



# The Roundtable

on Religion and Social Welfare Policy

## A Preview of the Pending Supreme Court Decision in *Locke v. Davey*

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### DESCRIPTION

The case of *Locke v. Davey*, to be argued in the U.S. Supreme Court in early December, could have a great impact on President Bush's Faith Based Initiative, often described as the top domestic priority of the Bush administration. In the 2002 Report on the *State of the Law*, we described the origins and import of the so-called "Baby Blaine Amendments," a widely adopted genre of state constitutional provision designed to impede state transfers of funds or property to religious institutions, especially schools.<sup>2</sup> Thirty-seven states have constitutional provisions that explicitly forbid state financing of religious organizations, and ten states have constitutional provisions that extend these limitations to both "direct" and "indirect" financing. These state constitutional restrictions on government transfers to religious groups may create significant impediments to state service contracts with, or grants to, faith-based organizations. As federal restrictions on government interaction with religious groups have lessened, state constitutions have come to the fore. Litigation about the meaning, and the validity under the federal constitution, of the Baby Blaine Amendments, has heated up since the publication of the 2002 Report.<sup>3</sup> Indeed, the case of *Locke v. Davey*<sup>4</sup> may turn out to be as important for

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<sup>2</sup> Provisions of this character originated in a Nativist political movement, beginning in the 19th century, aimed at retaining the Protestant character of America's common (public) schools and forbidding states from appropriating monies for the support of Catholic schools. Such provisions are often called "little Blaine Amendments," after Senator James Blaine who urged unsuccessfully, as part of a run for the Presidency in 1876, that the federal Constitution be similarly amended to explicitly preclude the states from using tax monies or public lands to aid sectarian schools.

<sup>3</sup> In addition to *Locke v. Davey*, discussed in this section, other related cases included *Pucket v. Rounds*, No. 03-CV-5033, which challenges application of south Dakota's Blaine Amendment to preclude paying the transportation costs of students attending religious schools; *Boyette v. Galvin*, No. 98-CV-10377, a suit arising from Massachusetts constitutional provisions analogous to the Blaine Amendments; and *Becker v. Granholm*, \_\_\_ F. Supp. 2d \_\_\_ (E.D. Mich. 2003) (enjoining Michigan, on federal constitutional grounds, from rescinding state scholarship to student majoring in theology.) The Michigan policy is based on a state statute, and not on a provision of the Michigan Constitution.

the constitutional future of the Faith-Based Initiative as the Court's landmark rulings in *Mitchell v. Helms* and *Zelman v. Simmons-Harris*.<sup>5</sup>

## THE FACTS

In 1999, the state of Washington created a new program, known as "Promise Scholarships," for low- and middle-income students who achieve an excellent academic record throughout high school. The Scholarship, which paid just over \$1,500 in 2000-01, is available for the first two years of a student's post-secondary education. The program is administered by the Washington Higher Education Coordinating Board ("HECB"). To be eligible, a student must be in a specified top percentage (10% in 1999) of her graduating class in a Washington high school, have a family income that does not exceed 135% of the state's median, and attend an accredited post-secondary institution in Washington. Washington law specifically precludes any state-funded financial aid, including Promise Scholarships, from going to "any student who is pursuing a degree in theology."<sup>6</sup> Moreover, Article I, section 11 of the Washington State Constitution (Washington's version of the Blaine Amendment) provides that "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."

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Joshua Davey applied for and was awarded a Promise Scholarship in August 1999. He enrolled in the fall of 1999 at Northwest College, an accredited institution associated with the Assemblies of God. Davey declared a double major in Business Administration and Pastoral Ministries. In October of 1999, after HECB notified the colleges in the state that students majoring in theology are not eligible for Promise Scholarships, Northwest refused to certify Davey for the program, because the major in Pastoral Ministries includes courses in Bible studies.

Davey brought suit in federal court against the Governor of Washington and

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<sup>4</sup> The U.S. Court of Appeals for the 9<sup>th</sup> Circuit decided the case under the name *Davey v. Locke*, 299 F.3d 748 (9<sup>th</sup> Cir. 2002).

<sup>5</sup> In *Mitchell v. Helms*, 530 U.S. 793 (2000), a plurality of the Court upheld a program that provided direct aid to public and private schools, both religious and nonreligious, finding that the issues for direct aid turn on the content of the aid and restrictions on its use – ensuring that public funding may not go to support religious indoctrination – rather than on the character of the aid-receiving institution. In *Zelman v. Simmons-Harris*, 536 U.S. (2002), the Court upheld a school voucher program that permitted students to redeem the vouchers at private schools, both religious and nonreligious, finding that indirect funding can support even religious activity, provided it occurs through a program scheme that has a secular public purpose, is neutral between religious and secular organizations, and provides for genuine and independent choice between providers.

<sup>6</sup> Washington Revised Code, sec. 28B.10.814.

officials of the HECB. Davey asserted that the exclusion of students majoring in theology from the Promise Scholarship Program violated the Free Exercise Clause of the First Amendment. The district court ruled in the state's favor. On appeal, a panel of the Ninth Circuit voted 2-1 to reverse the district court. The appeals court noted that the Program included all post-secondary institutions in the state, including religiously affiliated schools like Northwest. The court held that because the program excluded only theology majors at religious schools, the program discriminated against the study of religion, and therefore burdened students' free exercise of religion. Washington State successfully petitioned the Supreme Court to hear the case, which now bears the caption *Locke v. Davey*.

## ANALYSIS

The Supreme Court's decision in *Locke v. Davey* has the potential to be very significant. In the wake of *Mitchell v. Helms* and *Zelman v. Simmons-Harris*, the Supreme Court's decision upholding the Cleveland school voucher program, the question of the scope of state constitutional barriers to financing services provided by FBOs has quickly and dramatically moved to the forefront. The Court now interprets the federal constitution in ways that permit significant interaction between church and state, but a number of state constitutions contain provisions, like Washington's, that prohibit state funding of religious entities. Some states, including Wisconsin and Ohio, where school voucher plans have been upheld, interpret their Blaine Amendments to permit indirect financing of services provided by faith-based organizations, but others (including Washington and Florida) do not.<sup>7</sup> Moreover, Blaine Amendments may also have consequences for direct financing of faith-based organizations. Such constitutional provisions, if broadly construed, may impede grants to FBOs even if the services being financed are exclusively secular.

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Accordingly, there is a great deal at stake in the Supreme Court's disposition of *Locke v. Davey*. A large number of "friend of the court" briefs have been filed on both sides of the case, and the United States has filed a brief on the side of Mr. Davey. A number of different dispositions of this case are possible, each with different implications for the future of the school voucher movement and the Faith-Based Initiative. Here is our appraisal of the leading arguments in the case:

<sup>7</sup> According to the brief filed by Washington State in the Supreme Court, fourteen other states exclude students preparing for the ministry or earning degrees in theology from programs of state financial assistance.

## 1. Independent State Policy on Church-State Issues.

Separationist interest groups assert that the State has a policy of church-state separation broader than that required by the federal constitution but nevertheless worthy of respect.

The Court's decision will turn on whether the state has constitutionally sufficient reason to exclude theology or ministry studies from the scholarship program. On this question, amicus briefs by other states and Separationist interest groups assert that the State has a policy of church-state separation broader than that required by the federal constitution but nevertheless worthy of respect. One such brief argues that Washington State, like a number of others, has historically refrained from subsidizing the training of clergy, just as it refrains – for reasons of special constitutional respect – from regulating the training of clergy.<sup>8</sup> Indeed, the only prior Supreme Court decision about clergy training also arose in Washington State. In *Witters v. Washington Department of Services for the Blind*,<sup>9</sup> the Supreme Court held that voucher-type financing of study for a blind person preparing for a ministerial career did not violate the federal Establishment Clause, but the Washington Supreme Court thereafter ruled that such state support for a career in ministry nevertheless violated the state constitution.<sup>10</sup>

Whatever the jurisprudential merits of Separationism, the structure of the State's policies on the availability of Promise Scholarships may make it difficult for Washington to sustain any strong arguments about an independent policy of church-state separation. The Scholarships are currently usable at religiously affiliated colleges like Northwest, where instruction in all subjects is religiously-based. The state is thus not pursuing any systematic policy of institutional separation between its financial arms and faith-based organizations. Whether, on these facts, an argument for independent state norms of Separationism will garner Supreme Court approval remains to be seen.

Ironically, many of the Justices on the Supreme Court most receptive to arguments from federalism will be substantively hostile to the Washington policy,<sup>11</sup> and many of the Justices likely to be receptive to the Washington

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<sup>8</sup> This brief was filed jointly by the American Civil Liberties Union, Americans United for Separation of Church and State, People for the American Way, and the Lambda Legal Defense Fund.

<sup>9</sup> 474 U.S. 481 (1986).

<sup>10</sup> *Witters v. State*, 771 P.2d 1119 (Wash. 1989). The Supreme Court thereafter denied certiorari when *Witters* petitioned the Court to hear the claim that Dr. Davey now presents – i.e., that the application of Art. I, sec. 11 of the Washington Constitution to exclude ministry study from a voucher-type plan for aiding career studies violates the Free Exercise Clause of the First Amendment. 493 U.S. 901 (1989). Justice White dissented from the denial of certiorari. *Id.* at 903-04.

<sup>11</sup> This group includes Chief Justice Rehnquist, and Justices Kennedy, Scalia, and Thomas.

policy are typically unreceptive to arguments based on federalism when federal civil rights are at stake.<sup>12</sup> Justice O'Connor is the only Justice who seems receptive to both the federalism concerns and whatever legitimate, substantive policies underlay the Blaine Amendments. We expect that other arguments, canvassed below, are more likely than considerations of federalism to be the ultimate determinants of the outcome.

## 2. Freedom of Speech.

This ground of decision played a small part in the 9<sup>th</sup> Circuit's opinion, but it may turn out to be decisive in the Supreme Court. Reduced to its essentials, the crucial premise in this argument is that the Promise Scholarship program should be viewed as a state-created forum for private as well as public speech. If it so viewed, the exclusion of a particular perspective may not be justified on the basis of the state's concern with the content of that viewpoint.

The law about public fora is mainly concerned with the access of private speakers to physical spaces made available by the government – parks, streets, and rooms in public buildings. Indeed, a long line of cases from the Supreme Court now establishes beyond argument that, once the state creates such a physical forum for speech on certain subjects, it may not exclude private speakers on the basis of their religious perspective on the subjects for which the forum is open.<sup>13</sup>

The crucial premise in this argument is that the Promise Scholarship program should be viewed as a state-created forum for private as well as public speech.

The Court has also held that the concept of the public forum extends to state provision of funds as well as physical space. In *Rosenberger v. University of Virginia*,<sup>14</sup> the Supreme Court ruled that the university violated the Free Speech Clause by refusing to provide a printing subsidy to a student journal written from a religious perspective, even though the subsidy was available to other student-prepared journals of opinion.

Under this approach to the case, the key questions in *Locke v. Davey* are: 1) whether the Promise Scholarship program creates a public forum, and 2) if so, whether the state exclusion of students majoring in theology or pastoral ministries is justifiable or, instead, is forbidden viewpoint discrimination. On the first question – whether this is a public forum – the breadth of the scholarship program

<sup>12</sup> This group includes Justices Breyer, Ginsburg, Souter, and Stevens.

<sup>13</sup> See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

<sup>14</sup> 515 U.S. 819 (1995).

operates in favor of an affirmative conclusion. Unlike many social service programs, or a program of tuition vouchers in elementary and secondary schools, a program of scholarships in higher education may indeed promote a broad dissemination of knowledge and viewpoint. If the scholarships covered only business studies, or engineering, or some similarly circumscribed set of subjects, the case for finding this to be a public forum would be considerably weaker. Under such circumstances, the State could plausibly argue that the study of theology – like the study of history or economics – lies outside the program’s purposes. The Promise Scholarship Program, however, appears to cover students majoring in virtually every college-level subject, other than theology, in every variety of accredited institution (public or private, secular or religious). When the state so broadly defines a program that facilitates teaching and learning, the case for finding the program to constitute a public speech forum has merit.

Nevertheless, it is by no means certain that the Court will find this Program to constitute a public forum. The best argument for rejecting such a conclusion is that a Scholarship program is not a forum at all; it is rather a program of state support for educational services, bounded entirely by the process of accreditation of institutions of higher learning. Presumably, schools that offer majors in astrology, or that teach demonstrably false propositions, would be excluded from participating as providers. This sort of selectivity among providers, latent in the Program, could lead to a conclusion that the program is not a speech forum at all, and thus constitutional concerns about viewpoint discrimination simply do not apply.

If the Court does conclude that the scholarship program is a public forum, the only question remaining is whether the exclusion of students with a particular major can be justified.

Moreover, the Supreme Court’s recent decision in *United States v. American Library Association*<sup>15</sup> may well undercut Mr. Davey’s public forum argument. In that decision, the Court upheld the Children’s Internet Protection Act, under which a public library receiving federal subsidies must install filtering hardware which blocks Internet access to certain sexually explicit material. The Court explicitly rejected the contention that a library is a public forum. According to the Chief Justice’s plurality opinion, a library “provides Internet access, not to encourage a diversity of views from private speakers . . .

but for the same reason it offers other library resources: to facilitate research, learning, and recreational pursuits.”<sup>16</sup> If the Court views the purposes of the Promise Scholarship Program as analogous to those of a public library, the public forum argument will fail.

<sup>15</sup> 123 S. Ct. 2297 (2003).

<sup>16</sup> *Id.* at 2305. Justice Breyer’s separate opinion agreed with this conclusion, *id.* at 2310, thereby putting a Court majority behind it.

If the Court does conclude that the scholarship program is a public forum, the only question remaining is whether the exclusion of students with a particular major can be justified. The state’s description about the scope of the exclusion leaves room for doubt about such justification. According to the state’s brief in *Locke*, the State of Washington may teach, and finance instruction in, comparative religion; that is, the state will support students who wish to learn about religion. But it may not pay for instruction “that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct.”<sup>17</sup> Because, after *Zelman*, this exclusion is not required by the First Amendment in cases of indirect financing, there is a substantial argument that the exclusion constitutes an impermissible discrimination based on the viewpoint – theology as religious truth – expressed by the speech. If the program is held to be a speech forum, the exclusion of theology taught from a believer’s perspective may well violate the Free Speech Clause.

### 3. The Anti-Catholic Provenance of The Blaine Amendments.

Much has been written and said about the anti-Catholic animus that lay behind the original movement in favor of the national Blaine Amendment in the 1870’s, and the movements thereafter to create “Baby Blaine” Amendments in many of the states. In *Locke v. Davey*, the Becket Fund for Religious Liberty has filed an amicus brief emphasizing the anti-Catholic elements in this history. A group of scholars and historians have filed an amicus brief on Washington’s side, emphasizing the assimilationist values of the common (public) school movement that were among the animating causes of the Blaine Amendments, and de-emphasizing the anti-Catholic elements in the support for “common” schools (which invariably included some version of generic Protestant ethics and outlook.)

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We think there is considerable truth in both accounts of the Blaine Amendments, but for a variety of reasons we do not think that these competing historical accounts will affect the outcome in *Locke v. Davey*. First, the case has not been litigated on the theory that Washington’s Blaine Amendment is the product of unconstitutional, anti-Catholic animus. That argument was neither advanced in nor considered by the lower courts, and no evidence has been offered to show any anti-Catholic motivation in the Washington State provision excluding state aid for religious instruction. Second, Washington’s Blaine Amendment appears in its Constitution primarily as a result of an Act of Congress relating to the admission

<sup>17</sup> See Brief for Gary Locke, Governor of the State of Washington, at 22-23, citing *Calvary Bible Presbyterian Church v. Board of Regents*, 436 P.2d 189, 193 (Wa. 1967), cert denied, 393 U.S. 960 (1968).

of four northwestern states; that Act required each of the states seeking admission to enact a Bill of Rights containing provisions protecting the nonsectarian character of its public schools and forbidding state support for religious instruction. We know of no evidence that that Act of Congress had anti-Catholic intentions behind it. Although some of the Justices will note the anti-Catholic elements in the general history of the Blaine Amendments,<sup>18</sup> we do not believe either historical account will affect those Justices whose votes are likely to be decisive in *Locke v. Davey*.

#### 4. Free Exercise of Religion.

The Court of Appeals for the 9<sup>th</sup> Circuit ruled in Mr. Davey's favor based on the Free Exercise Clause of the First Amendment, and a decision affirming the Circuit Court's ground of decision will have dramatic effects on the scope of the Blaine Amendments in the many state constitutions in which they appear. We think that the Free Exercise arguments in the case can be fruitfully divided into two categories:

##### *a. Discretionary Funding vs. Penalty on Constitutional Rights.*

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On the other hand, all exclusions from public benefit programs must satisfy a variety of independent constitutional concerns. The state could not have a program of scholarships for whites only, nor could it exclude studies in a particular faith (as distinguished from the subject of theology generally) from a scholarship program. Moreover, the Court has also taken the view that the state

<sup>18</sup> Four of them already have noted this history. See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion joined by Chief Justice Rehnquist, and Justices Kennedy, Scalia, and Thomas).

<sup>19</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>20</sup> *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

may not use expenditure policy to penalize (rather than merely fail to subsidize) the exercise of constitutional rights. So, for example, a policy that required public television stations receiving a government subsidy to refrain from all editorializing, even if the editorial effort was supported only by private funds, has been held to unconstitutionally penalize freedom of speech.<sup>21</sup>

On which side of these constitutional divides does the Washington State program fall? Mr. Davey asserts that the state is penalizing his decision to major in pastoral ministries because it is withholding a Scholarship that is applicable to his entire course of study, rather than merely withholding some amount proportional to his study of theology. The state's position is that Mr. Davey is not penalized or prohibited from studying theology by state policy; he remains free to keep his Scholarship AND study theology by attending two schools at once, and majoring at one of them in a different, nontheological subject. This seems both unrealistic and indicative of the burden imposed by the state policy. Indeed, given the costs and inefficiencies of dual college attendance, this argument seems to concede that the state's policy creates a substantial disincentive to the study of religion for those students who need financial assistance.

These points may weaken the deference that courts ordinarily afford to a state's exercise of discretion in making choices about funding. Even if the state were permitted to restrict religious use of its scholarship funds, the Washington statute effectively prohibits recipients of Promise Scholarships from using their own funds to pay for an education in theology. If the Court were to decide that this impact on the use of non-state resources is a penalty (sometimes described as an "unconstitutional condition" on state benefits), it could decide the case in Mr. Davey's favor without reaching the broader and more contentious question whether the state may, as a general policy, exclude theology or ministry studies alone from state assistance.

### **b. Discrimination Against Religion.**

The broader question presented in *Locke* is one of first impression in the Supreme Court – penalty or not, does it violate the Free Exercise Clause of the First Amendment for a state to single out religious activities for exclusion from state financed benefits? Reinforced by the brief from the Solicitor General, Mr. Davey argues that it does, calling such exclusion forbidden discrimination, and a violation of the overarching principle that the state must remain religiously neutral. He relies on decisions by the Supreme Court that have found it unconstitutional for a state to

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<sup>21</sup> FCC v. League of Women Voters, 468 U.S. 364 (1984).

exclude members of the clergy from being state legislators,<sup>22</sup> and unconstitutional to forbid killing animals for religious sacrifice when virtually all other reasons for animal killing are not prohibited.<sup>23</sup>

With respect to those particular decisions, the state has responded by asserting that the exclusion of clergy from the legislature involves the separate and independent constitutional right to seek political office, and that the animal sacrifice case involves an instance of singling out an unpopular religious minority for punishment for engaging in religious ritual. More generally, the state argues that a refusal to fund is nonpunitive and therefore cannot be a “prohibition” of free exercise.

Mr. Davey’s theory of “free exercise as nondiscrimination” resonates with a number of general trends in the Supreme Court about the relationship between religion and government. This approach leaves unexplained, however, why the state should be able to accommodate religion specially, which states sometimes do, but not be equally able to exclude religious causes from benefits because of religion’s distinctive character. A doctrine of “religious neutrality” puts into question both benefits and detriments to religion.

On the other hand, the state’s generic assertion that discriminatory refusals to fund religious activity can never violate the Free Exercise Clause probably goes too far. At least one major line of decisions in the Supreme Court, involving discriminatory exclusion from unemployment insurance benefits of those who suffer religion-based inability to work on particular days or at particular jobs, suggests that, under some circumstances, refusal to fund the religious variant of an activity may be actionable under the Free Exercise Clause.<sup>24</sup> Promise Scholarships, like unemployment benefits, may be sufficiently entitlement-based (i.e., nondiscretionary – all who meet objective eligibility requirements receive the benefits) to warrant similar treatment under the Free Exercise Clause. Nevertheless, whether a Court that was willing to accept an entitlement-based theory of “free exercise as nondiscrimination” would go still further, to a theory that presumes unconstitutional all generic disfavoring of religious activity, is a large question indeed.

It is impossible to predict with confidence whether Mr. Davey’s broad free exercise argument, which rests on the general assertion that it is presumptively unconstitutional for the state to single out religious activity for disfavored treatment, will garner five votes in the Supreme Court, but we expect that it will not. The consequences of accepting this argument in its broadest form are sweeping. States will be obliged to include religious entities that otherwise meet

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<sup>22</sup> *McDaniel v. Paty*, 435 U.S. 618 (1979).

<sup>23</sup> *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

<sup>24</sup> The leading case in this line of decision is *Sherbert v. Verner*, 374 U.S. 398 (1963).

relevant eligibility requirements in every program – school vouchers, or any sort of social services – in which the state includes private secular entities. For someone like Justice O’Connor, who tends to prefer narrow, fact-based grounds of decision to more global theories, the broad free exercise argument may have too many large and unforeseeable consequences to be attractive.

In particular, a comprehensive rejection of the Blaine Amendments, based on free exercise grounds, would interfere with states that want to be more cautious about separation of church and government than might ultimately be required by the federal constitution’s Establishment Clause. For example, some states might limit direct assistance to faith-based organizations to in-kind transfers of property, on the ground that such transfers are easier to safeguard against diversion to religious use than are transfers of money.<sup>25</sup> Similarly, states might refrain from entering into certain contractual relations with houses of worship, for fear of church-state entanglements that might arise in the constitutionally mandated monitoring of such arrangements. A broad-based invalidation of the Blaine Amendments would undermine these legitimate state concerns about the current scope and ultimate direction of the law under the Establishment Clause. Out of deference to such state concerns, we expect that Justice O’Connor, and perhaps others as well, may be inclined toward a narrower theory of decision in *Locke v. Davey*.

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## CONCLUSION

We see three potential grounds on which the Supreme Court may rule in Mr. Davey’s favor. The first, and narrowest, is that the Promise Scholarship Program penalizes Mr. Davey’s free exercise of religion by making him forfeit not only the Scholarship’s payment for religion classes, but even payments for his secular courses. A ruling on this ground would require the state to reconfigure its Scholarship Program – perhaps by permitting theology majors to receive a prorated portion of the scholarship for secular courses – but would not cause a major disruption in the application of Blaine Amendments in other contexts.

The broadest possible ground for affirming the 9<sup>th</sup> Circuit is the broad theory of Free Exercise as nondiscrimination. This approach, if accepted, would make constitutionally suspect every state policy that treats religious activities or institutions differently from their secular counterparts. Such a principle would cast doubt on every application of the Baby Blaine Amendments in every state,

<sup>25</sup> In their crucial opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), Justices O’Connor and Breyer hinted at the possibility that cash transfers might be more problematic than in-kind transfers. *Mitchell v. Helms* involved the constitutionality of in-kind transfers only.

even if these applications may be justified by some state-specific theory of institutional separation broader than that required by the First Amendment.

The third such ground, intermediate in its sweep, is the theory of free speech and the public forum. This theory is triggered only by the creation of such a forum, an event over which the state retains considerable control. For example, a state or local social service program for substance abusers that was limited to providers that focused on physical health would presumably exclude all providers that used a faith-based methodology, as well as mental health providers and all secular entities that were not staffed and led by professionals trained in matters of physical well-being. Such a program would not constitute a public forum for the discussion and consideration of approaches to substance abuse, because it begins with a premise that the state is supporting only one approach. Accordingly, the free speech argument could not succeed in a challenge by an FBO to such a program. By contrast, the theory of free exercise as nondiscrimination, relied upon by the 9<sup>th</sup> Circuit, might well require the state to specially justify the exclusion of religious approaches to substance abuse, especially in a voucher-type program in which religious content is permissible as a matter of federal constitutional law.

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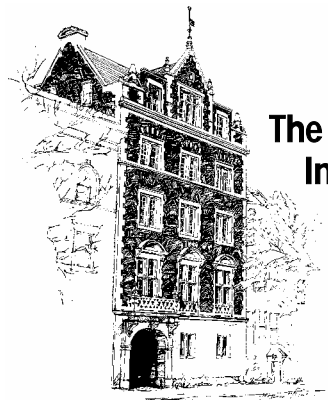
favor of Washington State, which of course remains possible, might signal judicial tolerance of a wide range of state autonomy in crafting church-state policies, even if such policies included Separationist elements that the First Amendment no longer requires. By contrast, a ruling for Mr. Davey, depending upon the grounds upon which it rests, will suggest a weakening of the state's legal authority to exclude FBOs from state benefits. A ruling based on the

broad theory of the Free Exercise Clause, in particular, would effectively eliminate the Blaine Amendments as a source of express disfavoring of faith-based providers, and thereby lift a state-imposed legal cloud – present in a substantial number of states – from the Faith-Based Initiative as well as from school voucher programs.





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