Davey's Deviant Discretion: An Incorporated Establishment Clause Should Reqnire tbe State to Maintain Funding Neutrality

NINA S. SCHULTZ*

INTRODUCTION

In February 2004, the Supreme Court decided *Locke v. Davey*,[1] holding that the State of Washington could exclude theology majors from scholarship money it made available to all other college students who met otherwise neutral criteria.[2] The Court rejected Davey's claim that this practice constituted a discriminatory burden on his Free Exercise right to practice his religion, reasoning that Davey could still *practice* his religion.[3] *Davey* was a departure from many other Rehnquist Court funding cases that involved the Religion Clauses, in that religion was *excluded* from funding rather than *included*. This Note argues that the *Davey* decision implicated not only the Free Exercise Clause, but more importantly, the Establishment Clause, which embodies a principle of neutrality with respect to government action among religions and between religion and nonreligion.

The State of Washington did not adhere to the neutrality principle when it excluded only theology majors, specifically excluding religion from the benefit made available to all others. The *Davey* Court placed the controversy within the "play in the joints" between the Religion Clauses, conferring discretion upon the states with respect to religious liberties.[4] But this runs contrary to the concept of an incorporated Establishment Clause. By giving the State of Washington the discretion to exclude Davey from a benefit made available to all others based solely on his choice to pursue his religious convictions through a theology degree, the Court hearkened back to the pre-incorporation era when each state could and did regulate religion within its own borders. Either the Court has implicitly decided that the Establishment Clause is not fully incorporated, returning discretion to the states in religious matters, or the Court did not fully address the implications of the federal Establishment Clause and its neutrality principles in *Locke v. Davey*.

Part I of this Note will trace the history of the Court's Establishment Clause jurisprudence, analyze the Court's increasing use of the neutrality principle, and explain what the neutrality principle does, or should do, for a religious adherent. Part II will detail the facts of *Davey* and analyze its holding, followed by a discussion of how the Court departed from the Establishment Clause's neutrality principle in the case.

---

* J.D. Candidate, 2006, Indiana University School of Law–Bloomington; B.A., 2003, Baylor University. I would like to thank Professor Daniel O. Conkle as well as the *Indiana Law Journal* associates and editorial board for their efforts and comments. In addition, this could not have been possible without the constant support and thoughtful insights of Braden Core and Lindsay Jaffee. Most of all, I wish to express gratitude to my mother, Mary Kay Schultz, for her endless encouragement and inspiration.

1. 540 U.S. 712 (2004).
2. *Id.* at 719.
3. *Id.* at 720.
4. *Id.* at 719.

Part III will reevaluate the Establishment Clause and its force on the states. It will question the incorporation of the Establishment Clause and discuss the neutrality principle in light of *Davey*. This Note will conclude by arguing that an incorporated Establishment Clause requires each state to afford its citizens the protections of the Clause—that is, neutrality.

I. ESTABLISHMENT CLAUSE JURISPRUDENCE

"Congress shall make no law respecting an establishment of religion . . . ."[5] The meaning of the Establishment Clause has evolved to confer certain rights and to accommodate religious liberties, while ensuring against the abuses resulting from entanglement of religion and the government. There is little record of the Founders' specific intent for the Establishment Clause as to how narrowly or broadly one should read the Clause. The Court's modern journey of interpreting and applying the Establishment Clause to the religious claims of today's society began with the incorporation of the Establishment Clause over fifty years ago.

Two principles protected by the Establishment Clause are religious liberty and religious equality. Religious liberty pertains to the freedom of choice by both the religious and the irreligious, whose choices are to remain free from government influence.[6] A similar protection, religious equality, prohibits distinctions by the government among religions and also between religion and irreligion.[7] The Court's Establishment Clause jurisprudence has consistently referred to yet another principle: neutrality. Neutrality by government actors both among religions and between religion and irreligion has the power to protect both religious liberty and religious equality, but only if implemented correctly. Religion Clause scholars, such as Professors Daniel O. Conkle and Douglas Laycock, have referred to the neutrality principle as one to which the Court has adhered in the past and should continue adhering to in the future to protect both religious liberty and religious equality.[8]

---

5. U.S. CONST. amend. I.

6. Daniel O. Conkle, *Indirect Funding and the Establishment Clause: Rehnquist's Triumphant Vision of Neutrality and Private Choice*, in THE REHNQUIST LEGACY 54, 57 (Craig Bradley ed., 2006).

7. *Id.*

8. *See, e.g.*, Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000); Douglas Laycock, *Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 156 (2004) [hereinafter Laycock, *Theology Scholarships*]; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) [hereinafter Laycock, *Neutrality Toward Religion*]. *Cf.* Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489 (2004) (arguing that a modified form of substantive neutrality, rather than formal neutrality, is the best course of action).

A. The Founders' Intent

The Religion Clauses of the First Amendment were included in the Bill of Rights by America's Founding Fathers to ensure against abuses that inevitably result from a governmental establishment of religion.[9] The first colonists came to the New World to escape religious persecution and in pursuit of religious freedom, aspirations that the Religion Clauses were intended to protect.[10] As mandated by each colony's charter, the colonists suffered the imposition of taxes used to support the Crown-established churches in each colony.[11] The financial support of each state's established church continued even after the Declaration of Independence and the ratification of both the Constitution and the Bill of Rights.[12] Virginia was at the forefront of the movement to end this practice. In the 1785–86 legislative session, Virginia legislators, led by Thomas Jefferson and James Madison, enacted Jefferson's "Virginia Bill for Religious Liberty."[13] This Bill, spurred also by Madison's *Remonstrance* against taxes used for the church, stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical... no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . ."[14] Many constitutional scholars, including justices of the Supreme Court, have used this and other language from the Virginia bill, conceptualized by two of America's founding fathers, to support the belief that the Framers of the Bill of Rights wished to erect, "in the words of [Thomas] Jefferson, . . . a wall of separation between church and State"[15] and thus, that the Religion Clauses were meant to further a separationist theory of church-state relations.[16]

As ratified in 1791, the First Amendment embodied a sense of federalism. According to the specific language and the function of the Bill of Rights, the First Amendment only applied to the federal government—incorporation through the Fourteenth Amendment had not yet occurred.[17] Furthermore, the Establishment Clause

---

9. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1504–05 (15th ed. 2004). *See* Everson v. Board of Education, 330 U.S. 1, 8–13 (1947).

10. *Everson*, 330 U.S. at 8–13.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 13 (quoting Virginia Bill for Religious Liberty, VA. CODE ANN. § 57-1 (2005)).

15. *Id.* at 16.

16. *Id.* at 13. *But see* Daniel O. Conkle, *Legal Theory: Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1115, 1130–31 (1988). Conkle cites the dissenting opinion of then-Justice Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38 (1985), that contested this historical account, arguing that Jefferson neither took part, nor was present, in the drafting and ratification of the Bill of Rights. Madison, on the other hand, conceived the Establishment Clause "to prohibit the establishment of a national religion." *See id.* at 98 (Rehnquist, J., dissenting).

17. Most provisions of the first eight amendments—excluding the Second and Third Amendments, the Grand Jury Indictment Clause of the Fifth Amendment, and the Seventh Amendment—have been incorporated to apply to the states through the Due Process Clause and other protections, such as the concept of "liberty" embodied in the Fourteenth Amendment, ratified in 1868. *See* SULLIVAN & GUNTHER, *supra* note 9, at 1508. The incorporation of the Religion Clauses of the First Amendment is discussed *infra* Parts I.B., III.A.

of the First Amendment is the only amendment in the Bill of Rights to specifically name Congress as the body of government upon which the Amendment places limitations.[18] The founders enacted the Establishment Clause under the belief that the states would remain the protectors of religious liberties. This federalism component of the Establishment Clause is further evidenced by the history of state-established churches, which continued to exist well after the enactment of the First Amendment.[19] The final state church to disestablish was that of Massachusetts in 1833.[20] Other than the specific language of the Establishment Clause and the historical evidence of state-established churches, the remaining evidence of the Framers' intent for the Establishment Clause is "woefully incomplete."[21] Justice Clark, of the United States Supreme Court, said of the Establishment Clause in *School District of Abington Township v. Schempp*,[22]

> A too literal quest for the advice of the Founding Fathers . . . seems to me futile and misdirected . . . the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. . . .
>
> . . . .
>
> . . . [O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously . . . .[23]

Without clear evidence of the original intent of the meaning of the Establishment Clause, the Supreme Court was forced to decide whether the Establishment Clause applies to the states through incorporation by the Fourteenth Amendment. The Court answered this question in its first modern Establishment Clause challenge: *Everson v. Board of Education*.[24]

---

18. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. *See also* Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1707 (1992) [hereinafter *A Federalist View*].

19. SULLIVAN & GUNTHER, *supra* note 9, at 1508. *See also* Conkle, *supra* note 16, at 1132–34 (arguing that the Establishment Clause was a reflection of the national government's "limited and enumerated powers, and these powers did not extend to matters of religion"); *A Federalist View*, *supra* note 18, at 1703 (arguing that "the Establishment Clause was intended to prevent Congress from interfering with the established state churches and with state efforts to accommodate religion").

20. William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509, 519 (1998) (citation omitted). Disestablishment in Massachusetts occurred forty-four years after drafting of the Establishment Clause. *Id.*

21. Conkle, *supra* note 16, at 1132–33 (positing that the only agreement of the ratifying states was that Congress could have no power to enact laws concerning religion, which protected separationist states, such as Virginia, and states that maintained established religions).

22. 374 U.S. 203 (1963).

23. *Id.* at 237–40.

24. 330 U.S. 1 (1947).

B. Incorporation of the Establishment Clause

The Court in *Everson* declared the incorporation of the Establishment Clause, applying its force to state action through the Fourteenth Amendment.[25] The doctrine of incorporation ensures the protection of "fundamental liberties" from state infringement through the Fourteenth Amendment just as the Bill of Rights amendments protect these liberties from infringement by the federal government.[26] It should be noted, however, that an incorporated Establishment Clause does not comport with two of the original rationales behind the Establishment Clause: to prevent the federal government from interfering with state-protected religious liberties and to ensure that the federal government would not disestablish the official state churches.[27] The state lost its power to regulate religious liberty without interference by the federal government after incorporation; similarly, religious liberties protected by some states could also violate the incorporated Establishment Clause. Thus, the original rationales for the Establishment Clause are now compromised to the extent the First Amendment safeguarded state power in religious affairs. Clearly, a state-established church would be contrary to an incorporated Establishment Clause. Nevertheless, the Court in *Everson* saw the need to protect state accommodation of religion and found a way to do so through incorporation of the Establishment Clause, applying the principles of the federal Establishment Clause to the states.[28] But there is little evidence that the Framers of the First Amendment intended the Establishment Clause to be applied to the states.[29]

On the contrary, there is direct evidence that legislators in office soon after the enactment of the Fourteenth Amendment did not intend for the Amendment to incorporate the Establishment Clause. In 1875, eight years after the ratification of the Fourteenth Amendment, Congress proposed another amendment to the United States Constitution. The first clause of the projected "Blaine Amendment," named after Congressman James G. Blaine who proposed the amendment, was an explicit application of the federal Establishment Clause to the states.[30] The amendment passed

---

25. *Id.* at 14–15 (reasoning that, given the application of the Free Exercise Clause to the states through Cantwell v. Connecticut, 310 U.S. 296 (1940), a likewise application of the Establishment Clause to the states is warranted).

26. *See, e.g., A Federalist View, supra* note 18, at 1708.

27. *See supra* notes 9–21 and accompanying text; SULLIVAN & GUNTHER, *supra* note 9, at 1508; Conkle, *supra* note 16, at 1132–1134 (arguing that the Establishment Clause was a reflection of the national government's "limited and enumerated powers, and these powers did not extend to matters of religion"); *A Federalist View, supra* note 18, at 1703 (arguing that "the Establishment Clause was intended to prevent Congress from interfering with the established state churches and with state efforts to accommodate religion.").

28. In *Everson*, a New Jersey taxpayer challenged the validity of a statute that authorized boards of education to make decisions concerning the transportation of children to and from school and the specific school board's policy of giving reimbursement for such transportation to parents of children in parochial schools. The Court held that the statute and policy of the school board did not violate the Establishment Clause, despite the wall of separation between church and state mandated by the Establishment Clause and applied to the states through the Due Process Clause of the Fourteenth Amendment. *See Everson*, 330 U.S. at 14–18.

29. *See supra* notes 17–20 and accompanying text.

30. *See* Conkle, *supra* note 16, at 1137–38; *A Federalist View, supra* note 18, at 1713; J. Scott Slater, *Florida's "Blaine Amendment" and Its Effect on Educational Opportunities*, 33

in the House of Representatives, but did not garner the required supermajority vote in the Senate.[31] Congress voted on the amendment nineteen times between 1875 and 1930, each time resulting in defeat.[32] Since the Blaine Amendment was introduced only eight years after the ratification of the Fourteenth Amendment, its defeat may reflect that a majority of Congress did not intend the Establishment Clause to be applied to the states when it enacted the Fourteenth Amendment.[33]

Many states enacted their own "Blaine Amendments" into their state constitutions to preserve a policy of anti-establishment in the state. Some state anti-establishment provisions are more restrictive than the prohibitions in the United States Constitution. Perhaps these more restrictive states are exercising their powers as the regulators of affairs between church and state, but it is arguable that this power was taken from the states when the Court declared the incorporation of the Establishment Clause in *Everson*.[34]

C. The Court's Move Toward Neutrality

Everson, the first major, modern Establishment Clause challenge to appear before the Court,[35] upheld bus fare funding for children of both public and parochial schools. Along with the doctrines of incorporation and separation between church and state, Justice Black extolled a principle that the Court presently refers to as neutrality: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[36] Though not a pervasive goal of the Court during its separationist era, commencing with *Everson*, the trend toward enforcing neutrality began in the 1960s[37] and has become increasingly important in the Court's Establishment Clause doctrine. Beginning with the bans of school-led prayer[38] and school-led Bible readings,[39] the Court began to use the Establishment Clause neutrality principle to invalidate practices

---

STETSON L. REV. 581, 584 (2004). The proposed amendment read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

See 4 CONG. REC. 205 (1875).

31. Slater, *supra* note 30, at 591.

32. *A Federalist View*, *supra* note 18, at 1714.

33. *See id.* at 1713–14; *see also* Conkle, *supra* note 16, at 1137–38. The closeness in time is, of course, not dispositive of the drafters' intent for the Fourteenth Amendment.

34. Conkle, *supra* note 16, at 1137–38. *See A Federalist View*, *supra* note 18, at 1709 (arguing that the incorporation of the Establishment Clause eliminates state authority over religion); *infra* note 79 and accompanying text.

35. Conkle, *supra* note 16, at 1124.

36. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

37. Conkle, *supra* note 8, at 6. Professor Conkle describes this neutrality among religions as denominational equality, which is a portion of the broad neutrality concept. *Id.* at 9.

38. Engle v. Vitale, 370 U.S. 421 (1962).

39. School Dist. of Abington Twp. v. Shempp, 374 U.S. 203 (1963).

that favored one denomination over another.[40] The neutrality concept was prevalent in Free Exercise cases dealing with unemployment compensation for which Saturday Sabbatarians who were fired for refusing to work on the Saturday Sabbath were not eligible.[41] Denominational neutrality, the view that the government may not favor or disfavor one religious denomination over another, expanded into a concept of neutrality between religion and nonreligion beginning in the 1970s.

The Court in *Walz v. Tax Commission of New York*[42] stated that the Religion Clauses precluded the Court from "tolerat[ing] either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for 'play in the joints' productive of a *benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference*."[43] Then-Chief Justice Burger's opinion contained the implicit declaration of neutrality between religion and nonreligion, holding that a property tax exemption for religious organizations with properties used for religious purposes does not violate the Establishment Clause.[44] In *Walz*, neutrality principles were not violated by allowing the state to treat a religious organization the same as a nonreligious organization. The next year, the Court enunciated the *Lemon* test,[45] by which most Establishment Clause challenges have been examined since.[46] The second prong of the *Lemon* test—that government action must not have the effect of advancing or inhibiting religion—has been the primary point of contention in recent Establishment Clause challenges to funding schemes. These funding cases shed significant light on the Court's use of the neutrality principle.[47]

Beginning in the mid-1980s, the Court consistently upheld the extension of benefits—through religious exemptions[48] or equal access[49]—to religiously affiliated

---

40. Professor Conkle attributes this move toward equality between denominations, in part, to the Civil Rights Movement and the inability of the Court to overtly favor Christianity as it had in the past. *See* Conkle, *supra* note 8, at 6.

41. *See* Sherbert v. Verner, 374 U.S. 398, 409 (1963) ("[T]he extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences . . . .").

42. 397 U.S. 664 (1970).

43. *Id.* at 669 (emphasis added).

44. *Id.* at 678–79.

45. The challenged statute or practice must "[f]irst have a secular legislative purpose; seeond, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statue must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (citation omitted) (quoting *Walz*, 397 U.S. at 668).

46. The *Lemon* test was modified in *Agostini v. Felton*, 521 U.S. 203 (1997), in which the Court stated it would continue to evaluate both the first and second prongs, but would no longer consider the entanglement prong apart from the effect prong. Conkle, *supra* note 6, at 4. Though some justices criticize the *Lemon* test as outdated, the Court used the *Lemon* test to invalidate prayer at a high school football game in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). *See id.*

47. See *infra* notes 60–68 and accompanying text for a discussion of *Zelman v. Simmons-Harris*, 536 U.S. 639 (2000), the last funding case before *Davey*.

48. Exemptions are given to religious adherents as a form of government accommodation of those religious adherents' beliefs. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (holding

organizations or individuals who used the benefit for religious purposes, as long as the benefit was distributed on a neutral, nondiscriminatory basis.[50] In *Rosenberger v. University of Virginia*,[51] the Court held that the University of Virginia had opened a limited forum for funding student publications and therefore could not discriminate based on viewpoints expressed within that forum, as the University had done in excluding a religious publication from the money made available to other publications.[52] The fund was open to student publications that met a set of neutral criteria, save one: the publication could not "primarily promote[] or manifest[] a particular belie[f] in or about a deity or an ultimate reality."[53] In invalidating the funding scheme, the Court stated that such an exclusion compromised "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment . . . and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."[54]

The Court followed the same rationale in *Good News Club v. Milford Central School*.[55] A religious group was denied access to school property for after-school activities because the group was religious and wanted to use the forum for activity that was "the equivalent of religious worship."[56] The Court cited *Rosenberger* as authority for maintaining a stance of neutrality, striking the school's exclusion of religious groups from the benefit of access to the forum.[57] Both *Rosenberger* and *Good News Club* are evidence of the increasing weight the Court began to give the neutrality principle when referencing the Establishment Clause in Free Speech cases. Though the Establishment Clause was not the basis of the holdings in either case—the holdings were based on the Free Speech Clause of the First Amendment—the Court in both cases referred to the neutrality principles embodied in the Establishment Clause as part

---

that the State was compelled to grant a religious adherent an exemption from denial of unemployment compensation when that person had lost her job due to choosing to conform with her religious practices instead of the requirements of the job).

49. Equal access is a function of the First Amendment Free Speech right in which the government generally may not deny access to a speaker based on the speaker's viewpoint. *See* United States v. O'Brien, 391 U.S. 367 (1968).

50. *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997) (holding that remedial education provided by publicly funded teachers could be extended to parochial schools without violating the Establishment Clause); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that the Establishment Clause was not violated by providing publicly funded sign-language interpreters to deaf students at parochial schools); Witters v. Washington Dep't. of Servs. for the Blind, 474 U.S. 481 (1986) (holding that extension of a scholarship to one pursuing a theology degree does not violate the Establishment Clause); Mueller v. Allen, 463 U.S. 388 (1983) (upholding tax deductions for parents of children in public and sectarian schools alike).

51. 515 U.S. 819 (1995).

52. *Id.* at 837.

53. *Id.* at 822–23 (third alteration in original).

54. *Id.* at 845–46.

55. 533 U.S. 98 (2001) (holding that the exclusion of the religious group from the public fonnm was viewpoint discrimination and thus, unconstitutional).

56. *Id.* at 103.

57. *Id.* at 114.

of its rationale:[58] "[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion."[59]

The last funding case before *Davey*, *Zelman v. Simmons-Harris*,[60] emphasized the availability of "true private choice" in extending nondiscriminatory benefits.[61] *Zelman* involved a voucher system established by the city of Cleveland, Ohio to provide financial grants for inner-city children to attend secular private schools, sectarian private schools, or public schools in adjacent school districts.[62] The money was given to the students' parents, who then could decide where to send their student with the tuition assistance.[63] Again, the Court held, as it did in *Mueller*, *Witters*, and *Zobrest*,[64] that the Ohio program "is neutral in all respects toward religion[,] . . . confers educational assistance to a broad class of individuals defined without reference to religion[, and] . . . permits the participation of *all* schools within the district, religious or nonreligious."[65] Therefore, "[t]here are no 'financial incentives' that 'skew' the program toward religious schools."[66] Because the program was distributed generally and on a neutral basis and did not favor or disfavor religion, it did not violate the Establishment Clause.[67] The principle of neutrality operated in *Zelman* to uphold the extension of benefits to students choosing to attend religious schools, treating those students the same as students choosing to attend nonreligious schools.

All of these cases utilized the neutrality principle of the Establishment Clause to uphold the extension of benefits to religious groups and individuals. Prior to *Davey*, it appeared that inherent in the neutrality policy is the inclusion of religious groups when the benefit is made generally available to all others. Neutrality is not neutral if it is used only to *uphold* extensions of benefits, but not used to *require* that same extension absent a compelling justification by the state. However, the Court has never held that a state is compelled to include religious groups in generally available benefits aside from cases involving equal access rights through the Free Speech Clause of the First Amendment.[68]

---

58. *See supra* note 50 and accompanying text.

59. *Rosenberger*, 515 U.S. at 839 (emphasis added).

60. 536 U.S. 639 (2002) (holding that extension of voucher system to sectarian schools does not violate the Establishment Clause despite the lack of a requirement to only use the money for purely secular purposes).

61. *Id.* at 649.

62. *Id.* at 644–45.

63. *Id.*

64. *See supra* note 50 and accompanying text.

65. *Zelman*, 536 U.S. at 653 (emphasis in original).

66. *Id.* (quoting Witters v. Washington Dep't. of Servs. for the Blind, 474 U.S. 481, 487–88 (1986)).

67. *See id.*

68. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (holding that excluding religious groups from using the university facilities for prayer and religious discussions is a denial of the Free Speech principle of equal access and is also viewpoint discrimination, but inclusion of the group does not violate the Establishment Clause); Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that the exclusion of an evangelical organization's film series, based on a Christian perspective, at a school open after hours for social, civic, and recreational purposes violates Free Speech rights of equal access and is viewpoint discrimination, but inclusion of the group does not violate the Establishment Clause).

D. The Differences Between Formal Neutrality and Substantive Neutrality

It is important to distinguish between the two degrees of neutrality the Court has and may continue to pursue through the Establishment Clause. Formal neutrality, as coined by Professor Douglas Laycock,[69] calls for the Free Exercise and Establishment Clauses "[to be] read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden."[70] Formal neutrality, therefore, proscribes facial discrimination against or in favor of a particular sect of religion or of religion in general.[71] An example of such discrimination was found in *Church of the Lukumi Babalu Aye v. City of Hialeah*,[72] where the city had enacted a statute that singled out the Santeria church for disfavored treatment. The statute was invalidated on Free Exercise grounds because the discriminatory treatment precluded the Santeria adherents from exercising the practices of their religion.[73] The Court likened its neutrality mandate to that of its past Establishment Clause jurisprudence: "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."[74] Thus, the Court used formal neutrality as a justification for invalidation under the Free Exercise Clause, but it did so under the auspices of the Establishment Clause.

Professor Douglas Laycock, nevertheless, finds formal neutrality inadequate to protect religious liberty. Instead, he advocates "substantive neutrality," which compels the government to "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[75] Substantive neutrality goes one step further than formal neutrality: it requires government practice to avoid the *effect* of disparate treatment.[76] Under the substantive neutrality principle, akin to the second prong of the *Lemon* test, the government may not act in a way that has the effect of advancing or burdening religion.[77] This approach

---

69. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1990).

70. *See id.* (quoting Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961)).

71. *See* Conkle, *supra* note 8, at 9.

72. 508 U.S. 520 (1993).

73. *Id.* The statute in *Lukumi* purposefully discriminated against the religious adherents, unlike the landmark Free Exercise case of Employment Division v. Smith, 494 U.S. 872 (1990), in which the Court denied a Free Exercise exemption for religious use of peyote. The use of peyote was a criminal offense under a neutral, generally applicable state statute, for which a state is not compelled to grant an exemption to a religious adherent to practice his religion. *See id.* at 886.

74. *Lukumi*, 508 U.S. at 532. This is akin to the first prong of the *Lemon* test. *See supra* note 45.

75. Laycock, *Neutrality Toward Religion*, *supra* note 8, at 1001; *see also* Conkle, *supra* note 8, at 9.

76. *See* Conkle, *supra* note 8, at 9.

77. *Id.*

requires a court to look past the face of the statute or regulation, into its result.[78] Professor Daniel O. Conkle contends that substantive neutrality is not neutral at all, but rather, gives religion special treatment.[79] Formal neutrality, he argues, is the "purest, and is certainly the simplest, means of implementing a policy of equal treatment for religion and nonreligion."[80] Davey would easily win under a substantive neutrality analysis because the State's denial of a scholarship had the effect of disparate treatment against Davey since he had chosen to pursue a theology major. But to avoid any special treatment of religion, this Note argues that the Court in *Davey* should have evaluated Davey's claim under the formal neutrality principle of the Establishment Clause.[81] In fact, the Court engaged in a substantive neutrality analysis under the Free Exercise Clause—reasoning that Washington's policy had no effect on Davey's ability to practice his religion.[82] But the Court did not need to delve that deeply into the effect of the State's policy to find it a violation of the Establishment Clause under formal neutrality analysis. The Promise Scholarship criteria was written "in terms of religion either to confer a benefit or to impose a burden," which formal neutrality prohibits.[83] The Court has before engaged in formal neutrality analyses for its Establishment Clause cases that also implicated the Free Speech equal access principles,[84] and it is only proper that the Court continues to do so even if it does not find a valid Free Speech claim.[85]

78. One could argue that the Court in *Lukumi* actually engaged in substantive neutrality in looking for an animus toward religion because the words used to exclude the Santeria religion were ambiguous as to whether they were used in a secular or religious way. "To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. . . . [But] 'the Court must survey meticulously the circumstances of governmental categories to eliminate . . . religious gerrymanders.'" *Lukumi*, 508 U.S. at 533–34 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

79. Conkle, *supra* note 8, at 10. Earlier in Professor Conkle's article, he discusses the history of Christianity in the Court's jurisprudence as being "distinct and distinctly important" before the Court moved to a doctrine of neutrality. *See id.* at 3–5. Perhaps formal neutrality is a way to avoid favoring religion, without excluding religion, as the State of Washington did in *Davey*.

80. *Id.*

81. All arguments for requiring the states to adhere to neutrality principles hereinafter will be in reference only to formal neutrality.

82. Locke v. Davey, 540 U.S. 712, 720 (2004).

83. *See supra* notes 69–70 and accompanying text.

84. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Rosenberger v. Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

85. Davey did raise a Free Speech claim, and the Ninth Circuit Court of Appeals relied heavily on this claim in holding the Washington Promise Scholarship unconstitutional. *See* Davey v. Locke, 299 F.3d 748 (9th Cir. 2002). The Supreme Court of the United States dismissed Davey's Free Speech claim in a footnote. *See Davey*, 540 U.S. at 721 n.3.

II. *LOCKE V. DAVEY*: ABANDONING NEUTRALITY

"From the perspective of the Court's cases on discrimination against religion, [*Davey*] is remarkable. The Court had never before held that the state can discriminate against religion."[86] Along with narrowing the holding of *Lukumi*, refusing to review state action that negatively affected a religious adherent under strict scrutiny, and allowing a state to exclude a religious adherent from a generally available benefit, the Court substantially deviated from the neutrality principles in the Establishment Clause. *Davey* was decided as a Free Exercise case, but this Note argues that the Court should have more closely evaluated the Establishment Clause implications when it declared that *Davey* fell within the "play in the joints" between the Free Exercise and Establishment Clauses.

A. Washington's Constitution and Promise Scholarship Program

The Washington State legislature created the Promise Scholarship Program in 1999 to assist low-income but academically gifted students in attending college.[87] A recipient could use the scholarship money for only two years of college, but the money could be used for any education-related expenses at a nationally accredited postsecondary institution, including religiously affiliated institutions.[88] At the time the *Davey* lawsuit was first filed, a prospective scholarship recipient had to meet the following criteria to receive the scholarship: (1) graduate from a Washington public or private high school; (2) graduate in the top 15% of a 2000 graduating class or in the top 10% of a 1999 graduating class; (3) have a family income that is less than 135% of the State's median; and (4) enroll, at least part-time, in a post-secondary educational institution in the State of Washington.[89] The final and non-neutral criterion that a scholarship recipient must meet is that he may not pursue a degree in theology.[90] While each institution decides which of its available degrees are "theology" degrees,[91] the definition used in *Davey* was a degree that is "devotional in nature or designed to induce religious faith."[92] Neither party disputed this definition.

The State of Washington excluded theology degrees from the scholarship program to avoid forcing its citizens to violate their "freedom of conscience," as provided by the

---

86. Laycock, *Theology Scholarships*, *supra* note 8, at 171.

87. *Davey*, 540 U.S. at 715–16.

88. *Id.* at 716.

89. *Id.* The scholarship has since been altered with an additional requirement: the student must attain, on the first attempt, a cumulative Scholastic Achievement Test I score of 1200 or higher or a score of 27 or higher on the American College Test. Update on state funding of Promise Scholarship, Washington Higher Educ. Coordinating Bd., http://www.hecb.wa.gov/financialaid/wps/wpsindex.asp (last visited January 18, 2006). *See also* Carlos S. Montoya, *Constitutional Development:* Locke v. Davey *and the "Play in the Joints" Between the Religion Clauses*, 6 U. PA. J. CONST. L. 1159, 1160 n.8 (2004).

90. *Id.*; WASH. ADMIN. CODE § 250-80-020(12)(f)–(g) (2000). *See also* WASH. REV. CODE § 28B.10.814 (2002).

91. *Davey*, 540 U.S. at 717.

92. *Id.* at 716.

Washington Constitution.[93] The pertinent provision of the Washington Constitution is as follows:

> Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment. . . .[94]

At oral argument before the Supreme Court, the attorney for Washington in *Davey* argued that the state's taxpayers' freedom of conscience would be violated if the scholarship money, taken from general tax funds, was extended to the education of future clergymen.[95] The money could be used at any sectarian school in the state, even by a student taking numerous religious courses, but if the student declared a theology major, the scholarship was denied to them based on the aims of the constitutional provision quoted above.[96] Washington's constitutional anti-establishment provision is more restrictive than that of the Federal Constitution in recognizing the State's citizens' "freedom of conscience," a right not found in the Federal Establishment Clause. A state is free to impose greater restrictions than the Federal Constitution requires, as long as it does not abridge a Federal Constitutional right by doing so.[97] This Note argues that the Promise Scholarship does abridge a Federal Constitutional right: the right to neutrality.[98]

Joshua Davey applied for and received the Promise Scholarship in 1999.[99] He chose to attend Northwest College, a Christian college affiliated with the Assembly of God denomination and dedicated to a pervasively Christian higher education.[100] Upon

---

93. Transcript of Oral Argument at 3, Locke v. Davey, 540 U.S. 712 (No. 02-1315) (Dec. 2, 2003) (statement by Narda Pierce, counsel for petitioner).

94. WASH. CONST. art. 1, § 11.

95. *See* Transcript of Oral Argument, *supra* note 93, at 17–18 (statement by Narda Pierce, counsel for petitioner).

96. *See id.* at 22–23.

97. Oregon v. Hass, 420 U.S. 714, 719 (1975); *see A Federalist View*, *supra* note 18, at 1715–16.

98. *See* discussion *infra*, Parts II.C.–III.

99. *Davey*, 540 U.S. at 717.

100. *Id.* Northwest College, now named Northwest University, is located in Kirkland, Washington. Its mission statement reads, "The mission of Northwest University is to provide, in a *distinctly evangelical* Christian environment, quality education to prepare students for service and leadership." *About the University*, Northwest University Web page, http://www.northwestu.edu/about/ (last visited Jan. 22, 2005) (emphasis added). Furthermore, all students at Northwest College are required to attend chapel, a time "to know God; to have fellowship within the body; and to reach the world," three times a week. Chapel Introduction, Northwest University Web page, http://www.northwestu.edu/ministry/chapel/index.php (last visited Jan. 22, 2005). This required class for every student at Northwest College teaches the same principles and doctrines that a pastoral studies major would take in pursuit of a "theology" degree. There seems to be no distinction between violating the Washington taxpayers' freedom

entering Northwest College, Davey declared a double major in business administration and pastoral ministries and was subsequently informed that he could not use his scholarship due to his chosen major of "theology."[101] He refused to change his major and filed an action in the District Court for the Western District of Washington against Washington State officials under 42 U.S.C. § 1983,[102] seeking to enjoin the State from denying him the scholarship based on his pursuit of a theology degree.[103] The district court granted summary judgment to the State, rejecting Davey's constitutional claims.[104] The Court of Appeals for the Ninth Circuit reversed, holding that the Washington scholarship singled out religion for disfavored treatment and that its discrimination did not survive the requisite strict scrutiny because the State's anti-establishment defense is not a compelling interest and therefore a violation of Davey's Free Exercise rights.[105] The Ninth Circuit also gave weight to Davey's Free Speech claim, recognizing the viewpoint discrimination by the State.[106] On writ of certiorari, the Supreme Court of the United States reversed, holding that the State's policy did not violate Davey's Free Exercise rights.

B. *The Majority's Rationale Behind* Davey

Eighteen years after the Supreme Court held in *Witters v. Washington Department. of Services for the Blind*[107] that Washington *could* extend a generally available scholarship to a student pursuing a theology degree without violating the Establishment Clause, a principle recently confirmed in *Zelman*,[108] a large majority of the *Davey* Court held that the Free Exercise Clause of the Federal Constitution does not *compel* Washington to include theology majors in the benefit made generally available to others.[109] The Court declared that *Davey* involved the "play in the joints" between the

---

of conscience by eontributing funds to allow a student to attend Northwest College where he will be required to attend chapel three times a week and contributing funds to a student who will take similar classes, but in pursuit of a certain degree. The incongruence of that which Washington is opposed to funding and what it readily funds is outside the scope of this Note, but it is an important fact to consider and another justification for protecting Davey's right to receive the scholarship benefit.

101. *Davey*, 540 U.S. at 717.

102. 42 U.S.C. § 1983 (2000) is the statute under which a citizen may sue state officials for infringing upon a federal constitutional right.

103. *Davey*, 540 U.S. at 718.

104. *Id.* Davey's constitutional claims in district court were violations of, inter alia, the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, as incorporated by the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment.

105. *Davey v. Locke*, 299 F.3d 748, 750 (9th Cir. 2002). The Ninth Circuit cited *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), as authority for invoking strict scrutiny for a statute that was discriminatory on its face toward religion, thus violating the Free Exercise Clause of the Federal Constitution.

106. *Davey*, 299 F.3d at 755–56.

107. 474 U.S. 481, 489 (1986) (holding that extension of a scholarship to one pursuing a theology degree does not violate the Establishment Clause).

108. 536 U.S. 639 (2002). *See supra* notes 60–68 and accompanying text.

109. *See Davey*, 540 U.S. at 719. The Court granted certiorari on the question of "whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the

Free Exercise and Establishment Clauses, allowing the state to have discretion in funding decisions.[110] The Court rejected *Davey*'s reliance on *Lukumi*,[111] reasoning that there must be evidence of an animus toward religion before strict scrutiny will apply to a statute that is facially discriminatory.[112] Furthermore, according to the Court, the denial of a scholarship to Davey to pursue a theology degree does not preclude him from exercising his religious beliefs and practices;[113] the alleged discrimination was merely the State's choice of what to fund and what not to fund, a choice it is entitled to make.[114] The Court also cited historical uprisings opposing the appropriation of funds to the education of clergy as further justification for Washington's policy of excepting the clergy from its generally available benefit.[115]

Justice Scalia's dissenting opinion, joined by Justice Thomas, contends that *Davey* should be controlled by *Lukumi* because a religious adherent has been burdened by

---

ministry, can deny them such funding without violating the Free Exercise Clause." *Id.* (citations omitted).

110. *Id.* This concept was first introduced in Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970), which upheld a state's practice of extending a benefit to a religious group. The Court stated that this "play in the joints" is an area in which the state may choose to extend a generally available benefit without offending the Establishment Clause. *See id.* at 669, 678-79; *supra* text accompanying notes 42–44.

111. 508 U.S. 520 (1993).

112. *See Davey*, 540 U.S. at 720. "That a State would deal differently with religious education for the ministry than with education for other callings is . . . not evidence of hostility toward religion." *Id.* at 721. Since *Davey* was a funding case, the requirement for an animus toward religion could apply only to funding cases, depending on how narrowly or broadly one reads the Court's opinion.

113. *Id.* at 720. The Court found Davey's situation to be unlike that in *Lukumi*, where the Santeria adherents were precluded from making animal sacrifices, an important part of their religious practices. The Santeria adherents were singled out as the only religious sect to be precluded from sacrificial activity, as there were exceptions for Jews and other sacrificial events. *See Lukumi*, 508 U.S. at 534–35. One could argue that, in fact, Davey was precluded from practicing his religion, as many evangelical pastors feel it is their "calling" from God to go into the ministry, and if Davey was not financially able to attend college without the scholarship, the purpose for which the scholarship was serving, it is not too difficult to find that he has been precluded from the exercise of his religious beliefs. Nevertheless, the Court has maintained in the past that it is not a violation of one's Free Exercise right to make religious practices more expensive except in cases involving unemployment compensation. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the State could not deny a religious adherent unemployment compensation when that person had lost her job after choosing to conform with her religious practices instead of the requirements of the job). *Cf.* United States v. Lee, 455 U.S. 252 (1982) (holding that an Amish man could not refuse, through religious objection, to pay social security taxes for his employees); McGowan v. Maryland, 366 U.S. 420 (1961) (holding Sunday closing laws constitutional despite the financial burden it placed on Saturday sabbatarians, whose religious practices compelled them to close on Saturdays as well, thus losing revenues for two days as opposed to Sunday sabbatarians who only closed one day).

114. *See Davey*, 540 U.S. at 720–21.

115. *See id.* at 723 n.6 (citing colonial Virginia's "A Bill Establishing A Provision for Teachers of the Christian Religion," reprinted in Everson v. Bd. of Educ., 330 U.S. 1, 74 (1947), and the public outcry that ensued resulting in Virginia's Bill for Religious Liberty); *see also supra*, Part I.A.

facially discriminatory state action.[116] Davey merely wants to be treated the same as all other Promise Scholarship applicants that meet the neutral criteria. According to Justice Scalia, Washington has created a "public welfare" program made generally available to everyone except those defined by their religious beliefs and practices.[117] He likens this burden on religious adherents to a special tax that would be assessed only to those who pursue theology degrees, since they are arguably paying more for college than they would had they chosen not to pursue a theology degree.[118] Such a special tax has the effect of burdening individuals who choose to pursue religious careers. Conversely, the majority references taxes used to support the clergy in colonial times as justification for denying Davey the scholarship.[119] The historical taxes that the majority uses in its rationale were actually taxes assessed specifically and solely to fund the clergy;[120] the monies that flowed to the clergy were not taken from a general tax for which the clergy was one of the beneficiaries. The funding scheme used in colonial times to support the clergy is wholly different from the funding scheme of the Promise Scholarship, which does derive from a general fund. Therefore, the Court's reliance on the historical outcry against funding for the clergy is misplaced and unrelated to the Promise Scholarship.[121]

C. The Court's Departure from Neutrality

1. The Changed Role of History in Religion Clause Jurisprudence

History has never been a controlling legal force. The Constitution was written broadly so that it could be interpreted in different ways as become necessary with changes in society, but some doctrines require the Court to consider history to discern the intent of the writers of the Constitution. In *Lynch v. Donnelly*,[122] Chief Justice Burger emphasized the importance of history in Establishment Clause cases, stating that the Court has "refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*.'"[123] The *Lynch* Court traced the historical presence of Christianity in American life through holidays such as Thanksgiving and Christmas, art found in the National Gallery, and use of prayer and references to God in governmental exercises and legislative sessions, as well as references to God on currency, in thc Pledge, and in the national motto, to

---

116. *See Davey*, at 726–35 (Scalia, J., dissenting).

117. *See id.* at 726–27 (quoting *Everson*, 330 U.S. at 16).

118. *See id.*

119. *See supra* note 115 and accompanying text.

120. *See Davey*, 540 U.S. at 727 (Scalia, J., dissenting); *Rosenberger*, 515 U.S. 819, 853 (1995) (Thomas, J., concurring) (disagreeing with the dissent's citation to the Virginia tax assessed specifically to fund the clergy as justification for not supporting a religious publication in a forum opened to all other publications).

121. Justice Scalia discussed this discrepancy as one of bis reasons for dissenting. *See Davey*, 540 U.S. at 727–29 (Scalia, J., dissenting).

122. 465 U.S. 668 (1984) (holding that the display of a crèche in a public display was not a violation of the Establishment Clause despite its pervasively Christian nature).

123. *Id.* at 678 (emphasis in original) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970)).

support its holding that a nativity scene displayed by the city was not an infringement of the Establishment Clause.[124]

Most recently, Chief Justice Rehnquist invoked history to support his concurrence in *Elk Grove Unified School District v. Newdow*,[125] stating that the words "under God" in the Pledge of Allegiance did not violate the Establishment Clause because of the pervasive history of God in American culture.[126] When a four-member group of the Court is known for "voting for . . . religion more than they [are] interpreting liberty"[127] in discriminatory funding cases because of the history of religion in American culture, the large majority garnered against religion in *Davey* is quite surprising.[128]

The majority opinion of *Davey*, written by Chief Justice Rehnquist, departs from the Court's customary use of history in past Religion Clause challenges. The Court, especially Chief Justice Rehnquist, typically used the history of Judeo-Christian thought in the United States—beginning with the original colonies and continuing to the present, in which an overwhelming majority of Americans believe in God[129]—to uphold equal, if not preferential, treatment for religious adherents in its Religion Clause jurisprudence.[130] Thus, for the modern Court to use the historical uprisings against a tax allocated specifically for the clergy, though not directly analogous to *Davey*,[131] to deny religious adherents even *equal* treatment is almost an aberration.

2. The Requirement of an Animus Toward Religion to Prove Facial Discrimination

In *Davey* the Court narrowed the holding of *Lukumi*, stating that despite the discrimination on the face of the statute against theology majors, an animus toward theology majors must be shown before the statute would be construed as presumptively unconstitutional and therefore subject to strict scrutiny.[132] Depending on one's reading of the scope of the holding, animus may only be required in funding cases.[133] But the Court, in both *Lukumi* and *Davey*, seemed to be more concerned with the *effect* of the discriminatory treatment than the motivation behind it. In *Lukumi*, the Santeria adherents faced criminal sanctions, which seems to be the "animus" the Court was

---

124. *Id.* at 674–77.

125. 542 U.S. 1 (2004).

126. *Id.* at 26–29 (Rehnquist, C.J., concurring) (referring to numerous other instances of God's placement in our culture: Washington's first inaugural address; the yearly Thanksgiving proclamation; "In God We Trust" as the national motto and on every piece of coinage; the Supreme Court Marshal's opening proclamation, "God save the United States and this honorable Court"; and the national anthem).

127. Laycock, *Theology Scholarships*, *supra* note 8, at 175 (discussing the usually consistent voting of Chief Justice Rehnquist and Justices Scalia, O'Connor, and Thomas in favor of religion, as seen in *Rosenberger*, 515 U.S. 819 (1995)).

128. The *Davey* majority garnered seven votes, with only Justices Scalia and Thomas dissenting. *Locke v. Davey*, 540 U.S. 712, 712 (2004).

129. Michael Newdow, *David vs. Goliath* (Oct. 12, 2003), *in* FREETHOUGHT TODAY (Freedom From Religion Found. Inc., Washington, D.C.), Dec. 2003 (an atheist stating that ninety-three percent of Americans believe in God).

130. *See* discussion *infra* Part II.C.1.

131. *See* discussion *supra* notes 119–21 and accompanying text.

132. *Davey*, 540 U.S. at 720.

133. *See* Laycock, *Theology Scholarships*, *supra* note 8, at 161–62.

looking for in *Davey*.[134] Moreover, the Court in *Davey* examined the purpose for including the heightened anti-establishment provision in state constitutions,[135] an inquiry into legislative motive in which Chief Justice Rehnquist did not join in *Lukumi*.[136] In fact, there was not even a majority of the Court that joined in the part of the *Lukumi* opinion that used legislative records to determine whether there was an animosity toward the Santeria adherents.[137]

Though the Court in *Davey* did not use legislative records, it did use the history of States' anti-establishment provisions to find the purpose of such provisions. Furthermore, it rejected and declined to comment on the plausibility of Washington's anti-establishment clause as a "Blaine Amendment," driven by discrimination, dismissing the issue in a footnote.[138] Many state "Blaine Amendments" were anti-establishment provisions that excluded religious institutions and organizations from public funding, motivated by Protestant leaders who were outraged at public funding that flowed to Catholic schools.[139] In the mid-1800s, Catholics had formed their own schools to escape the pervasive Protestant culture taught in the public classroom.[140] When the first Blaine Amendment, proposed as an amendment to the Federal Constitution, failed in Congress, more than half of the states enacted similar amendments for their respective state constitutions to keep from funding the Catholic schools.[141] The State of Washington contended that its anti-establishment provision, Section Eleven of the Washington Constitution, is not a "Blaine Amendment," and Davey did not dispute this.[142] The question remains whether the Court would construe evidence that Washington's anti-establishment provision was motivated by anti-Catholic animus as sufficient to invalidate the provision under *Lukumi*.[143]

---

134. *See id.* "In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind [than in *Lukumi*]. It imposes neither criminal nor civil sanctions on any type of religions service or rite." *Davey*, 540 U.S. at 720.

135. *Davey*, 540 U.S. at 722–24. Although the Court did not look into the specific history of the Washington constitutional provision, it explored the reasons for inclusion of such a provision in various other states as justification for Washington's provision.

136. Instead, the Chief Justice joined in Justice Scalia's concurrence-in part and concurrence in the judgment, which explicitly repudiated the inquiry into legislative motive for the facial discrimination against the Santeria adherents. Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 558–59 (1993) (Scalia, J., concurring) (arguing that inquiry into the purpose of a law that affects a First Amendment right is rarely appropriate because the appropriate inquiry is into the effect of the law on one's First Amendment rights). "[The First Amendment] does not put us in the business of invalidating laws by reason of the evil motives of their authors." *Id.* at 558.

137. Part II.A.2 of Justice Kennedy's opinion in *Lukumi* was joined only by Justice Stevens.

138. *Davey*, 540 U.S. at 723 n.7.

139. *See* Slater, *supra* note 30, at 586–92.

140. *Id.*

141. *Id.*

142. *Davey*, 540 U.S. at 723 n.7.

143. *See* Laycock, *Theology Scholarships*, *supra* note 8, at 187–91 (arguing that a claim similar to Davey's could win by establishing bad motive through a "Blaine Amendment").

3. The "Play in the Joints"

The Court characterizes *Davey* as a case in which there is a "play in the joints" between the Establishment Clause and the Free Exercise Clause.[144] This occurs when the Establishment Clause does not *forbid* the state from extending benefits to religious adherents and organizations,[145] and the Free Exercise Clause, alternatively, does not *compel* an extension, thus conferring discretion upon the state.[146] In past funding cases that fell into this chasm between the two Religion Clauses, the Free Speech Clause was also implicated. Through the Free Speech Clause, the Court protected the religious adherent's equal access in exercising his religious right, ensuring that he received the benefit that was available to all others.[147] Though the Supreme Court dismissed Davey's Free Speech claim,[148] the principles set forth in the Court's Free Speech cases that protected religious equality and liberty should be maintained in *Davey*, even absent a valid Free Speech claim.[149] The Establishment Clause alone protects these rights—religious liberty and equality.[150] The scholarship money made available to the Washington high school students that met the neutral criteria[151] is arguably the same type of funding forum opened in *Rosenberger* for the publication of student magazines.[152] Forum analysis is usually reserved for Free Speech challenges, but there

---

144. *Davey*, 540 U.S. at 719.

145. Witters v. Wash. Dept. of Servs. for Blind, 474 U.S. 481 (1986).

146. *See Davey*, 540 U.S. 719.

147. *See* Rosenberger v. Univ. of Va., 515 U.S. 819 (1995) (holding that a religious publication had an equal access right to printing funds that were generally available to all other publications that met the neutral criteria because the school had opened the fund as a forum in which it could not engage in viewpoint discrimination); Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that an evangelical organization had an equal access right to show its film series that presented a topic from a Christian point of view at a school open after hours for social, civic, and recreational purposes, which was a limited forum in which the school could not engage in viewpoint discrimination); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a religious group had an equal access right to use university facilities that were open to all other groups in a limited forum in which the university could not engage in viewpoint discrimination). In an interesting article, Professor Conkle assesses the redundancy of the Free Exercise Clause in that the rights that are protected by it are already protected by Free Speech principles. Daniel O. Conkle, *The Free Exercise Clause: How Redundant, and Why?*, 33 LOY. U. CHI. L.J. 95 (2001) (arguing that perhaps Free Speech protections already ensure the rights of the Free Exercise Clause). If this is true, *Rosenberger* (upholding a free exercise challenge in a funding forum) and *Davey* (rejecting a free exercise challenge in a funding forum) are inconsistent.

148. *Davey*, 540 U.S. at 721. The Ninth Circuit relied, in part, on Davey's Free Speech claim in its decision that held the Washington Promise Scholarship unconstitutional. *See* Davey v. Locke, 299 F.3d 748, 755–56 (9th Cir. 2002).

149. See Laycock, *Theology Scholarships*, *supra* note 8, at 191–96 for an interesting discussion of a college as a forum for speech within which the Promise Scholarship could not discriminate because of Free Speech principles.

150. *See supra* notes 6–7 and accompanying text.

151. The neutral criteria for the Promise Scholarship are academic achievement, income level, and enrollment criteria (enrolled at least half time at a nationally accredited school in the state of Washington). *Davey*, 540 U.S. at 716.

152. Professor Laycock asserts that the Court would not even need to engage in a forum

is no logical reason that Davey should not be protected in the same type of funding situation as the religious adherents were in *Rosenberger* only because the Court sees no merit in Davey's hybrid Free Speech right.[153] The student magazines in *Rosenberger* had to meet neutral criteria before they could be considered for funding.[154] Before the Court invalidated the school's policy, the school excluded all religious magazines from funding, the sole exclusion to the funding, much like the Promise Scholarship, and this is precisely what the Court struck down in *Rosenberger*.[155] The Court should have afforded Davey the same protection of religious liberty and equality,[156] and it could have done so by more fully considcring the implications the Establishment Clausc had on Davey's claim. In cases that fall into the "play in the joints," the Court should fully consider both the Free Exercise and Establishment Clauses to afford the claimant all protections available in both clauses.

The State of Washington argued that it has the discretion to choose what to fund and what not to fund because of the "play in the joints" between the Free Exercise and Establishment Clauses,[157] a choice which the State typically enjoys.[158] But, as Professor Laycock explains, funding that includes religious organizations or religious adherents is different from all other funding because of the Establishment Clause. Since the Court's Establishment Clause jurisprudence has maintained a principle of neutrality, a state must appropriate funds on a neutral basis if the benefit is available upon otherwise neutral criteria.[159] Because *Davey* fell in between the two Religion Clauses, the "play in the joints," the neutrality protections of the Establishment Clause should have had some force in the Court's decision to allow the State full discretion in funding.

---

analysis because viewpoint discrimination, present in *Davey* through exclusion only of theology majors, is presumptively unconstitutional regardless of a forum of any kind. Laycock, *Theology Scholarships*, *supra* note 8, at 192 (citation omitted).

153. I borrow the term "hybrid" from Justice Scalia's opinion in *Employment Division v. Smith*, 494 U.S. 872, 882 (1990), referring to the need for two constitutional rights to receive an exemption from a generally applicable law. Justice Scalia, the author of *Smith*, obviously does not want to extend the hybrid right requirement to a situation like Davey's since he wrote one of the dissenting opinions to the denial of Davey's claim.

154. The student group that would maintain the magazine had to have a majority membership of students, had to have managing officers who were full-time students, could not discriminate in its membership, and had to place a disclaimer on all correspondence with third parties that the organization was independent of the university. Rosenberger v. Univ. of Va., 515 U.S. 819, 823 (1995).

155. *See* discussion *supra* Part I.C.

156. See *supra* notes 51–54 and accompanying text for a discussion of neutrality principles maintained by the Court in *Rosenberger*.

157. *See* Transcript of Oral Argument, *supra* note 93 at 26–27 (statement by Narda Pierce, counsel for petitioner).

158. The Court in *Rosenberger* recognized this right of the State. "'[W]hen the government appropriates public funds to establish a program it is entitled to define the limits of that program.'" *Rosenberger*, 515 U.S. at 892 (Souter, J., dissenting) (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)). But the Court rejected the State's discretionary power because the choice not to fund was based on viewpoint discrimination. *Id.* at 845 (majority opinion).

159. *See* Laycock, *Theology Scholarships*, *supra* note 8, at 175–184.

The Supreme Court upheld state discretionary funding as a permissible choice of the state to "fund one activity to the exclusion of the other"[160] in *Rust v. Sullivan*, a viewpoint discrimination challenge to a government policy of appropriating funds to doctors wbo told their patients about contraception, but not about abortion.[161] Similarly, the Court upheld a government decision to appropriate funds to Medicaid programs for childbirth, but not for abortions.[162] Professor Laycock contends that the Court's justification in *Davey* that "[t]he State has merely chosen not to fund a distinct category of instruction"[163] was taken from these discretionary funding cases involving abortion.[164] But when the Court declared in *Everson* that a state could not exclude religious adherents "from receiving the benefits of public welfare legislation,"[165] it extended the reach of the Establishment Clause to include funding. Therefore, the neutrality principle of the Establishment Clause also is extended to funding schemes that implicate religious adherents. Unlike funding for childbirth and abortions, the Court should require a state to maintain a position of neutrality toward religious adherents when extending a generally available benefit; it may not exclude the religious on the basis of their religious convictions as a state may do in excluding social services that it does not wish to endorse, such as abortion.[166]

The Court began its Establishment Clause jurisprudence with the principle of neutrality in *Everson*, but the Rehnquist Court formalized that neutrality principle and made it an essential part of its Religion Clause inquiries, culminating with *Zelman*.[167] Though the Court addressed *Davey* as a Free Exercise claim, the Establishment Clause principle of neutrality should have had more force in the "play in the joints" between the two clauses, rendering Washington's discriminatory funding unconstitutional. The Court dismissed any Establishment Clause violation in a footnote, stating that the reasons to dismiss under the Establishment Clause were the same as they had discussed in dismissing the free exercise claim.[168] While the State may be correct that Davey's rights to freedom of action and belief under the Free Exercise Clause are not burdened

---

160. *Rust*, 500 U.S. at 193 (holding that such discretionary funding was not viewpoint discrimination). *See also* Laycock, *Theology Scholarships*, *supra* note 8, at 175.

161. *See Rust*, 500 U.S. at 194; Laycock, *Theology Scholarships*, *supra* note 8, at 175.

162. Maher v. Roe, 432 U.S. 464 (1977).

163. *Davey*, 540 U.S. at 721.

164. Laycock, *Theology Scholarships*, *supra* note 8, at 176.

165. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

166. *See* Laycock, *Theology Scholarships*, *supra* note 8, at 176–77. Professor Laycock also cites the endorsement test as justification for this argument. The state may not "'endorse or disapprove of religion.'" *Id.* at 177 (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). The second prong of the *Lemon* test also conveys a principle of neutrality: "[the statute's] principal or primary effect must be one that neither advances nor inhibits religion." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

167. Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding vouchers distributed to students, which could be used at sectarian private schools without any requirements that the funds be used for secular aspects of education). *See also supra* Part I.C–D. Part I.D provides a comparison of formal neutrality and substantive neutrality.

168. *Davey*, 540 U.S. at 725 n.10 ("Although we have sometimes characterized the Establishment Clause as prohibiting the State from 'disproving of a particular religion or religion in general' . . . the State has not impermissibly done so here." (citations omitted)). See also *supra* Part II.A. for a discussion of the Washington Constitution.

by the denial of the scholarship,[169] that justification does not change the discriminating nature of the scholarship on the basis of religion, which is an infringement of the Establishment Clause.

The new Chief Justice of the Court, John G. Roberts, gave little indication as to his views on the Religion Clauses in his confirmation hearings, and he has not published any judicial opinions or legal scholarship on the subject. He did state in day two of the confirmation hearings that, in his opinion, "the animating principle of the framers, that's reflected in both of the religion clauses, is that no one should be denied the rights of full citizenship because of their religious belief or their lack of religious belief."[170] And though he "[hasn't] expressed [his] personal views on the establishment clause in any context," he believes that the framers of the constitution did not "[intend] just to have a protection for denominational discrimination" in protecting the citizens' exercise, or non-exercise, of religion.[171] Whether Chief Justice Roberts would ascribe to formal neutrality between religion and nonreligion remains to be seen, but an amicus brief he collaboratively wrote while serving as Solicitor General is somewhat revealing.[172] Though it is a brief written to advocate the position of the government, Solicitor General Roberts made the same connection between the Establishment Clause and forum analysis, as equal protectors of equal treatment without regard to religion—neutrality.[173]

III. THE ESTABLISHMENT CLAUSE REVISITED

Justice Black declared in *Everson*[174] that the Establishment Clause applied to the states, thus beginning the formal incorporation of the Establishment Clause.[175] The Court has used the incorporation precedent from *Everson* to validate religious accommodation by the states and extension of benefits that do not run afoul of the Establishment Clause.[176] In certain contexts, the Court has declared that the Free Exercise Clause compels a state to accommodate religion to prevent a religious adherent from choosing between his religion and following the regulation.[177] The compulsory state accommodation was partly restricted in *Employment Division v. Smith*,[178] but the State can nevertheless choose to accommodate the religious adherent

---

169. *Davey*, 540 U.S. at 720.

170. *John G. Roberts Confirmation to the Supreme Court: Hearing of the Senate Judiciary Committee* (Sept. 13, 2005), *available at* http://www.post-gazette.com/pg/05257/571043.stm (last visited Nov. 5, 2005) (statement of John G. Roberts).

171. *Id.*

172. Brief for the United States as Appellant, Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (No. 88-1597), 1989 WL 1127408.

173. *See id.* at 30–36.

174. Everson v. Bd. of Educ., 330 U.S. 1, 18 n.21 (1947).

175. *Id.* at 14–15; *see supra* Part I.B.

176. *See* discussion *supra* Parts I.B–C and accompanying notes.

177. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the State was compelled to grant a religious adherent an exemption from denial of unemployment compensation when that person had lost her job due to choosing to conform with her religious practices instead of the requirements of the job). Some argue this compulsory accommodation is only required in the unemployment compensation context.

178. 494 U.S. 872, 882 (1990) (requiring the existence of a hybrid constitutional right to

to relieve him of a burden from a generally applicable law.[179] When a religious adherent is not protected by the Free Exercise Clause (or Free Speech principles), the Court refers to the "play in the joints" between the Free Exercise Clause and the Establishment Clause that allows a state discretion on how to pursue the matter. This "play in the joints" has now, after *Davey*, left the religious adherent with no recourse: he is no longer afforded strict scrutiny when burdened by a facially discriminatory statute unless an animus, which may need to rise to a penal level, toward his religion can be shown,[180] nor are his religious convictions distinctly important to the Court as they once were.[181] In fact, religious convictions seem to have been relegated to a lower status than ever before.

Never before has the Court held that the Establishment Clause compels a state to ensure that religious adherents receive their share of generally available benefits, but perhaps it should. The receipt of a benefit is different from the relief from a burden. This distinction is demonstrated in the difference between abortion funding schemes (the right not to be unduly burdened by the government) and the inclusion of religion in funding schemes (the right to religious liberty and equality and therefore neutrality).[182] The Establishment Clause, as incorporated, should compel a State to extend the right to neutrality in the receipt of generally available benefits as the Court has described the neutrality principle in most of its major Religion Clauses cases.[183] By allowing a State to exclude religious endeavors, the Court is not adhering to its self-proclaimed Establishment Clause principles, thus giving a State more power than an incorporated Establishment Clause allows. Such discretion runs afoul of incorporation principles and does not adequately protect religious liberties.

A. Incorporation?

If the Court is going to give states the discretion to exclude religious pursuits from otherwise generally available benefits, the Court should cease its position that the Establishment Clause is incorporated. Before incorporation, a State had the discretion to exclude religion, but incorporation made the protections of federal constitutional rights applicable to the States.[184] After incorporation, the States are no longer the regulators of religious liberty and equality as they once were; the liberties exuded in the Federal Constitution confer religious rights upon the citizenry.

As discussed previously in this Note, there is little historical support for incorporating the Establishment Clause.[185] The framers wanted to leave religious liberty issues to the States and also wanted to prevent the establishment of a national

---

compel an exemption from a generally applicable law except in special situations such as unemployment compensation and education, for which the Court carved out individual exemptions).

179. *See id.*

180. *But see supra* note 112 and accompanying text (explaining that an animus may only be required in funding cases).

181. *See supra* note 79.

182. *See* Laycock, *Theology Scholarships*, *supra* note 8, at 177; *supra* notes 147–56 and accompanying text.

183. *See supra* Parts I.C–D.

184. *See supra* Part I.B.

185. *See supra* Part I.B.

church.[186] If the Establishment Clause were not incorporated, then Washington would be able to exclude Davey from its scholarship program in the name of the State's religious principles, which is precisely what it did in *Davey*. Absent incorporation, Washington could protect its citizens' "freedom of conscience," as its constitution provides, without infringing upon their religious rights because the State would have the authority to regulate religious liberties. But, notwithstanding incorporation of the Establishment Clause, the Court upheld Washington's exclusion.

Justice Thomas has argued that the Establishment Clause does not confer any substantive rights because the clause is only a concept of federalism, "intended to prevent Congress from interfering with state establishments."[187] If the Establishment Clause is only a concept of federalism, then incorporation is futile because it applies the clause to both the federal and state governments, losing the federalism component. Professor Daniel O. Conkle contends that Chief Justice Rehnquist also wished to maintain the federalism component in the Establishment Clause, encouraging the discretion of state policymakers on religious liberties.[188] This goal of the Chief Justice may explain his surprising vote in *Davey* to "give the states considerable leeway" in religious matters.[189] But the discretion that *Davey* gave to the States to exclude religious groups from otherwise generally available benefits is contrary to the incorporation of the Establishment Clause.

B. Neutrality as a Federal Constitutional Right

If the Court is to respect its precedent and maintain that the Establishment Clause, guided by the principles of neutrality, is incorporated, then it cannot use the Establishment Clause to validate only *extensions* of benefits, as it did in *Mueller*, *Witters*, *Zobrest*, *Agostini*,[190] and *Zelman*.[191] Neutrality compels equal treatment of the religious and nonreligious alike; it compels treatment *without regard* to religion.[192] Much like viewpoint discrimination, which is impermissible under Free Speech principles, the federal government and the States should not be able to discriminate on the basis of religion if the Establishment Clause is incorporated. The Court has never declared that one has a "right" to neutrality, but the protection against favoring or disfavoring religion is a foundation principle of the Establishment Clause.[193] Perhaps the Court should explicitly state the right inherent in the various Establishment Clause tests—the right to neutrality.

---

186. *See supra* Part I.A–B.

187. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

188. *See* Conkle, *supra* note 6, at 23.

189. *Id.* at 20.

190. *See supra* note 50 and accompanying text.

191. *See supra* note 65 and accompanying text.

192. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 16–18 (1947).

193. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("[It] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. *Disapproval sends the opposite message.*") (emphasis added).

The State of Washington chose not to follow the doctrine of neutrality, citing its own state constitution as justification for excluding theology majors.[194] If Washington's state constitution allows it to violate the principle of neutrality, it is violating the protections of the Federal Establishment Clause. A right to neutrality is essential to the preservation of one's religious rights that fall into the "play in the joints" divide between the Religion Clauses that the Court has not yet protected.[195]

The Court seems to hesitate in requiring neutrality between religion and nonreligion, which was at issue in *Davey*, but doubtfully would it be as hesitant to require neutrality among religions. For example, it is doubtful that the Court would vote as it did in *Davey* if the Statc had excluded only those students wishing to pursue rabbinical school in the future, as opposed to *all* theology majors—Christians, Muslims, and Jews alike. Such an exclusion would be disfavoring Jews and, therefore, preferring one religion over another, a different abuse of Establishment Clause doctrine. Counsel for the State of Washington conceded at oral argument that such a discrimination among religions would be impermissible.[196] The Court must require the States to maintain neutrality among religious sects *and* between religion and nonreligion to avoid discrimination in the name of religion, as Washington was allowed to pursue through *Davey*.

If the Court is going to maintain a position of neutrality in its Establishment Clause jurisprudence, a religious adherent should have a right to that neutrality. Since the First Amendment is incorporated,[197] a State may not infringe upon one's right to neutrality. Even if its state constitution gives it the power to do so, a State may not limit a person's federally protected constitutional rights.[198] If the Court would explicitly recognize one's right to neutrality under the Establishment Clause, as opposed to merely *referring* to it in Establishment Clause cases, Free Exercise cases, and Free Speech cases alike, religious liberty would truly be able to flourish.

When the State of Washington chose to open its scholarship to private sectarian schools, it no longer had the right to offer that bcnefit to all educational majors, excluding only one, defined by religion. Washington could have limited the scholarship to students that attended only public schools in furtherance of the state public school system.[199] Washington chose to interpret its constitution to allow the inclusion of

194. *See supra* Part II.A–B.

195. "[T]he right to religious liberty is a right to government neutrality." Laycock, *Theology Scholarships*, *supra* note 8, at 177. *Cf.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49–52 (2004) (Thomas, J., concurring) (arguing that the Establishment Clause does not confer any substantive right and is rather only a concept of federalism that should only apply to the federal government, thus rejecting incorporation).

196. *See* Transcript of Oral Argument, *supra* note 93, at 7 (statement by Narda Pierce, counsel for petitioner).

197. *See supra* Part I.B.

198. Oregon v. Hass, 420 U.S. 714, 719 (1975). With incorporation, a state must respect the doctrinal refinements of the federal constitutional amendment that the federal courts have defined. *See supra* notes 97–98 and accompanying text; Laycock, *Theology Scholarships*, *supra* note 8, at 176; *A Federalist View*, *supra* note 18, at 1708. See also *supra* Part III.A for a discussion of the incorporation doctrine.

199. Locke v. Davey, 540 U.S. 712, 729 (2004) (Scalia, J., dissenting). As Justice Scalia explains, this would "just happen[] not to subsidize [religion]." *Id.*

religious schools in the benefit, and it cannot, in the same breath, call on that same constitution to deny the benefit to one majoring in theology, a religious endeavor. If Washington had excluded all science majors because it wanted to enhance the humanities degrees in the state of Washington, a student majoring in science probably would not have a claim before the Court, but the Court has never stated that the Federal Constitution requires a position of neutrality with regard to science degrees.[200] The Court has maintained a position of neutrality in its Establishment Clause jurisprudence; since the Establishment Clause does affect Davey's claim, he has a right to the protections and benefits of that neutrality.

CONCLUSION

By abandoning the neutrality principle of the Establishment Clause, the Court allowed the State of Washington to deny Davey access to a benefit that was otherwise generally available to all others who met the neutral criteria. Washington's justification for this exception was its state antiestablishment principles, which are more restrictive than that of the Federal Constitution and, arguably, impermissible under the Court's previous Establishment Clause jurisprudence. If the Court continues to maintain the incorporation of the Establishment Clause, applying its force and doctrine against the States, the Court must require the States to also maintain a position of neutrality. With *Davey*, States have the discretion to exclude religious adherents from generally available funding, specifically because of the religious nature of the potential beneficiaries. The States now have too much power to encroach upon religious liberties and equality by treating religious adherents differently than the nonreligious.

Since it is doubtful the Court will abandon the incorporation of the Establishment Clause, it should afford citizens the protections of the Establishment Clause principles when neither Free Exercise rights nor Free Speech rights are able to protect the religious adherent from being discriminated against—the "play in the joints" area of Religion Clause jurisprudence that has always been troublesome. The Court should adhere to the principle declared in *Everson* that first incorporated the Establishment Clause: "[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[201] The State of Washington acted as Davey's "adversary" when it denied him the scholarship based on Davey's individual choice to pursue a theology degree. As a religious classification, this exclusion from the Promise Scholarship runs afoul of the Establishment Clause and its neutrality principles.

---

200. *See* Laycock, *Theology Scholarships*, *supra* note 8, at 176.
201. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).