
CONSTITUTIONAL LAW — RELIGION CLAUSES — TENTH CIRCUIT STRIKES DOWN COLORADO LAW EXEMPTING “PERVASIVELY SECTARIAN” RELIGIOUS COLLEGES FROM STATE SCHOLARSHIP PROGRAM. — *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

Courts and legal scholars have long noted an enduring tension between those actions the First Amendment’s Establishment Clause prohibits and those the Free Exercise Clause requires.¹ Where the former “constrains government in its attempt to create a religious identity for itself,” the latter forces the government’s hand by compelling it to treat religious institutions on a level playing field with secular ones.² In choosing whether to fund religious institutions, governments must navigate the space between these two constitutional constraints, finding the “play in the joints”³ of the Religion Clauses. States may wish to exclude religious institutions from funding schemes in order to steer far clear of Establishment Clause concerns. Indeed, the Supreme Court’s 2004 decision in *Locke v. Davey*⁴ validated just such a scheme, upholding a Washington state statute that excluded theological majors from a college scholarship scheme. Although many scholars predicted that *Davey* would give states “carte blanche” to exclude religious institutions from state educational funding programs,⁵ one recent circuit court decision suggests otherwise. Recently, in *Colorado Christian University v. Weaver*,⁶ the Tenth Circuit invalidated a Colorado statute that excluded “pervasively sectarian” religious universities from a state scholarship scheme. Although the outcome in *Colorado Christian* was the correct one, the Tenth Circuit avoided confronting the implications of *Davey*, and in doing so, sidestepped important considerations regarding extending states greater discretion under the Religion Clauses.

¹ See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (“Numerous cases considered by the Court have noted the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause.”); Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It’s a Lot More than Just Republican Appointments*, 2008 BYU L. REV. 275, 276 (noting that “since 1947, the Court has struggled to reconcile two competing intuitions”).

² Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 21–22 (2006) (noting the “constitutional claustrophobia” that is created by the tension between the Establishment and Free Exercise Clauses, specifically regarding state regulation).

³ *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970). The two clauses “thus create both a floor under and a ceiling over the formulation of religion policy.” Lupu & Tuttle, *supra* note 2, at 22.

⁴ 540 U.S. 712 (2004).

⁵ See, e.g., Thomas C. Berg & Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 228 (2004).

⁶ 534 F.3d 1245 (10th Cir. 2008).

In September 2003 Colorado Christian University applied to participate in a Colorado state scholarship program.⁷ The state provides several scholarships to resident students who choose to stay in-state for college.⁸ To be eligible for any of the programs, students must attend “an institution of higher education,” defined under state law to exclude any “pervasively sectarian or theological institution.”⁹ A college is not “pervasively sectarian” if the Colorado Commission on Higher Education determines that it meets certain criteria, such as maintaining “a strong commitment to principles of academic freedom” and not “requir[ing] attendance at religious convocations or services.”¹⁰ The statute provides no guidance to the Commission as to the weight to be accorded to each criterion or how many of the criteria must be met before an institution’s students can receive funding.¹¹

In its application, Colorado Christian attempted to prove that it was not a pervasively sectarian institution by asserting that neither its board of trustees, nor its students, nor its faculty were required to be members of a particular faith.¹² Despite this effort, the Commission concluded that the University failed to meet at least three of the statutory criteria.¹³ First, the Commission found that the University’s theology courses “tend[ed] to indoctrinate or proselytize.”¹⁴ Next, contrary to Colorado Christian’s assertions, it found that the University’s board reflected a single religion.¹⁵ Finally, the Commission found that since some students were required to attend religious services, the University was in violation of the statute’s admonition against such conditions.¹⁶ In response, Colorado Christian filed suit in federal district court against the Commission, alleging that the statutory scheme violated the Free Exercise and Establishment Clauses as well as the Fourteenth Amendment’s Equal Protection Clause.¹⁷

⁷ *Id.* at 1252.

⁸ *See, e.g.*, Colorado Student Incentive Grant Program, COLO. REV. STAT. §§ 23-3.5-101 to -106 (2008).

⁹ *Id.* § 23-3.5-102(3)(b).

¹⁰ *Id.* § 23-3.5-105. The statute provides six criteria in all:

(a) The faculty and students are not exclusively of one religious persuasion. (b) There is no required attendance at religious convocations or services. (c) There is a strong commitment to principles of academic freedom. (d) There are no required courses in religion or theology that tend to indoctrinate or proselytize. (e) The governing board does not reflect nor is the membership limited to persons of any particular religion. (f) Funds do not come primarily or predominantly from sources advocating a particular religion.

Id.

¹¹ *See Colo. Christian*, 534 F.3d at 1251.

¹² *Id.* at 1252.

¹³ *Id.* at 1253.

¹⁴ *Id.* (alteration in original) (quoting COLO. REV. STAT. § 23-3.5-105(d)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

The district court granted summary judgment for the state defendants.¹⁸ Focusing solely on Colorado Christian's as-applied challenge,¹⁹ the court looked to the Supreme Court's recent *Davey* decision for guidance regarding how far the state could go in excluding religious institutions.²⁰ At issue in *Davey* was a Washington state scholarship program that excluded those students who decided to "pursue a degree in theology . . . while receiving the scholarship."²¹ The Court held that, given Washington's "historic and substantial state interest" in deciding the appropriate cutoff point for funding it chooses to bestow upon religious institutions, the statutory exclusion fit comfortably in between actions prohibited by the Establishment Clause and those compelled by the Free Exercise Clause.²² Although accepting that Colorado's "pervasively sectarian" exemption was "non-neutral," the district court used *Davey*'s logic to find that such a scheme should be presumptively constitutional and subject to only rational basis review as long as there was "no manifest evidence" that the scheme was "motivated by hostility towards religious beliefs or practices."²³ The court found that no such hostility existed²⁴ and recognized that the state's interest in vindicating the Colorado Constitution's prohibition against aid to religious institutions²⁵ was a "compelling one," rejecting Colorado Christian's challenge.²⁶

The Tenth Circuit unanimously reversed.²⁷ Writing for the panel, Judge McConnell began by distinguishing *Davey*.²⁸ He agreed that *Davey* symbolized an "explicit recognition" of the "legislative discretion" due to state governments in deciding whether to include religious institutions in funding programs.²⁹ The court then distinguished *Colorado Christian* on the facts and restricted *Davey*'s impact to cases involving "certain historic and substantial state interest[s]."³⁰ First, where the scheme in *Davey* equally excluded *all* theological majors of

¹⁸ Colo. Christian Univ. v. Baker, No. 04-cv-02512, 2007 WL 1489801 (D. Colo. May 18, 2007).

¹⁹ *Id.* at *3 ("There is no value in independently assessing the constitutionality of the statute as it might apply to some other hypothetical college.").

²⁰ *See id.* at *5-6.

²¹ Locke v. Davey, 540 U.S. 712, 716 (2004).

²² *See id.* at 725.

²³ *Baker*, 2007 WL 1489801, at *5.

²⁴ *Id.* at *14.

²⁵ *See* COLO. CONST. art. IX, § 7 ("Neither the general assembly, nor [other governmental entities] shall ever make any appropriation . . . in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any . . . college [or] university . . . controlled by any church or sectarian denomination whatsoever . . .").

²⁶ *Baker*, 2007 WL 1489801, at *14.

²⁷ *Colo. Christian*, 534 F.3d at 1250.

²⁸ *Id.* at 1254. Judges Seymour and Holmes joined Judge McConnell's opinion.

²⁹ *Id.*

³⁰ *Id.* at 1255 (alteration in original) (quoting Locke v. Davey, 540 U.S. 712, 725 (2004)) (internal quotation mark omitted).

all religious sects, the Colorado statute “expressly discriminate[d] among religions” of different religiosity, granting aid to generally sectarian institutions, but not to pervasively sectarian ones.³¹ Second, where the program in *Davey* permitted the institution itself to determine the eligibility of certain majors, the Colorado scheme and its six criteria subjected institutions to “intrusive religious inquiry.”³²

Next, the court explained why the Colorado program impermissibly discriminated among religions in violation of the Establishment, Free Exercise, and Equal Protection Clauses. Noting how the Colorado program had permitted state funds to go to some other religious institutions, the court determined that the effect of the statute was to “exclude some but not all religious institutions” on the basis of the level of religiosity.³³ The court then rejected the state defendants’ counterarguments that Colorado was “entitled to discriminate in spending legislation in ways that it could not if legislating directly” and that discrimination is permitted if not done on the basis of “animus, hatred, or bigotry.”³⁴ Neither of these contentions could overcome the “constitutional requirement . . . of government neutrality.”³⁵

The court analyzed the statute’s six criteria defining “pervasively sectarian” and rebuked the use of those criteria in Commission determinations as an unconstitutionally “‘excessive entanglement’ between religion and government.”³⁶ The court methodically called attention to how each criterion contributed to the overly intrusive nature of the state’s “pervasively sectarian” standard. For example, the court criticized the criterion insisting that the board of trustees not “reflect” a particular religion as requiring an assessment of whether the substantive decisions of a board reflect the doctrine’s particular religion, a task not possible “without entangling [the state] in an intrafaith dispute.”³⁷

Finally, the court rejected Colorado’s claims that it had any “compelling” state interest that justified its action or that the discrimination was “narrowly tailored” to further such a goal.³⁸ Although the Tenth Circuit acknowledged that *Davey* “dropped . . . hints that the proper

³¹ *Id.* at 1256.

³² *Id.*

³³ *Id.* at 1258.

³⁴ *Id.* at 1259–60.

³⁵ *Id.* at 1260 (emphasis omitted).

³⁶ *Id.* at 1261 (quoting *Agostini v. Felton*, 521 U.S. 203, 233 (1997)).

³⁷ *Id.* at 1263. Judge McConnell cited the dangers of having the government — in the form of the Commissioners — become an arbiter of religiosity, noting “how often assessments of objectivity and bias depend on the eye of the beholder.” *Id.* The court noted that the statutory inquiry was an unconstitutional governmental “second-guessing [of] an institution’s characterization of its own religious nature.” *Id.* at 1266.

³⁸ *Id.* at 1266–68.

level of scrutiny” in funding discrimination cases is “something less than strict,” the court refrained from deciding which level of scrutiny was appropriate because Colorado’s program “scarcely ha[d] any justification at all.”³⁹ The court first discussed the legislative history of Colorado’s “pervasively sectarian” test, noting that the scheme was designed to “make funds as broadly available as was thought permissible under the Supreme Court’s then-existing Establishment Clause doctrine.”⁴⁰ Then, Judge McConnell dismissed as historically inaccurate claims that the statute served to vindicate the Colorado Constitution’s non-establishment values.⁴¹ The court concluded that the only “actual” interest Colorado had in the statute’s enactment — “award[ing] scholarships to deserving students as universally as federal law permits” — was not served by a discriminatory statute.⁴²

Although the opinion in *Colorado Christian* correctly characterized the Colorado statute’s criteria as unconstitutionally invasive, it did not sufficiently grapple with the Supreme Court’s decree in *Davey* that “[i]f any room exists between the two Religion clauses, it must be” located where a state’s legislature chooses to vindicate antiestablishment values and where only a “relatively minor burden” is placed on religious practice.⁴³ The intrusive method by which the Commission determined the religiosity of an institution was “fraught with entanglement problems.”⁴⁴ Despite the fact that the Tenth Circuit was right to condemn the haphazard and intrusive manner in which the Colorado program was administered, the court’s avoidance of *Davey*’s implications indicates an overly narrow reading of that decision that would unnecessarily leave states with less room to craft funding schemes.

The opinion in *Colorado Christian* avoided dealing directly with *Davey*’s impact⁴⁵ despite the fact that *Davey* suggested that the space between the two Religion Clauses was wider than previously thought. In *Davey*, the Supreme Court by its own action and language indicated that the “consequence of presumptive unconstitutionality does not follow” from a mere showing of “facial discrimination.”⁴⁶ Most importantly, *Davey* suggested that if the state’s choice not to fund a particular institution “imposes neither criminal nor civil sanctions on any type

³⁹ *Id.* at 1267.

⁴⁰ *Id.*

⁴¹ *See id.* at 1267–68.

⁴² *Id.* at 1269.

⁴³ *Locke v. Davey*, 540 U.S. 712, 725 (2004).

⁴⁴ *Colo. Christian*, 534 F.3d at 1261.

⁴⁵ *See id.* at 1255 (noting several ways in which *Davey* was not revolutionary and emphasizing that the discretion it gives to states “has limits”).

⁴⁶ Douglas Laycock, *The Supreme Court, 2003 Term—Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 214 (2004).

of religious service or rite” and “does not require students to choose between their religious beliefs and receiving a government benefit,”⁴⁷ it represents a governmental “disfavor of religion . . . of a far milder kind” than other types of discrimination.⁴⁸ The Tenth Circuit’s decision proceeded as if *Davey* had never been decided and erected a tall barrier to selective funding programs by announcing that it would be “especially unlikely” for a less strict form of review to apply.⁴⁹ Judge McConnell characterized the *Davey* factors as mere “hints” that discriminatory funding schemes should be treated with a lighter judicial hand.⁵⁰ Despite conceding that *Davey* might require a balancing test in religious funding cases, the *Colorado Christian* court refused to address what such a test might look like, choosing instead to distinguish *Davey* on the facts.⁵¹ Although the Tenth Circuit admitted that it was unlikely that *Davey*’s precedential value would be “confined to its facts,”⁵² *Colorado Christian* essentially came to just that conclusion.

In contrast, other courts have treated *Davey* as an important adjustment to previous doctrine, according greater room for state discretion in choosing to exclude religious programs. For example, in *Eulitt ex rel. Eulitt v. Maine Department of Education*,⁵³ the First Circuit rejected an attempt to “restrict [*Davey*’s] teachings to the context of funding instruction for those training to enter religious ministries.”⁵⁴ The court cited *Davey* to demonstrate that discrimination in funding was of minor consequence and could not tip the scale in favor of invalidation of a state scheme.⁵⁵ In addition, in *Bush v. Holmes*,⁵⁶ a Florida appellate court upheld a funding scheme similar to that in *Colorado Christian*.⁵⁷ The court could find “nothing in the *Davey*

⁴⁷ *Id.* at 214–15 (quoting *Davey*, 540 U.S. at 720–21) (internal quotation mark omitted).

⁴⁸ *Davey*, 540 U.S. at 720.

⁴⁹ *Colo. Christian*, 534 F.3d at 1255 & n.2 (citing the Supreme Court’s Second Amendment decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), as evidence that a lesser form of judicial review such as rational basis review would be inappropriate despite *Davey*’s insinuations to the contrary).

⁵⁰ *See id.* at 1267.

⁵¹ *See id.* at 1255–56 (noting that despite the “need for balancing interests” in cases like *Davey*, the court “need not decide in [*Colorado Christian*] whether such a balancing test is necessary or how it would be conducted”).

⁵² *Id.* at 1254.

⁵³ 386 F.3d 344 (1st Cir. 2004) (upholding a state funding scheme for Maine secondary private schools that excluded sectarian institutions).

⁵⁴ *Id.* at 355.

⁵⁵ *See id.* at 354 n.5 (“Any shift in the decisional calculus for parents who must decide whether to take advantage of [the] benefit or pay to send their children to a school that provides a religious education is a burden of the sort permitted in *Davey*.” (citation omitted)).

⁵⁶ 886 So. 2d 340 (Fla. Dist. Ct. App. 2004).

⁵⁷ The Florida scheme restricted aid to “sectarian institutions,” but the court noted that parties included the term “pervasively sectarian” in their briefs and conceded that the statutory standard could equally be “pervasively sectarian.” *Id.* at 353 n.10.

opinion . . . [that] limits its application to [the] facts.”⁵⁸ As the Supreme Court had done with regard to the provision in *Davey*, the court in *Holmes* held that the Florida no-aid provision embodied an “expression of a substantial state interest” in not funding religious institutions and that this state interest, vindicated without animus toward any particular religion or sect, outweighed the minor burden of discriminatory funding.⁵⁹ Unlike *Colorado Christian*, these decisions took seriously the new deference authorized by *Davey*.

Like these courts, scholars — whether or not they supported the logic behind *Davey* — agreed that its legacy would inevitably be to expand state discretion to experiment with different funding schemes of religious institutions.⁶⁰ One scholar argued that the *Davey* Court “could not have been clearer” in declaring that “hostility to religion must be shown for strict scrutiny to apply.”⁶¹ Others contended that *Davey* had “constricted the reach of the neutrality principle” such that “government spending programs . . . will not be required to adhere to standards of viewpoint neutrality.”⁶² Professor Douglas Laycock noted that although the decision in *Davey* could be read to “appl[y] only to funding the training of clergy,” its logic could “well be extended to all funding decisions,” and it was a “major win” for those who oppose compelling state funding of religious institutions.⁶³ It would have been easy for the Court to have struck down the provision at issue in *Davey*, but instead, it decisively ruled in favor of greater discretion to state legislators.⁶⁴

Colorado Christian’s refusal to confront *Davey*’s implications ignored the importance of permitting states some leeway in balancing two important goals: education and nonestablishment. *Colorado Christian*’s adherence to a type of strict neutrality did not acknowledge that “our secular public order presupposes that [states] may prefer

⁵⁸ *Id.* at 364.

⁵⁹ *See id.* at 364–65.

⁶⁰ *See, e.g.,* Berg & Laycock, *supra* note 5, at 228 (simultaneously noting the “broad discretion” states would have post-*Davey* and the “series of mistakes” the *Davey* Court made); *see also* Lupu & Tuttle, *supra* note 2, at 73; Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1326 (2008) (noting that despite the “perfect opportunity” in *Davey*, the Court declined to limit state discretion to “selectively deny aid to religious components”). *But see* Frank S. Ravitch, *Locke v. Davey and the Lose-Lose Scenario: What Davey Could Have Said, but Didn’t*, 40 TULSA L. REV. 255, 257 (2004) (characterizing the *Davey* decision as “quite limited in scope”).

⁶¹ Marci Hamilton, *The Supreme Court Issues a Monumental Decision: Equal State Scholarship Access for Theology Students Is Not Required by the Free Exercise Clause*, FINDLAW’S WRIT, Feb. 27, 2004, <http://writ.news.findlaw.com/hamilton/20040227.html>.

⁶² Lupu & Tuttle, *supra* note 2, at 73–74.

⁶³ Laycock, *supra* note 46, at 161–62.

⁶⁴ *Davey* was decided 7–2 with only Justices Scalia and Thomas writing in dissent. *See* Locke v. Davey, 540 U.S. 712, 726 (2004); *see also* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 425 (2008) (noting the unexpected nature of the *Davey* decision).

and encourage secular solutions and applications of government benefits, actions that may inadvertently influence individuals' choices."⁶⁵ Because "states and local communities may have a strong sense of political identity that is enmeshed with a particular attitude toward religion," there are "functional as well as historical reasons to afford the states greater discretion to formulate religion policy."⁶⁶ Further, "stare decisis and the religion clauses suggest that courts now should leave room for state-level experimentation and variety rather than [enforce] a uniform national solution on the issue of compelled public aid to religious schools."⁶⁷ As *Colorado Christian* rebuked Colorado's discrimination among religions, it ignores the flexibility *Davey* seemed to endorse in permitting a state to express community preferences and not endorse overly religious institutions.

Ultimately, it is no surprise that the Tenth Circuit reached the outcome it did in *Colorado Christian*: the six criteria the Colorado scheme used to define "pervasively sectarian" permitted inconsistent and intrusive application, and Judge McConnell has long advocated against selectivity in funding for religious institutions.⁶⁸ However, the decision is still significant beyond the specific state scheme it invalidated. Especially because its author is a leading First Amendment scholar, *Colorado Christian* may be influential in shrinking the latitude states have in determining the correct funding levels for religious institutions. If other courts follow Judge McConnell's lead and avoid *Davey*'s broader implications, thereby limiting its reach to cases of clergy training, they will unfortunately permit states less and less flexibility. If followed, *Colorado Christian*'s reasoning could increase the "constitutional claustrophobia"⁶⁹ created by the First Amendment's two Religion Clauses, and in doing so, stifle state efforts to balance the need for private options in education with a desire to vindicate anties-establishment values.

⁶⁵ Steven K. Green, *Locke v. Davey and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 955 (2004) (arguing that "treating religion equally is not required by our constitutional order" in cases such as *Davey*).

⁶⁶ Lupu & Tuttle, *supra* note 2, at 65–66.

⁶⁷ Martha Minow, *The Government Can't, May, or Must Fund Religious Schools: Three Riddles of Constitutional Change for Laurence Tribe*, 42 TULSA L. REV. 911, 934 (2007) (arguing that when looked at together, the three "puzzles" of the Religion Clauses, stare decisis, and federalism point toward a more hands-off judicial role in state funding schemes).

⁶⁸ See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 989 (1991) ("But selective funding raises problems, especially when it influences citizens in their exercise of constitutionally protected choices.").

⁶⁹ Lupu & Tuttle, *supra* note 2, at 22.