COMMENT

THEOLOGY SCHOLARSHIPS, THE PLEDGE OF ALLEGIANCE, AND RELIGIOUS LIBERTY: AVOIDING THE EXTREMES BUT MISSING THE LIBERTY

Douglas Laycock

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Douglas Laycock*

The Supreme Court heard two important religious liberty cases this Term; it decided one and produced revealing separate opinions in the other. *Locke v. Davey* asked whether the State of Washington could exclude students majoring in theology, taught from a believing perspective, from a generally available scholarship program. In *Elk Grove Unified School District v. Newdow*, the question was whether the state can ask school children to recite the religious affirmation — "one Nation under God" — in the Pledge of Allegiance.

This Comment places these cases in a larger context and reviews them from a perspective of substantive neutrality, concluding that the theology scholarships should have been constitutionally required and that the current Pledge ceremony is constitutionally forbidden. These are not the Court's views, and they do not appear to be the views of any organized interest group. But for reasons to be explained, these are the results that would best serve religious liberty.

Together, *Davey* and *Newdow* implicated all three major lines of religious liberty cases: funding of religious organizations, regulation of religious practice, and sponsorship and regulation of religious speech. Two of these fields have recently seen dramatic doctrinal change. Federal constitutional restrictions on funding religious institutions have collapsed. Protections for religious practice abruptly changed from a substantive liberty, triggered by a burden on religious practice, to a form of nondiscrimination right, triggered by a burden that is not neutral or not generally applicable. These two changes set up the plaintiff's claim in *Davey*: if funding is permitted and discrimination is forbidden, it seemed to follow that a discriminatory refusal to fund is forbidden.

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2 See id. at 1309–11.
4 See id. at 2305–08.
6 See infra pp. 200–11.
These changes have not touched the religious speech cases. The Court has long protected private religious speech to the same extent as other protected speech. The Court has prohibited government sponsorship of religious speech for more than forty years, without exception in the public schools and with few exceptions elsewhere. The issue in Newdow was whether to create an arguably de minimis exception in the public schools.

Why have the speech cases not moved in unison with the funding cases? If it were a simple function of the Court’s swing to the right, or of the religious and separationist interest groups that file amicus briefs, we might expect the two principal lines of Establishment Clause cases to move together. Seven Justices seem to view the cases this way: three consistently vote to permit religious funding and protect religious speech, even if government sponsored, while four consistently vote to prohibit religious funding and often to prohibit religious speech in government-sponsored forums, even by private speakers. But to Justices Kennedy and O’Connor, the speech and funding cases are very different. What reconciles the speech and funding cases is the principle of minimizing government influence and maximizing individual choice.

Financial aid can be distributed in a way consistent with individual choice; the inelegant catch phrase in the recent voucher case is “true private choice.” Each family receiving a government voucher can choose the school that it prefers among all the options available. In a metropolitan area with many choices, each family can choose religious or secular, which religious tradition, and how intensely religious. Choice may be constrained by poverty, the inadequacy of the voucher, or the inadequacy of choices in some educational markets. But even where the choices are inadequate, there are more choices with the voucher than without it. Nondiscriminatory funding expands individual choice.

The Court’s protection of private religious speech also fits this theory of individual choice. When a student prayer club meets in an empty classroom, its audience is only those who choose to attend the prayer club, not all those assembled for some other school event. Those who choose to participate can decide whether the club will be

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7 See infra pp. 218–22.
10 See Zelman v. Simmons-Harris, 536 U.S. 639, 649–50, 653, 662 (2002) (upholding a program that permitted the general population to redeem publicly funded tuition vouchers at secular or religious private schools).
religious or secular, in what religious tradition, and how intensely religious. If an individual dislikes the direction in which the group is moving, he can stop attending.

But individual choice is impossible in cases of government-sponsored religious speech. Any religious observance at a public event necessarily requires a collective decision. Government must decide whether the content of the speech will be religious or secular, in which religious tradition, and how intensely religious, or it must delegate these choices to a selected citizen who becomes a government agent for this purpose. The frequent result is prayer that can hold a majority in the school board or prayer by a student who can win a student election.

The speech and funding cases are thus united by a principled commitment to government neutrality and individual choice in religious matters. The Court’s decisions reflect that commitment, but it is actually the commitment of only two Justices. Seven Justices seem to vote — in speech and funding cases — for or against religion instead of for or against religious liberty. That voting lineup is mostly scrambled in the religious practice cases; votes on regulation of religious practice (except for those of Justice Stevens) appear to be better explained by views about the proper role of the judiciary.

To some extent, these voting patterns broke down in Davey and Newdow. The plaintiff’s claim in each case was a straightforward application of recent precedents. But Davey involved an important competing principle: there is very little that the government is constitutionally required to fund. In Newdow, many holdings pointed one way, but much dicta pointed the other. And in different ways, each claim was extreme. Joshua Davey claimed not only that government may fund his theology major, but that it must — that what had long been constitutionally prohibited, and had only just been constitutionally permitted, was now constitutionally required. In Newdow, politicians and the general public overwhelmingly condemned the Ninth Circuit’s invalidation of the Pledge of Allegiance. From a realist perspective, neither claim seemed likely to prevail in the Supreme Court. Neither claim did.

In Davey, the gravitational pull of the no-aid tradition overrode the rule prohibiting discrimination against religion. Newdow went off on
standing grounds, but three Justices would have reached the merits and would have upheld "under God" in the Pledge — for three radically different reasons.

Interest groups lined up in predictable ways. Some of these groups have more nuanced positions across the full range of religious liberty issues, but in this Term, those who filed amicus briefs in both cases appeared to support religion, oppose religion, or support government discretion. Religious conservatives and their allies supported theology scholarships in Davey and "under God" in the Pledge of Allegiance, as did Justices Thomas and Scalia. Most separationist groups who filed in both cases took the opposite positions, opposing theology scholarships and also opposing "under God" in the Pledge.

15 For analysis of the standing issues, see The Supreme Court, 2003 Term—Leading Cases, 118 Harv. L. Rev. 248, 426 (2004).
16 See Newdow, 124 S. Ct. at 2316–20 (Rehnquist, C.J., concurring in the judgment); id. at 2321–27 (O'Connor, J., concurring in the judgment); id. at 2327–33 (Thomas, J., concurring in the judgment).
18 See Davey, 124 S. Ct. at 1320 (Thomas, J., dissenting); Newdow, 124 S. Ct. at 2327 (Thomas, J., concurring in the judgment).
tion groups and five states opposed mandatory theology scholarships but supported "under God" in the Pledge. This religiously mixed position supports the educational establishment and governmental discretion, but is also consistent with a separationist opposition to government funding of religious education and a realist recognition that the Pledge has overwhelming popular support. Popular support for "under God" in the Pledge is presumably the reason the American Jewish Congress supported it, and the reason other prominent separationist organizations filed no brief in Newdow.

Only one amicus or attorney who filed in both cases supported theology scholarships in Davey and opposed the Pledge in Newdow: the author of this Comment. Representing two very different groups of amici, I took what I believe to have been a consistent position in favor of minimizing government’s influence on the religious beliefs and practices of the American people. The discriminatory funding scheme discouraged a religious practice — actually paid students not to major in theology. The Pledge encouraged a religious practice — actually imposed a short profession of faith on millions of children. I have long argued that government should be substantively neutral toward religion, meaning that government should “minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.”

21 See Brief for the National Education Association as Amicus Curiae Supporting Petitioners, Davey (No. 02-1315), available in 2003 WL 21697737; Brief Amicus Curiae of the National Education Association in Support of Petitioners, Newdow (No. 02-1624), available in 2003 WL 23011470; Amicus Curiae Brief of National School Boards Association et al. in Support of Petitioners, Davey (No. 02-1315), available in 2003 WL 21697733; Brief of Amicus Curiae National School Boards Association in Support of Petitioners, Newdow (No. 02-1624), available in 2003 WL 23011475.

22 See Brief of the States of Vermont et al., Amici Curiae in Support of Petitioners, Davey (No. 02-1315), available in 2003 WL 21715036; Fifty-State Brief, supra note 17.

23 See Brief Amicus Curiae of the American Jewish Congress in Support of Neither Party, Newdow (No. 02-1624), available in 2003 WL 23144816 [hereinafter AJC Newdow Brief] (concluding that “under God” in the context of the Pledge is basically secular and should be upheld).

24 People for the American Way Foundation, the Baptist Joint Committee on Public Affairs, and the American Jewish Committee did not file in Newdow.

25 See Brief Amici Curiae of the Council for Christian Colleges & Universities et al. in Support of Respondent, Davey (No. 02-1315), available in 2003 WL 22176102; Brief of Rev. Dr. Betty Jane Bailey et al. as Amici Curiae Supporting Respondent Michael A. Newdow, Newdow (No. 02-1624), available in 2004 WL 314150 [hereinafter Clergy Brief]. Seeing little prospect of success, I also devoted a third of the Clergy Brief in Newdow to suggesting a way to uphold the Pledge that would do the least damage to religious liberty. See id. at *20-30; infra p. 238 and note 529. Professor Thomas Berg at St. Thomas University (Minnesota) was the principal author of the Christian Colleges Brief. I participated actively and take full responsibility, but much less than full credit.

26 Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DEPAUL L. REV. 993, 1001 (1990). For broadly similar approaches to religious liberty, see, for example, Thomas C. Berg, Religion Clause Anti-Theories, 72 NOTRE DAME L. REV. 693 (1997),
ence of government maximizes the freedom to make religious choices or to act on existing religious commitments. The government's conduct failed this neutrality test in both *Davey* and *Newdow*.

I describe these positions here, partly in the interest of full disclosure, but mostly to highlight the difference between promoting religious liberty and promoting or opposing religion. A strong commitment to religious liberty necessarily requires equal concern for the rights of believers and nonbelievers. One's views on religious liberty should be independent of one's views on religion. To support religious liberty only or mostly for people with views more or less like one's own would be to repeat, in diluted form, the Puritan mistake in seventeenth-century Massachusetts.  

This Comment is organized around the three principal sets of religious liberty issues. Part I considers *Davey*'s implications for funding programs. As so often happens in constitutional litigation, each side's clear and simple principle leads to results that the Court considers unacceptably extreme. But nine independent minds trying to define a position in the middle are likely to appear unprincipled, illogical, and inconsistent.  

The Court struggled for decades to find a middle ground that would permit some funding for religious institutions but not too much. Its new middle ground is to permit most funding but to require hardly any. This position maximizes government discretion and judicial deference, but it threatens religious liberty. The Court has quite possibly come to the worst solution for religious liberty, maximizing government power over religious institutions.

*Davey* also poses important questions about the boundaries of its holding. As written, it applies only to funding the training of clergy, but it may well be extended to all funding decisions, including discriminatory refusals to fund secular services or instruction delivered by religious institutions. There are exceptions for government-funded forums for speech, for badly motivated refusals to fund, and for withholding government funds for secular activities in ways that penalize religious activities, but these exceptions are narrowly conceived and


may be illusory. Important questions remain open, but *Davey* is a major win for the opponents of funding.

Part II considers *Davey*’s implications for disputes over government regulation of religious practice. At least some of those who would narrowly construe the Free Exercise Clause claim that *Davey* authorizes facially discriminatory regulation of religion and requires proof of bad motive for any successful free exercise claim. This is wishful thinking on their part. *Davey*’s holding has one clear limit, dictated by the facts of the case and the scope of the dispute: *Davey* is a funding case. It authorizes discriminatory funding, but it does not authorize discriminatory regulation, and it does little to clarify the regulation cases.

Part III considers *Newdow* and the religious speech cases. Once past the phony argument that “under God” is not a religious statement, *Newdow* posed a longstanding question about the limits of the rule against government-sponsored religious observances. The logic of the Court’s rule leads to an absolute ban on any government endorsement of a religious viewpoint, and the Court has carried that principle farther than it carries most principles. But the Court’s aversion to extreme results sometimes overrides doctrinal logic. Repeated dicta have disclaimed absolutism and asserted the permissibility of some de minimis government expressions of religious faith. *Newdow* required the Court to define the de minimis exception and decide whether it encompassed the Pledge of Allegiance. The Court postponed the problem by finding that the plaintiff lacked standing.

Three Justices addressed the merits in separate opinions. Justice O’Connor attempted to define a reasonably objective boundary to the de minimis exception; her opinion is a substantial improvement over all previous judicial comments on this issue. Chief Justice Rehnquist offered fuzzy euphemisms with no prospect of leading to a workable solution. Justice Thomas would have eliminated this issue and many others by holding that the Establishment Clause creates no individual rights. Fortunately, this position is far too extreme to attract five votes.

### I. *DAVEY AND THE FUNDING CASES*

#### A. The Doctrinal Context: Funding of Religious Institutions

The case law on funding religious institutions has changed dramatically over the last twenty years. These changes are rooted in ten-

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sions that go back to the very beginnings of modern Establishment Clause doctrine.

From 1947 on, the Court struggled to reconcile two competing institutions, announced in consecutive paragraphs in *Everson v. Board of Education*. On one hand was the no-aid principle: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." On the other was the non-discrimination principle: the state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."

The no-aid principle derived from eighteenth-century debates over earmarked taxes levied exclusively for the funding of churches. In an era with few public welfare benefits, these taxes funded purely religious programs and funded those programs preferentially. As applied to that dispute, the two principles did not conflict, and the no-aid principle served religious liberty. No-aid protected citizens from being forced to contribute to churches, it protected the churches from financial dependence on the government, it prevented discrimination in favor of religion, and it did not discriminate against religion.

But all the modern cases involved equal funding of religious and secular alternatives. And in all the modern cases, government money funded secular services in a religious environment, not purely religious programs. In that context, the Court had to choose: either government money would flow through to religious institutions, or students in religious schools and patients in religious hospitals would forfeit instruction or services that the state would have paid for if they had chosen a secular school or hospital.

This difficulty was apparent in *Everson* itself and produced a 5-4 split. Free bus rides to school were a public welfare benefit. Free bus rides to Catholic school supported the religious activity of attending Catholic school. Refusing free bus rides to students attending Catholic school excluded individual Catholics from the public welfare benefit because of a choice that, for most of them, was based squarely on their faith.

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31 *Id.* at 16.
32 *Id.*
The nondiscrimination principle prevailed in *Everson*, which upheld the government-funded bus rides to a Catholic high school, and again in *Board of Education v. Allen* in 1968, which allowed states to provide secular textbooks for use in religious schools. These cases applied the weak form of the nondiscrimination principle; they permitted equal funding, but did not require it. Few judges took seriously the possibility that equal funding might be constitutionally required.

In *Lemon v. Kurtzman* in 1971, the Court struck down a funding program for the first time, holding that states could not subsidize teachers' salaries in religious schools. The no-aid principle predominated from then until its highwater mark in *Aguilar v. Felton* in 1985. *Aguilar* invalidated the use of federal Title I funds to pay public school teachers to provide remedial instruction in secular subjects to educationally deprived children in low-income neighborhoods, on the campuses of religious schools.

Even so, the no-aid principle never completely triumphed; the *Lemon* era was also the era of much-ridiculed distinctions. The state could provide books, but not maps; it could provide bus rides to school, but not bus rides to field trips. Perhaps most absurd, after *Aguilar* the government provided remedial instruction in vans parked near religious schools. The cost of vans, and of dressing children to go back and forth in all weathers between the school building and the vans, was a deadweight economic and educational loss for a symbolic

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34 See *Everson*, 330 U.S. at 17-19.
36 Id. at 243-49.
37 See *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 381-87 (W.D. Mo. 1973), aff'd mem., 419 U.S. 888 (1974) (holding that state was not required to provide bus rides to private schools); cf. *Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (rejecting claim that if state aided private schools, equal protection required aid to religious schools that would otherwise have been prohibited by the Establishment Clause).
38 403 U.S. 602 (1971).
39 Id. at 615-25.
42 See *Aguilar*, 473 U.S. at 404-07 (describing the program); id. at 408-14 (invalidating the program).
46 See *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1455-61 (9th Cir. 1995) (describing and upholding the van program).
change that completely failed to satisfy the objections of those who thought there should be no funding at all.

The awkward distinctions persisted partly because the swing votes were unwilling to overrule the earlier cases, and partly because they were still trying to leave some scope for the two competing principles of no-aid and nondiscrimination.\textsuperscript{47} Even the \textit{Lemon} test, the very symbol of strict separationism, took its first two elements almost verbatim from the Court's earlier elaborations of "wholesome neutrality" toward religion.\textsuperscript{48} \textit{Lemon} formally prohibited government actions that \textit{inhibit} religion as well as government actions that \textit{advance} religion.\textsuperscript{49}

The Court implicitly reconciled its commitment to no-aid with its lingering sense of neutrality in part by manipulating baselines,\textsuperscript{50} and in part by disaggregating the measure of neutrality into separate inquiries into effects that advanced religion and effects that inhibited religion.\textsuperscript{51} This made it possible to characterize any benefit to religion as an advancement, without considering the relative magnitude of advancement and inhibition under alternative policies.

Manipulating the baseline and disaggregating the neutrality inquiry sharply limited government aid to religious schools in the period after \textit{Lemon}. But as the ridiculed distinctions illustrate, these techniques never fully captured the field for the no-aid principle. Even at the height of the \textit{Lemon} era, the Court let government provide bus transportation,\textsuperscript{52} textbooks,\textsuperscript{53} standardized testing,\textsuperscript{54} diagnostic services,\textsuperscript{55} state income-tax deductions,\textsuperscript{56} and remedial instruction and therapeu-


\textsuperscript{48} \textit{Lemon}, 403 U.S. 602, 612 (1971), cites \textit{Board of Education v. Allen}, 392 U.S. 236, 243 (1968). \textit{Allen} quotes \textit{School District v. Schempp}, 374 U.S. 203, 222 (1963). In \textit{Schempp}, the words that became the first two elements of the \textit{Lemon} test were offered as a test for identifying "[t]he wholesome 'neutrality' of which this Court's cases speak." \textit{Id.}

\textsuperscript{49} \textit{Lemon}, 403 U.S. at 612.

\textsuperscript{50} See Laycock, supra note 33, at 48 (explaining the choice of baselines).

\textsuperscript{51} See Laycock, supra note 26, at 1007-11 (explaining disaggregated neutrality).


\textsuperscript{53} See Meek v. Pittenger, 421 U.S. 349, 359-62 (1975) (plurality opinion); \textit{id.} at 385 (Burger, C.J., concurring); \textit{id.} at 396 (Rehnquist, J., concurring); \textit{Allen}, 392 U.S. at 243-49.


\textsuperscript{55} See Wolman, 433 U.S. at 241-44.

tic services delivered off the property of the religious school. Because the Court manipulated neutrality instead of repudiating it, because it never squarely repudiated the nondiscrimination principle, and because the resulting body of law seemed incoherent, the no-aid decisions remained vulnerable to new Justices measuring neutrality from a different baseline.

Beginning in 1986, the Court progressively elevated the nondiscrimination principle and subordinated the no-aid principle. Since 1986, the Court has upheld six programs that permitted government funds to reach religious institutions; it has invalidated none. Four decisions from the Lemon era have been overruled in whole or in part. The Court has upheld vouchers that can be used to pay tuition at any public or private school, including religious schools, and it has upheld long-term loans of equipment to private schools, including religious schools, where the equipment is distributed to all schools on the basis of enrollment. Lemon's ban on direct cash grants to religious institutions remains, but at least in the school context, there is no reason for state legislatures to test that limit. They can deliver as much money as they are willing to spend in the form of grants or vouchers to students and their families.

57 See Wolman, 433 U.S. at 244–48.
62 See Mitchell, 530 U.S. 793.
64 The Bush Administration's initiatives for faith-based social services might be different in practice from vouchers for schools. Legislators and judges might doubt the capacity for private choice among the mentally ill, the drug addicted, and other beneficiaries suffering severe social problems. And while government funds secular schools for all, it has not funded secular programs for all who need these other services. But direct cash grants to religiously affiliated social service providers were rarely controversial until the Bush proposals. The real issues in that controversy are over the rules for delivering and administering the money: whether the church-
Some of the cases in this transition were decided on narrow facts, others were decided with no majority opinion. But in Zelman v. Simmons-Harris, the voucher case, the opinion had sweeping implications and there were five votes throughout. Unless the dissenters persist and acquire a fifth vote from new appointments, the Establishment Clause part of this fight is over. There is a long political tradition of no aid to Catholic or other "sectarian" schools, but Supreme Court decisions restricting such aid are confined to a remarkably brief period, from 1971 to 1985. The no-aid principle never dominated constitutionally to the extent it once dominated politically, and Zelman appears to be a huge consolidating win for the proponents of nondiscriminatory funding.

B. What the State May Fund

Washington State Promise Scholarships were available to any student with a certain level of academic achievement and a family income below 135% of the state median. A Promise Scholarship could be used at any accredited school in Washington, for any college-related expense (including room and board), and for the study of any major — except that it could not be used for any expense, however secular, incurred by a student majoring in theology. By uncontroversial stipulation, an affiliated provider must be separately incorporated from the church, whether it must separate religious and secular components of the program, whether it must forfeit its right to hire employees of its own faith, and whether granting agencies will be forbidden to discriminate between religious and secular providers. This last issue parallels the issue in Davey: are grants to religious providers merely permitted, or should they be required (by statute if not by the Constitution) on equal terms with secular providers? For pre-Davey analyses of faith-based social services, see IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW 2003: DEVELOPMENTS IN THE LAW CONCERNING GOVERNMENT PARTNERSHIPS WITH RELIGIOUS ORGANIZATIONS 2-28 (2003), available at http://www.religionandsocialpolicy.org/docs/legal/reports/12-2-2003_state_of_the_law.pdf; 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, 982-83 (2003); and Symposium, Public Values in an Era of Privatisation, 116 HARV. L. REV. 1211 (2003).


67 See Mitchell, 530 U.S. at 801.


70 The dissenters’ persistence and the possibility of their acquiring a fifth vote is the theme of Fried, supra note 58.


72 Davey, 124 S. Ct. at 1310.

73 See id.
lation, although not on the face of the statute, "theology" meant theology taught from a perspective that is "devotional in nature or designed to induce religious faith." So a Promise Scholarship could be used to major in theology from a neutral academic perspective, as in the typical academic religion department.

Joshua Davey claimed that excluding devotional theology majors was unconstitutional discrimination against religion. Washington did not even argue an Establishment Clause defense. The state might have argued that there is something special about training clergy — that funding the training of clergy is decisively different from subsidizing attendance at a church-affiliated elementary or secondary school that satisfies the state's secular compulsory education requirements. Witters v. Washington Department of Services for the Blind, which allowed a student to attend seminary with his scholarship for the blind, would have been an obstacle to that argument. But Witters might have been distinguished as a special case about aid to the disabled.

The bigger obstacle to an Establishment Clause defense, even for state funds for training the clergy, was the Court's reasoning in upholding financial aid delivered through programs of "true private choice." At bottom, the Court has held that there is no state action in a student's choice of a school or a major. As Davey summarizes:

Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology, and the State does not contend otherwise. This statement is dictum, but it accurately describes the Court's reasoning.

This private-choice reasoning implies the irrelevance of an argument that has long been central to the funding debate. Supporters of the constitutionality of modern funding programs have argued not just that the programs are nondiscriminatory, but also that the state gets full secular value for its money. The state pays for math, reading,
and history, or it pays for medical care, or for food and shelter for the homeless; it does not pay for the clergy or the training of clergy. But this secular-value distinction no longer matters.

If "true private choice" breaks the link to state action, then there are no constitutional constraints on how the money can be spent. And that should mean that there is no need to allocate the cost of a church-affiliated school between the secular portion of the instruction and the religious portion. If the state can pay for seminarians, it can surely pay for middle-schoolers' religion classes, so long as the money is routed through "true private choice." If its voters can be persuaded to support the expenditure, a state can provide vouchers that pay the full cost of attending church-affiliated schools.

_Rosenberger v. Rector & Visitors of University of Virginia_81 also supports the inference that the religious intensity of the program is irrelevant to the constitutionality of funding. _Rosenberger_ held that where a state university used student fees to pay for a broad forum of student publications, it could not refuse to pay for a student religious publication.82 _Rosenberger_ was a free speech case, distinguished as such in _Davey_.83 But in rejecting the university's Establishment Clause defense, _Rosenberger_ relied on neutral funding of the students' independent publications.84 This reasoning is a variant on the private-choice and no-state-action rationale that culminated in _Zelman_: _Rosenberger_ emphasized neutrality rather than individual choice, because the money did not pass through the hands of an individual before benefiting the magazine.85 But individual choice was still at work; the Court required the program to be viewpoint neutral, and small groups of students chose the content of each publication.86 And while the Court implausibly said that the money in _Rosenberger_ benefited only a publication and not a religious institution,87 it was undisputed that much of that publication’s content was core proselytizing speech.88 The religious intensity of the program did not matter in

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82 See id. at 828–40.
83 See _Davey_, 124 S. Ct. at 1312 n.3. This dubious distinction is considered _infra_ section I.C.3.c, pp. 191–95.
84 See _Rosenberger_, 515 U.S. at 839–40, 843–44.
85 See id. at 825 (describing procedures for payment from the student council to creditors of the funded organization).
86 See id. at 825–26 (describing the founder, editors, and content of the magazine founded by the lead plaintiff).
87 _Id_. at 844.
88 See id. at 826; _id_. at 865–68 (Souter, J., dissenting).
Rosenberger or Witters, and the dictum in Davey treats it as settled that religious intensity does not matter if funds are administered through "true private choice."

There probably will still be a ban on gerrymandered categories that fund purely religious programs and little else. Examples might be a subsidy for all groups that meet once a week to consider issues pertaining to the meaning of life, or a Utah subsidy for the costs of traveling and living away from home while working without pay for a tax-exempt organization for up to two years. But so long as the funding category includes substantial secular content, there appears to be no constitutional limit on the religious intensity of individual choices within the category.

This emerging rule may plausibly be viewed as an exception to the generalization that the Court avoids pursuing its logic to extreme results. No doubt this clear rule avoids difficult problems of apportionment and line-drawing. And avoiding such line-drawing promotes religious liberty, by eliminating incentives for programs to stay just on the secular side of the line. But refusing to draw lines also overrides the core religious liberty claim of the opponents of funding — that they should not be forced to pay taxes for other people's religious instruction. That claim was weak and attenuated as applied to instruction in secular subjects; the longstanding objection to funds for secular subjects in religious schools is a category mistake.

The objection to government funds for instruction in religious subjects is far more plausible but still not obviously correct. Government financial incentives to choose secular over religious instruction directly discourage individual religious choices, whereas taxpayers' knowledge that a tiny fraction of the government's tax revenues goes to nondiscriminatory funding of education in religious schools is not influence any person's religious choices. Even so, there is much to recommend a rule that although government may or must pay for secular value delivered, churches or individuals must pay for religious components of the program. The case for such a limit on funding is strongest in programs for the delivery of social services, where the service plainly could be delivered without the religious message accompanying

89 This hypothetical program would exactly fit the practice of young Mormons to go "on mission" for two years, seeking to spread the faith. See Richard N. Ostling & Joan K. Ostling, Mormon America: The Power and the Promise 203-20 (1999). Where the state is funding secular content, as in elementary and secondary education, the Court has not cared that most of the private institutions in the program were offering that secular content in a religious environment. See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639, 656-60 (2002). But the Court might react differently in the unlikely event of a program that funded overwhelmingly religious content.

it or supporting it. It is considerably weaker where the government is funding private speech, including secular and anti-religious speech. However this balance should be struck, there is not much evidence that either wing of the Court saw two competing claims to religious liberty. The no-state-action rationale resolved the may-fund cases without reference to religious liberty.

C. What the State Must Fund

The holding in *Locke v. Davey* concerns what the state must fund. The answer appears to be very little, perhaps nothing. *Davey* held that when the state elects to fund a category of private-sector programs, it may facially discriminate against religious programs within the category. From the perspective of the Court’s cases on claims of a right to government funding, this holding is not surprising. From the perspective of the Court’s cases on discrimination against religion, it is remarkable. The Court had never before held that the state can discriminate against religion.

The plaintiff’s claim in *Davey* attempted to apply to a funding program the nondiscrimination principle that is newly prominent in the cases on regulation of religious practice. The two most recent Supreme Court cases in that line — *Employment Division v. Smith* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* — converted the right to free exercise of religion into some kind of nondiscrimination right. For now I fudge with “some kind,” because there is a large debate about the precise nature of this right. We will have to explore the full complexity of that debate to understand *Davey’s* implications for the regulation cases. But little of that complexity is necessary to understand either the claim in *Davey* or *Davey’s* disputed implications for the funding cases.

There was no subtlety to the discrimination in the Washington State Promise Scholarships. The scholarships could be used to study in any accredited program except theology taught from a perspective designed to induce or reinforce belief. So *Davey* filed a very simple claim: barring his theology major was discrimination against religion, on the face of the statute, in open and obvious violation of the *Smith-Lukumi* rules. *Lukumi* had said: “[T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning

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91 See *Davey*, 124 S. Ct. at 1311–15.
94 See infra Part II, at pp. 200–18.
95 See *Davey*, 124 S. Ct. at 1309–10.
discernible from the language or context." The statute creating the Promise Scholarships referred to theology on its face, and no one claimed that the reference to theology included any secular meaning. The law treated the believing study of theology worse than it treated any other accredited major; theology majors were excluded, because of their faith-based choice of major, "from receiving the benefits of public welfare legislation." This was discrimination under any understanding of discrimination. Moreover, the Establishment Clause was not a defense, because the money went to the student and the student's decision to major in theology was a "true private choice."

To be clear on the scope of this free exercise claim, note that virtually everyone agrees that the state can distinguish between funding its own schools and funding private schools. There is no plausible claim of a constitutional right to have the state contract out its services. Public and private schools may or may not differ in their treatment of religion, but they differ fundamentally in their ownership, and there is nothing constitutionally suspect about the state discriminating on the basis of public or private ownership. Religious minorities who find unacceptable secularism in public schools chafe under the burden of paying taxes for public schools and tuition for private schools, but an attack on that burden would not be a simple discrimination claim. It would require a far more robust claim: that the secularism of public education is so burdensome to some families' exercise of religion that they have no choice but to forgo their right to a free public education, and that the only remedy for that burden is for the state to pay for education in a religiously acceptable environment. It is easy to imagine such a claim, but it is impossible to imagine a court taking it seriously. The courts have rejected claims merely to be exempted from small parts of the curriculum — claims that were much less sweeping and much simpler to remedy.

96 Lukumi, 508 U.S. at 533.
97 See WASH. REV. CODE § 28B.10.814 (1997) ("No aid shall be awarded to any student who is pursuing a degree in theology.").
100 See Norwood v. Harrison, 413 U.S. 455, 461–63 (1973) (rejecting claim that the right to attend private schools implies a right to funding for those schools); Brusca v. Missouri ex rel. State Bd. of Educ., 332 F. Supp. 275, 279–80 (E.D. Mo. 1971), aff'd mem., 405 U.S. 1050 (1972) (rejecting claim of free exercise right to funding for private religious schools); Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 19–22 (1st Cir. 2004) (rejecting claim that disabled students in private schools are entitled to the same government-funded services as are disabled students in public schools); Davey, 124 S. Ct. at 1317 (Scalia, J., dissenting) (conceding that the state "could make the scholarships redeemable only at public universities," which "would replace a program that facially discriminates against religion with one that just happens not to subsidize it").
101 See, e.g., Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 696–702 (10th Cir. 1998) (rejecting home-school student's claim of right to take selected classes at pub-
Discrimination claims like the one in *Davey* arise only after the state makes a voluntary decision to fund attendance at private institutions. Then the question is whether it can fund attendance at secular institutions but not religious ones, or as in *Davey*, fund secular courses of study but not religious ones. Prohibiting such discrimination would not require the state to fund religious institutions. A decision not to fund private schools at all would eliminate any argument about discrimination among private schools. Davey's claim depended on a prior political decision to fund private schools; once the state did that, he argued, it could not discriminate between secular and religious schools or majors.

Davey's claim appeared to be a slam dunk under *Lukumi*. And yet it lost, 7-2. The Court held that *Lukumi*’s ban on discriminatory regulation did not apply to a discriminatory refusal to fund the training of the clergy, at least absent antireligious motive. The Court cited a long national tradition against government funding of the clergy, reflected in “popular uprisings” and made explicit in state constitutions from the founding era. The state's interest in adhering to this tradition was "historic and substantial." In a strangely structured opinion, the Court relied on this interest to conclude that the discriminatory refusal to fund was not presumptively unconstitutional or inherently suspect, and then relied on the same interest to justify the discrimination under the unspecified but apparently more deferential standard that applied in the absence of such a presumption or such suspicions. These points were the entirety of the holding.

The terse opinion implies more than it states. The remainder of this section teases out and evaluates what the Court has done. Section

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102 See *Strout v. Albanese*, 178 F.3d 57, 60-66 (1st Cir. 1999) (upholding such a plan where the money was paid directly to the schools); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 133-36, 143-47 (Me. 1999) (upholding the same plan); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563-64 (Vt. 1999) (reserving the question).

103 Not all commentators have realized that Davey’s claim was self-limiting in this way. See Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 Harv. L. Rev. 1810, 1864 (2004) (arguing that under Davey's theory, funding of secular public schools would require funding of religious private schools). For the reasons explained in the text, this claim would not follow from Davey's theory.

104 *Davey*, 124 S. Ct. at 1313.

105 See id. at 1314 (collecting provisions from early state constitutions).

106 Id. at 1315.

107 See id.

108 See id.
I.C.1 reviews the Justices’ inconsistent voting patterns in cases about what the state must fund. Section I.C.2 shows that the Court relied on earlier cases distinguishing financial penalties from “mere refusals to fund,” and that deference to government definitions of “mere refusal to fund” has led the Court to uphold what are in fact financial penalties on the exercise of constitutional rights. Section I.C.3 explores other limits to Davey’s holding and finds that these limits are likely to be illusory. Section I.C.4 assesses the regime that Davey creates: unchecked government discretion to either fund religion or not — with or without conditions — thus maximizing government power to interfere with religious liberty.

1. A Realist Introduction to the Discriminatory Funding Cases. — Joshua Davey was not the first litigant to complain that a state funding program discriminated against the exercise of a constitutional right. Usually, the Court rejects such claims; occasionally, it grants them. There are principled distinctions to be drawn among some of these cases, but it is clear that the votes of individual Justices are influenced by their sympathy or lack of sympathy for the underlying constitutional right. Michael McConnell demonstrated such inconsistencies on the Burger and early Rehnquist Courts. This pattern has continued and perhaps gotten worse.

Only two recent discriminatory funding claims were unambiguously successful. Rosenberger v. Rector & Visitors of University of Virginia required the university to fund a religious magazine so long as it maintained a forum of subsidized student publications. Legal Services Corp. v. Velásquez required the government to fund lawsuits seeking to “reform a Federal or State welfare system” so long as it funded lawsuits seeking benefits under an existing and unformed welfare system. Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas voted to require funding for religious magazines but not for law-reform litigation; Justices Stevens, Souter, Ginsburg, and Breyer voted to require funding for law-reform litigation but not for religious magazines. Only Justice Kennedy voted to require funding in both cases. Part of the disagreement between the two blocs of four was based on the Establishment Clause. But quite independently of the Establishment Clause, the Stevens-Souter-

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109 See McConnell, supra note 80, at 989–91.
111 See id. at 828–46.
114 See id. at 540–49.
115 See Rosenberger, 515 U.S. at 864–92 (Souter, J., dissenting) (relying on the Establishment Clause).
Ginsburg-Breyer bloc thought that there was no free speech claim in *Rosenberger*, where the university funded a broad range of publications, but that there was a free speech claim in *Velasquez*, where the government paid lawyers for the poor but limited the lawsuits it was willing to pay for.

*Rosenberger* and *Velasquez* are not the only examples of such apparent inconsistency. Chief Justice Rehnquist and Justices Scalia and Kennedy, who voted to require equal funding of religious magazines in *Rosenberger*, voted not to require equal funding of abortion information in *Rust v. Sullivan*. Justice Stevens cast the opposite vote in each case. Justices Stevens, Souter, and Ginsburg, who voted to require equal funding of law-reform litigation but not of religious magazines, also voted to require equal funding of computers without pornography filters in *United States v. American Library Ass'n*. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas cast the opposite votes in each case, voting to require equal funding of religious magazines but not of law-reform litigation or computers without pornography filters. Some of these votes can no doubt be reconciled. But it is hard to resist the inference that in *Rosenberger*, Justices were voting for and against religion more than they were interpreting liberty.

2. Penalties Versus Refusals To Fund. — One distinction from these earlier cases was central to the Court’s reasoning in *Davey*. The Court often says that when the government refuses to fund a constitutionally protected activity, it imposes no cognizable burden on the exercise of the unfunded constitutional right. It also says that the government cannot respond to an exercise of a constitutional right by withholding money for other activities eligible for government funding; this would penalize the exercise of the right. The no-penalty side of this distinction is an application of the much-debated rule against unconstitutional conditions. But the Court places most funding cases on the other side of the line, as “mere” failures to fund.

Invoking this body of law without citation or elaboration, the Court denied that Washington had pressured Davey to abandon his

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116 See id. at 892–99 (finding subject-matter exclusion, which is permissible, instead of viewpoint discrimination, which is forbidden).
117 See *Velasquez*, 531 U.S. at 540–49.
119 Not everyone was inconsistent. Justice Souter voted not to require funding in either case, and Justice O'Connor voted to require funding in both cases, but on statutory rather than constitutional grounds in *Rust*.
120 See 539 U.S. 194, 220 (2003) (Stevens, J., dissenting); id. at 231 (Souter, J., dissenting).
121 For an introduction to the voluminous literature on unconstitutional conditions, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 2–6 & nn.1–22 (2001). For promising steps toward a general solution, see id. at 6–112.
Rather, "[t]he State has merely chosen not to fund a distinct category of instruction."\textsuperscript{122} This is a close paraphrase of \textit{Rust v. Sullivan},\textsuperscript{124} where the government paid doctors to advise patients about contraception but forbade them to mention abortion. \textit{Rust} said that "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."\textsuperscript{125} With or without citation, Davey's paraphrase of \textit{Rust} is unmistakable.

Similarly, when the Court upheld government programs that paid for live birth but not for abortion, it said that refusal to fund did not pressure indigent women to surrender their right to abortion. Cutting off other benefits, instead of merely refusing to fund the abortion, would have penalized the choice to abort, a consequence the Court recognized as raising "[a] substantial constitutional question."\textsuperscript{126} But "[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."\textsuperscript{127} And the state "has imposed no restriction on access to abortions that was not already there" in the form of the woman's indigency.\textsuperscript{128}

There are two substantial problems with Davey's reliance on this argument. First, because the Court has never required government to be neutral toward abortion, the implicit analogy to abortion is fundamentally flawed. Second, taking the argument on its own terms, the Court's rule against penalizing constitutional rights has been seriously eroded by a collateral rule: the government can insist that funded activities be kept rigorously separate from activities it refuses to fund.

\textit{(a) The Error in the Abortion Analogy: Burden Rights and Neutrality Rights.} — Davey's model for analyzing discriminatory funding programs unmistakably originated in the abortion cases. But there are fundamental differences between religion and abortion: The Court has never said that government must be neutral toward abortion. Government can attempt "to persuade the woman to choose childbirth

\begin{itemize}
\item \textsuperscript{122} See \textit{Davey}, 124 S. Ct. at 1312-13.
\item \textsuperscript{123} Id. at 1313.
\item \textsuperscript{124} 500 U.S. 173 (1991).
\item \textsuperscript{125} Id. at 193.
\item \textsuperscript{126} See \textit{Harris v. McRae}, 448 U.S. 297, 317 n.19 (1980) ("A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion."); \textit{Maher v. Roe}, 432 U.S. 464, 474-75 n.8 (1977) ("If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits,... strict scrutiny might be appropriate....").
\item \textsuperscript{127} \textit{Maher}, 432 U.S. at 474.
\item \textsuperscript{128} Id.
\end{itemize}
over abortion”;129 what it cannot do is impose undue burdens on the right to choose abortion.130 Religious liberty is different; the Court has “often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in
general.”131 The Court’s endorsement test equally prohibits statements that “endorse or disapprove of religion.”132 The right to choose abortion is a right to be free of undue burdens; the right to religious liberty is a right to government neutrality. That is why litigants can object to government-sponsored religious symbols even though plaintiffs in such cases are not “unduly burdened.”

In the first abortion-funding case, Maher v. Roe,133 the Court squarely relied on this distinction between burden rights and neutrality rights. A key precedent for the women seeking funding was Sherbert v. Verner,134 which had held that the state could not refuse unemployment compensation to a Seventh-day Adventist who was unavailable for work on Saturdays.135 Sherbert was the first holding to enforce the Court’s earlier dictum that no person could be denied “the benefits of public welfare legislation” because of her faith.136 But in Maher the Court said that abortion was different. The right to abortion “protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion . . . .”137 Sherbert “was decided in the significantly different context of a constitutionally imposed ‘governmental obligation of neutrality.’”138 So government can make “a value judgment” that live birth is preferable to abortion, but it cannot make a value judgment that secularism is better than religious faith.139

130 See, e.g., id. at 874–79 (adopting the undue burden standard and reviewing its evolution in abortion cases); Bellotti v. Baird, 428 U.S. 132, 147 (1976) (“[A] requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion.”).
131 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (collecting cases); see also Volokh, supra note 11, at 365–73 & nn.46–66 (collecting many cases requiring government neutrality toward religion).
135 See id. at 403–10.
137 Maher, 432 U.S. at 473–74.
138 Id. at 475 n.8 (quoting Sherbert, 374 U.S. at 409).
Pornography that falls short of obscenity is another example of a constitutional right that government can refuse to fund.\footnote{See United States v. Am. Library Ass'n, 539 U.S. 194 (2003).} And as with abortion, the right to pornography does not include a right to government neutrality. Government could teach children in public schools that pornography is bad for them; it certainly could not teach children in public schools that religion is bad for them. Government could refuse to fund abortion because it could make a value judgment in favor of live birth, but that reasoning cannot be applied to religion.

The Court ignored this distinction in \textit{Davey}. Instead, the Court said that government had a different reason for not funding religion — not that it disapproved of religion, but that there was a long tradition of no government funding.\footnote{See \textit{Davey}, 124 S. Ct. at 1315.} Funding is now an exception to the rule of government neutrality toward religion.

(b) \textit{Separating Funded and Unfunded Activities}. — Even assuming that funding theology majors should be subject to the same rules as funding abortions, it remains to explore those rules. The most important part of those rules is neither the rule permitting mere refusals to fund, nor the rule prohibiting penalties on the exercise of constitutional rights, but the collateral rule that marks the boundary between those two more visible rules. Here too the story begins with how the abortion-funding cases distinguished \textit{Sherbert v. Verner}.

When \textit{Sherbert} was decided, the Court had not yet introduced its distinction between refusing to fund and withholding other benefits. The Court in \textit{Sherbert} conceived of unemployment compensation as a generally available benefit, withheld from Sherbert because of her religious practice, and thus imposing "the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."\footnote{\textit{Id.} at 409.} The Court did not conceive of the unemployment benefits as paying for her religious practice, which would have made \textit{Sherbert} a mere refusal-to-fund case under the distinction developed later. Rather, these payments "reflect[ed] nothing more than the governmental obligation of neutrality in the face of religious differences."\footnote{\textit{Id.} at 409.}

In the abortion-funding cases, the Court said that the facts of \textit{Sherbert} were analogous to withholding all Medicaid benefits from women who chose an abortion, because in \textit{Sherbert} the state had withheld "all unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling..."\footnote{Sawyer v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) (condemning "a value judgment" that medical reasons for not shaving were more important than religious reasons for not shaving).}
to work one day per week on her Sabbath." This characterization of the case overlooks the causal sequence from refusing work on the Sabbath to losing one’s job to needing unemployment compensation for the whole week. A closer analogy to Sherbert would be a state that refused Medicaid benefits for injuries or medical complications caused by privately funded abortions. It is not clear that Sherbert would come out the same way if it first arose today, but the Court continues to treat Sherbert and its progeny as good law.

The rule against withholding other benefits became a holding in FCC v. League of Women Voters, where Congress had prohibited editorials on public television stations that received federal funds. The majority reasoned that Congress had not merely prohibited editorializing with federal grant money, which would have been a mere failure to fund. Congress had also prohibited the stations from editorializing with their own money if they accepted any federal money. From the stations’ perspective, if they editorialized with their own money, they forfeited all federal money. That forfeiture, the Court held, was an unconstitutional penalty on political speech. But Justice Rehnquist dissented. He thought the distinction between editorializing with federal money and with private money "ignore[d] economic reality, because both sources of funds supported the same staff and facilities, and therefore everything done by that staff or in those facilities.

Rehnquist’s reasoning underlay the Reagan Administration’s regulations at issue in Rust v. Sullivan. Under these regulations, a federal grant recipient could use federal funds to provide information on contraception and use its own funds to provide abortions or information

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144 Harris v. McRae, 448 U.S. 297, 317 n.19 (1980); see also Maher v. Roe, 432 U.S. 464, 475 n.8 (1977) (briefly distinguishing Sherbert on similar grounds). Maher distinguishes Sherbert on two grounds, separated by "[i]n addition." The first ground is that Sherbert involved a penalty on the constitutional right; the opinion distinguishes other penalty cases, and then says that Sherbert "similarly is inapplicable here." The second ground is the ground discussed supra p. 177.


147 See id. at 366; see also Regan v. Taxation with Representation, 461 U.S. 540, 544–45 (1983) (elaborating the distinction between penalizing and refusing to subsidize, in an opinion upholding the loss of tax benefits for charities that spent substantial funds on lobbying); id. at 552–54 (Blackmun, J., concurring) (same); McConnell, supra note 80, at 1015–22 (reviewing the development of the distinction and applying it to abortion and to religious schools).


149 Id. at 406 (Rehnquist, J., dissenting).
about abortion. But the regulations required the two programs to be "physically and financially separate," with separateness measured not just by separate accounting, but by separate personnel and separate space as well. These rules were highly burdensome to the grantees, their doctors, and their patients, but the Court upheld the rules as necessary to ensure that no federal money for contraception subsidized abortion. In effect, the Court permitted the government to require prophylactic degrees of separation, to avoid any possibility of indirect subsidy through shared overhead and the like.

Davey did not cite this line of cases either, but Chief Justice Rehnquist tried to bring Davey within it. He said that Washington's program "does not require students to choose between their religious beliefs and receiving a government benefit." As a factual matter, that statement was false. All Davey's general education courses, and all his electives — even including theology electives — were eligible for support from a Promise Scholarship. He could claim that scholarship if he declared a different major, or presumably if he delayed declaring his major for as long as possible, but he forfeited the scholarship for his secular courses as soon as he declared a theology major. He was indeed required to choose between his religious beliefs and a government benefit for his secular courses.

As it happened, Joshua Davey was a double major in theology and business administration. It was perfectly clear that in his case, he forfeited a scholarship for his business administration major as a consequence of declaring his theology major. The Court addressed that problem in a footnote, arguing that "Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology." By focusing on the unusual case of a dual-degree candidate, the Court entirely avoided the more common problem of forfeiting scholarship funds for electives and general education requirements. Even for a dual-degree candidate, taking the two degrees at two separate schools is impractical, at least requiring much commuting, quite likely requiring extra courses and extra semesters, and certainly depriving him of his first choice of school, faculty, and curriculum for the second degree. There

151 Id. at 180-81.
153 See Rust, 500 U.S. at 196-99.
154 Davey, 124 S. Ct. at 1312-13.
155 See id. at 1315 n.9. The state professed doubts about this rule but had not changed it. Id.
156 Id. at 1310.
157 Id. at 1313 n.4.
is no doubt that these difficulties would be cognizable burdens on a constitutional right in any context except government funding.\textsuperscript{158}

But the convenience of taking secular courses and a theology major at the same school is like the savings of overhead in \textit{Rust v. Sullivan}. And allocating the scholarship to the secular courses looks like a bookkeeping entry with no real-world consequences. So although it is false to say that Davey was not penalized, that is not the point. The rule of \textit{Davey} and \textit{Rust} is that the state can impose prophylactic rules to minimize the chances for cross-subsidization, and that the resulting burdens on recipients of government funds are constitutionally irrelevant. The Court's tolerance for such prophylactic rules means that the rule permitting mere refusals to fund is swallowing the rule against penalizing a constitutionally protected activity by withholding other related benefits. None of this paragraph is spelled out in the opinion, but this is undoubtedly what it means.

Similar arguments about how to allocate or account for the flow of government funds have arisen in other contexts, with varied implications for religious liberty. For a time, the Court held that states could give religious schools only secular goods and services that were incapable of diversion to religious uses.\textsuperscript{159} The heart of the \textit{Lemon} test in operation was a dilemma built on the divertibility of aid: any aid diverted to religious uses advanced religion, and any government monitoring to prevent such diversion caused excessive entanglement.\textsuperscript{160} Later, the Court said that any substantial benefit to a religious school advanced religion, basically because money is fungible.\textsuperscript{161} Even if the state provided only math books, the school would save the cost of buying math books, and the money saved might be spent on religion. The Court eventually rejected the legal relevance of these economic realities with respect to goods and services, but it has not yet done so with respect to cash. Even the plurality opinion in \textit{Mitchell v. Helms}, the opinion that would go furthest to uphold direct aid, reserved the issue of direct cash grants to religious schools.\textsuperscript{162} \textit{Zelman v. Simmons-Harris}\textsuperscript{163} avoids the whole problem; because "true private choice"\textsuperscript{164} is

\textsuperscript{158} The Court relied on similar inconveniences to explain why a male student was burdened by exclusion from the nursing program at a state university even though the state offered other nursing programs that were open to him. See Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982).


\textsuperscript{160} See Lemon v. Kurtzman, 403 U.S. 602, 619 (1971); id. at 668 (White, J., concurring).

\textsuperscript{161} See Wolman v. Walter, 433 U.S. 229, 248–51 (1977) (invalidating loans of educational equipment); see also Lemon, 403 U.S. at 641 (Douglas, J., concurring).

\textsuperscript{162} See Mitchell, 530 U.S. at 818–19 & n.8.

\textsuperscript{163} 536 U.S. 639 (2002).

\textsuperscript{164} Id. at 649, 650, 653, 662.
said to break the link between the government giving the money and the religious school receiving it, the possible uses of the money are irrelevant to the permissibility of voucher programs. But Davey held that government may choose to be concerned with how the money might be spent, even in programs of "true private choice," and that it can act on that concern by adopting prophylactic rules requiring stringent separation of funded and unfunded activities.

Similar issues about the fungibility of cash arise with respect to the scope of the federal spending power. The United States can attach conditions to its grants of money, and it has historically applied those conditions to the entire program or activity that receives the money, even if the United States supplies only a small part of the budget. Within the assisted program, Congress can assume that "money is fungible," and that "money can be drained off here because a federal grant is pouring in there." Similar issues about the fungibility of cash arise with respect to the scope of the federal spending power. The United States can attach conditions to its grants of money, and it has historically applied those conditions to the entire program or activity that receives the money, even if the United States supplies only a small part of the budget. Within the assisted program, Congress can assume that "money is fungible," and that "money can be drained off here because a federal grant is pouring in there."

Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in programs or activities receiving federal funds, defines "program or activity" broadly. Title VI has long been at the core of federal civil rights policy, and many other civil rights statutes borrow its definition. One of these is the Spending Clause provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires compelling justification for substantial burdens on religious exercise in federally assisted prisons. Courts have so far rejected claims that the Act exceeds the scope of the spending power. The broad reach of the spending power in RLUIPA depends on the view that money is fungible, the same view that underlies Washington's requirement that Davey attend two colleges if he wants a scholarship for his secular courses.

If one accepts the Court's view that states have a constitutional right not to be held to Congress's understanding of individual liberties, then Davey and the challenges to RLUIPA are parallel. Wash-

166 Sabri v. United States, 124 S. Ct. 1941, 1946 (2004) (upholding an indictment for bribery in a federally assisted program, and rejecting a defense that the indictment did not allege a connection between the bribe and the federal funds). Sabri reserves the possibility that a state grant recipient might have a valid objection where a briber would not. Id. at 1947-48.
168 See 42 U.S.C. § 2000d-4a (2000) (defining the aided "program or activity" to include the entire department, agency, university, or "public system of higher education" that receives the money).
171 Id. § 2000cc-1(b)(1).
172 See infra p. 213 and note 379.
ington was permitted to withhold all funds for Davey's education to avoid any risk of subsidizing theology, and Congress may similarly withhold all funds for state prisons to avoid any risk of subsidizing unjustified restrictions on the prisoners' religious liberty. If the Court acts on its view of permissible rules for tracing the flow of funds — and not on its policy views about the challenged funding condition — RLUIPA's Spending Clause provisions are constitutional and Davey is one more precedent supporting that conclusion. ¹⁷⁴

My own view is that the Spending Clause cases are about interpreting the scope of legislative power expressly delegated to Congress, where that power is not limited by a countervailing guarantee of individual rights. In that context it is perfectly sensible to assume that money is fungible. The same assumption is much more troubling where government uses it to override an express constitutional right. But that is not the Court's view.

The Court has so far given total deference to government's desire to avoid any risk of indirectly subsidizing something it chooses not to subsidize, and it has given no weight to the resulting practical penalty on the exercise of constitutional rights. Plainly, there must be some limit to this approach. In the full logic of fungibility, separate schools or separate facilities are not enough. Davey would be more able to afford his theology degree if the state had paid for his business administration degree elsewhere, or if the government had subsidized his student loan, or if it had paid social security benefits to his mother. Of course the Court will not go to that extreme. But it has gone far already: under Davey and Rust, government's power to withhold funding can be leveraged into substantial power to penalize religious liberty or any other constitutional right. Assuming that money is fungible has enabled the Court to avoid facing the problems of the unconstitutional conditions doctrine, but drawing boundaries to that assumption will eventually add another layer of complexity to those problems.

3. Other Limits to the Holding. — The most important limit to Davey's holding is that it applies only to funding, not to regulation. ¹⁷⁵ That limit is real and important; it is separately discussed in section II.B. ¹⁷⁶

Within the universe of funding cases, serious limits are harder to find. The rule against penalties is a limit, although judicial deference to prophylactic rules of physical separation will often make that limit


¹⁷⁵ See Davey, 124 S. Ct. at 1313 n.5 ("[T]he only interest at issue here is the state's interest in not funding the religious training of clergy.").

¹⁷⁶ See infra section II.B, pp. 213–18.
illusory. The Davey opinion suggests at least three more distinct limits to the holding. On its face, the holding is confined to the training of clergy, to refusals to fund that are not based on hostility to religion, and to cases that do not involve forums for speech. Like the rule against penalties, each of these limitations may well turn out to be illusory.

(a) Religious Intensity of the Program Where Funds Are Used. — There is much to suggest, beginning with the Court’s discussion of tradition and its collection of early state constitutions, that the opinion is confined to the training of clergy. The Court says that “[t]raining someone to lead a congregation is an essentially religious endeavor,” and that “majoring in devotional theology is akin to a religious calling as well as an academic pursuit.” The Court insists that “the only interest at issue here is the State’s interest in not funding the religious training of clergy.” And the Court concludes: “We need not venture further into this difficult area to uphold the [program] as currently operated . . . .”

The Court is certainly right that the training of clergy is an “essentially religious endeavor.” The well-established “clergy exception” in employment law holds that the relationship between a church and its clergy is immune from state interference, and this doctrine has also been applied to employment disputes arising in the seminaries that train clergy. In a case now pending in the Texas Supreme Court, unaccredited seminaries are arguing that the state has no constitutional power to license the training of clergy or to regulate the content of their education. That claim should prevail, although the lower courts have so far held that the state is not regulating content. But if training the clergy is especially sensitive on the regulation side, it may be equally sensitive on the funding side.

None of the Davey opinion’s comments about the training of clergy would apply to other discriminatory refusals to fund services delivered by religious institutions. A state that will pay for secular private schools but not religious private schools, or secular charter schools but

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177 Davey, 124 S. Ct. at 1313.
178 Id. at 1313 n.5 (emphasis added).
179 Id. at 1315.
181 See, e.g., EEOC v. Catholic Univ., 83 F.3d 455, 460–65 (D.C. Cir. 1996) (dismissing sex discrimination claim by professor of canon law); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 282–85 (5th Cir. 1981) (holding that a seminary is a church, and its faculty are clergy, for purposes of the ministerial exception).
not religious charter schools, is not refusing to pay for the training of clergy. Such a state is refusing to pay for education that satisfies the state's compulsory education requirements in math, reading, and other secular subjects.

There is some national tradition of not paying for such instruction in religious schools, but that tradition does not go back to the Founding and is not reflected in early state constitutions. The strongest and most persistent version of that tradition goes back to the mid-nineteenth century, and is reflected in many state constitutions, but that version consisted principally of a refusal to fund Catholic education in private schools while Protestant education flourished in public schools.\textsuperscript{183} It is hard to make a case for a general reluctance to fund education in a religious environment before prayers and religious instruction were removed from the public schools, a change that began in the late-nineteenth century in a few states,\textsuperscript{184} spread broadly in the third quarter of the twentieth century in states that complied with the Supreme Court's decisions on school-sponsored prayer,\textsuperscript{185} and remains contested even today in some states.\textsuperscript{186} As applied to elementary and secondary schools, the no-funding tradition is a misinterpretation of the Establishment Clause, deeply rooted in historic anti-Catholicism. And there is no sustained national tradition of any kind that refuses to fund religious delivery of social services. Billions of government dollars have flowed through religious charities over the decades.\textsuperscript{187}

The tradition-based interest on which the Court relied is thus at its maximum in \textit{Davey} itself; it is considerably weaker in other contexts. Distinctions along these lines would be perfectly sound. But \textit{Davey} is

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likely to lead to a more general principle that all religious programs and institutions can be excluded from funding programs. There is first the magnitude of the vote. Seven Justices voted to uphold the discriminatory refusal to fund, and four of them probably believe that nondiscriminatory funding would be unconstitutional even if the state volunteered to provide it.188 If only three votes are in play, all three would have to distinguish refusing to provide tuition at religious elementary schools from refusing to provide tuition for theology majors. That could and should happen, but for supporters of nondiscriminatory funding, it is a bit like drawing to an inside straight. New Justices could of course change the odds.

A second reason for thinking that religious intensity will not matter to what the state must fund is that, as already noted, religious intensity has dropped out of the debate over what the state may fund.189 On the question of what the state may fund, there is no difference between soup kitchens, math classes, and training clergy. This doctrinal development makes it harder to reintroduce that distinction and make it central to the question of what the state must fund. There would be no logical inconsistency: In the may-fund cases, religious intensity is irrelevant to the issue of state action, and the finding of no state action disposes of the case. In the must-fund cases, there is obviously state action; the question is the strength of the state's interest in not funding, and religious intensity may be relevant to the weight of that interest without being relevant to the presence of state action. The case for symmetry is thus more impressionistic and aesthetic than logical or doctrinal. The distinction may yet be drawn, but the Court's reasoning on what the state may fund makes it less likely to rely heavily on degrees of religious intensity with respect to what the state must fund.

The Court's willingness to uphold prophylactic rules requiring physical separation of functions is another obstacle to distinguishing funding of education in secular subjects from funding the training of clergy. If the Court were to say that states funding private schools can refuse to fund religion courses, but cannot refuse to fund secular courses in religious schools, states could respond that the religious and secular instruction must be rigorously separated to avoid any risk of cross-subsidies. A state could apparently insist that religion classes be offered in a separate building, staffed by separate personnel.

Such a requirement of physical separation would not be entirely unprecedented. In the twelve years between Aguilar v. Felton190 and

Agostini v. Felton,\(^{191}\) when the Court prohibited federally funded remedial instruction in the buildings of religious schools, that instruction was moved to nearby vans.\(^{192}\) One can imagine, in a state that wanted to fund secular private education but not religious private education, the religious schools moving their religious instruction to vans and staffing it with personnel paid by the local church instead of by the school. But while one can imagine that result, it is hard to imagine the political process that would lead to it.

Refusing state funding for math and reading, because the school also teaches religion, is clearly a penalty on teaching religion and on attending a school that does so. If religious liberty consists of minimizing government influence on religious choices, such a penalty restricts religious liberty. But states choosing to impose that penalty seem likely to prevail after Davey. Early decisions applying Davey have extended it to elementary and secondary education without even noting that this was an extension or that it presented a substantial choice.\(^{193}\)

(b) Bad Motive. — Bad motive is a clearer doctrinal limit to the holding in Davey. The Court emphasized that Washington had a legitimate reason for refusing to fund the training of clergy, and that that reason suggested no hostility or animus against religion.\(^{194}\) The Court implied that discriminatory refusal to fund religious education would be constitutionally suspect if it were motivated by hostility to religion.\(^{195}\) The question is whether supporters of funding can prove bad motive in any significant range of cases. They think they can.

Much of the American tradition of refusing to fund private schools is derived from nineteenth-century anti-Catholicism.\(^{196}\) The proposed Blaine Amendment to the federal Constitution would have codified the nineteenth-century Protestant position, permitting government-sponsored Bible reading in the public schools and prohibiting govern-

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192 See supra p. 164 and note 46.
194 See Davey, 124 S. Ct. at 1314.
195 See infra pp. 215-16.
ment money for "sectarian" schools.197 "Sectarian" initially meant something like denominational; the term arose in early-nineteenth-century battles between liberal and conservative Protestants.198 But Protestants closed ranks in response to Catholic immigration,199 and for most of the nineteenth century, "sectarian" was a code word for Catholic.200 The Blaine Amendment failed in the Senate, but state Blaine Amendments addressed to the funding issue were added to about three-quarters of the state constitutions.201 These amendments come in many variations; they are generally more detailed than the federal Establishment Clause. Some of them have been read to permit nondiscriminatory funding of religious and secular schools,202 others to prohibit funding of religious schools by any mechanism.203 Many have not been interpreted in recent years. Contemporary supporters of aid to religious schools argue that these amendments are invalid because they were motivated by anti-Catholic bigotry.204 Opponents have ar-

197 For the text of the proposed amendments, see H.R. Res. 1, 44th Cong. (1876), as amended by the Senate Committee on the Judiciary; 4 CONG. REC. 5453 (1876), reprinted in Green, supra note 184, at 60.


199 See Glenn, supra note 198, at 179; Kaestle, supra note 198, at 98; Jeffries & Ryan, supra note 12, at 301.

200 For the anti-Catholic politics of the Blaine Amendment, see Green, supra note 184 passim; and Hamburger, supra note 196, at 324-26. For explicit contemporary acknowledgement of the code meaning of "sectarian," see id. at 325 n.99 (quoting the September 7, 1878 edition of the Index, a separationist newspaper).


202 See Kotterman v. Killian, 972 P.2d 606, 616-25 (Ariz. 1999) (upholding tax credits for gifts to scholarship funds for private schools); Simmons-Harris v. Goff, 711 N.E.2d 203, 211-12 (Ohio 1999) (concluding that Cleveland voucher plan could include religious schools); Jackson v. Benson, 578 N.W.2d 602, 620-23 (Wis. 1998) (upholding Milwaukee voucher plan).


204 See Berg, supra note 69, at 199-208 (summarizing the argument); Lupu & Tuttle, supra note 64, at 959-60, 967-70 (assessing the strengths and difficulties of the argument).
gued that there were other, more legitimate motives, or even that papal resistance to democracy justified anti-Catholicism at the time.

Judges are notoriously reluctant to find bad motive, but seven Justices have already taken note of this history; good litigators might be able to prove it to judicial satisfaction in many states. And ancient bad motive is sufficient grounds to invalidate current applications of a badly motivated provision. In 1985, the Court invalidated a facially neutral provision of the Alabama Constitution because of bad motive at the Constitutional Convention of 1901.

The problem with this litigation strategy is that states need not rely on their Blaine Amendments. Scholars of bad motive have long worried about the harmful law being struck down for bad motive and then reenacted without any bad motive apparent on the legislative record. A legislature could enact a discriminatory funding scheme that excludes religious institutions and rely simply on a "tradition" of not funding religious institutions. Or a legislature could refuse to enact any private funding plan at all. Surely it is not required to do so, no matter what badly motivated provisions lurk in the state constitution.

To invalidate a modern program on the basis of a state's Blaine Amendment, a litigant would have to show some causal connection between the state Blaine Amendment and the modern provision at issue. Davey suggests that that will be difficult. Washington argued that the religious exclusion in its Promise Scholarship Program was designed to implement Article I, Section ii of the state constitution. Section ii is a detailed provision, combining strong guarantees of free exercise with a strong guarantee against establishment, and specifying that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." The apparent reason for asserting the statute's connection to this provision was the doubtful hope that a state constitutional provision might get more judicial deference than a state statute. But states need not assert such connections; Washington could have argued that the religious exclusion was a modern legislative pro-

205 See Scholars Brief, supra note 20 (citing support for public schools and noting early disagreements among Protestants).
206 See Brief Amici Curiae of the American Jewish Congress et al., Davey (No. 02-1315), available in 2003 WL 21697726, at *25-30.
210 WASH. CONST. art. I, § 11.
vision, untainted by any bad history attaching to the state constitutional provision.

The Washington Constitution contains another provision, Article IX, Section 4, providing that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." The Court identified this provision as Washington's Blaine Amendment. Then it said that "[n]either Davey nor amici have established a credible connection between the Blaine Amendment and Article I, Section 11, the relevant constitutional provision. Accordingly, the Blaine Amendment's history is simply not before us."

It is not clear whether this conclusion means that there is no connection between the federal Blaine Amendment and Article I, Section 11, or no connection between the two sections of Washington's constitution. Either way, the Court implies a very narrow view of what would count as "a credible connection." The two sections were both drafted at the Constitutional Convention of 1889, a convention of seventy-five delegates who met for twenty-nine days in Olympia. If those few delegates in that short time in that small town wrote two provisions restricting the flow of state money to religious institutions, it beggars the imagination to suppose that one provision was tainted by anti-Catholicism but not the other. If the Court could not find a credible connection between the funding provision of Section 11 and either the state or federal Blaine Amendment, it is unlikely to find a connection between nineteenth-century Blaine Amendments and any twenty-first-century enactment.

If courts invalidate an enacted program under a state's Blaine Amendment, the Supreme Court could presumably reverse that judgment on the ground that the state Blaine Amendment, as applied in that case, violated the federal Constitution. But if the Court denies certiorari when the question first arises, how could anyone create a new case or controversy that would present the question? There would be no state program, the lack of a state program would not be unconstitutional, and federal courts would not order a new spending program to be enacted.

211 Id. art. IX, § 4.
212 Davey, 124 S. Ct. at 1314 n.7.
213 Id.
214 WASH. CONST. constitutional convention note. For the original 1889 text, see id. art. I, § 11 historical note; and id. art. IX, § 4.
All that said, *Davey* expressly held the issue open. Good lawyers believe that supporters of funding will ultimately prevail on these motive claims. But *Davey* also seems to erect a very large obstacle to ever reaching the issue.

*(c) Speech.* — The two recent cases in which the Court invalidated discriminatory funding programs were both decided on free speech grounds. For *Davey*, the most obviously relevant precedent was *Rosenberger v. Rector & Visitors of University of Virginia*. In *Rosenberger*, where the university funded a limited forum for student publications, the Court held that excluding a student religious magazine was unconstitutional viewpoint discrimination. Evangelical Christianity offered viewpoints on many issues important to college students, including issues addressed from secular viewpoints in other student publications funded by the university. Joshua Davey sought to apply this reasoning to Washington’s exclusion of theology majors.

Education consists largely of speech. That statement surely seems more sensible to law professors than to chemistry professors. But in any discipline, education consists largely of the transmission and exchange of information and viewpoints, and at more advanced levels, of the discovery or creation of new knowledge. These are central concerns of the First Amendment; education is not an activity to which speech is merely incidental. Theology and other disciplines are likely to yield different viewpoints on a variety of issues. More obviously, the difference between studying theology from a believing perspective and studying it from a detached or skeptical perspective is purely a difference of viewpoint. So *Davey* alleged viewpoint discrimination in violation of *Rosenberger*.

The Court rejected this claim in a conclusory footnote, saying that “the Promise Scholarship Program is not a forum for speech.” The program’s purpose was to assist students with their education, not to “encourage a diversity of views from private speakers.” The Court

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216 See *Davey*, 124 S. Ct. at 1314 n.7 (“[T]he Blaine Amendment’s history is simply not before us.”).


219 See *id.* at 828-37.

220 See *Volokh*, supra note ii, at 366.


222 *Davey*, 124 S. Ct. at 1312 n.3.

did not elaborate this intuition, but it made similar points at greater
length in United States v. American Library Ass'n.\footnote{224}

A public library does not acquire Internet terminals in order to create a
public forum for Web publishers to express themselves, any more than it
collects books in order to provide a public forum for the authors of books
to speak. It provides Internet access, not to "encourage a diversity of
views from private speakers," but for the same reasons it offers other li-
brary resources: to facilitate research, learning, and recreational pursuits
by furnishing materials of requisite and appropriate quality.\footnote{225}

It is true enough that the scholarship program was not designed to
"encourage a diversity of views from private speakers," and certainly
there is no forum for the general public to offer courses at public or
private universities. Such a claim of access for private speakers is
what the Court seemed to be worried about when it said that a library
is not a forum for authors of books. But it is equally certain that
Davey made no such claim. He sought access only to the existing "di-
versity of views" within the existing array of courses and majors, and
he claimed viewpoint discrimination within that array. The set of
speakers offering these courses — some public, some private, all sub-
ject to some degree of institutional control, and all available only to
limited audiences pursuing specified programs — fits oddly into forum
analysis. But forum analysis was a distraction, because Davey showed
viewpoint discrimination. Viewpoint discrimination is presumptively
unconstitutional even in nonpublic forums,\footnote{226} and even if the speech is
not on government property and there is no forum of any kind. If a
new Huey Long attempted to suppress opposition newspapers,\footnote{227} it
would not be a defense that the state had not created a forum for
newspapers.

Another way to read the Court's free speech footnote is that the
Promise Scholarship Program was intended to benefit the students, not
the universities or their faculties, and that the students are more in the
role of audience than of speaker. That debatable characterization of
students should not change the analysis; the Free Speech Clause pro-
tects audiences as well as
\footnote{228} We may likewise assume that
the legislature did not view Promise Scholarships as a means of ex-
anding the diversity of courses and majors that students might study.

\footnote{224} 539 U.S. 194 (2003).
\footnote{225} Id. at 206 (plurality opinion) (quoting Rosenberger, 515 U.S. at 834).
\footnote{226} See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); Perry
\footnote{227} See Grosjean v. Am. Press Co., 297 U.S. 233, 249-51 (1936) (invalidating Louisiana tax on
large-circulation newspapers, most of which opposed the governor).
\footnote{228} See Bd. of Educ. v. Pico, 457 U.S. 853, 866-69 (1982) (plurality opinion) (protecting stu-
dents' right to receive information in the school library, and collecting cases supporting the right
to receive information and ideas).
But except for devotional theology majors, it intended to assist students in studying whatever they chose to study from the existing offerings. The state excluded the viewpoint Davey wished to study, even though that viewpoint was already available within the class of speech that Promise Scholarships subsidized.

The only way to make sense of the Court's footnote is to reduce it to a special rule about funding: viewpoint discrimination in funding is permitted unless the purpose of the funding program is to "encourage a diversity of views from private speakers."\textsuperscript{229} But the Court had already rejected that very formulation in \textit{Legal Services Corp. v. Velazquez},\textsuperscript{230} which required the government to fund law-reform suits for indigents:

Although the LSC program differs from the program at issue in \textit{Rosenberger} in that its purpose is not to "encourage a diversity of views," the salient point is that, like the program in \textit{Rosenberger}, the LSC program was designed to facilitate private speech, not to promote a governmental message.\textsuperscript{231}

This distinction — between the government's own messages and the government's subsidies of private messages that it is unwilling to endorse — has had some persistence in the cases. In \textit{Rust v. Sullivan},\textsuperscript{232} the government wanted to spread information about contraception. It was willing to pay private doctors to do that, but it was not willing to pay for other messages of which it disapproved.\textsuperscript{233} In \textit{Rosenberger}, the university wanted to encourage student speakers, but it certainly was not willing to be responsible for what they said.\textsuperscript{234} So it had to say it was subsidizing private speech, and that meant it could not discriminate among viewpoints. In \textit{Velazquez}, the United States wanted to pay lawyers to represent indigents, without promising to agree with the indigent clients when they sued private defendants or state and local governments and certainly without conceding anything when they sued federal agencies.\textsuperscript{235} So although there was nothing remotely like a forum in \textit{Velazquez}, it was clear that the government was funding private speech and not sending a message of its own.

This intuitively sensible distinction breaks down in a range of cases in the middle, where the government makes some choices itself and leaves other choices to private speakers, as in grants to artists based on

\textsuperscript{229} \textit{Davey}, 124 S. Ct. at 1312 n.3.  
\textsuperscript{230} 531 U.S. 533 (2001).  
\textsuperscript{231} \textit{Id.} at 542.  
\textsuperscript{233} See \textit{id.} at 193 (characterizing the program as one "to encourage certain activities" and not others).  
\textsuperscript{234} See \textit{Rosenberger v. Rector & Visitors of Univ. of Va.}, 515 U.S. 819, 824 (1995) (describing university's efforts to disclaim all responsibility).  
\textsuperscript{235} See \textit{Velazquez}, 531 U.S. at 542-44.
judgments about artistic excellence,236 or grants to scientists based on promising lines of research. The government has its own purposes in these programs, and does not want to subsidize everybody, but neither does it want to be responsible for what grantees do with their awards. The state universities are such a middle case. Legislators, regents, and educational administrators may decide which disciplines or programs they are willing to fund, but there is a long tradition of academic freedom for individual professors within those programs, and universities are quite willing to disclaim responsibility when a professor says something politically embarrassing.

This distinction between government and private messages, whatever its attractions and its problems, cannot explain the result in Davey. The scholarships in Davey were available to all within a very broad category; no one would claim they supported any government message more specific than that young people should aspire to attend college. The program was not designed to steer students into a few disciplines selected by the state as especially important, like a scholarship for education majors. Nor was it designed to subsidize the speech of the faculty at state universities. Student choices of major were plainly private choices about what to study. The subsidized speech was private for purposes of this distinction for the same reason that funding would have been permissible:237 Davey's choice of major was not state action.

The distinction between the government sending its own message and subsidizing diverse private messages is related to two other suggested distinctions. The first is between funding (or permitting) one or a few speakers or messages and excluding most, as opposed to funding (or permitting) nearly all speakers or messages within a broad category and excluding one or a few. The latter is much more suspect, in part because it prima facie appears to be censorship of the excluded speaker or message, rather than promotion of any affirmative message or government purpose. Of course, Davey is an example of the latter. A second refinement is Robert Post's distinction between public discourse and managerial speech, by which he means speech that is part of the government's effort "to achieve specified ends."238 In this useful formulation, the government may not be sending a message when it speaks; it may just be getting its work done.239 But that does not describe Davey either. The rules of managerial speech could explain why a professor has to teach contracts instead of his latest research, but

236 See Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 583–87 (1998) (narrowly construing, and upholding, statutory restrictions on funding for indecent or disrespectful art).
237 See Davey, 124 S. Ct. at 1311–12.
239 Id.
they do not explain why Davey can choose any major except devotional theology.

Davey’s free speech claim does not appear to have received much thought. The Court had already concluded that funding was not required, and alternative theories were not going to change that. In theory, there remains a range of cases in which discriminatory refusals to fund religious speech would violate the Free Speech Clause. But those cases may have to look exactly like Rosenberger: explicit, self-conscious government efforts to promote a forum for private speech.

4. The Hazards of Governmental Discretion. — At least with respect to funding, the rule now appears to be that government may treat religion neutrally, but it is not required to. This is not the only doctrinal area where the Court has increased government discretion over religion. Government may exempt religious organizations and practices from neutral and generally applicable laws, but it is not required to. Government may exempt churches from tax (so long as the exemption is not too narrow), but it is not required to. In church property disputes, state courts may defer to the highest church authority recognized by both sides before the dispute arose, but they are not required to.

This discretion minimizes judicial interference with majoritarian political decisions. But all this discretion threatens religious liberty. The discretion — and the problem — is greatest with respect to funding. Davey relied on the traditional view that “state-supported clergy undermined liberty of conscience.” The state can control a state-funded clergy by threatening to take the money away. That risk is minimized if the state funds nothing; the Court seems to have seen that. The risk is greatly reduced if the state’s funding is controlled by stringent rules that tie the flow of funds to some external standard and prevent the state from dictating policies or views to the groups or ac-


241 See Smith, 494 U.S. at 876–90.


247 Davey, 124 S. Ct. at 1313–14 (quoting FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 188 (2003)).
The Court did not see that. And the risk to religious liberty is maximized if the state has broad discretion to fund, not to fund, or to fund with conditions. The Court clearly did not see that, because that is the situation it created.

What the Court has created is for some important purposes the worst of all worlds. When the state chooses to fund private education, it can freely make a second choice: to fund religious and secular education alike, to fund secular education only, or to fund some forms of religious education and not other forms. The Court in *Davey* emphasized how much religious higher education Washington was willing to pay for, including secular courses at pervasively religious schools and devotional courses so long as the student did not major in devotional theology. This suggests significant power for the state to pick and choose.

Maryland for many years funded secular colleges and some church-affiliated colleges, but not "pervasively sectarian" colleges. The Fourth Circuit struck down this discrimination, but that holding is in jeopardy after *Davey*. If Washington can draw the line between devotional electives and devotional majors, it is hard to see why Maryland cannot draw the line between somewhat religious schools and pervasively religious schools. (But perhaps Maryland's rule is still invalid because of the "shameful pedigree" of "hostility to aid to pervasively sectarian schools." If discriminatory funding imposes only a "minor burden" that can be justified by tradition, and if *Davey*'s holding expands beyond the training of clergy to the full range of secular services offered by religious institutions, there would seem to be few enforceable limits on government discretion in funding decisions. Funding once granted could be taken away at any time, or the scope of funded programs could expand and contract, without regard to any claim of discrimination between religious and secular education. Political movements opposed to funding religious programs could attack that funding without having to take on analogous secular programs.

*Davey* also strengthens government's claim of power to put conditions on the money, without regard to the possible conscientious objections of recipients or of the institutions where recipients spend the

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248 See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 39-40 (2000) ("[T]he great dangers arise from the government's discretion to engage in selective subsidy: the power to create incentives for individuals to alter their conduct by providing financial support to one choice and not to a substitute.").

249 See *Davey*, 124 S. Ct. at 1314-15.


251 Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion). Or perhaps, because the money goes to the college and not the students, the college's free speech claim will survive. See supra pp. 192-93.

252 *Davey*, 124 S. Ct. at 1315.
money. The rule of Rust and Davey — that government can choose what it wants to fund and confine its money to that program — is far more threatening from the perspective of grantees. Rust and Davey mean that if you take money from the government, the government acquires full power to prohibit any other activity, including the exercise of constitutional rights, performed by subsidized staff or conducted on the property where the government money is spent. Any regulation imposed as a funding condition can be described as defining what the government is willing to subsidize, or as taking care to avoid indirect subsidies of an activity the government is not willing to subsidize.

Opponents of funding who are unable to defeat the program outright can attach poison-pill conditions that make the funding unacceptable. For example, the most vigorous debate about the Bush Administration’s proposals for nondiscriminatory funding of faith-based social services has been the debate over whether recipients of government funds must surrender their existing right, under an exemption from the employment discrimination laws, to hire employees who share their faith commitments.

At least there is a firm rule against denominational discrimination. But even that rule is of limited value. Of course no state could fund Catholic seminary students and not Protestant seminary students. But a state may impose a funding condition offensive only, or primarily, to one or a few faiths with strong views on a particular issue. Suppose California provided that vouchers could be used only at schools that offer contraception and abortion services to students and staff. This example is not entirely hypothetical. Larson v. Valente found denominational discrimination in a rule that mentioned no particular faith but affected only a few. But that was because the Court found the denominational discrimination to be deliberate. It distinguished Gillette v. United States, which had upheld

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253 For pre-Davey analyses of the problem, which were more optimistic about limiting conditions on money, see Berg, supra note 69, at 194–96, 208–20; Lupu & Tuttle, supra note 64, at 972–82; and Tushnet, supra note 69, at 22–29.

254 For an analysis of the range of conditions commonly attached to government funds, see Carl H. Esbeck, The Regulation of Religious Organizations as Recipients of Governmental Assistance 11–42 (1996).


256 See Larson v. Valente, 456 U.S. 228, 244 (1982).


258 456 U.S. 228.

259 See id. at 246 n.23, 255.

discrimination between conscientious objectors who objected to war in any form and those who objected on the basis of just-war theory, describing that distinction as merely having "disparate impact" on the denominations that teach just-war theory.\textsuperscript{261} Legislatures should have little difficulty excluding religious institutions with commitments on faith and morals that are unpopular with competing interest groups.

There was some protection against such discriminatory or conditional funding in the cases requiring laws that burden religion to be neutral and generally applicable,\textsuperscript{262} but \textit{Davey} appears to hold those cases inapplicable to funding decisions. There was also some protection in the nondiscrimination rule in \textit{Rosenberger}.\textsuperscript{263} To the extent that activities or institutions that did and did not qualify for funding could be described as offering different viewpoints, funding discrimination could be characterized as viewpoint discrimination. At best this would have offered limited protection, but now that protection is mostly gone.\textsuperscript{264} There may be some protection in the right of expressive association, most recently illustrated by \textit{Boy Scouts v. Dale},\textsuperscript{265} but the expressive association cases have invalidated outright regulation, not funding conditions.

Of course it will always be true that grant programs can come and go. A state may fund private education for a time and then reduce or eliminate that funding to concentrate on public education or some new political priority. Similarly, any funding program must insist that grantees achieve the program's secular goals. A voucher plan could not exclude Islamic schools that taught the Koran and the secular curriculum, but it could exclude schools that taught only the Koran and not the secular curriculum. And even if the Court prohibited discriminatory refusals to fund and seriously scrutinized conditions on funding, its aversion to extreme results would ensure that the burden on government to justify withholding funds would be less stringent than the burden to justify a criminal prohibition on the same conduct. For example, there would inevitably be a range of hate speech that government could refuse to fund but could not ban. It is impossible to protect funded groups against all risk of the loss of funds.

\textsuperscript{261} \textit{See Larson}, 456 U.S. at 246 n.23. In the same footnote, the Court distinguished on similar grounds \textit{McGowan v. Maryland}, 366 U.S. 420 (1961), which upheld Sunday-closing laws over the objection that they promoted the views of certain faiths, \textit{id.} at 442. \textit{See Larson}, 456 U.S. at 246 n.23.

\textsuperscript{262} \textit{See infra} Part II, at pp. 200--18.

\textsuperscript{263} \textit{See Rosenberger v. Rector & Visitors of Univ. of Va.}, 515 U.S. 819 (1995).

\textsuperscript{264} \textit{See Davey}, 124 S. Ct. at 1312 n.3; \textit{see also supra} section I.C.3.c, pp. 191--95.

\textsuperscript{265} 530 U.S. 640 (2000) (holding that the Boy Scouts could not be required to retain an openly gay scout leader). Mark Tushnet suggested this argument before \textit{Davey} was decided. \textit{See Tushnet, supra} note 69, at 24--25.
But it is possible to protect against unrestrained government discretion. Under a strong neutrality rule, the state could not cut funds to religious private education without also cutting funds to secular private education. And it could not cut off a particular program alleged to be harmful or dangerous without judicial review and a burden of justification.

The line of decisions culminating in *Zelman v. Simmons-Harris* gave a green light to indirect government funding of religion, and thus eliminated the constitutional protection that opponents of funding cared about most. But *Davey* seems to give a green light to attaching strings to that money. The worst case would be government offering broad conditional subsidies and buying up the right to free exercise of religion. That is not likely to happen apart from isolated incidents. And it is not too late to create doctrine to address the worst case if it begins to happen on a larger scale. But the current doctrinal combination — few limits on funding, few limits on discrimination in funding programs, and few limits on conditions attached to funding — maximizes government power over religion.

Religious organizations may or may not have thought through these risks. The rosy scenario is that they will get the money with few strings attached in states where they are politically strong, they will get no money in states where they are politically weak, and the offer of money with ruinous conditions will be a rare political outcome. The pessimistic scenario is that in some states they will get enough money to become dependent on it. And then, when some financial abuse or unpopular practice is reported, or when political power shifts, the conditions and distinctions among recipients will proliferate. And there will be no basis in judicial doctrine to protect the free exercise of religion. Religious communities will have to surrender the money or surrender control of their institutions. Of course, religious strict separationists have long been warning of such an outcome.

Funding secular programs, but not religious equivalents that provide the same secular benefit, is rank discrimination, with the immediate and obvious effect of discouraging or penalizing the free exercise of religion. It is hard to accept such discrimination out of fear that correcting it will make things worse in the long run. Moreover, some scholars argue that religious organizations are better off with equal ac-

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266 536 U.S. 639 (2002).


cess to money and the risk of regulation than with no money\textsuperscript{269} and the risk of being regulated anyway.\textsuperscript{270} But permitting nondiscriminatory government funding to include secular services at religious institutions is clear progress for religious liberty only if the Court is willing to provide strong protection against attaching unconstitutional conditions to that money. It now seems clear that this is not going to happen.

II. Davey and the Regulation Cases

There are few firm limits to Davey’s reach within the universe of funding cases. But that universe is itself the clearest and most important limit: Davey is a funding case. Davey’s claim to equal funding relied on the Free Exercise Clause and on \textit{Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah},\textsuperscript{271} the leading case on government regulation of religious practices. Inevitably, Davey is a major interpretation of \textit{Lukumi}. Davey holds that \textit{Lukumi}’s complex nondiscrimination rules do not apply to discriminatory funding. But Davey does not change those rules as applied to regulation.

A. The Doctrinal Context: Regulation of Religious Practice

The most direct and forceful way for government to interfere with individual choice in religious matters is to prohibit a religious practice. It is a hollow assurance of religious liberty to tell people they can believe their faith but cannot practice their faith. The threat of criminal penalties powerfully discourages the regulated religious practice, but deregulating such a practice (or exempting it from regulation that would otherwise apply) normally does little to encourage it. This comparison of discouragement and encouragement works out differently for religious practices that serve some secular self-interest, so that exemption would encourage people to adopt the religious practice for reasons other than religious conviction. Consider a religious objection to paying taxes. And some religious practices must be regulated or prohibited to prevent some significant temporal harm to others. So no simple and universal rule is possible. But from the view that religious liberty consists of minimizing government influence and maximizing individual choice, government best protects religious liberty in the usual case by exempting religious practices from regulation.

The Supreme Court shared this view from 1963 to 1990. The Court’s rule was that government-imposed burdens on religious practice presumptively violated the Free Exercise Clause, and that gov-

\textsuperscript{269} See Berg, \textit{supra} note 69, at 195 (emphasizing the difficulty of competing with cultural and ideological opponents who are funded by the government).

\textsuperscript{270} See GLENN, \textit{supra} note 267, at 42–61 (discussing strings without money).

\textsuperscript{271} 508 U.S. 520 (1993).
ernment could justify such a burden only by showing that it served a compelling government interest by the least restrictive means.272 The best-known cases in this line were Sherbert v. Verner,273 holding that a state could not refuse unemployment compensation to a Sabbatarian who was unavailable for work on Saturdays,274 and Wisconsin v. Yoder,275 holding that a state could not require Amish children to attend high school.276 But results were mixed. Prison and military regulations were subject to a much more deferential standard,277 and many commentators thought the compelling interest test was relaxed in some of the cases that the government won.278

The Court famously amended the Sherbert-Yoder test in 1990, in Employment Division v. Smith.279 Under Smith, the threshold question is whether the law that burdens religious exercise is “neutral” and “generally applicable.”280 If so, the burden on religion requires no justification whatever. If not, the burden on religion is subject to the compelling interest test as before. The meaning of Smith’s threshold test remains disputed, but Smith undoubtedly provides less protection for religious liberty — and less protection for religion — than the Sherbert-Yoder rule. Filing rates for free exercise claims plummeted after Smith,281 and these claims had lower success rates than the larger number of claims decided before Smith.282

The Justices’ views on Smith confound any simple model of voting for or against religion. Justices Souter and Breyer, who have generally appeared to vote against religion in the funding and speech cases, have

274 See id. at 403–06.
276 See id. at 213–36.
280 Smith, 494 U.S. at 881.
281 See Amy Adamczyk, John Wybraniec, & Roger Finke, Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA, 46 J. CHURCH & STATE 237, 250 tbl.1 (2004) (reporting 310 claims decided in the nine-and-a-quarter years before Smith, compared to thirty-eight claims decided in three-and-a-half years after Smith).
called for the reconsideration of *Smith.*283 Justices Rehnquist and Scalia, who have generally appeared to vote for religion in the funding and speech cases, were in the majority in *Smith;* Scalia wrote the opinion. Justices Kennedy and O'Connor, who have been the swing votes in the funding and speech cases, are divided over *Smith:* Kennedy was in the majority and O'Connor has persistently rejected its central holding.284 Only Justice Stevens generally appears to vote against religion in the funding, speech, and regulation cases, and even he has found important exceptions.285 Justices Thomas and Ginsburg have not spoken to the choice between *Smith* and *Sherbert-Yoder.* Except for Justice Stevens, votes on *Smith* are better explained by views about the scope of individual liberty and the proper role of judges than by views about religion. *Smith* conceded that leaving regulation of religious practice to the political process would advantage large religions and disadvantage small ones, but it said that that consequence must be preferred to a system "in which judges weigh the social importance of all laws against the centrality of all religious beliefs."286

*Smith* changed free exercise from a substantive liberty — a rebuttable guarantee of freedom to act within the domain of religiously motivated behavior — to a comparative right,287 in which the constitutionally required treatment of religious practices depends on the treatment of some comparable set of secular practices.288 A prohibition on discriminating against religion was not new; it was implicit in the earlier substantive liberty, and there were cases invalidating discrimination against religious conduct,289 discrimination against athe-

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284 Compare *Smith,* 494 U.S. 872, with Boerne, 521 U.S. at 544–65 (O'Connor, J., dissenting), and Lukumi, 508 U.S. at 577–80 (Blackmun, J., concurring, joined by O'Connor, J.), and *Smith,* 494 U.S. at 891–903 (O'Connor, J., concurring).
286 *Smith,* 494 U.S. at 890.
288 See id. at 391 (defining a comparative right as one that is triggered by the treatment of some other person). For the argument that it is irrational to make the free exercise of a religious practice depend on whether some significant population does the same thing for secular reasons, see Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence,* 26 HARV. J.L. & PUB. POL'Y 627 (2003).
289 See *McDaniel,* 435 U.S. 618 (invalidating the exclusion of clergy from the state legislature).
ists, and discrimination among religious faiths. But free exercise claims before Smith had not required proof of discrimination, and when discrimination was subtle, there had been little incentive to look for it. A burden on religious practice was a prima facie violation; discrimination was just an aggravating factor. Thus in Sherbert, where the state protected the jobs of workers unavailable to work on Sunday, but refused even unemployment compensation to workers who lost their jobs for their religiously motivated refusal to work on Saturday, the Court said that this religious discrimination "compounded" the "unconstitutionality of the disqualification of the Sabbatarian."

Smith changed all this. Eliminating the substantive liberty put the focus on the comparative right. And thus the challenge to discriminatory funding in Davey was based squarely on Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, the leading case interpreting Smith.

Although it was immediately clear that Smith created a comparative right, the precise nature of that right was unclear. Many commentators gave Smith a worst-case reading, fearing that the Court might treat all or most laws as neutral and generally applicable. I joined in pointing out that worst-case scenario, but I also argued from the beginning that Smith "may be sweeping or limited, depending on how the Court interprets all the boundaries and exceptions to its opinion." Those ambiguities are still not entirely resolved, but Lukumi and the trend of lower court opinions read Smith in a way that provides substantial protection to religious liberty.

One source of ambiguity is that Smith is written not in terms of what the Free Exercise Clause requires, but rather in terms of what it

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291 See Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").
295 See Laycock, supra note 145, at 54–68 (exploring the consequences of not enforcing the protective portions of Smith).
296 Id. at 41; see also id. at 41–54 (exploring the consequences of enforcing the protective portions of Smith).
does not require. Another is Smith's novel formulation of the comparative right. Nothing in the opinion tracks the conventional language of discrimination laws; Smith does not mention laws that discriminate against, because of, or on the basis of, religion. Forms of the word "discriminate" appear only twice in the opinion, and neither instance refers to the kind of laws the Court deems suspect under the Free Exercise Clause. Nor is there any reference to bad motive, anti-religious animus, or religious bigotry. Instead, Smith is written in terms of a new category: the "generally applicable law." The Court refers to generally applicable laws at least twelve times: four times in combination with the word "neutral," and eight times without that addition.

Smith's explanation of the Court's prior cases implies that one or a few exceptions or gaps in coverage can prevent a law from being "generally applicable." The Court distinguished generally applicable laws from the unemployment compensation laws at issue in Sherbert v. Verner and its progeny. The unemployment compensation laws required "individualized governmental assessment of the reasons for the relevant conduct" — in those cases, the claimant's reasons for refusing a proffered job. The unemployment cases thus "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."

A law that permits individualized exemptions lends itself to discrimination in administration, and because the allowance of such exemptions is likely to be dispersed in time and place, such discrimination

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297 See Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990) (quoting Justice O'Connor's reference to "race discrimination"); id. at 890 (referring to "nondiscriminatory religious-practice exemption[s]" — that is, to laws exempting religious practice from regulation, not to laws imposing regulation). Footnote 3 does analogize religious classifications to racial classifications, and neutral, generally applicable laws burdening religion to neutral laws with uneven effects on different racial groups. See id. at 886 n.3

298 Id. at 879 ("valid and neutral law of general applicability" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (internal quotation mark omitted)); id. at 880 ("neutral, generally applicable regulatory law"); id. at 881 ("neutral, generally applicable law"); id. at 886 n.3 ("generally applicable, religion-neutral laws").

299 Id. at 878 ("generally applicable law"); id. ("generally applicable and otherwise valid provision"); id. at 882 ("generally applicable criminal laws"); id. at 884 ("generally applicable criminal law"); id. at 885 ("generally applicable prohibitions"); id. at 886 & n.3, 887 n.4 ("generally applicable laws").


301 Smith, 494 U.S. at 884.

302 Id. (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.)).
tion will often be difficult to detect and prove.\textsuperscript{303} It is an effective protection against this risk of unverifiable discrimination to apply the compelling interest test to laws that burden religious practice and that require or permit “individualized governmental assessment of the reasons for the relevant conduct,”\textsuperscript{304} “consideration of the particular circumstances,”\textsuperscript{305} or “individual exemptions”\textsuperscript{306} for personal hardships of a secular kind. A law with individualized exemptions might be thought “generally applicable” in the weaker sense of applying to most cases of the regulated conduct, but such a law is not “generally applicable” in the stronger sense of applying to all cases of the regulated conduct. In the law of unemployment compensation, the general rule is that beneficiaries must be available for work,\textsuperscript{307} and acceptable reasons for refusing work are obviously exceptional.\textsuperscript{308} The Court’s treatment of individualized assessments, especially in the unemployment cases, thus implies a strong requirement of general applicability.

The Smith opinion also contains one reference to a hypothetical law with the “object” of prohibiting the free exercise of religion,\textsuperscript{309} one quotation referring to hypothetical laws “aimed at the promotion or restriction of religious beliefs,”\textsuperscript{310} one example of a hypothetical law that prohibits certain acts “only when they are engaged in for religious reasons,”\textsuperscript{311} and one hypothetical example of a law that prohibits acts that would usually be done for religious reasons if done at all — “bowing down before a golden calf.”\textsuperscript{312} These examples are another source of ambiguity. Government attorneys of course claim that these examples are exhaustive — that all other laws are neutral and generally applicable.\textsuperscript{313} But that interpretation would nullify the whole discussion of individualized assessments and individualized exemptions. These examples are thus best understood as polar types — the obviously unconstitutional exact opposites of generally applicable laws. Between a

\textsuperscript{303} Cf. Bd. of Educ. v. Grumet, 512 U.S. 687, 702-05 (1994) (invalidating law accommodating a single religious group, because there was no way to ensure that other religious groups would receive comparable accommodations over time).
\textsuperscript{304} Smith, 494 U.S. at 884.
\textsuperscript{305} Id.
\textsuperscript{306} Id.
\textsuperscript{307} Id.
\textsuperscript{308} MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 9.10, at 768 (2d ed. 1999).
\textsuperscript{309} See id. §§ 9.10-9.14, at 768-96 (reviewing decisions on the acceptability of proffered reasons for losing or refusing work).
\textsuperscript{310} See Smith, 494 U.S. at 878 (“[I]f prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”).
\textsuperscript{311} Id. at 879 (quoting Minersville School District v. Gobitis, 310 U.S. 586, 594 (1940)).
\textsuperscript{312} Id. at 877. The example is a law “to ban the casting of ‘statues that are to be used for worship purposes.’” Id. at 877-78.
\textsuperscript{313} See infra notes 316, 336, and 347 and accompanying text.
law that applies generally and a law that applies only to religion, there is a large middle ground. The discussion of individualized exemptions implies that most of these laws in the middle, applicable to some cases of the regulated conduct but not to others, are less than generally applicable.

The Court elaborated further in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.* Lukumi was a challenge to a set of local ordinances that prohibited animal sacrifices. As defined by the ordinances, to "sacrifice" was "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." The city argued that this was a generally applicable ban on sacrifice. The church argued that it was a ban on killing animals for religious reasons, carefully drafted so as not to prohibit any killings of animals for secular reasons. The Court unanimously agreed with the church. *Lukumi* gives substance to Smith's requirements of neutrality and general applicability, but it does not entirely eliminate the ambiguity.

The opinion in *Lukumi* treats "neutrality" and "general applicability" as two "interrelated" but separate requirements, and it illustrates a variety of ways to show that a law fails to meet them. "At a minimum," the Free Exercise Clause requires heightened justification of a law that "discriminates against" religious beliefs or regulates conduct "because it is undertaken for religious reasons." A law is facially discriminatory "if it refers to a religious practice without a secular meaning discernible from the language or context." To discriminate "against" or "because of" religion is the conventional language of nondiscrimination laws. If these are "minimum" requirements, then the full meaning of neutrality and general applicability must require something more than the usual model of non-discrimination.

The neutrality requirement prohibits any "[o]fficial action that targets religious conduct for distinctive treatment," or laws with "the object" of suppressing a religious practice. These inquiries into tar-

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318 *Lukumi*, 508 U.S. at 531.
319 See id. at 532-42 (neutrality); id. at 542-46 (general applicability).
320 Id. at 532.
321 Id. at 533 (emphasis added).
322 Id. at 534.
323 See id.
gets and objects are objective; that the Hialeah ordinances prohibited religious but not secular killings of animals constituted objective evidence of such targeting.\textsuperscript{324}

\textit{Lukumi} invalidated some of the ordinances under \textit{Smith}'s rule for individualized assessments. It was an element of the offense of sacrifice that the animals were killed "unnecessarily."\textsuperscript{325} This required "an evaluation of the particular justification for the killing," and thus represented a system of individualized assessments.\textsuperscript{326} The Court said that the city's "application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons."\textsuperscript{327}

\textit{Smith} had spoken only of "individualized" exceptions,\textsuperscript{328} but \textit{Lukumi} also relied heavily on the ordinances' categorical exceptions. There were exceptions (or a lack of any prohibition) for "licensed [food] establishment[s]," fishing,\textsuperscript{329} extermination of pests,\textsuperscript{330} medical research,\textsuperscript{332} animals without commercial value,\textsuperscript{333} and so on. Both the narrow prohibitions and the existence of categorical exceptions tended to show that the ordinances were not generally applicable.\textsuperscript{334} The Court said that "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."\textsuperscript{335}

The city argued, as government lawyers are prone to do, that the ordinances applied to everything within their scope.\textsuperscript{336} In that sense, every law is generally applicable to whatever it applies to, but that tautology would render the requirement of general applicability entirely vacuous. The Court refused to confine its analysis to the four corners of the challenged ordinances,\textsuperscript{337} and its opinion ranged over the entire body of state and local law on the killing of animals.\textsuperscript{338} The

\begin{itemize}
  \item \textsuperscript{324} See id. at 535–36. Justice Scalia joined this part of the opinion, which further shows that these inquiries are objective. See id. at 558–59 (Scalia, J., concurring) (denouncing reliance on motive); see also infra p. 208.
  \item \textsuperscript{325} See supra note 315 and accompanying text (quoting the ordinance).
  \item \textsuperscript{326} \textit{Lukumi}, 508 U.S. at 537; see also Employment Div. v. Smith, 494 U.S. 872, 884 (1990).
  \item \textsuperscript{327} \textit{Lukumi}, 508 U.S. at 537–38.
  \item \textsuperscript{328} \textit{Smith}, 494 U.S. at 884.
  \item \textsuperscript{329} \textit{Lukumi}, 508 U.S. at 536 (first alteration in original).
  \item \textsuperscript{330} \textit{Id.} at 543.
  \item \textsuperscript{331} \textit{Id.}
  \item \textsuperscript{332} \textit{Id.} at 544.
  \item \textsuperscript{333} \textit{Id.}
  \item \textsuperscript{334} See \textit{id.} at 537, 543.
  \item \textsuperscript{335} \textit{Id.} at 542.
  \item \textsuperscript{336} For a discussion of the government's general-applicability argument in the less obvious context of a narrow exception to the general policy of the Bankruptcy Code, see Douglas Laycock, \textit{The Supreme Court and Religious Liberty}, 40 CATH. LAW. 25, 29–32 & nn.21–22 (2000).
  \item \textsuperscript{337} See \textit{Lukumi}, 508 U.S. at 544.
  \item \textsuperscript{338} See \textit{id.} at 537, 539, 543–45.
\end{itemize}
ordinances' lack of general applicability was shown by their collective failure to prohibit secular killings of animals — analogous secular conduct outside the scope of the ordinances — and also by their failure to prohibit other secular conduct, not analogous as conduct, that caused analogous harmful consequences. For example, garbage from restaurants caused the same public health problems as those the city attributed to improper disposal of sacrificed animals.

Finally, Justice Kennedy included in the lead opinion a section, joined only by Justice Stevens, marshalling evidence of the city's hostility to religious sacrifice. He concluded that "the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice." He offered this evidence as among the "objective factors" that "bear on the question of discriminatory object." Nothing in the opinion suggests that this evidence was essential rather than cumulative, even for Justice Kennedy. And it had only two votes. Nine Justices voted to hold the ordinances unconstitutional, but only two found bad motive; whatever else it is, Lukumi is not a holding about motive.

The facts of Lukumi were extreme; when carefully analyzed, the ordinances applied to almost nothing but religious killings of animals. So opponents of exemptions argue that Lukumi implies nothing about any facts less extreme. Governments argue that Lukumi was really a bad motive case even though most Justices refused to say so. Less implausibly, opponents of exemptions say that Lukumi applies only if religion is singled out for unique disadvantages. But the Court also disavowed that reading. The Court said it did not need to "define

339 See id. at 543 ("[M]any types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision.").
340 See id. ("They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree . . . .")
341 Id. at 544-45.
342 Id. at 522; see also Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) ("Under Lukumi, it is unnecessary to identify an invidious intent in enacting a law — only Justices Kennedy and Stevens attached significance to evidence of the lawmakers' subjective motivation.").
343 Lukumi, 508 U.S. at 540-42 (opinion of Kennedy, J.).
344 Id. at 540 (quoting Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979)).
345 Id.
346 See Am. Family Ass'n v. FCC, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (stating that facially neutral laws violate the Free Exercise Clause if "they target religious faith or speech to an extreme degree, and if those extreme burdens are not related to . . . legitimate government interests"). This formulation misstates all three elements that it purports to summarize — generally applicable law, substantial burden, and compelling government interests.
347 See Brief of the Defendants-Appellants at 44, 47, Murphy v. Zoning Comm'n, No. 03-9329-cv (2d Cir. filed May 28, 2004) (arguing that Lukumi requires proof of "animus or hostility").
348 See Am. Family Ass'n, 365 F.3d at 1171 (reading Lukumi to apply only where regulatory burden falls on religion and "almost no others" (quoting Lukumi, 508 U.S. at 536)).
with precision the standard used to evaluate whether a prohibition is of general application," because the ordinances in question "fall well below the minimum standard necessary to protect First Amendment rights."

Subsequent lower court cases have addressed the location of that boundary. The leading case is Fraternal Order of Police v. City of Newark, which reviewed a regulation requiring police officers to be clean-shaven. The regulation contained exceptions for officers with medical conditions and for undercover officers, but not for officers with religious restrictions. The court of appeals held the exception for undercover officers irrelevant, because it did not undermine the rule's stated purpose of maintaining a uniform appearance among persons recognizable as police officers. But the medical exception undermined that interest in the same way as a religious exception. The city had "made a value judgment" that medical reasons were more important than religious reasons, and such value judgments require compelling justification. A single secular exception that undermined the rule's purpose made the rule less than generally applicable.

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350 170 F.3d 359 (3d Cir. 1999).

351 Id. at 360.

352 Id. at 360, 365–66.

353 See id. at 366.

354 Id.

355 Id.

356 See also Blackhawk v. Pennsylvanina, 381 F.3d 202, 206–12 (3d Cir. 2004) (holding that a permit fee for keeping wild animals, with exceptions for zoos, circuses, hardship, and extraordinary circumstances, was not neutral and generally applicable); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1235 (11th Cir. 2004) (holding that a zoning law was not generally applicable where it prohibited religious institutions but permitted private clubs and lodges); Axson-Flynn v. Johnson, 356 F.3d 1277, 1297–99 (10th Cir. 2004) (holding that one exception given to student of another faith, and earlier exceptions given to plaintiff, gave rise to triable issue of fact on whether defendant maintained a system of individualized exceptions); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167–68 (3d Cir. 2002) (holding that a ban on attaching "any sign or advertisement, or other matter" on utility poles was not neutral where, in practice, authorities had not disturbed house number signs, directional signs, lost animal signs, orange ribbons, and other signs); Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 885–86 (D. Md. 1996) (holding that a landmarking ordinance was not neutral and generally applicable where it had exceptions for substantial benefit to city, financial hardship to owner, and best interests of a majority of the community); Rader v. Johnston, 924 F. Supp. 1540, 1551–53 (D. Neb. 1996) (holding that a rule applicable to college freshmen was not generally applicable where a variety of individual and categorical exceptions exempted about one-third of freshman class); Horen v. Commonwealth, 479 S.E.2d 553, 556–57 (Va. Ct. App. 1997) (holding that a ban on possession of certain bird feathers was not neutral, when it contained exceptions for taxidermists, academics, researchers, museums, and educational institutions).
The persistent effort to read a bad motive requirement into the Smith-Lukumi rules distorts the structure of those rules. Bad motive may be one way to prove a violation, but first and foremost, Smith-Lukumi is about objectively unequal treatment of religion and analogous secular activities. The protection for religious liberty under the Smith-Lukumi rules lies in their effect on the political process. Legislatures can impose on religious minorities only those laws that they are willing to impose on all their constituents. Smith-Lukumi makes sense, if at all, as an application of Justice Jackson's observation that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." Regulation that "society is prepared to impose upon [religious groups] but not upon itself" is the "precise evil [that] the requirement of general applicability is designed to prevent."

Even narrow secular exceptions rapidly undermine this interest. If the legislature can exempt those secular groups with the greatest motivation or ability to resist a proposed law, then the effective secular opposition would be left with no reason to continue its opposition, and the religious minority would be left without political protection in the legislature. And if these secular exceptions do not trigger strict scrutiny under Smith-Lukumi, the religious minority would also be left without the protection of judicial review. The focus on secular exceptions is thus an integral part of the Smith-Lukumi rules.

When unequal treatment of religious and secular activity imposes a burden on religion, the reasons for the unequal treatment are evaluated under the compelling interest test. Insistence on proof of bad motive assumes that the treatment is not really unequal unless badly motivated, or if there is a reason for it. But such assumptions would fundamentally rearrange the Smith-Lukumi burdens of justification. Such arguments attempt to move the inquiry into the state's reasons out of the compelling interest test and into the threshold determination of neutrality and general applicability. They attempt to substitute a rational-basis inquiry, in which a not-terrible reason is sufficient to uphold the unequal treatment, for strict scrutiny, in which the state must prove a compelling justification for the unequal treatment. Requiring the religious claimant to prove bad motive goes even further,

359 Id. at 546.
attempting to change the state's burden to prove a compelling interest into the religious claimant's inherently difficult burden to prove the government's motive.

Interpreted most generously to religious liberty, the comparative right of *Smith* and *Lukumi* still provides protection that is less inclusive, more complicated, and harder to invoke than the substantive liberty of *Sherbert* and *Yoder*. The shift away from substantive liberty provoked widespread disagreement among other branches and levels of government. Congress enacted first the Religious Freedom Restoration Act (RFRA), then the American Indian Religious Freedom Act Amendments, then the Religious Liberty and Charitable Donation Protection Act, then the Religious Land Use and Institutionalized Persons Act (RLUIPA). RFRA attempted to restore the *Sherbert-Yoder* test as a matter of statutory right. The Court invalidated RFRA as applied to the states, but Congress strengthened RFRA as applied to the federal government, broadening the definition of protected "religious exercise." Twelve state legislatures passed state RFRAs, and Alabama put a similar provision in its state constitution. At least ten state courts have considered *Smith* and adopted a more protective standard under their own constitutions. At least

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365 See 42 U.S.C. § 2000bb-1 (codifying the *Sherbert-Yoder* compelling interest test). For accounts of the legislative and judicial battles over RFRA, see EPPS, supra note 279, at 225-41; and LONG, supra note 279, at 227-76.
367 See 42 U.S.C. § 2000bb-2(4) (incorporating into RFRA the definition from RLUIPA). The biggest win for a religious minority burdened by federal law is *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003), reargued en banc, No. 02-2323 (10th Cir. Mar. 9, 2004), in which the panel affirmed a preliminary injunction prohibiting the government from enforcing drug laws against religious use of hoasca, a mild hallucinogenic. *Id.* at 1176-87.
369 ALA. CONST. amend. 622.
370 See Larson v. Cooper, 90 P.3d 125, 131 & n.31 (Alaska 2004) ("substantial threat to public safety, peace or order or where there are competing state interests of the highest order"); City
three other state courts followed more protective precedents and simply ignored Smith. Another has applied pre-Smith law and reserved the question whether to adopt Smith. Three states have more protective pre-Smith precedents expressly decided under their state constitutions. In all, more than half the states appear to have adopted some version of the Sherbert-Yoder test.

RLUIPA requires compelling justification for land use regulations that substantially burden the exercise of religion, if the burden is imposed in implementation of a system of regulation that permits "individualized assessments of the proposed uses for the property involved." This is a direct application of the individualized assessment portion of the Smith-Lukumi rules. RLUIPA also prohibits other forms of discrimination against religious land use and restores the Sherbert-Yoder test to land-use regulations and prison practices.


Id. § 2000c(c)(b); see also Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1235-43 (11th Cir. 2004) (upholding key parts of this section).
within the reach of the commerce power\textsuperscript{376} or the spending power\textsuperscript{377}. The constitutionality of the land-use provisions has been upheld by all but one of the district courts that have considered their validity,\textsuperscript{378} The prison provisions have been upheld in three circuits,\textsuperscript{379} but invalidated on Establishment Clause grounds in another.\textsuperscript{380}

All of these issues are interconnected. Lawyers, judges, and legislators most inclined to protect individual choice in religious practice want the \textit{Sherbert-Yoder} rule restored where possible, and where that is not possible, they want the \textit{Smith-Lukumi} rules interpreted broadly, consistent with a sophisticated understanding of the risks of subtle and not-so-subtle discrimination in a pervasively regulated society. Those lawyers, judges, and legislators most hostile to the unregulated free exercise of religion want the \textit{Smith-Lukumi} rules to be applied universally and interpreted very narrowly, so that the compelling interest test hardly ever applies and the Free Exercise Clause protects only against the most hostile and least disguised government efforts to restrict religious practice.

\textbf{B. The Impact of Davey}

The \textit{Smith-Lukumi} rules ban facial discrimination against religion as part of "the minimum requirement of neutrality."\textsuperscript{381} Yet \textit{Davey} upholds facial discrimination against religion, without requiring a compelling justification. An exception to the ban on facial discrimination is surely also an exception to the ban on more subtle forms of discrimination manifested in laws that are less than generally applicable. \textit{Davey} is thus an important exception to the remaining protection for

\textsuperscript{376} 42 U.S.C. § 2000cc(a)(1)(B) (land use); id. § 2000cc-1(b)(2) (prisons).
\textsuperscript{377} See id. § 2000cc(a)(2)(A) (land use); id. § 2000cc-1(b)(4) (prisons).
\textsuperscript{381} Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).
religious practice, and it is important to define the scope of that exception.

Those who sought from the beginning to confine Smith-Lukumi to cases of bad motive now claim that Davey confirms their view. Most prominently, Marci Hamilton argues that Davey requires a showing of anti-religious motive in every case. But whether on close reading or on simple examination of the facts at issue, that is not what the opinion says.

The heart of the opinion is a response to Davey’s claim that the Washington program “is presumptively unconstitutional because it is not facially neutral with respect to religion.” The opinion accepts the premise of facial discrimination but concludes that the consequence of presumptive unconstitutionality does not follow. The unifying theme is that facial discrimination against religion is presumptively unconstitutional if, and only if, the discrimination burdens a religious practice. There are multiple ways to show such a burden, but none of them were present in Davey; a mere refusal to fund does not impose a substantial burden.

First, the Court says that the state “imposes neither criminal nor civil sanctions on any type of religious service or rite.” That is, this case is not about regulation of conduct. A regulatory prohibition on a religious practice, with penalties for violation, unambiguously burdens that religious practice. But the Court has often said that a mere refusal to fund does not burden the unfunded practice, and as we have already seen, the Court put Davey’s funding claim in that line of cases. It is an essential part of the holding that the law at issue in this case carries no sanctions.

Second, the Court says that Washington “does not deny to ministers the right to participate in the political affairs of the community.” This observation distinguishes McDaniel v. Paty, which struck down restrictions on political participation. A law that required the surrender of political First Amendment rights as the cost of exercising religious First Amendment rights would of course be “presumptively unconstitutional.”

These two points are alternative grounds of presumptive unconstitutionality. A discriminatory law is presumptively unconstitutional if

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382 Hamilton, supra note 29 (“There are few instances where strict scrutiny is justified under the Free Exercise Clause. In Free Exercise challenges, hostility to religion must be shown for strict scrutiny to apply.”).
383 Davey, 124 S. Ct. at 1312.
384 Id.
385 See supra pp. 175-76, 180-81.
386 Davey, 124 S. Ct. at 1312.
it imposes civil or criminal penalties, or if it requires surrender of political rights. It would make no sense to require claimants to prove both conditions in every case. Nor could the Court possibly mean that proving one of these conditions yields presumptive unconstitutionality, but proving the other one does not; in that case, the Court's discussion of one of these alternatives would be meaningless. Rather, these are alternate grounds that, when combined with a form of discrimination cognizable under Smith-Lukumi, result in presumptive unconstitutionality.

Third, the Court says that the law "does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction." This alternative is more complicated, as we saw in the discussion of what the state must fund. What amounts to a mere refusal to fund theology majors, and what amounts to withholding other benefits from theology majors, becomes a complicated question once the state is allowed to require prophylactic separation of funded and unfunded programs. But for purposes of interpreting Smith and Lukumi, there is no change in the relationship among the points the Court listed. A discriminatory law is presumptively unconstitutional if it imposes penalties, or if it restricts rights of political participation, or if it forces people to choose between their religious practice and other government benefits for which they are eligible. Any of these three alternatives would impose a burden. But a mere failure to fund does not impose a burden.

At this point, the Court begins a lengthy response to Justice Scalia, who suggests a fourth way to show a burden. Scalia argues that Promise Scholarships are so generally available that they are part of the baseline for measuring burdens; withholding such a generally available public welfare benefit burdens the religious exercise of devotional theology majors. The Court responds that funding theology is different from funding other majors, and that Washington has legitimate reasons for its distinction. This response to Scalia is the exclusive context for the Court's discussion of motive. The Court says that facial discrimination with respect to the funding of clergy is readily explained by the long tradition of not funding the clergy, and thus is "not evidence of hostility toward religion." Washington has been solicitous of free exercise rights in other contexts, squarely rejecting the

388 Davey, 124 S. Ct. at 1312-13 (citations omitted).
389 See supra pp. 175-76, 178-81.
390 See Davey, 124 S. Ct. at 1316 (Scalia, J., dissenting).
391 Davey, 124 S. Ct. at 1313-14 (citing tradition of not funding clergy).
392 Id. at 1313.
Smith-Lukumi test and retaining a state version of Sherbert-Yoder, and it has voluntarily funded a substantial quantity of religious higher education, drawing the line only at devotional theology majors. Finding no evidence of animus toward religion, and finding a substantial state interest in not funding the clergy, the Court says that it "cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect."

Anti-religious motive is thus a fourth reason for finding presumptive unconstitutionality, and like the third reason, it applies even to funding programs. If a discriminatory refusal to fund is based on a bad motive, that refusal to fund is presumptively unconstitutional. But nothing in this opinion implies that a bad motive requirement now applies to the first three sources of presumptive unconstitutionality. The Court does not say that the state can impose discriminatory penalties on religion if it does so without bad motive; the single sentence distinguishing laws that impose civil or criminal sanctions stands on its own. The state cannot condition political participation on forgoing religious exercise even if it somehow does so without bad motive; allowing that would overrule McDaniel v. Paty, a decision that found no bad motive and that Davey clearly preserves. Nor does the Court suggest an inquiry into motive when a state withholds secular benefits from claimants who used their own funds for some religious practice. The discussion of motive is in the context of mere refusals to fund; it does not introduce a new and universal requirement.

This close analysis of the opinion merely confirms what should be obvious from the larger context: Davey is a funding case. Davey's claim relied on Lukumi, the leading regulation case, but his goal was to extend the Lukumi rules from regulation to funding. That effort failed; Lukumi does not apply to funding. But neither was Lukumi rolled back as applied to regulation. The central dispute about the meaning of "generally applicable laws" was not clarified. The only thing the Court said about regulation of religious practice is that

393 Id. at 1314 n.8 (describing Washington's free exercise rule as "more protective" than the federal rule). For the content of Washington's free exercise rule, see First Covenant Church v. City of Seattle, 840 P.2d 174, 185-88 (Wash. 1992).
394 Davey, 124 S. Ct. at 1314-15.
395 Id. at 1315.
397 The provision at issue in McDaniel dated to 1796. Id. at 621 (plurality opinion). The plurality accepted that the original purpose had been to protect the new and possibly fragile experiment of disestablishment. See id. at 622-25. The plaintiff suggested that the true purpose was to codify a Presbyterian belief that it was sinful for a minister to become involved in politics. Id. at 636 n.9 (Brennan, J., concurring). No one appears to have believed that the provision arose from subjective hostility to religion, although Justice Brennan said that the state's Establishment Clause rationale inherently "manifests patent hostility toward, not neutrality respecting, religion." Id. at 636.
Davey is not such a case: the state "imposes neither criminal nor civil sanctions on any type of religious service or rite." 398

In the Court's view, Davey was a case of unequal treatment but not a case of significant burden on religion, because the Court has repeatedly said that failure to fund is not a burden. 399 As the Davey Court concluded, "the exclusion of such funding places a relatively minor burden on Promise Scholars." 400

The Court's initial discussion of Lukumi and the sources of presumptive unconstitutionality also makes sense in terms of burden. When the Court says that "the State's disfavor of religion" in Davey "is of a far milder kind," 401 it is referring to the mildness of the burden, not to the nature or magnitude of the discrimination — express discrimination on the face of the statute is rarely thought to be a mild form of discrimination. The sentence about "a far milder kind" of disfavored is immediately followed, in the same paragraph, by the listing of the three burdens this case does not involve — criminal or civil penalties, loss of political rights, or loss of government benefits beyond the state's refusal to pay for the one activity it will not fund for anybody 402 — and then by the Court's response to Justice Scalia's suggestion that there is a fourth source of burden. 403

In responding to Scalia's broader conception of burden, the Court considers the state's reason for discriminating as part of its analysis of why the law is not burdensome — not as part of its consideration of whether the law is neutral and generally applicable. The law was not neutral, and the Court did not claim otherwise. But Davey does stand for the proposition that in the absence of any other burden, bad motive may suffice to show that discrimination is burdensome. And to that extent, the inquiry into reasons for discrimination can be taken out of the compelling interest test and moved to the threshold inquiry into whether the compelling interest test applies. 404 Stated affirmatively, Smith-Lukumi requires a showing that the challenged law is less than generally applicable and that it burdens the exercise of religion. That

398 Davey, 124 S. Ct. at 1312.
400 Davey, 124 S. Ct. at 1315. Professor Schragger, whose views on religious liberty are very different from mine, and who is generally much less disposed to protect religious liberty from local political majorities, also reads Davey as a holding that failure to fund is not a burden. See Schragger, supra note 103, at 1858-64.
401 Davey, 124 S. Ct. at 1312.
402 Id. at 1312-13.
403 Id. at 1313-15.
404 Compare this exception for funding cases with the discussion supra pp. 210-11, which explains why the inquiry into the state's reasons for unequal treatment generally cannot be taken out of the compelling interest test.
dual requirement is not a surprise, but Davey clarifies it; Smith and Lukumi focused on general applicability because burden was obvious.

Davey lies at the intersection of the funding and regulation cases, but fundamentally, it distinguishes the two lines and maintains their separation. The Court rejects the attempt to transport Lukumi wholesale from the regulation cases to the funding cases. But it does not rewrite the regulation cases.

III. Newdow and the Religious Speech Cases

A. The Doctrinal Context: Religious Speech With and Without Government Sponsorship

The religious speech cases include cases of religious speech by government and cases of religious speech by private speakers; these two subsets are separated by a much-litigated border. Most of these cases, on both sides of that border, have arisen in public schools. And for more than forty years, the Court has decided cases on religious speech in public schools with remarkable consistency: without a single exception in all that time, these cases are explained by the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Put more fundamentally, the difference between establishment and free exercise is the presence or absence of state action.

Neither side in the culture wars much likes this rule. From the perspective of either promoting or restricting religion, state action is beside the point. One side would restore school-sponsored prayer; the other side would censor much private religious speech in public schools and sometimes in other public places as well. But the Court is plainly right to draw the line; the religious speech cases are its most successful sustained effort to protect religious liberty. Protecting the religious speech of individuals and voluntary groups prevents government from suppressing or discouraging an important set of religious practices. This protection enables religious communities to form and function, to explore and develop their faith, to spread their message, and to seek to persuade or convert others. Prohibiting government speech that takes positions on religious questions prevents these private speakers from bringing government power to bear in their efforts to persuade or convert; protects all views about religion from having to

406 See, e.g., DeBoer v. Vill. of Oak Park, 267 F.3d 558, 561-62 (7th Cir. 2001) (meeting rooms in village hall); Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1276-77 (10th Cir. 1996) (city senior centers).
compete with the power of government promoting some other view; protects everyone from being coerced or manipulated into attending religious observances they would not freely choose to attend; and in general, prevents government from either encouraging or discouraging any religious belief or practice.\textsuperscript{407}

When speaking to the Court, litigants no longer challenge the basic distinction between private and governmental speech about religion. Instead, they struggle to move or manipulate the boundary. Those who would restrict religious speech in public schools claim to find government sponsorship everywhere; those who would expand religious speech in public schools claim to find student free speech everywhere. But identifying government sponsorship is not so difficult or manipulable as it is made out to be by litigants unhappy with the underlying rule.

Justices have disagreed about nuances in the formulation of a test for government sponsorship,\textsuperscript{408} but all of the Court's judgments are consistent with the simple rule that if persons are speaking in their private capacities, government cannot discriminate for or against them based on the religious content of their speech. Religious speech is attributable to the government if government gives it any assistance not equally available to other private speech — that is, if government employees select the religious message,\textsuperscript{409} deliver or lead a recitation of the religious message,\textsuperscript{410} encourage students to deliver or reflect on their own religious thoughts or message,\textsuperscript{411} arrange for a third party to deliver the religious message,\textsuperscript{412} or give an otherwise private speaker preferential access to a school forum, program, audience, or facility.\textsuperscript{413} The Court has recognized no exception to these rules in a school case since 1952, when it upheld a program that gave churches offering religious education preferential and mildly coercive access to school children.\textsuperscript{414} The Court has recognized two more recent exceptions outside


\textsuperscript{413} See Santa Fe, 530 U.S. at 303; Weisman, 505 U.S. at 581; Stone v. Graham, 449 U.S. 39, 39 & n.1 (1980).

\textsuperscript{414} See Zorach v. Clauson, 343 U.S. 306, 308–10 (1952) (describing a program in which the only choices were religious instruction at a local church or custodial care by the school). In such programs, the school "serves as a temporary jail for a pupil who will not go to Church." \textit{Id.} at 324.
the school context, permitting legislative sessions to open with prayer and permitting a municipal Christmas display that included Santa Claus and candy canes as well as a Nativity scene. "Under God" in the Pledge of Allegiance would likely have become another school exception if the Court had reached the merits; realistically, the question was how to define the scope of that exception.

If government has not endorsed religious speech by one of the means just listed, that speech is private and constitutionally protected, even on government property or in a public school. If a private speaker selects and delivers his own message, and if government employees do not express an opinion about that message, do not invite or arrange for the message, do not give the speaker preferential access to government forums, programs, audiences, or facilities, and in general, if they treat the religious speaker like similarly situated secular speakers, the religious speech is attributable to the private speaker. This is the rule in public schools, in higher education, and on other government property. The rule is broader than speech on government property; the Court has never doubted the right to make religious arguments in political debate, and it has upheld the right of clergy to hold political office. These rules are not a product of any recent swing to the right; protection of religious speech on public property goes back to the Jehovah's Witness cases in the Vinson Court and before. Indeed, prior to Locke v. Davey, the Court had never held in

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422 See cases cited supra note 419.
any context that government may or must discriminate against a private speaker based on the religious content of his speech. Davey creates a funding exception to the rule prohibiting discrimination against religious speech.423

Having repeatedly lost on their claim that equal access to a government forum would violate the Establishment Clause, litigants seeking to limit private religious speech have increasingly shifted strategies. They now give greater emphasis to the claim that government controls the scope of the forums it creates, so that access is not guaranteed under the Free Speech Clause.424

It is familiar doctrine that the Court’s free speech cases recognize three kinds of forums. The first, perhaps confined to streets and parks, is “property that has traditionally been available for public expression.”425 Second is “the designated public forum,” property that is a forum because the government said so.426 Third is the nonpublic forum on “all remaining public property.”427 Designated and nonpublic forums can be open to private speakers but may be limited by subject matter or speaker identity.428 The difference between a nonpublic forum and a designated forum with limitations has never been expressly defined, but it is a reasonable inference that limits on a designated forum must be imposed by category;429 in a nonpublic forum, speakers may be admitted or excluded individually.430 The important point for present purposes is that in both designated and nonpublic forums, government has substantial power to pick and choose who will be permitted to speak and what they will be permitted to discuss.

Of course this power is not unlimited. Viewpoint discrimination is forbidden in any kind of forum.431 And so long as a designated forum

423 See supra section I.C.3.c, pp. 191–95.
426 Id.
427 Id. at 678–79.
429 See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 48 (1983) (noting that if admission of selected speakers “has created a ‘limited’ public forum, the constitutional right of access would in any event extend only to other entities of similar character”).
430 See Cornelius, 473 U.S. at 804–05 (describing admission of “appropriate” speakers on criteria that were not “merely ministerial”); Perry, 460 U.S. at 47 (describing practice of “selective access”).
431 See ISKCON, 505 U.S. at 678–79.
remains open, government must have a compelling reason for excluding a speaker who falls within the forum’s designated limits. But government can exclude unwanted speakers by further restricting the designated subject matters or classes of permitted speakers, or by closing the designated forum entirely. These rules have been criticized on the ground that in nontraditional forums, free speech depends on government fiat and censorship is self-justifying. But the rules survived an attack by four Justices in ISKCON v. Lee, and the Court continues to work within them.

The distinction between viewpoint discrimination and subject-matter exclusions is far more important than the difference between designated and nonpublic forums. Governments argue that religion is a subject matter, permissibly excluded from either kind of forum, and speakers argue that excluding their religious speech is viewpoint discrimination. The speakers have been winning; the Court has consistently held that government exclusion of religious speech is viewpoint discrimination.

The distinction between government and private speech, and the characterization of religious speech as an expression of viewpoints, have been remarkably stable and persistent, but these two rules actually have the full support of only two Justices, Kennedy and O’Connor. Justices Rehnquist, Scalia, and Thomas would permit significant government sponsorship of religious speech, and Justices Stevens, Souter, Ginsburg, and Breyer would impose significant restrictions on private religious speech in public places. This persistent 4–3–2 split has enabled Kennedy and O’Connor to prevail; they generally have six votes to prohibit government sponsorship of religious speech, and at least five votes to invalidate government discrimination against private religious speech.

433 See Cornelius, 473 U.S. at 802; Perry, 460 U.S. at 46.
434 See ISKCON, 505 U.S. at 693–94 (Kennedy, J., concurring).
435 See Laycock, supra note 407, at 45–51.
436 See ISKCON, 505 U.S. at 693 (Kennedy, J., concurring).
439 See, e.g., Good News Club, 533 U.S. at 127 (Breyer, J., concurring in part); id. at 130 (Stevens, J., dissenting); id. at 134 (Souter, J., dissenting); Rosenberger, 515 U.S. at 863 (Souter, J., dissenting).
B. The Pledge of Allegiance

The Pledge of Allegiance in *Newdow* was clearly government-sponsored speech. Congress enacted the text of the Pledge by statute, teachers led the Pledge in public school classrooms. The question was whether the religious portion of the Pledge could somehow be rationalized, treated as secular, or fit within a de minimis exception that had a long history in dicta.

Despite the Court's repeated holdings that government may not endorse any view about religion, the Justices have always assumed that some modest degree of government-sponsored religious observance is permissible. Repeated dicta suggested that the Court would not invalidate "In God We Trust" on the currency, presidential Thanksgiving Day proclamations, or the opening invocation at the Court's own sessions: "God save the United States and this honorable Court." At least one opinion of the Court, and many separate opinions, offered "under God" in the Pledge of Allegiance as an example of the minimal religious references permitted by the Constitution. "Ceremonial deism" has been another label for this de minimis exception.

But the Court had never been required to define the boundary between these tolerated manifestations of government-sponsored religion and all the others that are unconstitutional. Lower courts had always upheld references that might have fallen within the de minimis exception, thus sparing the Court the difficulty of writing an opinion either defending it or defining it. The opinion would be difficult to write because the implicit exception is at best a matter of judgment rather than principle. It is easy to explain why government can never say anything about religion, and equally easy (though less convincing)

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442 See Lynch v. Donnelly, 465 U.S. 668, 676 (1984); id. at 716-17 (Brennan, J., dissenting); *Weisman*, 505 U.S. at 638-39 (Scalia, J., dissenting); *County of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Jaffree*, 477 U.S. at 78 n.5 (O'Connor, J., concurring); id. at 88 (Burger, C.J., dissenting); *Engel v. Vitale*, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting); see also *County of Allegheny*, 492 U.S. at 602-03 (reserving the issue).
443 For a well-developed attack on the exception, see Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996).
to explain why government can say anything it wants about religion so long as it does not coerce or penalize those who disagree. Avoiding either extreme requires the Court to pick and choose, to explain why government can endorse some religious propositions but not others, with no clear principle to guide the choices.

No matter how the Court defines a de minimis exception, it would be hard to fit the Pledge of Allegiance within it. In *Newdow*, it may have been politically impossible to affirn and legally impossible to reverse.

1. *The Religious Content of the Pledge.* — To recite that the nation is “under God” is inherently a religious affirmation. In theistic faiths, the existence of God is perhaps the most fundamental religious proposition. The politicians who added “under God” to the Pledge openly announced their religious purposes, including religious indoctrination of the nation’s children.445 Yet as so often happens in religious speech cases, defenders of the Pledge attempted to deny its obvious religious meaning.446 The United States argued that “under God” in the Pledge is a permissible reference to historic and demographic facts about the nation’s religious and mostly Christian population.447 Chief Justice Rehnquist seemed to agree, arguing that the Pledge “is a patriotic exercise, not a religious one,” and that “[t]he phrase ‘under God’ is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact” that the nation was founded on a belief in God.448

No nonbeliever can take these claims seriously. Michael Newdow could readily tell the difference between his daughter writing on a history exam that religious movements have been important to political developments, or that most Americans have believed in God — which would indeed be statements of fact — and his daughter personally affirming that the nation is “under God.” The Pledge has no statement about what many Americans believe, or about what the Founders believed. There is only a profession of what each person taking the Pledge believes: “I pledge allegiance to . . . one Nation under God.”449

The secularized interpretation of the Pledge is equally unacceptable to serious believers. From the religious right, Father Richard John Neuhaus twice condemned such arguments, claiming “widespread

445 See Epstein, supra note 443, at 2118–22. For the argument that the Pledge is unconstitutional under existing precedent, see id. at 2151–53.
446 See U.S. *Newdow* Brief, supra note 17, at *45 (“It is not a religious exercise at all . . . .”); Petitioners’ Brief on the Merits, *Newdow* (No. 02-1624), available in 2003 WL 23051996, at *30 (“The Pledge Is Not a Religious Act or a Profession of Religious Belief . . . .”).
447 See U.S. *Newdow* Brief, supra note 17, at *20–23 & n.18; id. at *31–33.
449 “One Nation” is an appositive phrase, an alternate name for the preceding noun phrase (“Republic for which it stands”), and stands in the same relation to the rest of the sentence. See, e.g., BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 68 (1995).
agreement that the government botched its case for keeping 'under
God' in the Pledge," and that "most Americans . . . agree . . . with Mr.
Newdow . . . that a reference to God is a reference to God, the gov-
ernment's brief notwithstanding." In an earlier comment, condemning
similar arguments from the American Jewish Congress, Neuhaus said:
"In other words, such references to God in public are permissible
because nobody really believes what they say. . . . Maybe the Court
will next rule that pigs can fly."

From the religious left, thirty-two Christian and Jewish clergy
whom I represented argued that "[e]ither government is asking school
children to make a sincere statement of belief in the one true God
Whom the Nation is under, or it is asking children to take the name of
the Lord in vain." Neither request is consistent with government's
duty of neutrality toward and among religions. If the Pledge means
what it says, it is a short profession of faith; if it does not, it is an in-
sincere statement of religious faith that has been redirected — misap-
propriated — to secular and political purposes.

Of course, the government's secular interpretation of the Pledge
was a polite lie, told only to the Court. Perhaps the government hoped
the Court would repeat the lie, but surely it did not expect that the
Court would believe the lie. The United States interpreted the Pledge
very differently in the President's letter to citizens who wrote the
White House about the Pledge case:

As citizens recite the Pledge of Allegiance, we help define our Nation. In
one sentence, we affirm our form of government, our belief in human dig-
nity, our unity as a people, and our reliance on God. . . .

When we pledge allegiance to One nation under God, our citizens par-
ticipate in an important American tradition of humbly seeking the wisdom
and blessing of Divine Providence.

The President's claim that the Pledge seeks God's wisdom and bless-
ing also goes beyond the literal language of the Pledge, but at least it

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450 Richard John Neuhaus, The Public Square, FIRST THINGS, June/July 2004, at 64, 83.
451 See AJC Newdow Brief, supra note 23, at *1-20.
452 Richard John Neuhaus, The Public Square, FIRST THINGS, March 2004, at 55, 70.
453 Clergy Brief, supra note 25, at *8.
454 Letter from George W. Bush, President of the United States, to Mitsuo Murashige, President
of the Hawaii State Federation of Honpa Hongwanji Lay Associations (Nov. 13, 2002), reprinted
in Amicus Curiae Brief of Americans United for Separation of Church and State et al. in Support
of Affirmance, Newdow (No. 02-1624), available in 2004 WL 298118, at *3a [hereinafter Ameri-
cans United Brief]. This letter responded to a Buddhist resolution opposing "under God" in the
Pledge. Letter from Mitsuo Murashige, President of the Hawaii State Federation of Honpa Hongwanji Lay Associations, to George W. Bush, President of the United States (Sept. 2002), re-
printed in Americans United Brief, supra, at *1a. The obvious mismatch between the original
letter and the White House response implies that this was the form letter for all who wrote about
the Pledge. The workload has increased unmanageably, and standards have declined, since Jef-
ferson's reply to the Danbury Baptists.
elaborates that language without negating its primary meaning, and it may be that many believers think of themselves as seeking God’s blessing whenever they invoke His name. Certainly the White House letter was more honest than the government’s brief.

Once we get past the polite lie and agree that “under God” is religious, it is common to assume that “under God” is so generic that it includes all believers, and that only atheists and agnostics could dissent. The legal relevance of this assumption is unclear; atheists and agnostics have as much right as anyone else to invoke the Establishment Clause. But the assumption matters politically, and it may also matter to whether the Pledge falls within a de minimis exception. In any event, it is false to assume that only nonbelievers dissent from the Pledge; a range of religious believers dissent as well. On careful analysis, “under God” implies a succinct religious creed, less specific than most creeds, but carrying substantial religious meaning.

Most obviously, the Pledge affirms that God exists. Further, as the court of appeals emphasized, the Pledge affirms that there is only one God. The Pledge does not recite that the nation is under “the Gods,” or that it is under “our God,” “a God,” “some God,” or “one of the Gods,” but simply that the nation is “under God.” The lack of any article or modifier necessarily implies that there is no other possible meaning or referent in the category mentioned; the Pledge does not speak for either nontheistic or polytheistic religions. If there is only one God, worshipers of other alleged gods are mistaken. They are worshiping false gods; the God of the Pledge is the one true God.

The Pledge also affirms an important characteristic of the one true God. God exercises some sort of broad superintending authority that an entire nation can be “under.” The nature of this authority is not further specified — it might be judgmental, protective, or triumphant, or it might reflect some other understanding of divine authority — but some conceptions of God are excluded. A “Nation under God” does not plausibly refer to God as First Cause, starting the universe in motion and then withdrawing, nor to God as a name or metaphor for all the goodness immanent in the universe.

Some Americans read “under God” in much more specific ways than I have read it. Father Neuhaus reads the Pledge to mean that the nation is “under judgment” by a higher authority. Thomas Berg expands on this theme, reading “under God” to imply “that government is a limited institution, subject to standards of authority higher than itself,” and that individual rights are derived from “a source higher

than the nation or any other human authority.\textsuperscript{457} A questioner at a Pew Forum discussion read “under” God to imply a Calvinist conception of God.\textsuperscript{458} For both Neuhaus and Berg, their reading of the Pledge states a truth that they believe; for the questioner at the Pew Forum, her reading states a belief that she appeared to reject.

School children do not carefully parse the language of the Pledge; children who believe are likely to casually equate the God of the Pledge with their own conception of God. Children who do not believe likely hear only a bald and literal assertion of God’s existence. Whether read carefully or casually, the religious content is definitely not secular. And it is not so generic as one might think on a cursory recital.

2. The Intrusiveness of the Pledge. — The religious affirmation in the Pledge is very brief; it is reasonably, although imperfectly, generic. These are the obvious reasons for thinking it might fit within a de minimis exception. But in other ways, the Pledge is an unlikely candidate: it is most frequently used in public schools, it asks for a personal statement of belief in God, and it links that request to a profession of loyalty to the nation.

Nowhere has the Court been more sensitive to departures from religious neutrality than in public schools. Public schools have been a battleground over religious instruction since their origins in the early nineteenth century.\textsuperscript{459} Parents reasonably believe they should be able to send their children to public school without the state taking advantage of the opportunity to teach someone else’s religion. The other examples of permitted ceremonial deism are religious observances directed to audiences consisting principally of adults — as in prayers at the opening of legislative sessions and the marshal’s cry at sittings of the Supreme Court — or to no one in particular, as in Thanksgiving proclamations and the motto on the currency. In contrast, public schools, with a captive audience of children subject to compulsory education laws, are the most sensitive place to recognize an exception for government-sponsored religious observances.

More fundamentally, only the Pledge asks each student for a personal commitment to the propositions it contains. In the Court’s first


\textsuperscript{458} See Lee McAuliffe Rambo, Comment at Discussion: Under God? Pledge of Allegiance Constitutionality (March 19, 2004) (transcript available at http://pewforum.org/events/index.php?EventD=53). On the record, Ms. Rambo said: “[O]ne of those words is a preposition, which, to at least some ears, implies a particular type of God, one that we are under, one that is transcendent.” \textit{Id}. In one-on-one questioning at the end of the event, she said that the connotations of authority attaching to “under,” emphasized by Neuhaus and Berg, connoted Calvinism.

prayer cases, students were asked to join in reciting the prayer, but no subsequent case presented such facts until Newdow. In the intervening cases, students at most had to stand or “maintain respectful silence,” they did not have to overtly join in. No other common example of ceremonial deism, in or out of the public schools, asks citizens to recite either a prayer or a religious proposition.

The Pledge is different. However briefly and generically, the Pledge ceremony asks for a personal profession of faith. As the Court observed long ago, “the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.” Speaking of the wholly secular Pledge as it existed in 1943, the Court said that “[i]t requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks,” including the truth of “liberty and justice for all” and the other descriptive characteristics attributed to the nation. Moreover, the Court recognized that one reason for refusing to recite the Pledge might be disagreement with one or more of these descriptive claims.

It is equally true today that recitation of the Pledge in a solemn ceremony affirms the truth of its description of the nation, including the additional belief, inserted in 1954, that the nation is “under God.” To affirm this description necessarily affirms the propositions included in that description: that there is a God, and only one, of such a nature that a nation can be under that God.

In a single sentence, the Pledge links this profession of religious faith to a profession of national allegiance. The Court has repeatedly expressed its concern that government endorsements of religious viewpoints tend to exclude from the political community citizens who do not share those viewpoints. That implication is more direct in the

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462 See County of Allegheny v. ACLU, 492 U.S. 573, 603 n.52 (1989) (distinguishing religious observances that “urge citizens to engage in religious practices” from those that do not).
464 Id.
465 Id. at 634 n.14.
466 Id. at 634 & n.14.
468 See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (“School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members
Pledge than when a government agent leads an audience in prayer. The Pledge expressly links not just religion and government, but also religion and loyalty. Students who cannot in good conscience affirm that the nation is "under God" cannot recite the officially prescribed pledge of their allegiance to the nation. They might not recite the Pledge at all, or they might drop out for two words in the middle. Either way, the message of exclusion is unmistakable. What kind of citizen cannot even recite in good faith the Pledge of Allegiance?

— This combination of religious and political sentiments evades the Court's longstanding rules on the proper remedy for those who conscientiously object to government ceremonies. No one may be required to affirm a political sentiment. But this rule does not preclude the state from asking citizens to pledge their allegiance. In *West Virginia State Board of Education v. Barnette*, which struck down compulsory recital of the secular Pledge of Allegiance as it then existed, the only remedy sought or granted was to enjoin enforcement "as to the plaintiffs" and "others similarly situated." The rule is fundamentally different with respect to government-sponsored religious statements. The Court's first school-sponsored prayer case held that it was not enough to excuse objecting children from participating in the brief government-sponsored prayer. The only adequate remedy was to prohibit school employees from leading any students in prayer, willing or otherwise. The Court has adhered to this rule ever since. If a religious practice violates the Establishment Clause, the government sponsorship is enjoined; allowing individuals to opt out does not avoid the constitutional violation.

The reason for this distinction between political and religious speech lies deep in constitutional structure and the legitimate functions of government. On political matters, government may lead public opinion to the best of its ability. It can encourage patriotism and civic duty; it can rally support for the war effort, the tax cuts, or the civil rights movement. It can discourage drug abuse, encourage physical fitness, or urge the populace to "Whip Inflation Now." Constitu-
tional structure implies some limits on government propaganda efforts, but those limits are very broad and enforced more by the political system than by any prospect of judicial review. Citizens remain free to agree or disagree, to rally in support of the government or in protest, to support the incumbent administration or to vote the rascals out. But on political matters, electoral losers must accept the results of the election.

None of these political practices apply to religion. On religious matters, citizens do not vote and government does not lead. The government has no legitimate role in shaping the religious opinions of the American people; that is what it means to say that government may not endorse any position on a religious question. Conceding government power to lead religious opinion implies the legitimacy of voting and campaigning on religious propositions, because voting and campaigning are how democracies choose positions for their governments to take. But voting on the truth of religious propositions is utterly inconsistent with committing religious faith to individual choices and commitments. The Court has correctly said that a referendum on religion is unconstitutional: "Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred." Government statements on religion seem harmless only when a vote seems unnecessary because the statement is bland enough to have overwhelming support. But government has no more legitimate power to lead religious opinion on the basis of an implicit vote than on the basis of an explicit vote.

The Court explained the essence of this distinction in Lee v. Weisman:

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. A state-created orthodoxy puts at grave risk that freedom of belief and con-

475 See id. at 111–38.
477 Santa Fe, 530 U.S. at 317.
science which are the sole assurance that religious faith is real, not imposed.479

I would delete the word “prime” and simply say that government may not participate in religious debates. But the qualification leaves open the long-acknowledged de minimis exception.

By combining religious and patriotic affirmations in a single sentence, the Pledge straddles both sides of the distinction between government’s roles in the shaping of religious and political opinions. The only remedy for the religious portion of the Pledge was the Establishment Clause remedy, forbidding government to lead or sponsor the recitation. But supporters of the Pledge argued that its patriotic elements determined the character of the Pledge as a whole, so that the existing right to opt out was a sufficient remedy. If accepted, that argument would lead to a regime in which government could freely sponsor religious observances, so long as each religious observance was combined with a sufficient quantity of political observance to bring the combined whole under the rule for government-sponsored political speech instead of the quite different rule for government-sponsored religious speech.

Under principles that had been consistently applied over forty years, the court of appeals properly invalidated “under God” in the Pledge.480 This brief recital is a government-sponsored religious observance, and prohibiting such observances is the settled remedy. The only plausible alternative would be to define a de minimis exception that somehow includes this uniquely intrusive, but very brief and relatively generic, religious observance.

C. The Court’s Response

The Court did not reach the merits of the Pledge, because it held that Michael Newdow, an unmarried father with disputed custody rights,481 lacked standing to sue.482 But three Justices would have found standing and reached the merits. Not surprisingly, all three would have upheld the Pledge. Also not surprisingly, they could not agree on a reason. Justice O’Connor offered the first serious effort by any Justice to define the de minimis exception. Justices Rehnquist and Thomas would have given government broad or unlimited discretion.

1. Defining a De Minimis Exception. — Justice O’Connor begins unpromisingly, joining in full Chief Justice Rehnquist’s opinion,483

479 Id. at 591–92 (citations omitted).
481 See Newdow, 124 S. Ct. at 2310–12.
482 See id. at 2308–12. For analysis, see Leading Cases, supra note 15, at 426–36.
483 Newdow, 124 S. Ct. at 2321 (O’Connor, J., concurring in the judgment).
which says both that the Pledge is secular and that government can often endorse religious sentiments.\textsuperscript{484} She says more in the same vein, concluding that the Pledge is, in a sense, secular. But she does not deny that language means what it means. She writes that “these references speak in the language of religious belief,”\textsuperscript{485} thus nodding to reality, but she adds that “they are more properly understood as employing the idiom for essentially secular purposes.”\textsuperscript{486}

To this point, she has added only the nod to reality. Justice O’Connor’s contribution is to offer relatively objective criteria for identifying religious statements that can be treated as secular. She offers four factors to be considered in assessing whether the government has endorsed religion, plus a requirement that must be separately satisfied.

Her first factor is “History and Ubiquity.”\textsuperscript{487} A finding of secular purpose requires “a shared understanding” of that purpose, which “can exist only when a given practice has been in place for a significant portion of the Nation’s history.”\textsuperscript{488} “[N]ovel or uncommon references to religion” are unlikely to qualify, because reasonable observers will not know their origins.\textsuperscript{489} This factor insures that a decision upholding one traditional recitation does not become the basis for an endless round of new experiments in government imposition of religion. It confines her opinion to a rather short list of existing practices that have long gone unchallenged. With regard to the Pledge, Justice O’Connor says that fifty years as “our most routine ceremonial act of patriotism” is long enough.\textsuperscript{490} One lesson is that separationist groups should sue immediately when they encounter any religious practice newly sponsored by the government.

Justice O’Connor’s second factor is “Absence of worship or prayer.”\textsuperscript{491} She quite plausibly found the Pledge to be neither. Passive religious symbols, such as crosses, Nativity scenes, and the Ten Commandments, would also pass this factor. To me, this factor relies on a mere difference in form. Leading students in a brief profession of faith is no more defensible than leading them in worship or prayer. Even so, this factor does substantial work, because government-sponsored prayer has been the most common form of government-sponsored religious observance. Government requests for a profession of faith have

\begin{footnotes}
\item See infra p. 239.
\item Newdow, 124 S. Ct at 2322 (O’Connor, J., concurring in the judgment).
\item Id.; see also id. (arguing that “[I]nearly religious references” can serve secular purposes).
\item Id. at 2323.
\item Id.
\item Id.
\item Id.
\item Id. at 2324.
\end{footnotes}
been confined to the Pledge. Any new practice of government-sponsored creeds would satisfy this factor, but not the History-and-Ubiquity factor.

Justice O'Connor saw more in this Absence-of-worship factor than a mere difference in form. She knew of no religion "that would count the Pledge as a meaningful expression of religious faith." That statement is surely wrong, but it approximates something important. No religion would draft a meaningful religious statement in the sparse language of the Pledge if the religious community were free to write the statement for itself. Brief, generic, least-common-denominator formulations are the inevitable result of drafting professions of faith to appeal to a national supermajority. Despite its inadequacies from a religious perspective, the Pledge retains sufficient religious meaning for millions of Americans to get angry at the prospect of removing its religious content. Father Neuhaus and Professor Berg, coming from different faith traditions and different places on the political spectrum, each read into the Pledge serious propositions of religious faith. Professor Berg goes further, predicting that if "under God" is removed, many Americans will refuse to recite the Pledge, viewing it as a pledge of loyalty to an absolute government that acknowledges no higher limits on its authority. The most committed believers and the most committed nonbelievers are thus united in taking the religious language of the Pledge seriously.

"In matters of religious liberty, we must give substantial attention to the prickly people; it is their rights that are most often at stake." For the "reasonable observer" in the middle of the political spectrum, it may be hard to imagine the full range of religious views in this country. But these strongly held views about religion go to why there should not be a de minimis exception at all. If we assume that there will be such an exception and that the task is to carefully define it, then Justice O'Connor is on the right track, and her view that no religion would count the Pledge as religiously meaningful is a pardonable overstatement.

Justice O'Connor's third factor is "Absence of reference to particular religion." Here she borrows a line from Justice Scalia, who once conceded that our constitutional tradition rules out "government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women

492 Id. at 2325.
493 See supra pp. 224–27.
495 See Berg, supra note 457, at 69–70.
496 Id. at 70.
497 Newdow, 124 S. Ct. at 2325 (O'Connor, J., concurring in the judgment).
who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)."498 Some of Justice Scalia's other votes cast doubt on the depth of his commitment to this concession,499 but in Justice O'Connor's hands, this no-particular-religion factor is a significant limitation on government. This factor excludes references to particular Gods or names for God, such as Jesus or Vishnu.500 She recognizes that it is impossible to be neutral with respect to nontheistic religions such as Buddhism,501 and she might have added polytheistic religions and nonbelievers. But she says that "under God" comes as close as language permits,502 and if the goal is to avoid an absolute rule, that is the best we can do.503

Justice O'Connor's fourth factor is "Minimal religious content."504 She contrasts the two words of the Pledge with the "repeated thanks to God and requests for blessings"505 in the prayers in Lee v. Weisman,506 which were a little more than one hundred words each.507 She says that brevity "tends to confirm" secular purpose, makes it easier for dissenters to "opt out" by omitting the religious passage, and limits government's ability "to express a preference for one religious sect over another."508

In Justice O'Connor's view, a statement that survives review under her four factors does not actually endorse the religious sentiments asserted on its face:

Such references can serve to solemnize an occasion instead of to invoke divine provenance. The reasonable observer discussed above, fully aware of our national history and the origins of such practices, would not perceive these acknowledgements as signifying a government endorsement of any specific religion, or even of religion over non-religion.509

500 See Newdow, 124 S. Ct. at 2326 (O'Connor, J., concurring in the judgment).
501 See id.
502 See id.
503 For a proposal that government religious observances should be constrained only by a tradition of nonsectarianism — defined as no reference to particular religious traditions — and that this limit should be judicially enforceable only in extreme cases, see Steven D. Smith, Nonestablishment "Under God?" The Nonsectarian Principle, 50 VILL. L. REV. (forthcoming Dec. 2004), manuscript available at http://ssrn.com/abstract=559148.
504 Newdow, 124 S. Ct. at 2326 (O'Connor, J., concurring in the judgment).
505 Id. (characterizing the prayers in Lee v. Weisman, 505 U.S. 577 (1992)).
507 See id. at 581–82 (reprinting the prayers verbatim).
508 Newdow, 124 S. Ct. at 2326 (O'Connor, J., concurring in the judgment).
509 Id. at 2322–23.
This rationale is unconvincing both to serious nonbelievers and to serious believers. Justice O'Connor cannot solve the problem for nonbelievers, who will experience the government's "language of religious belief" as a singularly inappropriate and exclusionary means of achieving secular purposes. Nor can she solve the problem for thoughtful believers, who see their religious language and images explained away and appropriated for purposes deemed secular. The attempt to secularize religious language is a collective choice, overriding individual choices on both sides.

Justice O'Connor would surely have done better to concede that observances within the de minimis exception are religious, and to simply say that she viewed them as so nearly harmless that the Court should not interfere. The de minimis exception makes sense as a prudential judgment not to pay the costs of absolutist enforcement of an unpopular rule, but it is hard to make the line appear principled.

Justice O'Connor also adds a fifth criterion, confirming that government may not "overtly coerce a person to participate in an act of ceremonial deism." In other words, West Virginia v. Barnette is still good law; no one can be required to say the Pledge of Allegiance or the portion of it that is "facially religious." This is a bright-line rule about coercion of any involuntary statement, whether religious, political, or other. It is not merely a factor to be considered in assessing endorsement.

It appears that for Justice O'Connor, the government need not satisfy all four of the endorsement factors in every case. She says that prayer could be upheld "only in the most extraordinary circumstances," which implies that her second factor is not quite an absolute rule. She acknowledges Marsh v. Chambers, which upheld prayers in state legislatures on the basis of long tradition. Marsh made no effort to fit within any of the tests announced before it was decided, and it probably will not fit within Justice O'Connor's test either. For Marsh to fit within her four factors, it must be the case that an unusually strong showing on two factors (or one and a half) can make up for

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510 See Smith, supra note 503 (manuscript at 18 & n.44) (criticizing Justice O'Connor's Newdow opinion as "probably the leading example" of judicial statements that "lose all credibility" in their efforts to explain the religious as secular). Another conservative scholar also harshly condemned Justice O'Connor's effort to give the Pledge a secular reading. See Michael M. Uhlmann, The Supreme Court Rules: 2004, FIRST THINGS, Oct. 2004, at 17, 22-25. Yet he reported without comment Chief Justice Rehnquist's equally implausible claim that "under God" in the Pledge merely recites a historical fact about the Founding. See id. at 22.

511 Newdow, 124 S. Ct. at 2327 (O'Connor, J., concurring in the judgment).

512 319 U.S. 624 (1943).

513 Newdow, 124 S. Ct. at 2322 (O'Connor, J., concurring in the judgment).

514 See id. at 2326-27.

515 Id. at 2324.

516 Id. (citing Marsh, 463 U.S. 783 (1983)).
failure to satisfy the others. Marsh was decided on the basis of an unbroken tradition of legislative prayer going back to the First Congress, so it was very strong on history. But these prayers were not a rote recitation; each day’s prayer had new content, so they did not satisfy the “ubiquity” half of the History-and-Ubiquity factor. The prayers in Marsh omitted all references to Christ after a Jewish legislator complained, and a later opinion treated that fact as essential to the holding. So the prayers in Marsh satisfied the no-particular-religion factor. But they could never satisfy the factors of minimal religious content or absence of worship or prayer.

Justice O’Connor says that the Pledge itself “is a close question,” even though it satisfies all four factors. Her treatment of the Pledge is a better guide to her approach than the sui generis opinion in Marsh. The purpose of her factors is to mark a relatively objective boundary for those modest religious references that she will treat as secular in purpose and effect. The factors will not serve their purpose if government generally needs to satisfy only one and a half of the four factors. On the other hand, the Pledge is a close case in part because of factors not mentioned in her list of four: that it is used in public schools, that it asks for a personal affirmation, and that it links religious faith to political loyalty.

An impending test of her four factors is large government-sponsored monuments displaying the text of the Ten Commandments. These monuments clearly satisfy only one of the four factors; they do not ask for worship or prayer. There is no long and ubiquitous history of large monuments displaying the text of the Commandments. Many of these monuments were donated by the Fraternal Order of Eagles in conjunction with promotions of Cecil B.

517 See Marsh, 463 U.S. at 786–92.
518 The Court neglected to state this fact, but it is implicit in the opinion. See id. at 785 n.1 (describing how the “prayers” were “collected from time to time into prayerbooks”).
519 See id. at 793 n.14.
521 Newdow, 124 S. Ct. at 2333 (O’Connor, J., concurring in the judgment).
522 Three circuits have upheld such monuments. See Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003), cert. granted, 2004 W.L. 2282082 (U.S. Oct. 21, 2004) (No. 03-1500); Freethought Soc’y v. Chester County, 334 F.3d 247 (3d Cir. 2003); Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973). Four circuits have ordered them removed. See ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020 (8th Cir. 2003), vacated and rel’g on banc granted, No. 02-2444 (8th Cir. Apr. 6, 2004); ACLU v. McCreary County, 354 F.3d 438 (6th Cir. 2003), cert. granted, 2004 W.L. 2059432 (U.S. Oct. 12, 2004) (No. 03-1693); Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003), cert. denied, 124 S. Ct. 497 (2003); Ind. Civil Liberties Union v. O’Bannon, 259 F.3d 766 (7th Cir. 2001), cert. denied, 534 U.S. 1162 (2002); Baker v. Adams County/Ohio Valley Sch. Bd., 86 Fed. Appx. 104 (6th Cir. 2004), petition for cert. filed, 72 U.S.L.W. 3769 (U.S. June 14, 2004) (No. 03-1661). The decision in Freethought Society was based in part on the monument’s obscure location and long history, see 334 F.3d at 253–54, 265–67, 269–70, which somewhat reduces the conflict between this decision and those of other circuits.
DeMille's 1956 movie, *The Ten Commandments*.\(^{523}\) So they have as long a history as "under God" in the Pledge, but they are not nearly so ubiquitous. A few hundred monuments scattered about the country does not compare to "our most routine ceremonial act of patriotism," repeated daily in more than a million classrooms. The "Ten Commandments" are well known as a phrase and as a concept, but no version of the text is well known; I am confident that most Americans could not list the Ten Commandments.\(^{524}\) The reasonable observer is not familiar with the text, let alone with any ubiquitous secular use of the text.

The Eagles version devotes sixty-six words to the five commandments with explicitly religious content.\(^{525}\) Supporters of such displays commonly claim that the Ten Commandments are the basis of secular law, but counting generously, only four of the Commandments are any part of current law.\(^{526}\) The Commandments are in fact predominantly religious, but predominance is far more than Justice O'Connor requires. Her factor is "minimal religious content," and certainly the religious content of the Commandments is more than minimal.

Finally, the Commandments' religious content is from a specific religious tradition. "Thou shalt have no other Gods before me" is unambiguously a claim of religious exclusivity. The God making this demand is not identified in typical displays of the Commandments, but that missing fact is certainly known to the reasonable observer. Large

\(^{523}\) See *Books v. City of Elkhart*, 235 F.3d 292, 294–95 (7th Cir. 2000).

\(^{524}\) I could not find polling data on this question, but I did find a poll on a much easier question about religious knowledge. In 1990, fifty percent of the population could name at least one of the four Gospels (Matthew, Mark, Luke, and John). *George Gallup, Jr., The Gallup Poll: Public Opinion 1990*, at 158 (1991). Surely a much smaller percentage could list all ten of the Ten Commandments.

\(^{525}\) The Eagles monuments begin as follows:

*[T]he Ten Commandments

I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee."

*Books*, 235 F.3d at 309. The first two lines are in larger type. For a photograph of a typical Eagles monument, see *id*.

\(^{526}\) The commandments not to kill, steal, or bear false witness are embodied in the law of murder, theft, perjury, and defamation. Adultery lingers in the law vestigially; it is an unenforced criminal offense in a few states, repealed in most, and a possible ground for divorce, rarely used now that divorces are awarded without fault. *See Jonathan Turley, Editorial, Of Lust and the Law, Wash. Post, Sept. 5, 2004, at B1 (arguing that adultery laws are widely violated, rarely enforced, unconstitutional, and archaic)*, available at 2004 WL 82781347. Coveting was never an offense in Anglo-American law, and with the health of the economy dependent on consumer spending, national economic policy now seems to affirmatively encourage it.
textual displays of the Ten Commandments should be an easy case under Justice O'Connor's four factors; if not, the factors will fail to accomplish their purpose.

Symbolic representations of the Commandments in art or architecture, without visible text, are a closer case.\textsuperscript{527} Such representations have minimal religious content and a longer history in a relatively defined context. They do not call for worship or prayer. Their allusion to a specific religious tradition is unmistakable, but less pointed and less substantial. These cases could be decided either way, but a reasonable observer of Justice O'Connor must predict that she would vote to uphold them.

For now, Justice O'Connor has only her own vote for her four factors. But she is the swing vote; her opinions tend to control results.\textsuperscript{528} And even if she has left the Court when the issue returns, her factors have much to recommend them. I am awkwardly situated to comment, because I proposed substantially the same five points as five requirements to be satisfied, rather than as four factors and one requirement.\textsuperscript{529} Factors to be considered are less stringent and more manipulable than requirements to be satisfied; neither her opinion applying the factors to the Pledge, nor my attempt to apply them to the Ten Commandments, reads like a bright-line rule. Moreover, these factors do not capture all the important considerations; they were designed to uphold the Pledge, so they omit the strongest reasons for invalidating it. They are imperfect, but the problem does not admit of a principled solution. If the Court will not enforce an absolute rule against government-led religious exercises, then it sorely needs an objective and judicially administrable boundary for the exception. Justice O'Connor's factors are a great advance over the Court's previous efforts to explain the de minimis exception.\textsuperscript{530}

\textsuperscript{527} See King v. Richmond County, 331 F.3d 1271, 1283-86 (11th Cir. 2003) (upholding such a symbol in a county seal).

\textsuperscript{528} On the particular issue of religious speech in public schools, Justices Kennedy and O'Connor have been the controlling swing votes. See supra p. 222. In 5-4 decisions across the range of issues, Justice O'Connor has been the most frequent swing vote by a large margin. See The Supreme Court, 2003 Term—Nine Justices, Ten Years: A Statistical Retrospective, 118 HARV. L. REV. 510, 520-21 tbl.V (2004).

\textsuperscript{529} See Clergy Brief, supra note 25, at *24-30. That brief proposed that if the Pledge were to be upheld, the grounds should be that "1) the Pledge is not in form a prayer; 2) the Pledge does not refer to Christianity or to any other particular religion; 3) the religious portion of the Pledge is only two words; 4) the Pledge was recited unchanged for fifty years before this Court considered the question; 5) no one can be required to say the Pledge . . . ." Id. at 29-30. That brief also proposed that "all these factors are essential to the decision." Id. at 30. That brief may have had some influence, but Justice O'Connor plainly made these five points her own and modified them substantially.

\textsuperscript{530} For a powerful argument against any de minimis exception, see Epstein, supra note 443, at 2166-69. Epstein effectively quotes some of my own earlier work. See id. at 2168-69 & nn.476-
2. Efforts to Unleash Government-Sponsored Religion. — The other separate opinions would have given government much more freedom to endorse religious sentiments and lead religious observances. Chief Justice Rehnquist took the familiar approach of blurring all lines between the religious and the secular. Justice Thomas proposed to get the Court out of the business of enforcing the Establishment Clause.

The broad implications of the Rehnquist and Thomas opinions are not surprising, because these two Justices have been persistent dissenters in the cases on school-sponsored prayer. But these opinions do not address the Court's problem. They may explain why government officials can lead the public in prayer whenever they choose. But they do not point the way to a rule that generally prohibits government endorsement of religion while permitting a narrow exception for modest, relatively harmless religious references. That is the problem raised by current doctrine, and the persistent dissenters do not address it.

(a) The Rehnquist Opinion. — Chief Justice Rehnquist first argued that the Pledge is secular, a patriotic rather than religious exercise, and not an endorsement of any religion. He devoted more space to the claim that government has made religious statements throughout our history, quoting Presidents Washington, Lincoln, Wilson, Franklin Roosevelt, and Eisenhower; “In God We Trust”; “God Save the United States and this honorable Court”; and the fourth verse of the National Anthem. The implicit premise of this second argument is not that the Pledge is secular, but that it is permissible for it to be religious. None of his examples arose in public schools, and in none of his examples were individual citizens asked to personally affirm the religious sentiment. Most of his examples were political speeches, occupying the murky ground at the border between the President's official capacity and his free speech rights as political leader and candidate for reelection. Those examples probably are protected free speech, but they tell us nothing about government employees unambiguously using their offices to lead citizens in religious observances.

Chief Justice Burger wrote a similar opinion in Lynch v. Donnelly, upholding a Nativity scene on the ground that it “depicts the historical origins of this traditional event long recognized as a National

478. I agree with Epstein in principle, but if a de minimis exception is politically inevitable, it is better to have clearly defined boundaries than a slippery slope.


532 See Newdow, 124 S. Ct. at 2319–20 (Rehnquist, C.J., concurring).

533 See id. at 2317–19.

Holiday.\textsuperscript{535} Of course, for most non-Christians, the events depicted were not "historical," because they never happened. For many Christians, the central event happened, but much of what is depicted in the conventional Nativity scene is not "historical" because it is nonessential embellishment and quite possibly metaphorical. And for most Christians, the central event depicted was one of the two most important miracles in the history of the universe — the Incarnation of God in human form — and not merely the "historical origin" of a "traditional event" and a "National Holiday."

These Burger and Rehnquist opinions fail to identify any boundaries. If the Court simply decrees the religious to be secular, instead of conceding that it is religious and then carefully defining a permitted subset of religious references or observances, then any religious statement can be labeled secular in the same essentially arbitrary way. The same problem follows from saying that government has said many religious things, so it can say some more. Either there are no limits, so that government can offer the Mass or a full-length worship service of any other faith, or the limits are undefined and standardless. If the limits are undefined, then every case must be appealed to the Supreme Court. And of course, such a standardless rule is more than usually subject to manipulation. This approach enabled the Fifth Circuit to hold a Ten Commandments monument secular in purpose and effect, with only the most abstract allusions to its religious content.\textsuperscript{536}

Quite possibly, the Chief Justice has some limit in mind, but he said nothing to help public officials, lawyers, or trial judges identify that limit. With no attention to line drawing, the opinion appears to be another effort to undermine the endorsement rule and roll back the cases on school-sponsored prayer.

(b) The Thomas Opinion. — Justice Thomas wrote the most sweeping opinion. He conceded that the Pledge is unconstitutional under\textit{ Lee v. Weisman} (the graduation prayer case),\textsuperscript{537} but he argued that \textit{Weisman} was wrongly decided.\textsuperscript{538} Not only that, he appears to believe that every decision in the Court's history giving any content to the Establishment Clause was also wrongly decided. Justice Thomas argued that "it makes little sense to incorporate the Establishment

\textsuperscript{535} See id. at 680.


\textsuperscript{537} Newdow, 124 S. Ct. at 2328–30 (Thomas, J., concurring) (applying \textit{Lee v. Weisman}, 505 U.S. 577 (1992)).

\textsuperscript{538} Id. at 2330.
Clause,"539 and more fundamentally, that the Establishment Clause "does not protect any individual right."540

Justice Thomas is a notable exception to the Court's aversion to extreme results. Perhaps he would feel or behave differently if he were the fifth vote. As long as he writes only for himself, his occasional extreme opinions have little consequence; his Newdow opinion appears to be one more example. But the opinion is intellectually important and deserving of comment.

Justice Thomas candidly acknowledged that the Pledge ceremony asks students to affirm a religious belief.541 But he said the states are free to do this. If the Establishment Clause protects any individual right, he said, it is against coercion imposed "by force of law and threat of penalty,"542 not coercion by government-induced social pressure in the classroom. Weisman relied on such social pressure, and Weisman was therefore wrong in his view.

His larger argument — that the Establishment Clause is a federalism provision that protects no individual right and cannot be coherently incorporated — appears to be offered in the alternative.543 I addressed that argument nearly twenty years ago and concluded that it was mistaken.544 Subsequent work by other scholars marshals additional evidence and analysis for the federalism interpretation545 and requires a more serious response than the few paragraphs that are possible here. But I have not changed my position.

It is true that the Establishment Clause left states free to decide whether to maintain established churches. But that is not significantly different from any other provision of the Bill of Rights, which left all state-level liberty questions to the states. There was not yet a consensus for disestablishment, which suggests that the Founders might not have been able to agree on a substantive understanding of the Establishment Clause. But they did not have to agree on disestablishment;

539 Id.
540 Id. at 2331.
541 See id. at 2339.
542 Id. at 2331 (quoting Weisman, 505 U.S. at 640 (Scalia, J., dissenting)).
543 See id. at 2330–31.
they had to agree only on what powers they were denying to the federal government.546

The Bill of Rights was debated on the assumption that without it, Congress could use its delegated powers in ways that interfered with the rights to be protected. Read against that assumption, the Establishment Clause had to impose some substantive restriction on the federal government. The brief recorded debate focused on the substantive bounds of what would be forbidden to the federal government, not on any federalism implications.547 At the very least, the Establishment Clause forbids Congress to use its taxing and spending powers to impose an earmarked tax on every citizen to support the clergy—a live issue at the state level in the late-eighteenth century.548 A taxpayer objecting to such a tax would be asserting a claim of individual right under the Establishment Clause. That right is a privilege or immunity of citizens of the United States, as readily incorporated as any other provision of the Bill of Rights.549 We can certainly debate what else the Establishment Clause protects against; some of its important applications derive more from applying its principles to subsequent developments than from any specific practice or intention of the Founders.550 But the claim that it protects no individual rights is, in my judgment, false to constitutional text and structure.

The no-individual-right view also greatly underestimates the importance of the Establishment Clause in protecting individual religious liberty. A central feature of the old formal establishment was the requirement that all persons attend services of the religion sponsored by

546 There is also the intriguing coincidence that the states most committed to established churches did not ratify the First Amendment until 1939. See LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 106–07 (2d ed. 1994) (discussing the failures to ratify in Massachusetts, Connecticut, and Georgia). But these failures might in fact have had more to do with federalism than with disestablishment; these states did not ratify the other amendments either. See id.

547 See Laycock, supra note 544, at 908–09.

548 See id. at 896–97, 899–901 (describing proposals in Virginia and Maryland and laws in Massachusetts, Connecticut, and Georgia).

549 See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 1–170 (2d ed. 1994) (marshaling evidence for incorporation through the Privileges or Immunities Clause); Lash, supra note 545, at 1100–54 (marshaling evidence for incorporation of the Establishment Clause as a substantive protection for religious liberty even if, as he believes, the Clause was originally a federalism provision).

550 See Laycock, supra note 544, at 913–23 (arguing that the founding generation rejected government aid to churches in forms that were controversial among the Protestant population of the time, and that this principle applies to other forms of aid that soon became controversial as the nation became more religiously pluralistic); Douglas Laycock, “Noncoercive” Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U. L. REV. 37, 41–53 (1991) (extending the argument).
the state.\textsuperscript{551} Only a radical fringe would defend such a requirement today; the right not to attend a religious service is an undoubted individual liberty. When the service is very short and the penalty is reduced to exclusion from a public meeting or ceremony, the thing has changed greatly in degree but not at all in principle. Religious liberty includes the right to attend school or participate in governmental affairs without having to sit through a prayer service of the state-sponsored religion, however brief that service may be.

The Pledge of Allegiance could be conceived in such terms, but a two-word service stretches the concept to the limit. The Pledge has more in common with another feature of formal establishments: the test oath. Englishmen were required, on pain of civil disabilities, to affirm their belief in various doctrines of the Church of England or, after 1689, of Protestantism more generally.\textsuperscript{552} Again the changes in degree are enormous but the principle is the same. In the Pledge as in the test oath, government tries to secure from every citizen an affirmation of religious conformity. The affirmation in the Pledge is far more generic, it is not under oath, and dissenters can refuse to say it (although this right seems little known outside the legal community). These important differences are partly offset by other differences: government requests the Pledge daily from children instead of occasionally from adults.

The modern remnants of establishment are less severe than those in the memory of the Founders, but that observation is true of most constitutional rights. Modern violations of the Establishment Clause, like their more severe seventeenth-century analogs, impose majoritarian religious observances on individual dissenters, and some of those dissenters experience these impositions as acute violations of their own religious liberty. The Establishment Clause protects against such religious imposition, and this protection is as much an individual right as any other in the Bill of Rights.

IV. CONCLUSION

Religious liberty is maximized when government influence on religion is minimized. Minimizing government influence provides a criterion for defining neutrality: government departs from neutrality when it does things that tend to influence private religious choice. If government requires or prohibits religious practices, if it offers incentives that reward or penalize religious practices, or if it makes statements

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\textsuperscript{552} See id. at *53, *57–58 (summarizing these laws).
that encourage or discourage religious belief or practice, it is influenc-
ing religious choices and commitments and thus interfering with reli-
gious liberty.

Because government is very large, its influence will rarely be zero. Often we must accept some modest government influence on religious belief and practice — sometimes even a large influence — because the only alternate policy would have greater influence. Promise Scholar-
ships for theology majors no doubt make it easier to major in theology. Scholarships reduce the net cost, and reduced cost should increase de-
mand. But the effect is very small if Promise Scholarships are avail-
able for every academic major, so that cost is reduced across the board. Students of modest means are encouraged to attend college, and that is a necessary prerequisite to majoring in theology. But students are not encouraged to choose theology over any other major.

Promise Scholarships for every major except theology have a much bigger effect; they reduce the cost for all the direct alternatives and thus increase the relative cost of studying theology. This policy does not discourage students from attending college; it discourages them from studying theology. At the margin, some students will choose a secular major to get the scholarship; those who continue in theology will suffer a financial loss. A Promise Scholarship for secular courses, if and only if the student does not major in theology, is like a fine on theology majors.\footnote{\textit{Cf.} Sherbert v. Verner, 374 U.S. 398, 403-04 (1963) (treating the burden of forfeiting unemployment compensation as equivalent to the burden of a fine).}

Protecting individual choice from government influence requires different operational rules in different contexts. In the funding cases, religious liberty is best protected from government influence by non-
discriminatory funding for both religious and secular providers of whatever secular goods or services government is willing to subsidize, and by tight limits on government discretion. In the regulation cases, religious liberty is best protected from government influence by ex-
empting religious practices from regulation where possible. In the speech cases, religious liberty is best protected from government influence by nondiscriminatory protection of religious and secular private speech, and by government making no statements that depend on views about religious truth.\footnote{The conclusions in this paragraph are elaborated in Laycock, \textit{supra} note 27, at 347-52.}

The Court has approached this ideal in the speech cases; private re-
ligious speech is fully protected and government religious speech is al-
most fully prohibited. These rules have been stable for more than forty years, a remarkable achievement sustained by many Justices. But at the moment, this achievement depends on just two Justices,
who are able to control the Court on religious speech issues because the other seven Justices are deeply divided.

In the funding cases, nondiscriminatory funding is again permissible after a long doctrinal battle. But *Davey* holds that discriminatory refusal to fund is also permissible. The Court is thus far from the ideal of minimizing government influence on religion. Four Justices have a very different vision of the ideal; they believe that all or most funding of religious providers should be prohibited even if it is perfectly nondiscriminatory. In *Davey*, this alternative vision still influenced Justices Kennedy and O’Connor, and perhaps Chief Justice Rehnquist, even though they say that this vision is not constitutionally required.

The funding cases implicate not just religious liberty, but also budget responsibility. All the Justices, but especially the Chief, believe that it is rarely a judicial function to expand the scope of spending programs. That premise is no doubt sound, but it competes with the equally sound premise that government should not be allowed to penalize the exercise of constitutional rights. *Davey* and the cases on which it implicitly relies fail to balance or reconcile these two premises. The Court defers to rules requiring prophylactic separation of functions, and this deference leaves few limits on government’s power to offer funding in exchange for a surrender of constitutional rights, at least when the money flows to institutions that conduct multiple activities with the same staff or on the same property.

In the regulation cases, protecting individual religious choice is not a goal the majority feels free to pursue. But most of the argument in these cases is not about religion or even about religious liberty. It is about the limits of liberty generally and about the proper role of the judiciary. For some of the Justices, an individual right to sometimes engage in legally prohibited conduct is a scary prospect, and judicial balancing of the government’s regulatory interest against the individual’s religious interest is another scary prospect. But government regulating religion in the same unrestrained way it regulates the commercial sector is also a scary prospect. The alternate vision of substantive liberty to practice one’s faith lingers and may influence some Justices in the majority, just as the abandoned rule against funding influenced some of the majority in *Davey*. With respect to regulation of religious practice, the Court appears to be creating an unusually strong nondiscrimination right. *Davey* does nothing to change or undermine that emerging right.

The Court’s aversion to extreme results influenced both of this Term’s cases, but especially *Newdow*. This aversion is often frustrating to advocates and analysts alike, and it is no doubt overdone on occasion, but it is not a bad thing. Avoiding extreme results generally avoids extreme blunders: it reduces the stakes at doctrinal turning points and reduces the costs of judicial error. And it reduces the risk of Pyrrhic victories. A decision to invalidate the Pledge would have
galvanized supporters of government-sponsored religious observances and quite possibly provoked a constitutional amendment. Perhaps that cost is worth paying over the Pledge, with its intrusive demands for personal professions of faith, but probably it is not. A ratified constitutional amendment would mean that the Court and the cause of religious liberty would have paid all the cost and retained none of the benefit. Whatever the right judgment with respect to the Pledge, it is not worth paying such a price to eliminate every vestige of ceremonial deism from government functions and every religious place name from the map of the United States. At some point, the Court must recognize either a substantive de minimis exception or a category of cases where the harm to individuals is too slight to justify standing. *Newdow* is not that case; the standing holding is confined to the facts. But Justice O'Connor's opinion is a start.

*Davey* is a much bigger decision. Its deference to prophylactic rules of physical separation to avoid confronting an unconstitutional conditions issue has implications for all constitutional liberties. With respect to religious liberty, *Davey* is the bookend to *Zelman v. Simmons-Harris*.

Together, the two cases may mark the end of an era. For more than 150 years, Americans have argued in constitutional terms about the funding of religious schools. But under *Davey* and *Zelman*, the Constitution may have remarkably little to say about that question. *Davey* appears likely to mean that funding is never required; *Zelman* means that if the money follows the right path, funding is never limited.

These decisions will not resolve the underlying controversy. There will at least be mopping-up cases, and if the limits on *Davey* are not as illusory as I fear, the Court will have to work out their boundaries. Having held that money can be granted with strings, the Court will have to decide whether money can be granted to religious institutions with fewer strings than are attached to secular institutions. Some new political initiative or doctrinal turn will eventually open up whole new lines of battle. But for now, the Court appears to be moving to the sidelines. If *Davey* is extended to the funding of elementary and secondary education, then the basic issue of whether to fund religious institutions will have been returned to Congress, to state legislatures and state supreme courts, and to the processes for amending state constitutions.

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