1-1-2005

Locke v. Davey and the Lose-Lose Scenario: What Davey Could Have Said, but Didn't

Frank S. Ravitch
Michigan State University College of Law, fravitch@law.msu.edu

LOCKE V. DAVEY AND THE LOSE-LOSE SCENARIO: WHAT *DAVEY* COULD HAVE SAID, BUT DIDN'T

Frank S. Ravitch*

I. INTRODUCTION

I first heard of *Locke v. Davey*[1] when it was percolating through the lower courts.[2] When the Supreme Court granted certiorari, I had profoundly mixed feelings about the case. On the one hand, Joshua Davey seemed to have a good argument. He qualified for a generally available scholarship and was denied solely because he wanted to use it to pursue a religious degree.[3] This violated the "Equal Access" principle,[4] which I strongly believe in.

On the other hand, the Court had recently decided *Zelman v. Simmons-Harris*,[5] a decision that seemed to be the final nail in the coffin for any serious analysis of the effects of government funding programs under the Establishment Clause.[6] I have argued elsewhere that *Zelman* was an unprincipled (or wrongly principled) decision,[7] and the potential impact of *Zelman* is far reaching. *Davey* presented an opportunity for a limiting principle on the seemingly boundless reach of *Zelman*. As will be seen below, *Zelman* holds that aid programs are

---

* Professor of Law, Michigan State University College of Law.

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

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

3. *Davey*, 540 U.S. at 715-17.

4. Equal access is a term that has generally been associated with access by religious groups to government facilities open to other groups as part of a public forum or limited public forum. *See e.g. Good News Club v. Milford C. Sch.*, 533 U.S. 98 (2001) (holding that a Christian club cannot be denied access to use classroom after school hours if other non-curriculum related groups are allowed to use facilities); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that a church group cannot be denied access to use school facilities to show movie on social issues from a religious perspective if other groups are allowed to use facilities to address similar topics from other perspectives); *see also Equal Access Act*, 20 U.S.C. § 4071 (2000) (holding that religious clubs cannot be denied access to use school facilities during non-instructional time when other non-curriculum related groups are allowed to use facilities). The term as used here would also include access by religious *individuals* to funds under broad funding programs, which allow those individuals to use the funds at a wide array of secular or religious private institutions. *See infra* nn. 10-12 and accompanying text. I would not use the term to refer to funding in other contexts.

5. 536 U.S. 639 (2002).

6. *Id.* at 687, 695-705 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

7. Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 Ga. L. Rev. 489, 502-23 (2004).

constitutional when government entities choose to fund them even where the bulk of the monies flow to one or two religions, but *Zelman* does not answer the question of whether the government *must* include religious entities when it chooses to fund aid programs.[8] Given the *Zelman* Court's reliance on "formal neutrality," the latter possibility seemed and seems a distinct possibility.[9]

The Court's approach in *Zelman* caused me to reconsider *Davey*. Without *Zelman*, quite frankly, I would have thought that Davey should have received his scholarship. My reasons would have been quite similar to those expressed by the Court in *Witters v. Washington Department of Services for the Blind*[10] and *Zobrest v. Catalina Foothills School District*[11]—i.e., when government funds a truly broad program that provides real choices to program recipients it may not discriminate against religious recipients based on their religious choices.[12] After *Zelman*, however, a limiting principle on the formal neutrality doctrine is desirable—any limiting principle! *Davey* presented such a possibility. The Court could have held in *Davey* that government entities *may* fund programs that send dollars to religious entities, but they are not *required* to do so even when a program is open

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

9. The possibility that religious entities would have to be included in generally available funding programs is implicit in the holding in *Rosenberger v. Rector and Visitors of University of Virginia*, even though the outcome in that case was heavily dependent on the Free Speech Clause. 515 U.S. 819 (1995) (holding that a university that provides funding to a variety of student publications may not exclude only religious publication because to do so would constitute viewpoint or content discrimination). In fact, Davey argued that, given the facial neutrality and broad private choices available under the Promise Scholarship Program, denying him the scholarship only because of his religious intentions would be to discriminate based on religion. *Davey*, 540 U.S. at 717-18. He relied on *Rosenberger* and *Church of the Lukumi Babalu Aye v. City of Hialeah*, among other cases. *Lukumi*, 508 U.S. 520 (1993) (finding that a city violated the Free Exercise Clause when it singled specific religion out for disfavored treatment, but reasoning could apply to singling out religion more generally for such treatment); *see also Davey*, 299 F.3d 748, 752-53, 755-56. The Ninth Circuit held that the state violated Davey's rights under the Free Exercise Clause and violated the neutrality principle when it denied him his scholarship because he decided to "pursue a degree in theology from a religious perspective." *Id.* at 756-60. In *Davey*, the Supreme Court never addressed whether these same arguments might be successful when the state denies a scholarship to a student because he or she wants to use it at a religious school or for a religion major when a degree in devotional theology is not involved. *See* 540 U.S. 712. Like the Court in *Rosenberger* and the Ninth Circuit in *Davey*, several scholars have suggested that once government opens an aid program to recipients for a variety of purposes or for use at a variety of entities on a neutral basis it cannot exclude only religious individuals or pursuits. *See* Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 497-502 (2003) (arguing for nondiscrimination principle when government allocates public funds); 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. Ann. Surv. Am. L. 413, 426-27 (2003) ("Nothing in the First Amendment . . . requires that a school choice program be enacted. But once such a program is enacted, the state, or for that matter courts, cannot eliminate the ability of participants to select religious schools solely because those schools are religious."); Richard W. Garnett, Brown's *Promise, Blaine's Legacy*, 17 Const. Commentary 651, 665-69 (2000) (The Free Exercise, Establishment, Free Speech and Equal Protection Clauses require that when government decides to enact a school choice program it may not exclude religious "choices, persons, or institutions."); Joseph P. Viteritti, *Davey's Plea: Blaine, Blair,* Witters, *and the Protection of Religious Freedom*, 27 Harv. J.L. & Pub. Policy 299, 335-37 (2003) (noting that Washington should not be able to deny Davey his scholarship, when he was otherwise qualified under a broad and neutral government funding program, simply because he chose to use his scholarship for religious purposes).

10. 474 U.S. 481 (1986).

11. 509 U.S. 1 (1993).

12. *Id.* at 10-11, 13-14; *Witters*, 474 U.S. at 483-84, 488-89.

to a broad array of recipients. The Court in *Davey*, however, managed to deny Davey his scholarship without creating any such limiting principle.

This article will explore how this result missed a golden opportunity to define the boundaries of the Court's new formal neutrality doctrine. Part II will provide a brief overview of *Davey* and *Zelman*. Part III will suggest that the result in *Davey* was a lose-lose result, because no serious limiting principle on the formal neutrality doctrine was created and a seemingly deserving student was denied a scholarship solely because his chosen profession was the clergy. Part IV will explore the question of the so-called Blaine amendments in light of *Davey*.[13] The Court clearly held in *Davey* that the state constitutional provision involved in that case was not a Blaine amendment. Still, the history of anti-Catholicism associated with Blaine amendments remains important because that history points to a third possibility regarding the formal neutrality doctrine, namely, that states *may* fund programs that allow funds to flow to religious entities, but they *need not* do so *unless* the reason for denying such funding involves a purpose to discriminate against religion. This article concludes, however, that while the history of the Blaine amendments is reprehensible, those amendments should not be presumed unconstitutional without further analysis because they later came to serve non-invidious purposes.

II. OVERVIEW OF *DAVEY* AND *ZELMAN*

A. Davey

Davey is a decision quite limited in scope. It holds that states can decide not to fund scholarships for those who wish to be trained in devotional theology,[14] and that states which choose to fund such scholarships are free to do so.[15] This is apparently the result of the "play in the joints"[16] between the Establishment Clause and the Free Exercise Clause.

The case involved a program in the state of Washington called the Promise Scholarship Program.[17] Students graduating from any high school in the state who met certain academic and financial requirements were eligible for these scholarships, which were worth $1,542 for the 2000-2001 academic year.[18] Promise

13. Blaine amendments are state constitutional provisions modeled after a failed amendment to the U.S. Constitution proposed by Senator James Blaine that would have banned funding to religious schools. There is no doubt that the movement behind these amendments was highly influenced by anti-Catholic, and to a lesser extent, anti-ecclesiastical sentiment. The Blaine amendments were designed to discourage the growth of the Catholic school movement, which evolved in part as a response to the Protestant domination of the common schools and ultimately the early public schools. *See* Philip Hamburger, *Separation of Church and State* 321-28, 335-42 (Harv. U. Press 2002) (explaining that both before and after Senator Blaine's failed attempt to amend the U.S. Constitution to prohibit any government funding of religious schools there was a strong movement that agreed with Senator Blaine's proposal, and that movement was heavily influenced by anti-Catholic animus).

14. *Davey*, 540 U.S. at 724-25.

15. *Id.* at 718-19.

16. *Id.* at 719.

17. *Id.* at 715.

18. *Id.* at 716.

scholars were free to use these scholarships for "postsecondary education expenses" at any eligible college or university in the state of Washington,[19] including religiously affiliated schools.[20] Students receiving Promise scholarships were free to pursue a variety of majors including religion majors, but they were not allowed to "pursue a degree in theology" while at an institution where the Promise scholarship was being used.[21] Davey met the requirements and was awarded a Promise scholarship, which he decided to use at Northwest College, a college affiliated with the Assemblies of God, a Christian denomination.[22] Davey decided to double major in business administration and pastoral ministries.[23] When Davey refused to drop his major in pastoral ministries, he lost his Promise Scholarship funding.[24]

Davey claimed that the denial of his scholarship solely on the grounds that he wanted to use it to train for the ministry violated his rights under the Free Exercise Clause.[25] The Ninth Circuit agreed.[26] The Supreme Court held that the play in the joints between the religion clauses allowed the state to protect its citizens' freedom of conscience by denying funding to those who wished to use tax dollars to train to become a member of the clergy.[27] The Court cited a long history of concern over state funding of the clergy going back to the time of the framers in support of its decision to allow the state to deny Davey his scholarship.[28] Interestingly, the Court did not hold that the Washington constitution's establishment clause could effect federal Free Exercise Clause concerns, but rather that there were no actionable free exercise concerns given the play in the joints in the First Amendment.[29]

The Court limited its holding to the question of whether states must fund scholarships for those pursuing devotional theology degrees under a broad funding program.[30] The Court did not say whether it would have been appropriate for the state to exclude all religiously affiliated schools from the Promise Scholarship Program, although the Court did cite the state's failure to do so as evidence that the state policy regarding devotional theology degrees did not evince hostility toward religion.[31] The opinion seems to carve out a small exception to the formal neutrality doctrine, but it does not tell us what states are

19. *Davey*, 540 U.S. at 715-16.
20. *Id.* at 724.
21. *Id.* at 716.
22. *Id.* at 717.
23. *Id.*
24. *Davey*, 540 U.S. at 717.
25. *Id.* at 718.
26. *Id.*; *Davey*, 299 F.2d 748.
27. *Davey*, 540 U.S. at 719-23.
28. *Id.* at 721-23.
29. *Id.* at 720-21.
30. *Id.* at 725.
31. *Id.* at 724.

free to exclude from facially neutral funding programs besides training in devotional theology.[32]

Justice Scalia dissented, arguing that the state was discriminating against Davey because of his religious convictions.[33] Justice Scalia's argument focused heavily on the formal neutrality concept (although he doesn't call it that).[34] He would have held that once the Promise Scholarship Program was opened to a variety of individuals to use for a variety of majors, the state was not free to exclude only devotional theology from the list of majors Promise scholars could pursue.[35]

B. Zelman

In *Zelman*, the Court upheld a voucher program in the Cleveland public schools that allowed a disproportionate number of students to attend religious schools.[36] As will be discussed below, the Court upheld the program because it was facially neutral and funds were distributed based on the private choices of voucher recipients.[37] This has been called "formal neutrality."[38]

The *Zelman* Court claimed to follow the *Agostini/Lemon* test.[39] The Court pointed out that the voucher program did not present a secular purpose issue because the goal of the program was to provide a better education to students in the Cleveland Public School District.[40] Of course, it is hard to imagine a situation involving government aid for education or those in need where there would not be an adequate secular purpose. Thus, the case centered on the effects of the program.[41]

The Court held that the voucher program involved "indirect aid" because funds were allocated based on the choices of funding recipients, rather than as grants directly to the religious schools.[42] Therefore, the Court looked to the formal neutrality criteria: whether the program was neutral on its face and whether the funding flowed to the religious institutions through individuals who have "true individual choice" regarding where to direct the aid.[43] Under the Court's reasoning, however, there is not a significant distinction between direct and indirect aid, because so long as the government entity drafting the program relates the aid that flows to religious institutions to the number of individuals who

32. *See generally Davey*, 540 U.S. 712.
33. *Id.* at 726-33 (Scalia & Thomas, JJ., dissenting).
34. *Id.* at 726-27, 731-33.
35. *Id.* at 726-32.
36. 536 U.S. at 648, 662-63; *id.* at 687, 700-05 (Souter, J., dissenting).
37. *Id.* at 662-63 (majority).
38. Ravitch, *supra* n. 7, at 490-513.
39. *Zelman*, 536 U.S. at 648-49; *id.* at 668-69 (O'Connor, J., concurring). *See Agostini v. Felton*, 521 U.S. 203 (1997); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
40. *Id.* at 649 (majority).
41. *Id.*
42. *Id.* at 649-53.
43. *Zelman*, 536 U.S. at 649-53, 662-63.

choose to use the private service it does not matter if the check is written from the government directly to the religious institution.[44]

The data on the Cleveland voucher program was rather staggering. Most of the private schools that accepted voucher students were religious schools and the religious private schools generally had far more seats available for voucher students than their secular counterparts.[45] Thus, it was not surprising that 96.6% of voucher students attended religious schools.[46] Most parents effectively had no choice among private school options, although the Court suggested otherwise.[47]

In finding true private choice sufficient to uphold the program, the Court went beyond the private school options the parents had, and included several public school options.[48] These public school options included magnet schools and charter schools.[49] Thus, government-run programs became part of the field of options the Court considered. This broadened the range of options parents allegedly had and supported the notion that the voucher program provided true private choice, despite the incredibly skewed statistics regarding private school attendance under the voucher program.[50] Yet parents who chose to take advantage of the voucher program because of dissatisfaction with all public school options, or the inability to get into a magnet school or failure to win a lottery slot at a community school,[51] would have little choice but to send their children to religious schools or forego the voucher option entirely.[52]

Under the reasoning in *Zelman*, the government—through the private choice of students—could send massive amounts of money into the coffers of religious schools.[53] This would be so if schools representing only one or a few religions are involved or if religions are put at a competitive disadvantage because they do not have the numbers to take advantage of economies of scale.[54] The larger religions (or the religions with larger schools) in a given area can be the primary beneficiaries of such programs without raising any serious constitutional concerns.[55] Thus, the formal neutrality approach would allow religious minorities (the religious "have-nots") who don't want to be indoctrinated in alien faiths to be left in the failing public schools, while the religious "haves" benefit from massive government subsidies and educational opportunities.[56] This reasoning could

---

44. *Mitchell v. Helms*, 530 U.S. 793, 816 (2000) (plurality opinion).

45. *Zelman*, 536 U.S. at 703-04 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

46. *Id.* at 650 (majority) (stating 96%); *id.* at 703 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (stating 96.6%).

47. *Id.* at 653-54 (majority).

48. *Id.* at 658-60; *id.* at 664 (O'Connor, J., concurring).

49. *Zelman*, 536 U.S. at 664.

50. *Id.* at 653-56, 659-60; *id.* 663-64.

51. Ravitch, *supra* n. 7, at 521 (citing *Zelman*, 536 U.S. at 646); *see Zelman*, 536 U.S. at 703-04 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (noting that admission to community schools is by lottery).

52. *Zelman*, 536 U.S. at 703-05 (Souter, Stevens, Ginsburg, & Breyer, JJ., dissenting).

53. *Id.* at 703-04, 710-11; Ravitch, *supra* n. 7, at 513-23.

54. Ravitch, *supra* n. 7, at 518-19.

55. *Id.* at 522, 560-61.

56. *Id.* at 521-22, 560-61.

readily be extended to a number of other government programs. Justices Stevens, Souter, and Breyer each filed strong dissenting opinions.[57]

III. WHY *LOCKE V. DAVEY* IS A LOSE-LOSE CASE

If the *Davey* Court had held that government entities need not fund programs that allow money to flow to religious recipients, but may do so under the *Zelman* formal neutrality doctrine, state and local governments could decide for themselves whom to include in such funding programs. While this would not erase the problems with the *Zelman* Court's reasoning, it would have created a limit on *Zelman's* reach.[58] On the other hand, if the *Davey* Court had allowed Davey to keep his scholarship—because to exclude him from such a broad program based solely on his religious motivations violates his free exercise rights—the result would seem fair and appropriate given the circumstances.[59] This result, however, would have meant that government must allow funds to go to religious entities and purposes so long as the relevant government program was facially neutral and allowed true private choice.[60] The problem is that while this works well under the facts in *Davey*,[61] the reasoning would extend to situations like that in *Zelman*, where there are few adequate private secular choices for recipients, but the Court nonetheless finds true private choice.[62] Under the *Zelman* Court's formalistic approach there is no difference between a truly broad program like those involved in cases like *Davey*, *Witters*, and *Zobrest*, and one which has the primary effect of advancing religion,[63] or even one that substantially facilitates religion.[64] This is inherent in the *Zelman* Court's holding that when a program meets the formal neutrality test there is no reason to consider actual effects under the effects test, and its corollary holding that public institutions may be definitively considered in determining whether recipients have true private choice, even when private options are skewed toward religious institutions or even institutions of a specific religion(s).[65]

If one were to ask what effects Davey receiving his scholarship under the Promise Scholarship Program would have, the answer would seem to be that Davey getting his scholarship poses little risk of primarily advancing religion.[66]

---

57. *Zelman*, 536 U.S. at 684 (Stevens, J., dissenting); *id.* at 686 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting); *id.* at 717 (Breyer, Stevens & Souter, JJ., dissenting).

58. This limitation would have been that inclusion of religious entities among the range of choices in government funding programs is not required, even though it is allowed.

59. *Compare Davey*, 540 U.S. at 715-19 *with Zobrest*, 509 U.S. 1; *Witters*, 474 U.S. 481. Excluding Davey under these circumstances would also probably violate the Establishment Clause because it would disfavor religion.

60. *See supra* n. 9 and accompanying text.

61. *Davey*, 540 U.S. at 716-19.

62. *Zelman*, 536 U.S. at 652-58; *id.* at 700-05, 707 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

63. Ravitch, *supra* n. 7, at 513-23.

64. *Id.* at 560-63.

65. *Id.* at 513-23, 560-61.

66. *Zobrest*, 509 U.S. at 10-11, 13-14; *Witters*, 474 U.S. at 483-84, 488-89.

Yet if this is so, what possible interest could the state have that would support denying him the funding under such a broad program? If *Witters* and *Zobrest* meant what they said, it would seem that denying the scholarship solely on the grounds that it would be used for religious training could raise serious free exercise concerns, given that there is no federal Establishment Clause concern that would justify the denial. Moreover, any concerns under a state establishment clause would have to give way to federal free exercise concerns under the Supremacy Clause.[67] This would be so regardless of *Zelman*. Denying Davey his scholarship under these facts would tend to discourage religion, potentially in violation of the federal Establishment Clause.[68]

Yet *Zelman* makes this all quite problematic, because the *Zelman* Court basically ignored the effects of the program involved in that case—a program that seriously favored and funded religious entities and involved few adequate secular choices for program recipients.[69] If Davey were entitled to his scholarship because the Promise Scholarship Program was neutral on its face and involved private choice,[70] then states would need to include religious schools in voucher programs and religious entities in other programs whenever the state creates a broad funding program that is facially neutral and allocates funds based on the number of recipients that use the relevant service.[71] Under the rationale in *Zelman*, this would be so even when the effect of the funding would be to favor one or two denominations so long as the formal neutrality criteria is met.[72] Since public entities could be counted among the relevant choices for recipients, there will almost always be a secular choice.[73] As I have pointed out elsewhere, formal neutrality as practiced by the *Zelman* Court involves quite a bit of formalism but no neutrality.[74]

Considering *Davey* without *Zelman*, it would seem that Davey should get his scholarship because the state's denial of his scholarship violates his rights under the Free Exercise Clause and maybe also the Establishment Clause. Add *Zelman* to the picture though, and such a holding could be joined with the Court's new formal neutrality approach to mandate that willing religious entities must be included in all government programs open to a wide range of recipients if those programs determine funding based on the number of people who use a given program. This would be so even where it results in significant benefits to only one

67. U.S. Const. art. VI, § 2.

68. *Agostini*, 521 U.S. at 218, 233 (1997) (holding that a primary effect of government action may neither advance nor inhibit religion); *see also* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990) (advancing the notion that government should neither encourage nor discourage religion).

69. Ravitch, *supra* n. 7, at 513-23.

70. *Cf. Zelman*, 536 U.S. at 662-63 (holding that facial neutrality and private choice are adequate to support government voucher program that allowed significant funds and students to go to religious schools).

71. *See supra* n. 9 and accompanying text.

72. Ravitch, *supra* n. 7, at 518-23, 560-62.

73. *Id.* at 515-16.

74. *Id.* at 498-523.

or two faiths and even when it helps support the core religious missions of such entities.

The result in *Davey* is the worst possible one, because it failed to seriously limit the formal neutrality principle and Davey did not get his scholarship. This was a lose-lose outcome. Neither the nondiscrimination principle nor the possibility of a limit on the formal neutrality doctrine was served.

As the law currently stands, government entities may create massive funding programs that inure primarily to the benefit of religious schools (or other religious entities) representing only one or two denominations. The schools (or other entities) are allowed to proselytize their new state funded constituents. In fact, they could require them to attend regular prayer services, even if the recipients choose to use the religious entity only because of safety concerns or because it happens to be the closest to their home.[75] This occurs—all in the name of neutrality and choice—even when there is no real choice. Yet, under a program where there really is a choice, a person like Davey may be denied the same opportunity that all other recipients have, solely because his chosen vocation is religious,[76] even though the effect of such a choice would be minuscule when compared to the massive benefits allocated to religion under *Zelman*.[77]

This is the world of formal neutrality and play in the joints. We ignore the real world effects of a program when they benefit more established religions by giving them a ready supply of recipients of other faiths or no faith at all to proselytize, but blow these effects out of all proportion when a devoutly religious person wants to pursue his or her calling at government expense when allowing the funding under the relevant program would not seem to disproportionately favor religion. Significantly, we still don't know the answer to the question of whether government entities *must* allow religious entities to participate in broad funding programs when funding recipients determine which entity to take their government dollars to.[78] Although, as is suggested above, the likely answer is that government entities must do so.[79]

IV. THE RELEVANCE OF BLAINE AMENDMENTS

It might seem odd to talk about the relevance of the so-called "Blaine" amendments[80] in an article addressing *Davey*, because the Court stated rather clearly that Washington's "Blaine" amendment was not relevant to that case.[81] A

75. *Zelman*, 536 U.S. at 687, 704-07 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

76. *Davey*, 540 U.S. at 721-25.

77. *Compare Davey*, 540 U.S. at 715-17 (possibility that a few students might use scholarship to train for ministry when there are many secular options), *with Zelman*, 536 U.S. at 644-47; *id.* at 700-05, 707 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (noting that there are thousands of students and millions of dollars sent to religious schools under circumstances where there are few secular private options).

78. *See supra* n. 9 and accompanying text.

79. *See supra* nn. 59-62 and accompanying text.

80. *See supra* n. 13 and accompanying text.

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

serious discussion of these amendments is beyond the scope of this article. Yet Blaine amendments reflect a third possibility in funding cases, namely, that government may fund programs that disproportionately benefit religion or a specific religion under the formal neutrality principle, but need not do so *unless* the motivation in not doing so is to disfavor religion or a specific religion. Of course, such motivations may exist regardless of a Blaine amendment, but these amendments have been pointed to as strong evidence of intent to disfavor religion in state funding regimes.[82]

There is no doubt that the motivations of those who originally supported state Blaine amendments were heavily influenced by anti-Catholic animus.[83] Simply put, the original purpose behind the Blaine amendments was discriminatory,[84] even if some of their supporters had "purer" motivations.[85] This does not answer the question of what impact this history should have today when these amendments arguably serve several nondiscriminatory purposes.[86] After all, there are other laws and even state constitutional amendments that we take for granted these days that were heavily motivated by bias against a particular religious group. The most obvious of these are the anti-polygamy laws and state constitutional provisions that were connected to extreme anti-Mormon bias.[87] If the history of the Blaine amendments renders them unconstitutional regardless of any nondiscriminatory purposes they may currently serve, then surely the history of the anti-polygamy laws would render them unconstitutional as well.[88] To answer that there are many valid reasons today for anti-polygamy laws, but not for

82. *See* Gall, *supra* n. 9, at 415-24, 436-37 (using history of animus underlying Blaine amendments to argue that they are invalid even if their discriminatory purpose has shifted from a particular sect to religion generally); 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, 967-69 (2003) (suggesting that the animus argument may be the strongest in the arsenal of those trying to undermine the Blaine amendments); Viteritti, *supra* n. 9, at 310-14, 323-25, 335-36 (pointing out anti-Catholic animus underlying Blaine amendments and the relevance of that animus in evaluating those amendments in modern opinions).

83. Hamburger, *supra* n. 13, at 324-28, 335-36, 338-42.

84. *Id.*; *but see* Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 First Amend. L. Rev. 107 (2003) (arguing that the Blaine amendments and state "baby Blaines" were not motivated solely by anti-Catholic animus, as a number of nondiscriminatory factors also motivated the no-funding amendments).

85. By "purer" motivations I am referring to the broadly anti-ecclesiastical strivings of groups like the National Liberal League. These people were a small minority, however, compared to the anti-Catholic bigots involved in the Blaine Amendments. Hamburger, *supra* n. 13, at 312-28 (addressing the general roles of the anti-ecclesiastical "Liberals" and the anti-Catholic nativists around the time of the original "Blaine" amendment). I use the term "purer" motivations because these people were against state support of religion generally rather than targeting only Catholics.

86. *See generally* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 50-53, 58, 73-74 (1997) (acknowledging the discriminatory history of the Blaine amendments, but suggesting that while we should not "reason from a premise rooted" in "anti-Catholicism," we should think about religious freedom questions "afresh," and suggesting justifications for a limited separationist approach).

87. *See* Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause*, 17 Ga. St. Univ. L. Rev. 691, 710-20 (2001) (noting anti-Mormon bias underlying the anti-polygamy laws and the Supreme Court's decisions relating to those laws).

88. *See generally id.* (suggesting the anti-polygamy laws violate the Free Exercise Clause).

laws denying state funding to religious entities, is simply to beg the question whether there are valid reasons for the latter, which is a hotly contested issue.[89]

Therefore, we must consider whether the history of the Blaine amendments is relevant to their current constitutional status, and if so, why? If this history is relevant and determinative, the state Blaine amendments are surely unconstitutional and would violate both the Free Exercise Clause and the Establishment Clause. If this history is not relevant, or even if relevant but not determinative, we must look to the purposes these amendments currently serve to determine whether they are constitutional given their disparate impact on religious entities.[90] At the heart of this latter inquiry is the question of whether separationist principles are appropriate in the funding context. The formal neutrality approach would seem to answer "no,"[91] but is this correct?

Answering this highly complex and important question is beyond the scope of this article, but the answer would be relevant in determining how far the third option goes. After all, if the Blaine amendments are constitutional, the "unless" in the third option—government entities may, but need not, allow substantial aid to flow to religious entities *unless* the motivation in not doing so is to disfavor religion or a specific religion—cannot be met simply because the state has denied funding based on a Blaine amendment. Thus, the facts and policies surrounding a specific denial of funding would be relevant to any claim challenging that denial. If the Blaine amendments are unconstitutional because of their original purpose, the "unless" is met every time the state acts pursuant to a Blaine amendment to deny funding to a religious entity. Unless the Supreme Court decides to rely upon the original purpose of the Blaine amendments when confronted with an appropriate case—reasoning that would also implicate anti-polygamy and other laws—the Court will at some point have to answer whether separationist principles are valid reasons for the denial of aid when the dictates of formal neutrality are met.

V. CONCLUSION

Locke v. Davey presented a golden opportunity to define the boundaries of the Court's new "formal neutrality" doctrine. The Court could have held that states are not required to allow state funds to be spent at religious institutions or for religious purposes, even under a facially neutral program that determines

89. Laycock, *supra* n. 86; Lupu & Tuttle, *supra* n. 82, at 957-72; *see also* Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. Rev. 1111 (2002) (arguing that separationist objections to state funding that reaches religious institutions are valid and historically grounded).

90. *Cf. Freethought Socy. of Greater Phila. v. Chester County*, 334 F.3d 247, 262 (3rd Cir. 2003) (holding that County's reasons for not removing Ten Commandments plaque from county courthouse in 2001, rather than the reason why it was placed on the courthouse in 1920, is the relevant inquiry for purposes of analyzing the constitutionality of the plaque).

91. *Zelman*, 536 U.S. at 687-96, 715-17 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (arguing that the Court's formal neutrality approach has abandoned the principles underlying *Everson v. Board of Education*, 330 U.S. 1 (1947), and is contrary to a number of other cases that rely on separationist principles).

where to allocate funds through the private choices of funding recipients. While this would have had the effect of denying Davey his scholarship, which would have been unfortunate under the facts in *Davey*, it would have placed a limit on the formal neutrality doctrine as applied by the court in *Zelman*. Even if the Court had held that the state must fund recipients who choose to use their state allocated funds at religious institutions or for religious purposes so long as the program meets the requirements of formal neutrality, state and local government entities would have had an answer to the question of whether they can exclude religious entities or purposes from such funding programs.

Instead, the Court handed down a very narrow decision in which Davey was denied his scholarship because he wanted to use it for devotional theology—a subject states can exclude under *Davey*—and no answer was forthcoming regarding the broader question of whether states must allow funds to flow to religious entities under the *Zelman* doctrine. The irony of this holding is that unlike the parents who sued in *Zelman*, recipients under Washington's Promise Scholarship Program really did have a wide array of choices, both public and private, from which to choose. Thus, the effect of Davey using his scholarship in the manner he wanted to would benefit religion far less than the disproportionate and significant amount of money and new students the religious schools received in *Zelman*. Welcome to the world of formal neutrality!