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SYMPOSIUM: THE FUNDING OF RELIGIOUS INSTITUTIONS IN LIGHT OF *LOCKE V. DAVEY*

***LOCKE V. DAVEY* IN HISTORICAL PERSPECTIVE: A BRIEF INTRODUCTION**

Paul Finkelman* and Carol A. Hudson**

A year ago legal scholars and political leaders watched closely as the United States Supreme Court considered and then decided *Locke v. Davey*.¹ Commentaries and law review articles were full of predictions of what the court would decide, and what ramifications the decision would have, especially on the future of state funded vouchers to sectarian schools.² Even beyond the legal world journalists took an unusual interest in the case.³

On February 25, 2004, the Court announced its decision. To the shock of most, the dismay of many, and the relief of others, the Court, in a 7-2 decision, held that Washington State did not violate the United States Constitution when it denied Joshua Davey a state-sponsored scholarship because he wanted to use the money for religious training.⁴ Davey had met every qualification necessary to receive Washington's Promise Scholarship.⁵ However, the scholarship was explicitly limited to those who were not studying devotional theology.

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1. *Locke v. Davey*, 540 U.S. 712 (2004).

2. See Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151 (2003); Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 570 (2003); Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917 (2003); Brandi Richardson, Student Author, *Eradicating Blaine's Legacy of Hate: Removing the Barriers to State Funding of Religious Education*, 52 Cath. U. L. Rev. 1041, 1078 (2003); Joseph P. Viteritti, *Davey's Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom*, 27 Harv. J.L. & Pub. Policy 299 (2003).

3. Editorial, *The Blaine Game*, 242 Wall St. J. A18 (Dec. 2, 2003). The extreme views on the issue were illustrated by *The Wall Street Journal's* description of the law at stake in *Davey* as "operat[ing] mostly to deny inner-city black and Latino kids a shot at a decent school." *Id.*

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

5. *Id.* at 716-17.

Washington authorities had denied Davey a scholarship because the state constitution explicitly prohibited state funding for religious training.⁶ The state officials quite logically concluded that Davey's intention to major in theology made him ineligible for the scholarship.⁷

In Davey's initial suit, the federal district court granted summary judgment to the state, and Davey appealed to the Ninth Circuit Court of Appeals. A divided Ninth Circuit ruled that Washington had discriminated against Davey because of his religion.⁸ The Court of Appeals based its decision on recent U.S. Supreme Court cases supporting an expansive notion of free exercise and equal protection.⁹ When it granted certiorari, most commentators believed that in light of its recent pronouncements,¹⁰ the U.S. Supreme Court would uphold the Ninth Circuit's decision, and in effect strike down a portion of the Washington Constitution. In its decision, the Supreme Court did not elaborate at length on its holding. It simply found that although Washington would *not* violate the Establishment Clause of the Constitution if it *did* award Davey the scholarship, it did *not* violate his free exercise rights by denying him the scholarship.¹¹ It characterized this area between the two halves of the Religion Clause as "play in the joints."¹²

The brevity of the Court's decision in *Davey* belies the magnitude of the issues involved. It was at once a case concerning the Establishment Clause, the Free Exercise Clause, religious discrimination, equal protection, incorporation of the First Amendment to the states under the Fourteenth Amendment, state funding of education, and federalism. The whole issue, however, boiled down to whether Washington, under its own constitutional guidelines and interpretations, could refuse to fund private religious education, while at the same time funding private secular education. Davey argued that this was unconstitutional discrimination against his religion and that he was denied his free exercise and

6. *Id.* at 717.

7. *Id.*

8. *Davey v. Locke*, 299 F.3d 748, 760 (9th Cir. 2002).

9. The court seemed to particularly rely on *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978).

10. Particularly relevant were *Zelman*, 536 U.S. 639, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), and *Mueller v. Allen*, 463 U.S. 388 (1983), dealing with funding, and *Rosenberger*, 515 U.S. 819, *Lukumi*, 508 U.S. 520, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Board of Education v. Mergens*, 496 U.S. 226 (1990), dealing with discrimination based on religion.

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

12. *Id.* (quoting *Waltz v. Tax Commn.*, 397 U.S. 664, 669 (1970)). The full context of the quote is interesting in light of the issues at hand:

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 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.

Waltz, 397 U.S. at 669.

equal protection rights. The State of Washington's claim was far more simple. The State argued that its constitution prohibited it from funding religion and that this prohibition was fully consistent with the Establishment Clause of the First Amendment, which, when applied to the states under the Fourteenth Amendment, bars both the national government and the state from supporting any religion. Indeed, Washington argued that the essence of the separation of church and state would be violated if the state used tax money to support religious institutions.¹³ In *Davey*, the Supreme Court upheld this strict understanding of separation of church and state.

It was not surprising that there would be much interest in the case's outcome. The debate surrounding the limits of judicial federalism have been evoking ever-increasing demands for answers to the question of where lines are to be drawn. Federalism issues are at the heart and soul of at least two hot button political and social issues of our times: vouchers and same-sex marriage. Both involve issues that have been traditionally in the hands of the state: educational funding, religion, and marriage. For the first one hundred and fifty years of America's history there was not much reason to question a state's right to defer to and interpret its own constitution—particularly in regard to the protection of individual rights and the separation of church and state. At the time of the Founding, most states had some form of religious establishment. In addition, all but New York and Virginia initially had religious tests for officeholding.¹⁴ Most of these disappeared by the 1820s, although a few lingered into the Jacksonian period.¹⁵ Most state support for religious institutions also disappeared in the first two decades under the national constitution, although New Hampshire's constitution provided for state support for religion into the twentieth-century.¹⁶

Many supporters of the Fourteenth Amendment believed it would make the Bill of Rights applicable to the states,¹⁷ but in what many scholars regard as a wrong turn in constitutional jurisprudence, the Court, in the *Slaughter-House Cases*,¹⁸ eviscerated the meaning of the Privileges and Immunities Clause of the Fourteenth Amendment and left the states free to regulate civil liberties, including religious freedom, without any constraints from the national government. In the early 1920s, the Court began to apply the Due Process Clause of the Fourteenth Amendment to protect fundamental rights,¹⁹ and in 1925 the Court, with little

13. This position dates from the earliest American ideas of separation of church and state, and was clearly articulated by James Madison, who later became the "father" of the Bill of Rights, in his *Memorial and Remonstrance Against Religious Assessments*. See Relig. Freedom Page, *Presentation to the General Assembly of the Commonwealth of Virginia*, http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html (accessed February 12, 2005).

14. J. Jackson Barlow, *Officeholding Clause of Constitution and Religious Test for Officeholding, and Officeholding: Religious-Based Limitations in Eighteenth-Century State Constitutions*, in *Religion and American Law: An Encyclopedia* 345-46, 346-48 (Paul Finkelman ed., Garland 2000).

15. *Id.*; see Morton Borden, *Jews, Turks, and Infidels* (UNC Press 1984).

16. Compare N.H. Const. pt. I, arts. 4-6 (1784) with N.H. Const. pt. I, arts. 4-6 (amended 1968).

17. See Michael Kent Curtis, *The Framing of the Fourteenth Amendment*, in *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 57-91 (Duke U. Press 1986).

18. 83 U.S. 36 (1872).

19. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Neb.*, 262 U.S. 390 (1923).

fanfare, decided that the Fourteenth Amendment in fact incorporated the Speech and Press Clauses of the First Amendment to the state.²⁰ This led to the gradual incorporation of most of the Bill of Rights to the states. By the end of the 1940s, the Free Exercise and Establishment Clauses were recognized as applying to the states.²¹ In 1940, the Court incorporated the Free Exercise Clause to the states in *Cantwell v. Connecticut*.²² In 1947, the Court applied the Establishment Clause to the states in *Everson v. Board of Education*.²³ In a case that allowed states to fund transportation to students of private and parochial schools, Justice Black, writing for the Court, decreed that the Establishment Clause was now applicable to the states.²⁴ It is here that Justice Black injected Thomas Jefferson's metaphor, written in an 1802 letter to the Danbury Baptists, into the national consciousness.²⁵ He wrote that "[i]n the words of Thomas Jefferson, the clause against establishment of religion was intended to erect a 'wall of separation between church and state.'"²⁶ The Court's task now became determining exactly how this feat was to be done. Since the First Amendment had been understood up to this time to reserve religious decisions to the states, how was the Court to ensure the states their sovereignty under judicial federalism, and yet uphold the requirements of the First Amendment? It has proven to be a daunting task.

In the half century since *Everson*, the Court has struggled to produce a meaningful answer to the dilemma between incorporation and federalism. The Court's attempts have brought it criticism from all sides. For the first three decades following *Everson*, the Court diligently attempted to implement Justice Black's charge to erect a high and impenetrable wall of separation between church and state. The most conspicuous area that was affected was the arena of public education. Often ruling against popular opinion, the Court virtually eviscerated any sign of the once predominant Protestant influence from public schools, replacing it with a determined secularism. Removing prayer, Bible reading, and any funding of sectarian education, its chief tool in attempting to apply this doctrine was developed in *Lemon v. Kurtzman*,²⁷ where it devised its infamous three-part test. According to *Lemon*, a law must: (1) have a legislative purpose that is secular; (2) neither advance nor inhibit religion; and (3) not excessively entangle the government with religion.²⁸ However, even the Court itself found *Lemon* to be insufficient as a guideline as it has time and time again revised and reinterpreted it.

20. See *Gitlow v. N.Y.*, 268 U.S. 652 (1925).

21. See *infra* nn. 22-23.

22. 310 U.S. 296.

23. 330 U.S. 1.

24. *Id.* at 2, 18.

25. *Id.* at 16. For a comprehensive history of Jefferson's letter to the Danbury Baptists and the effect its inclusion in *Everson* has had on First Amendment jurisprudence and the national consciousness, see generally Philip Hamburger, *The Separation of Church and State* (Harv. U. Press 2002).

26. *Everson*, 330 U.S. at 16.

27. 403 U.S. 602 (1971).

28. *Id.* at 612-13 (citations omitted).

Over the past two decades the Court has moved away from its goal of strict separation and allowed a gate to be installed in the wall. That gate is neutrality.²⁹ The Court now finds that rather than requiring total separation from religion, the Establishment Clause requires neutrality toward religion: neither favoring nor disfavoring it.³⁰ This has been particularly true in the area of funding. In *Everson*, Justice Black clearly enunciated a funding principle, and it was a simple one: there was to be no funding by the government of religious enterprises.³¹ “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.”³² This decree was to apply not only to the federal government, but to the states as well, which before the decree were free to fund (or not fund) whatever religious endeavors they chose. Regardless of the strong rhetoric in *Everson*, the Court has never consistently held to this strict standard.

Equipped with the new emphasis on neutrality, the tide arguably began to irrevocably turn with the Court’s view of funding in *Mueller v. Allen*.³³ The Court held that there was a difference in state aid to religious schools when the aid was indirect and based on parental choice.³⁴ *Mueller* was followed by a string of cases, all standing for the proposition that where choice breaks the link between the government and the religious institution, there is no violation of the Establishment Clause.³⁵

The Court’s emphasis on neutrality also affected its decisions regarding nondiscrimination. It had most recently articulated this nondiscrimination doctrine in its 1993 decision of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,³⁶ where it stated 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.”³⁷ The Ninth Circuit relied on *Lukumi* in determining that Washington had indeed discriminated against Joshua Davey’s free exercise of religion.³⁸

Is *Davey* headed for the annals of history as a landmark case? If the Court had found that Washington discriminated against Davey’s free exercise of religion,

29. “A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.” *Rosenberger*, 515 U.S. at 839. For a discussion of the evolution and application of the neutrality principle, see Gabriël A. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. Rev. 535.

30. *Davey*, 299 F.3d at 752. “We recur to basic principles. The First Amendment declares: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ Thus, the state may neither favor, nor disfavor, religion. A law targeting religious beliefs as such is never permissible.” *Id.*

31. *Everson*, 330 U.S. at 15-16, 18.

32. *Id.* at 16.

33. 463 U.S. 388 (1983).

34. *Id.* at 403-04.

35. See *Zelman*, 536 U.S. 639; *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest*, 509 U.S. 1; *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986).

36. 508 U.S. 520.

37. *Id.* at 533.

38. *Davey*, 299 F.3d at 752-53, 757.

then it might have found that the relevant section of the Washington Constitution³⁹ was unconstitutional. This means *Davey* would have marked the death knell for those state constitutional amendments that contain establishment clauses that are stricter than the federal Constitution, and left states with no refuge against funding for religious schools. Those so-called “Blaine Amendments” are named for Speaker of the House, James G. Blaine, who from 1869 to 1875 attempted to push through Congress an amendment to the Constitution that would prohibit religious schools from ever receiving any direct or indirect tax money.⁴⁰ The impetus for the proposed amendment was alleged to be Catholic bigotry on the part of Protestants who had a firm toehold in the public schools, and did not want tax money to follow Catholics who left public schools to start their own schools. Although Blaine’s attempt at a federal amendment failed, to date approximately two-thirds of state constitutions have amendments to their constitutions with similar wording.⁴¹ These amendments were rarely used by the states over the years, as they were rarely needed. Before *Everson*, state sovereignty in religious matters was rarely questioned. Even after *Everson*, U.S. Supreme Court decisions on the Establishment Clause were strict enough to render state establishment clauses redundant. However, as the Court began taking a new approach to First Amendment funding issues, some states balked at the new approach to funding and dusted off their own constitutional establishment clauses. They began basing their holdings on their own establishment clauses instead of the now more lenient grounds of the Constitution’s Establishment Clause precedent. The question came to a climax in *Davey*. Would the Supreme Court allow the states to do so? How would the Supremacy Clause and incorporation affect the states’ rights to do so?

Historical analysis also played a significant role in *Davey* and the drama leading up to it. *Everson* had arrived at its conclusions about the importance of building a wall of separation between church and state by presenting a virtual dissertation on the history behind the First Amendment, particularly the views of

39. The clause at issue in the Washington State Constitution reads:

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. . . . 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

Wash. Const. art. I, § 11.

40. For a detailed history and analysis of Blaine’s amendment and its progeny see Hamburger, *supra* n. 25, at ch. 11. The Blaine amendment reads:

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 or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Richard Aynes, *Blaine Amendment*, in *Religion and American Law: An Encyclopedia* 40 (Paul Finkelman ed., Garland 2000).

41. *Supra* n. 39.

Jefferson and Madison. In the 1985 case of *Wallace v. Jaffree*,⁴² Justice Rehnquist set forth his own version of constitutional history in opposition to Justice Black's.⁴³ The contrast between the two versions confirms suspicions that history is in the eye of the beholder. In *Davey*, Chief Justice Rehnquist once again reverted to a history lesson, warning that from the beginning of our nation's history "there have been popular uprisings against procuring taxpayer funds to support church leaders."⁴⁴

So what can we learn about the current status of First Amendment jurisprudence from *Davey*? Perhaps we are no closer than before to having an understanding of the nexus of incorporation and federalism. What promises are guaranteed to citizens regarding their free exercise of religion under the First Amendment, and where do those promises intersect with the state's right to construe their own constitutional establishment clause provisions? In *Davey*, the Court saw federalism as the prevailing precept, at least in this instance.

What does this mean for the issues at stake, particularly for state funding of vouchers for education? What effect will the decision in *Davey* have? In the final analysis, not many questions were definitively answered. *Davey*'s detractors are already looking for ways the decision might be distinguished. They would also remind us that the Court did not give its *approval* to so-called Blaine amendments; it simply said that Blaine amendments were "not before us."⁴⁵ There is still hope in that camp that Blaine amendments might yet be ruled unconstitutional. A quick online shepardizing of *Locke v. Davey* will already produce many law review articles responding to the decision. We believe the articles in this symposium issue will also shed more light on the issues at hand.

42. 472 U.S. 38.

43. *Id.* at 91-114 (Rehnquist, J., dissenting).

44. *Davey*, 540 U.S. at 722.

45. *Id.* at 723 n. 7.

