State frees up money that could then be spent on sectarian activities, the Establishment Clause is violated. However, the Court has rejected the reduction-of-opportunity-cost theory of Establishment Clause jurisprudence, noting that the fact that the State's providing funds to support the provision of secular services might free up institutional funds to be used for sectarian purposes does not in itself invalidate the provision of those benefits.⁴⁴ Otherwise, the State might be thought precluded from according police or fire services to religious institutions.⁴⁵

The Court explained that state funding, which accords an incidental benefit to a religious institution, is not barred by the Establishment Clause.⁴⁶ Rather, the Clause merely requires that the State have a policy of "neutrality."⁴⁷ Yet, the Court's neutrality requirement is open to misinterpretation. The *Roemer* Court was not suggesting, for example, that neutrality requires the State to fund religious programs if non-religious programs are also being funded. On the contrary, religious programs cannot be funded. As the *Roemer* Court explained, "The State must confine itself to secular objectives, and neither advance nor impede religious activity."⁴⁸

⁴² See *id.* at 754–55.

⁴³ *Id.* at 747 (The Court was not "blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends.").

⁴⁴ *Id.* (noting that the Court had long since rejected that "the State may never act in such a way that has the incidental effect of facilitating religious activity").

⁴⁵ [I]n *Everson*, the Court held that reimbursement by the town of parents for the cost of transporting their children by public carrier to parochial (as well as public and private nonsectarian) schools did not offend the Establishment Clause. Such reimbursement, by easing the financial burden upon Catholic parents, may indirectly have fostered the operation of the Catholic schools, and may thereby indirectly have facilitated the teaching of Catholic principles, thus serving ultimately a religious goal. But this form of governmental assistance was difficult to distinguish from myriad other incidental if not insignificant government benefits enjoyed by religious institutions—fire and police protection, tax exemptions, and the pavement of streets and sidewalks, for example.

Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 260 (1963); see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("For if the Establishment Clause did bar religious groups from receiving general government benefits, then 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" (quoting *Widmar v. Vincent*, 454 U.S. 263, 274–275 (1981)).

⁴⁶ See *Roemer*, 426 U.S. at 747.

⁴⁷ *Id.* ("Neutrality is what is required.").

⁴⁸ *Id.*

When suggesting that neutrality is required, the *Roemer* Court meant that the Establishment Clause does not prohibit the State from providing funds to religiously affiliated institutions *that are providing secular services*. The required neutrality is with respect to the *identity* of the provider of the secular service—not with respect to the kind of service provided. The *Roemer* Court would never have agreed with the plurality in *Mitchell v. Helms*⁴⁹ that the State may provide aid to pervasively sectarian institutions as long as secular institutions are also receiving that aid.⁵⁰

Even when this potentially confusing point about Establishment neutrality is clarified, it may not always be easy to tell what the neutrality principle requires, permits, or prohibits.⁵¹ The Court has given some guidance, however, explaining that the “State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.”⁵² Thus, while some of the implications of the Court’s neutrality policy may not be clear, the *Roemer* Court made very clear that the State could not pay for a religious education and, presumably, ministerial studies would be a paradigmatic example of religious education.⁵³

The *Roemer* district court found that the schools at issue were not pervasively sectarian,⁵⁴ a conclusion that the Court refused to reverse on appeal.⁵⁵ The district court also concluded that aid “was extended only to ‘the secular side,’”⁵⁶ a finding later accepted by the Court.⁵⁷ This meant that the challenge to the funds allocation as a violation of the primary effect prong could not be sustained.⁵⁸ By the same

⁴⁹ 530 U.S. 793 (2000).

⁵⁰ *Cf. id.* at 809

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.

Id.

⁵¹ *See Roemer*, 426 U.S. at 747 (“Of course, that principle is more easily stated than applied.”).

⁵² *Id.*

⁵³ *Cf. Steven K. Green, Locke v. Davey and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 928 (2004) (“Quite clearly, few would contest that the public funding of religious ministries strikes at the heart of the nonestablishment concept.”).

⁵⁴ *See Roemer v. Bd. of Pub. Works*, 387 F. Supp. 1282, 1293 (D. Md. 1974).

⁵⁵ *See Roemer*, 426 U.S. at 758–59 (“The general picture that the District Court has painted of the appellee institutions is similar in almost all respects to that of the church-affiliated colleges considered in *Tilton* and *Hunt*. We find no constitutionally significant distinction between them, at least for purposes of the ‘pervasive sectarianism’ test.” (footnote omitted)).

⁵⁶ *See id.* at 759 (quoting *Roemer*, 387 F.Supp. at 1293).

⁵⁷ *See id.*

⁵⁸ *See id.* at 761–62 (implying that “the foregoing answer to the ‘primary effect’ question seems easy”).

token, the Court accepted the district court's conclusion that the aid at issue did not foster excessive entanglement.⁵⁹

While analyzing whether the funding at issue passed constitutional muster, the *Roemer* Court offered its interpretation of *Hunt*, reading that decision as requiring “(1) that no state aid at all go to institutions that are so ‘pervasively sectarian’ that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be [sic] separated out, they alone may be funded.”⁶⁰ Basically, the Court suggested that the Constitution precludes funding of sectarian activities. If the secular and the sectarian cannot be separated, then the State cannot fund the secular, because it would thereby be funding the sectarian as well.

The *Tilton-Roemer* trilogy suggests that the State cannot fund religious education, which means that the State is prohibited by the Establishment Clause from providing grants to schools preparing individuals to be members of the clergy. However, as the Court made clear in *McDaniel v. Paty*, the Constitution precludes states from being hostile to the clergy.⁶¹

B. Impermissible Burdening of the Clergy

In *McDaniel*, which was decided a mere two years after *Roemer*, the Court examined whether a Tennessee statute precluding members of the clergy from serving as delegates to the state's limited constitutional convention violated free exercise guarantees.⁶² The Tennessee Supreme Court examined the clergy disqualification and held that: (1) it imposed no burden on religious belief, and (2) it restricted religious action only in the lawmaking process, where religious action was barred by the Establishment Clause.⁶³ The court concluded that the “state interests in preventing the establishment of religion and in avoiding the divisiveness and tendency to channel political activity along religious lines”⁶⁴ justified the disqualification.⁶⁵ The Tennessee decision was appealed.

When explaining why the Tennessee decision had to be reversed, the *McDaniel* Court began by noting that if the “provision were viewed as depriving the clergy of a civil right solely because of their religious beliefs, [the] . . . inquiry would be at an end. The Free Exercise Clause categorically prohibits government from regulating, prohibiting or rewarding religious beliefs as such.”⁶⁶ However, it did not seem accurate to suggest that the beliefs as such were being penalized—an

⁵⁹ In reaching the conclusion that it did, the District Court gave dominant importance to the character of the aided institutions and to its finding that they are capable of separating secular and religious functions. For the reasons stated above, we cannot say that the emphasis was misplaced or the finding erroneous. The judgment of the District Court is affirmed.

Id. at 766–67 (footnote omitted).

⁶⁰ *Id.* at 755.

⁶¹ 435 U.S. 618, 637 (1978).

⁶² *See id.* at 620.

⁶³ *See id.* at 621 (citing *Paty v. McDaniel*, 547 S.W. 2d 897, 903 (1977)).

⁶⁴ *Id.* at 622.

⁶⁵ *See id.*

⁶⁶ *Id.* at 626 (citing *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

individual who was not a member of the clergy but who had religious beliefs identical to her minister's was not barred by Tennessee law from serving as a delegate to the convention. By the same token, Tennessee would not bar an individual who renounced his ministry from being a legislator even if his religious beliefs had not changed.⁶⁷ The *McDaniel* Court reasoned that it was not the individual's beliefs as such that were targeted by the Tennessee statute; rather, "the Tennessee disqualification operates against McDaniel because of his *status* as a 'minister' or 'priest.'"⁶⁸ For that reason, "the Free Exercise Clause's absolute prohibition of infringement on the 'freedom to believe' [was] inapposite,"⁶⁹ and the Tennessee disqualification provision could not be struck down as a violation of constitutional guarantees safeguarding religious belief.

That said, however, the State still needed to justify the disqualification. The State asserted that its "interest in preventing the establishment of a state religion is consistent with the Establishment Clause and thus of the highest order."⁷⁰ But the Court rejected the implicit characterization of the clergy as individuals who would be "less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts."⁷¹ Thus, the Court rejected that the means adopted by the State—disqualifying members of the clergy from acting as legislators—was sufficiently closely tailored to achieve the desired end of preventing the establishment of a state religion. As Justice White pointed out in his concurrence in the judgment, "All 50 States are required by the First and Fourteenth Amendments to maintain a separation between church and state, and yet all of the States other than Tennessee are able to achieve this objective without burdening ministers' rights to candidacy."⁷²

Yet, the fact that Tennessee was employing a method no longer used by other states did not establish that method's unconstitutionality. After all, there was no suggestion that the clergy disqualification provision had been adopted out of animus toward religion. Indeed, the *McDaniel* Court noted that "at least during the early segment of our national life, those [clergy disqualification] provisions enjoyed the support of responsible American statesmen and were accepted as having a rational basis."⁷³ After making clear that it would "not lightly invalidate a statute enacted pursuant to a provision of a state constitution which has been sustained by its highest court,"⁷⁴ the *McDaniel* Court explained that "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be."⁷⁵

⁶⁷ See *id.* at 634 (Brennan, J., concurring) ("If appellant were to renounce his ministry, presumably he could regain eligibility for elective office.").

⁶⁸ *Id.* at 627.

⁶⁹ *Id.*

⁷⁰ *Id.* at 628.

⁷¹ *Id.* at 629.

⁷² See *id.* at 645 (White, J., concurring).

⁷³ *Id.* at 625.

⁷⁴ *Id.*

⁷⁵ *Id.* at 626.

By noting the deference that would normally be accorded to such a constitutional provision, and by suggesting that the disqualification was considered reasonable at the time of its adoption, the Court implied that it would not have reversed the judgment of the Tennessee Supreme Court if it merely was employing rational basis scrutiny under the Equal Protection Clause. The Court has been willing to make assumptions in other contexts about how an individual's religious beliefs might alter her perceptions of what the Constitution requires,⁷⁶ so it would have been surprising for the Court to have treated Tennessee's having done so as irrational and thus not passing muster under rational basis scrutiny. Nonetheless, because McDaniel's activity enjoyed "significant First Amendment protection,"⁷⁷ the Tennessee clergy disqualification could not pass muster. In his concurrence in the judgment, Justice Brennan argued that the Court's:

[C]haracterization of the exclusion as one burdening appellant's "career or calling" and not religious belief cannot withstand analysis. Clearly freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood. One's religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.⁷⁸

Of course, Tennessee did not seek to preclude all devoutly religious individuals from serving as legislators, so it is not as if that was the state's goal. While one might expect a correlation between the depth of sincerity of religious belief and the decision to enter into the ministry, there would be many individuals with deeply held religious beliefs who would not be members of the clergy, and there might be members of the clergy whose religious beliefs were not deeply held.

In any event, even if the statute was viewed as implicating religious status rather than religious belief, the Court held that the Tennessee statute impermissibly interfered with McDaniel's Free Exercise rights.⁷⁹ Eight years later in *Witters v. Washington Department of Services for the Blind*, the Court would hold that states could help individuals study for the ministry without violating Establishment Clause guarantees.⁸⁰

⁷⁶ Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 618–619 (1971)

We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.

Id.

⁷⁷ *McDaniel*, 435 U.S. at 627.

⁷⁸ *Id.* at 631 (Brennan, J., concurring).

⁷⁹ See *McDaniel*, 435 U.S. at 629 ("We hold that § 4 of ch. 848 violates McDaniel's First Amendment right to the free exercise of his religion.").

C. Public Support for Becoming a Minister

Witters was an important case in part because of what it did not, rather than what it did, say. The petitioner, who was suffering from a progressive eye condition,⁸¹ was eligible for rehabilitation assistance. He was attending a private Christian college,⁸² and was studying to become a pastor, missionary, or youth director.⁸³ At issue was whether the Establishment Clause precluded his receipt of the rehabilitation assistance.

The Court explained that Establishment Clause guarantees are not necessarily violated merely because money once in the possession of the State has been given to a religious institution.⁸⁴ After all, a public employee could donate all of her paycheck to a religious institution without offending constitutional guarantees, even if the State knew about the employee's intention to make that donation prior to her receipt of the paycheck.⁸⁵ Of course, the analogy is not entirely apt. When paying an employee for services rendered, the State cannot put conditions on those monies, for example, say that they must be used to buy food or clothing. Rather, it is entirely up to the recipient to decide what she shall do with the money—it is not for the State to distinguish among the myriad legal uses to which the monies might be put.⁸⁶ In contrast, the funds at issue in *Witters* were specifically designated to provide visually handicapped individuals with “special education and/or training in the professions, business or trades.”⁸⁷ They could not be used for just any purpose. While a variety of programs, almost all of which were secular, were permissible in light of the relevant limitations,⁸⁸ recipients were not given the kind of freedom of choice with respect to the use of funds that an individual would have with respect to how she would spend her paycheck.

When the State pays an employee for services rendered, the State is paying a debt owed. The State is not offering a gift whose acceptance can be conditioned on that gift's being used for certain purposes and not others. Thus, while it is true that in both scenarios the State once possessed the monies that eventually would have

⁸⁰ *Witters v. Wash. Dep't of Services for the Blind*, 474 U.S. 481, 489 (1986).

⁸¹ *Id.* at 483 (“Petitioner, suffering from a progressive eye condition, was eligible for vocational rehabilitation assistance under the terms of the statute.”).

⁸² *Id.* (“He was at the time attending Inland Empire School of the Bible, a private Christian college in Spokane, Washington . . .”).

⁸³ *Id.*

⁸⁴ *Id.* at 486.

⁸⁵ *Id.* at 486–87 (“[A] State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary”).

⁸⁶ Marjorie Reiley Maguire, Comment, *Having One's Cake and Eating It Too: Government Funding and Religious Exemptions for Religiously Affiliated Colleges and Universities*, 1989 WIS. L. REV. 1061, 1079 (1989) (noting that “employees are free to spend their salaries any way they want.”).

⁸⁷ *Witters*, 474 U.S. at 483 (citing WASH. REV. CODE § 74.16.181 (1981)).

⁸⁸ *Id.* at 488 (“[A]id recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian.”).

ended up in the hands of the pervasively religious charity, that does not make the situations comparable. Otherwise, one would expect the Court to say that because a government employee would be free to donate her salary to a church to spread God's truth, the State should be free to do so as well.

For the State to preclude an individual from using earned monies to contribute to any and all pervasively religious charities would itself violate the Establishment Clause. But the Court made quite clear in the *Tilton-Roemer* line of cases that there was no Establishment Clause violation by the State's refusing to fund pervasively sectarian institutions. Were the *Witter* Court's analogy to private choices apt, either the Establishment Clause would impose limitations on private donations to pervasively sectarian institutions, or the Establishment Clause would impose no limitations on state aid to pervasively sectarian institutions. But neither of those positions is correct. The Establishment Clause of course imposes no limitations on private donations,⁸⁹ and the Establishment Clause does impose limitations on state aid to pervasively sectarian institutions.⁹⁰ A separate issue is whether the Washington statute passed muster, but the analogy to private choices is simply unhelpful.

The *Witters* Court refused to characterize the aid going to the Inland Empire School of the Bible as "resulting from a *state* action sponsoring or subsidizing religion."⁹¹ However, the Court was not particularly clear about why that was so, and numerous explanations might be offered.

The Court began its discussion of what was "central" to its analysis by noting that the assistance is "paid directly to the student, who transmits it to the educational institution of his or her choice," reasoning that any aid that flows to "religious institutions does so only as a result of the genuinely independent and private choices of the recipient."⁹² The *Witters* Court also noted that the State could not give an in-kind grant of money to a religious institution, where that would be a direct subsidy of religious teaching.⁹³ It might be thought, then, that the constitutional parameters are clear—state monies that go to students and then to the schools only indirectly do not implicate constitutional limitations, whereas state monies that go directly to religious institutions do implicate those limitations.

Yet, this analysis does not represent the relevant limitations as explicated by *Witters*. First, after explaining that the State cannot give an in-kind grant of money to a religious institution, where that would be a direct subsidy of religious

⁸⁹ See *Laskowski v. Spellings*, 443 F.3d 930, 937 (7th Cir. 2006), ("As long as the religious component is financed entirely by the private donations, there is no violation of the establishment clause"), *vacated and remanded on other grounds*, 127 S. Ct. 3051 (2007).

⁹⁰ See *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 755 (1976) ("*Hunt* requires (1) that no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded.>").

⁹¹ *Witters*, 474 U.S. at 488.

⁹² See *id.* at 488 ("Certain aspects of Washington's program are central to our inquiry. . . .").

⁹³ *Id.* at 487.

teaching,⁹⁴ the *Witters* Court also noted that an impermissible in-kind grant might take place *even where a student or the student's parents were the conduit for that grant*.⁹⁵ An important issue thus became how to distinguish among the different kinds of indirect aid, some of which were permissible and others of which were not.

One way to distinguish is to seek to determine whether the student's decision to direct the funds to a sectarian rather than secular institution is "a result of the genuinely independent and private choices of the recipient."⁹⁶ Yet, it is unclear why the fact of independent and private choice should immunize a decision from Establishment Clause review rather than simply be a factor in determining whether the funds could be directed to a sectarian institution without offending constitutional guarantees. For example, at issue in *Committee for Public Education and Religious Liberty v. Nyquist*⁹⁷ were New York programs whereby parents sending their elementary school children to non-public schools might receive some reimbursement⁹⁸ or state income tax deduction.⁹⁹ Eighty-five percent of these schools were religiously affiliated.¹⁰⁰ These schools were Roman Catholic, Jewish, Lutheran, Episcopal, and Seventh-Day Adventist, among others.¹⁰¹

The *Nyquist* Court noted that there could be no doubt that "these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools . . ." ¹⁰² The Court then explained that the "controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result."¹⁰³ Rejecting that the question was settled when the parents rather than the schools received the funds, the Court explained that the existing jurisprudence established that "far from providing a *per*

⁹⁴ "It is equally well-settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.* (citing *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 394 (1985)).

⁹⁵ *Id.* ("Aid may have that effect [i.e., be a direct subsidy to a religious school] even though it takes the form of aid to students or parents.")

⁹⁶ *Id.* at 488.

⁹⁷ 413 U.S. 756 (1973).

⁹⁸ *Id.* at 764 ("To qualify under this section a parent must have an annual taxable income of less than \$5,000. The amount of reimbursement is limited to \$50 for each grade school child and \$100 for each high school child.")

⁹⁹ *Id.* at 765–66.

Under these sections parents may subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least \$50 in nonpublic school tuition. If the taxpayer's adjusted gross income is less than \$9,000 he may subtract \$1,000 for each of as many as three dependents. As the taxpayer's income rises, the amount he may subtract diminishes. Thus, if a taxpayer has adjusted gross income of \$15,000, he may subtract only \$400 per dependent, and if his adjusted gross income is \$25,000 or more, no deduction is allowed.

Id.

¹⁰⁰ *Id.* at 768.

¹⁰¹ *See id.*

¹⁰² *Id.* at 780.

¹⁰³ *Id.* at 781.

se immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered."¹⁰⁴

Other factors to be considered included an examination of what would be done with money. The *Nyquist* Court noted with disapproval that there had been "no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.'"¹⁰⁵ Indeed, the Court suggested that by "reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools,"¹⁰⁶ concluding that the Establishment Clause would not permit this, because "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."¹⁰⁷

Yet, it might be argued that the tuition reimbursement at issue in *Nyquist* was not really going to the schools. The tuition had already been paid, and the reimbursement might be used for a variety of purposes. Thus, because "New York's program calls for reimbursement for tuition already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payment by the parents,"¹⁰⁸ the Court understood that the parent was "absolutely free to spend the money he receives in any manner he wishes."¹⁰⁹ That these monies were not simply being directed through the parents to the schools militated in favor of the program's constitutionality. However, the *Nyquist* Court noted that if the funds were being offered as an incentive to parents to send their children to sectarian schools, then the Establishment Clause was violated whether or not the actual dollars were received by those schools.¹¹⁰ Indeed, the Court explained, whether the "grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same."¹¹¹

The *Nyquist* Court implicitly offered a way to understand the difference between the parents acting versus not acting as a conduit. Basically, the question was whether the contributions were being routed through the parents or, instead, could be used for any purpose. The Court implied that where the funds were simply routed through the parent, the constitutionality of the funding would be analyzed in the same way as would any *direct* funding by the State. If the funding was not simply being routed through the parents, then a different analysis was in order—the question would be whether the monies were being offered as an incentive to or inducement for the parents to send their children to sectarian

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 783 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 785–86.

¹⁰⁹ *Id.* at 786.

¹¹⁰ *See id.* (noting that "if grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions").

¹¹¹ *Id.*

schools. If so, then the provision of the funds would still violate constitutional guarantees; if not, then the funding might pass constitutional muster.

It might be noted that using this definition of “conduit,” the *Witters* program should have been analyzed in the same way that a direct subsidy to the school would have been analyzed, because the monies would have gone to the school via the student. Indeed, the *Witters* Court acknowledged that aid might be a direct subsidy to a school even though it had gone through the student,¹¹² citing *Nyquist*,¹¹³ but then seemed to think that this *Nyquist* point governed a different factual scenario. Adding to the confusion, the *Witters* Court incorporated language from *Nyquist* to describe the program at issue, namely, that the program was “made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,”¹¹⁴ as if the fact that aid was made available generally would preclude aid from being a direct school subsidy. But that is not what *Nyquist* said or implied. Even if generally available, the aid at issue would be direct aid if it was simply passed through to the schools.

Much of the *Witters* discussion involved a laundry list of what the Washington program was *not*. For example, the program was not “skewed towards religion”¹¹⁵ or an ingenious method by which the State could channel aid to sectarian schools.¹¹⁶ The program did not provide greater or broader benefits for those who were using the aid for religious education.¹¹⁷ Nor were the full benefits limited in large part to students at sectarian institutions.¹¹⁸ But these considerations might come into play when analyzing a program where the money had not gone directly to the school via a student conduit. They simply were not relevant where the recipient was functioning as a mechanism through which the funds were being transferred to the school, because the appropriate analysis in that kind of case is simply whether the funding would have passed muster were it going directly to the educational institution.

It is not exactly clear why the Court was spelling out all of these things that were untrue of the Washington program. It may be that Justice Marshall (who wrote the opinion) was trying to undermine a previous opinion, *Mueller v. Allen*,¹¹⁹ in which the Court had upheld a tax deduction for expenses incurred in providing tuition, textbooks, and transportation for children attending primary and secondary schools.¹²⁰ In his *Mueller* dissent, Justice Marshall had noted that “the vast majority of the taxpayers who are eligible to receive the benefit are parents whose

¹¹² See *Witters v. Wash Dep’t of Services for the Blind*, 474 U.S. 481, 487 (1986) (“Aid may have that effect [be a direct subsidy to schools] even though it takes the form of aid to students or parents”).

¹¹³ See *id.* at 487–88.

¹¹⁴ *Id.* at 488 (citing *Nyquist*, 413 U.S., at 782–83, n.38).

¹¹⁵ *Id.*

¹¹⁶ See *id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 463 U.S. 388 (1983).

¹²⁰ *Id.* at 391.

children attend religious schools,”¹²¹ that the Minnesota program would give a financial incentive to parents to send their children to religious schools,¹²² and that the bulk of the tax benefits afforded by the program went to parents of children attending parochial schools.¹²³ These are exactly the kinds of considerations that the *Witters* opinion suggests would support a finding that the program violated Establishment Clause guarantees.

Thus, one way to read *Witters* is as a debate about a previously decided opinion rather than about the issue at hand. Several members of the Court had noted the majority’s glaring failure to discuss *Mueller*,¹²⁴ and Justice Powell implied that an explanation should have been offered for that omission.¹²⁵ Indeed, in his *Witters* concurrence, Justice Powell implicitly recognized that many of the criteria cited in *Witters* militating against the constitutionality of a program indirectly aiding sectarian schools were not applicable in *Witters* but were applicable in *Mueller*.¹²⁶

In *Witters*, one of the debates occurring among the Court members *sub silentio* might have been about whether *Mueller* was compatible with *Nyquist*. The *Mueller* Court had distinguished *Nyquist* by suggesting that the Minnesota deduction was available to parents whose children attended public schools as well as parents whose children attended private schools.¹²⁷ Of course, the fact that all parents would be entitled to some deduction did not establish that all parents would receive roughly comparable deductions. On the contrary, parents sending their children to public schools might be able to deduct the cost of pencils and gym clothes, while parents sending their children to private schools would be deducting

¹²¹ *Id.* at 405 (Marshall, J., dissenting).

¹²² *Id.* at 407 (Marshall, J., dissenting).

¹²³ *Id.* at 409 (Marshall, J., dissenting).

¹²⁴ See *Witters v. Wash. Dep’t of Services for the Blind*, 474 U.S. 481, 490 (1986) (White, J., concurring) (“I agree with most of Justice Powell’s concurring opinion with respect to the relevance of *Mueller v. Allen*, 463 U.S. 388 (1983), to this case.”); see also *id.* at 490 (Powell, J., concurring) (“The Court’s omission of *Mueller v. Allen*, 463 U.S. 388 (1983), from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one. I write separately to emphasize that *Mueller* strongly supports the result we reach today.”); *id.* at 493 (O’Connor, J., concurring in part and concurring in the judgment) As Justice Powell’s separate opinion persuasively argues, the Court’s opinion in *Mueller v. Allen*, 463 U.S. 388 (1983), makes clear that “state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries.” (quoting *Mueller v. Allen*, 463 U.S. 388, 490-91 (1983) (Powell, J., concurring) (footnote omitted)).

¹²⁵ See *id.* at 490, n.1 (“The Court offers no explanation for omitting *Mueller* from its substantive discussion. Indeed, save for a single citation on a phrase with no substantive import whatever, . . . *Mueller* is not even mentioned.”).

¹²⁶ See *id.* at 490 (Powell, J., concurring) (suggesting that the “Court’s omission of *Mueller* from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one”); see also, *id.* at 492 (Powell, J., concurring) (“On the understanding that nothing we do today lessens the authority of our decision in *Mueller*, I join the Court’s opinion as well.”).

¹²⁷ *Mueller*, 463 U.S. at 397 (“[t]he deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools.”).

the costs of tuition.¹²⁸ Thus, parents sending their children to public schools would receive a benefit that paled in comparison to the benefits received by parents sending their children to private schools.¹²⁹ Further, about 95% of the students attending private schools were attending sectarian schools,¹³⁰ so if the effect of the New York statute at issue in *Nyquist* had been to promote religious schooling, the same was true of the Minnesota program at issue in *Mueller*. Indeed, it might have been thought that the program at issue in *Mueller* could not be upheld without overruling *Nyquist*.¹³¹ Thus, one way to read *Witters* is as an admonishment of certain members of the Court for having issued a decision in *Mueller* that seemed to contradict *Nyquist* in particular, and the existing jurisprudence more generally.

In retrospect, however, it might have been better had Justice Marshall discussed some of the respects in which the program at issue in *Mueller* was less constitutionally suspect than the program at issue in *Witters*. For example, because *Mueller* involved a tax deduction for education expenses,¹³² the Court suggested that parochial schools were receiving an “attenuated financial benefit.”¹³³ After all, one simply could not tell where the monies saved through the tax deduction would be spent.¹³⁴ It might be that the parochial school costs would be paid in any event and that other expenses would not have been incurred but for the tax deduction.¹³⁵

¹²⁸ *Id.* at 408 (Marshall, J., dissenting) (“Although Minnesota taxpayers who send their children to local public schools may not deduct tuition expenses because they incur none, they may deduct other expenses, such as the cost of gym clothes, pencils, and notebooks, which are shared by all parents of school-age children.”).

¹²⁹ *Id.* at 408–09 (Marshall, J., dissenting)

That the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition. It is simply undeniable that the single largest expense that may be deducted under the Minnesota statute is tuition. The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses.

Id.

¹³⁰ *See id.* at 391 (“[A]bout 95% of these students attended schools considering themselves to be sectarian”) (majority opinion).

¹³¹ *See id.* at 404–05 (Marshall, J., dissenting)

The majority today does not question the continuing vitality of this Court’s decision in *Nyquist*. That decision established that a State may not support religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students. 413 U.S., at 780, 785–786. *Nyquist* also established that financial aid to parents of students attending parochial schools is no more permissible if it is provided in the form of a tax credit than if provided in the form of cash payments. *Id.*, at 789–791. Notwithstanding these accepted principles, the Court today upholds a statute that provides a tax deduction for the tuition charged by religious schools.

Id. (citation omitted).

¹³² *See id.* at 390 (“Minnesota allows taxpayers, in computing their state income tax, to deduct certain expenses incurred in providing for the education of their children.”).

¹³³ *Id.* at 400.

¹³⁴ *Cf.* cases cited *supra* notes 108–111 (discussing how the *Nyquist* Court addressed a similar point).

¹³⁵ *Cf. Wolman v. Walter*, 433 U.S. 229, 251 n.17 (1977) (“[I]t was at least arguable in *Nyquist* that the tuition grant did not end up in the hands of the religious schools since the parent was free to

In contrast, the monies at issue in *Witters* would have to go to the religious institution.

Surprisingly, the *Witters* Court did not mention the *Tilton-Roemer* line of cases at all. But those cases established that the State could not promote religious education. Further, it will not do to say that because the funding was going to the student rather than to the school directly, *Witters* did not fall into the *Tilton-Roemer* line of cases. *Witters*, itself, rejected the direct versus indirect argument, noting that funneling funds to religious institutions was impermissible even if parents or students were the means by which the funds were funneled to the schools. Further, using the notion of “conduit” suggested in *Nyquist*, monies are funneled to the schools through the conduit of a student or parent when those monies are routed “to the schools, in advance of or in lieu of payment”¹³⁶ by the student or her parent. Because the monies at issue in *Witters* would not have been paid to reimburse *Witters* for expenses already paid, but instead would have been directed by him to the school,¹³⁷ *Witters* would be acting as a conduit (using the *Nyquist* notion of “conduit”).

The claim here is not that the *Nyquist* Court’s analysis of what constitutes a conduit is beyond reproach. While it may be that a paradigmatic example of parent-acting-as-conduit would involve a parent who signs over to a religious institution a check from the State that is intended to pay this year’s tuition at the institution,¹³⁸ the analysis becomes much murkier after that. Suppose, for example, that a parent receives reimbursement for the tuition payment made during the previous year. She then signs over that check to a religious institution for this year’s tuition payment. There was no requirement that the check be signed over to the school—it could have been used for other expenses, but she nonetheless paid the religious school tuition bill with a check from the State.

If the fact that the money could have been used elsewhere would suffice to free her from being designated as a conduit, then we would have a seemingly anomalous result. The parent would be a mere conduit if she signed over to the school the check that she received from the State to cover this year’s tuition.

spend the grant money as he chose”). The same point might have been made in *Mueller*. See generally Maguire, *supra* note 86, at 1079 (“A prospective tuition grant that must eventually flow to a school is very different from *Mueller’s* retrospective tax deduction that indirectly flows to parents who have already spent their own money on the school.”).

¹³⁶ *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 785–86 (1973).

¹³⁷ *Witters v. Wash. Dep’t of Services for the Blind*, 474 U.S. 481, 488 (1986) (“vocational assistance provided under the Washington program is paid directly to the student, who then transmits it to the educational institution of his or her choice”).

¹³⁸ Cf. Melinda Barker, Comment, *From Everson to Zelman: The Advent of “True Private Choice” and the Erosion of the Wall between Church and State*, 44 SANTA CLARA L. REV. 529, 552–553 (2004)

Once a participant has qualified for the voucher program, the parents evaluate their options and select a school in which to enroll their child. If the chosen school is a private school, the parents sign over a voucher, like a third party check, to the chosen school administration. The school then “cashes in” the voucher and directly receives a transfer of funds from the state.

Id.

However, she would not be viewed as a mere conduit if she paid this year's tuition by signing over to the school the check that she received from the State to cover last year's tuition. In both cases, state monies would simply be signed over to a religious school, but the Establishment Clause would be offended in one but not the other case.¹³⁹

If her signing over the reimbursement check for last year's tuition was too conduit-like even though she could have used the money for anything, then suppose instead that the parent deposits the reimbursement for last year's tuition payment in her checking account and then writes a check drawing on that account for this year's tuition. If this would still count as a conduit, then it might be argued that the parent must use the reimbursement check for other purposes, e.g., making one or several mortgage payments. The parent could then use the monies that would have been used for the mortgage payments to pay tuition. Because the Court has rejected the reduction-of-opportunity-cost theory of Establishment Clause jurisprudence,¹⁴⁰ this use of the monies would presumably pass muster.

Yet, requiring this kind of segregation of funds would impose an insurmountable burden on some of those whom such grants were designed to help. Many of the potential recipients simply would not have the resources to be able to pay the tuition bills in a particular year without making use of the government grants to do so. Thus, were individuals receiving government grants constitutionally required to segregate the grant funds to make sure that they were not used to promote sectarian activities, many deserving but poor recipients might be viewed as ineligible for the grants, whereas someone with access to greater resources might be able to pay religious school tuition with non-government funds and use the government funds to pay other expenses. But this would mean that the most needy and deserving might be constitutionally barred from taking advantage of the program that had been designed to help them.

It is by no means clear where the line between being a mere conduit and not being a mere conduit should be drawn, although it is clear that the mere act of signing over a state check to a religious school would not make the parent a conduit. Else, the public employee who signs over her paycheck would be viewed as a mere conduit. Certainly, we can distinguish between the individual who receives a check from the government to pay religious school expenses and the individual who receives a check from the government for services rendered. The point is merely that drawing the relevant line may be somewhat more difficult than might first appear. Presumably, any analysis should capture two points: (1) a public employee who uses her paycheck to send her child to a religious school is not somehow violating Establishment Clause guarantees, and (2) a parent who

¹³⁹ It is doubtful that members of the Court would view the constitutionally significant question as involving what the parties before the Court had in fact done with the monies. *Cf. Witters*, 474 U.S. at 492 (Powell, J., concurring) ("Nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole*.").

¹⁴⁰ *See supra* notes 43–45 and accompanying text.

simply signs over a check that could only be used for a religious school education is acting as a mere conduit.¹⁴¹

The Court has never offered an account of what would constitute a parent or student merely acting as a conduit. That said, however, *Witters* was not a particularly difficult case along the continuum suggested by *Nyquist*, because *Witters* would have signed over the monies to the school “in advance of or in lieu of payment.”¹⁴²

Suppose, however, that one rejects the invitation to distinguish between individuals who are acting as mere conduits and those who are not, because of the difficulty in drawing a line that persuasively distinguishes between these two groups.¹⁴³ The *Nyquist* Court suggested a different kind of limitation on the use of government funds, namely, that state monies only be used for secular purposes.¹⁴⁴ However, it might be noted that such a principle would have precluded the award at issue in *Witters*, unless it were granted as a kind of *de minimis* exception.¹⁴⁵

It may be that the *Witters* Court did not offer a detailed analysis of the jurisprudence, because the opinion was really designed to uphold the grant without encapsulating the jurisprudence. Basically, all members of the Court agreed that the program at issue did not violate constitutional guarantees.¹⁴⁶ However, they may well have had very different reasons for thinking so, and *Witters* may have been written in a way which was designed to smooth over those differences. By not forcing members to sign onto particular descriptions of the jurisprudence, the Court may have been leaving the hard work of carefully working out the relevant jurisprudence for another day with, perhaps, a fact scenario that was more conducive to offering a clear and careful exposition of the relevant principles.

Justice Marshall apparently believed the program constitutional as a kind of *de minimis* exception.¹⁴⁷ He noted in the opinion both that a very insignificant amount of the total grant monies supported religious education,¹⁴⁸ and that no one else had sought to use grant monies in the same way as *Witters* had.¹⁴⁹ In contrast,

¹⁴¹ In *Zelman*, the Court upheld Ohio’s voucher program, at least in part, because the vouchers could be used at various kinds of schools. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002) (noting that the program “permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.”).

¹⁴² *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 785–86 (1973).

¹⁴³ See *supra* notes 138–41 and accompanying text.

¹⁴⁴ See *supra* note 105 and accompanying text.

¹⁴⁵ See *infra* notes 147–49 and accompanying text.

¹⁴⁶ Justice Marshall wrote the opinion, which was joined by Chief Justice Burger, and Justices Brennan, White, Blackmun, Powell, Rehnquist, Stevens, and by Justice O’Connor in part. See *Witters v. Wash. Dep’t of Services for the Blind*, 474 U.S. 481, 481 (1986). Justice White wrote a concurring opinion (see *id.* at 490), as did Justice Powell (*id.*). Justice O’Connor wrote an opinion concurring in part and concurring in the judgment. *Id.* at 493.

¹⁴⁷ *Cf. Mitchell v. Helms*, 530 U.S. 793, 864 (2000) (O’Connor, J., concurring) (“The evidence proffered by respondents, and relied on by the plurality and Justice Souter, concerning actual diversion of Chapter 2 aid in Jefferson Parish is *de minimis*.”).

¹⁴⁸ *Witters*, 474 U.S. at 488.

¹⁴⁹ *Id.* (“No other evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State’s program”); see also *id.* at 486 (“[N]o more than a miniscule amount of the aid awarded under the program is likely to flow to religious

several Justices believed *Mueller* was strongly supportive of the outcome, if not controlling,¹⁵⁰ notwithstanding that *Muller* involved reimbursement for expenses paid and *Witters* involved the State's providing fund that would go directly through the student to the school, and that *Mueller* involved a more generalized program rather than a one-time use of the vocational funds to pursue sectarian training.

Witters is a disappointing decision more because of what it did not say than because of what it did say. The opinion is compatible with a variety of approaches to Establishment Clause jurisprudence. One infers, for example, that Justice Marshall did not believe *Mueller* controlling in that he seemed to believe that the grant at issue in *Witters* was permissible, perhaps as a *de minimis* exception, while the program at issue in *Mueller* was not. However, by not discussing *Mueller*, including the fact that the monies received by the parents in *Mueller* might not in fact have gone to religious schools, the *Witters* Court created the possibility that *Witters* would be viewed as a watershed opinion in which a private individual's receipt of funds would immunize what was done with those funds, even if the individual might be thought a mere conduit through which the funds were being directed to the pervasively sectarian school.¹⁵¹

The opinion could have emphasized the differences between the facts of *Mueller* and *Witters*, while nonetheless upholding the use of the grant in *Witters* after emphasizing that there were no other reported instances in which this grant would be used for ministerial training. That way, the Court could have suggested that the Establishment Clause did not bar this grant, but that the Clause nonetheless does not permit state support of religious functions as a general matter and does not immunize state funding of pervasively sectarian schools via parent or student conduits. By offering such an analysis, the subsequent effect of the opinion might have been more limited and, for example, it would not have been used to provide support for *Zelman v. Simmons-Harris*,¹⁵² in which the Court upheld state funding of religious schools via vouchers that were simply signed over to the school without restrictions on the use of those funds.¹⁵³ Regardless of how one reads

education."); F. King Alexander and Klinton W. Alexander, *The Reassertion of Church Doctrine in American Higher Education: The Legal and Fiscal Implications of the Ex Corde Ecclesiae for Catholic Colleges and Universities in the United States*, 29 J.L. & EDUC. 149, 167 (2000) ("In this case, the program was not perceived as a way to advance religion because a significant portion of the aid did not end up at a religious institution. This seems to suggest that had a significant number of blind students chosen to attend a religious college with the money from the program, the 'significant portion of aid' test may have been satisfied.").

¹⁵⁰ See *Witters*, 474 U.S. at 490 (White, J. concurring); see also *id.* at 490 (Powell, J., concurring) (joined by Chief Justice Burger and Justice Rehnquist); *id.* at 493 (O'Connor, J., concurring).

¹⁵¹ See *Locke v. Davey*, 540 U.S. 712, 719 (2004) ("Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients.") (citations omitted).

¹⁵² 536 U.S. 639 (2002).

¹⁵³ See *id.* at 663 (O'Connor, J., concurring) ("[A] significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds"). The *Zelman* Court cited *Witters* and *Mueller* as support for the constitutionality of the voucher program.

Witters, however, *Rosenberger v. Rector and Visitors of the University of Virginia*¹⁵⁴ at least suggests that there are broad protections for state funding of the promotion of religion.

D. Protecting the Right to Proselytize

In *Rosenberger*, the Court examined a University of Virginia refusal to reimburse the printing costs of a student publication that had “promoted or manifested a particular belief in or about a deity or an ultimate reality.”¹⁵⁵ The Court seemed to view the case as if it were a speech case, noting that the State is precluded from regulating speech based on its content or message.¹⁵⁶

Yet, *Rosenberger* is difficult to understand even as a speech case, given the Court’s holding that the University of Virginia had engaged in viewpoint discrimination.¹⁵⁷ To understand why this was a somewhat surprising holding, a little background is necessary.

A state can create a limited purpose public forum and exclude some kinds of speech without offending constitutional guarantees.¹⁵⁸ However, when setting up such a forum, the State must observe the parameters that it has set up—speech cannot be excluded if the basis of the distinction is not reasonable in light of the forum’s purpose.¹⁵⁹ The *Rosenberger* Court explained that:

[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint

See id. at 649 (“[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and 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” (citations omitted)). Indeed the *Zelman* Court analyzed *Witters* in particular. *See id.* at 650–51.

¹⁵⁴ 515 U.S. 819 (1995).

¹⁵⁵ *Id.* at 827.

¹⁵⁶ *Id.* at 828 (suggesting that it is “axiomatic that the government may not regulate speech based on its substantive content or the message it conveys”).

¹⁵⁷ *See* Alan Trammell, Note, *The Cabining of Rosenberger: Locke v. Davey and the Broad Nondiscrimination Principle that Never Was*, 92 VA. L. REV. 1957, 1967 (2006) (“What is also striking about both the Fourth Circuit and Supreme Court opinions is the two courts’ agreement that the University had engaged in viewpoint, not just subject-matter, discrimination.”).

¹⁵⁸ *See Rosenberger*, 515 U.S. at 829 (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

¹⁵⁹ *Id.* (“Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum.”) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 804–06 (1985)).

discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.¹⁶⁰

The *Rosenberger* Court interpreted the University's restriction to be one that was viewpoint based,¹⁶¹ although the Court was not particularly clear about why this was so. Indeed, the dissent had suggested that the University of Virginia had engaged in content—rather than viewpoint—discrimination, noting that groups espousing any beliefs about God as well as atheists and agnostics were denied funding.¹⁶² But if the University had engaged in content discrimination and that discrimination was reasonable in light of the forum's purpose to avoid triggering the Establishment Clause,¹⁶³ then one would have expected the Court to uphold the classification.

The Court rejected the characterization of the restriction as content-based, suggesting that the dissent's "assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech."¹⁶⁴ Yet, the majority's response to the dissent was simply inaccurate, because the dissent was not offering a bi-polar analysis. On the contrary, the dissent noted that numerous religious and non-religious voices had been precluded from speaking in this forum. Indeed, accusation that a bi-polar analysis was being offered notwithstanding, the Court seemed to appreciate that many viewpoints were being excluded from this forum when it criticized the dissent for not realizing that the "declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways."¹⁶⁵

¹⁶⁰ *Id.* at 829–30 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

¹⁶¹ *See id.* at 831; *see also* Trammell, *supra* note 157, at 1962

The Supreme Court's decision rested primarily on the conclusion that the University of Virginia had created a limited public forum and, therefore, could not exclude potential participants based on their viewpoint. In essence, the University compelled students to contribute to the SAF and thereby sought to foster a diversity of viewpoints, a goal consistent with the University's mission of providing secular education.

Id.

¹⁶² *See Rosenberger*, 515 U.S. at 895 (Souter, J., dissenting)

If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only "in" but "about" a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists

Id.

¹⁶³ *Id.* at 838 ("The Court of Appeals ruled that withholding SAF support from Wide Awake contravened the Speech Clause of the First Amendment, but proceeded to hold that the University's action was justified by the necessity of avoiding a violation of the Establishment Clause, an interest it found compelling.").

¹⁶⁴ *Id.* at 831.

¹⁶⁵ *Id.* at 831–32.

The majority's response to the dissent simply will not do. Virtually any content limitation might instead be labeled as an attempt to effect multiple-viewpoint discrimination. Unless there is a way to tell which kind of discrimination is content-based (and thus possibly permissible if the case involves a limited purpose public forum) and which kind of discrimination is viewpoint-based (and thus presumptively impermissible), there will be havoc within the jurisprudence.¹⁶⁶

The Court noted that "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints,"¹⁶⁷ implying that the University's willingness to permit religion as a subject matter but its unwillingness to permit discussions promoting belief about the existence or non-existence of God amounted to viewpoint discrimination. Yet, to say that such an approach qualifies as viewpoint discrimination is to turn the entire Establishment Clause jurisprudence on its head.

Consider what the *Schempp* Court had to say:

[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.¹⁶⁸

Here, the Court suggests that the First Amendment requires a distinction between teaching religion on the one hand and teaching about religion on the other, and that public schools are permitted to do the latter but not the former. Yet, the *Rosenberger* Court is apparently suggesting that permitting the discussion of religion, but not the promotion of particular views about God,¹⁶⁹ involves viewpoint discrimination, implicitly if not explicitly rejecting a distinction that has long underpinned Establishment Clause analysis.¹⁷⁰ Perhaps the Court believes that

¹⁶⁶ See *id.* at 898 (Souter, J., dissenting) ("If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.").

¹⁶⁷ *Id.* at 831.

¹⁶⁸ Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963).

¹⁶⁹ See Leslie Griffin, "We Do Not Preach. We Teach." *Religion Professors and the First Amendment*, 19 QUINNIPIAC L. REV. 1, 8 (2000) ("Today the *Rosenberger* dicta suggest that the line between instruction and evangelism cannot hold. That argument challenges the premises of the academic discipline of religious studies . . .").

¹⁷⁰ *Id.* at 44–45

The Establishment Clause permits the funding of the scholar but forbids the state to "pay the preacher to preach." Justice Kennedy does not recognize this distinction, but it is the Court's own standard, set in *McCullum*, *Engel*, and *Schempp* (the classic First Amendment cases), that has kept "core religious activities," including prayer and religious instruction, from the nation's public schools.

Id.

such a distinction is too hard to draw,¹⁷¹ although the Court had not been willing to address the implications of the impossibility of drawing such a line. Suppose, for example, that the University wanted to set up a limited purpose public forum that respected the State's anti-establishment commitment. Would the limited purpose public forum have passed muster if the school had in addition refused to fund anything that touched on the subject of religion? Or would such a broad limitation be viewed as unreasonable because it potentially would exclude so many categories of discussion?

After finding that the regulation at issue denied the students' free speech rights,¹⁷² the *Rosenberger* Court examined whether the university's action could be saved by appealing to its duties under the Establishment Clause.¹⁷³ Rejecting that the Establishment Clause barred the State's paying the printing costs of a religious publication, the Court explained instead that the neutrality required by the Constitution was respected when the government extends benefits to promote the expression of viewpoints and ideologies across a wide spectrum.¹⁷⁴ The Court failed to note that this usage of neutrality was much different from the use of neutrality extolled by the *Roemer* Court, where the neutrality was with respect to the identity of the provider of secular services rather than with respect to whether sectarian services could be supported as long as secular services were supported as well.¹⁷⁵

Shifting its focus from speech to spending, the *Rosenberger* Court explained why the expenditure at issue should not be viewed as a direct payment from the State to a religious organization. First, the monies were collected as part of the student activity fee and were transferred to a third party (the Student Activity Fund). The monies would then be sent to yet another outside party (the printer) to pay the printing costs of the publication.¹⁷⁶ Further, the printer provided services for a broad range of student services, and thus, the Court suggested, any benefit to a religious group might be viewed as incidental.¹⁷⁷

Once again, the *Rosenberger* analysis differs in important ways from past analyses. The *Hunt* Court explained that when analyzing whether a particular governmental allocation had the primary effect of promoting religion, the Court would not consider all of the programs benefited by the government funding but

¹⁷¹ *Id.* at 45 (“In *Rosenberger*, Kennedy . . . suggested that the line between ‘religious speech’ and ‘speech about religion’ is too hard to draw.”).

¹⁷² See *Rosenberger v. Rector*, 515 US 819, 837 (1995).

¹⁷³ See *id.* (“It remains to be considered whether the violation following from the University’s action is excused by the necessity of complying with the Constitution’s prohibition against state establishment of religion.”).

¹⁷⁴ *Id.* at 839 (“[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”).

¹⁷⁵ See *supra* note 47 and accompanying text.

¹⁷⁶ See *Rosenberger*, 515 U.S. at 840–41.

¹⁷⁷ *Id.* at 843–44 (“Any benefit to religion is incidental to the government’s provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life.”).

would instead only consider the program before it.¹⁷⁸ Thus, the benefits to a religious group would not be considered merely incidental because non-religious groups also received the funding. Rather, a benefit to a religious group might be viewed as incidental if, for example, the state funds promoting secular functions freed up other funds that might then be used to pursue other projects. However, state funds promoting sectarian services would not be considered incidental merely because secular services also received funding.

The *Rosenberger* rationale would seem to permit many practices that had at least been thought to violate constitutional guarantees. Suppose, for example, that a legislature were to set up a special Book-Buying Committee (BBC), which would help all schools purchase books for their students. Monies from the general tax fund would go to the BBC. The BBC could only use those monies to pay for books. The BBC would send checks to designated book suppliers, so it would never be the case that checks from the BBC went to religious organizations. Suppose further that there was a non-religious company that published Bibles among other works. Because the BBC was a step removed from the general tax fund and because this program was open to public and private schools, both secular and sectarian, it would presumably be permissible for the BBC to purchase Bibles via the book suppliers for the religious schools.¹⁷⁹ Yet this is exactly the kind of neutrality that the current jurisprudence had been thought to prohibit. For example, when the Court upheld the State's buying books and loaning them to private schools in *Board of Education of Central School District No. 1 v. Allen*,¹⁸⁰ the Court emphasized that the "books now loaned are 'text-books which are designated for use in any public, elementary or secondary schools of the State or are approved by any boards of education.'"¹⁸¹ Basically, the Court was confident that the books themselves would not have religious content and thus it was permissible for the State to provide them.¹⁸² Had the *Rosenberger* view obtained, there would have been no need for the Court to have worried about whether the loaned books were secular or sectarian.

In her *Rosenberger* concurrence, Justice O'Connor implied that the case before the Court was extremely difficult because it implicated conflicting constitutional principles.

¹⁷⁸ See *supra* notes 30–31 and accompanying text.

¹⁷⁹ See *Rosenberger*, 515 U.S. at 864–65 (Souter, J., dissenting) (noting that the "opinion of the Court makes the novel assumption that only direct aid financed with tax revenue is barred").

¹⁸⁰ 392 U.S. 236 (1968).

¹⁸¹ *Id.* at 239 (citing N.Y. EDUC. LAW § 701 (Supp. 1967)).

¹⁸² *Id.* at 245

[W]e cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law. In judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.

This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. It is clear that the University has established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes some 15 student publications with predictably divergent viewpoints. It is equally clear that petitioners' viewpoint is religious and that publication of *Wide Awake* is a religious activity, under both the University's regulation and a fair reading of our precedents. Not to finance *Wide Awake*, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance *Wide Awake*, argues the University, violates the prohibition on direct state funding of religious activities.¹⁸³

But this dilemma is of the Court's own making. The neutrality required by the Establishment Clause had been with respect to the identity of the recipient of the government's largesse, not to whether the State must support secular and sectarian activities. On that understanding of neutrality, there would have been no conflict between the principles cited by Justice O'Connor. While financing religious proselytizing might violate the prohibition on state funding of religious activities,¹⁸⁴ the State's refusing to finance the printing of such materials would not have violated the principle of neutrality, which merely requires that the State be neutral with respect to the identity of those providing *secular* services. Because the student publication involved sectarian matters, the State was not violating neutrality by refusing to pay those printing costs.

The conflict arose because the Court turned Establishment Clause jurisprudence on its head to say, for example, that the State's willingness to accord secular benefits obligates it to provide sectarian ones as well. That this contradicts the past understanding should be clear when one considers the *Roemer* Court's point that the "State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike."¹⁸⁵

Justice O'Connor offered the consolation that the "Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence."¹⁸⁶ While that may be so, the neutrality principle when construed this way would seem to require the State to promote sectarian institutions in ways that earlier Courts had

¹⁸³ *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring).

¹⁸⁴ *See id.* at 868 (Souter, J., dissenting) ("Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money.").

¹⁸⁵ *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976).

¹⁸⁶ *Rosenberger*, 515 U.S. at 852 (O'Connor J., concurring).

never dreamed could be required.¹⁸⁷ Justice O'Connor noted that the "insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all,"¹⁸⁸ since withholding access might be thought to imply that the religious groups were disfavored.¹⁸⁹ Yet, if that is so, then one would expect that the refusal to fund ministerial studies would violate Establishment Clause guarantees, because such a refusal would imply that those religious studies were disfavored. In a surprising decision, the Court upheld Washington's refusal to fund ministerial studies in *Locke v. Davey*.¹⁹⁰

E. Funding Ministerial Studies

Locke involved a Washington state scholarship program that was designed to help academically gifted students pursue postsecondary education.¹⁹¹ Joshua Davey was awarded a scholarship and wanted to use it to train to become a church pastor. However, because that area of study was excluded from the fields of study that were permissibly funded,¹⁹² he was told that he could not use the scholarship for those purposes.

The Court explained that the Establishment Clause did not bar a state from awarding scholarship monies to help students pursue ministerial studies.¹⁹³ However, the question at hand was whether the State's refusing to permit the use of monies to pursue that field of study violated Free Exercise guarantees.¹⁹⁴ Thus, the State had not argued that it was precluded by the Establishment Clause from awarding the funds to the student—that issue had allegedly been resolved in *Witters*.¹⁹⁵ Instead, the State argued that it was precluded by its own constitutional limitations from awarding the funds at issue, and thus the question at hand was whether the Federal Constitution precluded the state of Washington from having such a limitation in the Washington Constitution.

¹⁸⁷ See *id.* at 868 (Souter, J., dissenting) ("Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money.").

¹⁸⁸ *Id.* at 846 (O'Connor, J., concurring) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981)).

¹⁸⁹ See *id.* ("Withholding access would leave an impermissible perception that religious activities are disfavored.").

¹⁹⁰ 540 U.S. 712 (2004).

¹⁹¹ *Id.* at 715 ("The State of Washington established the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses.").

¹⁹² *Id.* at 717 ("There is no dispute that the pastoral ministries degree is devotional and therefore excluded under the Promise Scholarship Program.").

¹⁹³ *Id.* at 719 ("[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . ." (citing *Witters v. Wash. Dep't of Services for the Blind*, 474 U.S. 481, 489)).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* But cf. *supra* notes 81–154 and accompanying text (discussing different ways to read *Witters*).

The Court began its analysis by noting that merely because an action is permissible under the Establishment Clause does not entail that it is required under the Free Exercise Clause.¹⁹⁶ The Court noted that training for a religious profession is different in important ways from training for a secular profession, suggesting that the former was in essence a religious endeavor.¹⁹⁷ Noting that the program permitted students to attend pervasively religious schools,¹⁹⁸ the Court rejected that its refusal to fund ministerial studies evidenced hostility towards religion.¹⁹⁹

A number of points might be made about *Locke*. First, it is a far cry from the analysis offered in the *Tilton-Roemer* line of cases, which precludes state funding of pervasively sectarian schools. In contrast, *Locke* seems to suggest that as long as the federal monies go through a student or parent conduit, there is no limitation on the state funds being used for religious purposes.

After *Locke*, the decision whether to permit state scholarship monies to fund ministerial studies is left up to the states—doing so is permitted by the Establishment Clause but not required by the Free Exercise Clause.²⁰⁰ The Court explained: “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 on Promise Scholars,”²⁰¹ concluding that if “any room exists between the two Religion Clauses, it must be here.”²⁰²

Yet, the Court did not explain why the State had a substantial interest in not funding devotional degrees. The Court noted that “[m]ost states that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.”²⁰³ But the Court had already explained that this funding would not involve an establishment of religion,²⁰⁴ so it is not clear how this state policy would promote that anti-Establishment interest. As Justice Scalia pointed out in his

¹⁹⁶ *Id.* (“[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause”).

¹⁹⁷ *Id.* at 721 (“But training for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit.”).

¹⁹⁸ *Id.* at 724 (“The program permits students to attend pervasively religious schools, so long as they are accredited.”).

¹⁹⁹ *See id.* at 721

And the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Id.

²⁰⁰ *See id.* at 719 (“[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.”).

²⁰¹ *Id.* at 725.

²⁰² *Id.*

²⁰³ *Id.* at 723.

²⁰⁴ *Id.* at 719 (“Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients.”).

dissent, while “a State has a compelling interest in not committing actual Establishment Clause violations,” it does not follow 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.”²⁰⁵ Nor did the Court explain why the exclusion of such funding placed a minor burden on Promise Scholars, given that the denial of funding might well mean that the student could not pursue these studies.²⁰⁶

One might have expected the *Locke* Court to offer a careful exposition of *McDaniel* and *Rosenberger*, so that it would be clear how *Locke* was compatible with those cases. Regrettably, no such analysis was forthcoming.

The Court distinguished the case before it from what was at issue in *McDaniel* by noting that the Washington program did not deny “to ministers the right to participate in community political affairs.”²⁰⁷ Certainly that is true, but the claim was not that Washington had imposed a restriction identical to Tennessee’s, but merely that the *McDaniel* rationale precluded the holding in *Locke*. The *McDaniel* Court had noted that “under the clergy-disqualification provision, *McDaniel* cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other.”²⁰⁸ Here, Davey could not receive the benefit and study to *become* a minister.

²⁰⁵ *Id.* at 730, n.2 (Scalia, J., dissenting).

²⁰⁶ See Jesse R. Merriam, *Finding a Ceiling in a Circular Room: Locke v. Davey, Federalism, and Religious Neutrality*, 16 TEMP. POL. & CIV. RTS. L. REV. 103, 123 (2006)

Because Washington’s criteria were applicable to all students seeking the Promise Scholarship benefits, Joshua Davey could not have been concerned that Washington was evaluating his personal religious beliefs. That is not to say that losing the scholarship benefits did not burden Davey. Clearly, Washington financially burdened Davey by taking money away from him. And surely, this financial burden was exacerbated by any metaphysical burden Davey experienced as a result of connecting his withdrawn benefits to the fact that he was intensely religious. However, because Washington applied its exclusion of religion on a generalized basis, Davey could not have been reasonably concerned that Washington would have funded, say, a Jewish student’s rabbinical studies. To the contrary, Davey lost his benefits knowing that every person of every faith in the State of Washington would not receive Promise Scholarship benefits to study theology from a devotional perspective. He could feel confident that the State of Washington assigned the same monetary value to his interest in becoming a Pastor as the State assigned to someone else’s interest in becoming a Priest or a Rabbi.

Id. But see Katie Axtell, Note, *Public Funding for Theological Training under the Free Exercise Clause: Pragmatic Implications and Theoretical Questions Posed to the Supreme Court in Locke v. Davey*, 27 SEATTLE U. L. REV. 585, 602 (2003)

By withdrawing the scholarship funds, Washington did not impose a substantial burden on Davey’s belief or practice comparable to that imposed on the plaintiff in *Sherbert*. Davey was no worse off after the Scholarship money was withdrawn than he was before being notified that he had received the scholarship. Although the Scholarship would have subsidized Davey’s major course of study, its revocation did not restrict Davey’s right to pursue his religion or coerce him from its practice. Rather, revoking the Scholarship made Davey’s choice of major slightly more expensive; after the revocation, Davey had to work fewer than three additional hours a week.

Id.

²⁰⁷ See *Locke*, 540 U.S. at 713 (citing *McDaniel v. Paty*, 435 U.S. 618 (1978)).

²⁰⁸ *McDaniel*, 435 U.S. at 626.

Perhaps the Court was suggesting that there was an important difference between acting as a minister (once one had already been ordained) and studying to become one. Yet, the Court did not seem to be emphasizing that, since the *Locke* Court argued that Washington did not require “students to choose between their religious beliefs and receiving a government benefit.”²⁰⁹ While the Court is correct in the sense that a student who had strong religious beliefs could receive a grant as long as he was not seeking to pursue devotional studies,²¹⁰ that should not have ended the inquiry.

At this point, it may be helpful to consider *McDaniel* again. There, too, the Court had emphasized that Tennessee had not been forcing the minister to choose between his beliefs and political participation, explaining that this was something the State simply could not do. “If the Tennessee disqualification provision were viewed as depriving the clergy of a civil right solely because of their religious beliefs, our inquiry would be at an end. The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.”²¹¹ Yet, the *McDaniel* Court did not end its analysis there. The Court noted that “to condition the availability of benefits [including access to the ballot] upon this appellant’s willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties.”²¹² By the same token, however, one would expect that the State could not condition the receipt of student benefits on his willingness to surrender his religiously compelled calling to become a minister.²¹³ As the *Locke* Court itself pointed out, “[M]ajoring in devotional theology is akin to a religious calling as well as an academic pursuit.”²¹⁴

²⁰⁹ *Locke*, 540 U.S. at 713.

²¹⁰ See Green, *supra* note 53, at 924 (noting that Davey “was not disqualified because of any status or on account of his beliefs . . .”).

It is for this reason that Justice Scalia is wrong to suggest that this was designed to burden those with strong beliefs. See *Locke*, 540 U.S. at 733 (Scalia, J., dissenting)

Let there be no doubt: This case is about discrimination against a religious minority. Most citizens of this country identify themselves as professing some religious belief, but the State’s policy poses no obstacle to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far narrower set. One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction.

Id.

Justice Scalia’s claim that the state was targeting those with strong beliefs echoes Justice Brennan’s argument in his *McDaniel* concurrence that “religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.” See *McDaniel*, 435 U.S. at 631 (Brennan, J., concurring).

²¹¹ *McDaniel*, 435 U.S. at 626 (citing *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

²¹² *Id.* (citing *Sherbert*, 374 U.S. at 406).

²¹³ Allison C. Bizzano, Recent Development, *Are We Headed for a New Era in Religious Discrimination?: A Closer Look at Locke v. Davey*, 9 LEWIS & CLARK L. REV. 469, 471 (2005) (“One flaw in the majority’s decision is its failure to recognize that Davey’s religious beliefs created an affirmative obligation to devote his life to the study of theology and become a minister.”); Green, *supra* note 53, at 925 (“[T]he exclusion still keeps Davey from exercising both interests at the same

The *Locke* Court emphasized that there had been no finding of animus.²¹⁵ Yet, there had been no finding of animus in *McDaniel* and the Court had nonetheless eschewed examining the classification in light of the rational basis test, instead suggesting that because the individual's free exercise rights had been adversely affected a more searching inquiry was due.²¹⁶ In contrast, the *Locke* Court implied that because there was no per se burdening of beliefs, the free exercise inquiry must end.

The *Locke* Court minimized the burden imposed by Washington, noting that the "State has merely chosen not to fund a distinct category of instruction."²¹⁷ Yet, this is exactly the kind of argument that one would not expect to see post-*Rosenberger*. The *Rosenberger* Court had noted that the University of Virginia had argued that its policy should be upheld because the case "involves the provision of funds."²¹⁸ The Court rejected that argument, because "viewpoint-based restrictions are [not] proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."²¹⁹ The *Rosenberger* Court explained that the "prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications."²²⁰ Yet, the refusal to fund devotional studies is a much clearer example of a perspective-based refusal to pay than was the University of Virginia's, which involved a refusal to fund a multiplicity of perspectives.²²¹ Further, given *Rosenberger's* explanation that the "government cannot justify viewpoint discrimination among private speakers on the economic fact of

time"). It may be that Davey had a change of heart regarding his religious calling as a result of the litigation. See Susanna Dokupil, *Function Follows Form: Locke v. Davey's Unnecessary Parsing*, 2004 CATO SUP. CT. REV. 327, 356 (2004) ("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.").

²¹⁴ *Locke*, 540 U.S. at 721.

²¹⁵ See *Locke*, 540 U.S. at 725. See also Trammell, *supra* note 157, at 1971–72 ("Having recast the Free Exercise inquiry as one that turned solely on animus, the *Davey* Court found that Washington's constitutional provision, though more restrictive than the federal Establishment Clause, did not evince such hostility.").

²¹⁶ See *supra* notes 73–76 and accompanying text.

²¹⁷ *Locke*, 540 U.S. at 713.

²¹⁸ *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 832 (1995).

²¹⁹ *Id.* at 834.

²²⁰ *Id.* at 831.

²²¹ Cf. *Locke*, 540 U.S. at 727 (Scalia, J., dissenting) ("No field of study but religion is singled out for disfavor in this fashion. Davey is not asking for a special benefit to which others are not entitled."); Thomas C. Berg & Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 228 (2004) ("The disqualifying feature of his theology major was that it would be taught from a standpoint that was 'devotional in nature or designed to induce religious faith.' If the theology major at Northwest College had reflected a 'secular' or 'purely academic' approach to religion and the Bible, Davey would have kept his scholarship."); Dokupil, *supra* note 213, at 328 ("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.").

scarcity,”²²² one would assume that the government would have great difficulty in justifying viewpoint discrimination among possible recipients of aid, especially when the government picks out only one area of study that cannot be funded.²²³

Rosenberger suggests that the State’s picking out religious matters for special adverse treatment amounts to a disfavoring of religion and thus a violation of the Establishment Clause. As Justice O’Connor explained in her concurrence, withholding funds can “leave an impermissible perception that religious activities are disfavored.”²²⁴ Yet, if that is so, one would have expected the Washington refusal to fund ministerial studies to be characterized as creating the “impermissible perception that religious activities are disfavored.” Thus, after *Rosenberger*, one would have expected the Court to suggest that the Establishment Clause did not permit Washington to single out devotional studies for disfavored treatment.

The *Locke* Court wanted to preserve some “play in the joints”²²⁵ between the Free Exercise and Establishment Clauses. To do so persuasively, it would have had to explain how *McDaniel*’s analysis of Free Exercise and *Rosenberger*’s analysis of the Establishment Clause²²⁶ were not controlling. Rather than offer a careful exposition,²²⁷ the Court basically announced that *Locke* did not involve some of the evils that the Religion Clauses are designed to prevent and thus was permissible.²²⁸ Such an analysis neither furthers an understanding of the Religion Clauses jurisprudence nor is likely to stand.

²²² *Rosenberger*, 515 U.S. at 835.

²²³ See *Locke*, 540 U.S. at 727 (Scalia, J., dissenting) (noting that the state of Washington “has created a generally available public benefit, whose receipt is conditioned only on academic performance, income, and attendance at an accredited school. It has then carved out a solitary course of study for exclusion: theology.”). Cf. Richard F. Duncan, *Locked Out: Locke v. Davey and the Broken Promise of Equal Access*, 8 U. PA. J. CONST. L. 699, 714 (2006) (“The Promise Scholarship Program in *Davey* is clearly designed to encourage Promise Scholars to choose from the infinitely broad selection of subjects, viewpoints, and courses of study that constitute the marketplace of ideas of higher education in the State of Washington.”).

²²⁴ *Rosenberger*, 515 U.S. at 846 (O’Connor, J., concurring); see *id.* at 831 (“the University . . . selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.”).

²²⁵ *Locke*, 540 U.S. at 719.

²²⁶ Cf. Nina S. Schultz, Note, *Davey’s Deviant Discretion: An Incorporated Establishment Clause Should Require the State to Maintain Funding Neutrality*, 81 IND. L.J. 785, 785 (2006) (“This Note argues that the *Davey* decision implicated not only the Free Exercise Clause, but more importantly, the Establishment Clause, which embodies a principle of neutrality with respect to government action among religions and between religion and nonreligion.”); Merriam, *supra* note 206, at 107 (“Although categorizing *Davey* as a straightforward free exercise case certainly seems right under this linear equation, such a categorization is wrong because it ignores the substantial role that the Establishment Clause played in the case.”).

²²⁷ Cf. Montoya, *supra* note 1, at 1172 (“The use of precedent by both the majority and Justice Scalia in attempting to reconcile what the two Clauses command was ‘nothing short of bizarre,’ and borders on the disingenuous.”).

²²⁸ *Locke*, 540 U.S. at 725 (“If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.”).

III. CONCLUSION

The Court's attitude toward state funding of devotional studies has been anything but consistent. In the *Tilton-Roemer* line of cases, the Court made clear that the State could not fund religious studies, while in *McDaniel* the Court made clear that the Constitution does not countenance the imposition of undue burdens on the ministry. The *Witters* Court upheld state funding of ministerial studies against an Establishment Clause challenge without clearly articulating what the Establishment Clause prohibits, permits, and requires. Indeed, *Witters* is compatible with any number of accounts of the Establishment Clause, especially if it is viewed as upholding what it viewed as a *de minimis* exception to the traditional Establishment Clause limitations. *Rosenberger* suggests that the funding of religious expression is not only permitted but required in certain instances, offering an account of "neutrality" that cannot be squared with accounts offered by earlier Courts.

Locke might seem to be a kind of compromise giving the states some latitude with respect to what they fund. However, the Court failed to offer a coherent account of either Free Exercise or Establishment jurisprudence, making it virtually impossible to reconcile *Locke* with the other cases or even to get a general idea of what the jurisprudence requires, permits, or prohibits. Further, too much should not be made of the compromise allegedly struck. *Locke* does not suggest that the funding of religious programs should be private.²²⁹ Indeed, the Court noted with approval that the program at issue would fund pervasively sectarian education,²³⁰ so the case can hardly be read as immunizing state refusals to fund religious activities.²³¹ Were such immunity conferred, the *Locke* Court would have needed to overrule *Rosenberger*, and there was no suggestion of that in the opinion.

Some commentators suggest that *Locke* gives states wide discretion to refuse to fund religion as long as they do not thereby evidence animus or hostility.²³² Yet, both *Rosenberger* and *McDaniel* suggest that that the jurisprudence cannot be read so broadly, and *Locke* nowhere suggested that either of those decisions had been

²²⁹ Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 782 (2006) ("The reason that the result in *Locke* is correct is that the Establishment Clause provides the framework for a secular society in which the financing of religious education is relegated entirely to the private sector.").

²³⁰ *Locke*, 540 U.S. at 724 ("The program permits students to attend pervasively religious schools, so long as they are accredited.").

²³¹ See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 178 (2004) ("Funding is now an exception to the rule of government neutrality toward religion.").

²³² Merriam, *supra* note 206, at 134 (suggesting that Professor Marci Hamilton argues that "the *Davey* Court held that discrimination against religion is permissible under the Free Exercise Clause so long as it is not motivated by animus."); Calvin Massey, *The Political Marketplace of Religion*, 57 HASTINGS L.J. 1, 19 (2005) ("After *Davey*, it is apparent that states are free to single out religion for exclusion from some benefits made available on a secular basis, so long as the purpose of the exclusion is not to exhibit animosity to religion."); Laura S. Underkuffler, *Davey and the Limits of Equality*, 40 TULSA L. REV. 267, 273 (2004) (suggesting that "hostility to religion is to be our touchstone for constitutional validity in this area").

wrongly decided. It should not be forgotten that neither Tennessee nor the University of Virginia had been accused of being hostile to religion, and in those cases the state classifications nonetheless could not pass muster.

Perhaps *Locke* should be read as a narrow case about Free Exercise, but there are at least two reasons that such a reading is not persuasive. First, *McDaniel* was a Free Exercise case, and the Court was not deferential to the State merely because no animus had been established. Thus, *Locke* is not persuasively written, even were it solely about Free Exercise. Second, reading *Locke* so narrowly would seem to misrepresent what Davey had argued, since he had challenged the Washington program on both Free Exercise and Establishment grounds.²³³

Perhaps the Court suddenly realized that striking down the Washington program would have had important implications for various state and federal programs.²³⁴ Yet, the Court provided no explanation of why the State's refusal to fund devotional studies did not create a perception that certain religious viewpoints were being disfavored, a result that *Rosenberger* suggests is not compatible with Establishment Clause limitations.

Locke cannot be reconciled with the then-existing jurisprudence, and the then-existing jurisprudence could not be reconciled with the pre-*Mueller* and pre-*Witters* jurisprudence. Basically, the Court has radically altered the guarantees of the Religion Clauses, making them yield results that would have been unimaginable not so long ago, and that can only be reconciled with Establishment and Free Exercise Clauses whose dictates are anyone's guess. One can only hope that the Court will begin to develop a jurisprudence of the Religion Clauses that is both coherent and plausible, although the Court's recent forays in this area give little reason to think that such hopes will be realized anytime soon.

²³³ See *Locke*, 540 U.S. at 718.

²³⁴ Green, *supra* note 53, at 919

Moreover, eighteen states have statutory bars on the funding of divinity, theological, or religious training similar to the Washington statute in controversy in *Locke*. The federal government makes similar distinctions in its funding programs, prohibiting the use of public monies for religious worship, proselytizing, sectarian instruction, or for study in "school[s] or department[s] of divinity."

Id.