The Rules of the Game: "Play In The Joints" Between the Religion Clauses

Sharon Keller

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In law, as in life, there is a good deal of ambivalence about playing. Play, as the portal to innovation and creativity, can be the enemy of settled expectations and predictability. In the recent case of *Locke v. Davey,*[1] Justice Rehnquist, writing for the majority, appealed to the "play in the joints" metaphor famously used in *Walz v. Tax Commission of N.Y.*[2] as an aid in

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[1] 540 U.S. 712, 124 S.Ct. 1307 (2004)

[2] The Court stated:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions,

constitutional balancing of apparently competing constitutional religion clause claims, saying:

> These two clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that 'there is room for play in the joints' between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.[3]

> which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664, 669 (1970).

[3] 540 U.S. at 718-19; 124 S.Ct at 1311

One of the more important tasks of law is to define and defend the expectations we loosely call rights,[4] consequently it is unsettling to find "play" as an operant feature of a legal rule describing the interaction of two important constitutional clauses -- the clause prohibiting the establishment of religion and the clause guaranteeing rights to the free exercise of religion.[5]

This article will analyze the argument of *Locke*. I will lay out the significant elements of the Establishment and Free Exercise clauses that created this tension in *Locke* and argue that the matter is not as simple as the Locke majority stated. Rather, that the legal precedents that the Locke majority relied upon to resolve the Establishment clause challenge in *Locke,* in

[4] I say "loosely-called rights" not because I will be contending that the term is very vague, but because one could coherently take a position that the expectations discussed in this article, particularly those in the discussion regarding conditioned benefits at section II.C. *infra,* do not rise to the level of right but are more properly viewed as "expectations" or "privileges." These arguments will be addressed in the aforementioned section. Suffice it to say, for the purposes of the introduction, that it will be contended in that section that the consequences of such disappointed expectations need not rise to the level of right to have legal consequences in this instance.

[5] U.S. CONST. AMEND. I

particular *Zelman v. Simmons-Harris,*[6] relies on presumptions that should elevate the level of scrutiny and eliminate much of the "play" in respect to the Free Exercise challenge.

That this question arose in *Locke* should not be a surprise. Indeed, this kind of conflict is nearly inevitable in cases where the Establishment clause issue is resolved by the application of the test found in *Zelman.* Such cases usually begin with the application of the tripartite test of impermissible governmental involvement with sectarian institutions found in *Lemon v. Kurtzman*,[7] *viz,* that the governmental action must not be motivated by a desire to aid sectarian institutions, must not have the primary effect of promoting such institutions and must not foster excessive entanglement with sectarian institutions. The test in *Zelman* relies upon the actions of a non-governmental, private "chooser" to resolve the entanglement and primary effect prongs of the *Lemon* test. Therefore, cases resolved by *Zelman* will concern choices by a private chooser that result in a government benefit to a sectarian institution; any inhibition or pressure on the free expression of the private chooser's religious preferences because of the nature of the choices the government

[6] 536 U.S. 639 (2002)

[7] 403 U.S. 602 (1971)

makes available will then implicate the Free Exercise clause, creating the nearly inevitable tension between the clauses.

In *Locke* the Establishment clause issue was resolved through the application of *Zelman* and then the Free Exercise issue was approached as an independent question of a condition on a benefit resolvable on a minimal rationality basis. I will argue within that limiting conditions on the application of the *Zelman* test should mean that such problems cannot be settled so easily nor so compartmentally. Rather, the application of *Zelman* itself requires a greater consideration of the burdening of the free exercise of religion than the *Locke* court applied. [8]

I. A. "Play" – The Problem as Presented in *Locke v. Davey*

In the *Locke* case, the "play" arose when a governmental disbursement that benefited a religious educational institution, *viz.* the receipt of publicly funded scholarship tuition funds for Joshua Davey's education, passed muster under the Establishment clause because of the intervention of a program of private choice by a private individual (*viz.* the scholarship recipient) who selected the school. Such sanitizing choices are a key determinant for the line

[8] I suppose I am suggesting also that *Locke v. Davey* is wrongly decided but that, of course, is water under the dam.

of Establishment clause cases, in particular *Zelman v. Simmons-Harris,*[9] that found government disbursements to religious organizations via such choices constitutional. Hereinafter such choice mechanisms will be termed "*Zelman* choices" for convenience. *Locke* is an exemplar of this new generation of Establishment clause cases that have written into law a safe harbor, *private choice*, for governmental benefits that find their way into the coffers of religious institutions in amounts that are neither incidental nor trivial.

The scholarship program in *Locke* had an important restriction – it could not be used for study in the ministry,[10] and this was the program and profession that Davey wanted to enter. Consequently, in *Locke* the options presented in the private choice arguably infringed upon Free Exercise rights -- the dilemma that gives rise to the title of this article.

[9] 536 U.S. 639 (2002)

[10] The relevant Washington statute phrased the prohibition as "no aid shall be awarded to any student who is pursuing a degree in theology," which the parties conceded meant degrees that "devotional in nature or designed to induce religious faith." *Locke* at 1310. As Justice Thomas pointed out in his dissent to *Locke*, the study of theology and preparation for the ministry are not necessarily the same thing. *Locke* at 1320-21. The case is resolved by attributing the state's administrative interpretation as applying the prohibition only to preparation for the ministry and this assumption will also inform this article.

Over the vigorous dissent of Justice Scalia, the *Locke* Court's analysis of the permissibility of the condition on the benefit (the exclusion of ministry studies) was based upon the argument that the government's greater power to create a benefit subsumed the lesser power to condition the benefit (the "greater powers" argument).[11] Justice Scalia would have employed a strict-scrutiny equal protection test to the conditioned benefit, but I will argue that, under either test, the analysis of the conditioned benefit should be modified to take into account the presumptions that are incorporated in the "private choice" safe harbor and that these presumptions "tighten up" the "play in the joints."

In *Locke* Joshua Davey, the relevant individual chooser (for Establishment clause purposes) in the *Zelman* choice, claimed that the governmental limitations on his *Zelman* choice burdened his free exercise of religion. It is here, I will say, where the "joint" of the metaphor is found – the "play" point where movement in one clause will cause the rights and/or privileges inherent in the other to bend. As Justice Scalia argued in frustration in his *Locke* dissent, this "play" as a decision point seemed to him "not so

[11] *See* text *infra* section II.C . For a full discussion of the "greater powers" doctrine *see* Brooks Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 U.C.L.A. L.REV 371 (1995)

much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives."[12]

Locke was the second occasion that the U.S. Supreme Court had locked horns with the recalcitrant Washington State refusing to permit students to apply certain state scholarship funds to train in the ministry. In their prior scuffle, *Witters v. State Comm'n for the Blind,*[13] a recipient of a scholarship, intended to help the blind train for a vocation, contested the same Washington State limitation on the funding, that is, excluding training for the ministry. The Supreme Court of Washington State justified the restriction under the federal and the Washington State constitutions' religion clauses.[14]

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[12] *Locke* at 1317 (Scalia dissenting)

[13] 474 U.S. 481 (1986)

[14] The U.S. Constitution religion clauses read: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. AMEND. I. The Washington State religion clauses are differently worded: "Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or

property shall be appropriated for or applied to any religious worship, exercise or instruction or the support of any religious establishment." WASH. CONST. ART. I § 11.

Another provision of the Washington Constitution, referring directly to schools, was rejected by the Court as being inapplicable to the *Locke* case. That section, stating "all schools maintained and supported wholly or in part by the public funds shall be forever free from sectarian control or influence," Wash. const. art. IX § 4, was challenged as a so-called "Blaine Amendment," a product of nativist, anti-Catholic sentiment of the late 19th century. James G. Blaine, a republican congressman, led an unsuccessful attempt in 1876 to amend the federal constitution to explicitly prohibit federal and state legislators from "permitting in any degree a union of church and state, or granting any special privilege, immunity, or advantage to any sect or religious body … or taxing the people of any state … for the support of any sect or religious body… ." Further, the amendments would prevent lawmakers from "levy[ing] any tax or mak[ing] any gift, grant, or appropriation, for the support, or in aid of any church, religious sect, or denomination, or any school, seminary or institution of learning , in which the faith or doctrines or any religious order or sect shall be taught or inculcated… ." *See* Philip Hamburger, *Separation of Church and State,* 299 et seq. (2002). The federal amendment failed in the Senate but the effort spawned a number of amendments to state constitutions. *Id.* The anti-catholic rhetoric in the discussion of these amendments raised a challenge to their validity as having an improper intent. The *Locke* court declined to join the issue, finding that the arguable "Blaine Amendment" was not implicated, *see Locke* at 1314 n.7, leaving the

The U.S. Supreme Court found no bar in the U.S. constitution's Establishment clause to the state singling out training for the ministry for exclusion from the scholarship program.[15] That said, the remaining question, whether singling out the ministry as unfundable was an unconstitutional impediment to the student's exercise of religion,[16] was answered in the negative. Hence the struggle to give substance to the Court's explanatory metaphor of this result – that there is "play in the joints."

B. Thesis in Brief

My discussion will focus on the implications of a governmental action that presents a possible infirmity under the Establishment clause and impacts upon a person's exercise of religion. I will argue that where the Establishment clause concern is vitiated by employing a valid *Zelman* choice, there are implications for Free Exercise and these concern the degree of governmentally-created coercion in the choice for the chooser. This question

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Blaine question for another day. For a discussion of the Blaine amendments, *see* F. William O'Brien, The Blaine Amendment 1875-1876, 41 U. Det. L.J. 137 (1963).

[15] *See* footnote 9, *supra*, discussing singling out the ministry is an interpretation of the Washington State constitutional language.

[16] The student also raised a free speech claim, disposed of perhaps too curtly by the court. *Locke* at 1313 n.3.

is an empirical one that should be resolved on the facts of the particular case. First, then, the specifics of the *Zelman* choice will be analyzed.

II. *Zelman* Choices and Their Limitations

A. Zelman *Choices Described*

The distribution of government largesse to religious institutions to advance their religious purposes is the essential *bete noir* of Establishment clause jurisprudence. At the time of the ratification of the federal constitution several states had had statutory requirements that funneled or coerced public support to one state religion or to religions in general; the federal constitutional ban clearly barred such activity by Congress.[17] This bar later was read into the limitations on actions by the states.[18]

[17] Nine of the thirteen original colonies had established churches. At the time of the adoption of the First Amendment only Massachusetts, New Hampshire and Connecticut still retained them. *See* James E. Woods, Jr., THE FIRST FREEDOM 7 (1990). *See also* Leonard Levy, THE ESTABLISHMENT CLAUSE 1 – 93 (1994).

[18] *See* Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940); Everson v. Bd. of Education, 331 U.S. 1, 31-32 (1947)

Schooling, particularly the non-elite education of the general population, had historically been a task of religious organizations.[19] As the task of promoting popular education became increasingly taken over by secular authorities as a duty of the state, the modern line of establishment jurisprudence developed.[20] This line limited the extent to which public funding for popular education could be shared with the religious organizations who shared the same task; the bulk of modern Establishment clause cases have addressed religion in schools.[21]

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[19] For a comprehensive history of the development of popular education including the involvement of religious organizations, see the seminal history by the famous early progressive educator Elwood Cubberly, THE HISTORY OF EDUCATION (1948)

[20] *See* Levy, *supra,* at 149.

[21] Of the seminal cases on the Establishment clause, cases concerning public schooling make up a lion's share. *See, e.g.,* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (reimbursing parents for money spent on public transportation for children going to and from schools including, private schools); McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (school board cannot offer religious classes in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (prohibited school board's official prayer); School Dist. of Abington Township v. Schempp et al, 374 U.S. 203 (1963) (no compelled Bible reading in public school); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidation of statute forbidding evolution courses because of its conflict with Biblical account); Bd.

Early cases used absolutist rhetoric about the "separation of church and state," even where the results of the cases seemed to back-pedal on the strongly-voiced position.[22] Language softened as justices seeking to

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of Educ. v. Allen, 392 U.S. 236 (1968) (statute requiring school districts to purchase and loan textbooks to private school students upheld); Lemon v. Kurtzman, 403 U.S. 602 (1971) (A statute concerning a number of programs aiding parochial education are invalidated using a three-part test which requires (1) government aid must have a secular purpose; (2) its effect must neither advance nor inhibit religion; and (3) the state must not foster an excessive government entanglement with religion.); Mueller v. Allen, 463 U.S. 388 (1983) (statute allowing parents to deduct tuition, textbook, and transportation expenses of their children upheld); Agostini v. Felton, 521 U.S. 203 (1997) (title I courses permitted to be taught in private religious schools); Mitchell v. Helms, 530 U.S. 793 (2000) (statute providing government aid in materials and equipment to public and private schools upheld); Zelman v. Simmons Harris, 536 U.S. 639 (2002) (government funding for tuition to parochial schools upheld). *Cf.* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating a statute outlawing parochial education on substantive due process grounds).

[22] Some of the most quoted absolutist language on the Establishment clause is found in Justice Black's *Everson* opinion, such as "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." 330 U.S. at 18. Nevertheless, the Court's decision

accommodate religious schools looked for leeway in the religion clauses, particularly in funding and similar aid for parochial schools.[23] This line of cases sought to "break the link" (that implicates the Establishment clause) between a governmental entity's disbursement from the public fisc and a recipient religious school.

Ultimately the desired break was accomplished by the mechanism of a private citizen making an intervening choice as to the recipient institution. This is at the crux of the Supreme Court decision *Zelman v. Simmons-Harris*[24] that sanctioned a government program of vouchers for education redeemable at parochial schools in Cleveland, Ohio. Under *Zelman* a link-breaking choice must have the following features: 1) the government's disbursement program must have a legitimate secular purpose; 2) the enabling statute for the program must be facially neutral in respect to religion; 3) the relevant chooser must be acting as a private individual; and 4) the choice must be "independent and genuine."[25]

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ultimately sided with the state in favor of the reimbursement of bus transportation expenditures as constitutional.

[23] See cases and discussion *infra* in section II.B.3.

[24] 536 U.S. 639

[25] 536 U.S. at 49

1) *Legitimate Governmental Purpose.* However tattered *Lemon v. Kurtzman*[26] may be, the "primary purpose" test, which requires a valid secular purpose for the legislation, remains good law. It also remains the least challenging prong of the *Lemon* test, tending to elevate form over substance. Very few governmental programs have been so unwary as to be impaled on this prong.[27]

2) *Facially neutral.* The statute that provides for the benefit must be "neutral in respect to religion," favoring no particular sect or doctrine on its face.[28] Since a *Zelman* choice only arises when there is a possibility that public funds will be disbursed to a religious entity, facial neutrality requires

[26] 403 U.S. 602 (1971)

[27] *See* Edwards v. Aguilard, 382 U.S. 578 (1986). The Court found that the Louisiana State requirement that public school instruction in evolution be "balanced" by instruction in creation science had no other effective purpose than to introduce religious content into the school curriculum, commenting that "while the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Id.* at 587. However, no subsequent Supreme Court decision similarly found sham purposes in Establishment cases.

[28] 536 U.S. at 652

that "the program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[29]

3) *Private Chooser.* The program in question "provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice."[30] This condition addresses both the *identity* of the chooser and the *nature* of the choice. The relevant chooser must be a private individual as opposed to, say, a public employee acting as an agent of a governmental body.

4) *An Independent and Genuine Choice. Locke's c*riteria for the choice to be "genuine and independent" include that there is no coercion or skewing of the choice toward religious institutions by the government program.[31] There seems to be no similar requirement that the program not be skewed towards the non-sectarian choices.[32] The Court argues that the program at issue "in fact creates financial disincentives for religious schools, with private

[29] Mueller v. Allen, 463 U.S. 388 (1983), cited and followed in *Locke* at 651.

[30] 536 U.S. at 652

[31] 536 U.S. at 653, 654

[32] *See Zelman* at 653-54.

schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools." [33]

At first blush one wonders how the choice can be "independent and genuine" where there is no parity between the sectarian and public school choice. Would this not mean that the chooser is being pushed towards the community and magnet schools? However, this is not the coercion the Court considered at issue; rather, it is the right in the chooser *not* to be coerced unduly to participate in a religious institution. That is, the Free Exercise right of the person to be free of religious compulsion was implicated.[34] Left unfulfilled and substantially unaddressed is the affirmative side of Free Exercise -- a right in the chooser to choose in accord with religious preferences without that choice being burdened.[35]

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[33] *Id.*

[34] *See, e.g.,* West Va. St. Bd of Educ. v. Barnette, 319 U.S. 624 (1943) (unconstitutional to punish children refusing on religious grounds to recite the Pledge of Allegiance); Engle v. Vitale, 370 U.S. 421 (1962) (unconstitutional to compel students to participate in a non-denominational prayer); School Dist. V. Schempp, 374 U.S. 203 (1963) (unconstitutional to compel students to participate in Boble reading in public schools).

[35] Moreover, placing the religious institution in a disadvantaged position invites a Free Exercise analysis as well on behalf of the religious institution. The Cleveland system

B. Conforming the Zelman *Choice to the* Lemon *Test*

Although a citation to *Lemon v. Kurtzman*[36] is conspicuous by its absence from the majority opinion in *Locke*, unless and until it is explicitly overruled it remains the summary of necessary conditions for the constitutionality of governmental interactions with religious institutions that raise a question of the establishment of religion.

Lemon's disjunctive tripartite test itself is an attempt at a summary of prior lines of religion clause jurisprudence that remain good law on their own: (1) that the statute must have a secular purpose; (2) that the statute's principal or primary effect must be one that neither advances nor inhibits religion; nor (3) can the statute foster an "excessive government entanglement with religion."[37]

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in *Zelman* placed the religious private school in no more disadvantaged a position than a secular private school, in the Court's view yielding a facial neutrality. *Zelman* at 653-54.

[36] 403 U.S. 602 (1971)

[37] *Lemon* at 612-13. Subsequent phrasings of the test have conflated part one with part two, stating, for instance, that the government did not act with the purpose or primary effect "of advancing or inhibiting religion." *Zelman* at 649. The rephrasing is not identical in meaning to the language in *Lemon* since it suggests, for instance, that a

The line of cases relied upon in *Zelman* rhetorically differ from earlier cases such as *Lemon.* For convenience in explaining the difference I will label the two approaches *arguments based on prohibitions* ("Ap") and *presumptions of propriety* ("Pp"); the reason for choosing these particular labels will become clearer *infra* as the approaches are described in greater detail. The change in rhetoric in the cases forming the foundation of *Zelman* also changed the nature of the Establishment clause inquiry, rendering it more empirical and consequently, it should also be more burdensome for the governmental party.

1. *Arguments Based on Prohibitions*

The structure of an argument based on prohibitions is one in which definite prohibited actions or conditions are laid out, and then the action or condition at issue is described and compared to the prohibited actions. If the action or condition at issue contains a *reasonable risk* of crossing into the prohibited ones, then that action is considered itself improper.

In *Lemon*, for example, the Court invalidated a salary supplement to sectarian teachers by such an argument. The relevant prohibited condition is the teaching of religion financed by public funds, that "government is to be

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statute that intentionally inhibits a religious institution from its mission might be constitutionally suspect under the Establishment clause as well as the Free Exercise clause. *Cf.* Church of Lukumi-Babalu v. Hialeah, 508 U.S. 510 (1993).

entirely excluded from the area of religious instruction."[38] Despite testimony by sectarian teachers that they would not be interjecting religion into their publicly-financed teaching of secular subjects, and the trial court finding that "religious values did not necessarily affect the content of the secular instruction,"[39] the Supreme Court considered the hazard intolerable:

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. … With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. …Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.
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> We do not assume however that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational

[38] *Lemon* at 625

[39] *Lemon* at 618

> responsibilities. *But the potential for impermissible fostering of religion is present.*"[40]

Absent from the Court's *Ap* approach is a willingness to wait and see if the improper activity occurs, indeed, even if the probability is necessarily likely. "Lines must be drawn,"[41] states the Court and the logical possibility weighed more heavily than an empirical approach. "Mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education." [42]

The great exemplar of the *Ap* approach is the opinion in *Everson v. Board of Education*[43] by Justice Black, who was never shy about drawing absolutist lines in the sand: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of

[40] *Lemon* at 619 (emphasis added)

[41] *Lemon* at 625

[42] *Nyquist* at 778

[43] 330 U.S. 1 (1947)

Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'."[44]

We find similar statements in other *Ap* cases, e.g. *Grand Rapids School Dist. v. Ball*[45] ("Although the Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government financed or government sponsored indoctrination into the beliefs of a particular religious faith.") and *Meek v. Pittenger,*[46] stating that the District Court erred in relying entirely on "the good faith and professionalism of the secular teachers and counselors," since the state must "be certain,… that . . .personnel do not advance the religious mission of the church-related schools."[47]

In sum, while the actions of individuals are culpable only if a statutory line is crossed in fact, the governmental program is to be judged improper if it opens a door wide enough to admit of a statutory violation easily committed, whether likely or not.

2. Presumptions of Propriety

[44] Everson at 16.

[45] 473 U.S. 373, 385 (1985)

[46] 421 U.S. 349 (1975)

[47] 421 U.S. at 370

Justice O'Connor declared that the court had progressed beyond the *Ap* approach in *Agostini v. Felton,* stating that "we have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion" adding that "such a flat rule, smacking of antiquated notions of 'taint' would indeed exalt form over substance."[48] Certainly some change in the law must account for the difference in results between *Aguilar* and *Agostini* since there was no change in the facts.[49]

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[48] Agostini v. Felton*,* 521 U.S. 203, 223 (1997) quoting Justice Rehnquist's opinion in Zobrest v. Catalina Foothills School District, 509 U.S. 1, 13 (1993).

[49] *Agostini* was brought pursuant to Federal Rule of Civil Procedure 60(b) requesting relief from a final judgment, that is, the judgment in Aguilar v. Felton, 473 U.S. 402 (1985), because it is "no longer equitable that the judgment should have prospective application" if the petitioning party can show "a significant change in factual conditions or in the law." The court did not find that there were any significant factual changes. *Agostini* at 216. Rather the case turned on an alleged change in the law, citing, *e.g. Zobrest* and *Witters. See* the discussion *infra* section II.B.3.

Justice O'Connor dates this explicit sea change in Establishment clause law to *Zobrest v. Catalina Foothills School District*[50] which, with its predecessors *Mueller v. Allen*[51] and *Witters v. Washington Department of Services for the Blind,*[52] form the precedential basis for the *Zelman* choice. *Zobrest* concerned the provision of a sign language translator to a deaf student at a parochial school pursuant to the Individuals with Disabilities Education Act.[53] Specifically repudiated is Justice Souter's *Ap*-style explanation of the result in *Zobrest* that attempts narrowly to categorize the translator task as one that will not implicate the forbidden possibilities. Rather, Justice O'Connor specifically admits to the possibility that the translator, a government employee, might have the opportunity to inculcate religion in the translating activity and took *Zobrest* to mean: "that public employees will be not be presumed to inculcate religion." [54]

What does Justice O'Connor mean by "presumption" and "presume" in the language quoted above? Generally a presumption in the law is "any matter

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[50] 509 U.S. 1 (1993)

[51] 463 U.S. 388 (1981)

[52] 474 U.S. 481 (1986)

[53] 20 U.S.C. §1400 *et seq.*

[54] Id. *See also* discussion at section II.B.(3)(c) *infra.*

of fact which is furnished to a legal tribunal otherwise than by reasoning, as the basis of inference in ascertaining some other matter of fact."[55] Generally a presumption effects evidentiary burdens at trial: a presumption can render some factual situation as legally sufficient for a *prima facie* case or shift the burden of production or persuasion to the party that does not receive the benefit of the presumption.[56]

True presumptions are defeasible and can be rebutted. They are "the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts."[57] There are differing theories among evidentiary scholars as to how much sunshine is required and exactly where the bats go when they disappear, but that is beyond the scope of this article.[58] Suffice it to say that a true

[55] James B. Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141, 143 (1889)

[56] 9 Wigmore, EVIDENCE § 2499 (1981)

[57] Mackowik v. Kansas City, St. James & Council Bluffs RR, 196 Mo. 550, 570, 94 SW 256, 262 (1906).

[58] A famous dispute arose between two preeminient scholars of evidence, James Thayer and Edmund Morgan, on the effect of rebuttal upon a presumption. One view, attributed to Thayer, treated a presumption as "fix[ing] the duty of going forward with proof," and if rebutted the presumption was destroyed and no longer a consideration in the case. *See* James Thayer, *A Preliminary Treatise on the Evidence at the Common Law*, 52 Mich. L. Rev. 313, 352 (1953). This effect of rebuttal on the

evidentiary presumption is rebuttable, so presumptions – such as someone who has disappeared and not been heard from in seven years is dead, that a letter properly addressed and posted was delivered, that a thing which someone possesses is owned by that person,[59] or liability based upon *res ipsa loquitur*[60] – can all be placed in doubt by competent evidence.

However, there is a second use of "presumption," commonly called "conclusive presumptions," that is disowned by evidentiary scholars as having "no place in the principles of evidence."[61] These are rules of substantive law that, certain facts having been established, render a legal conclusion unassailable by contrary factual showings.[62] For instance, such "conclusive

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presumption was characterized as the "bursting bubble" theory of presumptions. *See* Edward W. Cleary, *Presuming and Pleading An Essay on Juristic Immaturity,* I12 Stan. L. Rev. 5, 17-18 (1959). Morgan considered the Thayer theory to give too little effect to presumptions and felt that the opponent of a presumption bore a burden both of introducing evidence and of persuasion. *See* Edmund Morgan, *Some Observations Concerning Presumptions,* 44 Harv. L.Rev 906, 927 (1931).

[59] Wigmore EVIDENCE §2492

[60] W. Prosser, LAW OF TORTS §§39, 40 (4th ed. 1971)

[61] Wigmore, EVIDENCE §2492

[62] "Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the

presumptions" can be established by statute as where a worker's compensation statute requires, for the purpose of those proceedings, any widow(er) of a covered decedent to be treated as having been wholly dependent on the decedent.[63]

A third usage of "presumption" is the casual usage wherein the word is simply synonymous with "assumption," and is used to describe some conclusion that a reasonable person would tend to draw given the particular facts of a matter. [64]

The *Pp* argument, as quoted in the language from *Agostini*, above, introduces presumptions of regularity in governmental behavior as factors in

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second fact does not exist, the rule is really providing that where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence." Wigmore, EVIDENCE § 2492

[63] *See* Kenneth S. Broun, *The Unfullfillable Promise of One Rule for All Presumptions,* 62 N.C.L.REV 697,700 (1984), *citing* N.C. Gen. Stat.§ 97-39 (1979).

[64] Cf. "The act of presuming or accepting as true. 3. Acceptance or belief based on reasonable evidence; assumption or supposition. 4. A condition or basis for accepting or presuming." The American Heritage Dictionary of the English Language (4th Edition. 2000)

the entanglement and primary effect prongs of the *Lemon* test. What sort of presumptions are these – true presumptions, "conclusive" presumptions or mere assumptions? There can be only one answer to this. If they are mere assumptions they would be common sense judgments founded in the particular facts of a particular case somewhat like judicial notice of a fact, and could not be the foundation of any generalizable legal rule. If they were "conclusive" presumptions the Court would be presuming as a matter of law the precise inquiry of the entanglement and effect prongs and thereby rendering them a legal nullity. Therefore they must be ordinary legal presumptions, rebuttable by facts.

So, in the treatment of the issue in *Agostini* and *Zobrest*, the Court relied upon a presumption of regularity in the behavior of the public employees in order to overcome *Lemon's* effect and entanglement prongs. That the *Ap*-style arguments entail a presumption of misbehavior by governmental employees seems to be a mischaracterization of the argument, since it is sufficient for the *Ap* argument if there are insufficient or entangling safeguards against the forbidden behavior whether it is likely or not that the public employee will stray from properly executing his or her duty.

The use of such a presumption introduces a complication that the *Ap* approach had been able to avoid. The *Ap* approach is entirely defeasible only

by a showing that *no* realistic opportunity to misbehave is present. This is a fairly high standard and the burden of persuading that no such possibility exists is on the proponent of the disputed statute. Empirical showings that the employees in fact have not misbehaved are beside the point for the *Ap* argument. Consequently the *AP* argument neither needs nor employs any true presumption in respect to the public employees once it is established that there is a real possibility of an insufficiently policable opportunity to misbehave.

This difference in rhetorical approach between *Ap* and *Pp* is marked in the Court's analyses of the effect and entanglement *Lemon* prongs. It is not a new feature of the purpose prong because that test, with the notable exception of *Edwards v. Aguilard*, nearly always reviews the language of statute facially and lets the legislature enjoy a true presumption (of the first kind) of regularity. The *Pp* approach carries over this tack into its analyses of the other *Lemon* prongs.

The *Pp* argument should be vulnerable then to empirical data and requires an investigation of the question: What circumstances justify the presumption? To answer this question the precedent cases for the *Pp* approach can be read to provide the conditions for establishing presumed regularity; that is, the precedent cases for *Zelman,* discussed in the next section following, can

provide guidance as to the substantive limits on when and under what conditions such presumptions can obtain.

3. Interpreting the *Zelman* Precedents' Limits on Presumptions

a. *Zelman* Presumptions and the Interplay of *Lemon's* Effect and Entanglement Prongs

To recap, the function of the presumptions of the *Pp* argument in a case like *Locke* is to navigate the rocky relationship between the primary effect prong of *Lemon* and the entanglement prong. In order to avoid the effect of an act from impermissibly benefiting religious institutions where such a potential exists there must be some sort of safeguard. If those safeguards require an intrusive policing of the religious institution by the state then the act will run afoul of the entanglement prong of the *Lemon* test.

There are two ways to limit the potential of an impermissible act: to presume certain acts will be sufficiently unlikely to occur as to reduce the potential to *de minimis* level (the *Pp* approach); or to forbid the action entirely or require the government to police the program (within the confines of the entanglement concerns) to assure that the impermissible act will not occur (the *Ap* approach). The advantage of the *Ap* approach is that it does not run the same risk of triggering the entanglement problems. The disadvantage is that to be sound it should require a justification that can withstand facts and statistical data and there should be an agreement as to what constitutes *de minimis.*

Financial grants to religious schools have been found permissible when they are carefully tailored to avoid financing religious functions, for instance, in *Tilton v. Richardson*[65] where federal construction grants for university facilities were approved for church-related universities. The grants could not be used for construction of "any facility used or to be used for sectarian instruction or as a place for religious worship or … any facility which … is used or to be used primarily in connection with any part of the program of a school or department of divinity."[66] The Court also took into account that the curriculum of the school was not so pervasively religious that the subjects taught in the buildings would amount to religious instruction.[67]

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[65] 403 U.S. 672 (1971)

[66] 403 U.S. at 675, quoting the Higher Education Facilities Act of 1963, 20 U.S.C. §751(a)(2).

[67] The opponents of the Act argued that a sectarian institution generally "imposes religious restrictions on admissions, requires attendance at religious activities, compels obedience to the doctrines and dogmas of the faith, requires instruction in theology and doctrine, and does everything it can to propagate a particular religion." 403 U.S. at 682. The Court acknowledged that some institutions had been found ineligible for grants but pointed out that no such showing had been made for the institutions at issue in *Tilton*. *Id.*

The *Tilton* Court gave a four-part test for their analysis, adding to the three prongs of *Lemon* a fourth condition that the statute not be found to inhibit the free exercise of religion. In this case the fourth prong addressed a claim by the complainants of a taxpayer injury because of the governmental grants to the sectarian institutions. The Court dismissed the charge given that they were not able "to identify any coercion directed at the practice or exercise of their religious beliefs" and the tax burden would be no more significant than the burdens approved in *Walz.*[68] The Court did not consider whether there was any burden on the religious institutions by the limits on their use of the facility. Despite presenting the test as though it had four prongs, the Court handled the Free Exercise claim as a separate inquiry, as do I in this article.

In any event, money from scholarships, as is the case with *Locke*, is not earmarked and a sectarian institution would be able to apply those funds to any of its functions. A direct, unrestricted grant by the government to a sectarian institution would not pass Establishment clause muster like the narrowly tailored and monitored grant in *Tilton.*[69] Even if the there was a finding of an appropriate secular purpose, such a grant would likely fail as having a primary

[68] 403 U.S. at 689

[69] The grants in *Tilton* were monitored for 20 years and religious use of the buildings so financed triggered penalties against the institution. 403 U.S. at 675. The Court invalidated the limit of 20 years. 403 U.S. at 683-684.

effect of advancing religion and/or engendering an extensive entanglement by monitoring the use of general funds.

In the case *Lynch v. Donnelly*[70](in which a public Christmas display by a town was ruled constitutional) Justice O'Connor proposed an alternative test, the "endorsement test," for determining the constitutionality of the effects covered in *Lemon* under the constitutional test for improper primary effect.[71]

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[70] 465 U.S. 668 (1983)

[71] *See* Lynch v Donnelly, 465 U.S. at 691-92 (1983):

> Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. The laws upheld in *Walzv. Tax Comm'n*, 397 U.S. 664 (1970) (tax exemption for religious, educational, and charitable organizations), in *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (mandatory Sunday closing law), and in *Zorach* v. *Clauson*, 343 U.S. 306 (1952) (released time from school for off-campus religious instruction), had such effects, but they did not violate the Establishment Clause. What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally,

Although it has not displaced *Lemon* it is not infrequently cited so in the interest of thoroughness, I will include this consideration in the following summaries.

First there is the *Lemon/Lynch* prohibition under the Establishment clause in which the government may not give to a sectarian institution a grant of money that is not limited in its uses to only secular activity:

Lemon/Lynch/Tilton

Government Grant ----------Limit: Cannot ----------> Religious Institution
support, burden or
endorse religion

Second, there is the *Zelman* approach to an unconditional government grant:

Zelman

Government Grant ---------->Private Chooser---------- > Religious Institution
(supported by presumptions
of regularity)

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that make religion relevant, in reality or public perception, to status in the political community.

Obviously the private chooser must fulfill the functions represented by the "limits" in the *Lemon/Lynch/Tilton* model. The foundational cases for the *Zelman* choice are *Mueller, Zobrest* and *Witters.* In each of these cases *the impermissible acts*, *the presumptions about the actors* and *the standard for de minimis effect* should be examined to ascertain what are the standards for *Pp* presumptions.

b) *Mueller v. Allen*

At issue in *Mueller* was a Minnesota statute that allowed state taxpayers to deduct from their income taxes expenses incurred in providing tuition, textbooks and transportation for their school-aged children. Some exemptions under the statute would have been permissible even as expenditures directly by the state such as provision of secular textbooks directly to students under *Board of Education v. Allen,*[72] and transportation under *Everson v. Board of Education*. [73] However, as of the time of *Mueller* no direct payment to religious schools had been found to be constitutional so if the deductions were the functional equivalent of such prohibited payments the tax scheme would appear to be unconstitutional.

[72] 393 U.S. 236 (1968)

[73] 330 U.S. 1 (1947)

The *prohibited act* would be an improper expenditure by the state in aid of parochial schools, especially to the extent that it can be perceived as a stamp of approval (or "imprimatur") of sectarian schools; the relevant presumption is that the state's method of distributing the benefit could not achieve such an effect except in an insignificant and incidental way, through distributing a general benefit through tax deductions available to all parents whether their children are in public or private schools, and whether their private school is sectarian or not. "[Neutrally provided] state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment clause."[74]

Hence, the unwieldiness of the tax deduction mechanism of distributing aid as a vehicle for government preferences for sectarian projects leads to a presumption that the government, reduced to policing only in its usual and unobtrusive activity of evaluating deductions listed on tax forms, is neither engaged in an activity with a prohibited degree of advancing religion nor entangling itself in it. Deciding that the tax-mechanism does not easily permit the government to manipulate private actors to do what the government cannot do directly, the area of activity sanitized by the presumption leaves a small area to be controlled by policing.

[74] *Mueller* at 398

The rebuttal of the presumption would be to show that the mechanism is rife with the high probability of just such a manipulation. In the dissents just such a rebuttal is undertaken pointing out that the deduction required that the parent have spent an amount in excess of $700 and those parents who send their children to public school "are simply ineligible to obtain the full benefit of the deduction except in the unlikely event that they buy $700 worth of pencils, notebooks, and bus rides for their school-age children." [75]

The Court, in passing, notes that empirical evidence of special benefits to religions "might be relevant to analysis under the Establishment Clause,"[76] insofar as they are probative of demonstrating that the questioned program is productive of "the evils against which the Establishment Clause was designed to protect."[77] "What is at stake as a matter of policy," reminds the Court, "is preventing the kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."[78] The Court reflects that "at this point in the 20th century we are quite far removed from the dangers" the framers of

[75] *Mueller* at 409

[76] *Mueller* at 397 n.7

[77] *Mueller* at 399

[78] *Mueller* at 400

the Constitution had in view in the late 18th century, presumably meaning the acts of various states that sponsored specific religious institutions.[79]

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[79] *Mueller* at 400. Nevertheless, in the matter of parochial schools, a digression giving some history may be instructive. In the early 19th century we find religious institutions very actively engaged in providing popular schooling and the City of New York was eager to encourage the practice. Schools were one method of serving one's flock while recruiting new adherents for various churches. Unfortunately, the poorer element of New York was not at the top of the churches' list for recruitment, leaving the area short of schools. Jail often became regarded by the young in these districts as their trade school and New York's city fathers were deeply concerned about the trades to be learned there. In addition to common thievery, the proliferation of child prostitution was of great concern. *See* Carl Kaestle, EVOLUTION OF AN URBAN SCHOOL SYSTEM (1972) at 112-120. The historical novel *The Alienist* by Caleb Carr was not merely being lurid with its plot centered on a child prostitution ring; it was also narrating phenomenon of 19th century New York that was not as uncommon as one might hope.

It happened that the religious commitments of the Society of Friends included moral precepts that both valued public service and specifically deplored proselytizing. Because they were not seeking to recruit, the Quakers readily embraced the task of the education of the poor without regard to their students' religion nor with the intention of confronting or changing it, therefore they were even more eager than most to step into a perceived underserved educational task. This is certainly not to say that other

religions did not form any schools for the poor. There were and still are admirable religious groups engaged in ministry to the poor through education but the Free School Movement in New York City had its genesis in the Society of Friends.

Having stepped into a perceived social vacuum of substantial concern to the city fathers, New York City gratefully provided a great deal of public support for the Free School Movement. The congruence of the Quakers non-sectarian approach to education and the government's interest in remaining neutral in respect to religion created a circumstance wherein the Quakers became a preferred provider because of their particular articles of faith. The Quakers in their turn zealously guarded the grants of public funds that enabled them to work with the poor and they became vocally involved in the competition with other sectarian schools for public support. Jealousy and enmity between religious providers ensued. Eventually the City of New York took over the Free Schools which became the nucleus of their public system of schools. *See* Kaestle at 159-164. *And see generally* Elwood P. Cubberly, History of Education (1922).

My point is that the possibility of real establishment problems are not as far behind us as the Supreme Court might wish. In countries with no comparable barriers to state support for religious projects we see intimations of what can happen when religious institutions become too dependent on the public fisc. In the 1990's the coalition government of Ehud Barack received its deathblow when it attempted to change the regulation and funding of

c) *Zobrest v. Catalina Foothills School District*

In *Zobrest* a deaf child attending a Roman Catholic high school in Tucson, Arizona challenged a refusal by the school district to provide to him a sign-language interpreter pursuant to the Individuals with Disabilities Education Act ("IDEA").[80] The school district denied the request based on their understanding of the Establishment Clause, reasoning that "the interpreter would act as a conduit for the religious inculcation of [the student]." [81]

Both parties conceded that the IDEA was secular and neutral on its face with no impermissible legislative intent; the effect and entanglement prongs of *Lemon* were the issue. The circumstances of the case suggested three possible prohibited scenarios: (1) a public employee paid to engage in the religious

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schools in which the sect/political party Shas was heavily invested. *See* Joshua Brilliant, *Government to Abolish Religious Affairs Ministry,* United Press International (Sept. 3, 2000).Of course the United States is not a parliamentary system, but that is mostly irrelevant to the point. Certainly the United States has organized sectarian political interest groups with a marked influence on American politics.

[80] 20 U.S.C. § 1400 *et seq.*

[81] *Zobrest* at 5

indoctrination of the student;[82] (2) a public employee will be engaged in an activity that is perceived as a governmental endorsement of a religious message; and (3) a governmental benefit or payment will accrue to the benefit of a sectarian institution, aiding it in its religious mission.

The Court's answer to (1) and (2) is a presumption that the interpreter's actions will constitute nothing more than being a mere, virtually mechanical, conduit, adding no increase, emphasis or elaboration of the proselytizing message:

> Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to 'transmit everything that is said in exactly the same way it was intended.' [The student's] parents have chosen of their own free will to place him in a pervasively sectarian environment. The sign-language interpreter they have

[82] Unlike institutions of higher education, elementary and secondary parochial schools are presumed to be unable to separate their religious mission from their educational mission. Consequently having the interpreter interpret only for secular subjects would not be a solution for this alleged Establishment Clause violation.

> requested will neither add to nor subtract from that environment and hence the provision of such assistance is not barred by the Establishment Clause.[83]

The Court suggests that this same transparency, coupled with the fact that the public employee is present only at the parent's behest, should be sufficient to deal with the appearance of endorsement. [84]

The presumption reduces the entanglement by assuming it adequate that the state need not police to ensure that no impropriety occurs, but rather only to do little more than act if one does occur and is brought by chance to the attention of a relevant authority. A similar presumption, a little more subtle, underlies the Court's treatment of (3):

> [U]nder the IDEA, no funds traceable to the government ever find their way into sectarian school's coffers. The indirect economic benefit a sectarian school might receive by dint of the IDEA is the handicapped child's tuition – and that is, of course, assuming that the school makes a profit on each student; that without an IDEA interpreter, the child

[83] *Zobrest* at 13

[84] *Zobrest* at 11

> would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.[85]

Under this description the economic advantage to the school is incidental and "attenuated." This evaluation is true although only to the extent that the small number of possible IDEA candidate students make the market advantage to the school of the additional personnel virtually nil. For instance, that presumption should fail for a sectarian school that marketed itself as especially desirable to special needs children and it intended to substantially rely upon public employees funded through the IDEA to provide services necessary for those children. Note that under this *Pp* approach the rather real possibility that sectarian schools might suffer a market *disadvantage* by being ineligible for IDEA is of no consequence.

d. *Witters v. Washington Dep't of Services for the Blind*

Witters has essentially the same facts as *Locke v. Davey*. A blind student wished to apply his Washington State scholarship to training for the ministry, which the Washington State statute prohibited. This case is remarkable among the cases in this section both for the fact that it is the only opinion that was not authored by Justice Rehnquist and for the, no doubt

[85] *Zobrest* at 10-11

related, fact that the *Witters* decision, as authored by Justice Marshall, is not a *Pp* but an *Ap* argument.

Justice Marshall disposed of the troublesome *Lemon* effect and entanglement prongs by finding that the expenditure of the scholarship funds was not properly attributable to the state, drawing on, *inter alia,* an unconvincing comparison to a state employee using his salary check to support his church.[86]

No doubt *Witters* is found in this list of precedents because of the language of the separate concurrences by Justices Powell and O'Connor in which Justice Rehnquist joined. These opinions cast the result as an extension of *Mueller* (not cited in the Marshall opinion) and the scholarship in *Witters* was deemed constitutional because the "benefit to religion resulted from the numerous private choices of individual[s]." Thus recast, the argument rested upon the *Pp* assumptions about the sanitizing effect of private choice, condemning the *Ap* approach of the Washington Supreme Court wherein the scholarship was invalidated because it "had the practical effect of aiding religion *in this particular case.*"[87] The concurring Justices preferred to "look

[86] *Witters* at 486-487

[87] *Witters* at 492 (emphasis in the original)

at the nature and consequences of the program *viewed as a whole.*"[88] But, of course, that is the whole difference between the *Ap* and *Pp* approaches.

For the *Ap* approach a single counter-example is sufficient to invalidate. The *Pp* approaches sweeps the relevant actions together with a broad brush and attributes what it deems the likely action to all the actors as their presumed course. Then, for the purposes of Establishment Clause jurisprudence, that presumed action is the only action that needs to withstand the tests of the Establishment Clause.

e. A Summary of the Use of Presumptions in the *Zelman* Precedents.

Some "choices" are shams, for instance the mugger's "your money or your life."[89] No meaningful choice was presented and the law refuses to treat

[88] Id. (emphasis in the original)

[89] This, I think, is the general view. There are those who argue that the mugger's proposition is a real choice. Richard Posner has taken the position that both the victim and the mugger are exercising "free will" as the victim willingly makes the choice to pay the mugger for his forebearance. *See* Richard Posner, ECONOMIC ANALYSIS OF LAW 101 (1986). Such a position may be reasonable in an abstract argument about market behavior, but, given that the ultimate concern in evaluating choice in the context of *Zelman* choices is that the choice be "independent and genuine" I believe that even Judge Posner would not characterize this choice in that way.

actions taken pursuant to the coercion inherent in the sham choice as freely-made choices. Nevertheless, in many choices daily our options are slim; no grocery store will bargain with you over the cost of their goods – the sale price is the only choice, take it or leave it. Most of our contractual lives are occupied by contracts of adhesion; our democratic institutions may offer us only two choices for our leaders and our options generally are limited by time, location, status, income or gender, not to mention luck.

Similarly the choices of those faced with *Zelman* choices may be serendipitously limited by conditions unrelated to the statutory scheme. If the blind student in *Locke v. Davey* had a personal fortune, or if he had qualified for other scholarships without the limitations of the Washington grant, the decision to take the Washington grant and forgo training for the ministry certainly could not be characterized as a pressured one. The validity of the statutory scheme cannot be expected to rise or fall on the accidental features of the various citizens who may be affected by it.[90] Nevertheless, given that one

[90] Some accidental features, of course, may call the statutory scheme into question in special circumstances, e.g. race, gender etc. Wealth discrimination however has not been found to trigger any heightened scrutiny and will not alone impugn the governmental program. *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28-29 (1972) (In refusing to extend strict scrutiny to a statutory program that disadvantaged the school districts of the poorer citizens the Court commented that

of the stated necessary conditions for a valid *Zelman* choice is that the choice be "independent and genuine"[91] it must be asked "independent of what?"

At the crux of the precedential cases for *Zelman* are presumptions and these presumptions concern the behavior of the government actors – that they will not abuse their positions, that their actions will be proper. The presumptions are not based upon a carefully researched inquiry into what the government is *likely* to do or even *able* to do but on the propriety of the tasks the statutory scheme places upon the governmental actors only when they perform their duties correctly. The presumptions did not begin and end with the actions of employees like the *Zobrest* translator. There is the presumption, as in *Mueller,* that the statutory scheme is properly formed in such a way that

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"the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process).

[91] *Zelman* at 652, *Locke* at 1311. *And see* text *supra* at section II.A.

the government engaged in employing it would be acting only in an appropriate way for appropriate ends.[92]

An assumption such as this is found in *Zelman* itself, wherein the majority that found that the Ohio vouchers distributed to parents for use in private schools did not have the primary effect of supporting religion. Justice Souter countered that the vast majority of private schools (82%) participating in the program were parochial and received 96% of the voucher funds.[93] How could that not constitute a primary effect of aiding religion? How can it be reconciled with *Committee for Public Education and Religious Liberty* v. *Nyquist,*[94]that found much smaller allocations to parochial schools via tax credits for parents had impermissible effect?

Justice Rehnquist in reply pointed out that the proportion matched the percentage generally of parochial to private schools in the city,[95] adding that the matter was of no relevance since the proportion of participating schools did

[92] The inquiry under *Ap* would be if there is a real risk that the program is capable of misuse, that is, the inquiry is not limited to how things would turn out if everything went exactly according to plan.

[93] *Zelman* at 703 (Souter dissenting)

[94] 43 U.S. 756 (1973)

[95] *Zelman* at

not reflect any activity by the government but simply an incidental fact about the demographics: "to attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools … but not in inner-city Cleveland … where the preponderance of religious schools happens to be greater."[96]

That is, as long as the government was taking the school situation as it found it and did nothing to create the situation, it was acting neutrally and within the strictures of the Establishment Clause. As for *Nyquist,* the fatal flaw there was that the *function* of the program in question "was *unmistakably* to provide desired financial support for nonpublic, sectarian institutions"[97] because public schools were not able to participate in the program. That is to say, the government's program *by design* was to create a skew in the benefits towards the parochial schools. If Cleveland's design of its programs was shown to create and exploit a skew in the benefits towards religious institutions

[96] *Zelman* at 657

[97] *Zelman* at 661 (emphasis in the original). Although this language suggests that the purpose prong of *Lemon* was offended, the program in *Nyquist* failed for offending the primary effects prong. *See Nyquist* at 780, 783.

then it would seem then that under Justice Rehnquist's reasoning Cleveland's program would fail under the *Nyquist* precedent.

Therefore, whatever else "independent and genuine" means for *Zelman* choices, it must mean *that the chooser must be free from actions prescribed in the governmental program that, even when working exactly as intended, skew or distort the chooser's choice*.

C. The Doctrine of Unconstitutional Conditions and *Zelman* Choices

Zelman choices concern governmentally distributed benefits, and the conditions on the receipt of benefit schemes can run afoul of the constitution. Stated simply the doctrine of unconstitutional conditions holds that "the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[98] The doctrine appeals to basic sensibilities about justice – that rights under the Constitution should not be destroyed or alienated by the state either directly, by lop-sided bargains or by stealth. Yet this doctrine is a troubled one in that there is widespread disagreement about the meaning and application of this rule and, indeed, as shall be seen, even of its rationale.

[98] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989).

For the purposes of this discussion of *Zelman* choices, I submit that the qualifications on the choices that sanitize government schemes touching on establishment of religion under *Zelman, viz.* that the choice must be "independent and genuine," imposes even more stringent limits on permissible *Zelman* choice schemes than the garden-variety doctrine of "unconstitutional conditions," particularly as it was applied by the *Locke* court.

Obviously it is tautological to say that a scheme must be invalidated if it entails unconstitutional conditions. However, as I will argue, "independent and genuine," not being a necessary factor in testing for unconstitutionality of conditions, should be treated as an additional factor in assessing the constitutionality of *Zelman* choices, *viz*., the Establishment clause inquiry. That is, that even a "very-close-to-unconstitutional" condition should be enough to defeat the *Zelman* choice's sanitizing effect since the standard "independent and genuine" can be violated by acts that fall short of outright unconstitutionality.

Put another way, the *Zelman* choice sanitizes *just because* the government surrendered control of the distribution of the benefit to private hands so completely that the government can no longer be viewed as the benefactor nor the endorser of the ultimate, recipient religious institution. If the independence of the private chooser is too compromised by the government

then the government has not surrendered control in a way that takes away the appearance of an endorsement and the primary effect of benefiting religion.

1. Analyzing Conditioned Benefits

Conditioned benefits are common but troublesome cases and the courts, to be sure, have not shown much consistency in describing which kind are permissible and which kind are not. Difficult to reconcile paradoxes abound, for instance, conditions upon the editorializing of public broadcasters,[99] or the advertising by casinos[100] that burdened freedom of speech were found constitutionally impermissible while burdens upon the speech of family planning counselors[101] and limitations on certain tax-exempt organizations to engage in political activity[102] were not found to be unconstitutional conditions.

One problem in analyzing the permissibility of conditioned benefits is that their analyses summon dueling characterizations: four approaches to the analyses of possible unconstitutional conditions will be described in more detail below. They are: (1) the conditions are merely a *refusal by the state to*

[99] FCC v. League of Women Voters, 468 U.S. 364 (1984)

[100] Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)

[101] Rust v. Sullivan, 500 U.S. 173 (1991)

[102] Regan v. Taxation Without Representation, 461 U.S. 540 (1983)

subsidize an activity; (2) the conditions are inappropriately *exacting a penalty* of the actor for making the choice; (3) by accepting the state's choice the actor is *waiving a right*; (4) the state's creation of the choice is *improper when viewed systemically*.

Refusal to subsidize / Exacting a penalty. One way to characterize the benefit in *Locke* could be as a statutorily conditioned benefit where the state, under no obligation to create scholarship benefits at all, is permitted to create a scholarship program which limits itself to something less than the broadest availability that the constitution will permit. The majority in the *Locke* case argued that refusing a scholarship for Joshua Davey was simply a governmental *refusal to subsidize* his particular whim to become a minister, while for the *Locke* dissenters the government was *exacting a penalty* on Davey, forcing him to lose a free exercise right to follow a religious calling.

The characterization of a conditioned benefit -- as a mere refusal to subsidize as opposed to a penalty -- is truly a glass-is-half-full or half-empty debate. Justice Rehnquist held that "the state has merely chosen not to fund a distinct category of instruction" under the scholarship program applicable to Joshua Davey, and "it does not require students to chose between their religious beliefs and receiving a government benefit."[103] However, argued

[103] *Locke* at 1312

Justice Scalia, "When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax."[104] What is at stake is whether the condition on the benefit will trigger strict scrutiny. If the burden and "baseline" is as Justice Scalia describes it, the condition will have to endure a separate, rigorous and probably fatal strict scrutiny test,[105] while the review of the majority ends with the facial neutrality of the statute where the court "cannot conclude that the denial of funding for vocational religious instruction is inherently

[104] *Locke* at 1316

[105] Once finding the condition subject to strict scrutiny Justice Scalia would extend the rule of Church of Lukumi Babalu Ave. Inc v. Hialeah, 508 U.S. 510 (1993) to these facts:

> If a state deprives a citizen of trial by jury or passes an *ex post facto* law, we do not pause to investigate whether it was actually trying to accomplish the evil the Constitution prohibits. It is sufficient that the citizen's rights have been infringed. It does not matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens. (In part quoting *Lukumi* at 559)

constitutionally suspect. Without a presumption of unconstitutionality, Davey's claim must fail."[106]

The majority, in supporting the state's right to limit the scholarship, appealed to an often-cited underlying rationale for conditioned benefits: that the greater power of the state to refrain entirely from granting a benefit entails a lesser power to limit the benefit. The "greater powers" argument has a long history[107] in American jurisprudence but not a clear one, despite its misleading patina of self-evidence. At one point Justice Brennan, despite having employed the doctrine himself just a few years before,[108] dismissed it as a

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[106] *Locke* at 1315

[107] The first mention of the doctrine in a Supreme Court case can be found in Justice McLean's concurrence in Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 504 (1841), but there are earlier references in Supreme Court literature. For a more comprehensive history of the doctrine *see Fudenberg* at 375 n.17 and references cited therein.

[108] Justice Brennan called the doctrine "discredited" in City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 n.8 (1988) but in Northern Pipeline Constr. Co, v. Marathon Pipe Line Co., 458 U.S. 50, 67 n.18 (1982) he argued that Congress' "power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose." *See also* Nollan v. California Coastal Comm'n, 483 U.S. 825. 842 (1987) (Brennan, J., dissenting).

"discredited doctrine" – which the Court proceeded to apply again in the same year.[109]

Both Justices Scalia[110] and Rehnquist have appealed to the doctrine, although Justice Rehnquist, in addition to being the author of *Locke* and primary author of the *Zelman* line of cases, has been, more than any other justice, the one who took up the mantle as its foremost advocate[111] from Justice O.W. Holmes, who famously articulated the strong greater/lesser powers position first when he was a state judge in the cases of *Commonwealth v. Davis*[112] and *McAuliffe v. Mayor of New Bedford*,[113] the latter case best known

[109] *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 433 (1989)

[110] Nollan v. California Coastal Comm'n, 483 U.S. 825.

[111] Justice Rehnquist authored seminal cases concerning conditioned rights, notably Rust v. Sullivan, 500 U.S. 173 (1991) which upheld the receipt of federal family planning funds conditioned upon an agreement to refrain from abortion counseling. *See also* John R. Hand, Note, Buying Fertility: the Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit to Norplant Insertion, 46 Vand. L. Rev. 715, 739-440 (1993) (examination of Rehnquist's position in 29 unconstitutional conditions cases).

[112] 39 N.E. 113 (Mass. 1895), aff'd, Davis v. Massachusetts, 167 U.S. 43 (1897)

[113] 20 N.E. 517 (Mass. 1892)

for the oft-quoted "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." That is to say, the greater power of the state to create the employment included the lesser power to make conditions on the employment. Justice Rehnquist reiterated that position in *Arnett v. Kennedy,*[114] where a public employee whistle-blower challenged his discharge and the procedures that governed it, since his pre-termination appeal rights were to appeal to the supervisor that he had exposed. In finding that the statutory procedures were constitutional despite their dissonance with the due process expectation of an unbiased decisionmaker Justice Rehnquist argued "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of the appellee must take the bitter with the sweet."[115]

Similarly Justice Rehnquist in *Locke* would have it that Joshua Locke must accept the "sweet" of the scholarship with the bitterness of having one of his possible educational and professional goals frustrated. However, *Arnett* itself was explicitly overruled in *Cleveland Board of Education v.*

[114] 416 U.S. 134 (1974)

[115] 416 U.S. at 152-154

Loudermill,[116] the Court's majority expressly rejecting the application of this "bitter with the sweet" approach in the context of due process procedures for benefit terminations.[117] While *Loudermill* may have made some clarifications in the law about procedural due process, it was by no means a death knell for the greater/lesser powers argument. Applying greater/lesser powers arguments, Justice Rehnquist won over the majority in *Rust v. Sullivan*,[118] upholding the government's right to condition family planning funds on a "gag rule" for the discussion of abortion, and, more recently, rejected an "unconstitutional conditions" challenge in *U.S. v. American Library Assoc. Inc.*,[119] to the Children's Internet Protection Act[120] which conditions library subsidies on their filtering internet content, stating that "within broad limits

[116] 470 U.S. 532 (1985)

[117] The Court held:

> In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed we provide it today. …While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. 470 U.S. at 541.

[118] 500 U.S. 173 (1991)

[119] 539 U.S. 194 (2003)

[120] 114 Stat. 2763A-335

when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[121]

Waiver. Waiver suggests something deliberately and freely entered into as part of a bargain. It smacks of something unsavory when the rights granted to citizens to protect them from overbearing governmental interference are overcome by the government's unequal bargaining power.

Where an individual chooser who has been offered a "Hobson's choice" to surrender some right or privilege to obtain another the coerciveness and quality of the choice offered is an important element. In most ethical analyses, certainly those of a deontological bent, coercion is an assault upon the autonomy of an individual with two elements usually presented as necessary conditions: (1) a significant degree or kind of compulsion, and (2) an intention on the part of the one compelling to control the other's action.[122]

Coercion in its pejorative sense means the compulsion and the intention are wrongful in degree or kind and is often discussed in conjunction with legal

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[121] 539 U.S. at 211

[122] *See, e.g.,* Peter Westen, *"Freedom and Coercion" – Virtue Words and Vice Words,* 1985 Duke law Journal 541, 589 (defined as a constraint knowingly brought to bear on another to act in a way that that will leave the other worse off)

standards for duress.[123] Yet wrongfulness admits of degrees. Most would agree that a choice is wrongfully coerced if made under a threat of torture or wrongful incarceration, or if the government's intention were of the sort that would be invalidated under the intent prong of the *Lemon* test. Unfortunately *Locke v. Davey* presents no such easy case – wrongfulness of the deprivation of the scholarship is neither entirely self-evident nor indisputable.

Moreover, most choices in day-to-day living are constrained – one must cross the street only where there is a crosswalk; one gets potato soup because the store does not stock vichyssoise; one attends law school part-time because one cannot afford to go full-time; one is constrained by the Justice Department from acquiring one's competitor. Indeed, coercion is considered a hallmark of the state, even a *sine qua non* for state power; that being so, the mere fact the government is behaving coercively cannot be sufficient for resolving the question of whether the waiver is proper. Something more is needed to show why a waiver should be deemed invalid.[124]

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[123] *Cf.* Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices,* 67 Va L. Rev. 79, 88 (1981)

[124] *See, e.g.,* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U.PA. L.REV 1293, 1295 (1984):

> [M]uch constitutional thinking centered on limiting the use of coercive force or criminal sanctions through which government has

Some commentators add that the waiver suggests that rights are up for sale, an undesirable commodification of those rights that were intended to act as a check on governmental powers and therefore, arguably, should be inalienable.[125] There is some support in case law that the forcing of a waiver

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> traditionally exerted its authority to deter undesirable conduct. However, the conception of negative rights as freedom from coercive violence has questionable value in shaping constitutional restraints on a government that more often exerts its power by withholding benefits than by threatening bodily harm. …Increasingly visible governmental actions substantially impinge on individual lives without invoking the threat of mayhem or incarceration. The greatest force of modern government lies in its power to regulate access to scarce resources."

[125] *See, e.g. Kreimer* at 1387-93:

> The case for recognition of waivers rests on the conviction that constitutional rights protect individual choice. But many constitutional rights protect other values or protect individual choice only as a means to the realization of other ends. For such rights, there is no paradox in asserting that the choice of the individual should not decide the applicability of the right in question. …To the extent that a right is the

is an improper coercion by the government in, for example, *U.S. v. Butler*[126] and its progeny. *Butler* invalidated a state requirement that foreign corporations waive their right to bring cases in federal court as a condition of doing business in the states; the subsequent application of the arguments found in *Butler* have been erratic.[127]

> result of a definition of the structure and power of government, an individual decision to waive it is irrelevant.

See also Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972); Edward L. Rubin, *Toward a General Theory of Waiver*, 28 U.C.L.A. L. Rev. 478 (1981). For a more sympathetic view of a market in rights *see* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988).

[126] 297 U.S. 1 (1936). *See also* Terral v. Burke Constr. Co., 257 U.S. 529, 532 (1922) (State cannot force waiver of right to resort to federal courts as a condition for doing business in the state).

[127] Shortly after deciding *Butler* the Court declined to apply it in Steward Mach. Co v. Davis, 301 U.S. 548 (1937) (decided on other grounds) wherein a claim was made that the Social Security Act of 1935 unconstitutionally conditioned funds upon the state's

Systemic impropriety. Other analyses of conditioned benefits, in particular, those of Kathleen Sullivan, have focused upon the *systemic* effect of conditioned benefits:

> [Such conditions] implicate the boundary between the public and private realms, which government can shift through the allocation of benefits as readily as through the use or threat of force. … [T]hey permit circumvention of existing constitutional restraints on direct regulation. The second distributive concern of unconstitutional conditions doctrine is the maintenance of government neutrality or evenhandedness among rightholders. The third is the prevention of constitutional caste: discrimination among rightholders who would otherwise make the same constitutional choice, on the basis of their relative dependency on government benefit.[128]

Under this systemic approach the court would "subject to strict review any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty

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passage of unemployment compensation legislation. Yet the rule in *Butler* was not specifically overruled.

[128] *Sullivan* at 421

or a direction favored by government."[129] Her analysis argued that the constitutional limitations on government encroachment on guaranteed liberties regulates relationships between government and rightsholders and between classes of rightsholders.[130] She divided the latter category into *horizontal* relationships (rightsholders for whom the tradeoff is not unacceptable or is no sacrifice as opposed to those for whom it is) and *vertical* (rightholders who differ, for instance, by economic class in their ability to resist the tradeoff of rights), which Professor Sullivan termed "Constitutional caste." This systemic approach would require strict scrutiny of any conditioned governmental benefit that substantially impinged upon the "distributive concerns" enumerated in the quote above.

What is important about all of these approaches and particularly the systemic approach is that, no matter whether a question of conditioned benefits will pass muster under the Free Exercise clause, when it must do so in combination with a *Zelman*-based Establishment clause defense, *the question of coercion, regularity of governmental actors and propriety of governmental behavior goes to the heart of the presumptions that justify the treatment of the Establishment clause question under* Zelman.

2. *Zelman* Choices as "Unconstitutional Conditions Lite"

[129] *Sullivan* at 1499

[130] Sullivan at 1491.

An "unconstitutional conditions" inquiry begins with an invasion of the rights of an individual chooser who has been offered a "Hobson's choice" to surrender some right or privilege to obtain another and the coerciveness and quality of the choice offered is an important element. While coercion often is applied as a lynchpin in many Free Exercise decisions, intuitive because it goes to the sense of injustice in the burden on religious freedom, I believe coercion is less relevant in respect to *Zelman* choices.[131] As I have suggested earlier, the importance of any aspect of coercion is not that it need go so far as to overcome the religious scruples of the person compelled nor invalidate a waiver but that it casts a shadow on the alleged independence of the *Zelman* choice.

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[131] In most ethical analyses, certainly those of a deontological bent, coercion is an assault upon the autonomy of an individual with two elements usually as necessary conditions: (1) a significant degree or kind of compulsion, and (2) an intention on the part of the one compelling. *See, e.g.,* Peter Westen, *"Freedom and Coercion" – Virtue Words and Vice Words,* 1985 Duke law Journal 541, 589 (defined as a constraint knowingly brought to bear on another to act in a way that that will leave the other worse off).

In coercion in its pejorative sense the compulsion and the intention are wrongful in degree or kind and is frequently discussed in conjunction with legal standards for duress. *See, e.g.,* Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices,* 67 Va. L. Rev. 79, 88 (1981)

Hence, while there is general agreement that the government may pursue goals with a carrot that it cannot attempt to achieve with a stick, in statutory schemes where there is, so to speak, of a-carrot-with-a-stick-inside, there seems no similar general agreement of how to cast the inquiry – with focus on the loss or on the benefit. The greater/lesser powers argument has inconsistent results. The more visceral attacks on conditioned benefits have focused upon the coerciveness of the conditioned benefit, although the degree and kind of coercion sufficient to invalidate is not easy to quantify and is probably not reached in a case like *Locke*.

Moreover, for the greater/lesser argument, the coercion argument and the waiver argument there is a good deal of confusion as to establishing the baseline against which the putative loss of the right is to be measured.[132] The dissent may or may not have the better argument that the condition ought to fail if properly subjected to heightened equal protection scrutiny but this is not the only apparent hurdle for constitutionality because, as I see it, the *Locke* majority has laid down more factors than simply the equal protection hurdle. Hence, while a demonstration that a statute offends equal protection obviously will invalidate an action, it is not necessary that a burden must rise to the level

[132] *See Kreimer* at 1351-72.

of invalidity under equal protection in order to be so excessive that it undermines the requirement that a choice be "independent and genuine."

The *systemic* argument reaches more of the *Zelman* concerns because the Establishment clause is a systemic concern. Even more unambiguously than Free Exercise or equal protection, the Establishment clause addresses the constitutional design for government in the U.S. and its legitimate concerns. Professor Sullivan's approach directly addressed the legitimacy of government pressure on citizen rights as a systemic matter. The more the governmental scheme systemically pressures and reduces the options realistically available to the *Zelman* choosers, the weaker the rationale for recognizing a sanitizing effect by the *Zelman* choices.

This argument is addressed, although not in this form, in *Zelman* itself. Justice Souter's dissent argued that the aid at issue in the *Zelman* predecessors *Mueller*, *Zobrest* and *Agostini* was found by the court to be insubstantial viewed systemically and did not have the effect of skewing choices.[133] He found the program in *Zelman* however to skew in favor of the participation of parochial schools in the voucher plan because of the small amount of the voucher subsidy, which closely approximated the relatively lower tuitions of privates schools that were sectarian, and the large proportion of sectarian

[133] *Zelman* at 2490

schools participating in the voucher program.[134] "The question is," Justice Souter stated "whether the private hand is genuinely free to send the money in either a secular direction or a religious one."[135] The majority responded by reiterating the facial neutrality of the statute at issue, which does not join the issue, and re-evaluating the empirical data, which does.[136]

Similarly, the question in *Locke v. Davey* and other *Zelman*-style Establishment clause cases cannot avoid the empirical facts regarding the situation of the putative chooser, questions that cannot be addressed through neutral principles nor the level of coercion required for Free Exercise tests because, as was demonstrated above, the foundation of *Zelman* and the cases upon which it depends are based upon defeasible presumptions the behaviors of the actors involved and the systemic effect of the statute at issue.

III. "Play in the Joints"

A. The Source of the Metaphor

The case was *Walz v. New York City* and the language was memorable:

> The course of constitutional neutrality in this area [of religious rights] cannot be an absolutely straight line;

[134] *Zelman* at 2493-2495
[135] *Zelman* at 2492
[136] *Zelman* at 2460

> rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[137]

In *Walz* a New York landowner and taxpayer challenged the property tax exemption for churches in New York. His argument, as summarized by the Supreme Court, was simply that the "grant of an exemption to church property indirectly requires … a contribution to religious bodies and thereby violates [the establishment clause]."[138] That is, if a governmental forgoing of revenue from the churches is to support them monetarily and support of religions is prohibited by the constitution then, a priori, foregoing revenue is

[137] Walz v. City of New York, 397 U.S. 664, 669 (1970).

[138] 397 U.S. at 667

constitutionally prohibited. Frederick Walz, appearing *pro se,* considered the proposition -- that exempting churches from taxes was governmental support -- sufficiently self-evident as to require no more than a 2 1/2 page appellate brief to assert it.[139] The New York Court of Appeals' *per curium* opinion, as though to return the favor, offered about the same amount of verbiage to dismiss Walz's claim out of hand, by citing precedent that supported the constitutionality of the statutory exemption without venturing into the arguments or logic of the decisions.[140] Walz relied upon an *a priori* argument, the Court on *stare decisis*, both rather rigid positions from a jurisprudential

[139] Walz v. Tax Comm'n, 24 N.Y.2d 30, 31 (1969)

[140] The Court of Appeals' opinion in its entirety stated that:

> Firmly embedded in the law of this State … is the doctrine that real property owned by a religious corporation and used exclusively for religious purposes is exempt from taxation [citations] and research discloses – and the 2 1/2-page brief of the plaintiff-appellant herein cites no authority to the contrary – that courts throughout the country have long and consistently held that the exemption of such real property does not violate the Constitution of the United States. [citations omitted]. We see no reason for departing from this conclusion in this case. *Walz*, 24 N.Y. 2d at 31.

point of view and in their own way, apples and oranges. Because it did not revisit the logic of the precedents, the Court of Appeals itself did not truly join the question that Walz had raised; similarly Walz, by citing no precedent for his position, did not join the Court's argument. When the matter was taken up by the U.S. Supreme Court, the path not taken – a factual inquiry -- was undertaken.

The Burger decision in *Walz* rejected Frederick Walz's position by disputing one premise that the logical argument rested upon -- that the prohibitions in the religion clauses should be read as absolute; then the court was free to review the aid factually and decide to reject Walz's necessary assumption that the tax breaks were "support" within the meaning of the establishment clause. Similarly, the Supreme Court rejected the Court of Appeals' simple reliance on precedent. It was in rejecting these *a priori* approaches[141] that led the Supreme Court to wade into evaluating the realities of the case's facts. Herein is where the court found "play," determining that

[141] I consider the Court of Appeals' argument to be *a priori* (or very nearly so) insofar as their conclusion necessarily must flow from their premises that there is only precedent supporting upholding the tax exemption and that precedent must be followed. It leaves only the inquiry whether the statement about the precedents is true.

"the test will be one of degree,[142]" and what follows in the decision is a weighing of the nature of the interaction permitted by the exemption statute.[143]

What I seek to emphasize at this point is this – the movement away from absolutes and bright lines and towards weighting factors produces the "play" that resolves *Walz;* but in order to be properly law like, predictable and just, that "play" needs principles. Certainly the *Walz* decision goes on to lay out some principles, just as *Locke* sets out its guidelines that are at the heart of

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[142] *Walz* at 678

[143] The factors *Walz* took into consideration included a quantitative effect:

> Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons and institutions within a State's boundaries, along with many other exempt organizations. The appellant [Walz] has not established even an arguable quantitative correlation between the payment of an ad valorem property tax and the receipt of these municipal benefits. Walz at 678.

the enquiry in this article. Important to such facts-and-circumstances tests are the acceptable ways in which factors are evaluated and, as I have argued *supra*, the jurisprudence can be clouded by the use of presumptions and burden–shifting. Such rhetorical moves displace principled absolutes with under-examined presumptive second cousins that only appear to be empirical; and their employment should be viewed skeptically if "play" is not to become synonymous with result-oriented arbitrariness.

To summarize my argument, the Supreme Court has developed a mechanism, described herein as a *Zelman* choice, whereby disbursements from the public fisc can be distributed to parochial pockets provided that the choice of the recipient is left to individuals exercising an independent and genuine power of choice. Such programs require that the relevant statute be for an appropriate secular purpose and facially neutral, thereby satisfying the "secular intent" prong of the *Lemon* test.

The "primary effect" and "entanglement" prongs of the *Lemon* test are addressed (1) by a requirement that the scheme, even if retaining the possibility of actions by state actors improper under the establishment clause, has so reduced the arena of state activity that state actors presumed to be behaving within the parameters of their regular duties would not be expected to engage in such actions even if unpoliced; and (2) that the legislature has so distanced

itself from the individual determinations of where and whether to divert to funds to parochial institutions that the effect on their economic is truly out of the state's hands and in those of independent choosers and it would not be reasonable to consider such an attenuated manner of payment "endorsement."

This being the case, *any* substantial limit on the "independent chooser" must be closely scrutinized. This is so *not* because the limits are a question of facial neutrality, as the *Locke* court wrongly thought; nor because there may be an unconstitutional impingement on the chooser's personal rights. Rather, the heightened scrutiny should be required because the limits undermine the presumptions of chooser independence and governmental distance necessary for an acceptable *Zelman* choice, which rests on a presumption of systemic regularity.

Thus, in *Locke v. Davey,* a determination that Joshua Davey's choices were hampered in a manner that showed the sort of *systemic* deficiencies as described above should undermine the applicability of *Zelman* because it challenges *Zelman's* necessary presumptions. Without the *Zelman* short-cut through the effects and entanglement prongs of *Lemon*, the old rules apply: there will have to be a showing of no primary effect and bearing the entanglement risk in policing them.