THE MISTAKES IN LOCKE V. DAVEY AND THE FUTURE OF STATE PAYMENTS FOR SERVICES PROVIDED BY RELIGIOUS INSTITUTIONS

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In the last twenty years, the ground has shifted dramatically in the federal constitutional disputes over the provision of government funds to religious schools and social services. Once the question was which few funding programs would be permitted to include religious schools under the Burger Court’s demanding Establishment Clause rules.¹ But the Rehnquist Court changed direction and permitted the inclusion of religious institutions in more and more funding programs. Under the new approach, the pressing constitutional question became whether the Free Exercise and Free Speech Clauses permit government to exclude religious institutions from programs that fund private secular institutions providing the same services. The new question arose because many states are likely to exclude religious schools because of political opposition or because of state constitutional restrictions on providing funds to “sectarian” institutions or instruction.²

In Locke v. Davey,³ the Supreme Court confronted the new question: whether singling out religious education for exclusion from generally available education benefits violates the Free Exercise Clause by discriminating against religious choice. The Court rejected the free exercise challenge by a strong 7-2 vote, on a set of facts seemingly sympathetic to the challenger. The State of Washington provides high-achieving students of modest family incomes with

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scholarships usable at any of the dozens of colleges in the state, for any of scores of majors, but denies scholarships to those few students who choose to major in theology taught from a devotional perspective. By upholding the Washington exclusion, the Court may have signaled that states will have broad discretion in all their funding programs to discriminate against religious educational choices. The free exercise claim for equal funding may have been strangled in its infancy.

In our view, it would be unfortunate if Davey ended the entire debate. We think that the majority opinion does not go nearly so far, and that even its narrower holding rests on a series of mistakes, large and small, about the nature and purposes of the Religion Clauses. Most importantly, the Washington exclusion violates the Clauses’ central goal by permitting government to distort the individual choice of scholarship recipients about whether to major in a religious subject. After detailing this and other problems with the opinion, we turn to the issues that remain after Davey, especially the prime issue of vouchers to fund education from kindergarten through 12th grade (“K-12”). Parts of Davey suggest that states now have carte blanche to exclude religious choices from K-12 vouchers and other funding programs. But much of the opinion focuses on the special case of funding the training of clergy, and we sketch the argument for limiting Davey to its reasoning, thus forbidding states from singling out religious providers for exclusion from other funding programs.

I. THE COURT'S OPINION

The State of Washington provides scholarships to high achieving students of modest income at any accredited college or university in the state, majoring in any subject, except for those majoring in theology from a religious perspective. Joshua Davey was eligible for a state Promise Scholarship to attend college on the basis of his academic record and his family's modest income. He was declared ineligible, however, because he decided to major in theology, along with business administration, at Northwest College, an evangelical Protestant school. The disqualifying feature of his theology major was that it would be taught from a standpoint that was “devotional in nature or designed to induce religious faith.” If the theology major at Northwest College had reflected a “secular” or “purely academic” approach to religion and the Bible, Davey would have kept his scholarship.

Davey challenged his exclusion from the scholarship on two constitutional grounds. The first was that it violated the Free Exercise Clause, by singling out a

4. Id. at 716.
5. Id. (quoting Petr. Br. at 6, Davey, 540 U.S. 712).
6. Petr. Br. at 5, 10, Davey, 540 U.S. 712; see id. at 10 (arguing that devotional courses “teach the Bible as truth, whereas a purely academic understanding”—for which a student could receive a scholarship—“would not necessarily subscribe to the Bible as ultimate truth”). Likewise, students in University of Washington theology courses could receive scholarships and take a secular approach to St. Augustine, Kierkegaard, and other thinkers on “God, man, knowledge, and authority.” Jt. App. at 68, 72, Davey, 540 U.S. 712. But a religion major at Northwest College would lose a scholarship because he studied the very same thinkers from the standpoint of whether and how they support Christian faith.
religious choice for denial of a government benefit, under decisions such as *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*\(^7\) and *McDaniel v. Paty*.\(^8\) The second was that it violated the Free Speech Clause, under decisions such as *Rosenberger v. Rector and Visitors of University of Virginia*,\(^9\) by discriminating against theology programs taught from a religious viewpoint.\(^10\) The Ninth Circuit ruled for Davey on both theories.\(^11\) But the Supreme Court reversed that decision in an opinion written, somewhat surprisingly, by Chief Justice Rehnquist.

In rejecting Davey's free exercise claim, the majority made two sets of arguments.\(^12\) The first was that denial of funding is not a constitutionally significant burden on religion, or is at most a minimal one. The Court rejected the argument that singling out religion for exclusion from funding was "presumptively unconstitutional" under decisions like *Lukumi*.\(^13\) That case involved criminal prohibition and an attempt "to suppress ritualistic animal sacrifices of the Santeria religion."\(^14\) But the burden on religion from discrimination in funding was "of a far milder kind," because withholding funding "imposes neither criminal nor civil sanctions on any type of religious service or rite,"\(^15\) "does not deny to ministers the right to participate in the political affairs of the community,"\(^16\) and "does not require students to choose between their religious beliefs and receiving a government benefit."\(^17\)

The majority's second set of arguments was much narrower. The Court cast the case as one about the training of clergy, and it concluded that the state had distinctively strong interests in denying funding for such activity.\(^18\) The majority

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12. On Davey's free speech claim, the Court did not question that excluding students majoring in theology "from a devotional perspective" was viewpoint discrimination under *Rosenberger*, 515 U.S. 819. Rather, it limited *Rosenberger's* rule against viewpoint discrimination in funding to government-created forums for speech. It concluded that "[t]he purpose of the Promise Scholarship Program is to assist students from low- and middle-income families with the cost of postsecondary education, not to encourage a diversity of views from private speakers." *Davey*, 540 U.S. at 720 n. 3 (quoting *U.S. v. American Library Assn.*, 539 U.S. 194, 206 (2003) (plurality)). This holding seems likely to dispose of most free speech challenges to excluding religious education, because other education funding programs seem even less likely than college funding to qualify as speech forums. We discuss elements of the free speech holding only as they bear on the Court's Religion Clause analysis. For further analysis of the free speech holding, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 191-95 (2004).
14. Id.
15. Id. In the light of this language, it seems apparent that *Davey* does not change the *Lukumi* rule that discriminatory regulation of religion is presumptively unconstitutional. We discuss here only *Davey's* impact on cases involving government benefits. For discussion of *Davey* and regulation cases, see Laycock, supra n. 12, at 200-18.
17. Id. at 720-21.
18. The actual excluded category, devotional theology majors, is not the same as prospective clergy. Some students in the major will pursue other careers, and some students in other majors will end up as
said that there were "few areas in which a State's antiestablishment interests come more into play" than funding of clergy training, and it offered several reasons why. First, training to join the clergy was unlike "training for secular professions": "[t]raining someone to lead a congregation is an essentially religious endeavor" and is "akin to a religious calling as well as an academic pursuit." The Constitution has "distinct views" about religious activity "that find no counterpart with respect to other callings or professions." "That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion." In addition, "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion.

This second set of arguments is limited to the funding of clergy and does not necessarily validate the denial of funding for other religious choices or activities. Indeed, the majority noted that Washington allowed recipients to use Promise Scholarships for religious instruction—to attend pervasively religious colleges like Northwest, and to take devotional theology classes as long as that was not their major. The majority went so far as to say, in response to Justice Scalia's warning that the decision would authorize states to exclude religion from all public services, that "the only interest at issue here is the State's interest in not funding the religious training of clergy."

II. DAVEY'S MISTAKES

The Davey decision rests on a series of mistakes about the nature and purpose of the Religion Clauses. Some of these mistakes concern the basic standard that should apply to free exercise claims challenging the exclusion of religion from funding programs. Others concern the state interests that might justify the exclusion of devotional-theology majors from generally available state college scholarships.

clergy members. Some students will change their minds. Joshua Davey had "planned for many years ... for a lifetime of ministry, specifically as a church pastor," Davey, 540 U.S. at 717 (quoting Jt. App. at 40), and that may yet happen, but he is currently a student at Harvard Law School. See Tony Mauro, Harvard Law Student on Top of the Docket: Former Divinity Student Presses Church-State Case, 26 Leg. Times 1 (Dec. 1, 2003). The Court never justified its step of equating devotional theology majors with future clergy. Devotional theology majors may be the best available proxy for prospective clergy, because asking students directly whether they plan to become clergy is both intrusive and likely to produce some inaccurate answers and predictions. But the fact that the question would be intrusive is an indicator of the inappropriateness of singling out clergy students for exclusion from the program.
20. Id. at 721.
21. Id.
22. Id.
23. Id. at 722.
25. Id. at 729-30 (Scalia & Thomas, JJ., dissenting).
26. Id. at 722 n. 5 (majority) (emphasis added).
A. Confusion about Neutrality: Formal Nondiscrimination Versus Substantive Religious Choice

Davey argued that the state's exclusion of theology majors is "presumptively unconstitutional because it is not facially neutral with respect to religion." The argument, as Davey and the Court phrased it, sounded in nondiscrimination: Davey relied on the "fundamental" and "minimum" requirement of the Free Exercise Clause that a law may not single out religiously motivated activity for unfavorable treatment. In the words of Lukumi, "[a] law that targets religious conduct for distinctive treatment" must "undergo the most rigorous of scrutiny" and "will survive strict scrutiny only in rare cases." This principle forbids laws that "impose special disabilities on the basis of . . . religious status." The "unique disability" imposed in McDaniel v. Paty was denying to members of the clergy a generally available opportunity—the right to serve in the state legislature if elected by the voters. In Davey, the "unique disability" imposed on devotional theology majors was to deny them a generally available financial benefit solely because they chose a particular religious course of study.

The discrimination was unquestionable: as in Lukumi, the singling out of religious activity "fell well below the minimum standard" for a law to be neutral and generally applicable. Nor should it have helped that the state allowed scholarship recipients to make certain other religiously motivated choices, such as attending a religious school or taking religious courses, as long as they did not major in devotional theology. The state in McDaniel, by disqualifying clergy from sitting in the legislature, "impose[d] a unique disability" on those who held their religious views "with such depth of sincerity as to impel [them] to join the ministry." Similarly, by denying a scholarship to those who care enough about their religious beliefs to concentrate on devotional theology, Washington "impose[d] . . . a civil disability upon those deemed to be too deeply involved in religion." The Court rejected the argument that this facially discriminatory treatment of religion violated the Free Exercise Clause. One of its key premises was that the First Amendment treats religion differently from other activities:

[T]he subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the

27. Id. at 720.
32. 508 U.S. at 543.
33. 435 U.S. at 632 (Brennan & Marshall, JJ., concurring).
34. Id. at 631.
35. Id. at 639-40.
ministry than with education for other callings is a product of these views, not
evidence of hostility toward religion.36

We wholeheartedly agree that the Constitution often requires distinctive
treatment of religion. But in cases such as Davey, the proper principle is
nondiscrimination against religion. Both nondiscrimination in Davey’s case and
distinctive treatment in other situations ultimately serve a more fundamental goal:
that government should avoid interfering with the voluntary choices of private
individuals in religious matters.

The ultimate goal of the Constitution’s provisions on religion is religious
liberty for all—for believer and nonbeliever, for Christian and Jew, for Protestant
and Catholic, for Western traditions and Eastern, for large faiths and small, for
atheist and agnostic, for secular humanist and the religiously indifferent, for every
individual human being in the vast mosaic that makes up the American people.
The ultimate goal is that every American should be free to hold his own views on
religious questions, and to live the life that those views direct, with a minimum of
government interference or influence.

The fundamental principle to achieve that goal is for the government to
maintain “substantive neutrality” toward religion. Substantive neutrality means
that:

[T]he religion clauses require government to minimize the extent to which it either
encourages or discourages religious belief or disbelief, practice or nonpractice,
observance or nonobservance. . . . [R]eligion [should] be left as wholly to private
choice as anything can be. It should proceed as unaffected by government as
possible. . . .

This elaboration highlights the connections among religious neutrality, religious
autonomy, and religious voluntarism. Government must be neutral so that religious
belief and practice can be free. The autonomy of religious belief and disbelief is
maximized when government encouragement and discouragement is minimized.
The same is true of religious practice and refusal to practice. The goal of maximum
religious liberty can help identify the baseline from which to measure
encouragement and discouragement.37

Substantive neutrality is not always the same as formal neutrality, where “formal
neutrality” means facial nondiscrimination or the absence of religious
classifications.38 Sometimes the government may or even must treat religion
differently from other ideas and activities in order to preserve the goal of
minimum government interference in religious choices and commitments. For
example, the government may accommodate private, voluntary religious exercise
by exempting it from burdensome regulation, even if the exemption does not

36. Davey, 540 U.S. at 721.
37. Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39
38. See e.g. Lukumi, 508 U.S. at 561-62 (Souter, J., concurring).
"come[] packaged with benefits to secular entities." Even though such an exemption gives religion distinctive treatment, it is constitutionally legitimate if it "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice." When the government itself speaks, it must also treat religion distinctively. Neutrality usually requires that the government not express religious views itself or take a position on religious questions, even though it may express views on a host of nonreligious questions and even seek to lead public opinion concerning them. But restrictions on the government's own religious speech do not authorize government to discriminate against the voluntary religious speech or activity of private individuals. "[T]here is a 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." As the Court emphasized in Rosenberger, a holding that the state "may not discriminate based on the viewpoint of private persons whose speech it facilitates" does not govern issues concerning "the [state's] own speech, which is controlled by different principles.

As everyone concedes, the instruction at private colleges where Washington's scholarships could be used was private speech and private activity, not government speech. The scholarships could be applied to a broad variety of educational choices, including any accredited college and any major except theology from a religious viewpoint. These wide ranging courses taught by varying faculty are bound to include conflicting perspectives, and thus—like the long list of student publications funded in Rosenberger—they cannot logically be called the position of the state. The private nature of this speech and activity is also evident from the student's right to use the scholarship for religious instruction as long as it occurs in a major other than theology. If using the scholarship really made the courses government speech, Davey could not apply the scholarship to any religious courses at all.

It is entirely consistent to hold that government must treat religion distinctively in some contexts, such as government's own speech, but must give it equal treatment in others, such as the provision of benefits. The explanation lies again in the underlying principle of substantive neutrality, that government should minimize its effect on citizens' diverse religious choices. In the context of government speech, neutrality means that government is constrained to express

41. See e.g. Lee v. Weisman, 505 U.S. 577, 591 (1992) (unlike in secular matters, "[i]n religious debate or expression the government is not a prime participant"); Sch. Dist. of Abington Township v. Schenck, 374 U.S. 203, 222-26 (1963) (holding that neutrality forbids public schools to conduct Bible readings or other religious exercises).
43. 515 U.S. at 834.
44. See id. at 833.
neutral viewpoints or to say nothing at all. Neutral expression on controversial subjects is hard to maintain; it is usually easier to preserve neutrality by silence, because "[a]ny [express] statement the government makes is bound to favor one faith over another; even an ecumenical statement that seeks to be inclusive of all faiths favors ecumenical religion over the more sectarian kinds."

By contrast, "government can respect religious pluralism when it gives financial aid, by giving aid to any group (religious as well as non-religious) that provides the requisite services." Thus, the way for the state to keep out of private individuals’ choices about religion is to refrain from religious statements in its own speech and to allow individuals receiving educational benefits to use those benefits at private religious schools on the same terms as private secular schools.

Denying Davey's scholarship plainly interfered with his individual choice in religious matters. The Court has repeatedly recognized that providing aid to private individuals under neutral, secular criteria and allowing them to use that aid at either religious or nonreligious schools promotes the "genuine and independent choices of [those] individuals." Conversely, to withdraw aid because a student chooses a religious major interferes with the student's choices. The Court said that the effect is "mild" when discrimination takes the form of denying a benefit, but there is no basis for that assertion. By declaring a major in pastoral ministries, Davey lost nearly $2,700 in scholarship aid for two years of college. Common sense, precedent, and the record all suggest that the prospect of losing such an amount would often affect a student's choice of major, especially for Promise Scholarship recipients with their modest family incomes. In Sherbert v. Verner, the Court found "unmistakable," and unconstitutional, "pressure . . . to forego [a religious] practice" in the prospect of losing 22 weeks of modest unemployment benefits. And in Davey itself, Northwest College's financial aid officer testified that students consider "changing [their] major to get" or retain the state scholarships.

46. Id.
49. See Wash. Admin. Code § 250-80-020(12)(e) (1999) (providing that recipient's family income cannot be more than thirty-five percent above the state median).
51. Id. at 404; see id. at 417-18 (Stewart, J., concurring).
52. The officer elaborated:

Being a Christian school, and working with the State, this issue, as you can imagine, comes up. And with the student who is perhaps struggling with being eligible for State money and their major, I talk with them. . . .

[I say that] [i]f you are planning to become a minister, no matter what your major is, this warrant, this check, this award, is not intended to go to a student in your position. And I talk with the student, by just changing your major to get this award is not the correct thing to do.

Jt. App. at 156-57, Davey, 540 U.S. 712. The counselor seemed to emphasize the spirit rather than the letter of the law, for a student taking a non-theology degree can retain his scholarship even if he is preparing for the ministry. Wash. Admin. Code § 250-80-020(12). But the key point is this: the
By excluding theology studies taught from a “devotional” perspective, the state created an incentive for students not to pursue that major and instead to pursue a major less infused with religious teaching. To paraphrase Sherbert, “the pressure upon [students] to forego [a theology major] is unmistakable.”\(^{53}\) In addition, because Washington allows scholarships for those pursuing a religion major taught from a secular perspective, it might induce some students committed to a religion major to choose a college whose approach to the study of religion is more secular and less devotional. At the margin, it might induce some colleges to tip their religion courses from the devotional toward the secular in order that their religion majors may receive Promise Scholarships.

These distortions of private choice should have been held to violate the First Amendment. State interference with private religious choice is minimized when the state funds nothing, or when it funds everything within a neutrally defined category. Discriminatory funding is always the worst policy, because it pressures citizens to adapt their own religious choices to the state’s favored categories.\(^{54}\)

The principle of substantive neutrality also shows why the religion-based exclusion differs from other conditions on funding that the Court has allowed—primarily the conditions against funding abortions. The abortion funding decisions reason that the state may “make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.”\(^{55}\) The state may “ma[ke] childbirth a more attractive option [than abortion], thereby influencing the woman’s decision.”\(^{56}\) It may do those things as long as it does not put an “undue burden” on the abortion decision, or an obstacle “that was not already there”\(^{57}\) because of the woman’s indigence.

In this respect, religious freedom is quite different from abortion rights. The state must be neutral on religious questions; it may not express preferences about religion of the sort it expresses about abortion and childbirth. The abortion funding cases distinguished religion cases on precisely this ground.\(^{58}\) Substituting religious references in the Court’s statements about abortion would make those statements plainly untrue as a matter of law. The state has no power “to make a value judgment favoring [nonreligion] over [religion], and to implement that judgment by the allocation of public funds.”\(^{59}\) It has no authority to “make

\(^{53}\) 374 U.S. at 404.

\(^{54}\) For further elaboration on this point, see Michael W. McConnell, The Problem of Singling Out Religion, 50 DePaul L. Rev. 1, 39-40 (2000); Laycock, supra n. 12, at 195-200.


\(^{56}\) Maher, 432 U.S. at 474.

\(^{57}\) Webster, 492 U.S. at 508; Maher, 432 U.S. at 474.

\(^{58}\) See Maher, 432 U.S. at 474-75 n. 8 (distinguishing Sherbert, 374 U.S. 398, on the ground that Sherbert “was decided in the significantly different context of a constitutionally imposed ‘governmental obligation of neutrality’”).

\(^{59}\) Cf. Maher, 432 U.S. at 474.
[secular private schools] a more attractive alternative, thereby influencing the
[student's] decision.”60 It has no power, “pursuant to democratic processes, [to]
expres[s] a preference for [nonreligion over religion].”61 The aim of religious
freedom is to keep the government out of people's religious choices, not to let it
influence or manipulate religious choices up to a point just short of imposing
"undue burdens."62

B. Unconstitutional Penalty on Religious Choice

Even assuming that the state can favor nonreligious over religious choices by
funding nonreligious courses and excluding religious ones, the denial of
scholarships to students like Davey still should have been held unconstitutional.
By excluding Davey from a scholarship, the state did not merely decline to fund
religious instruction as the Court claimed.63 The state went further and imposed
an independent penalty on Davey's religious choice, by denying him aid for
secular courses—aid to which he would otherwise be entitled—because he chose
to pursue a theology major taught from a religious perspective. The state
subjected Davey to an unconstitutional condition.

The Court's case law distinguishes unconstitutional conditions from mere
refusals to fund. "Our 'unconstitutional conditions' cases involve situations in
which the Government has placed a condition on the recipient of the subsidy
rather than on a particular program or service, thus effectively prohibiting the
recipient from engaging in the protected conduct outside the scope of the federally
funded program.”64 Put differently, the cases distinguish between government
"merely refus[ing] to pay" for an activity, and government "deny[ing] . . . any
independent benefit" because the beneficiary engages in the activity.65

A key factor in this distinction is whether the recipient can, in realistic terms,
pursue his constitutionally protected activities in a separate program. The Court
in FCC v. League of Women Voters of California66 struck down a federal law
barring federally funded radio and TV stations from editorializing. Because the
law provided no effective way for the station to "segregate its activities according
to the source of its funding," it effectively meant that a "station that receives only

60. Cf. id.
61. Cf. Casey, 505 U.S. at 872.
62. A similar point distinguishes American Library Ass'n., 539 U.S. at 210-13, which upheld the
condition that libraries receiving federal funds for Internet services take steps to filter out
pornographic material. Governments do not endorse every publication in their libraries, but neither
do libraries attempt to neutraly collect everything that is printed. They necessarily choose "material
of requisite and appropriate quality for educational and informational purposes." Id. at 211. Implicit
in this judgment is another point: government need not be neutral toward pornography. Government
cannot suppress pornography in private hands, but "libraries have traditionally excluded pornographic
material from their other collections," id. at 212, and certainly public schools could teach children that
pornography is best avoided. In contrast, schools plainly could not teach children that religion is best
avoided.
63. Davey, 540 U.S. at 721.
64. Rust, 500 U.S. at 197 (emphasis in original).
1% of its overall income from [federal] grants is barred absolutely from all editorializing. 67 But in Regan v. Taxation with Representation of Washington, 68 which upheld the condition that tax-exempt organizations not engage in lobbying, it was crucial that the exempt organization could create a separate § 501(c)(4) entity for lobbying and still maintain deductibility for contributions to its § 501(c)(3) entity. 69 The Court specifically noted that the requirements for separating the two entities were "not unduly burdensome" and there was no showing that the plaintiff "was unable to operate with the dual structure." 70 Rust v. Sullivan 71 was explicitly decided by analogy to Regan and in sharp contrast to League of Women Voters. 72 The Court underestimated or minimized the difficulty of physically separating contraception and abortion services, 73 but the Court's claim that family-planning agencies could realistically engage in abortion counseling and referral in separate programs outside the federally funded project was essential to the opinion as written. 74

The Court made a similar claim in Davey, but this time it greatly exceeded the bounds of plausibility. Withdrawing Davey's scholarship went beyond "refus[ing] to pay for" religion; it "den[ied] independent benefit" 75 by withdrawing aid for his entire education. Davey took numerous courses for which he would have received scholarship support had he not declared theology as a major. All Northwest College theology majors took core courses in subjects such as English and math. 76 But the penalty for choosing a theology major was particularly clear in Davey's case. He proposed to double major in business administration and theology. He lost funding for his business administration degree solely because he also chose to major in theology at Northwest. The Washington exclusion is so broad—covering the entire "school where the scholarship is used" 77—that Davey could not pursue a secular degree at Northwest College even in an entirely separate program from his theology degree, with no overlap in faculty, classroom space, or other features.

The Court answered that the scholarship exclusion did not "require students to choose between their religious beliefs and receiving a government benefit," assertedly because "Promise Scholars may still use their scholarship to pursue a

67. Id. at 400.
69. Id. at 544-46.
70. Id. at 544-45 n. 6. Likewise, in American Library Assn., 539 U.S. 194, the Court emphasized "the ease with which patrons may have the filtering software disabled," id. at 209, which limited the effect of the funding condition on other, constitutionally protected speech viewed by adults. See also id. at 214-15 (Kennedy, J., concurring); id. at 219-20 (Breyer, J., concurring).
72. See id. at 197-98.
74. See Rust, 500 U.S. at 198.
75. Regan, 461 U.S. at 545.
secular degree at a different institution from where they are studying devotional theology.\textsuperscript{78} As the state put it, Davey could use the Promise Scholarship for the non-theology major at Northwest, and then "simultaneously us[e] his own money to pursue a theology degree in a separate program at a second school."\textsuperscript{79}

This answer is no solution whatsoever. The Court implicitly suggests that the student pay close to two full-time tuitions simultaneously\textsuperscript{80} and bear the serious inconvenience of attending two full-time programs at potentially distant campuses. The state alternatively suggested that a student pursue each degree half-time—\textsuperscript{81} and therefore, of course, take twice as long to finish college. Either course is so "unduly burdensome"\textsuperscript{82} that the condition "effectively prohibit[s] the recipient from engaging in [a theology degree] outside the scope of the [state] funded program."\textsuperscript{83} Discrimination that forces a student to attend a different college or university is a constitutionally cognizable burden, as the Court held in \textit{Mississippi University for Women v. Hogan.}\textsuperscript{84} Hogan said that a female-only admissions policy at state nursing school \"[w]ithout question . . . worked to [the male applicant's] disadvantage\" by forcing him to drive "a considerable distance from his home" to a coeducational state nursing school and to forego jobs that he could have had closer to home.\textsuperscript{85}

The burden in these cases does not stop at inconvenience. To devout students preparing for the ministry, theology degrees are not fungible items. There is no guarantee—indeed, it may be less than likely—that a student like Davey will find another theology program that he can realistically attend and that fits his doctrinal beliefs and his particular goals for his ministry career. If the student instead chooses Northwest College for theology, he may not find a Washington college that he can attend that teaches business courses in an evangelical Christian context as Northwest does. Either way, the rigid terms of Washington's school-wide exclusion cause students like Davey not only a severe practical burden, but also a serious risk that their conscientious choice of religious education will be frustrated.

It was absurd for the Court to say that Davey would not be significantly burdened by undertaking, and paying for, two college educations instead of one. The Court came to this result because of a separate principle—that government can require physical separation of funded and unfunded activities.\textsuperscript{86} The Court

\begin{itemize}
  \item \textsuperscript{78} Davey, 540 U.S. at 721 n. 4.
  \item \textsuperscript{79} Petr. Br. at 25, Davey, 540 U.S. 712.
  \item \textsuperscript{80} The Promise Scholarship’s yearly maximum of approximately $1,500 covers only a small percentage of tuition at most colleges, especially private ones. Paying two tuitions with a $1,500 scholarship is far more expensive than paying one tuition without a $1,500 scholarship; the state’s proposed method of offering financial support for Davey’s secular education would actually cost Davey thousands of dollars.
  \item \textsuperscript{81} See Petr. Br. at 12, Davey, 540 U.S. 712.
  \item \textsuperscript{82} Regan, 461 U.S. at 545 n. 6.
  \item \textsuperscript{83} Rust, 500 U.S. at 197.
  \item \textsuperscript{84} 458 U.S. 718 (1982).
  \item \textsuperscript{85} Id. at 724 n. 8.
  \item \textsuperscript{86} For further elaboration on this paragraph, see Laycock, \textit{supra} n. 12, at 178-83.
\end{itemize}
has allowed governments to carry this principle to extreme lengths. If government is willing to pay for most college educations but not for theology majors, it can require rigorous separation of the two to avoid any indirect subsidy to theology majors. Taken to its logical conclusion, this approach authorizes government to ban any activity it chooses on any premises where government funds are spent, to ensure that the government funds do not inadvertently subsidize the banned activity. This rule of physical separation threatens to completely swallow the rule against unconstitutional conditions. It was another of Davey's mistakes to defer so totally to Washington's demands for physical separation of funded and unfunded activities, without weighing the actual burden these demands imposed on Joshua Davey.

C. Denying Scholarships Served None of the Purposes of the Religion Clauses

Refraining from state funding of private religious education can, in some situations, serve the Religion Clauses' goals of liberty and religious autonomy. Government money is a powerful source of government influence; government expenditures on religion generally expand government influence in a field where that influence should be minimized. Describing the same point from the private perspective, voluntary funding of religious instruction often maximizes individual liberty and the influence of private choice. Each individual can decide when, how, and how much to contribute to whom, and whether to contribute at all. Voluntary funding of religious organizations protects individual conscience and keeps government out of religion.

But Washington's exclusion of theology majors like Davey served none of these goals. Indeed, it transgressed a number of them. Government funding decisions have the least impact on private religious choice when government funds nothing, or when it funds everything within a neutrally defined category. Government does maximum harm to free choice when it funds some choices and refuses to fund their directly competing alternatives. The Court claimed that Davey was a strong case for refusing state aid. In reality, the case was very weak.

1. Imposition on Taxpayers' Consciences

A common and longstanding argument against state support of private religious organizations is that it forces taxpayers to support instruction in religious doctrines that they may conscientiously oppose. The objection goes back as far as Thomas Jefferson's charge "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." The majority cited this history in noting that protests against taxpayer funding of church leaders go back to "the founding of our country."

88. Davey, 540 U.S. at 722.
We discuss the overall relevance of that history in detail below.89 For now, we focus on the concern about respecting the taxpayer’s choice not to fund religion. This may be a consideration in some cases, but not in Davy.

The state plainly did not think that including students’ religious choices in Promise Scholarships coerced any taxpayers to support religious instruction. The state awarded scholarships to students at religious colleges such as Northwest majoring in any subject other than theology. It did so even though non-theology majors likely would receive a great deal of religious instruction at Northwest, which (like many other religious colleges) aims to educate all students “from a ‘distinctly Christian’ point of view.”90

Promise Scholarships should not be seen as coercing taxpayers to support religion. On facts highly similar to those in Davy, the Court held 9-0 in Witters v. Washington Department of Services for the Blind91 that when a college student chooses to use neutrally available aid for a pastoral course of study at a pervasively religious college, “the decision to support religious education is made by the individual, not by the State.”92 The same factors that made the connection between the state and the religious instruction “highly attenuated” in Witters93 were present with respect to Promise Scholarships. Nothing in the scholarship program gave recipients like Davy any financial incentive to choose a religious course of study, and indeed a relatively small percentage made that choice.94 In other words, the state simply required the taxpayer to support a student’s education—which benefits the state in secular terms by “assuring the development of the talents of its qualified domiciliaries.”95 It is the student’s decision, not the state’s, for the education to be religious.

The Court, of course, focused on the fact that support for devotional theology majors was (in most cases) support for training of clergy. But the element of clergy training makes no change in the logic of the situation. Larry Witters was also training for the ministry, but the Court unanimously rejected a challenge to state funding of his education. If the choice of how to use the funds is the student’s, not the state’s, then the choice to pursue training for the ministry is the student’s as well.

2. Government Entanglement in Religious Questions

Some forms of funding require the government to make discretionary decisions about which activities are valuable enough to fund, how much funding they should receive, and so forth. When decisions involving religious recipients turn on discretionary rather than bright-line factors, there is a danger that

89. See infra pt. II(C)(4).
90. Davy, 299 F.3d at 751.
92. Id. at 488.
93. Id.
94. See id.
95. Davy, 299 F.3d at 756.
government will interfere in and distort private religious choices by deciding whom to fund, or in what amount, according to political pressure, popularity, or the religious preferences of the dominant faction. In its early no-aid decisions of the 1970s, the Court warned about competing political pressures for discretionary grants direct to religious schools.96 But respecting the choice of students like Davey to use their scholarships for theology study does not involve the state in any religious questions. The state simply offers the scholarship to students who qualify because of academic achievement and family income, without regard to whether the student chooses a religious use and without making any subjective judgment. The case law now firmly distinguishes such “true private choice”97 programs from programs that directly involve the government in religiously sensitive decisions.

It is the exclusion of students like Davey that puts the state in the improper position of drawing discretionary and religiously significant lines. The state must decide, for example, which theology degrees are taught from a secular, “academic”98 perspective and which are taught in ways “designed to induce religious faith.”99 Some programs may fall clearly in one category or the other: the University of Washington’s theology classes may be clearly secular,100 while Northwest College classes may be clearly devotional. But the line is far less clear at other colleges, which try to maintain an often “precarious balance,” in Stephen Carter’s words—giving weight to both the teachings of their church and the standards of the secular academy.101

Consider, for example, this policy statement of Brigham Young University:

At BYU, individual academic freedom is based not only on a belief (shared by all universities) in the value of free inquiry, but also on the gospel principle that humans are moral agents who should seek knowledge in the sacred as well as in the secular, by the heart and spirit as well as by the mind, and in continuing revelation as well as in the written word of God.102

It is far from clear how the state should apply its secular/devotional distinction if Brigham Young were located in Washington. To decide whether BYU theology degrees were eligible, the state might have to examine their content closely. It might have to conduct the kind of “comprehensive, discriminating, and continuing state surveillance”103 that the Court has said creates excessive entanglement between church and state. By approving the devotional/secular distinction, Davey

96. See e.g. Lemon, 403 U.S. at 622-23.
97. See e.g. Zelman, 536 U.S. at 649; Mitchell v. Helms, 530 U.S. 793, 810-11 (2000) (plurality); id. at 841-44 (O’Connor & Breyer, JJ., concurring); Witters, 474 U.S. at 487-88; Mueller, 463 U.S. at 397-99.
99. Id. at 6.
100. See supra n. 6 and accompanying text.
103. Lemon, 403 U.S. at 619.
invites other states to make such religiously sensitive and entangling decisions in their funding criteria.

3. Recipient Schools’ Autonomy

Even if the state offers a funding program with no religious conditions on eligibility, the funding might still raise religion clause concerns if it comes with other conditions limiting the autonomy of participating religious schools. Just as religious conditions distort the religious choices of those eligible for scholarships, such conditional funding might create incentives for a religious school to compromise its independent mission and message and conform to the state’s views and policy goals. But such concerns are absent or minimal with a program like Washington’s Promise Scholarships. There was no assertion that any conditions accompanying Promise Scholarship eligibility might realistically restrict a religious school’s autonomy. Again, scholarships were available to students at any accredited undergraduate institution in the state, and for any program of study save one. The only significant condition was the very one at issue here—the exclusion of theology majors taught from a religious perspective. Ending that exclusion would have ended the one incentive that schools have to change their teaching so that their students can receive state aid.

4. The Founding-Era History

We can review the weakness of the state’s interests in Davey by comparing modern education funding like Promise Scholarships with the funding of religion that the Founders rejected and the Davey majority cites. As the Court noted, “[p]erhaps the most famous example of public backlash” against funding of clergy was Virginia’s rejection of the general assessment in 1785. The Court relied on the rejection of the general assessment as a reason to resist nondiscriminatory funding of scholarships for higher education. But the two programs are fundamentally different. Nothing like the general assessment has been seriously proposed since repeal of the Massachusetts establishment in 1833.

As is made clear by its full title—A Bill Establishing a Provision for Teachers of the Christian Religion—the essence of the general assessment was a massive discrimination in favor of religious viewpoints. In a time of minimal government, Christian clergy and Christian places of worship were to be singled out for special subsidy. Supporters of the measure did all they could to make it nonpreferential as among Christian denominations. They even provided a secular alternative for non-Christians and conscientious objectors, who could decline to designate a church and thereby send their clergy tax to a fund for schools. But there was no attempt to make the general assessment neutral as between religion

104. Davey, 540 U.S. at 722 n. 6.
106. Id. at 74.
and nonreligion. No one claimed, or could have claimed, that clergy and church buildings fell within the neutrally drawn boundaries of some larger category of state-funded activities. And no one claimed, or could have claimed, that the state would receive any secular service or benefit not derived from the religious functions of the churches. The argument for the general assessment was the familiar argument for other forms of establishment—that the state would benefit from having a more Christian population. The premise was that "the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers."

All modern funding cases, including Davey, are fundamentally different from the general assessment. No one proposes to fund the inherently religious functions of churches. No one proposes the funding on the ground that religion alone provides a unique or greater social benefit than do secular ideas; and no one proposes to fund religious organizations preferentially over secular organizations providing the same service. Instead, the state funds a service—in this case, higher education—that is offered by both secular and religious providers. Higher education at religious colleges like Northwest College met all the state’s accreditation requirements and offered a wide range of courses less infused with religion than those in the theology department.

The broad neutral category of higher education includes, as one of its many applications, the training of clergy, and the training of clergy is a core religious function. But for multiple reasons, Davey is still like the modern funding cases and unlike the general assessment. The training of clergy is clearly an incidental application of a vasty broader program; the training of clergy also serves the state’s goal of educating its citizenry; and the decision to direct the money to religious uses is made by private citizens with no encouragement from the state. Discriminatory exclusion of theology majors powerfully interferes with private religious choice, but treating them identically with all other majors does not influence anyone’s choice. Excluding theology majors from a generally applicable program is a far greater departure from religious neutrality than including them.

As Justice Scalia’s dissent put it:

One can concede the Framers’ hostility to funding the clergy specifically, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all. No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church.

Nor would the Framers have “excluded ministers from generally available disability or unemployment benefits.” The majority responded that the text of founding-era provisions was not expressly limited to preferential funding of the

107. Id. at 72.
108. Davey, 540 U.S. at 727-28 (Scalia & Thomas, JJ., dissenting) (emphasis in original).
109. Id. at 728 n. 1.
clergy.110 But preferential funding was the only issue in the founding-era; the Founders had no intention either way about funding a broad category of secular activities that included some religious applications. Their ratified texts did not address such possibilities, which were almost literally unimaginable under the limited governments of the time.

Before Davey, the Court had already decided cases where a neutrally defined category included some applications involving core religious functions. Witters was such a case; the Court held that a broad scholarship program could be applied to the training of clergy.111 And Rosenberger was such a case; the magazine at issue there was core religious speech, permeated with evangelical, and evangelistic, Christian faith.112 The secular benefit to the state was not in the magazine’s religious speech as such, but in the creation of a broad and nondiscriminatory forum for ideas. Promise Scholarships presented one more in a series of modern funding cases, in which the state pays for a secular benefit and a religious institution provides that benefit in conjunction with religious functions of its own.113

110. Id. at 723 (majority).
111. Witters, 474 U.S. at 489.
112. See Rosenberger, 515 U.S. at 825-26; id. at 865-67 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).
113. Some of the state’s amici in Davey tried to erase the difference between modern nondiscriminatory funding of secular functions performed in religious contexts and the general assessment’s discriminatory funding of religious functions. They claimed that Madison and Jefferson opposed “an effort by the Virginia Assembly to impose an assessment for the support of houses of worship and teachers of religion, including teachers in private religious schools.” Br. of Amicus Curiae Historians & L. Scholars at 6, Davey, 540 U.S. 712 (emphasis added). They claimed that “Jefferson and Madison viewed their constitutionally based [no-aid] principle as applying in the religious school context.” Id. at 7. Justice Souter made a similar argument in his dissent in Rosenberger, claiming that the assessment was “more general in scope” than funding Christian clergy because “scholars have generally agreed that the bill would have provided funding for nonreligious schools.” Rosenberger, 515 U.S. at 869 n. 1 (Souter, J., dissenting). For these propositions, both Justice Souter and the Davey amici cited Douglas Laycock, Thomas Buckley, and Thomas Curry—none of whom supports the argument.

Each of the cited sources simply describes the assessment bill’s opt-out paragraph, which provided that the payments of any taxpayer who failed to designate a church should be paid “into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning.” General Assessment Bill, in Everson, 330 U.S. at 74; Thomas E. Buckley, Church and State in Revolutionary Virginia, 1776-1787, at 108-09, 133 (U. Va. Press 1977); Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 141 (Oxford U. Press 1986); Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 897, 897 n. 108 (1986). Laycock shows that the reference to “seminaries of learning” meant schools for general education, not schools for the training of ministers. Id. Buckley and Curry treat that usage as obvious. The whole issue was theoretical; there was no general school fund in Virginia before 1810. J.L. Blair Buck, The Development of Public Schools in Virginia 1607-1952, at 28-29 (Commw. Va. 1952). There were probably few Virginians in 1785 willing to publicly advertise themselves as non-Christians. But public advertisement was the price of exemption; the bill required public posting of an alphabetical list of taxpayers and the churches they had designated to receive their tax. General Assessment Bill, in Everson, 330 U.S. at 73.

What is important is that the provision for payment to a school fund was not an effort to support religious schools as part of support for education overall. Rather, it was an effort to accommodate the possibility of non-Christian taxpayers in a program whose overwhelming purpose and effect was to support core religious teaching. And it was a minor aspect of the bill; it occasioned no controversy and certainly was not the target of the assessment’s opponents. Madison did not mention schools in his
D. State Discretion to Choose a Church-State Policy

Given the effect of Washington's exclusion on religious choice and the weakness of the asserted Justifications, the Court's ruling ultimately rests on giving the states wide discretion in making policy toward religion. The majority led off by saying that "[t]hese two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension," but that "there is room for play in the joints' between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." By emphasizing the state's discretion, the majority was able to find that the discrimination against theology majors was permitted even though the unanimous Court in Witters had found that it was not required by Establishment Clause values. In our view, the argument for discretion here rests on the final deep misconception of the Religion Clauses.

It is no accident that the Court's formulation ties the need for "play in the joints" between the clauses to the idea that they are "in tension." If the Free Exercise and Establishment Clauses conflict or push in opposite directions, then indeed the reach of one clause or both needs to be cut down; otherwise, anything the state did concerning religion in a given situation would run into a constitutional barrier on one side or the other. But the matter is different if the two clauses are not conflicting, but complementary—if they constitute two aspects of a single statement or principle about religion and the government. If both clauses together serve the goal of protecting individual religious choice, then it makes perfect sense to say that a policy—like Washington's—that distorts religious choice is both unsupported by the Establishment Clause and violative of the Free Exercise Clause. In the words of Justice Scalia's dissent, "There is nothing anomalous about constitutional commands that abut." Indeed, if the two clauses work together, one would expect that a policy that serves no Establishment Clause values would also conflict with Free Exercise Clause values.

The Religion Clauses should be read as complementary aspects of a single principle. To interpret them as conflicting is, as one of us has previously argued,

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Memorial and Remonstrance Against Religious Establishments (reprinted in Everson, 330 U.S. at 63-72 (app. to the opinion of Rutledge, J., dissenting), the most complete compendium of secular and religious arguments against the assessment. Buckley's survey of other arguments against the assessment does not mention any attack on the schools provision. Buckley, supra, at 113-43. It is a gross distortion of history to convert this exemption for non-Christians into an attempt to raise money for religious schools with implications for modern funding programs.

114. Davy, 540 U.S. at 718-19 (citation omitted).

115. Id. at 728 (Scalia, J., dissenting). Scalia's example is that "[a] municipality hiring public contractors may not discriminate against blacks or in favor of them; it cannot discriminate a little bit each way and then plead 'play in the joints' when haled into court." Id. (emphasis in original). We do not think that the Equal Protection Clause necessarily reduces solely to formal nondiscrimination, and we think that the Religion Clauses at bottom protect individual choice rather than simply prohibiting formal nondiscrimination. But we agree with Scalia's general point: the Constitution may set a principle (nondiscrimination or individual choice) and forbid the state to depart from it in either direction.
“a mistake at the most fundamental level.” It “imputes incoherence to the Founders,” and it ignores the historical record: “The Religion Clauses were no compromise of conflicting interests, but the unified demand of the most vigorous advocates of religious liberty.”

Certainly the state needs some discretion to choose among different policies that affect religion. There should be discretion when the state’s interest in acting is strong—as the “compelling interest” test in free exercise law tries to ascertain—and perhaps when the constitutional principles at stake in a case are ambiguous or conflicting, so that either course of action may affect religious freedom.

But in Davey, as we have argued, there was little argument that constitutional principles were in tension, or that the denial of funds would serve certain religion clause principles. The exclusion of students like Davey violates the core principles of religious choice and serves none of the salutary purposes that rules against discretionary state funding of religious education might serve. As the Court held in Widmar, to withhold a widely available benefit from an activity simply because of the religious viewpoint it reflects cannot be justified by the interest “in achieving greater separation of church and State than is already ensured under the Establishment Clause.” Indeed, funding students in circumstances like Davey’s is not merely permitted by the Establishment Clause; it is so clearly permitted that the question is not even close. The Witters decision, permitting such funding on similar facts, was unanimous, including the votes of those justices who were the most restrictive of funding under the Establishment Clause—Justices Brennan, Stevens, and Marshall (the latter of whom wrote the Court’s opinion).

Because the arguments against funding in Davey’s situation were so weak, to hold that the state could not discriminate against his religious choice would have been far from holding that the state must fund religion whenever the Establishment Clause permits it. Most obviously, a state need not fund private education at all. But if it does choose to fund private education, it must have compelling justifications for discriminating against religion.

III. Davey, Vouchers, and Other Aid Cases

Before the Court’s decision, observers generally saw the Davey case as simply the first Supreme Court skirmish in the war over whether funding programs may include religious institutions such as schools and social services. The main battle is not over college scholarships for religious majors, but over the inclusion of church-affiliated K-12 schools in programs of vouchers given to families to use at the school of their choice. Including religious schools in voucher programs is permissible under Zelman, but many states and cities might exclude

117. Id.
118. Widmar, 454 U.S. at 276.
119. See 474 U.S. at 482-93.
religious schools for political and policy reasons or because of state constitutional provisions that bar aid to "sectarian" or religious institutions or instruction. 120

Some observers have now suggested that the 7-2 rejection of Davey's claim ends the war at the first skirmish: that it eliminates any free exercise or free speech challenges to the exclusion of religious schools from K-12 voucher programs. 121 Several courts have agreed. Florida's intermediate appeals court, for example, treated Davey as controlling on whether the state constitution validly excluded religious schools from a scholarship program for students in failing public school districts. 122

Davey can be read to allow states to exclude religious schools from K-12 voucher programs. But it can easily be read much more narrowly, and in view of our criticisms of the decision, we think the narrow reading is much to be preferred. The key question is which of the two bases for Davey set out in part I is most fundamental. The first basis—that the denial of funding is not a constitutionally significant burden on religion 123 broadly applies to the funding of K-12 education and likely dooms any free exercise challenge to the exclusion of religious schools from vouchers. If withholding a $2,700 two-year college scholarship is only a "mil[d]" burden on religion because "[i]t imposes neither criminal nor civil sanctions," 124 then neither is it a real burden to withhold a K-12 voucher, typically worth only a little more per year. 125 If the Court was willing to say that the Washington exclusion "[d]id not require students to choose between their religious beliefs and receiving a government benefit," 126 then it also seems

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121. See e.g. Erwin Chemerinsky, Government Is Not Required to Aid Religion, 40 Trial 84, 87 (May 2004) ("[T]he Court's decision can be understood as a ruling that allows government to decide whether, and how much, it wants to support religion," including through school vouchers.); Ira C. Lupu & Robert W. Tuttle, Hitting the Wall: Religion Is Still Special Under the Constitution, Says the High Court, 27 Leg. Times 68, 69 (March 15, 2004) ("[A]fter Locke v. Davey, federal courts will not rely on the principle of neutrality" to require that religious schools be equally eligible for vouchers.);

122. Bush v. Holmes, 886 So. 2d 340, 362-67 (Fla. 1st Dist. App. 2004), certified for appeal, id. at 367; see also Eullit v. Maine, 386 F.3d 344, 352-56 (1st Cir. 2004) (relying on Davey to reject equal protection challenge to Maine's practice of paying tuition for students attending private or out-of-district secular schools but not religious schools); Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 20-21 (1st Cir. 2004) (citing Davey in rejecting free exercise challenge to Congress's "failure to provide to disabled children attending private religious schools the identical financial and other benefits it confers upon those attending public schools"); Am. Jewish Cong. v. Corp. for Natl. & Community Serv., 323 F. Supp. 2d 44, 64-65 (D.D.C. 2004) (relying on Davey to exclude religious schools from program of subsidies to teachers at K-12 schools). None of these cases seriously attended to the choice between the two competing rationales in Davey or to the Court's statement that "the only interest at issue here is the State's interest in not funding the religious training of clergy." Davey, 540 U.S. 722 n. 5 (emphasis added).

123. See supra nn. 12-17 and accompanying text.

124. Davey, 540 U.S. at 720.

125. In Zelman, for example, the largest private-school vouchers were worth $2,250 a year. 536 U.S. at 646.

likely to hold that the denial of vouchers does not require religious-school families to make such a choice. If the Court—erroneously—thinks it sufficient that students could use their Promise Scholarships at an entirely different institution, then it may well think it sufficient that religious families could send their children to separate religion classes after their daily secular education.

But the second, narrower basis for Davey—that the state has a particular “historic and substantial” interest in denying funds for clergy training—does not apply to K-12 vouchers, by its terms or its reasoning. The Court confined itself to the narrower basis when it said that “the only interest at issue here is the State’s interest in not funding the religious training of clergy.” Recall first that the Court treated training of clergy as a “distinct category of instruction”: it differs from “training for secular professions” in that it “resembles worship” and is “akin to a religious calling as well as an academic pursuit.” Even if clergy training is so different as to justify excluding it from a funding program open to all other majors, this argument plainly does not apply to education in K-12 religious schools. As the Court has long recognized, those schools pursue not only religious instruction but also secular education. They train students for the same secular professions and careers that secular schools do; in the Court’s words, they “play[] a significant and valuable role in raising national levels of knowledge, competence, and experience.” The schools teach the same “common subjects like math, English, social studies, and science, that all accredited schools provide,” and “a decent elementary or secondary school education in English, math, and science provides secular educational value, even if it takes place in a thoroughly religious setting.”

Religious K-12 schools, then, do not provide “a distinct category of instruction”: excluding them excludes instruction that falls within the same category as secular schools but is done from a religious viewpoint. It is a pure case of discrimination against an activity solely because of its religious motivation or viewpoint—the core forms of discrimination impermissible under the Free Exercise and Free Speech Clauses, respectively. Core discrimination against religious motivation or viewpoint also strengthens the inference for the anti-religious animus that the Court said was absent in Davey. In concluding that Washington had no such animus, the Court relied heavily on the fact that scholarship students could take non-theology majors and classes taught from a pervasively religious perspective. But in a K-12 program, this would be the very

127. Id. at 721 n. 4.
128. See supra nn. 18-26 and accompanying text.
129. Davey, 540 U.S. at 722 n. 5.
130. Id. at 721 (quoting Calvary Bible Presbyterian Church of Seattle v. Bd. of Regents of the U. of Wash., 436 P.2d 189, 193 (Wash. 1967)).
132. Id. at 247.
133. Berg, supra n. 120, at 173.
134. Id. at 174.
135. See Davey, 540 U.S. at 724-25 (noting that Northwest College students received scholarships even though “its concept of education is distinctly Christian in the evangelical sense” and it “prepares
option that excluding religious schools would forbid. The Court in *Davey* thought it important that "the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits,"\(^{136}\) which cannot be said when religious K-12 schools are excluded from voucher programs.

In addition, the history of opposition to funding clergy that *Davey* cites is not relevant to the inclusion of religious K-12 schools in vouchers and other general programs of education funding. We have already discussed why even college scholarships for ministry students, when included in a general program funding many majors, are quite different from the preferential funding of ministers that the Founders opposed and *Davey* cites.\(^{137}\) But whether to fund K-12 religious schools as part of general educational funding was simply not an issue at the time of the founding, because general education funding did not exist.\(^{138}\)

Opposition to funding K-12 religious schools dates not to the founding era, but to the mid-nineteenth century and the Protestant campaign to expand public schools and deny support to the newly forming Catholic school systems. The opposition to supporting Catholic schools contained a significant strain of anti-Catholic bigotry, as numerous studies have shown.\(^{139}\) The opponents pushed for Protestant-style prayers and Bible readings in the public schools,\(^{140}\) while blocking funding to "sectarian" (a code word for Catholic) schools on the ground that they would educate their students in religious "superstitions" and anti-democratic habits.\(^{141}\) The opponents failed to enact a federal constitutional ban on aid to sectarian schools through the Blaine Amendment of 1876, but they succeeded in inserting similar bans—"little Blaine Amendments"—into nearly forty state constitutions between the mid-1800s and the early 1900s.\(^{142}\)

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\(^{136}\) *Davey*, 540 U.S. at 724.

\(^{137}\) See supra pt. II(C)(4).

\(^{138}\) As we have already argued, the inclusion of religious schools in an opt-out provision in the 1785 Virginia assessment bill did not come close to turning that assessment into a general program of educational funding. See supra n. 113.


\(^{140}\) See e.g. Jeffries & Ryan, supra n. 139, at 298-300; Jorgenson, supra n. 139, at 78-83.

\(^{141}\) See e.g. Glenn, supra n. 139, at 229 (quoting Horace Bushnell on "foreign prejudices and superstitions" taught in Catholic schools); Jeffries and Ryan, supra n. 139, at 301 (noting "sectarian" schools ... in practical terms meant Catholic’); *supra* at 302-03 (summarizing nineteenth-century arguments that Catholicism was "inimical to democracy").

\(^{142}\) See supra n. 2.
The elements of religious prejudice behind the nineteenth-century state bans on funding have generated arguments that those provisions are unconstitutionally tainted and cannot be applied today under the Free Exercise and Equal Protection Clauses. In *Davey*, the Court sidestepped this argument on the ground that the Washington constitutional provision at issue—which barred state funds from being “appropriated for or applied to religious worship, exercise or instruction”—was not based on or associated with the Blaine Amendment. This dubious holding will also dispose of some claims that the denial of K-12 vouchers to religious schools is tainted by historical animus, because states with school-choice programs can make similar arguments that their exclusion of religious schools is not based on their Blaine amendment.

However, *Davey* clearly does not foreclose challenges to other state constitutional provisions more directly tied to state or federal Blaine amendments. The Court noted that another, broader Washington provision—requiring that schools “supported wholly or in part by the public funds shall be forever free from sectarian control or influence”—was a descendant of the federal Blaine Amendment but was not at issue in the case. When a state exclusion of religion rests on such a provision, it is still open to challenge on the ground that it reflects anti-Catholic animus.

Much of *Davey*'s reasoning, therefore, rests on the narrow basis that states have a particular interest in denying funds to clergy training. The Court's arguments on this score suggest that denying vouchers to K-12 religious schools is far more objectionable; those arguments certainly do not foreclose such a claim. Under this reading, *Davey* is indeed no more than the first skirmish in the war over state bans on funding, and we think that the Court ought to adopt the narrow reading. *Davey* is deeply flawed, for the reasons we set forth in part II, and a flawed decision ought to be confined as much as possible. More fundamentally, the facts of the case presented the clergy-training question; that rationale was sufficient to decide the case and any broader rationale is dictum.

The narrow reading, however, may well be a bad predictor of what the Court will actually do. Recall that *Davey*'s first basis, that denial of funding is only a minimal burden, applies just as strongly to the denial of vouchers to religious schools. For vouchers to be distinguished from college-level clergy training, three justices in the seven-vote *Davey* majority must conclude that the two situations are

143. See *e.g.* Becket Br., supra n. 139; DeForrest, supra n. 139, at 606-24; Garnett, supra n. 139, at 666-74; Heytens, supra n. 2, at 140-59.
145. *Davey*, 540 U.S. at 723 n. 7.
146. Indeed, the exclusion of religious options from other K-12 school choice programs has rested on state provisions even further removed from the nineteenth-century anti-Catholic movement, such as Vermont’s 1777 provision forbidding “compell[ing] … support [for] any place of worship.” Vt. Const. ch. I. art. 3; see also Chittenden Town Sch. Dist. v. Dept. of Educ., 738 A.2d 539, 552-59 (Vt. 1999) (applying this provision to forbid students in remote areas receiving state high-school tuition benefits from using them at religious schools, at least without safeguards to confine the application of state funds to the secular curriculum).
147. *Davey*, 540 U.S. at 723 n. 7 (discussing Wash. Const. art. IX, § 4).
different. It is difficult to identify those three votes. Four justices—Stevens, Souter, Ginsburg, and Breyer—oppose the inclusion of religious schools in aid programs in most circumstances and therefore, a fortiori, will nearly always defer to a state’s exclusion of them. Under the Court’s current composition, if any one among the trio of Rehnquist, O’Connor, and Kennedy continues to vote with the state, a challenge to the denial of religious-school vouchers will fail.

Moreover, although the denial of K-12 vouchers is more blatantly discriminatory than the \textit{Davey} exclusion, the strict separationist case for denying K-12 vouchers is in some ways stronger than the case in \textit{Davey}. The claim that giving scholarships to ministerial students would impose on Washington taxpayers’ conscience was very attenuated given the minute percentage of Promise Scholarships that went to devotional theology majors. K-12 voucher programs support education across the secular curriculum, further attenuating the plausibility of any taxpayer’s claim of conscientious objection, but they generally result in a much larger percentage of overall state funding following families to religious schools than to college theology majors. In either the college case or the K-12 case, of course, the funding recipient makes the choice, and the Court has held—properly, we think—that this fact breaks the causal attribution to the state, no matter what percentage of aid is used at religious schools.\footnote{2} But \textit{Davey} held that the state could seek to avoid such attribution even when the connection was attenuated; the majority would likely defer to that state’s desire at least as much in the voucher context. In addition, K-12 vouchers are far more likely than college scholarships to bring restrictions on the autonomy of the recipient schools (as we noted, \textit{Davey} involved no such restrictions).\footnote{3} The state generally regulates K-12 schools more closely than it does colleges, and regulations accompanying funding are correspondingly likely to be more stringent at the lower level.\footnote{4}

If the separationist interests in denying K-12 funding are in some ways stronger than the weak interests that sufficed in \textit{Davey}, that suggests that the exclusion of religious schools from vouchers is likely to be upheld. But there remains one more argument that exclusion from K-12 vouchers is unconstitutional, even if exclusion of theology majors is not. As one of us has argued before, in the context of K-12 vouchers “the state may well have a less discriminatory means of achieving”\footnote{5} strict separationist goals: it “could decline to create a private-school voucher program in the first place, meaning no vouchers

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\begin{itemize}
\item \footnote{2}{See \textit{Zelman}, 536 U.S. at 658-59; \textit{Mueller}, 463 U.S. at 401.}
\item \footnote{3}{See \textit{supra} pt. \textit{II(C)(3)}.}
\item \footnote{5}{Berg, \textit{supra} n. 120, at 197.}
\end{itemize}
for secular private schools either. In other words, the only kind of educational ‘choice’ involved in the system would be a choice between various public schools.”

This broader exclusion would achieve strict separationist goals by avoiding funding of religious schools, but it would not discriminate against religious schools within any relevant category. And because the vast majority of private schools are religiously affiliated, a voucher program limited to secular private schools does little to achieve the typical goals of such programs—either in serving a significant number of students or in providing statistically significant data on what voucher designs work. Thus, once religious schools are denied vouchers, excluding secular private schools as well will do relatively little marginal harm to the state’s policy objectives. Refraining from private-school vouchers altogether—limiting school choice only to public schools—satisfies both the political demands of strict separationists and the constitutional principle of not discriminating against the exercise of religion. The state is not required to forgo all aid to private schools, but it can do so if it chooses. This nondiscriminatory alternative negates the asserted justification for discriminating against religious schools.

The narrow reading of Davey, limiting it to funding of clergy training, also leaves open challenges to the exclusion of religious options from other state funding programs. A college scholarship or grant program that excluded religious schools and religious courses altogether is unlikely, but Davey certainly suggests that such a restrictive funding ban is open to challenge on the ground that it reflects animus toward religious education. A more common issue may involve state programs that fund private social services through vouchers or other mechanisms of individual choice but then exclude religious providers. Denying funds simply because a provider is religious or incorporates religious teaching or exhortation into its program is more objectionable than denying funds for clergy training, for essentially the same reasons we set out concerning K-12 vouchers.

Whether or not the Court will actually see social services and K-12 school vouchers as different from clergy training is, of course, another matter. Again, the first half of Davey points more toward discretion for the states to exclude religious options in many situations. But the arguments for distinguishing vouchers and social services from clergy training are powerful, with deep roots in the facts of the case, the opinion of the Court, and the political and constitutional traditions on which the Court relied. The second half of Davey seems pointedly designed to leave those arguments open.

152. Id.

153. See e.g. Zelman, 536 U.S. at 656-57 (“Cleveland’s [81%] preponderance of religiously affiliated private schools ... is a phenomenon common to many American cities.”); Heytens, supra n. 2, at 121 (“Since over 85% of private primary and secondary schools are religiously affiliated, it is difficult to implement a viable voucher program that does not include religiously affiliated schools.” (citing Jeff Archer, Today, Private Schools Span Diverse Range, 16 Educ. Wk. 1, 14 (Oct. 9, 1996)).

154. Compare the federal charitable-choice program, which makes religious providers equally eligible for funds but states that direct funding to the provider shall not be expended “for sectarian worship, instruction, or proselytization.” 42 U.S.C. § 604a(j) (2000).
IV. Conclusion

At least two of the mistakes underlying Davey go to the heart of how to interpret the Religion Clauses. The Davey majority sees free exercise and non-establishment as conflicting norms and therefore concludes that the scope of each must be confined in order to save the state from facing incompatible duties. As a result, clauses designed to limit government influence over individual’s religious choices have been read to give government discretion to pressure those choices. But if the clauses work together, there is no problem with holding that the government not only may treat religious educational choices the same as non-religious choices, but that often it must do so.

In addition, although the Davey majority correctly recognizes that the First Amendment treats religion differently from other ideas and activities, it fails to explain what underlying principle governs that distinctive approach. As a result, the majority can offer no criterion for when to treat religion differently and when to treat it the same. The principle of leaving religion to individual choice offers such a criterion. It explains why the government should sometimes treat religion differently than secular ideas—for example, refraining from interjecting itself into religious debates by endorsing explicitly religious propositions or messages. Conversely, though, the distinctive vision of the Religion Clauses means that an individual’s choice to use generally available funding at a religious provider should be treated just as well as the choice to use it in a nonreligious setting. That is how the Court should have ruled in Davey, and how it still should—and can—rule in the case of vouchers for K-12 schools or for social services.