

DAVEY AND THE LIMITS OF EQUALITY

Laura S. Underkuffler*

I. INTRODUCTION

In *Locke v. Davey*,¹ the United States Supreme Court (by a 7-2 vote) upheld a Washington State college scholarship program that denied funds to students who pursued degrees that were “devotional in nature or designed to induce religious faith.”² Chief Justice Rehnquist, writing for the majority, rejected the argument that because the program’s restriction lacked facial neutrality, it violated federal constitutional guarantees.

Although *Davey* might appear—at first blush—to have addressed a fairly narrow question, the Court’s decision in this case assumes great significance because of other recent action by the Court. In particular, the Court had previously held in *Zelman v. Simmons-Harris*³ that the federal Establishment Clause presented no bar to voucher funding of religious schools. This decision was anticipated to clear the way for aggressive adoption of school voucher programs by state and local governments. However, voucher proponents have found themselves stymied by more stringent state constitutional provisions that prohibit taxpayer funding (including voucher funding) of religious education.⁴ Whether states could persist in these denials became the most important question in the post-*Zelman* landscape. Voucher proponents broadly argued that state no-funding laws that lack facial neutrality—that is, those that single out religion for particular, disadvantageous treatment—violate federal free exercise, antiestablishment, and equal protection guarantees. Since *Davey* involved a state law of this type, it promised to shed light on the general ability of state governments to deny equal funding for religious activities or institutions on the basis of the states’ own (more stringent) antiestablishment guarantees.

* Professor of Law, Duke University School of Law.

1. 540 U.S. 712 (2004).

2. *Id.* at 716 (quoting Petr. Br. at 6).

3. 536 U.S. 639 (2002).

4. See e.g. *Cal. Teachers Assn. v. Riles*, 632 P.2d 953 (Cal. 1981); *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st Dist. App. 2004); *Spears v. Honda*, 449 P.2d 130 (Haw. 1968); *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971); *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983); *Op. of the JJ. to the Sen.*, 514 N.E.2d 353 (Mass. 1987); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974); *Dickman v. Sch. Dist. No. 62C*, 366 P.2d 533 (Or. 1961); *Elbe v. Yankton Indep. Sch. Dist.*, 372 N.W.2d 113 (S.D. 1985); *Almond v. Day*, 89 S.E.2d 851 (Va. 1955); *Chittenden Town Sch. Dist. v. Dept. of Educ.*, 738 A.2d 539 (Vt. 1999); *Weiss v. Bruno*, 509 P.2d 973 (Wash. 1973).

In *Davey*, the Court rejected the notion that states are required by the federal Constitution to provide equal funding for religious institutions or activities. The core federal constitutional concern, the Court held, is that a state act to protect legitimate interests and not to express hostility toward religious persons or religious affairs. In this case, Washington articulated credible antiestablishment concerns as the reason for its action. Simple declination to fund religion is not, in itself, evidence that a state law is intended to suppress religion or is inherently hostile to it. In the absence of evidence of a link between a particular state law and animus toward religion, the denial of funding for religion alone violates no federal constitutional guarantee.⁵

Although clothed in somewhat humble factual garb, *Davey* is one of the most important decisions that the Court has rendered in the religion field in the past two decades. In particular, the outer limit of the "equality model"—the idea that religion and nonreligion must be treated equally—finally has been marked in this case. This model, which gained momentum with the Court's recent public fora,⁶ instructional materials,⁷ and vouchers decisions,⁸ threatened to engulf the Court's jurisprudence in this field. *Davey* makes it clear that, in the short term at least, this will not happen. I shall suggest that this is welcome news for those who fear religion's divisive power and wish to preserve its vibrancy in American life.

II. THE *LOCKE V. DAVEY* CASE

In 1979, the Washington Legislature created the Promise Scholarship Program, which provides a scholarship, renewable for one year, for the post-secondary educational expenses of eligible students. To be eligible for the scholarship, a student must meet certain academic, income and enrollment requirements. With respect to the last requirement, the student must enroll at least half-time in an eligible post-secondary institution. Eligible institutions include those that are affiliated with religious institutions. However, while receiving the scholarship, the student may not pursue a "degree in theology," a requirement that codifies Washington's constitutional prohibition on the expenditure of State funds for the pursuit of degrees that are "devotional in nature or designed to induce religious faith."⁹

Joshua Davey was awarded a Promise Scholarship and chose to attend a private, religiously affiliated college. He subsequently decided to pursue a degree in pastoral ministries. Upon communicating this decision to college officials, he

5. See *Davey*, 540 U.S. at 719-25.

6. See e.g. *Rosenberger v. Rector & Visitors of the U. of Va.*, 515 U.S. 819 (1995) (upholding equal access for religious groups to university-sponsored plans which would pay for a student newspaper's costs); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (plurality opinion) (requiring equal access for religious groups to a state-owned square); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (requiring equal access by religious groups to school facilities for after-school activities).

7. See *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding state law that required equal provision of secular instructional materials to religious and nonreligious schools).

8. See *Zelman*, 536 U.S. 639.

9. See *Davey*, 540 U.S. at 716 (quoting Wash. Rev. Code § 28B.10.814 (1997); Petr. Br. at 6).

was told that the scholarship funds could not be used for the pursuit of that degree. He then brought suit against the State of Washington, contending that its rule violated the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the Constitution.¹⁰

Chief Justice Rehnquist's brief majority opinion presented the case as one of no great difficulty. It began by observing that the Free Exercise and Establishment Clauses of the First Amendment are frequently in tension, and that there must be "room for play in the joints" between them.¹¹ In other words, it is possible for some state actions to be "permitted by the Establishment Clause but not required by the Free Exercise Clause."¹²

This was, in the Court's view, such a case. Because "the link between government funds and religious training [in this case would be] broken by the independent and private choice of recipients,"¹³ the federal Establishment Clause would present no barrier to state funding for Mr. Davey's education, should the State of Washington wish to do so. "[T]here is no doubt that the State could, consistent with the federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . ."¹⁴ However, the question before the Court was not whether the State of Washington *could* fund Davey's study of theology, but whether it was *required* by the federal Constitution to do so.

In an effort to establish this, Davey made several arguments. First, he argued that the denial of state funding for those who pursue religious majors lacked facial neutrality with respect to religion and thus was presumptively unconstitutional under the "equal treatment" guarantees of the Free Exercise Clause.¹⁵ The Court disagreed. The fact that "a [s]tate would deal differently with religious education for the ministry than with education for other callings"¹⁶ does not, in itself, violate any free exercise guarantee. Different treatment in this regard simply permits a state to vindicate its "antiestablishment interests," a concern of long and deeply entrenched historical pedigree.¹⁷ Indeed, the particular question here—the use of taxpayer funds to train and support religious leaders—was the subject of vehement objection by dissenting citizens at the time of the Nation's founding. "That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk."¹⁸

10. See *Davey*, 540 U.S. at 717.

11. *Id.* at 718 (quoting *Walz v. Tax Commn.*, 397 U.S. 664, 669 (1970)).

12. *Id.* at 719 (emphasis added).

13. *Id.* I have called this the "theory of the individual as causative agent." See Laura S. Underkuffler, *Vouchers and Beyond: The Individual As Causative Agent in Establishment Clause Jurisprudence*, 75 Ind. L.J. 167 (2000) (critiquing the idea that state money can be laundered through "private choice" as a way to avoid Establishment Clause guarantees).

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

15. See *id.*

16. *Id.* at 721.

17. See *id.* at 722-23.

18. *Id.* at 723 (emphasis in original and footnote omitted).

The Court cautioned that if a state law is intended (in fact) to suppress religious exercise, it will be invalid on that ground.¹⁹ However, the Court held that there was no evidence of that in this case. The Washington rule applies neither criminal nor civil sanctions to any type of religious service or rite. It does not deny ministers the right to participate in political affairs. It permits student recipients to attend pervasively religious schools, and does not require students to choose between their religious beliefs and the receipt of any government benefit. "The State has merely chosen not to fund a distinct category of instruction."²⁰ Its decision to do so is a product of its legitimate antiestablishment interests, not hostility toward religious persons or religious affairs.²¹

The claim by Davey and amicus parties that Washington's constitutional provision was "a so-called 'Blaine Amendment,' which has been linked with anti-Catholicism,"²² was rejected by the Court as well. "As the State notes and Davey does not dispute, . . . the provision in question is not a Blaine Amendment."²³ In the absence of any "credible connection" between the Blaine Amendment and the Washington constitutional provision, "the Blaine Amendment's history is simply not before us."²⁴

Davey's other arguments were similarly, and summarily, rejected. For instance, relying on *Rosenberger v. Rector and Visitors of University of Virginia*,²⁵ Davey argued that the Promise Scholarship Program was an unconstitutional viewpoint restriction on speech. In *Rosenberger* and other cases,²⁶ the Court had previously held that when a forum for public speech is created or maintained by government, equal access to that forum must be given, if requested, to the religious viewpoint. The Court responded that the Promise Scholarship Program "is not a forum for speech" and thus, "[o]ur cases dealing with speech forums are simply inapplicable."²⁷ Davey's claim under the Equal Protection Clause was similarly dismissed. "Because . . . the program [does not violate] the Free Exercise Clause," the Court wrote, "we apply rational-basis scrutiny"²⁸ to this claim. And "[f]or the reasons stated herein, the program passes such review."²⁹

19. See *Davey*, 540 U.S. at 724-25; *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546-47 (1993).

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

21. See *id.* at 720-25.

22. *Id.* at 723 n. 7. In 1875, Congressman James G. Blaine of Maine introduced a federal constitutional amendment that would have prohibited the payment of tax money, raised for educational purposes, to institutions under religious control. See Lloyd P. Jorgenson, *The State and the Non-Public School, 1825-1925*, at 138-40 (U. Mo. Press 1987). Although this federal amendment failed, contemporary state constitutional provisions that prohibit public funding for religious schools are often labeled "Blaine Amendments" or "Little Blaines" by those who oppose them.

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

24. *Id.*

25. 515 U.S. 819 (1995).

26. See e.g. *Rosenberger*, 515 U.S. 819; *Capitol Square Rev.*, 515 U.S. 753; *Lamb's Chapel*, 508 U.S. 384.

27. *Davey*, 540 U.S. at 720 n. 3.

28. *Id.*

29. *Id.*

Thus, the primary question that remained after *Zelman*—whether states are *required*, as well as permitted, to fund religious education—has been clearly and decisively answered in the negative. As long as state refusals to fund religious education are grounded in legitimate, antiestablishment interests, they will pass federal constitutional muster. Different treatment of religious education that is grounded in a state's desire to avoid the enmeshment of church and state is permissible under federal constitutional guarantees.

III. ANALYZING *DAVEY*: AN UPHILL CLIMB FOR FEDERAL CHALLENGE

The *Davey* decision does not preclude federal constitutional challenges to state no-funding laws—it only makes them more difficult. In this section, I will discuss just how difficult those challenges, post-*Davey*, will be.

As a broad historical matter, state antiestablishment efforts were products of the same conditions that motivated federal-level reforms. At the time of the American Revolution, religious establishments existed in one form or another in all of the American colonies. Common forms included “taxpayer assistance to religious institutions, state enforcement of favored religious observance and conformity, religious tests for public office or general civil capacity, and other preferential treatment on the basis of religious affiliation or belief.”³⁰ All forms of such establishments were generally considered to be pernicious by reformers, even though they were believed by others to be essential for the survival of both religion and state.³¹

During the early post-Revolutionary period, the success of reformers at the federal level was not mirrored in the states. Indeed, at the time of their adoption, the Religion Clauses of the First Amendment were viewed by the vast majority of people not as guarantors of fundamental individual liberties, but as guarantors that state religious establishments would not be threatened by a rival establishment created by the federal government. The acceptance at the state level of the existence of church-state integration was reflected in state constitutions adopted in the late eighteenth century. Almost all contained explicit references to preferred religious beliefs, religious tests for public office, state support of particular religious organizations, and other forms of religious establishment.³²

30. Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 Wm. & Mary L. Rev. 837, 930 (1995). See also *id.* at 879-91, 930-60 (discussing this history).

31. See *id.* at 930-40.

32. See e.g. Del. Const. art. 22 (1776) (repealed 1792 by Del. Const. art. I, § 2) (oath for state officers required a profession of faith “in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore”); Md. Const. art. XXXIII (1776) (amended 1851) (equal protection in religious liberty limited to “persons professing the Christian religion”); Mass. Const. pt. I, art. III (1780) (amended 1833 by Mass. Const. amend. XI) (taxes would be collected for the support of “public Protestant teachers of piety, religion, and morality”); N.J. Const. art. XVIII–XIX (1776) (repealed 1844 by N.J. Const. art. I, § 4) (limiting public office to those persons “professing a belief in the faith of any Protestant sect”); N.C. Const. art. XXXII (1776) (repealed 1868 by N.C. Const. art. I, § 26) (denying public office to any person “who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments”); S.C. Const. art.

Struggles within the states against such establishments were long and complex. Although overt sectarian references and compelled taxpayer support of religious institutions largely disappeared from state constitutions over the next five decades,³³ struggles for sectarian influence over public institutions continued throughout the nineteenth-century and into the twentieth century in most states. The content of public school curricula and the question of public funding of private religious schools were lightning-rod issues for larger social, political, and religious debates. Eventual legal bars to the use of taxpayer funds for religious schools were a response to complex forces, including pressures for funding and curricula control by Protestant, Catholic, and other religious groups. While there is evidence that nativism and religious prejudice (particularly anti-Catholicism) motivated popular clamor for some of these laws, they were also supported by those who represented minority religious groups or who simply believed in the separationist ideal.³⁴

It is, therefore, very difficult to identify the historical “origins” of state no-funding laws. In addition, most have now been in place, in one form or another, for more than one hundred years. During that period, whatever political forces originally supported those laws, others have arisen to replace them. Even if—as opponents claim—the original enactments of some of those laws were tainted with religious prejudice, the re-enactment or endorsement of those laws in more recent decades undoubtedly has been the product of far more diverse antiestablishment, political, religious, and educational concerns.³⁵

In view of this history, a federal constitutional challenge to state no-funding laws would appear to be an uphill battle. After *Davey*, opponents cannot rely on the simple lack of facial neutrality between religion and nonreligion in such laws to establish their unconstitutionality. Rather, they must demonstrate that a

XXXVIII (1778) (repealed 1790 by S.C. Const. art. VIII, § 1) (“The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.”). See generally Underkuffler-Freund, *supra* n. 30, at 874-960 (discussing colonial and state establishments in the late eighteenth century).

33. Massachusetts was the last state to abolish taxation for the support of religious institutions, accomplishing this by constitutional amendment in 1833. See *supra* n. 32.

34. See e.g. Jorgenson, *supra* n. 22, at 138-40 (discussing the complicated political, religious, and educational concerns that motivated nineteenth-century anti-funding laws). For instance, the motivation for state funding bans enacted in Michigan, Wisconsin, Indiana, and Minnesota seemed to have little to do with the anti-Catholicism expressed elsewhere. See Steven K. Green, “Blaming Blaine”: Understanding the Blaine Amendment and the “No-Funding” Principle, 2 First Amend. L. Rev. 107, 126-27 (2003).

35. For instance, when—in 1968—the Florida Constitutional Revision Commission proposed the removal of the Florida Constitution’s prohibition on the payment of public monies to religious or sectarian institutions, the Florida Legislature took action to retain and to strengthen the restriction. See *Bush*, 886 So. 2d at 351. In California, an attempt to amend the state constitution to allow the use of publicly funded vouchers in sectarian schools was defeated overwhelmingly by voters in 1993. See Cynthia Bright, *The Establishment Clause and School Vouchers: Private Choice and Proposition 174*, 31 Cal. W. L. Rev. 193, 194-97 (1995). An attempt to amend the New York Constitution to permit religious-school funding was defeated (after a divisive battle) in 1967. See Lewis B. Kaden, *The People: No! Some Observations on the 1967 New York Constitutional Convention*, 5 Harv. J. on Legis. 343, 359 (1968). And the prohibition on non-public school funding contained in the Constitution of Michigan was adopted in 1970 after extensive public debate. See *Sch. Dist. of Traverse City v. Atty. Gen.*, 185 N.W.2d 9, 13 (Mich. 1971).

particular state law (in its current incarnation) has no legitimate grounding, and is, instead, motivated by anti-religious or anti-sectarian sentiment. This is a very difficult task when we must focus on the contemporary reasons for the existence of such laws, and when contemporary anti-religious or anti-sectarian sentiment (if there is any) is deeply intertwined with legitimate antiestablishment concerns.

Is this outcome the correct one? To my mind, it is the only reasonable choice. If hostility to religion is to be our touchstone for constitutional validity in this area, it is only sensible that something more than conflicting evidence of popular sentiments expressed a hundred or a hundred and fifty years ago be required to prove that hostility. Old evidence might be very useful in forcing us, as a nation, to face our long history of religious hostilities and bigotries; it is far less useful in understanding the complex forces that undergird current popular support for no-funding laws. Indeed, even those who argue that such laws were often steeped in anti-Catholic prejudice in the nineteenth century admit that the reasons for their perpetuation are far more complex.³⁶ When we consider the *contemporary* legal validity of *contemporary* state funding bans, it only makes sense that we should consider what those bans mean today.

IV. DAVEY'S DEEPER IMPLICATIONS

Davey's role in upholding the federal constitutional validity of state no-funding laws is important in itself. The importance of the decision, however, does not end there. In the beginning of this article, I stated that *Davey* is one of the most important church-state opinions that the Court has rendered in the past two decades. In this section, I will explain why this is so.

For many years, the animating principles of the Court's Religion Clause jurisprudence could be readily identified. "Free religious exercise" meant explicit, constitutional recognition of the value of religion in individual lives,³⁷ and the protection of religious exercise absent the presence of a compelling government interest.³⁸ "Freedom from establishment of religion by government" meant, primarily, the institutional separation of church and state.³⁹ The Court's interpretations of both guarantees were united by a common assumption: that religion is *different*—specially valuable, and thus specially protected; specially dangerous, and thus specially prohibited.

It is true that there were potentially contrary strains in the Court's opinions. For instance, the principle of "neutrality," articulated by the Court as part of its Establishment Clause guarantee, was stated to require evenhandedness toward religion and nonreligion; in theory, neither could be favored over the other by

36. See e.g. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Policy 657, 659 n. 10 (1998).

37. See e.g. *U.S. v. Ballard*, 322 U.S. 78, 86-87 (1944); *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

38. See e.g. *Hernandez v. Commr.*, 490 U.S. 680, 699 (1989); *Thomas v. Rev. Bd. of the Ind. Empl. Sec. Div.*, 450 U.S. 707, 717-19 (1981); *Wis. v. Yoder*, 406 U.S. 205, 220 (1972).

39. See e.g. *Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("[U]nion of government and religion tends to destroy government and to degrade religion.").

government.⁴⁰ The clash of this principle with the idea of special protection of religion (under the Free Exercise Clause) was obvious. However, despite such potentially disharmonious strains, the general philosophical posture of the Court was clear. Religion, in both positive and negative ways, was a special force in human life.

In 1988, the Court abruptly changed course. In *Lyng v. Northwest Indian Cemetery Protective Association*⁴¹ and *Employment Division v. Smith*,⁴² decided two years later, a new approach to the Free Exercise Clause emerged. Under this new approach, if the prohibiting or burdening of religion is the object of a challenged law, the law must be justified by a compelling state interest. However, if religion is not so targeted—if the law is “neutral” in its objective—then there is no cognizable claim under the Free Exercise Clause.⁴³

With this single (or dual) stroke, the Court radically shifted the foundation of its Religion Clause jurisprudence. As a result of these decisions, an approach which had required special judicial solicitation for religion was replaced by what is essentially an antidiscrimination guarantee. Under the new approach, government could not intentionally target religion for particular disabilities. However, it could sweep religious interests—along with other interests—within the general prohibitions of “religiously neutral” laws. As a result, half of the constitutionally mandated “special” character of religion—that is, its special value, and its special protection—was gone.

For several years, the demise of religion’s special place in free exercise cases rested uneasily with the apparent retention of the special treatment of religion under the Establishment Clause.⁴⁴ Since the same conception of religion as a particularly powerful force underlies special treatment in both contexts, the demise of religion’s special treatment in one context, but its retention in the other,

40. See e.g. *Epperson v. Ark.*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

41. 485 U.S. 439 (1988).

42. 494 U.S. 872 (1990).

43. See *Smith*, 494 U.S. at 878; *Lyng*, 485 U.S. at 449, 451-52. The idea that evenhanded or “neutral” government regulations might be immune from free exercise challenge was advanced in *Goldman v. Weinberger*, decided in 1986. However, since that case dealt with military regulations, which (presumably) enjoy particularly protected status, the significance of this move was not appreciated until the decision in *Lyng*, two years later. See *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986).

44. During this period, the implications of a broad idea of “equality” for religious and nonreligious interests in Religion Clause jurisprudence dominated scholarly reviews. See e.g. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 Ohio St. L.J. 89 (1990); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990); William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 Ind. L.J. 193 (2000); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. Rev. 7.

seemed difficult to rationalize.⁴⁵ The inconsistency in the Court's approach was noted by scholars, and some boldly suggested that religion should be stripped of its special status across the board.⁴⁶

The Court, however, made few apparent moves to address the paradox. In several cases involving public fora, the Court stressed the need for government "neutrality" toward religion, which required equal treatment of religious and nonreligious groups.⁴⁷ This could be interpreted as endorsement of the idea that religion must suffer no special disabilities under the Establishment Clause. However, the rationales of other decisions undercut this conclusion. For instance, in *Agostini v. Felton*,⁴⁸ the Court upheld a program that sent public school teachers into religious schools to provide remedial services, citing (as pivotal) the absence of traditional, "separationist," Establishment Clause concerns.⁴⁹

In 2000, a clear break with the past was signaled. In *Mitchell v. Helms*,⁵⁰ the plurality opinion seemed to endorse the idea that equal treatment of religion and nonreligion is the hallmark of Establishment Clause concerns. *Mitchell* involved a challenge to a federal program under which computers and other technical materials and services were purchased with federal money by local school districts, and distributed as "loans" to all schools within the district's geographical boundaries, including private religious schools. Using a blended theory of "neutrality" and "private choice," the plurality found that this program posed no Establishment Clause problem.⁵¹ Aid was distributed on the basis of enrollment, and enrollment was determined by parental (not government) choice. The program used "neutral, secular" criteria for aid decisions that neither favored nor

45. For instance, as I previously wrote:

The fundamental reason for the different treatment of religious and secular institutions, as reflected in traditional understandings of the Establishment Clause, is the belief that *religion is different*, and that religious institutions reflect that difference. We worry about the merger of religion and government—we worry about the endorsement of religion by government—we worry about the funding of religion by government—because of the *particular* value and resultant power that religion has in individual lives. The movement to a neutrality or "parity" paradigm in Establishment Clause jurisprudence is possible only if we shed this idea. . . . To do this, we must first conclude that religion as a specially powerful—and specially valuable—force in human lives is one to which we no longer subscribe.

Laura S. Underkuffler, *The Price of Vouchers for Religious Freedom*, 78 U. Det. Mercy L. Rev. 463, 476 (2001). Arguably, it is just this view of religion that *Lyng* and *Smith* reflect.

46. See e.g. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245 (1994).

47. See e.g. *Rosenberger*, 515 U.S. at 845-46; *Capitol Square Rev.*, 515 U.S. at 770; *Lamb's Chapel*, 508 U.S. at 394.

48. 521 U.S. 203 (1997).

49. For instance, the Court cited the facts that there was no evidence that the program's services "supplanted" those offered in religious schools, *id.* at 229; that the program created a "financial incentive to undertake religious indoctrination," *id.* at 231; that the services provided were of a religious character, *id.* at 223-28; or that the secular character of those services could not be ensured without excessive entanglement of church and state, *id.* at 232-35.

50. 530 U.S. 793 (2000).

51. See *id.* at 809-32.

disfavored religious schools. Finally, the aid that was provided was itself “secular, neutral, and nonideological” in nature, and was used in public schools.⁵²

Although the plurality in *Mitchell* expressed some concern about traditional Establishment Clause dangers,⁵³ with the implicit “special treatment” of religion that these involve, the ideas of neutrality and private choice seemed to be far more powerful in determining the outcome. If government aid to religion is “neutral”—if it is “offered to a broad range of groups or persons without regard to . . . religion”—then it is unreasonable, the plurality wrote, to conclude that religious indoctrination had occurred at government behest.⁵⁴ And if individuals are involved in channeling government money to religious uses, “a government cannot, or at least cannot easily, grant special favors”⁵⁵ to religion, the apparent test (in the plurality’s view) for Establishment Clause concerns.

The power of the “equality model” in Establishment Clause jurisprudence was seemingly confirmed in *Zelman*, decided two years later. In *Zelman*, the question was whether the funding of religious schools with taxpayer money through voucher programs presented an Establishment Clause violation. In answering this question, the Court assumed that the pivotal Establishment Clause issue was the favoring (or disfavoring) of religion by government. The Court held that since the law was facially neutral, with any disproportionate benefit to religious schools (through greater student enrollment) being the product of private choice, there was no violation of the Establishment Clause.⁵⁶

The *Mitchell* and *Zelman* cases were criticized for their holding that public money can be shed of its public character if laundered through private choice.⁵⁷ The idea that through this rationale, religious institutions might be in line for possibly massive amounts of public funding disturbed those who believed that the Establishment Clause contains far more robust guarantees.⁵⁸ Underlying concern, however, went far beyond this narrow question. Exactly how far did this “equality model” go? We had already seen the Court’s rejection of the traditional idea of religion’s special *positive* qualities, in the interpretation of the Free Exercise Clause. Were the special *dangers* of religion (mixed with government) now rejected, as well? Would the “equality model” mean the end of any disabilities for

52. *See id.* at 832.

53. For instance, the plurality was particularly insistent that religious “indoctrination” not be done at government behest. *See id.* at 809-14.

54. *Id.* at 809-10.

55. *Mitchell*, 530 U.S. at 810.

56. *See Zelman* 536 U.S. at 652-55 (stating that challenged law is “facially neutral”; “[p]rogram benefits are available . . . on neutral terms”; “no reasonable observer would think a neutral program of private choice . . . carries with it the *imprimatur* of government endorsement [of religion]” (emphasis in original)).

57. *See e.g.* Green, *supra* n. 34, at 107-08; Laura S. Underkuffler, *The “Blaine” Debate: Must States Fund Religious Schools?*, 2 First Amend. L. Rev. 179 (2003). For a general critique of this theory, see Underkuffler, *supra* n. 13.

58. For instance, markedly absent from this approach is the traditional requirement that state aid provide only “incidental” benefit to religious schools. *See e.g. Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976) (“The State may not . . . pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.”).

religious practices or institutions, as a part of government, under the Establishment Clause? Would the “equality model,” through some marriage of free exercise and (redefined) antiestablishment guarantees, require the affirmatively equal treatment of religion and nonreligion by state and federal governments?

In *Davey*, we seem to have our answer. For the current Court, at least, the “equality model” will not go so far. Although *Davey* dealt with the ability of states to recognize religion’s special dangers, the Court’s acknowledgment of the validity of those concerns in that context strongly indicates that they will be recognized in other contexts as well. The dangers of the mixture of religion and government may be denied in voucher cases and others involving “private choice,” but they will not be denied as a general matter in church-state jurisprudence. Religion *is* different, and that difference will be reflected in the Court’s evaluation of government’s practices and policies.

In my view, the importance of this holding is immense. The religious tolerance that exists in this country is both situational and thin. No one could witness the hostility to Islam that emerged after the events of September 11, 2001, and deny that religion remains a bitter and divisive force. To the extent that we have achieved religious freedom and tolerance in this country, it is precisely because we have enforced institutional separation of religion and state. More particularly, we have not forced individuals to conform to government-chosen religious exercise, and we have not forced taxpayers to fund religious groups and activities with which they deeply disagree. *Davey*’s reassertion of the special dangers presented by the merger of religion and government is a welcome sign that we have perhaps not forgotten all that we have learned.

