

FINDING A CEILING IN A CIRCULAR ROOM: *LOCKE V. DAVEY*, FEDERALISM,
AND RELIGIOUS NEUTRALITY

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The text of the U.S. Constitution clearly distinguishes religion from non-religion by providing that while Congress may pass laws concerning many subjects and prohibiting many things, Congress may not make laws respecting the establishment of religion or prohibiting religious exercise.¹ As the distinctiveness of religion is clear from the text, the Court has had no problem settling that religion, as a subject matter, and religious believers, as a class of persons, are constitutionally distinct.² Though not explicated in the text, it is equally clear, and equally settled, that the Religion Clauses tug the government in opposite directions. Noting this tension, the Court has tread the line between the Clauses carefully, holding that if the government opposes the establishment of religion too vigorously it will burden religious exercise,³ and if the government seeks to accommodate religious exercise too liberally it will establish religion.⁴ However, while these propositions—that religion is distinct and that there is tension between the Clauses—are clear and settled, the Court has struggled mightily to reconcile them. That is, the Court has not been able to answer the following question: How differently may the

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¹ The text of the Religion Clauses provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

² For example, the Court has held that because religion is constitutionally distinct from non-religion, the Constitution requires the government to exempt people from laws that substantially burden their religious beliefs; but the Constitution does not require the government to exempt people from laws that substantially burden their secular conscientious beliefs. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (“Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.”).

³ *See, e.g., McDaniel v. Paty*, 435 U.S. 228 (1978).

⁴ *See, e.g., Board of Educ. of Kiryas Joel Village Sch. Dist v. Grumet*, 512 U.S. 687 (1994).

government treat religion from non-religion under one Clause without violating the other?

In the government funding context, this bears on the question of whether states may exclude religious organizations from generally available funding programs. This is a question of both practical and normative significance. Practically, the question is quite significant to many states considering K-12 voucher programs. If the answer to this question is that the Free Exercise Clause requires the government to include religious organizations in funding programs, then states must include religious schools in their voucher programs. Consequently, tax dollars that have been reserved for secular schools will soon end up going to religious schools. Although government funding of religious education might be desirable for some,⁵ it is troubling for many American taxpayers.⁶ Significantly, because government funding of religious education is troubling for many taxpayers, a constitutional rule requiring states to treat religious schools like secular schools might discourage many states from experimenting with voucher programs. That such a rule might discourage states from creating voucher programs is worrisome—not only because voucher programs might be a good idea, but also because many low-income communities might *need* this sort of educational experimentation.⁷ Alternatively, if the answer to this question is that in pursuing the goals of the Establishment Clause the government may exclude religious organizations from funding programs, then many

⁵ See, e.g., The Becket Fund for Religious Liberty, *Schools*, at <http://www.becketfund.org/index.php/topic/7.html> (“The Becket Fund believes that government may not specially exclude schools or students from government funding, or any other government benefit, simply because they are religious.”)

⁶ See, e.g., Americans United for Separation of Church and State, *Vouchers/Religious School Funding*, at http://www.au.org/site/PageServer?pagename=issues_vouchers (“Americans must be free to contribute only to the religious groups of their choosing. Voucher programs violate this principle by forcing all taxpayers to underwrite religious education.”)

⁷ See Black Alliance for Educational Options, *Tax-Supported Scholarships (Vouchers)*, at http://www.baeo.org/programs?program_id=5&program_category_secondary_page_id=20.

deserving and benevolent organizations might be discriminated against under the guise of the U.S. Constitution. That their Constitution sanctions this discrimination would surprise, and even worse, upset, many Americans.

Normatively, the question is quite significant to constitutional lawyers and scholars. If the answer to this question is that the Free Exercise Clause requires the government to include religious organizations in funding programs, then James Madison's argument about the taxpayer's conscience⁸ will be eradicated from First Amendment law, and thus, a foundational work on church-state relations will no longer apply to constitutional adjudication. Additionally, if the government must include religious organizations in their funding programs, the discretion that states have in developing their own church-state partnerships will be limited. This limitation on state discretion is an important addition to church-state law because many believe that the Religion Clauses were originally intended and understood to grant states control over how they partner with religious organizations.⁹ However, if the answer to this question is that the government may exclude religious organizations from generally available funding programs, there is a risk that the primary criterion of church-state jurisprudence—neutrality towards religion—will be lost.

This Article attempts to answer the question of how differently the government may treat religion from non-religion under one Clause without violating the other. My

⁸ In his Memorial and Remonstrance Against Religious Assessments, James Madison argued that government funding of religion violates the taxpayer's conscience. The Remonstrance can be found in 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland et al eds., 1973). The Remonstrance also can be found in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63-72 (1947) (appendix to opinion of Rutledge, J. dissenting).

⁹ See STEVEN SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-54 (Oxford University Press 1995); and EDWARD S. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 106 (Michie Co., 1951) (declaring that "the principal importance of the [First] Amendment lay in the separation which it effected between the respective jurisdictions of State and nation regarding religion . . .").

answer is inspired and informed by the Court’s 2004 decision in *Locke v. Davey*.¹⁰ In *Davey*, the Court addressed a claim by a student, Joshua Davey, that the State of Washington unconstitutionally excluded him from the Washington State Promise Scholarship.—a college scholarship awarded only to those students who satisfied certain academic,¹¹ financial,¹² geographic,¹³ and religious¹⁴ requirements. Joshua Davey satisfied the first three conditions, but because he declared a double major in Business Administration and Pastoral Ministries at a religious college, Davey failed to satisfy the fourth condition prohibiting the use of the Promise Scholarship for the study of religion from a devotional perspective. After Washington denied him the scholarship, Davey claimed that Washington violated three provisions of the U.S. Constitution¹⁵ by denying Davey the scholarship based on his decision to major in Pastoral Ministries at a religious college. The Court rejected Davey’s claim, holding that at least in certain contexts the government may exclude an individual from a funding program on the basis of religion.

¹⁰ 540 US 712 (2004).

¹¹ Washington provided scholarships only to students who ranked in the top 15% of the graduating class, or who had performed a 1200 or better on the Scholastic Assessment Test I, or a score of 27 or better on the American College Test. *Id.* at 716.

¹² Washington provided scholarships only to students with a family income below 135% of the state median. *Id.*

¹³ Washington provided scholarships only to students who “enroll at ‘least half time in an eligible postsecondary institution in the state of Washington.’” *Id.*

¹⁴ Washington provided scholarships only to students who did not pursue a degree in theology at the institution while receiving the scholarship. *Id.* It should be noted this is a statutory requirement that “simply codifies the State’s constitutional prohibition” on public funding of religious education. *Id.* It also should be noted that this fourth requirement permits applicants to major in theology from an academic perspective but does not permit applicants to major in theology from a perspective that is “devotional in nature or designed to induce religious faith.” *Id.*

¹⁵ One, Davey claimed that Washington violated the Free Speech Clause by discriminating on the basis of viewpoint—that is, Washington refused to fund Davey’s studies because Davey decided to study religion from a devotional perspective. Two, Davey claimed that Washington violated the Free Exercise Clause by burdening his religious exercise with a religiously discriminatory law. And three, Davey argued that Washington violated the Equal Protection Clause by discriminating on the basis of religion. It should be noted that the merits of Davey’s free speech and equal protection claims will not be addressed in this Article.

Much that has been written about *Davey* has been negative. Immediately after the Court issued the decision, the Council for Christian Colleges & Universities expressed its disappointment with the ruling.¹⁶ Several conservative publications featured articles criticizing the decision.¹⁷ And several legal scholars sharply derided the *Davey* Court's reasoning.¹⁸ Perhaps the most incisive academic criticism has come from Professor Laycock, who warned in his Harvard Law Review article that the decision's maximization of "government discretion and judicial deference . . . threatens religious liberty."¹⁹

In this Article, I take on these critiques of *Davey*. In so doing, I hope to accomplish three goals: (1) to defend the holding and reasoning in *Davey*; (2) to assuage the concerns of *Davey*'s critics; and (3) to develop a paradigm that grants states discretion over how they partner with religious organization but still limits states in a way that is consistent with the guarantees in the Religion Clauses. These goals are addressed in three Parts.

¹⁶ Council for Christian Colleges & Universities, *Statement on Locke v. Davey*, at http://www.cccu.org/news/newsID.260,parentNav.Archives/news_past_detail.asp ("On behalf of its 129 U.S. members and affiliates, the Council for Christian Colleges & Universities expresses its disappointment with today's ruling in *Locke v. Davey* . . .").

¹⁷ See, e.g., National Review Online, *Open Door to Religious Discrimination*, at <http://www.nationalreview.com/comment/dokupil200402270920.asp> (claiming that the Promise Scholarship "wrongfully discriminates against religion" and accusing the *Davey* decision of "erod[ing] the principle of neutrality toward religion").

¹⁸ Professor Eugene Volokh has criticized the opinion in his blog. See *The Volokh Conspiracy, Discrimination Against Religion*, at http://volokh.com/2004_02_22_volokh_archive.html ("I think Justice Scalia's dissent is far more persuasive than the Chief Justice's majority opinion. The one good thing I can say about the case is that the opinions are short enough that they'll be less trouble than usual to excerpt in my 2004 casebook supplement."). Also, Professor Stephen Bainbridge harshly criticized the opinion in his blog, approvingly citing Professor Volokh's criticism and suggesting that the opinion upheld anti-Catholic bigotry. See Professor Bainbridge, *Eugene Volokh on Locke v. Davey*, at http://www.professorbainbridge.com/2003/12/eugene_volokh_o.html. For a longer and more detailed critique of the opinion, see Thomas Berg & Douglas Laycock, *Davey's Mistakes and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L.J. 2 (2005).

¹⁹ Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 161 (2004).

Part I defends *Davey*. This defense begins by establishing the proposition that *Davey* is a case about both Religion Clauses. After Part I.A demonstrates that *Davey* is about both Religion Clauses, Part I.B branches into an analysis of *Davey*'s claim under each Clause. Part I.B.1 analyzes the claim under the Free Exercise Clause. This Subpart concludes that Washington's decision not to fund religious instruction is not a clear violation of the Free Exercise Clause; this conclusion rests on the distinction between *Davey* and three categories of free exercise violations. Part I.B.2 analyzes Washington's interest in excluding *Davey* under the Establishment Clause. This Subpart concludes that states have a substantial interest in developing policies on church-state relations that both prevent taxpayers from experiencing a conscientious burdening and that encourage harmony among different religious groups.

Part II claims that *Davey*'s grant of discretion to states in developing church-state partnerships might have many salutary effects. Considering the intent of the Framers, empirical data, and recent legal scholarship, this Part contends that discretion can lead to greater religious liberty and political accountability in the states.

Part III develops a paradigm that circumscribes state discretion—a paradigm in which the states have discretion to experiment with different levels of both the Establishment Clause and the Free Exercise Clause, but also a paradigm in which both religious disestablishment and liberty are guaranteed.

I. DEFENDING *DAVEY*

A. Why *Davey* Is a Case about Both Religion Clauses

Whether framed as a critique or a defense of *Davey*, every significant piece of scholarship on *Davey* has analyzed the merits of *Davey*'s claim exclusively in terms of

the Free Exercise Clause.²⁰ That many have limited their discussions of *Davey* to the Free Exercise Clause should not come as a surprise. After all, limiting a discussion of *Davey* to the Free Exercise Clause makes quite a bit of sense if one thinks about the case linearly. The linear equation is as follows:

Davey claimed that Washington violated his right to exercise his religious beliefs, a right incorporated to Washington through the 14th Amendment. Washington defended its exclusion of Davey by denying that the exclusion violated Davey's right to exercise his religious beliefs, and by arguing that Washington was required by the disestablishment mandate in its state constitution to exclude Davey from the program. Since the Supremacy Clause means that Washington's obligations under the U.S. Constitution trump any obligations Washington has under its state constitution,²¹ it follows that the dispute between Davey and Washington came down to the Free Exercise Clause.

Although categorizing *Davey* as a straightforward free exercise case certainly seems right under this linear equation, such a categorization is wrong because it ignores the substantial role that the Establishment Clause played in the case. Following is a discussion of three ways in which the Establishment Clause was involved.

1. The Establishment Clause provides the background for Washington's interest in excluding Davey.

Washington claimed that it excluded *Davey* in order to protect taxpayers from the burden of conscience that results when the government uses tax dollars to fund religion.

²⁰ This is not to say that commentators have not discussed the background issue of what the government may not fund under the Establishment Clause. Instead, this is to say that in analyzing whether or not Davey's claim should have prevailed, commentators have focused on the fact that "Davey's claim appeared to be a slam dunk under *Lukumi*." Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 173 (2004).

²¹ U.S. CONST. art. VI.

Significantly, Washington’s interest in protecting its taxpayers is the same interest that James Madison had in mind in his Remonstrance. The relationship between Washington’s exclusion of Davey and Madison’s Remonstrance is significant because the Remonstrance is enmeshed in the Court’s Establishment Clause jurisprudence. For example, in *Everson v. Board of Education*,²² the landmark case incorporating the Establishment Clause, the Court cited the Remonstrance as a basis for finding that a primary purpose of the Establishment Clause is to protect citizens from this conscientious burden—this, in both the majority²³ and dissenting²⁴ opinions. Thus, Washington’s interest in excluding Davey is part of a long tradition of protecting citizens from religious establishment—a tradition, moreover, that underlies the Court’s understanding of the Establishment Clause, and a tradition, perhaps, that inspired the adoption of the Clause.²⁵

Because Washington’s exclusion of Davey is part of this tradition, Washington’s exclusion is understood best by discussing the tradition. Therefore, many of the concerns that underlie the Establishment Clause—specifically, the problems that arise when the government directly or indirectly funds religious instruction—are relevant to a discussion of *Davey*.

2. Washington’s justification for excluding Davey under its state constitution is directly related to the Rehnquist Court’s narrow interpretation of the Establishment Clause.

²² 330 U.S. 1, 13 (1947).

²³ *See id.* at 13 (noting that “[t]his Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute”).

²⁴ *See id.* at 37 (Rutledge, J. dissenting) (finding that “the Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment’s author concerning what is ‘an establishment of religion.’”).

²⁵ LEONARD W. LEVY, “THE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT,” in *RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER* 44 (Baylor University Press, 1984) (noting that there is a broad and a narrow interpretation of the original meaning of the Establishment Clause, and that “[t]he heart of this broad interpretation is that the First Amendment prohibits even government aid impartially and equitably administered to all religious groups.”).

The relationship between Washington's citation of its state constitution and the Rehnquist Court's narrow interpretation of the Establishment Clause is evident by imagining that the dispute between Davey and Washington arose before *Zelman*.

Before the Court decided *Zelman* in 2002 it was unclear whether the Establishment Clause permitted states to provide substantial funding for religious instruction.²⁶ Thus, if *Davey* arose before *Zelman*, a critical constitutional question would have been whether Washington could *include* Davey in the program under the Establishment Clause. Accordingly, if *Davey* arose before *Zelman*, Washington surely would have cited the Establishment Clause in order to justify its exclusion of Davey.

However, because *Davey* arose after *Zelman*, it was clear that the Establishment Clause permitted Washington to include Davey in the program. As this was clear, Washington could not turn to the U.S. Constitution as a justification for excluding Davey. Instead, Washington had to turn to its own constitution. Thus, Washington's reliance on its own constitution instead of the U.S. Constitution can be understood as an incident of the views that the five Justices in the *Zelman* majority, two of whom are no longer on the bench,²⁷ held on the Establishment Clause.

This is significant because the *Zelman* majority expressed a view on the Establishment Clause that sharply diverges from the views held by the four Justices

²⁶ Some might point to *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986) for the proposition that the government may indirectly provide substantial funding to religious organizations. But *Witters* does not support this proposition because that case came down to the fact that under the program "only a small handful [of the recipients] are sectarian" and "nothing in the record indicate[d] that . . . any significant portion of the aid expended . . . will end up flowing to religious education." *Id.* at 488. *Davey* is much more like *Zelman* than *Witters*, because if Davey prevailed, Washington probably would have to fund more than a handful of sectarian schools, and, moreover, a significant portion of the aid would go to purely sectarian education. That the government may provide substantial funding to education of a purely sectarian nature through a generally available funding program was not established in *Witters* but rather in *Zelman*.

²⁷ Both Chief Justice Rehnquist and Justice O'Connor were in the *Zelman* majority.

dissenting in *Zelman*. All of these Justices are still on the bench, and considering the vigorous dissents incited in *Zelman*,²⁸ there is reason to believe that these four Justices still believe that states violate the Establishment Clause when they provide substantial funding to religious instruction.

Furthermore, the *Zelman* majority expressed a view on the Establishment Clause that diverges from the historical foundation of the Establishment Clause²⁹ and the Court's core Establishment Clause precedent.³⁰ Thus, the difference between Washington's exclusion of Davey being a state constitutional issue and an Establishment Clause issue comes down to an interpretation of the Establishment Clause (that might be held by only three sitting Justices) that is neither compelled by precedent nor close to how four sitting Supreme Court Justices interpret the Establishment Clause.

This, of course, is not to say that the *Zelman* majority's interpretation of the Establishment Clause should not be binding law. As our system currently operates, a majority vote on a given issue is enough to create binding law. This is true even if the majority is a slim one, and even if the majority's holding varies from precedent. *Zelman* is therefore the law of the land despite the fact that the majority opinion differs sharply from both the Court's precedent and mainstream interpretations of the Establishment Clause.

But accepting that *Zelman* is good law does not mean that the majority in *Zelman* should have the power to demote what was recently a federal constitutional issue to a

²⁸ See the dissenting opinions in *Zelman*. *Id.* at 684-729.

²⁹ See *Everson*, 330 U.S. at 13 (“This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.”);

³⁰ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

mere state constitutional interest. Since Washington's reason for excluding Davey is very much in line with the Court's Establishment Clause precedent and mainstream interpretations of the Establishment Clause, Washington's exclusion of Davey should be understood in light of that precedent and in light of those mainstream interpretations.

3. The strength of the Establishment Clause could have been affected by the *Davey* decision.

The Establishment Clause must be considered when a decision interpreting the Free Exercise Clause to mean X could prevent the Court from interpreting the Establishment Clause to mean Y. In *Davey*, this was the case, since had the Court held that the Free Exercise Clause prohibits the government from excluding religious organizations from general funding programs, the Court then would not be able to hold that the Establishment Clause prohibits the government from indirectly funding religious organizations. This relationship between the Clauses is evident by imagining what would happen if, after deciding *Davey*, the Court were to decide that *Zelman* was the incorrect interpretation of the Establishment Clause.

Returning to the law as it was before *Zelman* would be simple if the Court ruled in *Davey*, as it did, that the Free Exercise Clause permits the government to discriminate on the basis of religion in order to exclude religious organizations from funding programs. In this case, the Court would simply have to overrule *Zelman* in order to return to the law as it was before *Zelman*.

However, had the Court ruled in *Davey* that the Free Exercise Clause always prohibits the government from discriminating on the basis of religion, as Jay Sekulow,³¹

³¹ Jay Sekulow is the American Center for Law Justice Chief Counsel; he argued before the Supreme Court on behalf of Joshua Davey.

urged in oral argument,³² the Court would have locked itself into a post-*Zelman* Establishment Clause.

In demonstrating how an alternative ruling in *Davey* would have locked the Court into a post-*Zelman* Establishment Clause, first it should be noted that in the funding context the post- *Employment Division v. Smith*³³ Free Exercise Clause and the pre-*Zelman* Establishment Clause are contradictory. Since *Smith* prohibits the government from formally discriminating against religious organizations,³⁴ this free exercise formulation applied to government funding means that the government may not deny an organization generally available funding on the basis of the organization’s religious affiliation. But, because the Burger Court held in *Lemon v. Kurtzman*³⁵ that the Establishment Clause prohibits the government from passing a law that could have the effect of establishing religion,³⁶ this formulation means that in many situations the government must exclude religious organizations from generally available funding schemes.³⁷ Accordingly, the pre-*Zelman* Establishment Clause and the post-*Smith* Free Exercise Clause mean that when the government makes funding available to the public, the government may neither include religious organizations in the program, nor exclude religious organizations from the program—that is, they stand for contradictory propositions.

³² The oral argument can be found at <http://www.oyez.org/oyez/resource/case/1631/audioresources>.

³³ 494 U.S. 872.

³⁴ *Id.* at 886 n.3 (“Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize governmental *classifications based on religion*.”) (emphasis added).

³⁵ 403 U.S. 602 (1971).

³⁶ *See id.* at 612 (holding that there are three conditions that a law must satisfy in order to be valid under the Establishment Clause, and one of these conditions is that the “primary effect [of the law] must be one that neither advances nor inhibits religion”).

³⁷ *See, e.g., Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756, 793 (1973) (holding that a statute providing benefits to all private schools, including religious schools, violated the Establishment Clause because the “inevitable effect [of including religious schools in the program is] to aid and advance those religious institutions”).

Until recently, it appeared that this irreconcilable tension between the pre-*Zelman* Establishment Clause and the post-*Smith* Free Exercise Clause meant that the Court could not apply a post-*Smith* Free Exercise Clause to government funding cases. However, over the past five years the Rehnquist Court radically modified the Burger Court's interpretation of the Establishment Clause by holding in *Mitchell v. Helms*³⁸ that the government may directly fund the secular activities of religious organizations³⁹ and in *Zelman* that the government may indirectly fund the religious activities of religious organizations. Thus, under the Rehnquist Court's modified Establishment Clause, the government often may include religious organizations in funding programs. By interpreting the Establishment Clause to mean that the government may include religious organizations in funding programs, the Rehnquist Court reduced the tension between the Religion Clauses. Now that the Establishment Clause question of whether the government may include religious organizations in funding programs is in the background, the new question has emerged of whether the post-*Smith* Free Exercise Clause applies to funding.⁴⁰

³⁸ 530 U.S. 793.

³⁹ It should be noted that the status of this proposition is still unclear, as *Mitchell* was a plurality opinion.

⁴⁰ A helpful, and interesting, way to visualize this relationship between the Religion Clauses is to consider the artist M.C. Escher's use of interlocking images. By interlocking images, Escher blurred the distinction between foreground and background. A famous example of this is Escher's *Day and Night*. For an image of the lithograph, go to: http://www.fantasyarts.net/Sci_fi/day_and_night_escher.jpg. In that lithograph, the white geese are visible in the foreground only if one sees the black geese as part of the background, and the black geese are visible in the foreground only if one sees the white geese as part of the background. This relationship between the black and white geese in Escher's *Day and Night* is analogous to the relationship between the Burger Court's post-*Lemon* Establishment Clause and the Rehnquist Court's post-*Smith* Free Exercise Clause. When the Burger Court's Establishment Clause was in the foreground, the post-*Smith* Free Exercise Clause could not be fully seen in government funding cases. However, as the Rehnquist Court modified the Establishment Clause, the post-*Smith* Free Exercise Clause has been brought into focus, much the way that Escher's black birds are fully visible only after the white birds form the background. Now that the Establishment Clause question of whether the government may include religious organizations in funding programs is in the background, the new question has emerged in the foreground: Does the Free Exercise Clause *require* the government to include religious organizations in generally available funding programs?

That brings us back to *Davey*. If the Court had ruled in *Davey* that the Free Exercise Clause always prohibits discrimination on the basis of religion, even in funding programs, such a ruling on the Free Clause would lock the Court into a post-*Zelman* Establishment Clause, since the pre-*Zelman* Establishment Clause often permitted, and indeed required, the government to discriminate on the basis of religion.⁴¹ In other words, an alternative interpretation of the Free Exercise Clause in *Davey* would have locked the Court into a post-*Zelman* Establishment Clause.

This is problematic as a matter of judicial integrity. If the Court is committed to a post-*Zelman* Establishment Clause, the Court should make this commitment after being briefed on and considering the merits of *Zelman* under the Establishment Clause—not covertly through the backdoor of the Free Exercise Clause.⁴²

This is troubling enough when the decision on the Free Exercise Clause commits the Court to a relatively clear area of law under the Establishment Clause—the constitutionality of the indirect funding of religious organizations. But this is particularly troubling when a ruling on the free exercise question could clarify an *unclear* area of the Court’s Establishment Clause jurisprudence—the constitutionality of the direct funding of religious organizations.

Even after *Mitchell v. Helms*,⁴³ there is still some doubt as to whether the government may fund the *secular* activities of religious organizations directly, and there is great doubt as to whether the government may fund the *religious* activities of religious

⁴¹ See, e.g., *Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

⁴² This relationship is again illustrated nicely by M.C. Escher’s Day and Night. Since we cannot see the black geese until the white geese merge into the background, this means that if we are committed to seeing the black geese then we are also committed to not seeing the white geese. Likewise, if the Court is committed to reading the Free Exercise Clause to mean that the government may not discriminate on the basis of religion, this means that the Court is thereby committed to a post-*Zelman* Establishment Clause.

⁴³ 521 U.S. 203 (1997).

organizations directly. However, if the Court had ruled in *Davey* that the Free Exercise Clause prohibits the government from discriminating on the basis of religion in funding programs, there would be no difference under the Free Exercise Clause between the government excluding religious organizations from a funding program involving secular activities and the government excluding religious organizations from a funding program involving religious activities—both exclusions would be unconstitutional. Thus, if the Court interpreted the Free Exercise Clause to mean that the government may never discriminate on the basis of religion, then the Court would have to rule that not only may the government directly fund the secular activities of religious organizations, but also that the government may fund the religious activities of religious organizations directly.

Of course, such a rule would have great significance for the Faith-Based Initiative. No longer would there be a question of whether faith-based organizations *may* compete with secular organizations for state funding. Instead, every state would be *required* to permit faith-based organization compete for funding. Moreover, because the government would be prohibited from ever discriminating against a religious organization, the permissibility of directly funding religious organizations might become a mandate when directly funding religious organizations would best achieve the government's purpose in providing the funding. Thus, in situations where a religious organization was clearly better at providing a given service, the government would be compelled by the U.S. Constitution to select the religious organization to provide the service, even if doing so required the government to fund religious activities.

These possibilities of church-state partnerships are certainly a long way from any interpretation that the Court has given to the Establishment Clause. But such partnerships

between government and religion are a logical outgrowth of an alternative ruling in *Davey* under the Free Exercise Clause. In *Davey*, the Court could have radically transformed the relationship between government and religion under the Establishment Clause with an expansive reading of the Free Exercise Clause. If both the Establishment Clause and the Free Exercise Clause are to have equal value under the U.S. Constitution, both Clauses must be considered in decisions in which the interpretation of one Clause effectively will limit the range of interpretations that may be given to the other Clause. Thus, both the Free Exercise Clause and the Establishment Clause must be considered in a discussion of *Davey*.

B. Analyzing *Davey* Under Both Religion Clauses

1. The Free Exercise Clause

In searching the Court's precedent for what constitutes a free exercise violation, the *Davey* Court found three categories of free exercise violations. One category of free exercise violation arises when the government regulates religious exercise either through a civil or criminal penalty.⁴⁴ A second category of violation occurs when the government denies a person the right to participate in the political affairs of a community on the basis of religion.⁴⁵ And a third category of violation arises when the government forces a citizen "to choose between her religious beliefs and receiving a government benefit."⁴⁶

In *Davey*, the Court upheld Washington's exclusion of *Davey* by distinguishing Washington's exclusion from these three categories of cases. As the Court succinctly put it, *Davey* falls outside of these categories because *Davey* is a case where "[t]he State has

⁴⁴ *Davey*, 540 U.S. at 720.

⁴⁵ *Id.*

⁴⁶ *Id.* at 720-21.

merely chosen not to fund a distinct category of instruction.⁴⁷ Part I.B.1.a-c explains why Washington’s exclusion does not fall into any of these three categories of free exercise violations.

a. Category One

The first category of free exercise violation arises when the government regulates religious belief or conduct⁴⁸ either through a civil or criminal penalty. This category is the heart of the Free Exercise Clause. While there has been some dispute as to whether this category includes situations where the government inadvertently regulates a religious exercise,⁴⁹ or whether this category is limited to situations where the government either purposely or formally discriminates against a particular religious practice,⁵⁰ there is widespread agreement that the Free Exercise Clause applies when the government regulates religious exercise.

However, there is not widespread agreement as to whether this category includes situations where the government *excludes* an individual from a *funding* scheme on the basis of religion. There is good reason to believe that, for Free Exercise Clause purposes, government regulation of conduct is different from government exclusion from funding. This distinction is found in the Court’s interpretation of the text of the Free Exercise Clause.

⁴⁷ *Id.* at 721.

⁴⁸ The Court used to distinguish between government regulation of religious conduct and government regulation of religious belief, holding that while the government may never interfere with religious opinions, the government may interfere with religious conduct. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878). The Court has abandoned this distinction—now religious conduct is protected by the Free Exercise Clause.

⁴⁹ This was the prevailing view before *Smith*. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁵⁰ The view expressed in the *Smith* majority was that this category is limited to situations where the government *formally* discriminates against a particular religious practice. In *Lukumi*, the Court extended this view to include situations where the government *purposely* discriminates against a particular religious practice.

The Court has interpreted this text to mean not only that the government may not *prohibit* individuals from participating in a religious exercise, but also that the government may not *coerce* individuals into participating or not participating in a religious exercise.⁵¹ With prohibition and coercion as the free exercise criteria, the distinction between government regulation and exclusion is obvious. When the government regulates a religious practice, it will often prohibit or coerce a religious exercise. However, when the government excludes an individual from public funding, the government will rarely prohibit or coerce a religious exercise. This is elaborated below.

i. Prohibition of religious exercise

In *Lyng*, the Court interpreted what it means to prohibit religious exercise under the Free Exercise Clause. In that case, Native Americans in Northern California sought to enjoin the United States Forest Service from building a road on a piece of publicly owned land that Native Americans used for religious ceremonies.⁵² Turning to the facts, the Court found that building the road would not prevent the Native Americans from following their religious beliefs.⁵³ While the government's decision to build the road might prevent the Native Americans from conducting ceremonies on that land, the Native Americans could still conduct their ceremonies somewhere else. Indeed, the Court found that "it seems less than certain that construction of the road will be so disruptive that it

⁵¹ See, e.g., *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439 (1988). In determining whether the Free Exercise Clause protected the plaintiffs, the Court turned to the text. *Id.* at 443. In the text, the majority found that "the crucial word is 'prohibit.'" *Id.* at 451. The Court then read prohibition to include more than outright prohibitions, but coercion as well. *Id.* at 450.

⁵² *Id.* at 443.

⁵³ *Id.* at 451.

will doom their religion.”⁵⁴ Accordingly, the Court held that the government did not prohibit a religious exercise and, therefore, the government could build the road.⁵⁵

Under the reasoning in *Lyng*, whether or not there is prohibition of a religious exercise comes down to the relationship between a citizen’s desire to exercise a religious practice and the citizen’s ability to participate in that practice. When the government’s action is the essential link between the citizen’s desire and ability, the government may not act in a way that could prevent the citizen from following her religious beliefs.

There was no essential link in *Lyng* because the government’s decision of whether or not to build the road did not stand in between the Native Americans’ desire to practice their religious beliefs and their ability to do so.

While the government’s use of its own property rarely is the essential link between an individual’s desire and ability to participate in a religious exercise, there are many situations where government regulation is the essential link. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,⁵⁶ for example, the city of Hialeah prohibited the ritual sacrifice of animals, which is required by the Santerian religion.⁵⁷ Because of the Hialeah statute, Santerians could not follow their religion.⁵⁸ Thus, Hialeah’s ordinance was the essential link between the desire of Santerians to follow their religion, and the ability of Santerians to do so. Accordingly, the Court ruled that the statute violated the Free Exercise Clause.

⁵⁴ *Id.*

⁵⁵ *Id.* at 458.

⁵⁶ 508 U.S. 520 (1993).

⁵⁷ *Id.* at 526.

⁵⁸ Of course, for a short period of time Santerians could follow their religion under the Hialeah ordinance by paying the fine or going to jail. But repeatedly doing so is not practicable. Paying a fine repeatedly would put many Santerians in a position where they could no longer pay the fine, and therefore could no longer practice their religion. And going to jail would put Santerians away from the animals necessary to perform the rituals, thereby preventing them from practicing their religion. Thus, the regulation ultimately was the essential link between their desire to practice Santerianism and their ability to do so.

When compared to the government's use of its property and the government's regulation of a religious exercise, it is clear that the government's exclusion of an individual from a funding scheme is much more similar to the government's use of its property. Government funding is like government property—in both situations, the government establishes how and when a given item will be used. Because people often have a means of practicing their religions outside the premises of the government property, as the Native Americans in *Lyng* did, the government rarely prohibits religious exercise by deciding how to use its property, as the Court held in *Lyng*. Likewise, because people often have a means of practicing their religions without using government funding, the government rarely, if ever, prohibits religious exercise by excluding a person from a funding program.

This is clear in *Davey*. Based on the facts, it appears that despite Washington's exclusion of Davey from the Promise Scholarship, Davey still was able to study theology from a devotional perspective at a religious college.⁵⁹ Of course, without the Promise Scholarship Davey might have had to pay for his studies. But Davey had that choice. Since Davey had that choice, Washington did not provide the essential link between Davey's desire to study theology from a devotional perspective at a religious college and Davey's ability to do so. Thus, Washington did not prohibit Davey's religious exercise.

ii. Coercion of religious exercise

Not only is prohibition difficult to find when the government excludes a citizen from a funding scheme, coercion is also. As Judge McConnell has noted, there are two

⁵⁹ As Davey explained, he challenged the law because he found it unfair—not because he needed the money; in fact, he "wasn't really desperate for the money." See Law.com, *Life After a Landmark Case*, at <http://www.law.com/servlet/jsp/article.jsp?id=1088699774490>.

types of coercion—direct coercion and indirect coercion.⁶⁰ He explains, “‘Direct’ coercion is government action that forbids or compels certain behavior; ‘indirect’ coercion is government action that merely makes noncompliance more difficult or expensive.”⁶¹ Direct coercion is the Lockean view of coercion;⁶² this is the narrower version of coercion that the Court rejected in the Establishment Clause context, applying instead the broader version—indirect coercion.⁶³ However, the Court’s free exercise case law clearly demonstrates that direct coercion is the standard for the Free Exercise Clause. In *Lyng*, for example, the Court did not find governmental coercion because the Native Americans were not *compelled* in any way. Indeed, they could perform their rituals as they wanted—they just could not perform their rituals on government property.

Under this definition of coercion, it is difficult to imagine how the government coerces an individual into participating or not participating in a religious exercise by excluding the individual from a funding program. This is evident in *Davey*. Joshua Davey sought Promise Scholarship funding, which was not available to every resident of Washington. Instead, it was available only to those who satisfied four conditions. In other words, only after satisfying those four conditions did a resident then have the *choice* to receive the funding. Davey, however, did not satisfy the fourth condition. Thus, Davey never had the choice to receive Washington’s funding. And without even the choice to receive the funding, Davey could not have been compelled in any way.

⁶⁰ Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U CHI L REV 115, 160 (1992).

⁶¹ *Id.*

⁶² See JOHN LOCKE, A LETTER CONCERNING TOLERATION, in LOCKE, 5 THE WORKS OF JOHN LOCKE 11 (Baldwin, 12th ed 1824) (stating that “it is one thing to persuade, another to command; one thing to press with arguments, another with penalties”).

⁶³ See *Lee v. Weisman*, 505 U.S. 577 (1992).

Sure, one could object, as Justice Scalia did in his dissent,⁶⁴ that the condition on government funding forms the baseline, and that therefore the withdrawal of funding altered Davey's choices. This might be right, depending, of course, on whether one assumes that Davey's choice to receive the funding arose when Washington created the Promise Scholarship, or if, alternatively, Davey's choice arose only after he satisfied the four conditions. But even if Justice Scalia is right that Davey's choice to receive the funding arose when Washington created the Promise Scholarship, and that the exclusion therefore altered Davey's choices, this alteration of Davey's choices did not *coerce* him in the strict sense of the term. Davey still could study religion at any school he wanted—he just could not do so with government funding. Thus, under the Court's case law, there was simply no compulsion and therefore no coercion.

b. Category Two

The second category of free exercise violations prohibits the government from denying a citizen the right to participate in the political affairs of the community on the basis of the citizen's religious affiliation. Unlike the first category of free exercise violation, the second category is not obvious from the text of the Free Exercise Clause because a citizen may still exercise his religious beliefs freely when the government denies the citizen the right to participate in the political affairs of the community. While the text might not support this category, one can make a strong case for this category by pointing to the structure of the Constitution—particularly, the role of the Free Exercise Clause in sustaining a republican democracy. Understanding the relationship between the Free Exercise Clause and republican democracy is important to understanding why

⁶⁴ *Davey*, 540 U.S. at 726 (“When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured . . .”).

Davey's claim does not fall within this category of free exercise violations. A helpful starting point in reaching this understanding is the Court's plurality opinion in *McDaniel v. Paty*.⁶⁵

The dispute in *McDaniel* arose after Tennessee disqualified a minister, Paul McDaniel, from serving as a delegate to the Tennessee constitutional convention by enforcing a Tennessee statute prohibiting ministers from serving as delegates. Although there was disagreement in the Court as to what constitutional provision Tennessee's statute violated, the eight Justices participating in the decision agreed that the statute was unconstitutional.

As to whether the statute violated the Free Exercise Clause, the case presented a problem for the Court because Tennessee did not regulate McDaniel's exercise of his religious beliefs through a civil or a criminal penalty. Indeed, McDaniel was free to exercise his religious beliefs as he wished. Accordingly, McDaniel's religious exercise was neither prohibited nor coerced, and his claim, therefore, did not fall under category one. Nonetheless, the Court found something troubling about Tennessee's decision to deprive McDaniel of the right to hold office on the basis of his religion affiliation. It was this conditional relationship between political participation and religious affiliation that made the statute unconstitutional despite the absence of a civil or criminal penalty on McDaniel's religious exercise.

Writing for himself and three other Justices, Chief Justice Burger explained that there were two rights at stake in *McDaniel*. One, McDaniel had a constitutional right to

⁶⁵ 435 U.S. 618 (1978).

exercise his religious beliefs under the U.S. Constitution.⁶⁶ Two, McDaniel had a statutory right to seek and hold office under Tennessee law.⁶⁷ According to Chief Justice Burger, Tennessee violated the Free Exercise Clause by “condition[ing] the exercise of one on the surrender of the other.”⁶⁸

Although Justices Brennan and Marshall concurred only in the judgment, they expressed agreement with most of the plurality’s reasoning.⁶⁹ Justice Brennan stated that Tennessee’s law was unconstitutional because “[i]t establishes a religious classification . . . governing the eligibility for office.”⁷⁰ Because the statute created a connection between religious affiliation and political participation, Justices Brennan and Marshall found the statute very similar to a test oath.⁷¹ Due to this similarity, they concluded that the statute violated the Free Exercise Clause.⁷²

As made clear in both of these opinions in *McDaniel*, the constitutional flaw in Tennessee’s statute was the relationship it established between political participation and religious affiliation. Thus, *McDaniel* does not mean that *all* government discrimination on the basis of religion violates the Free Exercise Clause. To the contrary, the case means only that government discrimination on the basis of religion that affects political participation violates the Free Exercise Clause. This distinction between religious discrimination that affects political participation and religious discrimination that does

⁶⁶ *Id.* at 626 (stating that “the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be”).

⁶⁷ *Id.* (“Tennessee also acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention.”).

⁶⁸ *Id.*

⁶⁹ The disagreement lies in the conduct/belief distinction that was still part of the Court’s free exercise jurisprudence when *McDaniel* was decided.

⁷⁰ *Id.* at 632.

⁷¹ *Id.*

⁷² *Id.*

not affect political participation rests on two Free Exercise Clause axioms. One, the Free Exercise Clause does not require equality between religion and non-religion. Two, the Free Exercise Clause protects the political process from religious discrimination.

i. Equality and the Free Exercise Clause

The Free Exercise Clause does not require equality between religion and non-religion. In fact, in many instances the Clause requires inequality between religion and non-religion. This non-equality component of the Free Exercise Clause is highlighted by contrasting the Free Exercise Clause with the Equal Protection Clause.

The Equal Protection Clause commands the government to protect all people equally. The Court has interpreted this to mean that the government may distinguish citizens on the basis of an attribute only if there is reason to think that the given attribute distinguishes people. In other words, the government must treat similarly situated people equally. Thus, if x factor does not make people dissimilar, then the government may not discriminate on the basis of x. For example, since we presume that race does not by itself make people dissimilar, the government may not discriminate on the basis of race unless it is an exceptional circumstance.

By contrast, the Free Exercise Clause limits the power of the government to prohibit one thing in particular—religious exercise. By limiting the power of government to prohibit religious exercise without limiting the power of government to prohibit other practices, the Clause distinguishes religious exercise from non-religious exercise. In making this distinction, the Clause asserts that religion is different from non-religion. Accordingly, people who hold certain religious beliefs must at times be treated differently from people who do not hold those religious beliefs. So while the Equal

Protection Clause requires the government to treat similarly situated people equally, the Free Exercise Clause requires the government to treat religious believers differently.⁷³

This difference between the Equal Protection Clause and the Free Exercise Clause is discussed in Judge McConnell's critique of *Smith*.⁷⁴ According to Judge McConnell, a primary difference between the Clauses is that the Equal Protection Clause is assimilationist while the Free Exercise Clause is counter-assimilationist. In requiring equality, the Equal Protection Clause aims to assimilate and integrate people who are fundamentally alike.⁷⁵ The Free Exercise Clause, however, is counter-assimilationist in that it "allow[s] individuals of different religious faiths to maintain their differences."⁷⁶ Unlike the Equal Protection Clause, which presumes that people are generally the same, the Free Exercise Clause presumes that "people of different religious convictions are different."⁷⁷

This explains why Washington did not violate the Free Exercise Clause by denying Davey the Promise Scholarship on the basis of his religious affiliation. Washington made the decision that the Promise Scholarship should be limited to students who use the Scholarship for secular education. Washington's decision is entirely compatible with the Free Exercise Clause because the decision rests on the premise that religious education is different from secular education.

⁷³ For a more in-depth discussion of how the Equal Protection Clause and the Free Exercise Clause differ, see JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 42-57 (Harvard University Press 1996). It should be noted that some scholars have argued that ratification of the 14th Amendment transformed the meaning of the Free Exercise Clause by making it a mere adjunct to the Equal Protection Clause. See Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 *YALE L. J.* 1611, 1614-25 (1993); Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 *SAN DIEGO L. REV.* 763 (1993).

⁷⁴ Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 *U CHI L REV* 1109 (1990).

⁷⁵ *Id.* at 1139.

⁷⁶ *Id.*

⁷⁷ *Id.*

While this non-equality component of the Free Exercise Clause explains why states may discriminate on the basis of religion, it does not explain the *McDaniel* decision. If the Free Exercise Clause permits and at times requires discrimination on the basis of religion, why was Tennessee's statute unconstitutional?

ii. Republicanism and the Free Exercise Clause

Although the Free Exercise Clause does not prohibit the government from treating religion and non-religion differently, the Clause does prohibit the government from basing an individual's political standing on the individual's religious beliefs. This is made clear by examining the relationship between the Clause and republicanism.

A central purpose of the Clause is to protect our political system. This argument is advanced in Professor David Richards' book "Toleration and the Constitution."⁷⁸ In analyzing the meaning of the Free Exercise Clause, Richards discusses the philosophical and political context from which the Clause emerged.⁷⁹ Richards shows how the Framers viewed religious liberty as essential to republicanism. Drawing from the writing of Pierre Bayle, who argued for religious toleration in France,⁸⁰ and John Locke, who argued that there is a natural right of freedom of conscience,⁸¹ the Framers believed that a republican form of government would survive only by protecting religious exercise from government intervention, thereby protecting the voice of the people.⁸²

⁷⁸ DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (Oxford University Press 1986).

⁷⁹ *See id.* at 103-162.

⁸⁰ *See id.* at 89-95.

⁸¹ *Id.*

⁸² *See id.* at 113 (discussing Madison's connection between the government's involvement in religion and tyranny).

An excellent example of the relationship between republicanism and religious liberty is found in Jefferson’s Bill for Establishing Religious Freedom.⁸³ In that statute, Jefferson refers to religious liberty in much the way that Locke did—as an inalienable right. Indeed, according to Richards, “Jefferson appears to have drafted the statute after a close study of Locke.”⁸⁴ Jefferson went even further than Locke—in Jefferson’s words, “where [Locke] stopped short, we may go on.”⁸⁵ While Locke urged for an inalienable right to religious freedom, which would include only a right to practice one’s religious beliefs free from government intervention, Jefferson argued that in a free society people must be free from any form of religious *qualification* for civil rights.⁸⁶ As one Jefferson historian writes, Jefferson believed that “[o]ur civil rights have no bearing on our religious opinions.”⁸⁷ So, just as “[o]pinions in physics and geometry do not incapacitate one for any public duty or office, nor should opinions in religion.”⁸⁸

Madison’s Remonstrance also draws from Locke’s writing on human reason and its relationship to political decisionmaking. Of course, Madison’s Remonstrance is most famous for its articulation of the taxpayer’s conscience. But the Remonstrance also provides a vivid portrait of what it means to live in a republican democracy. In the Remonstrance, Madison claims that freedom means that citizens have the power to form conclusions on the basis of their own beliefs—in his words, “the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the

⁸³ A Bill for Establishing Religious Freedom (Va. 1786), quoted in MICHAEL W. MCCONNELL ET AL, RELIGION AND THE CONSTITUTION 69-70 (Aspen 2002).

⁸⁴ DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 112 (Oxford University Press 1986).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ EDWIN S. GAUSTAD, SWORN ON THE ALTAR OF GOD: A RELIGIOUS BIOGRAPHY OF THOMAS JEFFERSON 66 (Wm. B. Eerdmans Publishing Co. 1996).

⁸⁸ *Id.*

dictates of other men.”⁸⁹ Because free men must be free to follow their own beliefs and not the beliefs of others, religious believers “cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced [religious believers].”⁹⁰ By the same reasoning, non-religious believers cannot deny an equal freedom to religious believers.

The relationship between religious freedom and political freedom reveals how the Free Exercise Clause furthers a republican democracy. In a republican democracy, our freedom is expressed in our beliefs, and our beliefs are expressed in our representatives. Accordingly, if our representatives are limited to those individuals who hold certain views, the range of our freedom is circumscribed. Therefore, in order to create a robust republican democracy—a system whereby our representatives truly reflect our beliefs—we must be free to elect whomever we want to elect.

This explains why the Free Exercise Clause prohibits states from conditioning political participation on religious affiliation. If religious citizens cannot elect politicians of their faith, the beliefs held by these citizens are underrepresented. The beliefs of other citizens are effectively imposed on them. And these religious citizens are thereby less free than non-religious citizens. For example, when Tennessee denied a minister the right to serve as a delegate to the constitutional convention, those residents of Tennessee who share the minister’s beliefs were denied a voice in the constitutional convention. A truly representative democracy requires the inclusion of their voices.

However, there is no denial of political representation when a state denies educational benefits on the basis of religious affiliation. Sure, those denied funding must

⁸⁹ JAMES MADISON, *A Memorial and Remonstrance Against Religious Assessments* (1785), in 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland et al eds., 1973).

⁹⁰ *Id.*

pay more than others for education. But this denial of funding does not bear on political representation. Indeed, those denied funding are perfectly free to elect representatives who can either abolish the scholarship program altogether or amend the program so as to include those using the scholarship for religious education.

That there is no denial of political representation in a denial of educational funding is illustrated in *Davey*. Despite being denied the Promise Scholarship, Joshua Davey could have elected representatives to change the program, or better yet, he could have run for a Washington government position. There was simply no denial of political representation in his exclusion from the Promise Scholarship. Thus, Davey's claim did not fall under the second category of free exercise violation.

c. Category Three

Under this third category, states may not force citizens to choose between their religious beliefs and receiving a government benefit. To understand why Davey's claim did not fall under this third category, it is important to discuss *Sherbert v. Verner*,⁹¹ the case that generated this category, and to appreciate two fundamental differences between Davey's claim and the claim at issue in *Sherbert*.

In *Sherbert*, the Court declared that the government violates the Free Exercise Clause when it forces a citizen to choose between a government benefit and her religious practice. *Sherbert* arose after Ms. Sherbert, a Seventh-Day Adventist, was fired from her job for refusing to work on Saturdays, as required by her religion.⁹² Ms. Sherbert then sought unemployment compensation, which she could receive under South Carolina law

⁹¹ 374 U.S. 398, 412 (1963).

⁹² *Id.* at 399.

only if her unemployment was involuntary.⁹³ South Carolina refused to provide compensation because, according to the South Carolina Employment Security Commission, Ms. Sherbert's termination was voluntary.⁹⁴ The Court ruled that, by forcing Ms. Sherbert to choose between following her religious beliefs but forfeiting her unemployment compensation on the one hand, and violating her religious beliefs but preserving her eligibility for unemployment compensation on the other hand, South Carolina imposed "the same kind of burden upon the free exercise of religion as would a fine."⁹⁵ Since a fine on a religious exercise undoubtedly would have violated the Free Exercise Clause, the Court found no reason to hold differently in *Sherbert*.⁹⁶

At first glance, *Sherbert* appears to stand for the proposition that the government may never discriminate against religion in a funding scheme. In two ways, however, the *Sherbert* holding is much narrower than that general proposition. One, *Sherbert* is limited to situations in which the government funding is conditioned on the non-performance of an act that a citizen is compelled to perform by her faith. Two, *Sherbert* applies only when the government discriminates individually.

i. Compulsion by faith as a necessary condition

As the Court explained in *Davey*, *Sherbert* means that the government may not force citizens "to choose between their religious beliefs and receiving a government benefit."⁹⁷ This is an either/or situation: the citizen can either follow her faith or receive the government benefit. Thus, this choice between following a religious mandate and receiving government funding arises only in situations in which a citizen is compelled to

⁹³ *Id.* at 400..

⁹⁴ *Id.* at 401.

⁹⁵ *Id.* at 404.

⁹⁶ *Id.* at 410.

⁹⁷ *Davey*, 540 U.S. at 721.

perform an act by her religion, and the government conditions funding on non-performance of that religiously compelled act. Accordingly, compulsion by faith is a necessary condition under *Sherbert*.

Davey's claim does not fall under this third category because he did not show that he was compelled by his faith to pursue a degree in theology. Although Davey might have sincerely believed that he had a calling to pursue a degree in theology from a religious school, Davey was probably not *compelled* by his faith to do so. In fact, there is strong evidence that Davey was not compelled in that Davey eventually decided not to pursue a career in the ministry and instead decided to pursue a law degree at Harvard Law School.⁹⁸ Thus, a more accurate description of his calling is that he felt *impelled* to pursue a degree in theology—that is, his beliefs *inspired* him to pursue the degree. Because he was impelled rather than compelled, Davey could use the Promise Scholarship for secular education without violating his religious beliefs. Therefore, Davey did not have to choose between following his religion and receiving government funds.

By contrast, Ms. Sherbert was not impelled. She was truly *compelled*—i.e., her interpretation of her religious text forbade her from working on Saturday. Because Ms. Sherbert would have directly violated a textual command in her faith by working on Saturday, Ms. Sherbert was presented with an either/or situation. She could either follow her religion and not receive government funds, or should could violate her religion and receive government funds. This is the type of situation that the Free Exercise Clause prohibits the government from creating.

⁹⁸ See Law.com, *Life After a Landmark Case*, at <http://www.law.com/servlet/jsp/article.jsp?id=1088699774490>.

ii. Individualized v. generally applicable laws

Even assuming that Davey's study of religion was just as compelled by his faith as was Ms. Sherbert's sabbatarian observance (which, as described above, is a generous and probably false assumption), Davey's claim does not fall under this third category of free exercise violations. As Justice Scalia explained for the majority of the Court in *Employment Division v. Smith*,⁹⁹ this category of free exercise violations is limited to instances in which the government discriminates individually.¹⁰⁰ Justice Scalia's narrow reading of this category is supported by how the Court applied the *Sherbert* ruling in subsequent cases.

After *Sherbert*, the Court typically upheld religion-neutral and generally applicable laws under the Free Exercise Clause, even when they substantially burdened an individual's religious exercise.¹⁰¹ Based on these cases, Justice Scalia noted in *Smith* that *Sherbert* and its progeny of unemployment compensation cases¹⁰² were the exceptions to this rule.¹⁰³ Justice Scalia explained that a different rule applied in these unemployment compensation cases because "their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment."¹⁰⁴ And when the government considers one person's reasons for being unemployed, there is a risk that the government will evaluate the worthiness of that person's religious beliefs.

That is precisely what happened to Ms. Sherbert. When the South Carolina Employment Security Commission asked Ms. Sherbert why she was fired, and Ms.

⁹⁹ 494 U.S. 872 (1990).

¹⁰⁰ *Id.* at 884.

¹⁰¹ See, e.g., *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988); *Goldman v. Weinberger*, 475 U.S. 503 (1986); and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

¹⁰² *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987).

¹⁰³ *Smith*, 494 U.S. at 884.

¹⁰⁴ *Id.*

Sherbert said that her religion forbade her from going to work, the government assessed her reason for not going to work. By refusing to accept *her reason*, the government implicitly rejected *her particular religious beliefs*. The government effectively told her that her religious reason was not a good reason.

The individualized nature of this process reveals why the unemployment cases raise a unique problem under the Free Exercise Clause. When the government has the power to grant benefits on the basis of whether a claimant's particular religious reason is a good reason, there is a serious risk that the government will accord some religious beliefs greater value than others. This is problematic because when the government grants benefits to citizens on the basis of their religious beliefs, a citizen's status in the political community is determined by her religious beliefs. For example, if the government had the power to determine whether a person's particular religious reason for missing work is a good reason, a government official who sympathized with Hindus but not Roman Catholics might award benefits to an individual fired for refusing to work in a slaughterhouse, but not to an individual fired for refusing to perform abortions. In this case, the Hindu would have a greater standing in the community than the Roman Catholic. And, as discussed earlier, the government's conditioning of political standing on religious beliefs violates a central aim of the Religion Clauses—to sustain a democratic republic.¹⁰⁵

As opposed to individualized discrimination against religion, discrimination against religion via a generally applicable law presents a minimal threat to religious liberty because it eliminates the possibility of the government evaluating an individual's religious beliefs. When the government excludes all religious callings from a generally

¹⁰⁵ See DAVID RICHARDS, *TOLERATION AND THE CONSTITUTION* (Oxford University Press, 1996).

available funding program, the government effectively tells all of its citizens that their religious beliefs will not be assessed as good or bad by the government. This consequently preserves the political equality of citizens. All citizens may exercise their religious beliefs freely, unconcerned that the government will deprive them of a government benefit that a follower of a more popular faith is awarded.

Because Washington's criteria were applicable to all students seeking the Promise Scholarship benefits, Joshua Davey could not have been concerned that he was deprived of a benefit that a follower of a different faith received. That is not to say that losing the scholarship benefits did not burden Davey. Clearly, Washington financially burdened Davey by taking money away from him. And surely, this financial burden was exacerbated by any metaphysical burden Davey experienced as a result of connecting his withdrawn benefits to the fact that he was intensely religious. However, because Washington applied its exclusion of religion on a generalized basis, Davey could not have been reasonably concerned that Washington would have funded, say, a Jewish student's rabbinical studies. To the contrary, Davey lost his benefits knowing that every person of every faith in the State of Washington would not receive Promise Scholarship benefits to study theology from a devotional perspective. He could feel confident that the State of Washington assigned the same monetary value to his interest in becoming a Pastor as the State assigned to someone else's interest in becoming a Priest or a Rabbi. For purposes of the Free Exercise Clause, Davey's experience is a world away from that of Ms. Sherbert, who, as she stood on line for unemployment compensation, had reason to worry that the person behind her could receive benefits by citing a religious reason for

missing work that was more popular with the South Carolina Employment Security Commission.

In light of the constitutional differences between discriminatory regulation and funding, the constitutional differences between denying a citizen funding and political participation, and the constitutional differences between individualized and generalized discriminatory funding, the Court did not apply strict scrutiny to Washington’s exclusion. Although the Court did not expressly state what standard of review it applied, the Court clearly stated that the presumption of unconstitutionality normally applied to free exercise violations did not apply to Davey’s claim.¹⁰⁶ Instead, a lower standard applied.¹⁰⁷ Parts II.B explores why Washington prevailed under this lower standard.

B. The Establishment Clause

The *Davey* Court found that Washington satisfied the lower standard of review because Washington had a substantial interest in not funding religious instruction.¹⁰⁸ Although the Court did not analyze the nature of this interest—that is, beyond noting the tradition in many states of not funding the clergy—it seems that based on the history of the Religion Clauses and the Court’s case law there are two powerful arguments underlying the Court’s finding of a substantial interest. One, the funding of religious organizations imposes a burden on the taxpayer’s conscience. Two, such funding increases the likelihood of political division and friction.

1. The conscientious burden

¹⁰⁶ *Davey*, 540 U.S. at 720 (“We reject his claim of presumptive constitutionality.”).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

James Madison famously explained the conscientious burden in his Memorial and Remonstrance Against Religious Assessments.¹⁰⁹ In the Remonstrance, Madison convinced Virginia not to use tax dollars to fund Christian teachers because of the burden it would impose on the taxpayer's conscience. Thomas Jefferson similarly claimed in his Bill for Establishing Religious Freedom that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."¹¹⁰ As Jefferson proudly explained, Virginia's decision not to fund religious instruction contributed to the liberation of the human mind after centuries of being "held in vassalage by kings, priests and nobles."¹¹¹ For this reason, he claimed that Virginia "produced the first legislature who has had the courage to declare that the reason of man may be trusted with the formation of his own opinions."¹¹²

Although Madison's and Jefferson's writings are undoubtedly remarkable, both as philosophical and political works, there is reason to question how they can be applied by courts in constitutional adjudication. After all, the principal burden that Jefferson and Madison described was a metaphysical burden—indeed, it is difficult to see how taxpayers are burdened in any physical way by paying taxes that are later used by the legislature for religious instruction. Even if a taxpayer opposes the funding of religious organizations and therefore finds it objectionable that her government uses her tax dollars to fund religious organizations, the resulting burden on her conscience, if it can be said to exist, is quite abstract and unquantifiable.

¹⁰⁹ JAMES MADISON, *A Memorial and Remonstrance Against Religious Assessments* (1785), in 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland et al eds., 1973). The Remonstrance is reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (appendix to opinion of Rutledge, J. dissenting).

¹¹⁰ A Bill for Establishing Religious Freedom (Va. 1786), quoted in MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 69-70 (Aspen 2002).

¹¹¹ EDWIN S. GAUSTAD, *SWORN ON THE ALTAR OF GOD: A RELIGIOUS BIOGRAPHY OF THOMAS JEFFERSON* 69 (Wm. B. Eerdmans Publishing Co. 1996).

¹¹² *Id.*

The conscientious burden was abstract and unquantifiable then; it is anachronistic now. In the modern welfare state, where the federal government uses tax dollars to regulate and fund many programs involving controversial issues, every taxpayer can articulate some conscientious burden. This burden is not limited to the religious taxpayer; the secular pacifist, the secular pro-lifer, and the secular environmentalist might all be conscientiously burdened by their government's funding of weapons, abortion, and oil production. As Professors Lupu and Tuttle note in their article on the *Zelman* decision, "There is no principled reason why the consciences of taxpayers with respect to religious matters should enjoy constitutional preference over the consciences of taxpayers with respect to nonreligious matters, such as support for weapons, sex education, or art."¹¹³

The Court's rejection of the taxpayer's conscience argument has infuriated some Justices. Dissenting in *Zelman*, Justice Souter cited Madison's reasoning in a vigorous argument against the indirect funding of religious education.¹¹⁴ Justice Souter explained that Madison's reasoning regarding the taxpayer's conscience applies to modern day America; indeed, he exclaimed, because we live in a plural state, and because religious beliefs invariably clash, government sponsored religious education creates as much of a conscientious a burden as ever.¹¹⁵

¹¹³ 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, 945 (2003).

¹¹⁴ Justice Souter claimed that "Madison's objection to three pence has simply been lost in the majority's formalism." *Zelman*, 536 U.S. at 711.

¹¹⁵ Justice Souter wrote: "Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines 'a nationalistic sentiment' in support of Israel with a 'deeply religious' element. Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention." *Id.* at 716.

While Justice Souter is surely right that government funding of religious might burden the consciences of some taxpayers, he is probably wrong in claiming that federal courts should invalidate state funding programs because of this burden. In a world where consequences matter more than theories, it does not make sense for the theoretical burden of state funding of religion to prevail under the Establishment Clause.

But, saying that states do not have an *obligation* to protect taxpayers from this burden is not the same as saying that states do not have an *interest* in providing protection from the burden. This distinction between constitutionally created mandates and legitimate policy interests is an important one—and, unfortunately, a distinction that has been overlooked in much of the commentary on *Davey*. Drawing on this distinction, courts should note that even if they should not invalidate state funding programs because of this burden, states might have an interest in not funding religious organizations so that they can protect their taxpayers from this burden. So, even if the Establishment Clause does not require the states to recognize this interest, the *Davey* Court properly recognized the interests that states have in not funding religious education.

How strong was this interest in *Davey*? As many Justices noted in oral argument,¹¹⁶ Washington's interest was probably not very strong, since Joshua Davey could have declared a major in business and then taken all of his theology classes under the scholarship condition; indeed, Washington did not prohibit him from taking theology class but only in majoring in theology. But, even if this interest in not funding religious education was not strong, it is an interest that is part of this country's tradition, and, moreover, it is an interest at the foundation of the Establishment Clause. Thus, while this

¹¹⁶ The oral argument can be found at <http://www.oyez.org/oyez/resource/case/1631/audioresources>.

interest might not be very strong, it is, nonetheless, an interest of constitutional dimensions, and the Court properly recognized it as such.

However, even if a state were to apply this interest in a more rigorous way than Washington applied it in the Promise Scholarship, it would be a stretch to characterize this interest as substantial. After all, as noted above, the burden is merely a metaphysical one, and metaphysical burdens have not made for strong arguments in federal courts.¹¹⁷ Moreover, it would not make sense for the taxpayer's conscientious interest to trump the more particularized conscientious interest that citizens have in being treated equally. Indeed, if it can be said that a person experiences a conscientious burden resulting from the government's funding of religious education even when the funding does not directly affect her, it surely can be said that a person experiences a more pernicious conscientious burden when the government takes money away from a person because of her religious affiliation. Furthermore, it does not make sense for the taxpayer's conscience to trump the economic interest that citizens like Joshua Davey have in receiving government funding that they have qualified for based on religion-neutral criteria. To defeat this concrete and practical interest that religious citizens have in receiving government funding, states must provide a similarly concrete and practical interest—such as the interest that states have in preventing political division and friction.

2. Political division and friction

In addition to expressing concern about the government's funding of religion leading to a conscientious burden on taxpayers, Madison explained in the Remonstrance that political division would result from such funding. While the Remonstrance is

¹¹⁷ This is illustrated in the Court's standing jurisprudence. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that the party invoking federal jurisdiction bears the burden of establishing a *concrete* injury).

probably most famous for its articulation of the taxpayer's conscience, it must be remembered that the Remonstrance was not merely an inquiry into metaphysical burdens; it was much more than that; indeed, it was a legal argument supported by both theoretical and practical reasoning. The practical element of the argument focused on the disharmony that would result from Virginia's funding of religious instruction. Such funding, Madison warned, would "destroy . . . moderation and harmony" and was, therefore, an "enemy to the public quiet."¹¹⁸

Jefferson also made this link between political unity and the government's refusal to fund religious instruction. In a letter to Dr. Thomas Cooper, Jefferson discussed the role of religion in his prized university, the University of Virginia.¹¹⁹ After noting that there is no divinity professor at the University, and that Jefferson's decision not to hire a divinity professor has led many to question whether the University opposes religion, Jefferson explains how he defended his decision to the Virginia legislature.¹²⁰ Jefferson writes to Dr. Thomas Cooper that the letter to the legislature began by "stating the constitutional reasons against a public establishment of any religious instruction,"¹²¹ and then proceeded to argue that, besides the constitutional concerns, it is expedient not to provide religious instruction because "by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality."¹²²

¹¹⁸ See JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland et al eds., 1973).

¹¹⁹ Letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822), in JEFFERSON WRITINGS 1463 (The Library of America 1984).

¹²⁰ *Id.* at 1465.

¹²¹ *Id.*

¹²² *Id.*

This link between government funding and political friction has not gone unnoticed by the Court. On many occasions, the Court has found that avoiding political friction is a reason for states not to fund religious organizations.¹²³ Perhaps most significantly, the Court focused on this link in its foundational case of *Lemon v. Kurtzman*,¹²⁴ where, after stating that government acts that excessively entangle government and religion are unconstitutional, the Court explained that state programs with a “divisive political potential” are presumptively unconstitutional because of their tendency in creating such impermissible entanglement.¹²⁵

Recently, Justice Breyer has suggested that preventing political division is the central purpose of the Religion Clauses. In *Zelman*, he thought that the Court should have invalidated Ohio’s voucher program because, despite the apparent benefits to low-income students, the fact that most of the money went to religious schools made the program “potentially harmful to the nation’s social fabric.”¹²⁶ Justice Breyer looked again to political divisiveness in his critical concurrence in one of the recent Ten Commandment cases. After noting that a basic purpose of the Religion Clauses was to “avoid that divisiveness based on religion that promotes social conflict,”¹²⁷ Justice Breyer upheld the Texas display because forcing its removal might “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”¹²⁸

Several Justices have questioned the role that the political divisiveness factor should play in the adjudication of disputes in federal courts. In *Zelman*, the majority

¹²³ See, e.g., *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 795 (1973) (discussing the relevance of “the potentially divisive political effects of an aid program” to the Court’s Establishment Clause analysis).

¹²⁴ 403 U.S. 602 (1971).

¹²⁵ *Id.* at 622.

¹²⁶ *Zelman*, 536 U.S. at 728 (Breyer, J., dissenting).

¹²⁷ *Van Order v. Perry*, 545 U.S. _____. (Breyer, J., concurring).

¹²⁸ *Id.*

responded to Justice Breyer’s invocation of the political divisiveness principle in his dissent by questioning “what sort of principle Justice Breyer [had] in mind, considering that the program had ignited no ‘divisiveness’ or ‘strife’ other than this litigation.”¹²⁹ Since the protection of people from political division sounds like a policy matter, not a juridical matter, the Court expressed concern as to “where Justice Breyer would locate [the] presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find ‘divisive.’”¹³⁰ This concern is particularly great in a federal court, where the authority to hear and adjudicate issues is constitutionally circumscribed.

Considering the federal judiciary’s circumscribed authority, the majority correctly rejected Justice Breyer’s reasoning in *Zelman*. It does not make sense for federal courts to adjudicate the constitutionality of state laws according to whether or not they might create political friction. Surely, if courts were charged with the duty of preventing political friction, courts would get entangled in local political feuds involving issues that federal courts cannot fully appreciate. Moreover, resolving disputes under the criterion of political divisiveness will make for fuzzy, and, arguably, arbitrary adjudication. For example, who is to say what will lead to friction? Since any church-state issue that gets to a court is going to be contentious and sectarian—after all, litigation is contentious and church-state issues are religious—either party can argue that the court’s ruling for the other party will create acrimony along religious lines, and thus either party can formulate a political division argument for why the Court should rule in her favor. As the political divisiveness criterion does not make for a sharp or reliable juridical tool, the political

¹²⁹ *Zelman*, 536 U.S. at 662, n. 7.

¹³⁰ *Id.*

divisiveness of a program involving the funding of religious organizations should not determine the constitutionality of the program.

But, again, that federal courts should not invalidate government acts that touch on religious matters merely because of their political divisiveness does not mean that states do not have a cognizable interest in avoiding political division by refusing to fund religious education. One of the primary duties of the state government is to protect citizens. And this is a duty that states are well-equipped to perform. So federal courts should defer to state decisions as to whether a particular program will create political conflict. Thus, by pointing to specific facts indicating that the government's funding of religious organizations will not only burden the consciences of many taxpayers but will also divide the people, a state should be able to prove that it has a substantial interest in not funding religious education.

Under this formulation, the *Davey* outcome was right. Although Washington did not justify its exclusion of Davey on this basis, Washington could have established how funding students wishing to study religion would have created division among Washington residents. Since there do not appear to be any colleges or universities in Washington offering programs for students seeking to become a Rabbi¹³¹ or an Imam¹³² or a Brahmin,¹³³ it is unlikely that Jews, Muslims, or Hindus would be able to use the Promise Scholarship benefits to study their respective faiths from a devotional

¹³¹ After a long Internet search, I was unable to find any universities or colleges in Washington offering programs for students seeking to become a Rabbi. The closest Jewish University I could find to Washington is the University of Judaism, which is in California. See <http://www.uj.edu>. Under the Promise Scholarship requirements, a scholarship beneficiary could not use the benefits to enroll in a college outside Washington. Thus, a student could not use the benefits to enroll in the University of Judaism.

¹³² I was also unable to find any universities or colleges in Washington offering programs for students seeking to become an Imam. In fact, I found only two Islamic schools in Washington, both of which are elementary schools. See http://www.bellevuemosque.com/Local_Islamic_schools.htm.

¹³³ I was also unable to find any schools offering programs for students seeking to become a Brahmin.

perspective. While there are not any schools offering these Jewish, Islamic, or Hindu instruction, there are several colleges and universities offering Christian instruction.¹³⁴ Despite their small populations, it is likely that some Jews, Muslims, or Hindus would be eligible for the Promise Scholarship, and would want to use the funds to study their own religious backgrounds from a devotional perspective.¹³⁵ But, because of Washington's requirement that the students use the funds in the state, and because there are no schools in Washington offering majors in Jewish, Islamic, or Hindu studies, no Jewish, Muslim, or Hindu students would be able to study their religious backgrounds from a devotional perspective with scholarship funds. Accordingly, only those students seeking to study Christianity from a devotional perspective would be able to use state funds to do so. By creating the conditions that allowed only Christians to study their religion with government funds, Washington could have increased the friction among different religious groups. Thus, Washington had a strong interest in excluding the study of religion from a devotional perspective from the Promise Scholarship.

II. ASSUAGING CONCERNS

Many commentators have expressed concern about the discretion that the *Davey* Court granted the states in refusing to fund religious organization. There are three reasons why there should not be too much concern. One, because the Framers intended, and the public originally understood, the Religion Clauses to be a federalist directive,

¹³⁴ There are at least six Christian colleges and universities in Washington: (1) Northwest College, (2) Pacific Lutheran University, (3) Puget Sound Christian College, (4) Seattle Pacific University, (5) Trinity Lutheran College, and (6) Whitworth College. Of course, because these colleges are denominational, some denominations might not be able to study their particular faiths with state funds. But even if that were the case, any member of a Christian denomination could study the fundamental principles of their faith—Christianity—with state funds. That could not be said for Jews, Muslims, or Hindus—that is, they could not study the fundamental principles of their respective faiths with state funds.

¹³⁵ Although these groups respectively make up about 1% of the state population, surely this is a large enough percentage to mean that there are some Jews, Muslims, and Hindus are eligible for the Promise Scholarship who want to study their religious backgrounds in college.

federal courts achieve some of the desirable effects of originalism—namely, political accountability and judicial consistency¹³⁶—by deferring to the states on close church-state questions. Two, because states have different needs and interests at stake in partnering with religious organizations, federal courts further state policymaking by granting states discretion to experiment in developing church-state policies. Three, because decentralization might protect religious liberty and autonomy, federal courts might further the central goals of the Free Exercise Clause by refusing to hold states to a restrictive, monolithic standard.

A. The Religion Clauses as a Federalist Directive

Noting that the text of the Religion Clauses only speaks to the powers of Congress, and that many states had officially established churches when the Framers adopted the First Amendment, many eminent scholars have concluded that the Framers intended the Religion Clauses to prevent only the federal government from passing laws respecting the establishment of religion and prohibiting the free exercise of religion.¹³⁷ Thus, some argue, the Religion Clauses are best understood as a federalist directive.

If the Religion Clauses are read as a federalist directive, the Establishment Clause prohibits the *means* that the federal government employs, not the *ends*. In other words, the Establishment Clause prohibits the federal government from affecting the status of religion in the states. This means that the federal government may not establish or *disestablish* religion. And if one accepts that the Establishment Clause prohibits the

¹³⁶ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); and ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 251-59 (Collier Macmillan Publishers 1990).

¹³⁷ See STEVEN SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 17-54 (Oxford University Press 1995); and EDWARD S. CORWIN, *A CONSTITUTION OF POWERS IN A SECULAR STATE* 106 (Michie Co., 1951) (declaring that "the principal importance of the [First] Amendment lay in the separation which it effected between the respective jurisdictions of State and nation regarding religion . . .").

federal government from both establishing and disestablishing religion, then the Court's incorporation of the Establishment Clause through the Fourteenth Amendment was in itself a violation of the Establishment Clause. Indeed, the Court cannot read the Due Process Clause to require the state disestablishment of religion when forcing states to disestablish religion violates the Establishment Clause—that is, unless one subscribes to a Godelian view of constitutional interpretation.¹³⁸ But if one insists on complete consistency within the constitutional system, disincorporation of the Establishment Clause is necessary. For this reason, some commentators and Justices today maintain that although the Court might have been right in incorporating the Free Exercise Clause,¹³⁹ the Establishment Clause should not have been incorporated.¹⁴⁰

The strength of these disincorporationist arguments might be questioned. After all, the original intent of the Framers in adopting the Religion Clauses is certainly less relevant after the ratification of the Fourteenth Amendment. Moreover, the argument that it is illogical to incorporate the Establishment Clause assumes that there is no individual

¹³⁸ By a Godelian view of constitutional interpretation, I am referring to an approach to constitutional interpretation that adopts the incompleteness theorem proposed by the mathematician Kurt Godel. See Wikipedia, *Godel's Incompleteness Theorem*, at http://en.wikipedia.org/wiki/G%F6del%27s_incompleteness_theorem. According to this theorem, axioms in a consistent system sufficiently powerful to produce propositions will always produce propositions that cannot be proven by the system itself. Only under such a system of thought can the Fourteenth Amendment incorporate the Establishment Clause when doing so violates the Constitution.

¹³⁹ Most agree that the Free Exercise Clause clearly should be incorporated under the reasoning that the other provisions in the Bill of Rights have been incorporated. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) (arguing that the Free Exercise Clause “invites incorporation” because it “was paradigmatically about citizen rights, not state rights”).

¹⁴⁰ Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 (1998); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1706-07 (1992). Chief Justice Rehnquist has expressed his support for this interpretation of the Framers' intent. In his dissent in *Wallace v. Jaffree*, 472 U.S. 38, 97 (1985), he argued that “[t]he Framers intended the Establishment Clause to prohibit the designation of any church as a ‘national’ one.” Justice Thomas recently suggested that he would like to disincorporate the Establishment Clause. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (explaining that he would like “to begin the process of rethinking the Establishment Clause” because “the Establishment Clause is a federalism provision, which, for this reason, resists incorporation”).

liberty right in the Establishment Clause. This assumption is probably false. As Justice Brennan keenly observed in his concurring opinion in *Abington School District v. Schempp*,¹⁴¹ “The fallacy in this contention is that it underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty.”¹⁴² Because the Establishment Clause guarantees liberty along with the Free Exercise Clause, it does not make sense to apply only one Clause to the states. Most importantly, at least as a practical matter, the argument that the Court erroneously incorporated the Establishment Clause is irrelevant because too much time has passed; indeed, it is unlikely that the Court will overrule its decision to incorporate the Establishment Clause after more than 50 years of uninterrupted application to the states.¹⁴³

Importantly, however, one need not believe in disincorporating the Establishment Clause to believe that the federalist background of the Religion Clause should inform the federal judiciary’s adjudication of church-state issues. Since the Religion Clauses were understood originally as a federalist directive, and since there is reason to believe that the Establishment Clause should continue to apply to the states, granting states broad discretion in designing their own church-state relations in certain cases achieves the systemic predictability and democratic accountability that some have argued are achieved in an originalist jurisprudence. One such case when federal courts should grants states this discretion is when there are strong state interests for both separating from and partnering with religious organizations.

¹⁴¹ 374 US 203 (1963).

¹⁴² *Id.* at 256.

¹⁴³ The Court incorporated the Establishment Clause to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947).

B. State Needs and Interests

There are strong state interests for both separating from and partnering with religious organizations when it comes to the provision of social services. Communities of course vary greatly in religious, social, economic, and racial composition. To determine how these characteristics relate to people's views on church-state relations, Professor Jelen of Illinois Benedictine College and Professor Wilcox of Georgetown University had people from different backgrounds fill out questionnaires on various church-state issues.¹⁴⁴ They found that a person's religious identity informs how one views church-state issues.¹⁴⁵ For example, they found that Roman Catholics are significantly more likely than Jews to favor both aid to religious institutions and protection of a Judeo-Christian heritage.¹⁴⁶ In addition, they found that a person's education is related to one's views on government aid to religion,¹⁴⁷ according to the study, greater levels of education make it more likely that a person will oppose government aid to religion.¹⁴⁸ They also found that people with higher incomes tend to oppose government aid to religion.¹⁴⁹ Race is also a factor;¹⁵⁰ as compared to the white respondents, "[b]oth African Americans and Hispanics [are] less likely to hold separationist attitudes, and [are] considerably more likely to be accommodationists."¹⁵¹

This study suggests that communities differing in religious, social, economic or racial composition will differ in how their residents perceive government aid to religious

¹⁴⁴ TED G. JELEN & CLYDE WILCOX, PUBLIC ATTITUDES TOWARD CHURCH AND STATE (M.E. Sharpe, 1995). Their study consists of two surveys—one in the Washington D.C. area, and another in Williamsburg, Virginia.

¹⁴⁵ *Id.* at 65.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 68.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 69.

¹⁵¹ *Id.*

organizations. For example, the study indicates that if a wealthy community wanted to develop a K-12 voucher program,¹⁵² the majority of the community would want to prevent religious schools from participating.

A wealthy community should have the discretion to exclude religious schools from the program because denying the community this discretion is inconsistent with our federalist scheme. Just as states may provide more speech protection than the Free Speech Clause requires,¹⁵³ more privacy protection than the Fourth Amendment mandates,¹⁵⁴ and a more searching rational basis review than the Due Process Clause demands,¹⁵⁵ states should be able to erect a higher wall between church and state than the U.S. Constitution requires.¹⁵⁶ Thus, a community should be able to exclude religious schools from a voucher program.

However, it does not follow that because some communities may exclude religious schools from a voucher program that all communities must. Just as denying one community the power to exclude religious institutions from its voucher program is inconsistent with our federalist scheme, denying another community the authority to make sure its children are safe and educated is inconsistent with our conception of liberty. Communities should be able to ensure that their children are safe. And many parents in urban communities support voucher programs because they want their children

¹⁵² It should be noted that this might not be a realistic hypothetical, since there is reason to doubt that a wealthy community would want a voucher program. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043 (2002).

¹⁵³ See, e.g., *State v. Shid*, 423 A.2d 615 (N.J. 1980) (holding that the New Jersey State Constitution protects citizens from the speech restraint of private property owners even though the Free Speech Clause only applies to governmental action).

¹⁵⁴ See, e.g., *People v. Scott*, 593 N.E.2d 1328 (N.Y. 1992) (rejecting the “open fields” doctrine because the New York State Constitution protects privacy more than the Fourth Amendment).

¹⁵⁵ See, e.g., *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309 (2003).

¹⁵⁶ Determining the precise limit on the height of this wall is of course one of the goals of this Article. This will be discussed in Parts III.

to be safe.¹⁵⁷ Communities should also be able to make sure that their children are educated; indeed, as Justice Thomas noted in *Zelman*, “without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment.”¹⁵⁸ And many parents support voucher programs because they want to improve their children’s education.¹⁵⁹ Faced with crime and poor education in secular schools, and safety and quality education in religious schools, children should be able to jump the wall to the religious schools—even if doing so requires using tax dollars for religious instruction. The Religion Clauses should not create such a high wall between religion and non-religion so that overcoming this hurdle is impossible.

C. Decentralization and Religious Liberty

Not only might decentralization of authority over church-state relations achieve originalist goals and promote social experimentation; it also might be an effective means of guaranteeing religious liberty. Professor Richard C. Schragger makes this argument in his paper on local government and religious liberty.¹⁶⁰ He argues that when governmental authority is dispersed, government is less able to control religion; indeed, “political decentralization ensures that the national councils do not have a monopoly on the power to regulate religion.”¹⁶¹ And when there is no monopoly on religion, religious organizations are free to compete. This competition, in turn, “prevents any one sect from

¹⁵⁷ Of the parents who were surveyed as to their motives for enrolling their children in the Cleveland voucher program, 95% cited their children's safety. *Zelman*, 536 U.S. at 704.

¹⁵⁸ *Id.* at 680.

¹⁵⁹ Of the parents who were surveyed as to their motives for enrolling their children in the Cleveland voucher program, 96.4% claimed that they wanted their children to have a better education. *Id.* at 704.

¹⁶⁰ Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004).

¹⁶¹ *Id.* at 1815.

gaining political dominance in the whole.”¹⁶² Thus, decentralization guarantees religious liberty, particularly for minority sects.

In addition, Schragger argues, decentralization makes it more difficult for religious groups to control government because decentralization empowers local governments. Schragger argues that when the federal courts or Congress make exemptions for religious organization, they “undermin[e] an important institutional location for the articulation of public norms and values.”¹⁶³ By undermining local institutions, federal courts and Congress weaken local government.¹⁶⁴ And when local government is weakened, religious organizations are consequently in a better position to control government, which of course means that the risk of oppression of minority sects is greater.¹⁶⁵ Thus, decentralization makes the local government a formidable guardian of religious liberty.

III. CREATING A NEW PARADIGM

A. Establishing the *Davey* Rule

The Court announced a new rule in *Davey*. That much is clear regardless of one’s view on religious establishment or religious liberty. However, commentators disagree on what the rule is. Thus far, two interpretations of the rule have appeared.

Professor Marci Hamilton has offered the broadest reading of the holding. In an article analyzing the decision, she explains that in *Davey* “[t]he Court could not have been clearer . . . [that] [i]n Free Exercise challenges, hostility to religion must be shown

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

for strict scrutiny to apply.”¹⁶⁶ She supports this interpretation of *Davey* by pointing to the majority’s statement that *Davey* is not like *Lukumi*.¹⁶⁷ She concludes that since *Lukumi*, unlike *Davey*, involved animus against religion, the difference between the outcomes in *Davey* and *Lukumi* is due to the fact that there was no animus in *Davey*.¹⁶⁸ Thus, the *Davey* Court held that discrimination against religion is permissible under the Free Exercise Clause so long as it is not motivated by animus.¹⁶⁹

Contrary to her claim that the distinction between *Davey* and *Lukumi* rests on the state’s motives for passing the law, the Court’s distinction between *Davey* and *Lukumi* clearly rests on the *burden* imposed on the claimant. In fact, the Court could not have been clearer about this. The Court explicitly stated that *Davey* was not like *Lukumi* because *Davey* merely involved withdrawn funding whereas *Lukumi* involved criminal sanctions.¹⁷⁰ In making this distinction, the Court clearly expressed that *Davey*’s claim did not fall into the first category of free exercise violation—the category that prohibits the government from regulating on the basis of religion.

Under Professor Hamilton’s broad reading of the *Davey* ruling, however, this first category would be narrowed to apply only when in regulating religious individuals or organizations the government evinced hostility towards religion. This would mean that the government could prohibit religious exercise so long as the government did not have a bad motive in doing so. But this was not what the Court held in *Davey*. In fact, one can be sure that had Washington enacted a law prohibiting the study of religion altogether,

¹⁶⁶ Marci Hamilton, *The Supreme Court Issues a Monumental Decision: Equal State Scholarship Access for Theology Is Not Required by the Free Exercise Clause*, at <http://www.constitutioncenter.org/education/TeachingwithCurrentEvents/Viewpoints/TheSupremeCourtIssuesaMonumentalDecision.shtml>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Davey*, 540 U.S. at 720.

with or without state funding, the Court would have struck down that law even if Washington expressed no animus in passing the law. Because Professor Hamilton's animus-rule is simply nowhere to be found in the opinion, and because her animus-rule is at odds with the Court's formulation in *Smith*¹⁷¹—and indeed would overrule some of the Court's free exercise case law¹⁷²—her argument that the *Davey* opinion rests on motives is therefore implausible.

On the other extreme are Professors Thomas Berg and Douglas Laycock who believe that *Davey* can be plausibly read to apply only to the funding of the clergy.¹⁷³ As compared to Hamilton's animus-only interpretation, there is plenty of evidence in the opinion supporting this clergy-only interpretation. After all, the facts before the Court involved the funding of Joshua Davey, a person seeking to become a Pastor. Moreover, much of the Court's reasoning can be applied only to the clergy. Indeed, the majority opinion frequently cites the tradition of not funding the clergy as support for the proposition that Washington had a substantial interest in excluding Davey. And the majority frequently suggests that the Court's inquiry was not whether states could refuse to fund religious organizations altogether, but rather whether states could refuse to fund the clergy.

However, this reading of *Davey* is not simply narrowed to the facts of the case; the reading is much more unfaithful to the opinion than that; the reading ignores the core doctrinal and policy issues before the Court. As a doctrinal matter, this interpretation is unreasonably narrow, as it fails to account for the Court's attempt to distinguish the

¹⁷¹ How, for instance, would she reconcile *Smith*, where Justice Scalia emphasized formal neutrality rather than unbiased motives?

¹⁷² This animus-rule would have to overrule *Yoder*, and perhaps *Sherbert* and *McDaniel*.

¹⁷³ Thomas Berg & Douglas Laycock, *Davey's Mistakes and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L.J. 2 (2005).

withdrawal of funding from three categories of free exercise relations. If the Court was interested in drawing a narrow exception for the funding of the clergy, there would be no need to distinguish the withdrawal of funding from the three categories of free exercise violations. Rather, the Court could have merely stated that, for historical reasons, the funding of the clergy is different from the funding of religious organizations—then the Court could have stopped the analysis there. But the *Davey* Court did not make this distinction between religious organizations and the clergy. Instead, the Court made a distinction between three categories of free exercise violation and the withdrawal of funding. There is nothing in this distinction suggesting that it should or can apply only to the clergy.

In addition, the Court did not indicate that the “play in the joints” between the Religion Clauses is limited to the clergy. And, not only did the Court not expressly limit the applicability of this principle, it would be odd if this flexibility did not refer to the distinct relationship of religious exercise and establishment under the U.S. Constitution—a relationship that applies to all relationships between religion and government—but, instead, referred only to a special relationship between religious professionals and government.

Furthermore, as Justice O’Connor noted in oral argument, the issue before the Court implicated the policy decisions of the states. Indeed, the Justices and lawyers discussed at length in oral argument how the decision would have an impact on K-12 voucher programs and the Blaine Amendments.¹⁷⁴ Thus, reducing *Davey* to a case about the funding of clergy simply misconstrues what was at stake in the decision.

¹⁷⁴ The Blaine Amendments are amendments to state constitutions calling for more separation between church and state than the Establishment Clause requires. These amendments are known as Blaine

Based on the oral argument and the text of the opinion, it does not seem that anyone who participated in the case viewed it as a case limited to the funding of the clergy. Rather, it seems that everyone understood *Davey* to be a case about the funding of religion. Accordingly, contrary to what Professors Berg and Laycock argue in their article, the Court's decision granting states discretion clearly extends to government decisions beyond the funding of clergy.

As these different interpretations of *Davey* suggest, it is not clear what the *Davey* rule is. To be sure, it is clear that the opinion does not make animus a necessary condition for free exercise violations or apply only to the funding of clergy. But much more than that is not clear. However, the majority's reliance on the church-state principles examined in this Article suggests that the rule is a composite of these principles. Because the Court declared that strict scrutiny does not apply when the government discriminates on the basis of religion in a generally available funding program, and because the Court established that states have a cognizable interest under the Establishment Clause in excluding religious organizations from generally available funding programs, the rule from *Davey* can therefore be stated in these terms: A state may discriminate on the basis of religion within a generally available funding program that does not directly affect an individual's ability to participate in the political community only if the state's religious classification relates to a cognizable Establishment Clause interest.

Amendments because of their relationship to James G. Blaine's proposed amendment to the U.S. Constitution. In 1875, when Blaine was Speaker of the U.S. House of Representatives, he proposed an amendment to the U.S. Constitution prohibiting states from funding religious institutions. After Blaine's amendment failed to receive the necessary two-thirds majority in the Senate for ratification, many states passed their own versions of the amendment. According to the Becket Fund for Religious Liberty, there are thirty-nine Blaine Amendments. See <http://www.blaineamendments.org/states/states.htm>; see also PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Harvard University Press, 2002).

While I believe this formulation to be a faithful account of the decision, I do not believe that it is ideal as a constitutional doctrine. For one, it does not provide the criteria for identifying a cognizable state interest under the Establishment Clause. And, perhaps more importantly, it does not explain the requisite relationship between the state's Establishment Clause interest and its chosen means of achieving that interest. Because the test does not provide these details, it is, as of now, quite manipulable.

This manipulability is evident in the fact that by merely reciting its interest in protecting the consciences of state taxpayers, a state can satisfy this test every time it refuses to fund a religious organization. For instance, a state opposing religious education could exclude religious schools from its K-12 voucher program by claiming that its Blaine Amendment, which is derived from the taxpayer's conscience, prohibits it from funding religious education. Indeed, there is already evidence of states citing *Davey* for this proposition, as the Florida Supreme Court recently interpreted the Florida State Constitution to compel the state to exclude religious schools from a K-12 voucher program, and found that the U.S. Constitution, as interpreted by the Court in *Davey*, permitted the state to exclude these schools.¹⁷⁵ Thus, under the *Davey* formulation, states can discriminate against religion whenever they want—even when the motives are not religion-neutral, even when the means are not religion-neutral, and even when the effects are not religion-neutral.

Even more problematic than *Davey* permitting states to discriminate against all religions arbitrarily is the possibility that states may favor one religious group over another. Since withdrawing members of one religious organization from a general funding program partially reduces the burden imposed on taxpayers of funding religion,

¹⁷⁵ *Bush v. Holmes*, 886 So. 2d 340, 344 (Fla. 2004).

states have an interest under the conscientious burden justification in refusing to fund one denomination. To be sure, states have a greater interest for refusing to fund *all* denominations. But, under the conscientious burden rationale, states also have *an interest* in refusing to fund only one denomination.

For this reason, Justice Scalia expressed concern in oral argument that if the Court held that states may discriminate on the basis of religion, as Washington urged the Court to rule, then, *a fortiori*, states also must be able to discriminate on the basis of one religion. To determine whether there is a limiting principle prohibiting sect-specific discrimination, Justice Scalia asked Washington’s counsel whether her argument meant that it would be constitutional for Washington to fund all religious instruction except for, say, Jewish studies. After Washington’s counsel failed to provide a case explaining why discrimination generally against all religions is permissible but discrimination specifically against one religion is not, it seemed that by ruling for Washington the Court necessarily would abandon the most settled proposition in church-state law since 1947—that both Clauses require “the state to be *neutral* in its relations with groups of religious believers and non-believers.”¹⁷⁶

That *Davey* can lead to the abandonment of the neutrality principle raises more than mere *stare decisis* concerns. If the Court were to abandon this principle, the Court would uproot the central criterion—whether or not an act is neutral towards religion—in adjudicating church-state issues, thereby leaving the Court’s jurisprudence in disarray. Furthermore, because the principle has explained what it means for religion to be constitutionally distinct—religion’s distinctiveness requires the government to treat religion neutrally—and because the principle has reduced the inherent tension between

¹⁷⁶ *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (emphasis added).

the Clauses—since both Clauses require the government to treat religion neutrally, the principle mitigates the concern that the government will violate one directive by vigorously enforcing the other—abandoning the principle would complicate the question of how distinct religion is and how the Clauses relate. In sum, if the *Davey* rule is going to be a workable rule, it must be squared with this neutrality principle.

B. Squaring the *Davey* Rule with the Neutrality Principle

While the neutrality principle has accomplished the two important feats of explaining what it means for religion to be constitutionally distinct and of reducing the inherent tension between the Clauses, the principle has raised a new problem: What does it mean to be neutral? Even though most of the Justices agree that neutrality is the baseline for adjudicating church-state issues, the Justices disagree sharply about what neutrality means.

Some Justices believe that neutrality requires strict separation between government and religion. Reading neutrality this way, the Court has held that the Free Exercise Clause compels the government to exempt religious groups from formally neutral laws,¹⁷⁷ and that the Establishment Clause prohibits the government from directly funding religious organizations.¹⁷⁸

¹⁷⁷ An excellent illustration of this is *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, Amish parents claimed that their children were entitled to an exemption from Wisconsin's compulsory high school attendance law because the lessons taught in public high school violate the Amish faith. *Id.* at 209. Writing for the Court, Chief Justice Burger began his analysis by establishing the substantial burden that high school education places on Amish families. *Id.* at 210. Chief Justice Burger then noted that the law at issue was facially neutral towards religion. *Id.* However, Chief Justice Burger held that "a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Id.* at 220. Because this law had the effect of substantially burdening the free exercise of the Amish faith, the Amish parents were entitled to an exemption from the law under the Free Exercise Clause. *Id.* at 234.

¹⁷⁸ For example, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) the Court struck down two state programs that provided funding to both religious and secular schools so long as the funds were used for secular purposes. *Id.* at 606. The Court ruled that, in order to make sure that the state funding was used only for secular instruction, the government would have to monitor the religious schools. *Id.* at 615. And because this

Other Justices, however, believe that neutrality is merely a formal requirement. In contrast to the separationist model of neutrality, formal neutrality disregards the effects of the law at issue and instead focuses on its terms. The Rehnquist Court incorporated this idea of formal neutrality into both Clauses, holding that the Free Exercise Clause does not require the government to exempt a citizen from a law that substantially burdens her religious exercise if the law is generally applicable and neutral,¹⁷⁹ and that the government may fund religious organizations so long as the funding criteria do not consider the religious affiliation of the recipient.¹⁸⁰

As illustrated in the Court's case law there is not much overlap between a substantive and a formal conception of religion-neutrality. The problem lies in the term "neutrality"—it does not have one meaning. As Justice Harlan has noted, neutrality is "a coat of many colors."¹⁸¹ Similarly, literary theorist Stanley Fish believes that religion-neutrality is meaningless as an independent criterion because neutrality "has meaning only within some particular set of background conditions."¹⁸² Perhaps Harvard Divinity School Professor Ronald Thiemann captures the problem best when he calls the Court's notion of neutrality "a

monitoring would have the *effect* of excessively entangling government and religion, the Court held that the funding violated the Establishment Clause. *Id.* at 625.

¹⁷⁹ In *Smith*, the Court held that religion-neutral and generally applicable laws are valid even if they substantially burden religious exercise. *Smith*, 494 U.S. at 879. Writing for the majority, Justice Scalia made it clear that, by neutral, he meant formally neutral. He explained in a footnote: "Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize governmental *classifications based on religion*." *Id.* at 886 n.3 (emphasis added).

¹⁸⁰ For example, the Court held in *Agostini v. Felton*, 521 U.S. 203 (1997) that the set of restrictions *Aguilar* had placed on states are not required by the Establishment Clause. The thrust of the *Agostini* decision is that when a government funding program is sufficiently broad so as to include both religious and secular beneficiaries, and the criteria for providing funding do not refer to religion, there is no Establishment Clause problem. The Court confirmed this rule in *Mitchell v. Helms*, 530 US 793 (2000), where the plurality of the Court upheld the direct distribution of secular educational materials to religious and secular schools on a per capita basis because the criteria were formally neutral between religion and non-religion.

¹⁸¹ *Bd. of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

¹⁸² Stanley Fish, *Mission Impossible: Settling the Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2266 (1997).

protean concept.”¹⁸³ Just as in *Ulysses*, where James Joyce spun readers into a maelstrom by introducing the stream of consciousness in the chapter “Proteus,”¹⁸⁴ the Court has lost followers of the Court by introducing its protean concept of neutrality into church-state jurisprudence.

However, in searching for the meaning of religion-neutrality, the Court has accomplished two important tasks: one, the Court has proven that religious-neutrality does not have one meaning, and two, the Court has established how different meanings of neutrality can apply to the Religion Clauses. As a result of the Court’s search for a neutral relationship between religion and government, we know that, at its most strict, the Free Exercise Clause requires the government to exempt religious believers from facially-neutral laws when the laws substantially burden their religious exercise. However, at its least strict, the Free Exercise Clause requires the government to invalidate laws that are either not generally applicable or not facially neutral towards religion. And as a result of the Court’s search for a neutral relationship between religion and government, we know that, at its most strict, the Establishment Clause means that the government may not interact with religion when doing so has the effect of promoting religion. But at its least strict, the Establishment Clause means that the government may interact with religion so long as in doing so it is evenhanded towards both religion and non-religion. The Court has thus set the ceiling and the floor for how the government may treat religious matters. This is crucial to a state seeking to determine how it may

¹⁸³ RONALD F. THIEMANN, *RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY* 60 (Georgetown University Press 1996).

¹⁸⁴ This is the third chapter of *Ulysses*. The chapter begins cryptically: “Ineluctable modality of the visible.” The chapter does not get any easier for readers.

treat religious matters under its constitution because federal ceilings and floors form the framework of state law.¹⁸⁵

Thus, a state should have the discretion to partner with religion above the floor of formal neutrality, so long as it remains below the ceiling of substantive neutrality. This functions best in a direct funding scheme. For example, based on a substantive conception of neutrality, if a state decides to provide funding to schools, the state may provide funding to secular schools without including religious schools in the program.¹⁸⁶ Conversely, based on a formal conception of neutrality, states may include schools in the program when the funding criteria do not refer to religion.¹⁸⁷

However, this linear paradigm does not apply as easily to indirect funding schemes like the Promise Scholarship. Finding the floor is the simple part. When private beneficiaries choose how they want to use government funds, the floor is the *Zelman* decision. Thus, so long as private beneficiaries independently choose their schools, the government funding of religious schools is permissible. But for the government to go above the floor, the government must prevent beneficiaries from funding religion. To do this, the government must single out religious organizations from the program. And by singling out religion, the government violates the core requirement of formal neutrality. In such situations, any attempt to build above the floor thereby pulls the state *below* the floor. This is the circle created by the neutrality requirement of the Religion Clauses. As

¹⁸⁵ In his influential article on state constitutional law, Justice Brennan argued that states should read their respective constitutions between the floor and any ceiling that the U.S. Constitution sets on state action. William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). This way, states can provide a second layer of protection for citizens. Notably, many state courts have followed Justice Brennan's advice. For example, citing Justice Brennan's article, the New York Court of Appeals found that the New York State Constitution guarantees "a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties." *People v. P. J. Video, Inc.*, 68 N.Y.2d 296, 303 (1986).

¹⁸⁶ See, e.g., *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

¹⁸⁷ See, e.g., *Mitchell v. Helms*, 530 US 793 (2000).

Chief Justice Burger wrote, “The course of constitutional neutrality in this area cannot be an absolutely straight line.”¹⁸⁸ Reducing the Clauses to a linear equation of ceilings and floors therefore appears futile—it is like finding a ceiling in a circular room.

A ceiling is found in this circular room by examining the Court’s interpretation of what it means to be neutral when the government singles out religion. In this respect, *Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*¹⁸⁹ provides some help. In *Amos*, the complainants argued that exemption for religious organizations violated the Establishment Clause by impermissibly “drawing distinctions on religious grounds.”¹⁹⁰ The Court rejected this claim, ruling that when the government discriminates between religion and non-religion, the law is valid under the Establishment Clause so long as it is “motivated by a permissible purpose of limiting governmental interference with the exercise of religion.”¹⁹¹ The idea is that when the government seeks to achieve a goal of the Free Exercise Clause, the government does not, as the *Amos* Court put it, “abandon neutrality”¹⁹² if in pursuing the goal the government goes beyond what the Court has interpreted the Clause to require.

In *Davey*, the situation was exactly like that in *Amos*—but the reverse. In *Amos*, the issue was whether the government violated the Establishment Clause by passing a law that classified based on religion in order to provide liberty for religious organizations. The *Amos* Court upheld the law because the law’s purpose was related to the aim of the Free Exercise Clause—religious liberty. In *Davey*, the issue was whether the government

¹⁸⁸ *Walz v. Tax Com. of New York*, 397 U.S. 664, 669 (1970).

¹⁸⁹ 483 U.S. 327 (1987).

¹⁹⁰ *Id.* at 339.

¹⁹¹ *Id.*

¹⁹² *Id.* at 335.

violated the Free Exercise Clause by pursuing an aim of the Establishment Clause—disestablishment of religion.

Amos therefore means that the government should be able to protect the interests of the Establishment Clause more than the Clause requires. Thus, if the government justifies a law with an interest that is not in line with those interests connected with the Establishment Clause, the law is not neutral towards religion under the Court's jurisprudence. As such, the law is above the ceiling and it therefore violates the U.S. Constitution. But if the government offers a substantial interest under the Establishment Clause, the law is neutral towards religion, and accordingly, the act should be upheld.

This application of *Amos* to the Establishment Clause, however, does not answer Justice Scalia's question as to whether the government may discriminate against all religious organizations but not against only one religious denomination. If *Amos* means that states satisfy the Free Exercise Clause whenever they discriminate on the basis of religion so long as they connect the discrimination to religious disestablishment, wouldn't that mean that states may exclude certain denominations from funding programs, since such exclusions partially achieve religious disestablishment?

The answer is that even though excluding one religious denomination from a program partially achieves religious disestablishment, doing so is not permissible because discrimination on the basis of religion is not religion-neutral—not under either a substantive or a formal conception of neutrality under either Clause. The Court has said as much, though perhaps not quite in that language.

In *Larson v. Valente*,¹⁹³ for example, the Court struck down a Minnesota law providing that “only those religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt from the registration and reporting requirements.”¹⁹⁴ Although the law did not facially discriminate among religious sects, the law had a disparate effect on different religious sects, burdening non-traditional religions, which usually acquire funds through solicitations, while not burdening traditional religions, which rarely acquire funds through such means.¹⁹⁵ After finding abundant evidence in the record that Minnesota legislators intended to discriminate against particular religious groups in enacting the law, the Court concluded that the law violated the Establishment Clause.¹⁹⁶

So laws intended to favor or disfavor certain religious groups are not religion-neutral if they succeed in doing so. But what about laws that expressly favor or disfavor certain religious groups? Intuitively, this would seem more problematic, since what is prohibited in substance is almost always prohibited in form. And this intuition finds significant support in the case law.

In *Larson*, Justices White and Rehnquist dissented, arguing that the Religion Clauses prohibit the government from expressly preferring one religion over another, but permit the government to pass laws that have a disparate impact on different religions. They concluded that the Minnesota law was constitutional because it did not expressly prefer one religion over another.¹⁹⁷

¹⁹³ 456 U.S. 228 (1982).

¹⁹⁴ *Id.* at 230.

¹⁹⁵ *Id.* at 247.

¹⁹⁶ *Id.* at 254-55.

¹⁹⁷ *Id.* at 261

Chief Justice Rehnquist expressed this view in other cases as well. Dissenting in *Wallace v. Jaffree*,¹⁹⁸ he claimed that a primary purpose of the Religion Clauses was “to stop the Federal Government from asserting a preference for one religious denomination or sect over others.”¹⁹⁹ Justice Thomas echoed this argument in *Rosenberger v. Rector*,²⁰⁰ concluding that the government may fund religion when it does not prefer any religious faith because “the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others.”²⁰¹ In fact, the proposition that the government may not pass laws facially preferring one religion is so settled that in searching for the original meaning of the Religion Clauses one commentator has claimed that express preferentialism is all that the Framers intended to prohibit.²⁰² Thus, whether or not one adopts a substantive or a formal conception of neutrality, singling out one religious group for favored or disfavored treatment is not religion-neutral.

Since the Court held in *Larson* that preferentialism violates the neutrality principle contained in the Religion Clauses, that means that under either a substantive or a formalist definition of neutrality the government’s favoring of some religions and disfavoring of others cannot be characterized as religion-neutral. Therefore, when the government passes a law that singles out religion, the Religion Clauses require that the law not prefer some religions over others. Thus, if *Amos* can be applied to government

¹⁹⁸ 472 U.S. 38 (1985).

¹⁹⁹ *Id.* at 113.

²⁰⁰ 515 U.S. 819 (1995).

²⁰¹ *Id.* at 855.

²⁰² Robert L. Cord, *Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129, 136-39 (1986). It should be noted that this contention might not be historically accurate. See Douglas Laycock, *Nonpreferential Aid to Religion: A False Claim About Original Intent*, 27 WM & MARY L. REV. 875, 877 (1986) (arguing that “[t]he prominence and longevity of the nonpreferential aid theory is remarkable in light of the weak evidence supporting it and the quite strong evidence against it”).

policies seeking religious disestablishment, that means that the government may not pass a law that discriminates on the basis of one religion, even if it partially achieves religious disestablishment.

Now we have filled the holes in *Davey*, bringing this paradigm to fruition. *Davey* means that a state may discriminate on the basis of religion within a generally available funding program that does not directly affect an individual's ability to participate in the political community only if the state's religious classification relates to a cognizable Establishment Clause interest. The problem with this rule is that it seems to permit the use of non-neutral means in achieving the Establishment Clause interest. *Amos* corrects this problem, providing that the government does not offend one Religion Clause in singling out religion if the government establishes a connection between the law and the interests contained in the other Clause, and if in doing so the government does not use means that abandon the neutrality principle. And *Larson* tells us that when the government passes a law that expressly or purposely favors or disfavors one religion to others, the law is not religion-neutral.

Putting all of this together, the new paradigm is this: In an indirect funding program, a state may go above the requirements of the Establishment Clause by excluding religious organizations from generally available funding programs so long as the state has a substantial religion-neutral interest under the Establishment Clause. Being that the two primary interests expressed in the Establishment Clause are, one, to protect the consciences of taxpayers and, two, to encourage harmony among different religions, the state must seek each of these two interests in order for its exclusion of religion to be a substantial interest under the Establishment Clause. And since the government must use

religion-neutral means, and since discriminating on the basis of one religion is not religion-neutral, the government must exclude all religions if it is going to exclude any.

With this as the standard, states will be limited in how much higher than the Establishment Clause they can go. Washington, for example, would not have satisfied this scrutiny by asserting only an interest in protecting the consciences of its taxpayers. Instead, Washington would have to demonstrate, in addition to how the exclusion protected the consciences of taxpayers, how the exclusion protected its residents from religious friction. Despite the fact that Washington did not demonstrate how it was protecting its people from religious friction, the *Davey* reasoning and outcome are right. Sure, the Court's reasoning was underdeveloped in that the Court did not explain fully how the exclusion fits with the meaning of the Religion Clauses. And sure, Washington's failure to justify its exclusion of Davey makes the outcome questionable. But, at its core, the *Davey* reasoning and outcome are right—because there were substantial reasons under the Establishment Clause for excluding the study of religion from the Promise Scholarship, because these reasons are at the heart of the meaning of the Establishment Clause, and because the Court properly recognized that states have much to contribute in finding the appropriate balance between religious liberty and disestablishment.

CONCLUSION

The Religion Clauses are so difficult to grasp, intellectually, and so difficult to settle, doctrinally, because the Clauses are inherently contradictory. Thus, it might be appropriate that the paradigm developed in this Article rests on its own contradictory foundation—that, by searching for one Religion Clause principle, the Court created

many, and that these many principles can be combined to create a unitary standard for the states to follow.

The protean meaning of neutrality gives the states discretion and therefore preserves the federalist nature of the Religion Clauses. This truly brings us back to the meaning of protean. Just as Menelaus could find his way back home to Helen only by taking a hold of Proteus, a sea god who could change his shape at will, we can bring church-state relations back to the states by holding on to the Court's protean concept of neutrality.