

# Tulsa Law Review

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Volume 40  
Issue 2 *The Funding of Religious Institutions in  
Light of Locke v. Davey*

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Winter 2004

## Locke v. Davey: States' Rights Meet the New Establishment Clause

Martin H. Belsky

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### Recommended Citation

Martin H. Belsky, *Locke v. Davey: States' Rights Meet the New Establishment Clause*, 40 *Tulsa L. Rev.* 279 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol40/iss2/5>

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## **LOCKE V. DAVEY: STATES' RIGHTS MEET THE NEW ESTABLISHMENT CLAUSE**

Martin H. Belsky\*

In early 2001, a number of Oklahoma state representatives introduced Oklahoma House Bill 1859. This proposed legislation stated that the Department of Corrections and private correctional facilities were to:

- (1) promote the availability and development of faith-based programs;
- (2) keep records on recidivism rates for all inmates participating in faith-based or religious programs;
- (3) increase the number of volunteers ministering to inmates in various faith-based institutions in the state; and
- (4) develop community linkages with churches, synagogues, mosques, and other faith-based institutions to assist in the release of participants back into the community.

The legislation was opposed by the Oklahoma Department of Corrections on state and federal constitutional grounds. The bill went nowhere.

In May of 2003, I was asked to address the annual Oklahoma Prison Chaplain's Training Conference. The topic was to be "faith-based services." Ministers of all faiths and all political affiliations wanted to know what the law was concerning services they or church groups could provide to prisoners. Specifically, they wanted me to address the validity of proposed legislation that would have promoted a new "faith-based re-entry program" for prisoners.<sup>1</sup> Again, the Oklahoma Department of Corrections was opposing the legislation, based on state and federal constitutional grounds.

I thought the issue was clear. For a number of years, the Supreme Court had been moving away from the so-called "*Lemon* test," established in 1971.<sup>2</sup> That

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\* Professor of Law, University of Tulsa College of Law. J.D., Columbia University (1968). I would like to thank Jeannette F. Liu for her research assistance on this article.

1. This proposal was in fact later introduced as Senate Bill 1486, in the Second Session of the 49th Legislature. The bill, which has now become law in Oklahoma, provided that:

All services available in the reentry program shall be selected after open bid and the Department shall give equal consideration to faith-based and secular providers in all service provider categories. Offenders assigned to the re-entry program shall have the option of selecting whether to follow a faith-based or secular continuum of services upon assignment to the program.

2. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

three-part standard, premised on a strict separation of church and state, was an almost total bar on government funding, directly or indirectly, of religion.<sup>3</sup> Because of a change in the membership of the Court, more recent Supreme Court cases have implicitly overruled the three-part *Lemon* test and said that a rule or regulation “does not violate the Establishment Clause unless it indicates a government ‘endorsement’ of religion or the law actually ‘coerces’ someone to be involved in a religious activity.”<sup>4</sup> Neutrality was the key. Under this new analysis, faith-based programs, I believed, were now presumptively constitutional.<sup>5</sup>

Moreover, in *Zelman v. Simmons-Harris*,<sup>6</sup> the Supreme Court had recently approved an Ohio voucher program that gave students and their parents the choice to use government money (vouchers) for private secular or parochial schools. Specifically, the Court held this was a “neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, [and thus did not carry] with it the imprimatur of government endorsement.”<sup>7</sup>

Surely, if the Constitution can allow students and parents to receive government money and attend a religious school, it would allow government money for prisoners or substance abusers to select faith-based services.<sup>8</sup> In my mind, the issue of faith-based services was no longer a legal or constitutional question, but only a political one.<sup>9</sup>

Lawyers from the Oklahoma Department of Corrections disagreed. Oklahoma is one of thirty-seven states that had state religion clauses, called “Blaine Amendments,” that provided independent bars to government funding of

3. The three-part review of laws under the establishment prong, described in *Lemon*, is as follows:

“First, the statute [or rule] must have a secular purpose [sic].” In other words, there must be a valid non-religious reason for the new law. “[S]econd, its principal or primary effect must be one that neither advances nor inhibits religion.” In short, the new regulation must be neutral towards religion and religions. “[F]inally, the statute must not foster ‘an excessive government entanglement with religion.’” Any rule that forced government at any level to become intertwined with religious institutions or principles was prohibited.

Martin H. Belsky, *Antidisestablishmentarianism: The Religion Clauses at the End of the Millennium*, 33 *Tulsa L.J.* 93, 94 (1997) (quoting *Lemon*, 403 U.S. at 612-13) (footnotes omitted).

4. *Id.* at 95-96 (footnotes omitted).

5. See Aaron Cain, Student Author, *Faith-Based Initiative Proponents Beware: The Key in *Zelman* Is Not Just Neutrality, but Private Choice*, 31 *Pepp. L. Rev.* 979, 1016 (2004).

6. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

7. *Id.* at 655 (emphasis omitted).

8. See e.g. *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003).

9. See Martin H. Belsky, *School Vouchers: The Legal and Policy Arguments*, *Tulsa Kids Mag.* 38, 38 (Aug. 2002):

The case [*Zelman*] was a close one, 5 to 4, and written by Chief Justice William Rehnquist. While it may be possible that sometime in the future, new [J]ustices could be appointed to replace one or more of those in the majority, it is likely that for the immediate future the legality of vouchers has been settled. That still leaves the policy debate: should the taxpayers fund a program that allows a student to pay for tuition at a school of his or her choice, even if that school is a religious one, and what impact would this have on our present public school system.

religious entities or activities.<sup>10</sup> While the various states' provisions differed, Oklahoma's Blaine amendment was a complete bar to any government funding of sectarian programs:

No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.<sup>11</sup>

Despite my own personal preferences, I disagreed with the legal advisors to the Oklahoma Department of Corrections. This was a post-9/11 world. Faith-based services were being touted, with some evidence, as being successful, and especially in education and treatment.<sup>12</sup> Oklahoma is a "Bible Belt" state. Whether I agreed or disagreed with the cases leading up to *Zelman*, I could not believe that a state constitutional provision would be interpreted by the state courts to be more restrictive than the federal Establishment Clause.<sup>13</sup> Moreover, I believed that the federal courts would not allow state laws to be upheld that were inconsistent with federal policy,<sup>14</sup> as expressed by the federal legislature, and approved by the Supreme Court.<sup>15</sup>

Oops!<sup>16</sup>

This article will explore why my absolute certainty as to how the Court would rule in *Locke v. Davey*<sup>17</sup> was so misplaced. Individual justices had to balance their concerns about state power and sovereignty with a desire to lessen government's ability to assist religious entities. Specifically, Justices O'Connor, Kennedy, and even Chief Justice Rehnquist felt that a "play in the joints" between these two philosophical premises allowed a particular state constitution to restrict government aid to religion and religious institutions in that state, even where the federal Constitution would allow and even encourage it.

10. See Michael J. Dailey, Student Author, *Blaine's Bigotry: Preventing School Vouchers in Oklahoma . . . Temporarily*, 39 Tulsa L. Rev. 207, 225-26 (2003).

11. Okla. Const. art. II, § 5.

12. See *Freedom from Religion Found.*, 324 F.3d at 883-84 (noting that religion is an effective treatment for some); John Cassidy, *Schools Are Her Business: A Young Scholar Proposes a Radical Plan*, 75 *The New Yorker* 144, 144 (Oct. 18, 1999) (stating that a voucher system for schools could be used to provide a better education and even to attain social goals such as racial integration).

13. Student author Toby J. Heytens, in the article, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 159-60 (2000), indicated that most state courts will try to interpret their state Blaine amendments "to allow aid to private religious schools so long as the aid is not prohibited by the Federal Establishment Clause." In *Meyer v. Oklahoma City*, 496 P.2d 789 (Okla. 1972), the Oklahoma Supreme Court, in fact, did this. It basically disregarded the explicit language in its state Blaine amendment, relied on its interpretation of the federal Establishment Clause, and upheld the right of Oklahoma City to put up a cross on fair grounds.

14. See e.g. Exec. Or. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002).

15. See Michael W. McConnell, John H. Garvey, & Thomas C. Berg, *Religion and the Constitution* 574-75 (Aspen L. & Bus. 2002). See also Dailey, *supra* n. 10, at 231, 234.

16. See Ira C. Lupu & Robert W. Tuttle, *Hitting the Wall: Religion Is Still Special under the Constitution, Says the High Court*, 27 *Leg. Times* 68, 68 (Mar. 15, 2004) (noting that the *Davey* decision was a surprise to many).

17. 540 U.S. 712 (2004).

## I. THE BLAINE AMENDMENTS

The accepted historical analysis of Blaine Amendments<sup>18</sup> was expressed in a recent article:

Most State Blaines arose in the mid to late 1800s, in response to a widespread controversy over whether Roman Catholics could obtain access to public funding for their schools. At that time, American public schools were overwhelmingly and explicitly Protestant, and private schools were predominantly Catholic. Many people wanted to keep public funds as far from Catholic schools as possible, a project zealously pursued and realized . . . in the State Blaines.<sup>19</sup>

Language of the various Blaine laws differed<sup>20</sup> but almost all barred “the use of generally available public benefits . . . because the recipient is a person who wants to put them to a religious use or is a religiously affiliated organization.”<sup>21</sup>

The traditional wisdom before *Locke v. Davey* was that these laws, developed in a time of and in response to religious prejudice, could not survive.<sup>22</sup> They were inconsistent with the Supreme Court’s jurisprudence providing for a less restrictive review of First Amendment limitations to funding of religious entities and programs.<sup>23</sup> Specifically, under a free speech analysis or free exercise analysis, biased restrictions on state funding could not possibly be considered a “compelling governmental interest” under the required “strict scrutiny” review.<sup>24</sup>

This was not, however, the view of a “surprisingly lopsided”<sup>25</sup> seven-justice majority in *Davey*. In *Davey*, the Court reviewed a Washington state constitutional provision that barred the giving of any state money for religious

18. These state laws are called “Blaine Amendments” because they are based on a proposed federal constitutional amendment proposed by Republican presidential aspirant James G. Blaine. McConnell, Garvey & Berg, *supra* n. 15, at 451-52. In 1876, the proposed amendment overwhelmingly passed the House but did not reach the two-thirds requirement in the Senate. *Id.* at 452-53. This law became the model for state laws and Congress “demanded the inclusion of such provisions as a condition to statehood in the Dakotas, Montana, Washington, and New Mexico. By 1890, some 29 states had enacted some form” of this provision. *Id.* at 457.

19. Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 *Fordham L. Rev.* 493, 495 (2003) (footnote omitted). See also Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 *Harv. J.L. & Pub. Policy* 551, 556-576 (2003).

20. For a detailed survey of the various state Blaine provisions, see DeForrest, *supra* n. 18, at 576-602.

21. Duncan, *supra* n. 18, at 495.

22. See *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000). See also Dailey, *supra* n. 10, at 210.

23. See *Mitchell*, 530 U.S. at 828-29. See also Dailey, *supra* n. 10, at 231. But cf. Katie Axtell, Student Author, *Public Funding for Theological Training under the Free Exercise Clause: Pragmatic Implications and Theoretical Questions Posed to the Supreme Court in Locke v. Davey*, 27 *Seattle U. L. Rev.* 585 (2003).

24. See Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 *N.Y.U. Annual Survey Am. L.* 413 (2003); 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). See also Tony Mauro, *Next School Voucher Case to Contest Ancient Ban Born of Anti-Catholic Bias*, 169 *N.J. L.J.* 486 (2002).

25. Tony Mauro, *States Can Ban Scholarships for Theology: Rehnquist Leads 7-Vote Majority in Washington State Case That Some See As Setback for School Voucher Programs*, 27 *Leg. Times* 7, 7 (Mar. 1, 2004).

“worship, exercise or instruction.”<sup>26</sup> The Washington state legislature had created a “Promise Scholarship Program to assist academically gifted students with postsecondary education expenses.”<sup>27</sup>

Joshua Davey received and sought to use this scholarship to pursue a “double major in pastoral ministries and business management/administration”<sup>28</sup> in order to become a minister. He sued in federal court to require the state to allow him to use the scholarship for his studies. He based his claim on the Free Exercise and Free Speech Clauses of the First Amendment, and the nondiscrimination guarantee of the Equal Protection Clause.<sup>29</sup>

The federal district court rejected Davey’s claims; the federal circuit court of appeals reversed and said that Davey could not be denied the scholarship. The Supreme Court granted certiorari and as noted above, the “conventional wisdom”<sup>30</sup> was that the Court would quickly uphold the court of appeals. But it didn’t. Chief Justice Rehnquist wrote for the majority that there must be a “play in the joints” between the two religion clauses of the First Amendment.<sup>31</sup> The state’s “antiestablishment interests”<sup>32</sup> are historic and legitimate. And, whatever the history of Blaine amendments, the law does not suggest “animus towards religion.”<sup>33</sup>

Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.

Without a presumption of unconstitutionality, Davey’s claim must fail. The 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. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.<sup>34</sup>

26. Article 1, § 11 of Washington’s Constitution provides in part as follows:

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

27. *Davey*, 540 U.S. at 715.

28. *Id.* at 717.

29. *Id.* at 718.

30. See *Duncan*, *supra* n. 18, at 593; *Gall*, *supra* n. 24, at 436; *Richardson*, *supra* n. 24, at 1078. *But cf. Axtell*, *supra* n. 23, at 619-22.

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

32. *Id.* at 722.

33. *Id.* at 725.

34. *Id.* The Court also rejected the free speech and equal protection arguments:

Davey . . . contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech. The purpose of the Promise Scholarship Program is to assist students from low- and middle-

## II. THE PLAY IN THE JOINTS

On first, and even repeated glances, it would appear that *Davey* is inconsistent with prior Supreme Court precedent. Specifically, in the recent case of *Mitchell v. Helms*,<sup>35</sup> five justices upheld a federal statute that provided funds to public and parochial schools. This was based on the relatively recent narrowing of the scope of review of the propriety of state and federal laws to a determination of neutrality and endorsement. Neutrality toward, and non-endorsement of, religion were the new tests.<sup>36</sup>

Justice Thomas's plurality opinion explicitly rejected the premise of Blaine laws:

Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."<sup>37</sup>

Yet only four years later, in *Davey*, only Justices Thomas and Scalia would have declared the Washington state constitutional provision to be in violation of the federal Constitution.<sup>38</sup>

Others, I am confident, will discuss the theoretical "free exercise" arguments to rationalize the *Davey* majority. I believe the vote can be analyzed more pragmatically. Four justices—Breyer,<sup>39</sup> Ginsburg, Stevens, and Souter—have consistently voted for "a relatively strong separation between church and state."<sup>40</sup>

income families with the cost of postsecondary education, not to "encourage a diversity of views from private speakers." Our cases dealing with speech forums are simply inapplicable.

*Davey* also argues that the Equal Protection Clause protects against discrimination on the basis of religion. Because we hold . . . that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to his equal protection claims. For the reasons stated herein, the program passes such review.

*Id.* at 720 n. 3 (citations omitted).

35. 530 U.S. 793 (2000).

36. See Belsky, *supra* n. 3. In *Mitchell*, Justice Thomas, writing for a four justice plurality, described the "neutrality" test: "Considering [this law] in light of our more recent case law, we conclude that it neither results in religious indoctrination by the government nor defines its recipients by reference to religion." 530 U.S. at 808. Two justices concurred in *Mitchell*, in an opinion written by Justice O'Connor. However, these justices believed more than neutrality was needed, and that law must not impermissibly advance nor endorse religion. *Id.* at 867.

37. *Mitchell*, 530 U.S. at 828-29.

38. Justice Scalia's dissenting opinion, joined in by Justice Thomas, 540 U.S. at 726, stated that the Washington law was not neutral and discriminated against religion. Upholding it was therefore inconsistent with recent Supreme Court precedent. This was not, in his mind, even a "close call" to allow a "play in the joints." *Id.* at 728. Justice Thomas added in his own dissent that a degree in theology "does not necessarily implicate religious devotion or faith." *Id.* at 734.

39. Justice Breyer has consistently voted with the four justice minority. See *e.g.* *Agostini v. Felton*, 521 U.S. 203, 240 (1997). In *Mitchell*, he joined Justice O'Connor in concurring in the judgment. 530 U.S. at 836. In that case, he probably felt that there was not "substantial" religious use. See McConnell, Garvey, & Berg, *supra* n. 15, at 548.

40. Lupu & Tuttle, *supra* n. 16, at 68.

For Justices O'Connor and Kennedy, the issue must have been the balance between the new Supreme Court precedents on the application of the religion clauses and state authority and sovereignty.

### III. JUSTICE O'CONNOR

In reviewing whether the Government has crossed the line between separation and advancement of religion, Justice O'Connor has moved away from the traditional three-part *Lemon* test to an "endorsement" analysis.<sup>41</sup> Thus, the federal government could provide tax credits and even funding for tuition for a theology student.<sup>42</sup>

Justice O'Connor also includes the idea of "neutrality" in her analysis of the validity of aid to religious entities.<sup>43</sup> Under a neutrality concept, could the federal government discriminate and not provide funding for theology students when it does so for law students? It would seem to be a violation of the rights of religious entities (under the Free Speech Clause) for the government to allow some groups to use public facilities but not religious groups.<sup>44</sup> For O'Connor, it is clearly a violation for a public school or college to fund student organizations but not religious student organizations.<sup>45</sup> It would seem to also be a violation of the concept of neutrality for a state to bar funding for a theology student when it funds other students.<sup>46</sup>

Justice O'Connor looked specifically at the issue of neutrality and the need to avoid any anti-religious bias in *Rosenberger v. Rector and Visitors of the University of Virginia*.<sup>47</sup> In *Rosenberger*, the University provided funding for student organizations to publish newsletters, bulletins, and newspapers.<sup>48</sup> The University would not fund the printing of "Wide Awake" by a student organization, as it was a paper published by a "religious organization" barred from funding by the University's guidelines.<sup>49</sup> The state chose not to fund religious publications. The Court held that it could not make that choice. Such

41. See e.g. *Agostini*, 521 U.S. 203.

42. See *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (funding for theology student); *Mueller v. Allen*, 463 U.S. 388 (1983) (providing a tax deduction for educational expenses associated with religious schools). See also Justice O'Connor's concurring opinion in *Witters*, 474 U.S. at 493.

43. See *Mitchell*, 530 U.S. at 838 (O'Connor, J., concurring):

I do not quarrel with the plurality's recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges. Our cases have described neutrality in precisely this manner, and we have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid.

See also *Bd. of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226, 248-49 (1990).

44. See *Mergens*, 496 U.S. at 235.

45. *Rosenberger v. Rectors & Visitors of the U. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring).

46. *Witters*, 474 U.S. at 493 (O'Connor, J., concurring).

47. 515 U.S. 819.

48. *Id.* at 827.

49. *Id.*



discrimination is a violation of First Amendment freedom of speech. Justice O'Connor concurred, and talked about the balancing needed:

This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. It is clear that the University has established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes some 15 student publications with predictably divergent viewpoints. It is equally clear that petitioners' viewpoint is religious and that publication of *Wide Awake* is a religious activity, under both the University's regulation and a fair reading of our precedents. Not to finance *Wide Awake*, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance *Wide Awake*, argues the University, violates the prohibition on direct state funding of religious activities.

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging . . . . Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.<sup>50</sup>

Justice O'Connor, in her concurrence in *Witters v. Washington Department of Services for the Blind*,<sup>51</sup> talked about her other standard—non-endorsement. In *Witters*, the state had barred funding to a blind person studying at a Christian college, seeking to become a pastor.<sup>52</sup> The Washington Supreme Court found such funding to be in violation of the Establishment Clause. The United States Supreme Court reversed, finding no such violation. The Clause did not bar such funding because the money went to the student and not to the religious institution. There was no “state support of religion.”<sup>53</sup>

There was no need to balance here. As Justice O'Connor noted in her concurrence, “[T]he aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief.”<sup>54</sup> In *Davey*, this straightforward rule now had to be balanced against an equally

50. *Id.* at 847.

51. 474 U.S. 481.

52. The State Commission and the lower state courts had found such funding to be in violation of the state constitutional provision barring direct or indirect funding of religion. *Id.* at 483-84. This, of course, is the same provision at issue in *Davey*. The Washington Supreme Court in *Witters* “declined to ground its ruling on the Washington Constitution.” *Id.* at 484.

53. *Id.* at 489. The Court left open the issue of the applicability of the Washington Constitution:

On remand, the state court is of course free to consider the applicability of the “far stricter” dictates of the Washington State Constitution . . . . We decline petitioner's invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause requires Washington to extend vocational rehabilitation aid to petitioner regardless of what the State Constitution commands or further factual development reveals, and we express no opinion on that matter.

*Id.* at 489-90 (emphasis in original). On remand, the Washington Supreme Court found assistance to the student to be barred by the Washington Constitution. *Witters v. St. Commn. for the Blind*, 771 P.2d 1119 (1989).

54. *Witters*, 474 U.S. at 493.

important constitutional principle—the sovereign rights of states. For Justice O'Connor, state sovereignty is at least as important a principle as any other constitutional doctrine.<sup>55</sup> It is the obligation of the Supreme Court, in balancing rights and obligations, to protect state sovereignty:

The true “essence” of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme. If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government’s compliance with its duty to respect the legitimate interests of the States.<sup>56</sup>

O'Connor’s rhetoric indicates her continual strong support for tipping the scales in favor of state power.<sup>57</sup> For example, in *New York v. United States*,<sup>58</sup> she wrote for a 6-3 majority that the United States could not compel New York to accept title to radioactive waste, even if it seemed to accept the comprehensive legislative package that that requirement was part of:

In Chief Justice Chase’s much-quoted words, “the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”<sup>59</sup>

And here, in *Davey*, the balancing is also affected by the fact that we are dealing with a state constitutional provision.<sup>60</sup> We are also dealing with decisions by the state Supreme Court upholding the validity of that provision.<sup>61</sup>

In *Gregory v. Ashcroft*,<sup>62</sup> the Supreme Court reviewed a Missouri state constitutional provision that mandated retirement of most judges at age seventy. This provision was found not to violate a federal statute. To avoid reaching the constitutional issue, the federal statute was interpreted not to apply to state judges. However, Justice O'Connor stressed the fact that in the constitutional balance, state powers had to be adequately considered,<sup>63</sup> and particularly when a state constitutional provision was involved.<sup>64</sup>

Thus, for Justice O'Connor, the balance had to be for state sovereignty. The states should be allowed to decide how they are going to spend their own money.<sup>65</sup>

55. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000) (Equal Protection Clause); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991) (habeas corpus); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (dissenting) (Commerce Clause). See also *Block v. N.D.*, 461 U.S. 273, 293, 296 (1983) (dissenting) (conflict between two “sovereigns”—state and federal governments).

56. *Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting) (emphasis in original and citations omitted).

57. See *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991) (O'Connor, J., concurring).

58. 505 U.S. 144 (1992).

59. *Id.* at 162 (quoting *Tex. v. White*, 74 U.S. 700, 700 (1868)).

60. See *Gregory*, 501 U.S. at 460. Compare *Witters*, 771 P.2d at 1122-23.

61. *Witters*, 771 P.2d at 1119.

62. 501 U.S. 452 (1991).

63. *Id.* at 457-59.

64. *Id.* at 460.

65. See *Garcia*, 469 U.S. at 580 (dissenting).

States could restrict, under their own constitutions, the funding of sectarian entities—even if the federal government could not under its constitution. And the state courts could interpret their own constitutional provisions to comply with the will of their people.<sup>66</sup>

#### IV. JUSTICE KENNEDY

Justice Kennedy probably goes farther than Justice O'Connor in downgrading claims that aid to religious institutions violates the Establishment Clause. In *Rosenberger*, he wrote the majority opinion that found that the denial of funding to a religious organization to publish its newsletter violated the Free Speech Clause.<sup>67</sup> “Discrimination against speech because of its message is presumed to be unconstitutional.”<sup>68</sup> For him, the key issue was neutrality: “We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”<sup>69</sup> Since this program was neutral to religion, there was no violation of the Establishment Clause.<sup>70</sup> This goes even farther than what Justice O'Connor felt should be the standard.<sup>71</sup> According to Justice Kennedy, more of a balancing is required than just the consideration of neutrality.

Similarly, Justice Kennedy adopted a position less restrictive of government funding of religious entities than Justice O'Connor when he joined the plurality in *Mitchell*.<sup>72</sup> In that plurality, Justice Thomas stated that the issue involved in whether the government could provide funding (Chapter 2 funds) to religious entities was one of “indoctrination” attributable to government<sup>73</sup>:

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66. *But see Bush v. Gore*, 531 U.S. 98, 121 (2000). *See also* Martin H. Belsky, *Bush v. Gore—A Critique of Critiques*, 37 *Tulsa L. Rev.* 45, 66-67 (2001).

67. 515 U.S. at 819.

68. *Id.* at 828.

69. *Id.* at 839.

70. *Id.* at 840.

71. *See* Justice O'Connor's concurring opinion in *Rosenberger*.

The nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's decision today. Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to *Wide Awake* that it does to other publications, the University would not be endorsing the magazine's religious perspective.

The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence. As I observed last Term, “[e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test.” When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified.

*Id.* at 849, 852 (citation and internal cross-reference omitted).

72. 530 U.S. 793.

73. *Id.* at 808 (“Considering Chapter 2 in light of our more recent case law, we conclude that it neither results in religious indoctrination by the government nor defines its recipients by reference to religion.”).

Chapter 2 does not result in governmental indoctrination, because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content. Nor does Chapter 2 define its recipients by reference to religion.<sup>74</sup>

Justice O'Connor felt that the plurality decision "announces a rule of unprecedented breadth."<sup>75</sup> Neutrality alone is not enough. There must not be any endorsement—direct or indirect—of religion.<sup>76</sup>

Thus, it would appear that Justice Kennedy, even more than Justice O'Connor, would need some very persuasive reasons to bar funding under a "neutral" program that provided money to students for theology and non-theology study. By joining the majority in *Davey*, he accepts state sovereignty as such a set of reasons.

This perspective was previewed in Justice Kennedy's previous actions and decisions. He joined the opinion of Justice O'Connor in *New York*, described above,<sup>77</sup> barring the federal government from forcing a state to accept title to property. He joined the majority in a series of cases limiting the federal government's power over a state under the Commerce Clause,<sup>78</sup> and even under the Fourteenth Amendment Equal Protection Clause.<sup>79</sup> Finally, he joined the majority in a series of cases providing for state immunity from federal suits.<sup>80</sup>

Like Justice O'Connor, Justice Kennedy is fervent in support of state independence and sovereignty. In *United States v. Lopez*,<sup>81</sup> he wrote a concurring

74. *Id.* at 829. Specifically, the majority opinion stated that "[I]t is clear that Chapter 2 aid 'is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.'" *Id.* (quoting *Agostini*, 521 U.S. at 231). Further: "The program makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof. We therefore have no difficulty concluding that Chapter 2 is neutral with regard to religion." *Id.* at 829-830 (citations omitted).

75. *Mitchell*, 530 U.S. at 837 (concurring). Justice O'Connor continued:

Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible. Although the expansive scope of the plurality's rule is troubling, two specific aspects of the opinion compel me to write separately. First, the plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school aid programs. Second, the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case.

*Id.* at 837-38.

76. *Id.* at 867.

77. *Supra* nn. 58-59 and accompanying text.

78. See *U.S. v. Morrison*, 529 U.S. 598 (2000); *Printz v. U.S.*, 521 U.S. 898 (1997); *U.S. v. Lopez*, 514 U.S. 549 (1995).

79. See *Morrison*, 529 U.S. at 619-27.

80. See *Bd. of Trustees of the U. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel*, 528 U.S. 62; *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996).

81. 514 U.S. 549 (1995).

opinion stressing that “federalism was the unique contribution of the Framers to political science and political theory.”<sup>82</sup>

In *Lopez*, the issue was a federal statute that infringed on state areas of concern. In *Davey*, the state was applying its own constitutional provision and was one of many states that had adopted similar provisions. In both cases, Justice Kennedy must have felt that upholding the state’s right to apply its own doctrine is consistent with our constitutional model of two sovereigns.<sup>83</sup>

The importance of state sovereignty was stressed again by Justice Kennedy when he wrote the majority opinion in *Alden v. Maine*.<sup>84</sup> This case involved the application of immunity of the state from suit under a federal statute even in the state’s own courts. The Constitution, wrote Justice Kennedy, recognizes the states as “sovereign entities.”<sup>85</sup> Within their own sphere, the states are not ordinarily subject to challenge.<sup>86</sup> What can be more within its sphere than implementing its own constitution,<sup>87</sup> and deciding how money is to be spent and not spent?<sup>88</sup>

## V. CHIEF JUSTICE REHNQUIST

David Garrow has written that “William H. Rehnquist has had remarkably consistent legal views . . . since his . . . elevation to the Court in 1972.”<sup>89</sup> This is especially true as to issues of separation of church and state<sup>90</sup> and as to federalism.<sup>91</sup>

In *Wallace v. Jaffree*,<sup>92</sup> a majority of the Supreme Court found an Alabama statute that mandated a “Moment of Silence” in public schools to be in violation of the Establishment Clause because the legislature’s clear and stated intent was to provide for prayer in the schools. Then-Justice Rehnquist dissented and argued that the Establishment Clause was never intended to create a “wall of separation” between church and state, but only to forbid preference of one religious sect over

82. *Id.* at 575.

83. In *Lopez*, Justice Kennedy stressed the need for state authority: “The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise . . . .” *Id.* at 583 (concurring).

84. 527 U.S. 706 (1999).

85. *Id.* at 713 (quoting *Seminole Tribe*, 517 U.S. at 71 n. 15).

86. *See id.* at 714:

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status. The States “form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.”

(quoting *The Federalist No. 39* (James Madison)).

87. *See Gregory*, 501 U.S. at 460.

88. Compare *Nail. League of Cities v. Usery*, 426 U.S. 833 (1976), with *Garcia*, 469 U.S. at 557 (Powell, J., dissenting); *id.* at 580 (O’Connor, J., dissenting).

89. David J. Garrow, *William H. Rehnquist in the Mirror of Justices*, in *The Rehnquist Court: A Retrospective* 274, 274-75 (Martin H. Belsky ed., Oxford U. Press 2002).

90. *Id.* at 277.

91. *See e.g. Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

92. 472 U.S. 38 (1985).

another.<sup>93</sup> Specifically, Rehnquist wrote that the Constitution did not forbid government providing benefits to religious institutions or to individuals who wished to use government funds at religious entities.<sup>94</sup>

Similarly, as to federal-state balance, then-Justice Rehnquist wrote in *National League of Cities v. Usery*,<sup>95</sup> quoting an earlier opinion by Chief Justice Chase:

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.<sup>96</sup>

*National League of Cities* declared unconstitutional federal mandates for minimum wages for state workers. It was later overruled by *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>97</sup> In his dissent, then-Justice Rehnquist reiterated his belief in the sovereignty of states and also that the Court would soon swing back to his perspective:

*National League of Cities* . . . recognized that Congress could not act under its commerce power to infringe on certain fundamental aspects of state sovereignty that are essential to "the States' separate and independent existence." . . . I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.<sup>98</sup>

As Chief Justice, Rehnquist has been able to build majorities. Part of this ability is based on ideology.<sup>99</sup> Part is based on Rehnquist's skill as Chief Justice.<sup>100</sup>

93. *Id.* at 92, 113. *See id.* at 106:

[Historically], the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. . . . The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

94. *Id.* at 111-12 (quoting *Comm. for Pub. Educ. & Relig. Liberty v. Nyquist*, 413 U.S. 756, 799 (1973) (Burger, C.J., concurring in part and dissenting in part)).

95. 426 U.S. 833 (1976).

96. *Id.* at 844 (quoting *Lane County v. Or.*, 74 U.S. 71, 76 (1868)).

97. 469 U.S. 528.

98. *Id.* at 579-80.

99. *See* Erwin Chemerinsky, *The Constitutional Jurisprudence of the Rehnquist Court*, in *The Rehnquist Court: A Retrospective* 195 (Martin H. Belsky ed., Oxford U. Press 2002). "[R]esults usually depend on whether the conservative bloc of Rehnquist, Scalia, and Thomas can get the votes of O'Connor and Kennedy. Frequently they do and many cases have been decided by five to four margins with that group in the majority." *Id.* at 195.

100. *See* Bernard Schwartz, *A History of the Supreme Court* 373-75 (Oxford U. Press 1993) (comparing the styles of Rehnquist and Burger and comparing Rehnquist's ability to forge majorities with that of Earl Warren).

In any event, he has been able to develop a set of winning core principles.<sup>101</sup> Two of these principles are the enhancement of state authority, sovereignty and power,<sup>102</sup> and “antidisestablishmentarianism,” providing for more flexibility in government support of religion.<sup>103</sup>

On federalism, Rehnquist has joined in the majority opinions, often written by Justices O’Connor and Kennedy,<sup>104</sup> narrowing the scope of Congress’s power to regulate states and reaffirming the validity of state sovereignty under the Tenth Amendment, and broadening state immunity from lawsuits brought under federal statutes.<sup>105</sup>

But as Chief Justice, who selects who writes the opinion when he is in the majority, Rehnquist has directly expressed his opinions and ambitions for the Rehnquist Court jurisprudence. For example, in *Lopez*, he noted that the Supreme Court had been granting broader and broader authority to the federal government.<sup>106</sup> It was now time to call a halt to this trend.<sup>107</sup> Five years later, in *United States v. Morrison*,<sup>108</sup> he was more direct. There are certain key areas of state concern that are closely tied to state sovereignty.<sup>109</sup> And it is the province of the Supreme Court to protect the states and decide how far the federal government can go in regulating these areas.<sup>110</sup> For the Chief Justice, as indicated in his earlier opinion in *National League of Cities*, how a state decides to spend its money is one such key area.<sup>111</sup>

## VI. RECONCILING THE TWO CORE PRINCIPLES

Three justices are strong proponents of more flexibility in allowing government funding of religion and in expanding state authority. To reconcile these two core principles, Chief Justice Rehnquist chose to write the *Davey* opinion himself. He would balance the two principles and come up with a resolution—a “play in the joints” that would allow some flexibility to the states

101. See Chemerinsky, *supra* n. 99.

102. *Id.* at 197.

103. See Belsky, *supra* n. 3.

104. See *supra* nn. 57, 62-64, 84-88 and accompanying text.

105. See Chemerinsky, *supra* n. 99, at 197.

106. 514 U.S. at 552-63.

107. *Id.* at 567-68:

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

(internal cross-references and citations omitted).

108. 529 U.S. 598.

109. *Id.* at 615-16.

110. *Id.* at 616 n. 7.

111. See Lupu & Tuttle, *supra* n. 16, at 68-69.

but yet not determine how far the states could go in not funding sectarian institutions or programs.<sup>112</sup>

On the side of federalism:

And the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion.<sup>113</sup>

Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.<sup>114</sup>

On the side of more flexibility to fund religious programs, the Court limited its analysis to the funding of the training of ministers,<sup>115</sup> and did not address the more general Blaine amendment question.<sup>116</sup>

## VII. CONCLUSION

So what happens next? Oklahoma's provision bars the use of funds for prison education, community drug programs, or school voucher systems. If it came before a state or federal court or the Supreme Court,<sup>117</sup> would it be upheld? I believe, despite my pre-*Davey* certainty, it would. At least one court has upheld the validity of its state constitutional provision barring vouchers, even though the system was found valid under the United States Constitution.<sup>118</sup>

Will such a case be decided on niceties like whether the voucher system or prison or drug program is a "subsidy" like that in *Locke v. Davey* or a broad-based "neutral" expenditure of funds that cannot discriminate?<sup>119</sup> Probably not! Rather, it will be decided on how many of the three justices balance their concerns in favor

112. *Davey*, 540 U.S. at 715.

113. *Id.* at 722 (footnotes and citations omitted).

114. *Id.* at 723.

115. *Id.* at 716, 719. *See id.* at 721-22, nn. 4-5.

116. *Davey*, 540 U.S. at 723 n. 7. *See Mauro, supra* n. 25, at 7.

117. *See Duncan, supra* n. 18, at 495; Lupu & Tuttle, *supra* n. 16, at 69.

118. *See Greg Winter, Florida Court Rules Against Religious School Vouchers*, N.Y. Times A15 (Aug. 17, 2004). *Compare Zelman*, 536 U.S. 639 (upholding Ohio's voucher system under the Establishment Clause).

119. *See Frank S. Ravitch, Law and Religion, A Reader: Cases, Concepts, and Theory* 395-96 (West 2004).



of federalism against their desire to loosen restrictions on government funding of religion.

I put my money on federalism—especially when we are dealing with a state constitution.<sup>120</sup> But, of course, this will not be the end of the issue. States will now be asked to amend their constitutions to provide for more funding for religious entities and programs. Or state courts will be asked to interpret their constitutions to limit the impact of their own state's law.

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120. See Erwin Chemerinsky, *Unanswered Questions: October Term 2003*, 7 Green Bag 323, 333 (2004); Lupu & Tuttle, *supra* n. 16, at 68.