

NOTETHE FUTURE OF *LOCKE V. DAVEY**Cleland B. Welton II**

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* J.D. 2009, University of Virginia School of Law; A.B. 2006, Princeton University. Many thanks to Professor Micah Schwartzman for his guidance, and to Sarah Robertson, Joseph Warden, and Katie Worden for helpful comments. Additional thanks to the Law Review's editors, and in particular to Elizabeth Horner.

INTRODUCTION

IN *Zelman v. Simmons-Harris*,¹ the Supreme Court held that the Establishment Clause does not prevent local governments from providing vouchers for use at private schools, even when the result is an “indirect” transfer of large sums of taxpayer money to religiously-affiliated primary and secondary schools. This conclusion sharply divided both the Justices (5-4, with three separate dissenting opinions) and the legal academy. One group of scholars deemed the case a “huge consolidating win.”² The First Amendment’s religion clauses, in their view, compel the government to adhere to a strong form of neutrality in its treatment of religion. That is, it should be required to maintain “neutral incentives” such that “it neither ‘encourages [n]or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.’”³ These authors’ hope was that courts would read *Zelman*, in combination with a series of cases condemning discrimination against religion,⁴ to create a mandate: if the government is constitutionally permitted to fund religious institutions and cannot discriminate against them, any government funding scheme would have to be structured to include religious programs that fit within its broad outlines.⁵ This result would fit neatly with their view of the Religion Clauses, by requiring that the state subsidize neither religious nor nonreligious providers of social services to the exclusion of the other.

¹ 536 U.S. 639 (2002).

² Douglas Laycock, Comment, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty, 118 Harv. L. Rev. 155, 167 (2004) [hereinafter Laycock, Theology Scholarships] (emphasis removed).

³ Douglas Laycock, Substantive Neutrality Revisited, 110 W. Va. L. Rev. 51, 54–55 (2007) [hereinafter Laycock, Substantive Neutrality Revisited] (quoting Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 1001 (1990) [hereinafter Laycock, Neutrality Toward Religion]). “Neutrality” in this context is a notoriously slippery term, susceptible to numerous and conflicting definitions. See *infra* Subsection II.A.2.

⁴ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

⁵ See, e.g., Thomas C. Berg, Vouchers and Religious Schools: The New Constitutional Questions, 72 U. Cin. L. Rev. 151, 164–208 (2003); Mark Tushnet, Vouchers After *Zelman*, 2002 Sup. Ct. Rev. 1, 15–21 (2002).

A second group of commentators maintained that even indirect diversion of state money to religious entities violates the Establishment Clause, at least where the program's scale and effects are significant enough.⁶ Having narrowly lost that battle in *Zelman*, opponents of the decision hoped to limit its reach by arguing that inclusion of religious institutions in funding schemes should be discretionary rather than mandatory.⁷ That is, they hoped that although the *Zelman* decision *permitted* government programs aiding religious schools, it would not *require* the inclusion of religious schools in such programs.⁸ The worst-case scenario from this perspective was that a full judicial embrace of *Zelman's* implications would force governments either to create voucher programs or to subsidize new religious schools in order to remain "neutral."

Barely had the ink begun to dry on the first round of this debate when a case arose with the potential to resolve the questions that *Zelman* had left open. *Locke v. Davey*⁹ looked like an easy case for the pro-funding side of the argument. The plaintiff, Joshua Davey, sought to use a relatively small amount of money from a broadly available state scholarship program to pursue a double major in pastoral ministries and business administration at Northwest College, with the intent of becoming a church pastor. The state undeniably could have funded Davey's course of study without violating the Establishment Clause.¹⁰ Yet the State of Washington refused to pay for either of his majors, citing a state constitutional prohibition on funding for degrees that are "devotional in nature or designed

⁶ See, e.g., *Zelman*, 536 U.S. at 685–86 (Stevens, J., dissenting); id. at 686–87 (Souter, J., dissenting); id. at 727–29 (Breyer, J., dissenting); Frank S. Ravitch, A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause, 38 Ga. L. Rev. 489, 513–23 (2004) [hereinafter Ravitch, A Funny Thing Happened] (arguing that the program in *Zelman* gave religious schools a "disproportionate and substantial benefit" and was therefore unconstitutional).

⁷ See Ira C. Lupu & Robert W. Tuttle, *Zelman's* Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles, 78 Notre Dame L. Rev. 917, 966 (2003); Frank S. Ravitch, *Locke v. Davey* and the Lose-Lose Scenario: What *Davey* Could Have Said, But Didn't, 40 Tulsa L. Rev. 255, 256–57 (2004) [hereinafter Ravitch, *Davey* and the Lose-Lose Scenario].

⁸ See, e.g., Ravitch, *Davey* and the Lose-Lose Scenario, supra note 7, at 256–57.

⁹ 540 U.S. 712 (2004).

¹⁰ See id. at 719; id. at 729 (Scalia, J., dissenting) ("The establishment question would not even be close . . ." (citing *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (9-0))).

to induce religious faith.”¹¹ Davey brought suit, arguing that the revocation burdened his religious practice in violation of the Free Exercise Clause.

A surprisingly lopsided 7-2 majority of the Supreme Court ruled against him. Perhaps more surprisingly, the Justices managed to do so without squarely addressing the “‘800 pound gorilla’ lurking in the courtroom”¹²—whether a voucher or scholarship program must include religious entities in order to be constitutional. The decision appears, on its face, to be quite narrow: Chief Justice Rehnquist’s opinion stated that “the only interest at issue here is the State’s interest in not funding the religious training of clergy”¹³ and devoted three of the opinion’s scant seven pages of analysis to articulating that interest and its historical significance.¹⁴ If that rationale controls, the case would not apply (at least, not directly) to the pre-university context, where vast sums of money are up for grabs and where the church-state questions are far more controversial. Nor would it apply to the myriad other government-funded services for which there are religious analogues—hospitals, addiction treatment programs, and the like. Limiting *Davey* to the historical interest in not funding the clergy would thus render it virtually meaningless in the big scheme of things.¹⁵

The Court, however, suggested other grounds for its result. For one thing, because “training for religious professions and training for secular professions are not fungible,”¹⁶ it may be the case that the state has no need to treat them equally. For another, declining to fund religion—in contradistinction to restrictively regulating it—creates only a “mild[]” and apparently insubstantial burden on re-

¹¹ Id. at 716 (majority opinion) (quoting Brief for Petitioners at 6, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), available at http://www.oyez.org/cases/2000-2009/2003/2003_02_1315).

¹² Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 227 (2007).

¹³ *Davey*, 540 U.S. at 722 n.5.

¹⁴ See id. at 721–23 & nn. 5–6.

¹⁵ The decision, in any event, had a powerful effect on Davey’s life plans: he did not immediately enter the ministry and was a student at Harvard Law School by the time the Supreme Court decided his case. See Northwest University President’s Report: Graduates of the 21st Century: Joshua Davey (2006), <http://www.northwestu.edu/report/06/davey.php> (last visited Sept. 12, 2010).

¹⁶ *Davey*, 540 U.S. at 721.

ligious practice.¹⁷ At its most extreme, this narrow understanding of free exercise would allow a state to attach onerous conditions to funds diverted to religious institutions, or to fund Catholic schools but not Jewish or Mormon ones.¹⁸ Finally, the Court emphasized that the state did not enact the exclusion due to its hostility towards religion generally or towards Davey's faith in particular.¹⁹ In order to apply *Davey* to future cases, courts will have to determine how each of these arguments work and which of them control.

To give concrete form to this abstract discussion, imagine a small city with a failing public high school system. Its students are under-educated across the board and consistently perform poorly on nationwide standardized tests. No quick fix for the schools' problems is in sight, at least in the near term: budgets are tight and the school board has been unable to implement any serious reforms. Several private schools exist, and their students generally perform much better, but tuition is prohibitively expensive for most families. One school (call it Country Day) is not affiliated with any religious group and teaches a secular college-preparatory curriculum. A second, Episcopal, is loosely affiliated with its namesake church: each school day begins with a prayer read over the intercom and students are encouraged to attend services on Sundays, but the curriculum and atmosphere are otherwise secular. Finally, Covenant Academy teaches a curriculum bound up in fundamentalist beliefs. While the school provides an education that meets minimum state requirements, all of its courses are taught from an evangelical Christian perspective and the inerrant truth of the Bible is central to the school's mission. Space in each school is limited, but each has room for several new students per class.

The city council is considering legislation that would offer vouchers to families who could not otherwise afford a private education. Although the vouchers would not account for the full cost of private school, they would nonetheless improve the range of

¹⁷ Id. at 720–21 (stating that “the State’s disfavor of religion (if it can be called that) is of a far milder kind” than a criminal or civil regulation targeting religious practice).

¹⁸ See Steven D. Smith, Response, *Playing Around with Religion’s Constitutional Joints*, 157 U. Pa. L. Rev. PENnumbra 123, 130–31 & n.33 (2008), <http://www.pennumbra.com/responses/12-2008/Smith.pdf> (suggesting a non-coercion view of the Free Exercise Clause that would do away with a denominational neutrality requirement, at least with regard to funding).

¹⁹ See *Davey*, 540 U.S. at 721.

choice for some students while simultaneously lowering the public schools' student-teacher ratio. In addition, because each voucher would be worth less than the amount that the school district allocates for each student, the public school system would see a net increase in its per-student budget.

Zelman permits the city to offer a formally neutral voucher program that would allow students to attend any of the three schools. The city would prefer, however, to fund only secular education. Most of its citizens believe that religious activity is something best kept in the private sphere and object to taxpayer money going to a school they see as indoctrinating its students into a religious worldview. In addition, while the city has sizeable minorities of Jewish and Muslim citizens, neither group is large enough to establish a school of its own. A formally neutral scheme would effectively deny citizens of those faiths the opportunity for state-subsidized religious education that it would make available to their Christian neighbors.

The *Davey* Court's refusal to "venture further into this difficult area"²⁰ left lower courts (and local governments) somewhat adrift in confronting such situations.²¹ If the clergy rationale controls, *Davey* has no application to the scenario just described. In order to avoid claims of unconstitutional discrimination against religion, the city would have to choose between funding all three schools and funding none of them. Following one of *Davey*'s broader rationales would give the city leeway to fund secular education at Country Day without creating a parallel obligation to fund religious education at Episcopal and Covenant Academy. But a court adopting the position that *Davey* is a broad decision has only answered part of the question. It must choose one or the other of the farther-reaching rationales (or at least analyze the case under both of them). And then it may have to determine how its decision should affect cases on the margins. If the city excludes some religious schools, must it exclude all of them? That is, may it include Episcopal but not Covenant Academy? If so, how should it make such

²⁰ 540 U.S. at 725.

²¹ See, e.g., *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008) ("The precise bounds of the [*Davey*] holding, however, are far from clear."); *Eulitt ex rel. Eulitt v. Me., Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) (reading *Davey* broadly).

judgments, and can it make them without offending other constitutional norms? As the *Davey* Court might have anticipated, the first two federal appellate court decisions to apply *Davey* (although they are not, strictly speaking, at odds²²) are in fundamental disagreement about the answers to questions about the case's reach.

The legal academy has not yet accounted for these divergent lower-court interpretations of *Davey*. This Note responds to these developments and presents an argument for reading the case expansively. Part I introduces the problem through a survey of the historical context leading up to *Davey* and the decisions that have followed it in the lower courts. With that context in mind, Part II argues that *Davey* ultimately should be understood as resting on the premise that government can exclude religious entities from general funding schemes without offending free exercise. An analysis of how the case's parts interact reveals that despite the Court's relatively longwinded discussion, the clergy argument cannot control. Because it is ultimately a statement about the weight of the state's interest, the clergy argument comes into play only after a reviewing court has settled on a standard of review. The Court at least implied that Washington's program did not violate any fundamental rights, which suggests that no more than rational-basis review applied and that no more than a legitimate legislative purpose was required. Furthermore, *Davey*'s implied neutrality argument is self-defeating. It simply highlights the fact that neutrality is not a concept capable of a universally accepted definition. Without agreement about what it would mean to achieve the stated goal, there is little sense in trying to pursue it. A narrow understanding of the right to free exercise is in harmony with common understandings of other similar constitutional rights—namely, the rights to free speech and to abortion. While the government is (broadly speaking) obligated to protect citizens' freedom in these areas, that duty does not carry with it an obligation to spend tax

²² See *Colo. Christian*, 534 F.3d at 1256–57 & n.4 (observing that “*Eulitt* went well beyond” *Davey* and distinguishing the cases on the ground that the Colorado statute at issue suffered from constitutional failings that were not present in *Eulitt*). The Seventh Circuit decided a third case touching on the issues raised by *Davey* shortly before this Note's publication. *Badger Catholic, Inc. v. Walsh*, Nos. 09-1102, 09-1112 (7th Cir. Sept. 1, 2010), available at <http://www.ca7.uscourts.gov/tmp/OR0MBXMG.pdf>. See *infra* note 220.

dollars in support of the exercise of that freedom. Similarly, the right to free exercise of religion is a right to religious autonomy; state action that falls short of actually restricting religious practice does not unconstitutionally “prohibit” it. This argument builds upon a recent article by Professor Nelson Tebbe²³ by demonstrating that a careful reading of *Davey* in context compels a narrow, autonomy-based understanding of religious freedom as a matter of constitutional doctrine.

While *Davey* should be read broadly, it does not establish an unlimited non-coercion reading of the Free Exercise Clause. Part III outlines and justifies four important limitations on the government’s power to exclude religion from its funding programs. First, it contends that the *Davey* Court’s fourth argument—that Washington’s scholarship program was not motivated by “animus” towards religion—should be understood as parallel to the Court’s use of that term in the equal protection context. That is, hostility towards a group of citizens is simply not an acceptable basis for enacting a law under any standard of review. Further, the government is not permitted to give some religions preferential treatment, or to condition unrelated welfare benefits on a citizen’s decision to forego his constitutional rights. Finally, Part III argues that *Davey* can and should be reconciled with *Rosenberger v. Rector and Visitors of University of Virginia*²⁴ by proposing a new distinction between programs that are designed to promote speech (where the government cannot exclude religious viewpoints) and programs that are designed with other purposes in mind (where the government can constitutionally opt to favor secular activities over religious ones). This Note concludes with a brief discussion of some potential applications of the *Davey* decision and of the concepts for which it stands to contexts outside of education.

²³ Nelson Tebbe, *Excluding Religion*, 156 U. Pa. L. Rev. 1263 (2008).

²⁴ 515 U.S. 819 (1995) (holding unconstitutional the University’s exclusion of a religious publication from a generally available subsidy).

I. THE PROBLEM

A. Historical and Doctrinal Backdrop

Modern Religion Clause doctrine begins, more or less, with *Everson v. Board of Education*,²⁵ which indicated that the principle of separation of church and state restricts the authority of government at all levels. Ewing Township, acting pursuant to state authorization, reimbursed families for the transportation costs of children who traveled to school via the publicly funded bus system. This subsidy was available regardless of whether the student attended public or parochial school.²⁶ A taxpayer sued, arguing that the program aided religious education in violation of the Establishment Clause.

Everson forced the Court to address a now-familiar problem in church-state jurisprudence. On the one hand, the Board's program facilitated, and arguably encouraged, students' attendance at religious schools. The four dissenting Justices, taking a strict "no-aid" line on church-state separation, argued that such subsidies were impermissible.²⁷ Even Justice Black's majority opinion maintained that "[n]o 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."²⁸ Invoking Jefferson, the Court intoned: "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"²⁹ On the other hand, the subsidy made transportation funding equally available to all students, regardless of religious affiliation or lack thereof. In that vein,

²⁵ 330 U.S. 1 (1947).

²⁶ *Id.* at 20 (Jackson, J., dissenting). Justice Jackson notes that no aid was available to families whose children attended "private schools operated in whole or in part for profit," and indeed that the aid was limited "to pay the cost of carrying pupils to Church schools of one specified denomination." *Id.* at 20–21.

²⁷ *Id.* at 24 ("It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school. The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church."); *id.* at 60 (Rutledge, J., dissenting) ("The Constitution requires, not comprehensive identification of state with religion, but complete separation.").

²⁸ *Id.* at 16 (majority opinion).

²⁹ *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

the Court asserted that the state must remain neutral as between religions, and as between religion and non-religion: it “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”³⁰

These two principles—no-aid and neutrality—are in tension. If no tax money whatsoever can go to assist religious activity, it seems hard to avoid the conclusion that the state must exclude religious groups from at least some forms of public welfare legislation. Rigid application of strict separation principles would have rendered *Everson*’s program unconstitutional, but at the cost of treating Catholic schoolchildren differently from their public-school counterparts (who would continue to receive transportation). Conversely, requiring neutrality ensures that tax money will go to aid religion in some circumstances. The Court ultimately tried to embrace both rules, asserting both that the program was neutrally available and that the expenditure was so small as not to constitute even the “slightest breach” of the wall between church and state.³¹

As articulated in both Justice Black’s majority opinion and Justice Rutledge’s dissent, the no-aid principle relied heavily on opinions expressed by Madison and Jefferson surrounding an eighteenth-century controversy in which the Virginia legislature, led by Patrick Henry, proposed to levy a tax for the support of religion.³² (Each taxpayer could select the denomination that would receive his share.³³) Madison opposed even a “general and nondiscriminatory” assessment as an improper use of state funds.³⁴ This separationist position, however, can be plausibly viewed as inapplicable to the law at issue in *Everson*, and, by extension, to many of today’s church-state controversies. The Virginia of the Founding generation provided little in the way of social services. There was no general education system, and no secular recipients for the tax’s

³⁰ Id. (emphasis omitted).

³¹ See id. at 17–18.

³² See id. at 11–13; id. at 33–43 (Rutledge, J., dissenting); Laycock, *Theology Scholarships*, supra note 2, at 163.

³³ *Everson*, 330 U.S. at 36.

³⁴ Id. at 37.

proceeds.³⁵ In that legal and cultural milieu, the two principles were not in conflict. A ban on tax dollars going to religious entities resulted in their remaining on equal footing with secular entities—neither group got anything from the government.³⁶

The growth of the modern welfare state and the development of a nationwide public school system changed this outlook. The government now funds a vast array of secular programs for which there exist religious groups providing the same services, with varying degrees of emphasis on religious messages and proselytization. As a result, neutrality and strict separationism now sometimes work at cross purposes: including religious programs in funding schemes arguably violates the no-aid principle, but denying such aid can give rise to claims of discrimination against religion. What's more, the proliferation of government services and the rise of religious diversity have made it increasingly difficult to discern what it means for the government to be neutral. Does a determination of neutrality stop with a look at the face of a challenged statute, or must courts ask about how it alters incentives? Must such a determination also account for the law's practical, real-world effects?

One way to get out from under these difficulties is to resolve the question in favor of the no-aid principle: if neutrality is not required, there is no need to define the term. The Court purported to take this road in *Lemon v. Kurtzman*.³⁷ In the course of invalidating a state program that allowed for public reimbursement of religious schools for the salaries paid to teachers of secular subjects, the Court developed a now-(in)famous three-part test for determining whether a government expenditure violates the Establishment Clause. To be valid, the Court held, a law must reflect "a secular legislative purpose," must have a "primary effect . . . neither advanc[ing] nor inhibit[ing] religion," and must not foster "excessive government entanglement with religion."³⁸ Although *Lemon* and its various progeny retain some currency, the last two decades have seen a significant erosion of the no-aid rule's dominance.³⁹

³⁵ See Laycock, *Theology Scholarships*, supra note 2, at 163.

³⁶ See id.

³⁷ 403 U.S. 602 (1971).

³⁸ Id. at 612–13 (citations and internal quotation marks omitted).

³⁹ See Laycock, *Theology Scholarships*, supra note 2, at 164–67 (discussing *Lemon*'s weaknesses and the Court's move away from a strict no-aid rule).

Specifically, a line of “true private choice” cases has held that when the government provides a benefit to a private citizen, that citizen’s use of the benefit to pay for religious services does not offend the Establishment Clause.⁴⁰ In *Witters v. Washington Department of Services for the Blind*, the Court ruled in favor of a student seeking to use a state scholarship to fund his seminary studies.⁴¹ Following *Lemon*’s no-aid analysis, Justice Marshall’s majority opinion first observed that the state’s generally available scholarship program had an obvious secular purpose, and was in no way intended to endorse religion.⁴² As to the effects prong, the Court reasoned by analogy: for the same reasons that there is no constitutional bar to a state employee tithing her income once it is in her possession, a state scholarship recipient is free (under the federal Constitution) to use his award to further a religious education.⁴³ Finally, because the state was uninvolved with the student’s choice to attend a religious school, there was no risk of church-state entanglement.⁴⁴

In *Zelman v. Simmons-Harris*, a divided Court extended this analysis to a school voucher program. As part of an effort to rescue Cleveland’s failing educational system, the State of Ohio extended aid to families with children attending private schools, including religious schools.⁴⁵ There was again no question as to the program’s secular purpose; at issue were the program’s effects.⁴⁶ The five-Justice majority thought it permissible for a state to enact a welfare program that “is neutral with respect to religion, and 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.”⁴⁷ Because such a program “permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipi-

⁴⁰ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10–11 (1993); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 487–89 (1986); *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

⁴¹ 474 U.S. at 489.

⁴² *Id.* at 485–86.

⁴³ See *id.* at 486–89.

⁴⁴ See *id.* at 488–89.

⁴⁵ *Zelman*, 536 U.S. at 644–45.

⁴⁶ *Id.* at 648–49.

⁴⁷ *Id.* at 652.

ents,” any advancement of religion was in the Court’s view “reasonably attributable to the individual recipient, not to the government.”⁴⁸ This was true despite the facts that eighty-two percent of the participating private schools were religious and that ninety-six percent of the students receiving vouchers opted to use them in religious schools.⁴⁹ In the Court’s view, the independent choices of individual students and families were sufficient to break the chain of causation and thereby to avoid an Establishment Clause problem.

Proponents of funding for religious schools viewed *Zelman* as a crucial victory.⁵⁰ It meant that “there are no constitutional constraints on how [state scholarship] money can be spent.”⁵¹ The decision freed states to include religious schools in their general scholarship funds without having to worry about separating secular and religious education and without regard to how much or what proportion of state funds wind up in the hands of religious groups.

If *Zelman* indicated that the Establishment Clause no longer posed an obstacle for religion-inclusive voucher programs, *Rosenberger v. Rector and Visitors of University of Virginia*⁵² suggested that such a funding scheme *must* include religious analogues to secular educational opportunities.⁵³ The University of Virginia provided funds to a wide array of student publications, but denied them to *Wide Awake*, a Christian newsletter. The Court declared this denial unconstitutional, reasoning that the school had created a speech forum from which it could not bar advocates of a religious viewpoint.⁵⁴ Compliance with the Establishment Clause was no defense to this conclusion, because prior decisions had established that public universities are free to allow religious groups access to

⁴⁸ *Id.*

⁴⁹ *Id.* at 657, 658.

⁵⁰ See Laycock, *Theology Scholarships*, *supra* note 2, at 167.

⁵¹ *Id.* at 169.

⁵² 515 U.S. 819 (1995).

⁵³ See Alan Trammell, Note, *The Cabining of Rosenberger: Locke v. Davey and the Broad Nondiscrimination Principle that Never Was*, 92 *Va. L. Rev.* 1957, 1960–85 (2006) (laying out the case for locating a general nondiscrimination principle in *Rosenberger*).

⁵⁴ *Rosenberger*, 515 U.S. at 845–46.

facilities and resources that are available to the student body at large.⁵⁵

While the expressive component of Wide Awake's activities garnered more of the Court's attention than did its religious mission, there remained a serious argument that *Rosenberger* stood for a nondiscrimination rule that would extend to other contexts.⁵⁶ The plaintiff's position in *Locke v. Davey*⁵⁷ represented, in part, an effort to solidify just such a neutrality requirement as a constitutional principle.⁵⁸ Why this effort did not succeed and where this leaves the doctrine are the subjects of the next two Sections.

B. Davey and the Fork in the Road

Davey concerned Washington State's Promise Scholarship, a generally available program that assisted academically qualified students with the cost of attending an accredited in-state academic institution. While a scholarship recipient could opt to use his grant at a religiously affiliated college, he could not apply it towards a degree in devotional theology.⁵⁹ This exclusion was designed to comply with the state constitution's prohibition on the use of state funds in pursuit of degrees that are "devotional in nature or designed to induce religious faith."⁶⁰ Importantly, the academic "institution [in question], rather than the State, determine[d] whether the student's major [was] devotional" in nature.⁶¹ Joshua Davey qualified for the scholarship and sought to apply it towards a double major in business administration and pastoral ministries at Northwest College, with the goal of becoming a preacher. Although Northwest is an evangelical Christian college that trains all

⁵⁵ Id. at 842 (citing *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Bd. of Educ. of the Westside Cmty. Sch. (Dist. 66) v. Mergens ex rel. Mergens*, 496 U.S. 226, 252 (1990)); id. at 845.

⁵⁶ See Trammell, *supra* note 53, at 1960–85; see also Tebbe, *supra* note 23, at 1306–07 (arguing that *Rosenberger* and *Davey* are in "real tension" because "*Rosenberger* prohibits the government from subsidizing a range of student expression other than sectarian speech," and asserting that "[i]t is no answer to say that *Rosenberger* was a speech case while *Davey* was a free exercise decision").

⁵⁷ 540 U.S. 712 (2004).

⁵⁸ See id. at 720.

⁵⁹ Id. at 716 (citing Wash. Admin. Code § 250-80-020(13) (2003)) (defining "[e]ligible postsecondary institution"); id. at 724.

⁶⁰ Id. at 716 (citation omitted).

⁶¹ Id. at 717.

its students “to use . . . the Bible as their guide, as the truth,”⁶² it was duly accredited and Davey could have used his scholarship there in pursuit of a degree other than one in pastoral ministries. However, Northwest considered the pastoral ministries major to be “devotional” in nature, and as a result Washington refused his request to use the scholarship at Northwest—even for the secular portion of his education.⁶³

Although at one time there was serious reason to think that the Constitution barred any tax money at all from going to Northwest,⁶⁴ by 2004 all nine Justices acknowledged that Washington could have gone so far as to extend the scholarship program to devotional theology majors.⁶⁵ The new question in *Davey* was whether the Free Exercise Clause *required* that the program be so extended. Generally speaking, free exercise law dictates that the government cannot impose special burdens on religious practice,⁶⁶ though it is not required to exempt adherents from otherwise applicable laws.⁶⁷ Before *Davey*, the rule barring discrimination against religion arguably prohibited the government from funding secular activity unless it also funded religious analogues. The Court held to the contrary, citing a principle of “play in the joints” between the Religion Clauses—that is, that there are government actions that the Establishment Clause permits but that the Free Exercise Clause does not mandate.⁶⁸ Within this space, according to the Court, decisions pertaining to religion are left up to lawmakers’ discretion.

This “play in the joints” principle is simple enough in the abstract, but squaring the Court’s result with its precedent is some-

⁶² Id. at 724 (citations omitted).

⁶³ Id. at 717.

⁶⁴ See, e.g., *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (“Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.”).

⁶⁵ See *Davey*, 540 U.S. at 719; id. at 728–29 (Scalia and Thomas, JJ., dissenting).

⁶⁶ See, e.g., *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

⁶⁷ *Employment Div., Dep’t. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 890 (1990).

⁶⁸ *Davey*, 540 U.S. at 718–19 (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 669 (1970)).

thing of a challenge. Most notably, the Court had previously stated that, if a law burdening religion is not both neutral and generally applicable, it is subject to strict constitutional scrutiny.⁶⁹ In *Church of Lukumi Babalu Aye v. City of Hialeah*, a Florida town had enacted an ordinance banning animal sacrifice. While it made no direct mention of religion, the law's obvious purpose⁷⁰ was to outlaw the Santeria faith's ritual slaughter of (among other things) chickens, goats, and turtles.⁷¹ The Court concluded that the ordinance violated the Free Exercise Clause, which (the Court asserted) contains a demand of neutrality both as between religions and as between religion and non-religion.⁷² At first blush, this holding appears inconsistent or even "irreconcilable"⁷³ with *Davey*. As Justice Scalia forcefully argued in dissent:

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.⁷⁴

Versions of this line of argument have been the thrust of leading literature criticizing *Davey*.⁷⁵

Chief Justice Rehnquist's majority opinion in *Davey* advanced four distinct (though interrelated) arguments for distinguishing *Lukumi*. First, Rehnquist indicated that the particular form of discrimination in which Washington had engaged did not actually restrict Davey's free exercise rights in any significant way. Whereas the City of Hialeah "sought to suppress" a religious practice, Washington's "disfavor of religion (if it can be called that) is of a

⁶⁹ *Lukumi*, 508 U.S. at 531–32.

⁷⁰ See *id.* at 535–39.

⁷¹ *Id.* at 525.

⁷² See *id.* at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face.").

⁷³ *Davey*, 540 U.S. at 726 (Scalia, J., dissenting).

⁷⁴ *Id.* at 726–27.

⁷⁵ See, e.g., Thomas C. Berg & Douglas Laycock, The Mistakes in *Locke v. Davey* and the Future of State Payments for Services Provided by Religious Institutions, 40 *Tulsa L. Rev.* 227, 230–36 (2004); Laycock, *Theology Scholarships*, *supra* note 2, at 176–78.

far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite.”⁷⁶ Rather, “[t]he State has merely chosen not to fund a distinct category of instruction.”⁷⁷ In the Court’s view, the program as administered imposed no burden on religion, or one so light as to be *de minimis*. With no constitutionally cognizable burden on Davey’s religious practice—that is, no violation of any of his rights—his claim would have to fail.

In the next paragraph, Rehnquist suggested a second justification: although *Lukumi* requires neutrality with respect to religion, Washington’s program was “neutral” in the relevant sense. Because “training for religious professions and training for secular professions are not fungible,”⁷⁸ nondiscrimination principles did not demand that they be treated alike. A third, related point was the historical pedigree of the state’s interest. Rehnquist cited Madison’s Memorial and Remonstrance against Virginia’s religious assessment and a series of early state constitutions explicitly excluding the ministry from receiving public funds,⁷⁹ and went on to conclude that the state interest at issue was “historic and substantial.”⁸⁰ Hialeah had no such pedigreed interest in support of its discrimination against a single minority faith. As a final justification for its result, the Court stressed that Washington’s law was not motivated by hostility toward religion: “That a State would deal differently with religious education for the ministry than with education for other callings is . . . not evidence of hostility toward religion,” but is instead a product of Washington’s “distinct views” on church-state relations.⁸¹

Considered carefully, each of these four arguments rests on a different premise and points in a different direction. The Court’s scattershot opinion leaves the future of the doctrine uncertain, and what *Davey* means for the future of Religion Clause jurisprudence will depend on which of the arguments the courts adopt as the focus of their inquiry. If the Court’s no-burden rationale controls, *Davey*’s scope is likely to be quite broad, as the idea is not in prin-

⁷⁶ *Davey*, 540 U.S. at 720.

⁷⁷ *Id.* at 721.

⁷⁸ *Id.*

⁷⁹ *Id.* at 722–23.

⁸⁰ *Id.* at 725.

⁸¹ *Id.* at 721.

ciple self-limiting. If some form of neutrality is still required, the case may still authorize many religious exclusions, so long as they are achieved by offering a baseline benefit of “secular education” or some cognate. However, should courts treat the historical importance of Washington’s interest in not funding the clergy as paramount, *Davey* would be virtually limited to its facts. An aggressive interpretation of the Court’s discussion of animus could have similar effects. The next Section explores the opinion’s four strands in an effort to grasp just what *Davey* means. It then touches on two additional considerations arising from the Tenth Circuit’s decision in *Colorado Christian University v. Weaver*.⁸²

C. The Future of the Doctrine

1. Davey’s Four Arguments

a. The No-Burden Rationale

Davey suggested that merely refusing to fund religious practice, in contrast to restrictively regulating it, does not impede a citizen’s right to the free exercise of his religion.⁸³ The importance of this idea to *Davey*’s holding is underscored by the Court’s operative assertion that there is “play in the joints” between the Religion Clauses. For there to be such a space between the Clauses, it must be the case that while government can take some action—funneling money to religious schools, for instance—without implicating anti-establishment rules, it can also refuse to do so without unconstitutionally restricting citizens’ rights to religious exercise.

To see how this justification works in practice, consider *Eulitt ex rel. Eulitt v. Maine, Department of Education*,⁸⁴ in which the First Circuit faced the gorilla that had been in the courtroom when the Supreme Court decided *Davey*: religious restrictions on elementary- and secondary-school vouchers. Maine provided each school district with the option to fulfill its obligation to educate its youth by paying private schools to furnish students’ educational needs.⁸⁵ However, a school district choosing this option was not permitted

⁸² 534 F.3d 1245 (10th Cir. 2008).

⁸³ See *Davey*, 540 U.S. at 719–20; supra notes 76–77 and accompanying text.

⁸⁴ 386 F.3d 344 (1st Cir. 2004).

⁸⁵ Id. at 346 (citing Me. Rev. Stat. Ann. tit. 20-A, §§ 2(1), 2(2), 2951, 4501, 5204(4) (West 2004)).

to pay the tuition of any student attending a sectarian school.⁸⁶ Plaintiffs, parents of Maine schoolchildren, challenged this bar under the Free Exercise and Equal Protection Clauses. The school district in which they resided had contracted its secondary education to a high school in a neighboring district with the stipulation that a limited number of students could instead attend other non-sectarian high schools if the public school could not satisfy their “educational needs.”⁸⁷ The Eulitts sought state assistance in sending their daughters to Catholic school on the ground that the public school did “not offer classes in Catholic doctrine or teach from a Catholic viewpoint,” and thus (according to the parents) failed to meet the students’ needs.⁸⁸

The First Circuit interpreted *Davey* expansively in ruling for the school district. *Davey*, the court said, “confirms that the Free Exercise Clause’s protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity.”⁸⁹ That is, “Maine’s decision not to deploy limited tuition dollars . . . [on] religious education” was not “an impermissible burden on [the parents’] prerogative to send their children to Catholic school.”⁹⁰ This conclusion was bolstered by *Strout v. Albanese*,⁹¹ a pre-*Davey* decision in which the First Circuit had held that the exclusion at issue “impose[d] no substantial burden on religious beliefs or practices . . . because it [did] not prohibit attendance at a religious school or otherwise prevent parents from choosing religious education for their children.”⁹² Furthermore, incentivizing secular over religious education was “a burden of the sort permitted in *Davey*”⁹³—which is to say, not one cognizable under the Free Exercise Clause. Without any such burden on their free exercise rights, the plaintiffs were left without a viable free exercise claim.

⁸⁶ *Id.* (citing Me. Rev. Stat. Ann. tit. 20-A, § 2951(2) (West 2004)).

⁸⁷ *Id.* at 346–47.

⁸⁸ *Id.* at 347.

⁸⁹ *Id.* at 354.

⁹⁰ *Id.*

⁹¹ 178 F.3d 57 (1st Cir. 1999).

⁹² *Eulitt*, 386 F.3d at 354 (citing *Strout*, 178 F.3d at 65).

⁹³ *Id.* at 354 n.5.

At least two other lower federal courts have applied similar analysis in applying *Davey*'s principles to facts straying away from the scholarship and voucher contexts. In a case evocative of both *Everson* and *Davey*, *Pucket v. Hot Springs School District No. 23-2* addressed the constitutionality of a school district's decision to discontinue its policy of providing busing for children attending parochial schools.⁹⁴ The court cited *Eulitt* and rejected the contention that *Davey* is limited to the clergy-education context.⁹⁵ It therefore found that, after *Davey*, "the denial of busing is too insignificant of a burden to constitute a free exercise violation."⁹⁶

Another obvious direction in which *Davey* might expand is state-funded social programs outside the educational context. *Teen Ranch, Inc. v. Udow*⁹⁷ involved the Michigan Family Independence Agency's decision to cease sending children in its care to Teen Ranch—a "non-denominational Christian faith-based organization that . . . provide[d] residential care for . . . troubled youth"—on the basis that its Christian perspective precluded it from receiving state funds.⁹⁸ Although the court decided the case on Establishment Clause grounds,⁹⁹ it also found no free exercise violation.¹⁰⁰ The court's analysis of the free exercise question was sparse, but the implication of its citations of *Davey* and *Eulitt*,¹⁰¹ and its grant of summary judgment to the state,¹⁰² must be that the court found no burden on the religion of either Teen Ranch or its potential patrons in the state's refusal to fund the program.

⁹⁴ No. Civ. 03-5033-KES, 2007 U.S. Dist. LEXIS 41326, at *2 (D.S.D. June 6, 2007), aff'd on other grounds, 526 F.3d 1151, 1153–54 (8th Cir. 2008).

⁹⁵ Id. at *41.

⁹⁶ Id. at *39.

⁹⁷ 389 F. Supp. 2d 827 (W.D. Mich. 2005), aff'd 479 F.3d 403, 411–12 (6th Cir. 2007), cert. denied, 552 U.S. 1039, 1039 (2007). The Sixth Circuit approved the district court's reasoning in full and also offered a separate statutory ground for affirmance. See 479 F.3d at 410–11.

⁹⁸ *Teen Ranch*, 389 F. Supp. 2d at 829–30.

⁹⁹ See id. at 837 (finding "no 'true private choice'" and therefore an Establishment Clause violation).

¹⁰⁰ See id. at 841–42.

¹⁰¹ Id. at 838.

¹⁰² Id. at 839.

b. Variable-Baseline Neutrality

Although Justice Scalia contended in his *Davey* dissent that “[t]he Court makes no serious attempt to defend the program’s neutrality,”¹⁰³ the majority opinion in fact contained the seed of such an argument. Chief Justice Rehnquist rejected Justice Scalia’s claim that the generally available scholarship program was “part of the baseline against which burdens on religion are measured”¹⁰⁴ by asserting that “training for religious professions and training for secular professions are not fungible.”¹⁰⁵ The majority thus suggested both that Washington had set its baseline benefit at the level of providing a *secular* education and that this strategy is permissible. That is, the state can act “neutrally” by offering to pay only for a secular benefit, because anyone asking for a religious analogue is in fact asking not for equal treatment but for something over and above what the state offers.

Although the no-burden rationale was sufficient for its decision, the *Eulitt* court embraced this reading of *Davey* as well:

[T]he statute does not exclude residents of Minot from participation in the tuition program on the basis of religion; all school-aged residents are equally eligible to apply for the benefit that the program extends—a free secular education. Any shift in the decisional calculus for parents who must decide whether to take advantage of that benefit or pay to send their children to a school that provides a religious education is a burden of the sort permitted in *Davey*¹⁰⁶

Chief Justice Rehnquist had approved of defining a benefit such that some “distinct categor[ies] of instruction”¹⁰⁷ are outside its scope. Following this line of reasoning, Judge Selya concluded that the state may characterize the benefit provided by its education system as “a free secular education.”¹⁰⁸ Of course, as *Zelman* demonstrates, Maine could just as well have chosen generic “educa-

¹⁰³ *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting).

¹⁰⁴ *Id.* at 726.

¹⁰⁵ *Id.* at 721 (majority opinion).

¹⁰⁶ *Eulitt ex rel. Eulitt v. Me., Dep’t of Educ.*, 386 F.3d 344, 354 n.5 (1st Cir. 2004) (citing *Davey*, 540 U.S. at 725).

¹⁰⁷ *Davey*, 540 U.S. at 721.

¹⁰⁸ *Eulitt*, 386 F.3d at 354 n.5.

tion,” as opposed to “secular education,” as the applicable descriptor for the benefit it would provide. *Davey*, as understood by *Eulitt*, stands for, *inter alia*, the proposition that the state can define the benefit it will provide however it wishes, and that whether the program is neutral will be determined in reference to that choice. A narrow definition (secular education) will render “neutral” a program that would appear discriminatory under a broader one (education). When a benefit is defined broadly, groups that seek to claim it can raise colorable allegations of discrimination when the benefit is denied on religious grounds. In contrast, a narrow definition means that individuals whom the state intends to exclude will not meet the criteria for claiming the benefit.¹⁰⁹ If this reading of *Davey* is controlling, states can bar religious entities from receiving taxpayer money even while claiming (however implausibly) to act with the utmost evenhandedness.

c. The Clergy Limitation

Intertwined with these first two arguments was the Court’s discussion of the pedigree of the interest at stake.¹¹⁰ The majority cited the nation’s history of “popular uprisings” against the use of public funds to support the clergy and a number of early state constitutional provisions banning the practice.¹¹¹ The opinion called the particular interest at issue “historic and substantial”¹¹² and stated that “the only interest at issue here is the State’s interest in not funding the religious training of clergy.”¹¹³

A court intent on striking down an exclusion could rely on this discussion to argue that a state interest must be especially “historic and substantial” to constitute a sufficient justification. This reasoning would probably have the effect of limiting *Davey* to its facts. As Professor Douglas Laycock—a prominent Religion Clause scholar

¹⁰⁹ *Pucket* also employed this tactic, arguing that “busing to and from a private school is not a public benefit.” *Pucket v. Hot Springs Sch. Dist. No. 23-2*, No. Civ. 03-5033-KES, 2007 U.S. Dist. LEXIS 41326, at *44 (D.S.D. June 6, 2007). This characterization rendered the plaintiffs’ demands for neutrality futile. *Id.*

¹¹⁰ See *Davey*, 540 U.S. at 721.

¹¹¹ *Id.* at 722–23. Justice Scalia’s dissent makes a compelling argument that this history is “misplaced.” See *id.* at 727–28 & n.1 (Scalia, J., dissenting).

¹¹² *Id.* at 725 (majority opinion).

¹¹³ *Id.* at 722 n.5.

and an advocate of a strong form of state neutrality with respect to religion—notes, while “[t]here is some national tradition of not paying for” religious education generally, that tradition is weak in comparison to the historical objections to publicly funded preachers.¹¹⁴ Whatever tradition does exist is, according to Laycock, tied up with discrimination against “sectarian” Catholic schools and in favor of public schools that reflected majority Protestantism.¹¹⁵ And “there is no sustained national tradition of any kind that refuses to fund religious delivery of social services.”¹¹⁶

The First Circuit’s holding in *Eulitt*, however, is a sign that courts will decline to take this view. Judge Selya’s opinion in *Eulitt* rejected just such an effort to cabin *Davey* to the context of training for the clergy, finding “no authority that suggests that the ‘room for play in the joints’ identified by the *Davey* Court . . . is applicable to certain education funding decisions but not others.”¹¹⁷ On the *Eulitt* court’s reading, *Davey* means that “state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so.”¹¹⁸

d. Animus

The *Davey* majority also devoted significant space to showing that Washington’s exclusion was not the product of anti-religious hostility. Justice Scalia thought this irrelevant, arguing that the *Brown* Court did not ask whether racial segregation was motivated by “‘animus’ against blacks” or “a well-meaning but misguided be-

¹¹⁴ Laycock, *Theology Scholarships*, supra note 2, at 185 & n.183, 187–88 (citing John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 *Mich. L. Rev.* 279, 297–305 (2001); David B. Tyack, *Onward Christian Soldiers: Religion in the American Common School*, in *History and Education: The Educational Uses of the Past* 212, 212–33 (Paul Nash ed., 1970)). Indeed, according to Laycock, “[a]s applied to elementary and secondary schools, the no-funding tradition is a misinterpretation of the Establishment Clause, deeply rooted in historic anti-Catholicism.” *Id.* at 185.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Eulitt ex rel. Eulitt v. Me., Dep’t of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) (citation omitted).

¹¹⁸ *Id.*

lief that the races would be better off apart.”¹¹⁹ Discrimination alone was enough. The Court’s rejection of the analogy to *Brown* is a point in favor of a broad no-burden reading of the opinion. It suggests that whereas any distinction based on race is suspect—that is, “separate” facilities cannot constitutionally be “equal” where the lines are racially drawn—a distinction based on religion is not problematic unless it imposes an actual burden on free exercise. Yet *Davey* also indicates that the state cannot exclude religion from a funding program on the basis of hostility towards either a particular faith or belief generally. The Court was not precisely clear about how this limit works, and the lower courts have not yet explored its implications, but the opinion suggests that laws based on historic discrimination against (for example) Catholics are impermissible even absent a cognizable burden.

2. *The Tenth Circuit’s Reaction in Colorado Christian*

Then-Judge (now Professor) Michael McConnell, another leading church-and-state scholar, had occasion to address *Davey* and its impact in *Colorado Christian University v. Weaver*.¹²⁰ The State of Colorado offered scholarships to students attending universities within the state, but required that such funding not be used to attend a “pervasively sectarian” school. “Pervasively sectarian” was defined by statute in terms of six characteristics, and the determination whether a particular institution qualified for scholarship use was made by the state, rather than by the institution itself (as had been the case in *Davey*).¹²¹ Under this policy, the state had permitted the use of its scholarships at Catholic and Methodist universities, but had refused to allow students to spend them at Naropa University (a Buddhist institution) and Colorado Christian University,¹²² an accredited private school that framed its education within a “Christian world view” and its affiliation with “the broad, historic evangelical faith.”¹²³ The case represented an early test of *Davey*’s

¹¹⁹ *Davey*, 540 U.S. at 732 (Scalia, J., dissenting).

¹²⁰ 534 F.3d 1245 (10th Cir. 2008).

¹²¹ *Id.* at 1250–51, 1266.

¹²² *Id.* at 1258 (citations and internal quotation marks omitted).

¹²³ *Id.* at 1252.

reach. Judge McConnell's unanimous panel decision held the exclusion unconstitutional on two distinct grounds.

a. Discrimination Among Religious Institutions

According to Judge McConnell, the Colorado scholarship program was unconstitutional because it forced the government to "discriminate[] among religions" in a way that *Davey* did not.¹²⁴ Whereas Washington excluded all devotional theology majors, regardless of faith or institution, Colorado drew a distinction between universities that were only somewhat sectarian and those that were "pervasively" so.¹²⁵ The court rejected the claim that the Colorado exclusion "'distinguish[ed] not between types of religions, but between types of institutions,'" seeing no reason to permit discrimination "on the basis of the nature of the religious practice" conducted by the institution.¹²⁶ Here the court cited *Larson v. Valente*¹²⁷ for the proposition that a government program discriminating among religions even on facially religion-neutral lines is subject to strict scrutiny because it in fact "ma[de] explicit and deliberate distinctions between different religious organizations."¹²⁸

If adopted elsewhere,¹²⁹ Judge McConnell's reasoning could seriously limit *Davey*'s scope. By denying that states may discriminate among religious institutions (as opposed to discriminating against religions as such), the opinion reduces *Davey*'s grant of discretion to an all-or-nothing proposition: a state can exclude religious groups entirely from its funding programs or it can include them all, but it cannot choose to fund only those religious activities or institutions that actually further its interests as it defines them. Under this reading of *Davey*, a state cannot, for instance, permit a student to use a science scholarship to study biology at a religious institution where the controlling religious doctrine accepts evolu-

¹²⁴ Id. at 1256.

¹²⁵ Id.

¹²⁶ Id. at 1259.

¹²⁷ 456 U.S. 228 (1982).

¹²⁸ *Colo. Christian*, 534 F.3d at 1259 (quoting *Larson*, 456 U.S. at 246 n.23).

¹²⁹ The Supreme Court will not directly decide whether Judge McConnell's approach is correct because Colorado declined to seek certiorari. See Press Release, Colorado Dep't of Higher Educ., No CCEH Appeal of Court Decision for Colo. Christian U (Aug. 1, 2008), available at http://www.coloradoattorneygeneral.gov/sites/default/files/press_releases/2008/08/01/.pdf.

tionary theory but refuse to let that student use the scholarship at religious schools where young-earth creationism is taught instead. While the state might distinguish between religious institutions through curriculum requirements or other facially religion-neutral grounds, a religious institution failing such a requirement could contend that the requirement was developed specifically so as to exclude the institution's religious perspective. On McConnell's view, a school making that argument would stand a fair chance of success.

b. Barring Inquiry into Religious Practice

Judge McConnell also asserted a second ground for finding Colorado's program unconstitutional: the exclusion involved "intrusive [governmental] judgments regarding contested questions of religious belief or practice."¹³⁰ Colorado's scheme required a government body to inquire into each university's degree of religiosity. This inquiry necessitated, for instance, that the state adopt a definition of what it meant to be a "Christian"¹³¹ and that it draw a line demarcating impermissible indoctrination and proselytization from allowable courses of study.¹³² Such determinations, the court reasoned, are so "fraught with entanglement problems" that they run immediately afoul of the relevant Religion Clause precedents.¹³³

Washington avoided this problem by asking each college to determine for itself whether any of its majors were "devotional" and therefore excluded. If, as *Colorado Christian* holds, states must avoid inquiring into the religious nature of the programs they fund, the practical result is obvious. A school wishing to allow its students to use state funds need only deny, no matter how disingenuously, that its curriculum and courses of study fall within the prohibited category, and the exclusion will have no effect. Under Judge McConnell's reasoning, Northwest College could have skirted the rule against Promise Scholars taking state money by simply reporting to the state that the pastoral ministries degree was not "devotional." Had the school done so, there would seem to be

¹³⁰ *Colo. Christian*, 534 F.3d at 1261.

¹³¹ *Id.* at 1265.

¹³² *Id.* at 1262.

¹³³ *Id.* at 1261 (citing, e.g., *Mitchell v. Helms*, 530 U.S. 793, 828 (2000); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979)).

little that the state could do to enforce its otherwise-permissible restriction in light of Judge McConnell's statement that "[t]he most potentially intrusive element" of Colorado's scheme was the inquiry into "whether [required] theology courses . . . 'tend to indoctrinate or proselytize.'"¹³⁴ Although the court professed that it did "not mean to say that states must allow universities to be the final judge of their own eligibility for state money,"¹³⁵ it is hard to see how else to understand the decision.¹³⁶ *Colorado Christian* represents the judicial manifestation of the academic opposition to *Davey*. The main thrust of that opposition sounds in arguments for various forms and degrees of government neutrality with regard to religion. Given the positions Judge McConnell has taken in his academic writing,¹³⁷ his effort to limit *Davey*'s reach is perhaps unsurprising. Whether and to what extent this effort succeeds will depend in large part on how courts interpret *Davey* going forward.

¹³⁴ Id. at 1261 (quoting Colo. Rev. Stat. § 23-3.5-105(1)(d) (repealed 2009)).

¹³⁵ Id. at 1266.

¹³⁶ Having found that the scholarship program violated the University's constitutional rights, Judge McConnell went on to consider whether the state could justify the burdens it imposed. Though the court noted that *Davey* left the proper standard of review somewhat unsettled, it saw no need to settle the question. Id. at 1267. Even if mere rational-basis review applied, the law may well have failed "because the State scarcely has any justification at all." Id. When it was enacted, the exclusion of "pervasively sectarian" institutions had been "an attempt to conform to First Amendment doctrine." Id. (quoting *Ams. United for Separation of Church & State Fund v. Colorado*, 648 P.2d 1072, 1075 (Colo. 1982)). But by the time the Tenth Circuit decided *Colorado Christian*, changes in the doctrine had "rendered [that justification] obsolete." Id.; see also, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002) (holding that as long as there is "true private choice," state funds may be diverted to religious schools without violating the Establishment Clause). Nor were there state constitutional grounds for upholding the statute; the Colorado Supreme Court had already found that only "direct subsidies to the religious institutions themselves," and not "indirect" aid diverted through individual students, violated the prohibition on state aid to religious education. *Colo. Christian*, 534 F.3d at 1268 (citing Colo. Const. art IX, § 7; *Ams. United*, 648 P.2d at 1083-84). Finally, the court dismissed (as unsupported by evidence) the contention the state had an interest in protecting taxpayers' freedom of conscience. Id. at 1268. The court's language also suggests that it would have applied strict scrutiny had it been compelled to choose a level of review: the statute, according to the court, was "not narrowly tailored to th[e] asserted goal" of protecting freedom of conscience. Id.

¹³⁷ See, e.g., Michael W. McConnell, *The Problem of Singling Out Religion*, 50 *DePaul L. Rev.* 1, 3 (2000); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 *U. Chi. L. Rev.* 1, 12 (1989).

How best to answer this question is the subject of the balance of this Note.

II. WHY THE NO-BURDEN RATIONALE SHOULD CONTROL

The above discussion has examined the four bases that Chief Justice Rehnquist provided for *Davey*'s holding: the historical interest in not funding the clergy; the assertion that the scholarship program was effectively neutral because the state can select the baseline from which courts will measure neutrality; the argument that free exercise is a right to autonomy that is not ordinarily burdened by a denial of state aid; and the observation that the state exhibited no hostility towards religion. The direction that church-state doctrine in this area will take in the future will depend on which of these lines of reasoning emerges as *Davey*'s true holding. This Part begins by arguing that the first two explanations fall apart on closer examination. It then presents a normative argument for concluding that the third rationale is the best way to understand the case. The Court's fourth consideration, animus, serves as a restriction on government power, for reasons discussed in Part III.

A. Two Arguments to Reject

1. The Clergy Limitation

The explicit terms of Chief Justice Rehnquist's opinion in *Davey* suggest that the holding is limited to the exclusion of programs for the education of the clergy from state funding schemes. That restriction should, and likely will, prove "illusory."¹³⁸

To begin, note that the *Davey* Court did not articulate a standard of review; it referred to the state interest involved, even given its historical pedigree, as merely "substantial"¹³⁹—not "compelling,"¹⁴⁰ or even "important."¹⁴¹ Had the Court stated that the state's

¹³⁸ Laycock, *Theology Scholarships*, supra note 2, at 184.

¹³⁹ *Locke v. Davey*, 540 U.S. 712, 725 (2004).

¹⁴⁰ See, e.g., *Gratz v. Bollinger* 539 U.S. 244, 270 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)) (requiring a "compelling" state interest to justify racial classifications).

¹⁴¹ See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (requiring an "important" state interest for a gender classification).

interest was compelling, the opinion would have implied both that heightened review applied and (consequently) that only an interest of equal import could substitute for the one Washington had asserted. It could perhaps be the case that the Court imposed some form of heightened rational basis review on laws of the sort in *Davey*, but that conclusion seems implausible. The lines between constitutional standards of review are murky as it is, and it is hard to see how a court could distinguish between an interest that is “substantial” and one that is merely “legitimate.” Further, *Davey* did not even touch on the question whether, and to what extent, Washington’s law was tailored to fit its goal. Courts should not read an opinion that does not mention a standard of review to announce a new one *sub silentio*.

More importantly, the Court concluded its analysis without finding that any of the Constitution’s normal limits had been transgressed in such a way as to trigger a form of review above the most basic rational-basis level. The Promise Scholarship’s exclusion did not violate any neutrality requirement because “training for religious professions and training for secular professions are not fungible”¹⁴²; Joshua Davey had simply asked for more than the benefit offered him. Likewise, the Court’s conclusion that Washington’s exclusion imposed no significant burden on Davey’s free exercise rights implies that no special justification was necessary. If the law was neutral in the relevant sense and did not impede Davey’s religious freedom, there is no reason to suppose that a similar enactment would be subject to anything other than the lowest level of constitutional scrutiny. And if no more than rational basis review applies, one can only conclude that the Court’s discussion of the clergy is ultimately a red herring.

2. *The Quixotic Quest for Neutrality*

The Court’s suggestion that the scholarship program was effectively neutral is no more useful for purposes of understanding the opinion and where it leaves the doctrine. *Davey* amply illustrates the fact that, as the second Justice Harlan once wrote, “[n]eutrality

¹⁴² *Davey*, 540 U.S. at 721.

is . . . a coat of many colors.”¹⁴³ Even proponents of “neutrality” have been unable to settle on a particular definition of the term. As Professor Laycock has acknowledged, “[w]e can agree on the principle of neutrality without having agreed on anything at all.”¹⁴⁴ For that reason alone, neutrality is a poor candidate either to explain the constitutional law of church and state or to protect religious freedom.

A brief examination of what “neutrality” could mean illuminates this point. Professor Laycock provides two possible definitions: “formal” and “substantive” neutrality.¹⁴⁵ The former would “prohibit classification in terms of religion either to confer a benefit or to impose a burden.”¹⁴⁶ While this formulation’s simplicity is initially attractive, its effects run counter to common intuitions regarding religious exemptions from generally applicable laws. Such accommodations (for sacramental wine or peyote use, for example) are not constitutionally required¹⁴⁷; a rigorous formal neutrality requirement would go a step further by stripping legislatures of the authority to create them by statute.¹⁴⁸

A formal neutrality requirement also risks awarding a stamp of approval to legislation with a practical effect that is anything but neutral. From the strict separationist perspective, *Zelman* is a prime example of this problem. Cleveland’s voucher program was formally neutral. Students taking state funds could choose to spend them on either a religious education or a secular one. That freedom of choice more or less closed the case for the majority, but the four dissenting Justices refused to end their analysis with the language of the ordinance. Because of the demographics of the school district in question, the program resulted in a massive transfer of funds from Ohio’s taxpayers to the coffers of a few religious schools. Few secular alternatives were available, and at least some parents were left with the dilemma of being forced to choose be-

¹⁴³ Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

¹⁴⁴ Laycock, *Neutrality Toward Religion*, supra note 3, at 994.

¹⁴⁵ See generally id. at 999–1006.

¹⁴⁶ Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 96 (1961), *quoted in* Laycock, *Neutrality Toward Religion*, supra note 3, at 999.

¹⁴⁷ *Emp’t Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 890 (1990).

¹⁴⁸ See Laycock, *Neutrality Toward Religion*, supra note 3, at 1000–01.

tween a religious school whose faith they did not share and a public school system whose failings had led to the creation of the voucher system in the first place.¹⁴⁹

By contrast, a regime of substantive neutrality (favored by Professor Laycock) would mandate “neutral incentives”¹⁵⁰: the state would have to “minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.”¹⁵¹ Although this concept is also appealing at first glance, it too suffers from a serious failing: whether a court considers a law to be substantively neutral will depend on the baseline from which it measures whether different people are treated equally. The theory does not provide this content, and there is no way to demonstrate that any given baseline is itself neutral.

Zelman and *Davey* are cases in point. In *Zelman*, Cleveland’s voucher scheme caused a massive shift in incentives and public dollars from public schools to religious ones. One therefore might have expected Professor Laycock to have opposed the vouchers on the ground that they altered the incentive structure so as to encourage religious activity. Instead, he hailed *Zelman*’s endorsement of Cleveland’s program as a victory for his cause.¹⁵² This endorsement was made possible by his choice of baseline: Laycock “would measure the impact on religion from a baseline of what the government is already doing, or, to put it another way, from a baseline of how government treats the same activity—education in reading, math, etc.—in a wholly secular environment.”¹⁵³ But alternate definitions of the relevant baseline are undeniably available, and the choice is dependent on an inherently subjective weighing of the interests at stake. Laycock concludes that “any effect on [the taxpayer] is just too small and too attenuated to outweigh the effect,

¹⁴⁹ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 707 (2002) (Souter, J., dissenting) (“[A] Hobson’s choice is not a choice, whatever the reason for being Hobsonian.”); Ravitch, *Davey* and the Lose-Lose Scenario, *supra* note 7, at 262 (arguing that “formal neutrality as practiced by the *Zelman* Court involves quite a bit of formalism but no neutrality”) (citing Ravitch, *A Funny Thing Happened*, *supra* note 6, at 498–523).

¹⁵⁰ Laycock, *Substantive Neutrality Revisited*, *supra* note 3, at 54 (emphasis omitted).

¹⁵¹ Laycock, *Neutrality Toward Religion*, *supra* note 3, at 1001.

¹⁵² Laycock, *Theology Scholarships*, *supra* note 2, at 167.

¹⁵³ Laycock, *Substantive Neutrality Revisited*, *supra* note 3, at 84–85.

on families choosing schools, of funding some options and not others,” but of course many taxpayers would take a different view.¹⁵⁴ If this sort of de minimis injury is sufficient to confer taxpayer standing to sue for alleged violations of the Establishment Clause,¹⁵⁵ it is difficult to see why a court should be allowed to cast it aside on the basis of an academic cost-benefit analysis and then to claim that the decision is meaningfully “neutral.”

In contrast, the scholarship in *Davey* was not neutral in even the most obvious sense—on the face of the statute—but the Court worked around this objection by asserting a meaningful distinction between “training for religious professions and training for secular professions.”¹⁵⁶ That Chief Justice Rehnquist was willing to draw such a distinction simply demonstrates that he settled on a different baseline than did Justice Scalia. The majority thus implicitly acknowledged the fatal flaw inherent in the idea of a religion-neutral funding scheme. The state can, as in *Witters* and *Zelman*, define a benefit “neutrally” so as to include religious options. Alternatively, as *Davey* and *Eulitt* indicate, the state can define a benefit “neutrally” so as to exclude religious options. There is no fixed theoretical definition of what it means for a state to act “neutrally,” so a court that purports to embrace neutrality will not in fact have embraced anything at all.¹⁵⁷ The court will have relied on

¹⁵⁴ Id. at 85.

¹⁵⁵ See, e.g., *Newdow v. Roberts*, 603 F.3d 1002, 1013–15 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment) (citing numerous cases and concluding that a taxpayer had alleged a sufficient injury-in-fact to challenge the use of religious elements of the presidential inauguration ceremony).

¹⁵⁶ *Locke v. Davey*, 540 U.S. 712, 721 (2004).

¹⁵⁷ See Ravitch, *A Funny Thing Happened*, supra note 6, at 493 (“Claims of neutrality cannot be proven. There is no independent neutral truth or baseline to which they can be tethered. Thus, any baseline to which we attach neutrality is not neutral; claims of neutrality built on these baselines are by their nature not neutral.”) (footnote omitted).

Because the government spends money on a secular public school system, substantive neutrality would seem to require it to spend money on some religious alternative in order to avoid skewing incentives. But Professor Laycock does not claim that voucher programs are constitutionally required; probably no one would take him seriously if he did. Instead, he argues that states “may discriminate between public schools and private schools, even if that discrimination has [a] disparate impact on religion.” Laycock, *Substantive Neutrality Revisited*, supra note 3, at 86. This distinction is unsatisfying. It reaches what everyone recognizes as the right result only by abandoning the very neutrality it is supposed to be defending. Professor Laycock is correct that “[i]t is difficult or impossible to construct a plausible doctrinal argument

its judgment (or on the legislature's), in which case there was no point in claiming neutrality in the first place.¹⁵⁸

While the Court could resolve this practical problem through the theoretically unsatisfying method of designating one baseline or another to be the constitutional standard, no single baseline would reach the right result in every set of circumstances. For example, a program allowing the use of vouchers at religious schools might work well in a city with diverse sectarian and secular options, where families have real choice. By contrast, in a city where demographic and economic factors have prevented all but one or two religious groups from operating schools, the provision of vouchers could skew incentives toward those religions. Deciding whether to implement such a program demands delicate policy judgments that should be left to local governments rather than decided by a necessarily arbitrary and inflexible court opinion. Because no court can satisfactorily determine whether a given law is "neutral," judges

that government must create privatized options for the services it provides," *id.* at 86–87, but that concession simply highlights the fact that a requirement of substantive neutrality measured from his chosen baseline does not square with any common understanding of the Religion Clauses.

¹⁵⁸ Professor Thomas C. Berg argues that the Religion Clauses should be seen, in part, as a bulwark against tyranny of the majority:

The ideal of legislators deliberating whether the inclusion of religion will cause social strife or promote equal citizenship is unlikely to be realized. Religious schools will be included in places where the faiths that operate them are numerous or powerful, and excluded in places where majorities are suspicious of those faiths.

Thomas C. Berg, Response, Religious Choice and Exclusions of Religion, 157 U. Pa. L. Rev. PENnumbra 100, 110–11 (2008), <http://www.pennumbra.com/responses/12-2008/Berg.pdf>. This argument cuts both ways. After *Zelman*, religious groups are free to receive indirect government subsidies, even if the secular and minority-religious private alternatives are so limited as to provide little real choice. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 698–707 (2002) (Souter, J., dissenting); Ravitch, A Funny Thing Happened, *supra* note 6, at 515–16. In localities where a few religious groups have the membership and resources to establish schools and lobby for vouchers, there is added impetus to enact such programs at the expense of public education. Objections based on the possibility of majoritarian abuses are not removed by imposing one or another notion of neutrality. As practiced by the *Zelman* Court, such a requirement may simply lend a veneer of neutrality to a funding scheme that is in practical effect far from neutral. Entrusting legislatures with the discretion to choose to fund only secular education at least gives them the ability to keep state funds from being diverted only to schools belonging to one or two prominent faiths to the exclusion of others.

should eschew *Davey*'s neutrality rationale in trying to make sense of the decision.¹⁵⁹

B. The Case for the No-Burden Rationale

While simple process of elimination could lead courts to understand *Davey* as standing for the proposition that denial of funds does not hamper free exercise, crossing theories off a list is not a compelling constitutional argument. This Section argues that *Davey*'s no-burden rationale rests on a sound understanding of the Free Exercise Clause, before going on to explain why religious exclusions like Washington's also do not violate the Establishment Clause.

1. Selective Funding and Free Exercise

Although many commentators and court decisions argue that the Free Exercise Clause includes a right to some form of government neutrality, the foregoing has argued that this position is ultimately untenable (at least in the area of government funding). Helpfully, the Court suggested a more attractive model for understanding free exercise. Without making the analogy explicit, the *Davey* Court "unmistakabl[y]" paraphrased *Rust v. Sullivan*,¹⁶⁰ a case upholding a government program that paid doctors to provide advice about contraception but prohibited them from mentioning abortion. Other cases have similarly held that although abortion is a fundamental right, the government may exclude it from programs that provide funding for childbirth and other medical procedures.¹⁶¹ The right to abortion is a right to autonomy, and for such rights "[t]here is a basic difference between direct state interference with

¹⁵⁹ There is, of course, much more to the debate over neutrality that cannot be addressed in this space. The point here is that because so many considerations enter into the question in any given case, to seek a universal definition is to tilt at windmills.

¹⁶⁰ Laycock, *Theology Scholarships*, supra note 2, at 176 (comparing *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.") with *Davey*, 540 U.S. at 721 ("The State has merely chosen not to fund a distinct category of instruction.")); see also Tebbe, supra note 23, at 1283 & n.80; Steven K. Green, *Locke v. Davey and the Limits to Neutrality Theory*, 77 Temp. L. Rev. 913, 925-27 & nn.91-97 (2004).

¹⁶¹ See, e.g., *Maier v. Roe*, 432 U.S. 464, 473-74 (1977).

a protected activity and state encouragement of an alternative activity consonant with legislative policy.”¹⁶² This distinction applies just as aptly to the right to engage in the free exercise of religion.

The analogy between free exercise and abortion is not obvious, however, in part because there is no explicit textual source for the right to abortion. Analogizing speech and religion is much easier. The First Amendment tells Congress that it can neither “prohibit[]” free exercise nor “abridg[e]” free speech.¹⁶³ The wording of the two clauses suggests that they limit government power in importantly similar ways. Indeed, the text suggests that Congress has broader latitude over religion than over speech: one can go quite far in abridging the ability to engage in some activity without fully prohibiting it.

In cases involving government funding, the Justices have concluded that a refusal to fund does not violate the Free Speech Clause. *Rust* involved doctors’ speech as well as the right to abortion, and the Court concluded that the state may choose to fund some but not all speech. The right to speak on a given subject did not imply a right to have the government pay for that speech.¹⁶⁴ The Court extended this reasoning in *National Endowment for the Arts v. Finley*,¹⁶⁵ defending the government’s authority to pick and choose what speech it funds. In a brief paragraph near the end of her majority opinion, Justice O’Connor asserted—citing both *Rust* and *Maher*—that “the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”¹⁶⁶ The Court implied that selective funding of speech imposed no constitutionally significant burden. And although he refused to apply the logic to the free exercise context, Justice Scalia made the same argument in his opinion concurring in the judgment. It is, he argued, “perfectly constitutional” for Congress to “establish[] content- and viewpoint-based criteria upon which grant applications are to be evaluated.”¹⁶⁷ From the text of the First Amendment, he found a

¹⁶² *Id.* at 475.

¹⁶³ U.S. Const., amend. I.

¹⁶⁴ See *Rust*, 500 U.S. at 200.

¹⁶⁵ 524 U.S. 569 (1998).

¹⁶⁶ *Id.* at 587–88.

¹⁶⁷ *Id.* at 590 (Scalia, J., concurring in the judgment).

“fundamental divide” between “‘abridging’ speech” and merely refusing to fund it.¹⁶⁸ That is, from the First Amendment’s text, Scalia derived a principle that the freedom of speech is a right only to autonomy, such that a discriminatory funding program imposes no constitutionally significant burden. The same reasoning would appear to apply equally to freedom of religion: while the government may fund religious activity (within the bounds set by the Establishment Clause), its decision not to do so does not necessarily violate free exercise principles.

Justice Scalia is evidently not swayed by this analogy. Dissenting in *Davey*, he uncharacteristically began not with the text of the Constitution, but with cases demanding government neutrality towards religion.¹⁶⁹ In the free exercise context, he would presumably join Laycock and McConnell in finding the Court’s implied analogy to abortion (along with the more obvious analogy to speech) “inapt,”¹⁷⁰ because while “[t]he right to choose abortion is a right to be free of undue burdens[,] the right to religious liberty is a right to government neutrality.”¹⁷¹ Although they do not mention Justice Scalia’s textual analysis or his citation of *Rust*, Laycock and McConnell have some case law on their side in distinguishing religion and abortion. Professor Laycock cites *Sherbert v. Verner*¹⁷² as “the first holding to enforce the Court’s earlier dictum that no person could be denied ‘the benefits of public welfare legislation’ because of her faith.”¹⁷³ Further, *Maher v. Roe* distinguished *Sherbert* as being “decided in the significantly different context of a constitutionally imposed ‘governmental obligation of neutrality.’”¹⁷⁴ These mandates of neutrality stem from an understanding of religious exclusions as discrimination akin to racial or gender discrimination: if a person cannot be denied welfare benefits because he is

¹⁶⁸ *Id.* at 599; see also *id.* at 597 (citing *Rust*, 500 U.S. at 193, 194).

¹⁶⁹ *Davey*, 540 U.S. at 726 (Scalia, J., dissenting) (citing, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)).

¹⁷⁰ *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008).

¹⁷¹ Laycock, *Theology Scholarships*, *supra* note 2, at 177.

¹⁷² 374 U.S. 398 (1963).

¹⁷³ Laycock, *Theology Scholarships*, *supra* note 2, at 177 (quoting *Sherbert*, 374 U.S. at 410).

¹⁷⁴ 432 U.S. 464, 475 n.8 (1977) (quoting *Sherbert*, 374 U.S. at 409).

black, neither should he be denied them because he is a Catholic.¹⁷⁵ Justice Scalia made this comparison explicit in his *Davey* dissent, citing *Brown v. Board of Education* and *United States v. Virginia* before going on to argue that “[t]his case is about discrimination against a religious minority” made up of “those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry.”¹⁷⁶ Expounding the analogy, he observed that government “may not discriminate *against* blacks or *in favor of* them; it cannot discriminate a little bit each way and then plead ‘play in the joints’ when haled into court.”¹⁷⁷

There is, however, an important flaw in Scalia’s analogy to racial and gender discrimination. While race and gender are (virtually always) unchosen personal characteristics that American society has come to view as illegitimate bases for discrimination, one’s religious views (like one’s speech) are voluntary on some level. Although children often inherit the beliefs of their parents, individuals’ religious beliefs and identities are eminently mutable. A related and more important objection is that the exclusions at issue in cases like *Davey* are concerned not with the *identity* of an individual or an institution as such, but instead with the *ideas* being expressed or studied. The state is permitted to fund speech and education that further its policy goals while denying money to activities that do not. Declining to extend such funding to forms of education that do not adequately serve the legislature’s purposes does not necessarily constitute discrimination against, for example, Catholics as Catholics, in the same sense that Jim Crow laws represented discrimination against blacks as blacks. Citizens remain free to worship as they see fit and should be neither punished nor prevented from doing so. This freedom, however, is not infringed by the government’s decision to fund other activities. While the government cannot target religious exercise for special restrictions or regulations, it is not obligated to subsidize faith.

¹⁷⁵ Or a Christian, or a Person of Faith—the category can be described at any level of abstraction.

¹⁷⁶ *Locke v. Davey*, 540 U.S. 712, 731–33 (2004) (Scalia, J., dissenting) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) (striking down racial segregation in public schools); *United States v. Virginia*, 518 U.S. 515, 549–51 (1996) (requiring that women be admitted to the Virginia Military Institute)).

¹⁷⁷ *Id.* at 728.

2. *Official Preference for Secular Education*

One might object here that selective funding schemes implicate the Establishment Clause by promoting certain views of religion to the exclusion of others. However, government entities fund secular institutions—public schools, for instance—all the time. The public schools undeniably represent a massive government subsidy for a secular activity for which there are, and always have been, direct religious analogues. Yet no one (at least, no one on the bench) argues that the government is compelled to offer either religious schools of its own design or funding for attendance at private religious schools as a necessary consequence of offering secular public schools. Further, the public schools are not required to teach a curriculum that is “neutral” with respect to religion. Indeed, treating some subjects “neutrally” has been held to violate the Establishment Clause. For instance, schools can teach the theory of evolution but cannot teach creationism or its descendants, “creation science” and “intelligent design.”¹⁷⁸ Similarly, public schools can permissibly promote contraceptive use at the expense of abstinence-only education, even if this decision has the effect of encouraging some students to rethink the sexual mores taught by their parents.¹⁷⁹ Public schools cannot tailor their curricula to the demands of a particular sect or group of sects;¹⁸⁰ they avoid preferential treatment of certain religions by maintaining their secular character. “Secularism” is not, for constitutional purposes, a religion, and states may promote it without risking an Establishment Clause violation.

Of course, there are constitutional reasons for keeping religion out of public school classrooms—reasons that may not enter into the debate over funding for private education. But in the context of government subsidies for private schools, other considerations arise. Most prominently, providing funds on equal terms to all religious and secular institutions may have the effect of disproportionately favoring some religious groups over others. The justifications for a bar on government aid to religion are strongest when the gov-

¹⁷⁸ *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (creation science); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 764 (M.D. Pa. 2005) (intelligent design).

¹⁷⁹ See Green, *supra* note 160, at 954.

¹⁸⁰ E.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1064 (6th Cir. 1987) (citing *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)).

ernment itself is the actor; *Witters* and *Zelman* make clear that the weight of these interests is diminished beyond the point of creating a constitutional mandate when private action becomes involved. The values behind those justifications do not simply vanish, and *Davey* indicates that the government may act to further those interests even when the Constitution does not require it to do so.¹⁸¹

This state of affairs makes sense in a diverse and pluralistic liberal democracy. There are simply too many religious perspectives in contemporary America for the government to concern itself with accommodating all of them.¹⁸² Furthermore, securing religious freedom for members of minority faiths requires ensuring that no religion is able to write its dictates into law.¹⁸³ This requirement in turn “entails the establishment of a civil order—the culture of liberal democracy—for resolving public moral disputes.”¹⁸⁴ Because the Establishment Clause bars any single religion or group of religions from becoming ascendant, the government must operate under a secular framework. In order to sustain this sort of order, the state must also be privileged to promote the substantive content and implications of that framework: “small-L” liberalism, tolerance, the academic pursuit of knowledge, and the like. Citizens are free under this framework to entertain and to espouse beliefs external to—and even contrary to—those promoted by the government, but a state’s decision to subsidize secular activities does not obligate it to treat religious activities equally.

This principle extends to cases like *Davey*. The government is permitted to fund private activities that on its view further the

¹⁸¹ See *Davey*, 540 U.S. at 725 (2004) (stating that although exclusion was not mandated, “[t]he State’s interest in not funding the pursuit of devotional degrees is substantial”); see also Tebbe, *supra* note 23, at 1272–74.

¹⁸² Cf. *Emp’t Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 888 (1990) (“Any society adopting such a system [presumptively granting religious accommodations to generally applicable laws] would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them.”).

¹⁸³ See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 *U. Chi. L. Rev.* 195, 198–99 (1992).

¹⁸⁴ *Id.* at 198; see also John Rawls, *Political Liberalism* 212–54 (expanded ed. 2005). Rawls argues that an ideal secular, liberal political order involves an independent moral commitment, which means that it is not “a mere *modus vivendi*,” *id.* at 146 (as Professor Sullivan suggests, see Sullivan, *supra* note 183, at 200), but is instead a lasting, stable state of affairs. See Rawls, *supra*, at 146–50.

secular public order without being compelled to fund analogous religious activities. The Promise Scholarship did not establish a religion of secularism any more than the operation of the public school system does. Secular private schools are likely to further the government's educational goals in the same way as the public school system. Religious schools may also do so, but subsidizing them may create adverse effects that are familiar to followers of the debate over church-state separation arguments: divisiveness, the appearance of government endorsement of particular faiths, infringement of taxpayers' freedom of conscience, and so on.¹⁸⁵ Allowing government to fund religious schools improves its ability to provide its citizens with adequate education, while providing the complementary discretion not to fund religious schools enables local governments to tailor policy to fit particular needs. Neither choice violates the Establishment Clause.

III. CONSTITUTIONAL LIMITS ON THE NO-BURDEN RATIONALE

The Constitution does of course impose some limits on the state's ability to selectively fund religion. If government discretion were unchecked, the Religion Clauses would have scarcely any meaning at all: a state could creatively design its programs so as to promote some religions over others, to discourage the exercise of rights unrelated to religious practice, or to unduly skew private speech and behavior. This Part outlines and justifies four principles that circumscribe *Davey's* reach. These limits are freestanding, in that they are not implied by *Davey's* controlling no-burden rationale. Each one operates as a separate constitutional restraint on the government's authority to make funding decisions that implicate religion.

A. Animus

The last Part discussed three of the four arguments that Chief Justice Rehnquist deployed to uphold Washington's exclusionary scholarship program. It rejected the neutrality argument as theoretically unsound, and concluded that the *Davey* Court's emphasis on the historic importance of the interest in not funding the clergy

¹⁸⁵ See Tebbe, *supra* note 23, at 1272–74.

is ultimately irrelevant. It then went on to explain why the no-burden argument is sound both as a matter of doctrine and as a matter of theory. The Court's remaining argument—that the exclusion was not motivated by animus toward religion—forms the basis for the first limit on the government's authority to exclude religion.

Because they do not ordinarily burden citizens' First Amendment rights, government funding programs that exclude religion will typically be subject only to rational basis review. Of course, if a state enacts a funding scheme that actually infringes a citizen's religious autonomy—a right that should be viewed as fundamental, akin to that enjoyed in the realm of speech¹⁸⁶—the exclusion will be subject to strict scrutiny and struck down absent extraordinary circumstances. However, such actually burdensome laws will likely be rare, and limited to those that violate the principles outlined in the next two Sections. The *Davey* Court's emphasis on the legitimacy of Washington's disestablishmentarian purpose implies that some exclusionary laws will run afoul of the Constitution even though they do not actually violate any individual rights. Specifically, the Court suggested that, had Washington been motivated by a desire to harm a religious group, its decision to exclude devotional theology majors might have been treated as presumptively unconstitutional.¹⁸⁷

This rule is a valid one, and is consistent with other areas of individual-rights jurisprudence. The best way to understand it is in reference to the various equal protection cases in which the Court has refused to credit hostility toward certain groups as a legitimate government purpose.¹⁸⁸ Even though only rational basis review

¹⁸⁶ Cf. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (“The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief . . . has parallels in our First Amendment jurisprudence.”) (citing, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983)).

¹⁸⁷ See *Locke v. Davey*, 540 U.S. 712, 725 (2004) (stating that, because the Court found no animus and the state interest at issue was “historic and substantial,” the denial of funding was not “inherently constitutionally suspect”).

¹⁸⁸ See, e.g., *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“[A] bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (invalidating a zoning ordinance

should apply to selective funding programs (because they do not typically infringe any constitutional rights), the government remains obligated to justify its laws with a legitimate objective. Disfavor toward a particular group of people, however, is not a legitimate government interest.¹⁸⁹ Consequently, a law that evinces no other aim apart from hostility will fail even the lowest level of constitutional scrutiny.¹⁹⁰

B. Nonpreferentialism

Evenhandedness as between religious sects is “[a] basic principle of religious freedom,”¹⁹¹ which applies both in obvious cases (such as funding Catholic schools but not Baptist ones) and in more subtle ones (such as denying funding to schools not offering contraceptive services).¹⁹² This principle—referred to as nonpreferentialism—should be understood in the context of exclusionary funding pro-

that “appear[ed] . . . to rest on an irrational prejudice against the mentally retarded” and had no other justification).

¹⁸⁹ Professor Laycock sees in this no-animus qualification a window for suits challenging a wide range of exclusions, particularly in the educational context, because “[m]uch of the American tradition of refusing to fund private schools is derived from nineteenth-century anti-Catholicism.” Laycock, *Theology Scholarships*, supra note 2, at 187. As he acknowledges, however, there remains the potentially problematic possibility of an impermissibly motivated exclusion being repealed and re-enacted on the strength of different, facially legitimate purposes. See *id.* at 189.

¹⁹⁰ Professor Tebbe would invalidate only exclusions “that bar[] religious groups from exceptionally broad government support programs or otherwise present[] a stark mismatch between the scope of the exclusion and the scope of state aid.” Tebbe, supra note 23, at 1330. But this definition is so narrow as to be redundant and therefore meaningless: the situations it covers are already subject to the ban on unconstitutional conditions. See *infra* Section III.C. The “paradigmatic example”—an ordinance denying fire protection to places of worship—is impermissible not because it is an expression of distaste for religion (though we might suppose that to be likely), but because it requires a citizen to forego religious autonomy in order to receive a basic benefit. Tebbe, supra note 23, at 1330. In any event, Professor Tebbe’s account does not fit with the *Davey* Court’s use of the term “animus,” which was as a synonym for “the hostility toward religion which was manifest in *Lukumi*.” *Davey*, 540 U.S. at 724–25.

¹⁹¹ Tebbe, supra note 23, at 1319.

¹⁹² Cf. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“The Free Exercise Clause protects against governmental hostility which is masked as well as overt.”).

grams as a component of the Establishment Clause.¹⁹³ Understood as an autonomy right, free exercise does not justify nonpreferentialism: even a facially discriminatory funding program does not hinder anyone's right to practice his faith. Rather, such a statute should be understood to violate the Establishment Clause's ban on official state preference for one set of religious views to the exclusion of others. If all religious groups are included in a "true private choice" scheme, however, there is no risk of the government advancing any one of them in particular. Furthermore, as long as secular options are available, there is (at least under the Court's present doctrine) no undue advancement of religion as such.

Importantly, the rule demanding nonpreferentialism does not bar the state from advancing a secular agenda by excluding all religious options from its funding programs. Because secular, liberal democratic values do not constitute a "religion" for Establishment Clause purposes, the state may advance them in ways that would be impermissible if undertaken in furtherance of religious values. For example, if a state allows a student to use government funds at one religion's educational institutions, it cannot prohibit the student from using the funds at another religion's schools. Such an exclusion—one based on distinguishing between religious identities—would at least appear to constitute government advancement of the favored faith or faiths. This Establishment Clause dictate might be analogized to the limited public forum jurisprudence that has grown out of the Free Speech Clause. When the state creates a forum for speech, it may restrict who is allowed to take advantage of it¹⁹⁴ and the topics on which speakers may opine,¹⁹⁵ provided that the restrictions do not discriminate on the basis of viewpoint and are reasonable in relation to the forum's purpose.¹⁹⁶ A similar rule, applied to religion, would fit with the autonomy-based view of free exercise endorsed in *Davey*. While the state is not required to provide the means to practice religion, it may choose to do so by, for instance, subsidizing education in such a way as to send money

¹⁹³ See, e.g., *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

¹⁹⁴ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48–49 (1983).

¹⁹⁵ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974).

¹⁹⁶ See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.* 473 U.S. 788, 806 (1985).

“indirectly” to religious schools. The state may restrict how such funds are used so as to best further its goals (such as by refusing to pay for clerical education), but it may not impose restrictions based on religious “viewpoint.” That is, if the state chooses to create a program that pays for some form of religious exercise, it may not bar members of certain disapproved faiths from participating in the program.

It might be objected here that the exclusion in *Davey* violated this prohibition on preferential treatment. In dissent, Justice Scalia argued:

This case is about discrimination against a religious minority. Most citizens of this country identify themselves as professing some religious belief, but the State’s policy poses no obstacle to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far narrower set.¹⁹⁷

Similarly, *Colorado Christian* held that the scholarship program at issue discriminated “on the basis of religious views or religious status.”¹⁹⁸ These arguments rest on a shared misinterpretation of the statutes involved. While the statutes had the effect of allowing funds to flow to some religious activities but not to others, they did so on a basis unrelated to the particulars of any faith or the religious identity of any individual or group. *Davey* was not denied his scholarship, and *Colorado Christian* was not rejected from the state’s program, *because* of evangelical Christian identity. The purpose and effect of the exclusions were not to elevate other faiths over evangelicalism but to promote secular activities—a promotion that the state is permitted to undertake. The state can, for instance, exclude “devotional” theology majors but not “secular” or academic theology majors.¹⁹⁹ Similarly, in distinguishing between insti-

¹⁹⁷ *Locke v. Davey*, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting).

¹⁹⁸ *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (quoting *Emp’t Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990)).

¹⁹⁹ See *Davey*, 540 U.S. at 716; *id.* at 734–35 (Thomas, J., dissenting) (noting that “the study of theology does not necessarily implicate religious devotion or faith” and joining Justice Scalia’s dissenting opinion on the assumption that the exclusion applies only to “devotional” and not to “secular” theology majors).

tutions in which religion pervades every activity and those in which it is an ancillary aspect of an otherwise secular endeavor, the state does not establish a church. Whereas a “sectarian” institution may still provide an essentially secular education, many religious schools are specifically designed to indoctrinate or to proselytize. The differences are of “institutional and educational policy, not religious belief or identity.”²⁰⁰ A state may properly determine that such distinctions are necessary for the furtherance of secular educational goals. The state cannot therefore pick and choose among religions as such, but it may identify and promote secular values even where the result is that government money goes to some religious institutions but not to others.²⁰¹

C. Unconstitutional Conditions

Justice Scalia and Professor Laycock worry that *Davey* empowers states to penalize citizens’ exercise of their religious freedom by denying them other forms of aid.²⁰² For instance, Justice Scalia sug-

²⁰⁰ See Brief of Am. Jewish Cong. et al. as *Amici Curiae* in Support of Appellee Baker and in Support of Affirmance at 21, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (No. 07-1247), available at http://www.aclu-co.org/docket/200713/200713_description.html.

²⁰¹ A related concern is the process by which the government determines what institutions and activities to fund. The *Davey* Court did not have to address this issue, because Washington relied solely on each university’s self-reporting. By contrast, the Colorado statute required the state to inquire into whether the school’s educational policies reflected the doctrine of a particular religion and whether its community was made up primarily of members of one religion. Both of these criteria forced the state to make judgments about religious truth, a practice that the Establishment Clause bars. See *Colo. Christian*, 534 F.3d at 1263–66.

One problem with this blanket condemnation of inquiry into an institution’s religiosity, however, is that it threatens to unduly limit the state’s ability to fund only secular activity. If a state must trust institutions to self-identify as being disqualified from funding, it can expect them to under-report religious involvement (if perhaps only unintentionally) and thus to undercut the operation of an otherwise constitutionally permissible program. Judge McConnell denied that his opinion would have this effect, see *id.* at 1266 (“We do not mean to say that states must allow universities to be the final judge of their own eligibility for state money—of course not.”), but it is difficult to see how else it could operate. The challenge of designing a constitutionally permissible program that is inclusive of some religious entities while exclusive of others may lead states to model their laws after *Davey*’s scholarship program, even if they would otherwise find a different solution to be preferable.

²⁰² See *Davey*, 540 U.S. at 734 (Scalia, J., dissenting); Laycock, *Theology Scholarships*, *supra* note 2, at 196–97.

gests that states are now free to deny medical benefits to the clergy.²⁰³ Precedent already exists, however, to provide grounds for holding such a law to be unconstitutional. The government, the Court has held, cannot condition a benefit on a citizen's abdication of an unrelated right.²⁰⁴

Thinking of this rule in terms of the government's right to advocate secular principles is helpful. When the state funds secular education by operating public schools or distributing vouchers for use at secular private schools, it is in effect promoting secular values. When the state conditions other benefits on the non-exercise of a constitutional right, however, the state can no longer be seen as playing the role of advocate. Such a restriction crosses the line between encouraging secular education (a permissible state prerogative) and penalizing religious practice (a prerogative barred by the Free Exercise Clause). Thus, while the state need not provide funding for church schools and may preferentially fund secular educational options, it may not deny other benefits in an effort to discourage families from choosing a religious school. For instance, suppose that a state enacts a program providing medical care to uninsured children. The program cannot require a family receiving the program's benefits to give up its right to choose a religious education, because the state's interest in ensuring that children receive adequate medical care is unrelated to the interest in secular education that such a requirement would purport to further. Such a condition would constitute not permissible advocacy of secular positions and entities, but punishment of citizens who prefer religious alternatives.²⁰⁵

²⁰³ *Davey*, 540 U.S. at 734 (Scalia, J., dissenting).

²⁰⁴ See, e.g., *Maier v. Roe*, 432 U.S. 464, 474–75 n.8 (1977) (“If Connecticut denied general welfare benefits to all women who had obtained abortions . . . strict scrutiny might be appropriate . . .”); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258 (1974) (“[A] classification which operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration[] must be justified by a compelling state interest.”) (internal quotation marks omitted).

²⁰⁵ Judge McConnell argues that this general constitutional limitation on the state's power prevents selective educational funding. If the government is in the business of providing secular education to its citizens, one might think that it should not be able to deny that benefit because a student desires to supplement it with a religious component. See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev. 989, 1017–19 (1991). This argument, however, depends on the premise that the religious and secular elements of education in a sec-

D. Other Rights

Although under *Davey* the government is generally empowered to exclude religion from its support without violating the Free Exercise Clause, it is not permitted to infringe other individual rights in the process. States cannot, for instance, exclude religion in such a way as to violate an individual's rights under the Equal Protection Clause. The government also cannot implement a selective funding policy with insufficient procedural safeguards to meet the requirements of the Due Process Clause. The Free Speech Clause imposes a third such limit. Because speech and religion are so closely intertwined—especially in the educational realm—speech deserves special attention.

As discussed above,²⁰⁶ a state may create a “limited public forum” for speech that is restricted to certain topics or speakers so long as those limits are drawn in furtherance of the forum's purpose. The state may not, however, exclude speech that is otherwise within a forum's parameters on the basis of the particular views being expressed.²⁰⁷ This ban on viewpoint discrimination has ramifications for funding schemes that exclude religion, because religious entities engage in all sorts of activities that contain speech components. If a government program creates or enables speech on a subject or a range of subjects, denying its benefits to persons who

tarian school are separable. At many schools, those elements are not easily distinguished: the school's religious identity pervades the study of other subjects. *Tebbe*, supra note 23, at 1325. Indeed, the desire to intertwine faith and education—to teach from a religious perspective—is often the reason for establishing a sectarian school in the first place. *Id.*; see also *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 379 (1985) (quoting certain religious schools' policy statement that “it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-pervading force in the educational program”) (emphasis omitted). Judge McConnell recognizes this point, but claims that it does not affect his position. See McConnell, supra, at 1019–20. One problem for this argument is that the government cannot avoid paying for religious education at such schools unless it cuts them out entirely. Moreover, it is hard to see how the government can be seen as imposing a condition on its provision of a secular education when in fact its money would go towards an education that is by design not secular.

²⁰⁶ See supra notes 194–96 and accompanying text.

²⁰⁷ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

speak on permitted subjects from a religious perspective may constitute viewpoint discrimination.²⁰⁸

The Court's conclusions with regard to viewpoint discrimination in *Davey* and *Rosenberger* appear inconsistent. In *Rosenberger*, the Court held that a university could not exclude a religious student publication from a generally available funding scheme.²⁰⁹ *Davey* declined to extend this logic, distinguishing *Rosenberger* (in a footnote) by asserting that the Promise Scholarship Program was not a speech forum.²¹⁰ This distinction is not wholly satisfying. As Professor Laycock has pointed out,²¹¹ *Rosenberger* rested on a finding of viewpoint discrimination,²¹² which is "presumptively unconstitutional" regardless of the setting.²¹³ Furthermore, a student's choice of where and what to study surely has free speech implications. With that observation in mind, Laycock argues that denying *Davey*'s scholarship on religious grounds, even if permissible insofar as the Religion Clauses are concerned, should have been treated as impermissible viewpoint discrimination under the Free Speech Clause.²¹⁴ If that argument were to prevail, *Davey* and *Rosenberger* would be difficult, if not impossible, to reconcile.

The Chief Justice's brief and dubious discussion of the issue, however, hints at a more plausible distinction between the cases. Rehnquist suggested drawing a line between cases where the government enacts a program specifically *for the purpose* of promoting speech—call it a "true speech forum"—and those where it enacts a program for some other purpose that nonetheless *has an impact on* speech rights.²¹⁵ If this distinction is sound, the constitutional bar

²⁰⁸ See Laycock, *Theology Scholarships*, supra note 2, at 192.

²⁰⁹ *Rosenberger*, 515 U.S. at 837.

²¹⁰ *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004).

²¹¹ See Laycock, *Theology Scholarships*, supra note 2, at 192 ("[F]orum analysis was a distraction, because *Davey* showed viewpoint discrimination.").

²¹² *Rosenberger*, 515 U.S. at 831.

²¹³ Laycock, *Theology Scholarships*, supra note 2, at 192 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 48–49 (1983)).

²¹⁴ See *id.* at 192–93.

²¹⁵ See *Davey*, 540 U.S. at 720 n.3 ("[T]he Promise Scholarship Program is not a forum for speech. The purpose of the Promise Scholarship Program is to assist students from low- and middle-income families with the cost of postsecondary education, not to encourage a diversity of views from private speakers.") (internal quotation marks omitted).

against restrictions on speech should apply more strongly in the former set of cases than in the latter. When the government provides a means by which citizens may speak about various subjects, it may not refuse access to religious perspectives (or any other disfavored viewpoints) absent an extraordinary justification. The Free Speech Clause thus limits the government's exclusionary power in cases like *Rosenberger*. By contrast, when a state creates a funding scheme for some other primary purpose (such as education, professional training, or foster care), excluding religion does not trigger the constitutional ban on viewpoint discrimination.

This extrapolation of *Davey* fits with existing First Amendment doctrine, analogous to the Court's treatment of limited public forums. Generally speaking, where the government establishes such a forum, it is free to impose reasonable limits on the forum's use in order to further its purpose.²¹⁶ This principle can be extended to government funding schemes more generally. The purpose of the Promise Scholarship Program, for instance, was to provide funding for a broad range of *secular* vocations and professions. Although education and vocational training undeniably involve important speech aspects, the state's purpose was not the promotion of speech. Consequently, the state was free to limit the program's uses to suit its purpose.

In *Rosenberger*, by contrast, the University of Virginia's goal was to promote speech, as such, on a wide range of topics relevant to the university's community and educational mission.²¹⁷ The *Wide Awake* publication provided news and commentary on such topics from a Christian perspective. The magazine therefore fit within the program's parameters, which were defined broadly enough to include publications with an overt political slant.²¹⁸ Because excluding *Wide Awake* did not serve the forum's purpose, the Court rightly viewed the exclusion as an impermissible restriction on the speech rights of a segment of the student body.

²¹⁶ See *Rosenberger*, 515 U.S. at 829–30 (citing *Cornelius*, 473 U.S. at 804–06; *Perry*, 460 U.S. at 46, 49).

²¹⁷ See *id.* at 824 (noting that one category of student group that could seek funding was “student news, information, opinion, entertainment, or academic communications media groups”) (internal quotation marks omitted).

²¹⁸ See *id.* at 825 (noting that while electioneering and lobbying were prohibited, an organization was not denied access to university funds because it espoused a political viewpoint).

Reconciling *Davey* and *Rosenberger* in this way preserves the Free Speech Clause as a real and important limit on the state's power to exclude religion from its services. Where the government consciously creates a forum for speech, whether a physical space or a "metaphysical"²¹⁹ one (like the program in *Rosenberger*), it may not exclude religious perspectives on subjects within the scope of the forum's purpose.²²⁰

²¹⁹ *Id.* at 830.

²²⁰ In a case decided just before this Note went to press, the Seventh Circuit confronted precisely this issue. *Badger Catholic, Inc. v. Walsh*, Nos. 09-1102, 09-1112, 2010 WL 3419886 (7th Cir. Sept. 1, 2010). The University of Wisconsin required every student to pay a fee to fund various extracurricular activities. *Id.* at *1. Because many of the groups receiving such funds used them to pay for speech, the court treated the funding program as a permissible viewpoint-neutral public forum. *Id.* (citing *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000)). The only string attached to these funds was that they could not be used to pay "for worship, proselytizing, or religious instruction"; the use of activity fees for "dialog, discussion, or debate from a religious perspective" was permissible. *Id.* *Badger Catholic*, a Roman Catholic organization, sought to use these generally available funds to pay for activities that it self-identified as falling within these three prohibited categories. See *id.* at *11 (Williams, J., dissenting) (observing that "the University plays no role in labeling activities. . . . It instead asks the student groups to self-identify those activities that are worship, proselytizing, and prayer and then it only declines to fund such activities.") The school denied the request, and argued on appeal that it was within its rights under *Davey* to do so. *Id.* at *4 (majority opinion). Chief Judge Easterbrook, writing for the panel majority, primarily distinguished *Davey* by arguing that because it operated a public forum, the University was not permitted to engage in viewpoint discrimination through exclusion of certain forms of religious speech. *Id.*

Judge Williams forcefully dissented. The majority's failure to acknowledge a distinction between worship and dialog "degrades religion and the practice of religion" by lumping all religious activities in with speech that is otherwise protected by the Free Speech Clause: "If religion, and the practice of one's religion, can be described as merely dialog or debate from a religious perspective, what work does the Free Exercise clause of the First Amendment do?" *Id.* at *9 (Williams, J., dissenting). Moreover, the University did not engage in any cognizable form of religious discrimination. It "does not deny money to *Badger Catholic* for expressing the Catholic version of worship; it denies money to any group to practice its version of worship." *Id.* The forum, in Judge Williams's view, "is meant to further the educational and extracurricular experience of students, and . . . [t]he University has the discretion to decide that certain activities are worth funding over others, so long as its decision-making criteria is [sic] viewpoint neutral." *Id.* at *10. Because no other religious or secular groups were granted funds for activities equivalent to Roman Catholic worship and proselytization, this requirement was met and the program was constitutionally permissible. *Id.* at *10-12. Finally, Judge Williams makes a point in passing that reinforces the contention discussed above (see *supra* Part II.A.2) that neutrality is ultimately in the eye of the beholder:

The University ha[s] done nothing to block Badger Catholic's or any other group's right to practice its religion. It has chosen instead to take a neutral stance on that core constitutional right, which preserves the purpose of the forum (enhancing educational and extracurricular experiences) without providing additional benefits to those who choose to engage in religious practices as opposed to those who do not.

Id. at *13. Whereas Chief Judge Easterbrook views neutrality as requiring the University to fund worship if it funds speech, Judge Williams thinks that it can safely draw its funding baseline at "speech on secular subjects" or somewhere similar. The problem, we see once again, is insoluble except by the arbitrary act of a judicial or legislative majority.

For reasons explained in the body of this Note, Judge Williams has the better of these arguments. The University should have been allowed to define the scope of the forum it created, so as to permit funding of speech on various topics from a religious perspective (as in *Rosenberger*) while denying it to outright worship and proselytization. The school could fairly conclude that the former variety of speech would further its educational mission, while the latter would not. Furthermore, Judge Williams makes an excellent point in arguing that treating all religious activity as speech subject to the Free Speech Clause's various forum and neutrality doctrines threatens the Free Exercise Clause's distinct meaning. (And, again, attempts at enforcing neutrality in the context of religious exercise are doomed to unsatisfactory arbitrariness.) Though speech and religion are inextricably intertwined, a satisfying account of the three relevant Clauses ought to provide each one with its own meaning. One component of such an account must be an acknowledgment that some activities that might be described as speech (if stripped of context) are ultimately components of religious exercise, and should be treated as such.

An interesting and difficult question remains regarding what speech is within the realm of a given forum's purpose and what crosses into pure proselytization or worship. Activities involving pure proselytization or worship might fall outside a government program's purpose in the same way that training for the clergy falls outside the purpose of a program providing education for secular professions but allowing some religious content. The Court has in past cases indicated that it will go quite far in finding speech to be merely "from a viewpoint" and not proselytization or worship. Compare, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108–09 (2001) (characterizing the club's activity as "teaching morals and character development" from a religious viewpoint and finding that excluding it from participating as an after-school activity constituted viewpoint discrimination), with *id.* at 131–34 (Stevens, J., dissenting) (arguing that the club's activities were properly classified as religious proselytization and could therefore have been excluded), and *id.* at 137–39 (Souter, J., dissenting) (describing the club's meetings and arguing that they amounted to worship); Compare *Rosenberger*, 515 U.S. at 826 (finding that *Wide Awake* addressed issues from a Christian perspective), with *id.* at 865–68 (Souter, J., dissenting) (examining the publication closely and arguing both that "[i]t is nothing other than the preaching of the word" and that funding such activity violated the Establishment Clause). Where the Court draws the line between the permissible and impermissible will define the precise scope of the viewpoint discrimination limit discussed here, but it is not immediately germane to the subject at hand. Of course, states can largely avoid this issue by asking funding applicants to self-identify programs falling outside the program's scope, as in *Davey* and *Badger Catholic*.

Professor Tebbe would disagree with this treatment of the cases. He takes the position that *Rosenberger* was wrongly decided, because as a right to autonomy akin to free exercise, freedom of speech is not violated in the usual case by discrimination in funding, even if based on viewpoint.²²¹ Tebbe goes on to argue, in agreement with Justice Souter's dissent in *Rosenberger*, that exclusions of religious speech need not always be seen as viewpoint discrimination (evidently assuming *arguendo* that such discrimination is impermissible).²²² Instead, the policy at issue in *Rosenberger* was on the Tebbe-Souter view a legitimate content-based restriction drawn to further the forum's purpose.²²³

There is reason to think that Tebbe is to some extent correct with regard to viewpoint discrimination in the funding context: the Justices have suggested as much.²²⁴ It is however a commonly held intuition (along the lines of the notion that nonpreferentialism is a central tenet of religious freedom) that the government should not be permitted to pick and choose which speakers are permitted to take advantage of a generally available speech forum that it has created. This intuition was at work in *Rosenberger*, and the Court should not abandon it. Religious speakers frequently have opinions on issues that secular speakers also address. Keeping out religious speakers can silence (or at least seriously disadvantage) one whole side of a debate. Tebbe thinks that the university's policy regarding religious publications paralleled its uncontroversial exclusion of all political activities,²²⁵ but the facts of the case (as the majority described them) cause this argument to break down. The magazine covered topics of general interest, including racism, crisis pregnancy, and eating disorders.²²⁶ The exclusion of "political activities"

²²¹ See Tebbe, *supra* note 23, at 1304–05.

²²² *Id.* at 1305 (citing *Rosenberger*, 515 U.S. at 895–96 (Souter, J., dissenting)).

²²³ See *id.*

²²⁴ See *supra* notes 164–68 and accompanying text (discussing *Rust v. Sullivan* and *National Endowment for the Arts v. Finley*).

²²⁵ *Id.* at 1306.

²²⁶ *Rosenberger*, 515 U.S. at 826. Justice Souter disputed the majority's characterization, concluding that *Wide Awake* was not mere commentary from a religious perspective, but "nothing other than the preaching of the word." *Id.* at 868 (Souter, J., dissenting). For purposes of understanding the doctrine, however, it is best to take the facts as the majority understood them.

covered only “electioneering and lobbying,”²²⁷ but the bar on religious speakers covered any publication that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.”²²⁸ Perhaps the analysis would have changed if the ban had covered only proselytizing activities (a closer analogue to lobbying and electioneering), but the majority did not treat the case that way. Tebbe’s position apparently entails an exception (for religious speech) to the general rule against viewpoint discrimination, but that exception is not one that is likely to be accepted by the courts, a fact he acknowledges.²²⁹ Given this path dependency, it seems better to attempt to make sense of the cases as they stand. The distinction sketched above provides one way in which courts might be able to achieve this goal without abrogating existing case law.

CONCLUSION

In remarkably few words and with little elaboration, *Locke v. Davey* laid out four distinct arguments for concluding that it was constitutional for Washington not to pay for Joshua Davey to become a preacher. Courts should discard two of them. First, the majority’s apparent reliance on the historical importance of the state interest in not funding the clergy is belied by the fact that the Court found no significant constitutional violation and applied no heightened standard of review. Second, the Court’s implicit argument that the scholarship was effectively neutral is self-undermining, because of the incoherence of the very concept of neutrality. Whether a funding program is neutral depends on the baseline from which a reviewing court measures neutrality, and the concept itself cannot answer this all-important question. Courts should instead rely on the “play in the joints” rule, which entails an understanding of the right to free exercise as a limited right to autonomy that does not of itself require that all religions or religious activities be funded evenhandedly. This third rationale fits the text of the Constitution, gives the two Religion Clauses independent meaning, and is of a piece with the Court’s understanding of similarly structured rights such as those to abortion and free speech.

²²⁷ Id. at 825 (majority opinion).

²²⁸ Id. at 823 (internal quotation marks omitted).

²²⁹ See Tebbe, *supra* note 23, at 1307.

The *Davey* Court's fourth argument—that Washington's law was not a product of hostility towards religion—forms the basis of the first of four important limits on the state's power to exclude religion; that is, animus does not qualify as a legitimate legislative objective. Freestanding prohibitions on favoring some faiths over others, on imposing unconstitutional conditions, and on restricting other constitutional rights further limit the state's authority. This reading of *Davey* harmonizes the case with other Religion Clause doctrine and protects religious liberty while allowing local governments the freedom to adapt policy to local conditions.

The hypothetical city from the Introduction should be able to subsidize attendance at Country Day without also sending its money to Episcopal or Covenant Academy. In contrast, a state could not deny all funding to a hospital merely because it declines to perform abortion: such a condition would run afoul of the rule against unconstitutional conditions, and the mere refusal to provide a particular service need not affect the provision of the other services that the state wishes to fund. Further, if the state seeks to implement a program that would have the effect of distinguishing between religious institutions, it must do so on secular, institutional bases so as not to privilege one religion over others. Thus should the hypothetical city wish to provide vouchers to students at Episcopal but not to those attending Covenant Academy, it would have to explain its decision not in terms of points of doctrine or religious identity but of the schools' design.

While the leading cases in this area center on religion and education, the underlying logic of the no-burden rationale is, indeed, "readily extendible"²³⁰ to government programs providing funds for medical treatment, social services, and the like. The operative principle—that ordinary refusals to fund religious activity typically do not impinge upon free exercise rights—has no necessary connection to education. Where the government has plausible, legitimate reasons to fund only secular services, *Davey* should be read to allow it to do so. The state cannot exclude religious groups on the basis of animus toward religion, but the state nonetheless should be permitted, for instance, to fund research into evolutionary biology while refusing to support "creation science" research. Similarly, if a

²³⁰ *Locke v. Davey*, 540 U.S. 712, 734 (2004) (Scalia, J., dissenting).

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hospital or some other service provider insists on integrating religion into its treatment programs, the state properly may rescind funding insofar as its programs are intertwined with religious proselytization.

All these considerations point to a rule permitting exclusions of religion that is both conceptually broad and carefully circumscribed. States are vested with this authority to exclude so that they can craft solutions to difficult local problems that the judicial branch is incapable of solving at the national level. Circumstances will differ from state to state and indeed from school district to school district or hospital to hospital. Legislatures and school boards should have the freedom to properly address the issues their communities face, and if *Davey* is read properly, they already do. Although Justice Scalia's observation about the extension of the principle that *Davey* articulated was prescient, his fears about its consequences and his demands for neutrality ultimately should not carry the day.