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From Everson to Davey: The Road Is Long, with Many a Winding Turn, That Leads Us to Who Knows Where, Who Knows When

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NOTE

FROM EVERSON TO DAVEY: THE ROAD IS LONG, WITH MANY A WINDING TURN, THAT LEADS US TO WHO KNOWS WHERE, WHO KNOWS WHEN*

A free government is a complicated piece of machinery, the nice and exact adjustment of whose springs, wheels, and weights, is not yet well comprehended by the artists of the age, and still less by the people.

John Adams to Thomas Jefferson, May 19, 1821.¹

I. INTRODUCTION

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”² These sixteen words are usually referred to as the “religion clauses” of the First Amendment to the United States Constitution. Chief Justice Marshall declared in *Marbury v. Madison*³ that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁴ This would, of course, include saying what the First Amendment means. But in 1993, in response to what some considered the Court’s suppression of religious freedom in its First Amendment decisions, Congress attempted to circumvent the Supreme Court’s authority to interpret the First Amendment by passing, almost unanimously, the Religious Freedom Restoration Act.⁵ Unsurprisingly, the Court ruled the Act unconstitutional in *City of Boerne v. Flores*.⁶ Relying on *Marbury*, the Court reaffirmed that *it* was the final arbiter of First Amendment meaning. The Supreme Court has continued to exercise the power to define what the sixteen words of the First Amendment mean. Libraries could be filled with books written about not only what the Supreme Court *has* decided those sixteen words mean, but also what the Court *should* decide they mean. One would have a hard

* The Hollies, *He Ain’t Heavy, He’s My Brother*, in *The Hollies Greatest Hits* (Capitol/EMI Records 2003) (CD).

1. Letter from John Adams to Thomas Jefferson (May 19, 1821), in *The Works of John Adams* vol. 10, at 398 (Charles Francis Adams ed., Little, Brown & Co. 1856).

2. U.S. Const. amend. I.

3. 5 U.S. 137 (1803).

4. *Id.* at 177.

5. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

6. 521 U.S. 507 (1997).

time finding any other area of the law that is so “needlessly convoluted, elusive or inherently conflicted.”⁷

In the first one hundred and fifty years of our Nation’s history, very few Religion Clause cases were decided⁸ because the states were not subject to the First Amendment. The text of the First Amendment expressly states that it applies only to Congress. The federalism implications of the First Amendment, combined with the reserved powers of the Tenth Amendment, required that religious freedom issues be reserved to state jurisdiction.⁹ Most constitutional commentators agree that “at the time of the ratification of the Constitution, it was not the intention of the Framers to apply the Religion Clauses to the states.”¹⁰ This issue of federalism was central to the original debate surrounding the drafting of the Bill of Rights, particularly the First Amendment.¹¹ States wanted assurance that they would not have to give up their right of sovereignty over issues of religion. At a time when suspicion of a strong central government was high, states were not interested in delegating this important area to the national government.

By contrast, in the past fifty years the Supreme Court has been overwhelmed with First Amendment litigation.¹² Reading majority and dissenting opinions in First Amendment cases might lead one to believe that the various justices were reading two different Constitutions. Even within their own opinions the justices lament the lack of coherence in this area.¹³ Justice Thomas, writing for the majority in a recent case, sympathized with the Fifth Circuit’s inability to make heads or tails of conflicting precedent.¹⁴ The turning point was the 1947 decision of *Everson v. Board of Education*.¹⁵ In a decision that required equal access to transportation for students who attended religious schools, Justice Hugo Black, writing for the majority, stated: “The First Amendment, as made applicable to the

7. Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 Thomas Jefferson L. Rev. 333, 333 (2004).

8. James J. Knicely, “*First Principles*” and the Misplacement of the “Wall of Separation”: Too Late in the Day for a Cure? 52 Drake L. Rev. 171, 173 (2004). The title of Knicely’s article refers to a remark by Justice William Brennan suggesting that even if it was determined that the writers of the Fourteenth Amendment had no intention to apply the First Amendment to the states, it is too late in the day now to do anything to reverse what has been done. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 257 (1963) (Brennan, J., concurring).

9. See John Witte, Jr., *From Establishment to Freedom of Public Religion*, 32 Cap. U. L. Rev. 499, 506 (2004).

10. Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 Cumb. L. Rev. 247, 250 (1995).

11. See *id.* See also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992).

12. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 287 (2001).

13. *Wallace v. Jaffree*, 472 U.S. 38, 110-14 (1985) (Rehnquist, J., dissenting) (describing the Court’s “consistent unpredictability”).

14. In *Mitchell v. Helms*, 530 U.S. 793, 806 (2000), Justice Thomas wrote:

The Fifth Circuit thus faced a dilemma between, on the one hand, the Ninth Circuit’s holding and analysis in *Walker* and our subsequent decisions in *Rosenberger* and *Agostini*, and, on the other hand, our holdings in *Meek* and *Wolman*. To resolve the dilemma, the Fifth Circuit abandoned any effort to find coherence in our case law or to divine the future course of our decisions and instead focused on our particular holdings.

15. 330 U.S. 1.

states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'"¹⁶

With this decision the Supreme Court began a journey that would change the direction of First Amendment jurisprudence and the relationship of religion and government, at state as well as national levels.¹⁷ Although the Court had already made the Free Exercise Clause applicable to the states through the Fourteenth Amendment nearly ten years earlier in *Cantwell v. Connecticut*,¹⁸ now *Everson* incorporated the Establishment Clause to the states as well.

Not only did *Everson* incorporate the Establishment Clause to the states, but it also interpreted the Clause to require total separation of church and state. Most of the confusion in the First Amendment decisions of the past fifty years is a result of the complications involved in applying *Everson's* requirement of incorporation together with its requirement of total separation of church and state.¹⁹ Here, a legal fiction is arguably required in order to apply these principles to the states.²⁰ In applying this legal fiction, the Court "turned upside down"²¹ the jurisdictional roles that the First Amendment had defined in matters of religion.

As *Everson's* legitimacy, and that of the line of cases attempting to apply it, continues to be questioned and debated, it becomes more and more obvious that *Everson's* legacy has become the "elephant in the room"²² that has made First Amendment jurisprudence unmanageable. The questions raised by *Everson* "go to the very nature of our Constitution."²³ Some scholars have gone so far as to compare the importance of incorporation of previously "unabsorbed" clauses, as was done in *Everson*, to Justice Marshall's decision in *Marbury*, while others have proclaimed it more far reaching than desegregation cases.²⁴

It is the contention of this note that since *Everson*, the Supreme Court's First Amendment jurisprudence has been a tortuous, winding path of contradictory decisions that could have been corrected with the 2004 case of *Locke v. Davey*.²⁵ In that case, the Court decided that the state of Washington did not violate Joshua Davey's constitutional rights when it revoked Davey's Promise Scholarship award solely because he chose to major in theology. The facts in *Davey* presented the Court with an opportunity to straighten its path by declaring that where state laws undermine the federal rights guaranteed by the First and Fourteenth Amendments, states should not be allowed to "define their own contradictory

16. *Id.* at 8 (citations omitted).

17. Knicely, *supra* n. 8, at 172.

18. 310 U.S. 296 (1940) (holding that conviction of Jehovah's Witnesses peaceably trying to spread their faith on a public street was a violation of their First Amendment rights).

19. Poppel, *supra* n. 10, at 248.

20. *See id.* at 248-49.

21. *Id.* at 249.

22. Knicely, *supra* n. 8, at 176.

23. Amar, *supra* n. 11, at 1194 (quoting Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929, 934 (1965)).

24. *Id.* at 1195-96.

25. 540 U.S. 712.

standards.”²⁶ The terms of the Promise Scholarship and the Washington Constitution’s establishment clause should have been ruled unconstitutional for their facial discrimination against a religious practice. The most recent U.S. Supreme Court precedent, current public policy, and the Supremacy Clause of the U.S. Constitution required such a holding. However, the Court failed to protect Davey’s religious freedom, bringing even further confusion to its First Amendment jurisprudence, and further removing the First Amendment from religious liberty.

Part Two of this note will contend that two errors in *Everson* have been at the heart of most of the confusion and inconsistency in First Amendment jurisprudence. The first mistake was the Court’s treatment of the religion clause of the First Amendment as if it protected two separate interests. The second error was its arbitrary construction of the First Amendment Religion Clause to demand total separation of church and state. Had *Everson* simply incorporated the Free Exercise and Establishment Clauses to the states, it might have been successful at developing a fair and consistent First Amendment jurisprudence. Adding *Everson*’s requirement of complete separation made those goals difficult if not impossible to attain.

Part Three will discuss how the Rehnquist Court has moved away from *Everson*’s demand for strict separation. The Court has developed sufficient precedent that *Davey* could have been a landmark case resulting in a more fair, consistent, and coherent First Amendment jurisprudence. However, the Court’s recent, more relaxed view of the relationship between church and state has resulted in some states beginning to rely on their own constitutions in decisions regarding religion, as Washington did in *Davey*. Many of these state constitutions contain establishment clauses that are stricter than the U.S. Constitution’s Establishment Clause.

Part Four reviews *Davey* and argues that allowing states to use their own establishment clause provisions to circumvent the Supreme Court’s First Amendment analysis and holdings creates even more confusion in an already confused First Amendment jurisprudence. *Davey* would have been the ideal vehicle for the Court to define more adequately the relationship between federalism and incorporation and to focus on maximizing religious liberty.

Part Five analyzes the Court’s limited rationale in *Davey*, arguing that the decision, unless very narrowly construed, leaves First Amendment jurisprudence even worse off than it was before.

II. *EVERSON*: THE JOURNEY BEGINS

Around the turn of the twentieth-century the Supreme Court began to apply, through the Fourteenth Amendment, certain provisions of the Bill of Rights to the states on the same basis that it applied those provisions to the federal

26. Joseph P. Viteritti, *Davey’s Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom*, 27 Harv. J.L. & Pub. Policy 299, 301 (2003).

government.²⁷ In *Everson*, the Court declared that the Establishment Clause was incorporated to the states just as fully as to the national government. After declaring incorporation, Justice Black continued with words that would forever leave their mark:

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. . . . No person can be punished for entertaining or professing religious beliefs. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”²⁸

The Court made two key mistakes in this pronouncement. First, it divorced the Religion Clause into two halves, treating it as if it protected two distinct interests in tension with one another. Second, it proclaimed the Establishment Clause’s purpose to be separation of church and state instead of religious freedom.²⁹ These two mistaken concepts were now to be applied to the states. By requiring states to enforce separation of church and state, the federal government made a law respecting an establishment of religion—the very thing the First Amendment expressly forbids it to do. Consequently, *Everson*’s decision and its rationale “forced a square historical peg into a round doctrinal hole by filing off a few of the more inconvenient sharp edges of history.”³⁰

A. *Mistake One: The Religion Clause Gets a Divorce*

The *Everson* pronouncement above states an Establishment Clause funding principle: there is to be no government funding to support religion in any way.³¹ The decision also contains a free exercise nondiscrimination principle: the state cannot discriminate against any persons in a religious group by preventing them, “because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”³² The former principle is based on a “secularist world view and requires complete separation of church and state”;³³ the latter is based on a “more

27. *Religious Liberty in the Supreme Court: The Cases That Define the Debate over Church and State* 1 (Terry Eastland ed., Ethics & Pub. Policy Ctr. 1993) [hereinafter *Religious Liberty*].

28. 330 U.S. at 15-16.

29. Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 *Ariz. L. Rev.* 293, 298-304 (2002).

30. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 *Notre Dame L. Rev.* 311, 317-18 (1986).

31. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 *Harv. L. Rev.* 155, 163 (2004).

32. *Id.* (quoting *Everson*, 330 U.S. at 16) (emphasis omitted).

33. Viteritti, *supra* n. 26, at 325.

pluralistic/egalitarian world view and calls for neutrality."³⁴ *Everson* straddles the fence: it is historically known for upholding strict separation, but its ruling ironically allowed government funding of transportation to a religious school.

Everson's presupposition that the purpose of the Establishment Clause is separate from, and in tension with, the purpose of the Free Exercise Clause is a root cause of much of the incoherence in the Court's Religion Clause decisions.³⁵ To focus primarily on the Establishment Clause "emphasiz[es] separation . . . at the expense of 'neutrality,'"³⁶ when it "makes little textual or historical sense to read the two clauses as conflicting"³⁷ to begin with. The two halves of the Religion Clause "should be considered together and understood as advancing fundamentally similar interests."³⁸ Yet the view that the Religion Clause can be divided into two distinct parts is so common that it is startling to consider otherwise.

The idea that there are natural structural tensions between the two halves of the Religion Clause—that they are not two sides of one coin³⁹—immediately creates tension between them. When each clause is seen as having its own interest to protect, those interests become inherently mutually exclusive. The Establishment Clause can be construed as somewhat negative toward religion, mandating a form of government discrimination, while the Free Exercise Clause demands all religion be treated favorably.⁴⁰ If this is the case, then "the Establishment Clause forbids the very type of accommodative commingling of government and religion that the Free Exercise Clause makes obligatory."⁴¹ If viewed in this light it might seem that either of the two religion clauses, "if expanded to a logical extreme, would tend to clash with the other."⁴²

The obvious potential for mischief in putting the Religion Clauses in tension is that one side is favored at the other's expense. Stephen Carter, professor of law at Yale, and a specialist on religion and the law, points out that there is, after all, only one occurrence of the word "religion" in the First Amendment, not two.⁴³ Yet the Court has defined the single occurrence of the word "religion" differently depending on which half of the Religion Clause is under examination.⁴⁴ When the free exercise half is under scrutiny, the Court gives "religion" a very broad

34. *Id.*

35. Paulsen, *supra* n. 30, at 313-15.

36. *Id.* at 323.

37. *Id.* at 324.

38. *Id.* at 315 (emphasis omitted).

39. *Id.* at 313 ("It is time to reject the widely-accepted premise that the establishment and free exercise clauses are in 'tension' with each other and affirm instead that the two clauses are but two sides of the same coin, a coin which represents a single 'value' in our constitutional democracy—religious freedom.")

40. Beerworth, *supra* n. 7, at 334-35.

41. *Id.* at 335.

42. *Walz v. Tax Commn.*, 397 U.S. 664, 668-69 (1970) (holding that tax exemptions given for property of religious organizations used solely for religious purposes do not violate the First Amendment).

43. Carter, *supra* n. 29, at 298-99.

44. *Id.* at 299.

meaning: it includes any and all beliefs and non-beliefs, even protecting atheism.⁴⁵ Yet when the word “religion” is used in the establishment half, the Court does not define it as including atheism or secularism, but almost exclusively applies it to Christianity.⁴⁶ It is apparent that when interpreted in this way, division of the two halves of the Religion Clause produces results that favor non-religion over religion. This result cannot possibly promote the Founders’ chief aim of guaranteeing religious freedom. Carter argues that:

In our enthusiasm for the anti-establishment side of the separation of church and state—the side that neither has nor can have any coherent doctrine behind it—we tend to neglect the pro-religious liberty side, the real concern of the pioneers of the metaphor. I think that is probably why we guard free exercise so poorly. We choose to place the energy of radical judicial intervention on the side of limiting government speech [as in posting the Ten Commandments]; whereas the greatest threats to liberty lie not in the government’s speech but in its action [as in not allowing a grade school student to read his favorite story to the class because it is from the Bible].⁴⁷

Carter also contends “the stumbling block, in nearly every case, is . . . the fruitless effort to pour content into the ‘free exercise clause’ without violating the ‘establishment clause.’”⁴⁸

The First Amendment Religion Clause has one purpose: the protection of religious liberty. When it is construed to protect two separate interests that are at odds with each other, religious liberty is endangered. *Everson* and its progeny should not have divorced the Religion Clause halves. Doing so led *Everson* to its second and even more problematic mistake.

B. Mistake Two: Total Separation

The second mistake that *Everson* made was the declaration that the preeminent purpose of the Religion Clause is total separation of church and state. Since *Everson*, the phrase “wall of separation between church and state” has become so synonymous with the First Amendment that perhaps a majority of Americans believe it is actually part of the Constitution.⁴⁹ But it actually

45. *Id.*

46. *Id.*

47. *Id.* at 308-09.

48. Carter, *supra* n. 29, at 307.

49. See Philip Hamburger, *Separation of Church and State* 1-6 (Harv. U. Press 2002). Hamburger points out that the idea of separation of church and state as envisioned by Jefferson and revitalized by Justice Black in *Everson* has become something of a myth. *Id.* at 3. He suggests that the concept is so deeply embedded in the public consciousness, because of repetition, that it is almost impossible to erase. *Id.* at 8. He gives examples of authors trying to shake off the implications of the phrase and yet continuing to define their views in its terms rather than invest in new coinage, and concludes that:

These commentators who attempt to wiggle free from the clear implications of Jefferson’s phrase make no effort to shake off the phrase itself and thereby reveal how much it has become part of American culture and constitutional thought. Although some have rejected the phrase as ahistorical, most judges, lawyers, academics, journalists, and other Americans—even those who reject its implications—repeatedly talk about religious liberty and especially that of the First Amendment in terms of a “separation of church and state.”

originated in a letter written by Jefferson in 1802 to the Danbury Baptist Association.⁵⁰ Because of the weight and effect of *Everson's* landmark pronouncement, Justice Black effectively “penned [Jefferson’s] metaphor into the First Amendment.”⁵¹ Of course, Jefferson was a giant among the founders of the republic. His ideas, writings, and views in many ways have “shaped the nation.”⁵² But Jefferson was in France at the time the Bill of Rights was written, and was not even involved in the debates.⁵³ Not only was he not involved in the writing of the First Amendment, his views were not the predominant views of the American people or the Drafters of the Bill of Rights.⁵⁴ Some have argued that if Jefferson “wished to promote a peaceable, rational religion that minds its own business, is tolerant of others, and does not meddle in affairs of state, [his] aspirations were diametrically opposed to those whose political efforts produced the first amendment.”⁵⁵ Professor Carter remarked that the “notion that the Founding Generation was particularly afraid of the influence of religion over the state is nonsense—pardonable nonsense, but nonsense all the same. It does not stand up well to the evidence.”⁵⁶ It has been suggested that rather than truly relying on Jefferson’s views on the First Amendment, the justices in *Everson* used his phrase as a pretext for imposing their own personal views on issues of church and state.⁵⁷ Using Jefferson’s metaphor “seemed obvious, natural, and clear to them because it fit so readily what they expected the Constitution to say.”⁵⁸ It would seem then, that a seven-word phrase written by Jefferson in a letter, more than two decades after the Bill of Rights was drafted, is a dubious source to rely on to definitively outline which rights the Drafters intended the First Amendment to protect.

Id. at 9.

50. *Id.* at 1. Jefferson quoted the First Amendment and gave his own twist to it, saying:

I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.

Hamburger, *supra* n. 49, at 1 (emphasis in original).

51. Beerworth, *supra* n. 7, at 340.

52. *Id.* at 1.

53. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

54. See Witte, *supra* n. 9, at 500 (suggesting that recent research shows Jefferson’s views were not the “conventional views in his own day—or in the century to follow”). See also Knicely, *supra* n. 8, at 199 (contending that the “separation Jefferson endorsed was contrary to [the separation] the Baptists and other dissenters sought . . . and has been incompatible with the lives of many Americans”).

55. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1446 (1990).

56. Carter, *supra* n. 29, at 297. For a critique of Carter’s book *The Culture of Disbelief*, see Kenneth R. Craycraft, Jr., *The American Myth of Religious Freedom* 156-164 (Spence Publ. 1999).

57. Jeffries & Ryan, *supra* n. 12, at 219.

58. *Id.*

C. *A Page of History is Worth a Volume of Logic*⁵⁹

To arrive at its faulty interpretation of the Establishment Clause, the *Everson* Court “imagined a past to confirm that interpretation.”⁶⁰ More recent scholarship, particularly that by Philip Hamburger, has shown that *Everson*’s history recital was inaccurate and misleading at best.⁶¹ *Everson* portrayed the primary intent of the First Amendment to be total separation of the church from the state. Even a cursory review of American history and the history of the First Amendment, however, shows that *Everson* got it wrong: separation of church and state was not preeminent in the minds of the men who wrote the First Amendment.⁶² The Court based its historical analysis in *Everson* on Jefferson’s and Madison’s views relating to religious freedom in Virginia.⁶³ It thus “treated the history of the United States as if it were the history of Virginia.”⁶⁴ Trying to extrapolate these men’s views on religious issues for Virginia, and applying them to the writers of the First Amendment, is not adequate for determining what interest the First Amendment was designed to protect. *Everson*’s view of separation of church and state is not an accurate reflection of the prevailing American vision of religion at the time of the Founding.⁶⁵ There was very little sympathy at the time the Bill of Rights was penned for the view that religion could be severed totally from interaction or even favor with the government.⁶⁶

The original intent of the First Amendment can best be determined by attempting “to see [it] through the eyes of [its] proponents, most of whom were members of the most fervent and evangelical denominations in the nation.”⁶⁷ At the time of the Revolution and subsequent Constitutional Convention, the nation had just come through the Great Awakening, resulting in a pervasively religious culture.⁶⁸ The American people presupposed that the government would by nature be religious and would encourage religion.⁶⁹ Complete separation was

59. This is an often-quoted phrase of Justice Holmes from *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

60. Jeffries & Ryan, *supra* n. 12, at 285-86.

61. See generally Hamburger, *supra* n. 49. See also Knicely, *supra* n. 8, at 198-99.

62. See Paulsen, *supra* n. 30, at 314 (“The Supreme Court’s reading of the religion clauses is completely indefensible—historically, textually, and practically.”).

63. 330 U.S. at 11-13. *Everson* is full of history from beginning to end.

64. Jeffries & Ryan, *supra* n. 12, at 286.

65. See generally Hamburger, *supra* n. 49.

66. Gabriël A. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. Rev. 535, 538.

67. McConnell, *supra* n. 55, at 1437.

68. William H. Marnell, *The First Amendment: The History of Religious Freedom in America* 93-104 (Doubleday & Co. 1964). See also Lib. Cong., *Religion and the Founding of the American Republic, Religion in Eighteenth-Century America*, <http://www.loc.gov/exhibits/religion/rel02.html> (Oct. 27, 2003).

69. Moens, *supra* n. 66, at 538. The author makes the point that:

[The Founders] knew that religion could not be separated from decision makers’ thought processes. In incorporating the Free Exercise and Establishment Clauses into the Constitution, the drafters did not intend to trivialize the role that religion played in the United States; rather, they sought to prevent the establishment of a state-sponsored church. Following the understanding of separation between church and state at that time, the Founders aimed to protect religion from the state, not the state from religion, as the Supreme Court has recently held.

thought by the people and their leaders to be not only impossible, but also imprudent.⁷⁰ At the time of the Constitutional Convention, at least six of the thirteen states allowed some form of government support to churches; several state constitutions limited the protection of religious freedom.⁷¹ Most states required religious tests for those who desired to run for public office.⁷² Consequently, at the time of the adoption of the First Amendment, no state, except possibly Rhode Island, “could have been . . . in compliance with the modern understanding of separation of church and state.”⁷³ The consensus of the nation was that religion was not only a good thing, but it was indispensable to freedom and democracy.⁷⁴

Madison’s first draft of the Religion Clause, the proposed amendments to it, and the debates the draft and amendments precipitated, are instructive in determining what rights and concerns were preeminent in the mind of the Framers. The first draft, which could itself be considered the annotated or amplified version of the final amendment, read:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.⁷⁵

The proposed changes that were then suggested, and the discussions that followed each new proposal, indicate that one fear among the Framers was that they would produce a document that would “be taken in such latitude as to be extremely

Id. (footnotes omitted).

70. McConnell, *supra* n. 55, at 1441 (“The central preoccupation of republican political theory was the necessity of public ‘virtue.’ In its religious manifestation, this meant that government should support and encourage religion in order to promote public morality.”).

George Washington in his Farewell Address stated:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

A Compilation of the Messages and Papers of the Presidents vol. 1, at 205, 212 (Bureau of Natl. Literature 1897).

71. Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity under Constitutional Federalism*, 15 *Yale L. & Policy Rev.* 113, 119 (1996).

72. *Id.*

73. Jeffries & Ryan, *supra* n. 12, at 292.

74. See generally McConnell, *supra* n. 55.

75. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 1 (Neil H. Cogan ed., Oxford U. Press 1997). About a month after the original draft was submitted the Congressional Register records that:

Mr. Madison [t]hought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed the people feared one sect might obtain a pre-eminence, or two combine together and establish a religion to which they would compel others to conform; he thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.

Id. at 2.

hurtful to the cause of religion.”⁷⁶ Almost two hundred years later, their fears were realized in *Everson*.

The pronouncements of Supreme Court justices in the early years of the republic provide further evidence that, at the very least, the Founders did not envision a complete separation. Justice Samuel Chase, appointed to the Supreme Court by George Washington, and a signer of the Declaration of Independence, said in *Runkel v. Winemiller*:⁷⁷

Religion is of general and public concern, and on its support depend, in great measure, the peace and good order of government, the safety and happiness of the people. By our form of government, the Christian religion is the established religion; and all sects and denominations of christians are placed upon the same equal footing, and are equally entitled to protection in their religious liberty.⁷⁸

Everson relied heavily on historical analysis to arrive at its conclusions. Subsequent Supreme Court historical analysis⁷⁹ and recent historical scholarship⁸⁰ concerning the First Amendment do not bear out *Everson*'s declaration that the goal of the First Amendment was to erect a high wall between religion and government. *Everson*'s application of Jefferson's wall metaphor to the First Amendment has, according to Chief Justice Rehnquist, and as will be seen, proven “all but useless as a guide to sound constitutional adjudication.”⁸¹

III. EVERSON'S LEGACY AND THE REHNQUIST COURT'S FOCUS ON NEUTRALITY

With the application of the First Amendment to the states came increased litigation.⁸² Religion Clause suits either claim that an establishment of religion has been made by the government, or, less often, that the free exercise of religion has been burdened by the government.⁸³ The free exercise cases fall into two categories: accommodation and discrimination.

A. *Free Exercise Accommodation Cases*

The first type of free exercise claim involves a plaintiff asking for an exemption from a generally applicable law.⁸⁴ The Court has woven an irregular piece of cloth, generally described as accommodation, from these decisions. In

76. *Id.* at 60.

77. 1799 WL 422 (Md. Gen. 1799).

78. *Id.* at *14.

79. *Wallace*, 472 U.S. at 92-107 (Rehnquist, J., dissenting).

80. See generally Hamburger, *supra* n. 49; see also Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (N.Y.U. Press 2002).

81. *Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting). *Wallace* held that a state law that allowed a moment of silence for “meditation or voluntary prayer” in public schools violated the First Amendment when the sole express reason for the law was to return voluntary prayer to the public schools. *Id.* at 40 n. 2.

82. Jeffries & Ryan, *supra* n. 12, at 287.

83. See generally *Religious Liberty*, *supra* n. 27.

84. McConnell, *supra* n. 55, at 1416-18.

Reynolds v. United States,⁸⁵ the only Religion Clause case of importance before the two halves were incorporated,⁸⁶ the Court seemed to rule out the possibility of exempting religious believers from generally applicable laws when the issue is a conflict between those laws and an individual's religious beliefs. In this 1879 bigamy case, based on federal anti-bigamy laws, the Court made a distinction between beliefs and actions.⁸⁷ Its decision indicated that, though beliefs are protected by the First Amendment, actions that are contrary to a generally applicable law are not. Individuals could hold beliefs without interference, they just could not practice them if they were illegal. It is difficult to see how this could have been the Framers' intent. If only beliefs were at issue, there would have been no need for the First Amendment to concern itself with free exercise of those beliefs—for who can *control* someone else's beliefs?

In 1963, the Court seemed to switch directions with its decision in *Sherbert v. Verner*.⁸⁸ Adell Sherbert was a Seventh Day Adventist who lost her job because she would not work on Saturday, her Sabbath.⁸⁹ When she applied for unemployment benefits, the state said she was disqualified because she refused to work.⁹⁰ The Court found the state's decision to deny Sherbert benefits unconstitutional.⁹¹ In contrast to *Reynolds*, *Sherbert* stood for the proposition that any law that burdened conduct that was religiously motivated was unconstitutional unless it protected a compelling state interest, and did so with the least intrusive means possible.⁹² Other cases that followed supported this proposition. One such case was *Wisconsin v. Yoder*,⁹³ where the Court ruled that a state could not require students to attend school until they were sixteen, in violation of their religious beliefs.⁹⁴ These were generally applicable laws that had the effect of burdening certain religious beliefs.⁹⁵ But in *Employment Division v. Smith*,⁹⁶ the Court went back to the position it held in *Reynolds*. While purporting to simply distinguish *Smith* from *Sherbert*, for all practical purposes it overruled the *Sherbert* line of cases.⁹⁷ In *Smith*, the Court held that an Oregon state law making the ingestion of peyote a felony was not a law that the plaintiff could be exempted from on religious grounds, even when the peyote was used only for ceremonial purposes.⁹⁸ The Court has thus gone back and forth, trying to find the proper balance between

85. 98 U.S. 145 (1878).

86. *Religious Liberty*, *supra* n. 27, at 1.

87. Beerworth, *supra* n. 7, at 337-38.

88. 374 U.S. 398.

89. *Id.* at 399.

90. *Id.*

91. *Id.* at 410.

92. *Religious Liberty*, *supra* n. 27, at 6.

93. 406 U.S. 205 (1972).

94. *Id.* at 207.

95. 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, 11 (2000).

96. 494 U.S. 872 (1990).

97. Conkle, *supra* n. 95, at 11-12.

98. 494 U.S. at 890.

allowing religious freedom to flourish, and yet not allowing everyone to become “a law unto [themselves].”⁹⁹

B. *Free Exercise Discrimination Cases*

The second type of cases brought under the Free Exercise Clause includes those involving the government singling out religion for discrimination. The decision in *Everson*, while decreeing the no-funding principle alongside the nondiscrimination principle, came down on the side of nondiscrimination, allowing funding for transportation to private sectarian schools.¹⁰⁰ However, in the early post-*Everson* decisions, the courts often seemed more concerned about the interests of non-believers than the interests of those the Amendment was actually intended to protect.¹⁰¹ One writer has suggested this is analogous to “fashioning freedom of the press around the needs of the illiterate, or orienting free speech to the preferences of the quiet, or the right to assembly around the dispositions of hermits.”¹⁰²

In recent years, however, the Rehnquist Court has required at least facial neutrality toward religion. In *McDaniel v. Paty*,¹⁰³ the Court ruled that disqualification from public office because of membership in the clergy was an unconstitutional discrimination against religion. The Court’s strongest articulation of its nondiscrimination doctrine was in its 1993 decision of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹⁰⁴ In this case the Court struck down a law that the Hialeah city council passed in an emergency session that would punish “[w]hoever . . . unnecessarily or cruelly . . . kills any animal.”¹⁰⁵ The Court found that the law, which was interpreted to include killing for religious sacrifices, targeted the Santeria religion, which planned to build a church in Hialeah.¹⁰⁶ The Court, continuing its trend requiring neutrality, said that “the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.”¹⁰⁷ The *Lukumi* Court seemed to draw an unambiguous line in the sand, putting states on notice: religious discrimination will not stand.

C. *The Establishment Clause Cases: Building the Wall*

In applying the Establishment Clause to the states, post-*Everson*, the Supreme Court has produced a series of decisions that are conflicting and

99. *Id.* at 885 (quoting *Reynolds*, 98 U.S. at 167).

100. 330 U.S. at 17-18.

101. Viteritti, *supra* n. 26, at 334-35.

102. *Id.* at 335.

103. 435 U.S. 618 (1978).

104. 508 U.S. 520.

105. *Id.* at 526.

106. *Id.* at 526-27.

107. *Id.* at 533.

unworkable. In *Lemon v. Kurtzman*,¹⁰⁸ a case disallowing a state to provide salary supplements or materials for religious schools, the Court said that in order to pass constitutional muster, a statute or regulation must: (1) have a legislative purpose that is secular; (2) neither advance nor inhibit religion; and (3) not excessively entangle the government with religion.¹⁰⁹ The history of the so-called *Lemon* test is not pretty. The Court has struggled to make sense of it, modified it, ignored it, used part of it, but never actually overturned it.¹¹⁰ Justice Scalia has remarked that, like a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys.”¹¹¹ One author has summarized the Supreme Court’s use of the *Lemon* test in First Amendment jurisprudence in the 1970s and 1980s as “so incoherent that at times [it] seemed to be acting arbitrarily.”¹¹² The author just quoted amasses an amazing list of conflicting decisions dealing with the issue of funding:

In one case [the Supreme Court] disallowed a program that reimbursed parochial schools for the administrative costs incurred for teacher-prepared achievement tests in compulsory subjects; in another it approved reimbursements of similar costs for standardized tests. It prohibited state funding for staff and materials in auxiliary services such as counseling, guidance, and speech, but permitted aid for diagnostic speech, hearing, and psychological testing. It ruled that while textbook loans are a legitimate benefit to parents and their children, loaning instructional equipment had “the unconstitutional primary effect of advancing religion.” Although states were allowed to offer students transportation to parochial schools, the states were not permitted to give the same students a ride to a public park or museum. The Court also ruled that public school teachers could not provide government-supported remedial services to disadvantaged children on the premises of their religious schools. The latter decision burdened parochial school children by requiring them to leave the comfort of their own schools to receive

108. 403 U.S. 602 (1971).

109. *Id.* at 612-13.

110. Moens, *supra* n. 66, at 540-55.

111. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (concurring). The entire quote reads:

As to the Court’s invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* conspicuously avoided using the supposed “test” but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart (the author of today’s opinion repeatedly), and a sixth has joined an opinion doing so.

The secret of the *Lemon* test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Id. at 398-99 (citations omitted).

112. Viteritti, *supra* n. 26, at 329.

much-needed remedial services that the court and most government officials agreed they were entitled to receive and forced public schools to build or rent temporary structures for the provision of the services that otherwise could have been delivered in the children's home schools.¹¹³

As a whole, these Establishment Clause cases represent only one area of First Amendment jurisprudence. They expose the inconsistency that has resulted from the Court's attempt to balance the demands of free exercise, total separation of church and state, and judicial federalism. *Everson's* wall was proving unworkable.

D. *The Wall Begins to Crumble*

In the 1980s there began to be cracks in the high wall of separation, as the Rehnquist Court began to gradually demand government neutrality toward religion.¹¹⁴ In a close decision in *Levitt v. Committee for Public Education & Religious Liberty*,¹¹⁵ the court upheld a New York law that allowed state funds to flow to private and parochial schools for certain administrative tasks. Then in the 1983 landmark decision of *Mueller v. Allen*,¹¹⁶ the Court upheld a Minnesota law providing that parents could claim a tax deduction for school expenses, including tuition, regardless of where their child went to school. This case distinguished between direct and indirect aid to religion based on parental choice.¹¹⁷

Since *Mueller*, the Court has held in a series of cases that government funds may reach religious institutions without offending the Establishment Clause when the funds are dispersed on a neutral basis for a secular purpose and the decision to use the money at a religious establishment is a function of personal choice. *Zelman v. Simmons-Harris*,¹¹⁸ *Mitchell v. Helms*,¹¹⁹ *Agostini v. Felton*,¹²⁰ *Zobrest v. Catalina Foothills School District*,¹²¹ *Bowen v. Kendrick*,¹²² and *Witters v. Washington Department of Services for the Blind*,¹²³ are all funding cases standing for the proposition that there is no violation of the Establishment Clause when private choice breaks the link between the government and the religious establishment.

The Court also began chipping away the wall with regard to cases dealing with free speech and equal access. In *Board of Education of Westside Community*

113. *Id.* at 329-30 (footnotes omitted).

114. Viteritti, *supra* n. 71, at 135.

115. 413 U.S. 472 (1973).

116. 463 U.S. 388.

117. Viteritti, *supra* n. 71, at 136.

118. 536 U.S. 639 (2002).

119. 530 U.S. 793 (2000).

120. 521 U.S. 203 (1997).

121. 509 U.S. 1 (1993).

122. 487 U.S. 589 (1988). This case is different from the previous cases. Those cases are all dealing with religious schools. This case upheld on its face federal funding of church-affiliated counseling centers promoting chastity. *Id.*

123. 474 U.S. 481 (1986).

Schools v. Mergens,¹²⁴ the Court ruled that the Equal Access Act was constitutional in requiring that “public schools must permit student religious clubs to meet on campus under the same terms as other non-curricular organizations.”¹²⁵ The Court noted that “if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.”¹²⁶ *Mergens* was followed by *Lamb’s Chapel v. Center Moriches Union Free School District*¹²⁷ and *Rosenberger v. Rector and Visitors of the University of Virginia*.¹²⁸ In each case the Court disallowed discrimination based on religious beliefs.

The Rehnquist Court’s neutrality doctrine seemed to dispel the notion that religious people and religious organizations are a threat to society. Although still not always consistent, nor always coherent, the Rehnquist Court was beginning to move away from the *Everson* view that the Religion Clause promises protection from religion, and back to the view that it promises protection of religion.¹²⁹ Under the Rehnquist Court’s jurisprudence, we find that “religious organizations [as they had been historically] are [once again] viewed more positively as institutions that are valued for their contribution to the civic culture.”¹³⁰

E. States Have an Ace In the Hole: Their Own Constitutions

After the passage of the Fourteenth Amendment, the Court did not rush to apply individual rights of the Constitution to the states.¹³¹ What rights were to be applied to the states through the Fourteenth Amendment, and to what extent they were to apply, has been a source of debate in and of itself.¹³² For the most part, the rule commonly used was that those parts of the Bill of Rights that were selected for incorporation were those “implicit in the concept of ordered liberty.”¹³³ In the long run, most of the provisions in the Bill of Rights have been incorporated to the states.¹³⁴

The Court has never explicitly spelled out how incorporation affects the federalism aspects of the First Amendment. What limits does incorporation now put on the states? If the First Amendment incorporates to the states those rights that have to do with “ordered liberty,”¹³⁵ then it would seem logical that the primary aim of First Amendment is to protect individual religious liberties. If the Supreme Court demands what has been called a “jot for jot”¹³⁶ incorporation of

124. 496 U.S. 226 (1990).

125. Viteritti, *supra* n. 71, at 138-39.

126. *Mergens*, 496 U.S. at 248.

127. 508 U.S. 384 (1993).

128. 515 U.S. 819 (1995).

129. Viteritti, *supra* n. 71, at 140.

130. *Id.* at 141.

131. *Id.* at 144.

132. See generally Amar, *supra* n. 11.

133. Poppel, *supra* n. 10, at 272.

134. *Id.*

135. *Id.* at 272-73.

136. See *id.* at 274-281 (discussing the concept of “jot for jot” incorporation).

First Amendment rights, it would stand to reason under the Supremacy Clause¹³⁷ that the states would have to conform their religious liberty decisions to the analytical reasoning of Supreme Court religious liberty and establishment cases. After *Mueller*, *Mergens*, and *Lukumi*, it seems likely that the Court, according to its “emerging pluralist philosophy,”¹³⁹ should be “vigilant in assuring that practice based on such convictions is not unduly burdened by a government-imposed secularism.”¹⁴⁰

However, while the Court has held that religious organizations may be the indirect recipients of government funding where choice breaks the connection between the state and religion, not all state courts have gone along with this view.¹⁴¹ Many have indicated that they do not believe that the Court’s analysis, particularly with regard to funding cases, is binding on how they interpret their own constitutions.¹⁴² This awakened vitality for federalism in the area of religion has resulted in wildly “conflicting interpretations of religious freedom” from state to state that have been allowed by the Court and are overripe for “remedy by the federal government.”¹⁴³ A renewed dependence on state constitutions to decide establishment clause issues changes the focus of the debate.¹⁴⁴ The dilemma now returns to the problem that *Everson* thrust upon the Court: how to apply federalism after incorporation. What boundaries in this “field of discretion”¹⁴⁵ do the states have? Are they free to contradict the Establishment Clause reasoning of the Court when the contradictions implicate free exercise issues?¹⁴⁶ “Where and how does one draw the line?”¹⁴⁷

In *Witters*, the Court hinted that it would allow the states broad latitude in deciding religious discrimination issues on the basis of state constitutions.¹⁴⁸ In *Witters*, a blind student desired to use his state vocational rehabilitation grant to study for the ministry at a religious school for the blind.¹⁴⁹ Basing its ruling on federal law, the Washington Supreme Court held that using the funds at a religious school would violate the Establishment Clause of the U.S. Constitution.¹⁵⁰ The U.S. Supreme Court reversed this decision, rejecting the contention that state vocational rehabilitation aid used at a religious school would advance religion and thus be prohibited under the Establishment Clause.¹⁵¹

137. U.S. Const. art. VI, cl. 2.

138. Viteritti, *supra* n. 71, at 149.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Viteritti, *supra* n. 71, at 150.

144. Viteritti, *supra* n. 26, at 309.

145. *Id.*

146. *Id.*

147. *Id.*

148. 474 U.S. at 489.

149. *Id.* at 483.

150. *Witters v. Washington Commn. for the Blind*, 689 P.2d 53 (1984).

151. *Witters*, 474 U.S. at 489.

However, the Court hinted that Washington could reconsider the case under its own state constitution,¹⁵² and that is precisely what the Supreme Court of Washington did. Citing its own constitution's strict establishment clause language, on remand the state court again denied Witter the funds.¹⁵³ The U.S. Supreme Court declined to review *Witters III*.¹⁵⁴

F. State Blaine Amendments

The Washington Constitution contains language, similar to language in many state constitutions, prohibiting any state funding of religious instruction.¹⁵⁵ These prohibitions have been used to support state court decisions holding that vouchers used by a student in a religious school violate the state interest in separation of church and state, regardless of United States Supreme Court analysis to the contrary.¹⁵⁶ Opponents of these state constitutional provisions, usually referred to as "Blaine amendments," point to the history of such amendments, claiming they are rooted in anti-Catholic bigotry.¹⁵⁷

In 1875, James G. Blaine, Speaker of the House from 1869 to 1875, proposed several forms of an amendment to the U.S. Constitution that would have prohibited religious schools from receiving any state tax money.¹⁵⁸ The impetus

152. *Id.* at 489.

153. *Witters v. Washington Commn. for the Blind*, 771 P.2d 1119, 1122 (1989).

154. *Witters v. Wash. Dept. of Servs. for the Blind*, 493 U.S. 850 (1989).

155. Wash. Const. art. I, § 11.

156. Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Policy 657, 659 (1998). Viteritti contends that:

At present the most severe battles taking place with regard to the issue of school choice are occurring in the state courts. Opponents of choice are planning their legal strategies around the existence of . . . provisions incorporated into many state constitutions; these provisions set more rigid standards of separation between church and state than those required by the Supreme Court in its interpretation of the First Amendment.

Id.

157. For a detailed history of the Blaine Amendment and subsequent amendments aimed not only at Catholics but Protestants as well, see Hamburger, *supra* n. 49, at ch. 11. Blaine's original amendment, proposed to the United States Congress in 1875, 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.

Id. at 297-298.

158. *Id.* Those proposing an amendment to the United States Constitution did so because of their belief that the Constitution did not adequately provide for separation of church and state. *Id.* at 296. In the beginning they argued for a revised First Amendment. This was originally instigated by a unified effort of Unitarians, the National Liberal League, and supported by such as William Lloyd Garrison and Charles Darwin. *Id.* at 288-89. Their pursuit of the amendment stemmed from the urging of a newspaper called the *Index*, which was published by the Free Religious Association. *Hamburger, supra* n. 49, at 288-96. For two years, starting at the beginning of 1874, the *Index* printed its favored version of a constitutional amendment. It read:

SECTION 1. Congress shall make no law respecting an establishment of religion, or favoring any particular form of religion, or prohibiting the free exercise thereof . . .

for the proposed amendments, which were repeatedly defeated, was a perceived Catholic threat to the pervasive Protestantism in public schools, and a disinclination to fund Catholic schools.¹⁵⁹

Catholics in large urban areas had begun to use the political process to get their state legislatures to provide public funds so that they could escape the predominantly Protestant public schools.¹⁶⁰ In other cases, Catholics pressured local school districts to prohibit Bible readings and other religious exercises that were against Catholic teachings.¹⁶¹ In response, pressure from Protestant churches and nativist groups to stop aid to sectarian schools and to preserve the Protestant character of the public schools began to mount.¹⁶²

President Ulysses S. Grant responded by proposing an amendment that would have ensured that no public money would support institutions that were religious.¹⁶³ Blaine, hoping to receive the nomination from the Republican Party to succeed Grant, offered to sponsor such an amendment.¹⁶⁴ Blaine's amendment was defeated by four votes in the Senate.¹⁶⁵ However, its principles became a part of the Republican Party's political platform and continued to affect public discourse concerning state funding for religious education.¹⁶⁶ When states like Washington sought admission into the Union, they were required by a Republican dominated Congress to have such amendments in their constitutions in order to receive congressional approval for admittance.¹⁶⁷ Consequently, there were reportedly twenty-nine states that had Blaine amendments in their constitutions by 1890.¹⁶⁸ Washington's constitution was alleged to contain such an amendment.

IV. *LOCKE V. DAVEY*

There was a great deal of anticipation leading up to the Court's decision on whether the denial of Joshua Davey's scholarship—solely on the basis of his major in devotional theology—was a violation of his constitutional rights.¹⁶⁹ Many saw

SECTION 2. No State shall make any law respecting an establishment of religion, or favoring any particular form of religion, or prohibiting the free exercise thereof No religious test shall ever be required as a condition of suffrage

Id. at 296. See generally Richard G. Bacon, *Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions*, 6 Del. L. Rev. 1 (2003) (particularly reviewing the Blaine Amendment's effects on education in Delaware); Brandi Richardson, Student Author, *Eradicating Blaine's Legacy of Hate: Removing the Barrier to State Funding of Religious Education*, 52 Cath. U. L. Rev. 1041 (2003); Viteritti, *supra* n. 71; Viteritti, *supra* n. 156.

159. Viteritti, *supra* n. 156, at 669.

160. *Id.*

161. *Id.* at 670.

162. *Id.*

163. *Id.*

164. Viteritti, *supra* n. 156, at 670.

165. *Id.* at 672. It is noteworthy that if Congress, in 1865, had interpreted the First Amendment to demand a separation of church and state, there would have been no need for an amendment prohibiting the funding of religious schools.

166. *Id.*

167. *Id.* at 672-73.

168. *Id.* at 673.

169. *Davey*, 540 U.S. 712.

the case as one more battle in the ongoing “culture wars.”¹⁷⁰ When the decision came, the Court’s ruling that Washington was within constitutional bounds to deny Davey his scholarship was a surprise to most.¹⁷¹

Washington established the Promise Scholarship in 1999 in order to help academically talented young graduates that might not otherwise be able to afford to attend college.¹⁷² The state legislature provided the scholarship to eligible students for postsecondary education-related expenses, renewable for one year.¹⁷³ The amount of the scholarship was to vary each year according to the amount appropriated in the general fund, and was to be prorated among the eligible students.¹⁷⁴

There were three areas of eligibility requirements for the scholarship: academics, income, and enrollment.¹⁷⁵ The candidate must graduate in the top fifteen percent of the class from one of Washington’s private or public high schools *or* receive at least a 1,200 SAT or 27 ACT on the first attempt.¹⁷⁶ The candidate must also demonstrate family income less than 135 percent of the State’s median income.¹⁷⁷ Finally, a candidate must enroll “at least half-time in an eligible postsecondary institution in the state of Washington.”¹⁷⁸ The only caveat, and the source of Davey’s complaint, was that the student must not have a major in devotional theology.¹⁷⁹

The Washington statute specifically provides that an eligible student is one who “is not pursuing a degree in theology.”¹⁸⁰ The intent of the statute was to be in compliance with the state’s constitutional provision that prohibits any funding for the promotion of religion.¹⁸¹ The relevant clause of the Washington Constitution states: “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.”¹⁸²

170. See Robert S. Greenberger, *High Court Backs Withholding Public Scholarships for Theology*, 243 Wall St. J. A4, A4 (Feb. 26, 2004) (“In a defeat for social conservatives, the Supreme Court upheld Washington state’s right to withhold publicly funded scholarships from students pursuing theology degrees. The 7-2 decision involving the Constitution’s separation of church and state comes as other issues in the so-called culture wars are heating up . . .”).

171. Professors Ira Lupu & Robert Tuttle, *Co-Directors of Legal Research, Roundtable on Religion and Social Welfare Policy, Analysis: Locke v. Davey*, http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=23 (“When, on February 25, the Supreme Court handed down its decision in *Locke v. Davey*, the timing took many people by surprise; most expected that the decision would come closer to the end of the Court’s Term in June. The result in *Davey*, however, proved to be a far greater surprise.”).

172. *Davey*, 540 U.S. at 715-16.

173. *Id.* at 716.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Davey*, 540 U.S. at 716.

178. *Id.* (quoting Wash. Admin. Code § 250-80-020(12)(f) (2003)).

179. *Id.*

180. Wash. Admin. Code § 250-80-020(12)(g) (2003).

181. Wash. Const. art. I, § 11.

182. *Id.*

After receiving the scholarship, Davey received a letter from the governor, congratulating him on his selection as a Washington Promise Scholarship recipient, and stating that “[e]ducation is the great equalizer in our society. Regardless of gender, race, ethnicity, or income, a quality education places all of us on a more level playing field.”¹⁸³

Davey enrolled in the fall of 1999 at Northwest College, a private religious school affiliated with the Assemblies of God denomination, and declared a double major in Pastoral Ministries and Business Management and Administration.¹⁸⁴ Davey then learned from the school’s financial aid office that because of his major in theology, he would be disqualified from receiving his Promise Scholarship.¹⁸⁵ The Washington Higher Education Coordinating Board (“HECB”) had sent notices to all postsecondary financial aid offices informing them that any student pursuing a degree in theology would not be eligible for the scholarship.¹⁸⁶

Apparently the governor’s stated purpose, as explained in his letter to Davey, of putting everyone on a level playing field, regardless of his or her gender, race, ethnicity or income, did not include diversity of vocation if the chosen vocation was religious. Davey, after having been selected due to his academic performance and financial need, was then prohibited from receiving the scholarship solely because of his career choice to be a pastor.¹⁸⁷

Davey filed suit in the District Court for the Western District of Washington, seeking an injunction against the state requiring the reinstatement of his scholarship.¹⁸⁸ He initially brought claims under the First and Fourteenth Amendments to the U.S. Constitution as well as Article 1, §§ 5 and 11 of the Washington Constitution.¹⁸⁹ The district court rejected all of Davey’s claims and granted summary judgment in favor of Washington.¹⁹⁰ The Ninth Circuit Court of Appeals reversed,¹⁹¹ relying on the Supreme Court’s decision in *Lukumi*, providing that any government program that is not facially neutral to religion is presumptively unconstitutional. The Ninth Circuit held that the relevant section of the Promise Scholarship statute singled out theology on its face.¹⁹² Further, it held that the denial of a scholarship to a student otherwise qualified under the state’s objective criteria, solely because he is pursuing a degree in theology,

183. Petr. Br. at 8-9, *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002) [hereinafter *Petr. Br.*].

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

185. *Id.*

186. *Petr. Br.*, *supra* n. 183, at 10.

187. *Id.* at 2, 11, 23.

188. *Davey v. Locke*, 2000 U.S. Dist. LEXIS 22273 (W.D. Wash. 2000).

189. *Petr. Br.*, *supra* n. 183, at 5.

190. *Davey*, 540 U.S. at 718. The district court relied primarily on *Witters v. State Commn. for the Blind*, 771 P.2d 1119 (Wash. 1989), *cert. denied*, 493 U.S. 850 (1989). *Davey*, 2000 U.S. Dist. LEXIS 22273 at *9.

191. *Davey v. Locke*, 299 F.3d 748 (2002).

192. *Id.* at 752.

“infringes his right to the free exercise of his religion.”¹⁹³ Washington appealed and the Supreme Court granted certiorari.¹⁹⁴

When the Supreme Court agreed to hear *Locke v. Davey*, both sides knew the stakes were high and the potential ramifications were far reaching. If the Supreme Court upheld the Ninth Circuit’s ruling that the relevant section of the Washington Constitution was unconstitutional, similar provisions in dozens of state constitutions might be invalidated.¹⁹⁵ Just three months before the Court decided *Davey*, the *Wall Street Journal* opined that “all sides understand that what’s really at stake [in *Davey*] is the future of the so-called ‘Blaine Amendment’ in the Washington constitution that provides the legal rationale for this discrimination.”¹⁹⁶ In reference to a previous quote from Justice Thomas that these types of provisions were “born of bigotry” and “should be buried now,” the *Journal* went on to say that “*Davey* gives the Supreme Court the chance to do just that.”¹⁹⁷

However, those hoping for such a burial were to be disappointed. Instead, the Court in *Davey* declined to specifically deal with the constitutionality of the severely strict establishment clause in Washington’s constitution, or even to apply any of its usual tests to the Promise Scholarship provisions that singled out Davey for exclusion.¹⁹⁸ In a surprisingly brief analysis, the court rejected all of Davey’s constitutional claims.¹⁹⁹ The strong language in *Lukumi* had clearly declared that the minimum requirement for constitutionality was that a statute not discriminate on its face.²⁰⁰ Washington’s Promise Scholarship statute was not neutral on its face.²⁰¹ Nevertheless, Justice Rehnquist, writing for the majority, said that the court must reject the claim that it should employ the *Lukumi* test of facial neutrality.²⁰² If it applied *Lukumi*, said Rehnquist, it would “extend that line of cases well beyond not only their facts but their reasoning.”²⁰³ Justice Scalia, joined by Justice Thomas, heartily disagreed in his dissent, arguing that the Court’s opinion in *Lukumi* was “irreconcilable with today’s decision, which sustains a public benefits program that facially discriminates against religion.”²⁰⁴

The Court also failed to address concerns that the relevant Washington constitutional provisions were products of the so-called Blaine Amendment. The brief presented to the Ninth Circuit on behalf of Davey had claimed that the foundational basis for the Washington Constitution’s strict establishment clause

193. *Id.* at 760.

194. *Locke v. Davey*, 538 U.S. 1031 (2003).

195. Viteritti, *supra* n. 156, at 673 (stating that there were twenty-nine state constitutions that had Blaine amendments by the end of the nineteenth-century).

196. Editorial, *The Blaine Game*, 242 Wall St. J. A18 (Dec. 2, 2003).

197. *Id.*

198. *Davey*, 540 U.S. 712.

199. *Id.* at 725.

200. 508 U.S. at 533-34.

201. Wash. Admin. Code § 250-80-020(12)(g).

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

203. *Id.*

204. *Id.* at 726.

was historical anti-Catholic bigotry.²⁰⁵ However, the Court alluded to these claims only in footnote seven of its opinion, which briefly mentioned the concerns that had been raised. It dismissed the contention that the denial of Davey's scholarship was based on a Blaine amendment by saying that neither the amicus briefs nor Davey had "established a credible connection between the Blaine Amendment and . . . the relevant constitutional provision."²⁰⁶ Chief Justice Rehnquist went on to say, "the Blaine Amendment's history is simply not before us."²⁰⁷

Hopes that the Court would use *Davey* to define the limits of the states' ability to chart their own course were dashed. Since funding is permitted according to *Zelman, Mitchell, Agostini, Zobrest, Bowen, and Witters*, and since discrimination is forbidden according to *McDaniel, Mergens, Lambs Chapel, Rosenberger*, and particularly *Lukumi*, it seemed likely the Court would find that Davey's constitutional rights had been violated. The Court was also, however, weighing the competing principle of federalism against incorporation. In the end, the Court leaned toward federalism, leaving states to analyze their own establishment clauses, and thus leaving incorporation incomprehensible. The Court should have clearly addressed how the First Amendment's application to the states through the Fourteenth Amendment changed the states' right to regulate religion. With federalism and incorporation at issue, the question *Davey* ultimately posed to the Court was: Do the Supremacy Clause of the United States Constitution, the protective promises of the First and Fourteenth Amendments, and public policy dictate that state constitutions should not be allowed to single out individuals for discrimination on the basis of religion? If the answer to this question is yes, *Davey* was wrongly decided, and Blaine amendments should have been, and still should be, ruled unconstitutional.

V. *LOCKE V. DAVEY*: FAULTY RATIONALE

In finding the terms of the Promise Scholarship constitutional, the Court reasoned that although Washington *could* fund Davey's scholarship and not be in violation of the U.S. Constitution, it was not *required* to do so. "In other words," according to the Court, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."²⁰⁸ Chief Justice Rehnquist described this area between the two parts of the Religion Clause as "room for play in the joints,"²⁰⁹ but did not define how spacious this joint might be.

205. *Petr. Br.*, *supra* n. 183, at 29-30.

206. *Davey*, 540 U.S. at 724 n. 7.

207. *Id.*

208. *Id.* at 718-19.

209. *Id.* at 718 (quoting *Walz*, 397 U.S. at 669). It is interesting that the context of the quote from *Walz* actually speaks to the requirement of neutrality, not the right of the state to discriminate against religion. It states:

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or

Instead, the Court simply concluded that Washington's interest in upholding its constitution outweighed Davey's burden of not receiving the scholarship.²¹⁰ The Court's holding that the state's interest was of greater weight than Davey's burden was one of the more baffling parts of the analysis. Justice Rehnquist dismissed Davey's burden as if he were swatting at a fly, saying only that "[t]he State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars."²¹¹ Davey's scholarship for two years would have been approximately \$2,700.²¹² It was undisputed that Davey had financial needs—after all, establishing a financial need was one of the criteria for receiving the scholarship.²¹³ Davey left for college the proud recipient of an honored scholarship, only to be faced with the notoriety and disappointment of being singled out for discrimination and made ineligible unless he changed his major. In his dissent Justice Scalia argued that:

Even if there were some threshold quantum-of-harm requirement, surely Davey has satisfied it. The First Amendment, after all, guarantees *free* exercise of religion, and when the State exacts a financial penalty of almost \$3000 for religious exercise—whether by tax or by forfeiture of an otherwise available benefit—religious practice is anything *but* free.²¹⁴

One of the most often applied prongs of the *Lemon* test requires that a law not excessively entangle the government with religion.²¹⁵ Applying this prong of the *Lemon* test to *Davey*, one might conclude that Washington "actually paid students not to major in theology."²¹⁶ In addition, testimony of the administrator of the scholarship at Northwest College attested to the fact that many students faced with the dilemma of losing their scholarship consider changing their majors.²¹⁷ This is a daunting decision to place before a college freshman. Dangling a carrot that forces an individual to choose between a generally applicable public benefit and a religious practice is arguably the type of government entanglement with religion that the Court has consistently disallowed.

The Court's attempt to distinguish *Lukumi* is not persuasive. In *Lukumi*, the Court made strong statements about religious discrimination, prohibiting states

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.

Walz, 397 U.S. at 669.

The Promise Scholarship's restriction does not appear to meet any of these standards: it is interfering with religion and it is not exhibiting "benevolent neutrality." The argument cannot be made that it is establishing religion, because the Supreme Court has said that when individual choice breaks the funding chain there is no establishment of religion. *Witters*, 474 U.S. at 489.

210. *Davey*, 540 U.S. at 725.

211. *Id.*

212. *Id.* at 716.

213. *Id.*

214. *Id.* at 731 (emphasis in original).

215. 403 U.S. at 612-13.

216. Laycock, *supra* n. 31, at 160 (emphasis omitted).

217. *Jt. App.* at 62-64, *Davey*, 540 U.S. 712.

from “disapprov[ing] of a particular religion or of religion in general.”²¹⁸ The Court also stated in *Lukumi* that “[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.”²¹⁹ It is hard to understand how the Court felt that Davey’s choice of a major in theology did not fall into the category of a religious practice. In determining that the state’s withdrawal of Davey’s scholarship did not prevent him from practicing his religion, the Court undermined its argument in *Lukumi*. The Santerias, based on the Court’s rationale in *Davey*, could have practiced their religion under the disputed statute, as long as they did not sacrifice animals. Here, according to Justice Rehnquist, Davey can practice his religion, he just cannot practice it by being a minister and still keep his scholarship. It is difficult to see the difference. The Court had emphasized in *Lukumi* that a “law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny”²²⁰ and that “the minimum requirement of neutrality is that a law not discriminate on its face.”²²¹ In the *Lukumi* concurrence, two justices said that when a law “discriminates against religion as such, . . . it automatically will fail strict scrutiny.”²²² These seemed like strong, unambiguous guidelines.

The Court distinguished *Davey* from *Lukumi*, however, saying that in *Davey* the state’s “disfavor of religion . . . is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite.”²²³ Yet *Lukumi* clearly stated that *no* discrimination was allowed, however mild.

The Court characterized the Promise Scholarship as going out of its way to accommodate religion by allowing students receiving the scholarship to attend pervasively Christian colleges.²²⁴ This argument is weak on two counts. First, the First Amendment is not about protection of “religion.” It is about protecting individuals in the free exercise of their religion. The law at issue here discriminates against Davey, an individual. Second, in allowing students to use the scholarship at Christian colleges the state belies the interest it claims to serve in revoking Davey’s scholarship. Its interest was stated to be ensuring that the Promise Scholarship conforms to the state constitution, which prohibits state money being “applied to any religious . . . instruction.”²²⁵ Allowing money to go to pervasively Christian colleges and yet not to theology majors makes discrimination against Davey seem arbitrary.

The ramifications of *Davey* may be far-reaching. Those who are interested in seeing Blaine amendments eradicated are primarily interested in those

218. 508 U.S. at 532.

219. *Id.* at 523.

220. *Id.* at 546.

221. *Id.* at 533.

222. *Id.* at 579.

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

224. *Id.* at 724-25.

225. Wash. Const. art. I, § 11.

amendments' effect on school vouchers.²²⁶ Those who are proponents of vouchers view them as the chief hope for bringing the American education system out of its current crisis.²²⁷ Unless *Davey* can somehow be narrowly distinguished, states will use laws based on their own establishment clauses to prevent legislation that promotes a market-based approach to education, particularly when it encompasses vouchers that can be used in religious schools.

As Justice Thomas pointed out in his dissent, *Davey* carried to its logical extreme could make other public benefits, ones that might indirectly go to someone studying for the ministry, eligible to be withheld. Although it is hard to imagine this scenario happening, the principle enunciated in *Davey* would allow for it. A person receiving disability, welfare, or unemployment benefits that decided to study for the ministry could foreseeably be barred from receiving his or her benefit.²²⁸

V. CONCLUSION

Everson v. Board of Education started the Court and the country down a long winding road toward a destination that is still unclear. Religion continues to be an important part of the lives of a majority of Americans. Yet America has also become a multi-cultural society with innumerable religions. The government has a duty to protect the believer and the non-believer alike from coercion in favor of or against religion. Yet the Court must observe that the First Amendment puts religion on a special pedestal and considers it important. Not only has the Constitution given it special prominence, but religion has also figured largely in the warp and woof of the republic since its inception.²²⁹ It is crucial that the government find the precarious balance needed to make good on the Founders' promises. As one author has noted:

There is nothing more repugnant to the notion of civil liberty than to use the religion clauses of the First Amendment as an instrument to discriminate against institutions or individuals on the basis of their religious affiliation. But the application of state constitutional standards to achieve the same effect is no less offensive to religious rights.²³⁰

If the Supreme Court continues to allow state governments to exercise the power to discriminate against religious conduct, "the Court has quite possibly come to the worst solution for religious liberty."²³¹ The Court left open the possibility that it would consider whether Blaine amendments are constitutional when it declared in *Davey* that "the Blaine Amendment's history is simply not

226. See generally Joseph P. Viteritti, *Reading Zelman: The Triumph of Pluralism, and Its Effects on Liberty, Equality, and Choice*, 76 S. Cal. L. Rev. 1105 (2003).

227. *Id.* at 1170-75.

228. See *Davey*, 540 U.S. at 734 (Scalia, J., dissenting).

229. See generally Lib. Cong., *supra* n. 69.

230. Viteritti, *supra* n. 26, at 336 (footnote omitted).

231. Laycock, *supra* n. 31, at 161.

before us.”²³² If and when the Blaine amendments are before the Court, the Court should simplify First Amendment jurisprudence by primarily considering the effect its decision will have on maximizing religious liberty and promoting a healthy pluralism. Sufficient time has been spent trying to build a wall, and it has not resulted in good law. Any Supreme Court decision should “minimize the effect it has on the voluntary, independent religious decisions of the people as individuals and in voluntary groups.”²³³ That is why the neutrality standard applied to either half of the religion clause is compelling. It offers “indisputable reasonability” and is “eminently fair.”²³⁴

The Court’s decision in *Davey* seems to indicate that, in spite of *Lukumi*’s dictates to the contrary, state statutes may facially discriminate against religion—at least when funding is at issue. This is “remarkable”²³⁵ in light of the fact that it had never before allowed such straightforward discrimination.²³⁶ Unfortunately, *Davey* adds not only another new book to the library about what the Court has decided the First Amendment means, but also a few volumes about what it *should* mean. The long and winding road just took a detour!

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232. 540 U.S. at 724 n. 7.

233. Laycock, *supra* n. 31, at 160-61 n. 26 (quoting Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L. Rev. 693, 703-04 (1997)).

234. Viteritti, *supra* n. 26, at 335.

235. *Id.*

236. *Id.*

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