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Excluding Religion

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EXCLUDING RELIGION

NELSON TEBBE[†]

This Article considers whether the government may single out religious actors and entities for exclusion from its support programs. The problem of selective exclusion has recently sparked interest in lower courts and in informal discussions among scholars, but the literature has not kept pace. Excluding Religion argues that the government generally ought to be able to select religious actors and entities for omission from support without offending the Constitution. At the same time, the Article carefully circumscribes that power by delineating several limits. It concludes by drawing out some implications for the question of whether and how a constitutional democracy ought to be able to influence private choices concerning matters of conscience.

INTRODUCTION	1264
I. EXCLUDING RELIGIOUS PRACTICE	1271
A. <i>The Basic Argument</i>	1271
B. <i>Other Rights</i>	1282
C. <i>Examples</i>	1284
D. <i>Objections</i>	1288
1. Discrimination on the Basis of Religion	1288
2. Noninterference with Private Choice	1291
3. RFRA.....	1292
II. EXCLUDING RELIGIOUS SPEECH	1296
A. <i>Government Speech</i>	1297
B. <i>Private Speech</i>	1300
C. <i>Excluding Worship</i>	1308
1. The Case for Allowing Exclusions of Worship.....	1309
2. Lower Court Debates	1314

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III. LIMITS.....	1318
A. <i>Nonpreferentialism</i>	1319
1. In Funding.....	1320
2. In Speech.....	1321
B. <i>Unconstitutional Conditions</i>	1322
C. <i>Animus</i>	1327
D. <i>Viewpoint Discrimination</i>	1331
E. <i>Restricting a Traditional Public Forum</i>	1333
CONCLUSION.....	1335

INTRODUCTION

May the government single out religious actors for exclusion from its support programs? For example, could a state establish a voucher program that funded all public and private schools other than religious ones?¹ Or would it be permissible for a board of education to display only secular holiday symbols in schools?² Could a town open its library facilities for use by all community groups except those that conduct worship services?³ Such questions have recently sparked interest in court opinions and in informal discussions among scholars. This Article attempts to answer them as a matter of constitutional law.

Questions like these may be framing a new paradigm in the law of religious freedom. Two other problems have traditionally occupied courts and commentators. First has been the issue of whether and how the state can regulate religious practices despite the Free Exercise Clause. Virtually everyone has agreed that the government cannot single out particular religious groups for special regulation except in extraordinary circumstances. The dispute has been whether or not it can enforce general laws that do not purposefully discriminate on the basis of religion but that nevertheless have the effect of burdening observance.

A second problem has concerned whether the government can support religious groups in keeping with antiestablishment principles. Familiar disagreements have involved state aid to religious schools, displays of holiday symbols on town property, and inclusion of the words “under God” in the Pledge of Allegiance. Together these two

¹ See, e.g., *Eulitt ex rel. Eulitt v. Me. Dep’t of Educ.*, 386 F.3d 344, 356 (1st Cir. 2004).

² See, e.g., *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006).

³ See, e.g., *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 143 (2007).

paradigms continue to describe many cases at the intersection of religion and government.

Now, however, a different issue has moved into the foreground: whether the government may select religious entities for exclusion from its support programs. One way of thinking about this matter—the problem of excluding religion—is that it shifts attention from the question of whether the government may fund religion to whether it must do so once it elects to support comparable secular activities.⁴ Previously, officials were required to exclude sectarian activities and institutions from subsidies in order to comply with federal antiestablishment rules.⁵ Today, lawmakers might decide to support only secular practices as a matter of policy.⁶ Whether they are permitted to do so is an incipient constitutional issue.

Why has this third problem become important only recently? Doubtless the causes are multiple, but one important factor must be the contemporary turnabout in antiestablishment law. During the last decade or so, the Supreme Court has shifted course and allowed new

⁴ Government “support,” as that term is used in this Article, may take many forms, including cash aid, use of public property, construction contracts, and even state employment. The paradigmatic case involves financial aid programs such as school voucher schemes. Exclusion from other programs may require a somewhat different analysis. Denying civil service or construction contracts to religious persons alone, for instance, would likely violate the rule against unconstitutional conditions defended below. See *infra* Part III.B.

⁵ See *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (finding constitutional an act that was “carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious functions of the recipient institutions”).

⁶ This Article does not address another pressing question—whether the government may deny funding to a category of groups that is defined without regard to religion, even if refusing aid in this general manner will disadvantage observant groups. For instance, lower courts have divided on whether public universities can refuse to recognize all student groups that discriminate on the basis of sexual orientation, despite the fact that some of these groups claim theological reasons for discriminating against gay men and lesbians in the selection of leaders. Compare *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (ruling in favor of the Christian Legal Society (CLS) and against the university), with *Christian Legal Soc’y Chapter of Univ. of Cal. v. Kane*, No. 04-4484, 2006 WL 997217, at *27 (N.D. Cal. May 19, 2006) (ruling against CLS on a similar claim). For a treatment of excluding expressive associations, see Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006). Such policies do not exclude religion as such, but instead deny support to a class of persons and organizations defined on some facially religion-neutral basis. This Article, by contrast, concerns laws and policies that either facially or purposefully single out religious actors.

forms of state aid to flow to religious organizations.⁷ Consider two examples of this phenomenon. First, the Court has approved school voucher programs that include religious educational institutions.⁸ That rule permits indirect aid, meaning funding that flows to religious entities only via the genuinely independent choice of private individuals. Second, the Court now also allows some direct aid. Two decisions have permitted Congress to directly subsidize religious and non-religious schools in certain ways,⁹ and both required the Court to overrule more restrictive precedents.¹⁰ So with respect to important forms of government funding, both indirect and direct, excluding religion may have shifted from a constitutional mandate to a policy option. Put in terms of a common metaphor, the gap has widened between the Free Exercise and Establishment Clauses, giving public officials greater discretion over whether to support observance. Lawmakers must now confront the question of whether it is a good idea to fund religion in these newly permissible ways.¹¹

At the moment, Supreme Court doctrine in this area is inconsistent. First, in *Rosenberger v. Rector & Visitors of University of Virginia*, the Court held that a public university could not elect to fund all student publications without also funding religious ones.¹² But in *Locke v. Davey*, the Court's latest free exercise decision, the Justices approved a college scholarship program for all top students except those majoring in devotional theology.¹³ Although these two decisions may appear to address different areas of law—free speech and free exercise,

⁷ See NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 210-11 (2005) (describing a series of major decisions in the 1990s and 2000s relaxing restrictions on government funding of religion).

⁸ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁹ *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion); *Agostini v. Felton*, 521 U.S. 203 (1997).

¹⁰ *Mitchell*, 530 U.S. at 835 (overruling *Meek v. Pittenger*, 421 U.S. 349 (1975)), and *Wolman v. Walter*, 433 U.S. 229 (1977)); *Agostini*, 521 U.S. at 235-36 (overruling *Aguiar v. Felton*, 473 U.S. 402 (1985), and partially overruling *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985)).

¹¹ Of course, the problem of excluding religion may have been confronted in earlier historical periods, before the Court began applying the Establishment Clause to the states, though it would not have been the focus of federal cases. See, e.g., PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 363 (2002) (discussing *Judd v. Board of Education*, 15 N.E.2d 576, 581-82 (N.Y. 1938), which addressed the separation of church and state in public schools under the New York Constitution).

¹² 515 U.S. 819, 828-31 (1995).

¹³ 540 U.S. 712, 725 (2004). Certain other academic and financial criteria applied as well. *Id.* at 716.

respectively—they actually stand in tension with one another: one permitted an exclusion of religion, and the other did not.¹⁴

This Article argues that the state generally ought to be allowed considerable latitude to exclude religious activities and actors from its support, at least as a constitutional matter. The government need not remain neutral toward religion in its support programs; it may instead sometimes fund one activity rather than another, even when doing so may skew private incentives toward nonreligious activities and messages, so long as it observes certain limitations that this Article will carefully delineate.

This is so partly because free exercise is best conceptualized primarily (though not exclusively) as a right to liberty or autonomy that, like other such rights, may be selectively funded without burdening its exercise and triggering constitutional objections.¹⁵ Elsewhere in constitutional law, particularly in the areas of speech and privacy, officials are permitted to subsidize the exercise of certain rights without aiding others.¹⁶ They may do so even though selective support may have the effect of influencing private choices. To the degree that religious liberty is analogous to those other rights, doctrine surrounding them lends support to the constitutionality of excluding religion.

Partly, too, allowing exclusions of religion is attractive because of considerations that are specific to religious freedom. A legislature might decline to facilitate religion for good reasons, such as promoting equal citizenship for members of minority faiths (or no faith at all), fostering community concord, or respecting taxpayers' freedom of conscience.¹⁷ Each of these three purposes arguably promotes an Establishment Clause value. Antiestablishment theory, in other words, provides justifications for permitting exclusions of religion even where

¹⁴ A footnote in *Davey*, 540 U.S. at 720 n.3, that purported to resolve the tension by distinguishing *Rosenberger* as a speech case fooled few. See, e.g., Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 191-93 (2004) (acknowledging the conflict between *Davey* and *Rosenberger*); see also Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 711-12 (1996) (arguing, before *Davey* was decided, that *Rosenberger* prohibits exclusions of religion from voucher schemes).

¹⁵ See Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 703-05 (2005).

¹⁶ See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (speech); *Maher v. Roe*, 432 U.S. 464 (1977) (privacy and reproductive rights); *Norwood v. Harrison*, 413 U.S. 455 (1973) (parental right to choose private school).

¹⁷ See sources cited *infra* notes 33-38.

it does not provide rationales for requiring them. The government may exclude religion in order to pursue a stricter vision of antiestablishment than the First Amendment requires, at least within certain limits.

Although some readers will find this Article's argument intuitive, others are likely to resist its position. Few leading scholars have addressed the issue so far, but those who have done so generally have voiced serious constitutional concerns with unequal funding of observance.¹⁸ Whereas the government once was constitutionally required to exclude religion from various types of support because of antiestablishment rules, these writers think that today it ought to be constrained in the other direction—the state should be prohibited by free exercise and free speech principles from differentiating on the basis of religion and influencing private decisions concerning matters of conscience. They see a constitutional obligation to treat religious groups and practices evenhandedly, even with respect to funding. So far, the literature has not provided a fulsome response.

Part I sets out the basic argument with respect to religious practices. To simplify for a moment, the government may decide which activities and institutions it wishes to facilitate, even if that means selecting out religious ones. A critical distinction separates differentiation in regulation, which is often subject to close judicial scrutiny, from differentiation in support, which remains largely within the discretion of the democratic branches. Again, that is true both because religious liberty should be conceptualized largely as a right to liberty or autonomy that need not be equally funded to be protected, and also because of religion-specific antiestablishment rationales. Contemporary conditions of pervasive welfare-state programming certainly do weaken the arguments for excluding religion in certain contexts, but the resulting exceptions are narrower than some have suggested.

¹⁸ See Laycock, *supra* note 14, at 199 (calling one instance where the government funded secular programs, but not comparable religious programs, "rank discrimination"); see also CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 222-27 (2007) (arguing generally against differentiation on the basis of religion, even in funding, while taking a nuanced position on *Davey* itself).

Some older articles treated (and opposed) Supreme Court rulings that *required* the nonfunding of religion as a constitutional matter—a different topic from the one addressed in this Article. See, e.g., Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Paulsen, *supra* note 14, at 710-17; see also Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 365 (1999) (arguing that equal funding of religion not only is constitutionally permitted, but also should be constitutionally required).

Part II extends the argument to state support of religious speech.¹⁹ Here, too, the government generally can excise religious messages from its own communications. It may decide, for instance, to display only secular holiday symbols without also showing menorahs or crèches. More difficult to defend is the exclusion of sacred messages from programs that support a range of private views.²⁰ Although this Article argues that *Rosenberger* is mistaken, it contends that even if that decision is not overruled, some room to exclude religious speech may remain. Perhaps the closest question today is whether the government is required to allow worship itself to take place on public premises whenever it opens them to speech by civic organizations. This Article disfavors such a rule even though there is strong support for it in the jurisprudence. Influential circuit judges have recently split on the issue, prompting one of them to call for its resolution by the Supreme Court.²¹

Part III draws five limits to this Article's proposal that the government be allowed to aid observance selectively. Each articulates a bright-line rule that may be administered without the exercise of excessive judicial discretion, and each is defended with careful theoretical arguments. First, the government may not target particular sects for disfavored treatment in its support programs, just as it is prohibited from doing so in its regulations.²² Second, it generally may not

¹⁹ Although aiding religious exercise is obviously different from aiding religious messages, it makes sense to consider these forms of support together. Within the category of speech, it also makes sense to compare government speech that works to advance religion with government support of private religious speech. For example, a town's display of religious holiday symbols supports the affected religions in much the same way as its decision to open up its property for the private display of those same symbols. Finally, it is sensible to analogize a government willingness to let its facilities be used by a variety of private speakers to its actual funding of those speakers. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543-44 (2001) (drawing on public forum cases for guidance in a subsidy decision).

²⁰ See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (invalidating an exclusion of sectarian speakers from an otherwise general government support program).

²¹ See *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 91 (2d Cir. 2007) (vacating a judgment prohibiting an exclusion of worship, with a split vote on the merits and one vote to vacate on ripeness grounds); *id.* at 132 (Walker, J., dissenting) ("[T]here is no doubt that this particular dispute . . . would benefit from a more conclusive resolution by [the Supreme] Court."); see also *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 911 (9th Cir. 2007) (upholding an exclusion of worship from public facilities), *cert. denied*, 128 S. Ct. 148 (2007).

²² See *Larson v. Valente*, 456 U.S. 228, 255 (1982) (invalidating a rule that exempted from certain registration and reporting requirements only religious organizations that receive more than half of their total contributions from members and affiliated organizations).

defund one activity by a religious group simply because that group is exercising its constitutional right to engage in some other religious activity using private funds. That is, the government may not violate the rule against unconstitutional conditions.²³ Third, exclusions of religion may not be driven by antireligious animus, a term this Article defines narrowly.²⁴

The remaining limits apply to exclusions of religious speech. The fourth prohibits the government from engaging in viewpoint discrimination when it subsidizes a range of private expression.²⁵ Regardless of whether treating exclusions of religious perspectives as viewpoint discrimination makes sense as a matter of theory—something this Article will question—the Court is sure to continue to treat them that way as a practical matter. Fifth, and finally, state actors are presumptively prohibited from banning religious speech from traditional public fora, such as parks or sidewalks.²⁶ That last rule may be understood not as an independent limit but instead as an articulation of a boundary of the main principle, since access to such fora is best seen not as a subsidy but rather as a baseline benefit that all citizens enjoy. Restricting access to them is closer to regulation than to a denial of aid, on that view.

Part V concludes by drawing out some of the argument's implications for a question of constitutional theory, namely whether and how it is appropriate for a democracy to influence citizen choice concerning commitments of conscience. This Article sets out a framework that may aid analysis of that difficult question. And to the degree that excluding religion has analogues elsewhere in constitutional law, this Article's proposal provides a way of thinking about the (limited) ability of a constitutional democracy to incentivize private behavior across

²³ See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364, 402 (1984) (invalidating grants given only to those broadcasting stations that do not engage in editorializing); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (invalidating a tax exemption conditioned on taking an antisubversion oath).

²⁴ See *Locke v. Davey*, 540 U.S. 712, 725 (2004). This Article does not distinguish between the terms "differentiation" and "discrimination." In this regard, it follows what seems to be the practice of at least some members of the Court. See, e.g., *id.* at 726 (Scalia, J., dissenting) ("[T]he minimum requirement of neutrality is that a law not discriminate on its face." (internal quotation marks omitted) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993))). Instead, I carefully separate out the term "animus." See *infra* Part III.C.

²⁵ See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992).

²⁶ See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

a wider range of constitutionally protected activity. In more instances than those that have generally been recognized, the government may be able to encourage protected behavior that it considers worthwhile.

I. EXCLUDING RELIGIOUS PRACTICE

This Part sets out the argument with respect to exclusions of religious practice from government support, first by defending such exclusions on theoretical grounds and then by showing how that defense links up with jurisprudence surrounding other rights to individual liberty or autonomy. It concludes by anticipating and addressing several objections.

A. *The Basic Argument*

When the government elects not to support the exercise of religious liberty, it should not normally be seen to be violating the right to free exercise, even though it might not be able to prohibit the religious activity directly.²⁷ That argument depends on a fundamental distinction between governmental regulation and support.²⁸ Whereas the state has only limited power to target religious groups for special regulation, it has a much greater ability to select them for denials of aid. Constitutional theory can support that distinction by construing free exercise primarily as a right to liberty or autonomy that is more readily burdened by regulation than by a state decision to withhold a subsidy.²⁹ When the government singles out religious actors and entities for denials of support, it frequently leaves them just as free to observe their faith as they were before the government program existed. Constitutional democracies must obey a negative prohibition on interfering with individual liberty of conscience, of course, but it does not

²⁷ The idea that the government may defund religious activity that it may not be able to prohibit should be familiar. In *Bob Jones University v. United States*, for instance, the Court assumed that the federal government could not prevent the school from imposing a religiously based rule against interracial dating. 461 U.S. 574, 593-94 (1983). Nevertheless, it held that the IRS could refuse to extend a tax exemption to a school that engaged in such a practice. *Id.* at 604.

²⁸ Thanks to Bruce Ackerman for emphasizing this distinction.

²⁹ See Tebbe, *supra* note 15, at 723-32 (expounding a "liberty conception" of free exercise). That view of free exercise, which interprets the provision primarily as a right to autonomy, is not exclusive. Free exercise also includes certain freestanding commitments to government evenhandedness, such as the guarantee of neutrality between denominations or sects. See *infra* Part III.A (delving into the doctrine of nonpreferentialism).

follow that they have an obligation to facilitate observance on equal terms.³⁰

On something like that theory, constitutional law in various areas allows the government to selectively subsidize the exercise of autonomy-based rights, as the next Section will explain more fully. That is true even when selective funding has the effect of skewing private incentives toward behavior that policymakers believe to be valuable. So, for instance, legislatures may facilitate public education but not private education, or marriage rather than cohabitation, even though both private schooling and cohabitation may be constitutionally protected. Of course, a government's ability to pick and choose may be supported by considerations that are specific to the right at issue. But viewed at a sufficiently high level of abstraction, constitutional law can be seen to allow selective support on the theory that basic liberties normally are not fundamentally impeded when they are denied subsidies.³¹ Excluding religion likewise ought to be permitted in many circumstances, leaving to lawmakers the question of whether it is good policy to support observance, sacred practices, and the like.

Here, selective support of religion can also be justified based on arguments of constitutional theory that are particular to religious liberty.³² After all, religion jurisprudence has its own detailed set of arguments concerning government support, namely those that surround the Establishment Clause. Three antiestablishment considerations stand out among the ones that officials might reasonably consider.

³⁰ *But see* *Sherbert v. Verner*, 374 U.S. 398, 415-16 (1963) (Stewart, J., concurring in the judgment) ("I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief and disbelief. In short, I think our Constitution commands the positive protection by government of religious freedom . . .").

³¹ This Article does not analogize religious liberty to equal protection, which more readily prohibits discrimination in government support programs. *See infra* note 111. Free exercise and antiestablishment include some guarantees of neutrality and equality, but these are specific to religious freedom and thus not profitably considered part of the more general right to equal protection.

³² I assume here that religion is special in the sense that government decision makers might legitimately conclude that funding sectarian institutions poses particular dangers to equal citizenship, community stability, and religious freedom. Religion need not be considered unique as a matter of abstract argument for this approach to work. *Cf.* Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. (forthcoming 2008) (critiquing the uniqueness of religion on theoretical grounds). Rather, the idea here is that lawmakers may take into account the fact that religion has long been thought to occupy a special place in American history and tradition. This Article brackets any further consideration of the notoriously difficult questions surrounding the particularity of religion as compared to other deeply held commitments.

First, policymakers might deny funding to sacred institutions in order to protect and promote equal citizenship for people who belong to unrepresented faiths or to no faith at all.³³ Officials might reasonably decide that funding religious entities would damage equal citizenship because only certain sects would in fact take up the offer of support.³⁴ That could create a situation in which the government became identified with a particular sect or sects as a practical matter—however mistakenly—so that people not affiliated with those faiths would come to view themselves as belonging to disfavored classes of citizens.³⁵

Second, lawmakers may believe that staying out of the business of supporting religion will foster community harmony and avoid harmful unrest or division.³⁶ They might reasonably conclude that aiding religion, even on equal terms with other groups, would highlight differences of identity among citizens in a way that disrupts peace within the polity and damages social solidarity.³⁷

Finally, funding sacred practices might reasonably be seen to impede the religious freedom of taxpayers who object to supporting in-

³³ See Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 601 (1996) (book review) (including equal citizenship as one facet of a theory of religious freedom); Posting of Jack Balkin to Balkinization, Reciprocity, the Religion Clauses and Equal Citizenship, <http://balkin.blogspot.com/2005/07/reciprocity-religion-clauses-and-equal.html> (July 1, 2005, 22:30 EST) (“I have always believed that at the heart of the jurisprudence of the religion clauses is the problem of securing equal citizenship in a country whose citizens have very different and sometimes contradictory beliefs about religion. The goal of the religion clauses is twofold—first, to preserve religious conscience, and second, to ensure equal citizenship for all persons regardless of their religious beliefs.”).

³⁴ Cf. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (“The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.”).

³⁵ See *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 105 n.8 (2d Cir. 2007) (Calabresi, J.) (describing reasonable grounds on which school officials decided not to allow worship by private groups after hours on school property, including a desire to avoid allowing public school buildings to become “identified with the church” in such a way that “members of the community who are not church members would feel ‘marginalized’” (emphasis omitted)); *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 214 (2d Cir. 1997) (“We think that it is reasonable for state legislators and school authorities to avoid the identification of a middle school with a particular church.”).

³⁶ See Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006) (analyzing, but not endorsing, this argument).

³⁷ See *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment) (explaining that a “basic purpose[] of [the Religion] Clauses” is “to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike”).

stitutions with which they differ as a matter of conscience. While this consideration has not often blocked the flow of public funds to religious organizations in the modern era, it has some pedigree in American constitutional history.³⁸ Without adopting any of these three rationales as justifications for Establishment Clause doctrine, this Article contends only that they provide religion-specific reasons for allowing officials to decide not to facilitate religious practices.

All three of these rationales are contested in contemporary American society. Cutting in the opposite direction are plausible interests such as a desire to promote the equal citizenship of religious people or an aim to facilitate free exercise. And, conceivably, excluding religion could produce more civil strife, not less.³⁹ The point here is simply that it makes sense to allow lawmakers themselves to resolve these issues when they decide whether to carve out sectarian institutions from government programs. That is, even if antiestablishment concerns like the three described above do not mandate exclusion of religious individuals and institutions—something that the Court has decided in the context of school vouchers, for instance⁴⁰—they should nevertheless cut in favor of allowing policymakers to decide whether to extend such programs to sectarian groups.⁴¹

It should be emphasized that this Article urges only that the option of excluding religion should be available to the democratic branches. Put in terms of political process theory, the idea is that democratically elected representatives should retain discretion to decline to fund religious practices for defensible policy reasons. Implicit in that argument is the assumption that deciding whether to allow selective funding will not normally present problems of political dysfunction. There is no *a priori* reason to suspect that religious groups, taken as a whole, will not be able to band together and protect themselves from loss of funding or other support through the normal channels of democratic decision making. Certainly, the story might be different if particular sects were singled out by the legislature, but

³⁸ Coercing taxpayers was a concern that figured prominently at the time of the Founding and has recently been revitalized by prominent thinkers. See FELDMAN, *supra* note 7, at 37-38 (describing Madison's view).

³⁹ Thanks to Robert Tsai for pressing this point in correspondence.

⁴⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁴¹ See *Widmar v. Vincent*, 454 U.S. 263, 289 (1981) (White, J., dissenting) (arguing that exclusion of religion ought to be permitted on the ground that the state has a "sufficiently strong" interest in providing greater protection against the establishment of religion than is required by the Constitution).

one of the limits set out in Part III prohibits that degree of specificity.⁴² With that prohibition in place, it is possible and indeed probable that faiths and denominations will be able to form political coalitions to effectively oppose denials of support that affect them all equally, or at least enough to generate political sympathy and interest alignment. Whether to fund religious practices and entities is a question of public values that the legislature is best positioned to resolve, for familiar reasons of institutional competence. The argument, therefore, is not that selective support is an attractive policy choice in every (or any) circumstance. This Article does not weigh in on whether, for instance, voucher programs work best without religious schools. It urges only that, as a constitutional matter, legislatures should be able to make that determination.⁴³

Would it be permissible to exclude religion even from broad welfare-state programs? Because such programs arguably shift the baseline level of benefits that all citizens are entitled to expect, some might worry that excluding religion from them would exert a coercive effect. Imagine, for instance, a law that denied police and fire protection to churches, or one that extended significant subsidies to all day care centers except religious ones, or one that allowed government funding to flow only to nonsectarian hospitals. If exclusions of religion from programs like these could not fairly be said to leave practitioners as free to pursue their faiths as they were before the programs were enacted, they might be thought to raise constitutional concerns.

In all candor, this worry may be difficult to allay on the level of constitutional theory. It raises the notoriously thorny problem of where to set the baseline level of government benefits when considering whether a denial should count as a hindrance rather than as a

⁴² See *infra* Part III.A.

⁴³ For an important set of arguments surrounding school vouchers, see PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 297-307 (2003).

Federalism considerations provide further support for allowing the practice of excluding religion to continue among the states. Although this Article does not leverage those arguments, they play an important role in the literature. Of particular interest here are works that support the Court's decision in *Davey* on federalism grounds. *E.g.*, Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 67-83 (2006); Jesse R. Merriam, *Finding a Ceiling in a Circular Room: Locke v. Davey, Federalism, and Religious Neutrality*, 16 TEMP. POL. & CIV. RTS. L. REV. 103, 106 (2007). Many states provide greater antiestablishment protection than the Court requires as a matter of federal law. Sometimes they do so under state constitutional provisions, known as "Blaine Amendments," and sometimes they do so in other ways. This dimension of the problem is rich—too rich to be treated adequately here.

simple decision not to subsidize.⁴⁴ Yet in practice, concrete examples of such carve-outs from fundamental state benefits turn out to be rare. Most broad government programs have traditionally extended public goods to religious groups on equal terms. And even where instances of excluding religion from such programs are possible to imagine, they can usually be adequately addressed by one or another of the limits set out in Part III. So, for instance, selecting sectarian institutions for denial of police or fire protection would almost certainly violate the rule against animus toward religion.⁴⁵ That is so because denying basic municipal services to churches, synagogues, and mosques appears so unconnected to any legitimate basis for excluding religion that the practice could only be motivated by a discriminatory purpose and not by any legitimate policy.

Selectively defunding only religious day care centers or hospitals presents a more difficult question. But excluding religion in those ways would run up against the second limitation described in Part III: the prohibition of unconstitutional conditions. A government violates this rule when it denies benefits to a religious entity simply because the group chooses to engage in free exercise using private funds.⁴⁶ The government thus cannot withhold funding to day care centers or hospitals simply because they are religiously affiliated. Now, certainly, the state could require them to segregate out secular and sectarian functions as a condition of funding, making it possible to fund only secular social services without also subsidizing religious observances.⁴⁷ It could not, however, refuse to subsidize even the secular operations of social service institutions simply because of their religious affiliations. None of this is to say that the problem is easy to solve. Yet the hope of this Article is that a combination of the limits set out in Part III could do much to mollify the concern that excluding religion would become coercive or unfair when applied to broad government entitlements.⁴⁸

⁴⁴ For a more comprehensive take on this "baseline problem," see Tebbe, *supra* note 15, at 722-23.

⁴⁵ See *infra* Part III.C.

⁴⁶ See *infra* Part III.B.

⁴⁷ See *Rust v. Sullivan*, 500 U.S. 173, 198 (1991) (holding that Congress may require recipients of federal family planning funds to separate out nonfunded counseling and referral services concerning abortions); *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (noting that Congress could fund only noneditorializing broadcast activities if it allowed public broadcasting stations to segregate out and separately fund their editorializing activities).

⁴⁸ If there were an exclusion of religion from a broad welfare entitlement that was not prohibited by this Article's mechanisms, any infringement on religious freedom

One way to think about excluding religion is as the rough inverse of legislative accommodation—i.e., the practice of singling out religious actors for special exemptions from regulatory laws. Legislative accommodations typically provide greater protection to free exercise than is constitutionally required. Consider, for instance, the statute that allows Native Americans to use peyote despite the drug laws.⁴⁹ Or think of the Religious Land Use and Institutionalized Persons Act (RLUIPA), which gives special protection to prisoners seeking to exercise their religion.⁵⁰ Accommodations like these are regularly upheld even though they often have the effect of advantaging religious actors over those who would like to act similarly for deeply held secular reasons.⁵¹ That is, they favor religious actors by skewing private decision making toward religious choices. A secular person who wishes to use peyote has an incentive to become a member of the Native American Church, for instance. Exclusions of religion from government support, on the other hand, promote a stricter vision of anti-establishment than is constitutionally required. And, as I argue, they too are often constitutional even though they may disincentivize sacred practices relative to comparable secular activities. Differentiating on the basis of religious observance is permissible, regardless of any incentive effect that it might create in either direction, so long as it does not unduly interfere with free exercise or run afoul of some other constitutional principle.⁵²

that it imposed could conceivably be invalidated by general free exercise principles. See Tebbe, *supra* note 15, at 729-32.

⁴⁹ 42 U.S.C. § 1996a(b) (2000). Absent the statutory exemption, Native Americans would not have a constitutional right to use peyote without being punished under the Controlled Substances Act. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (leaving religious exemptions from drug laws up to the legislature).

⁵⁰ See *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005) (upholding RLUIPA's prison provisions against an Establishment Clause challenge while acknowledging that observant inmates would receive less protection under the Constitution than they do under RLUIPA).

⁵¹ See Tebbe, *supra* note 15, at 714 (arguing that many legislative accommodations have the effect, if not the purpose, of advantaging religious actors in this way).

⁵² Of course, the precise inverse of excluding religion—that is, singling out observance for special subsidization—would most often violate the Establishment Clause. It is difficult to imagine that such a program could have a governmental purpose that did not favor religion and was not impermissible for that reason. Exclusions of religion, by contrast, need not be motivated by antireligious animus, and in fact may not be. See *infra* Part III.C. For instance, state constitutional provisions that enact strong antiesestablishment commitments have not been found to constitute impermissible discriminations against religion. See, e.g., *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1122-23 (Wash. 1999) (en banc) (holding that a ban on certain funding under the

This Article's basic argument draws much of its support from *Davey*.⁵³ Although that decision has met with criticism from leading commentators,⁵⁴ it sensibly extends the Court's rulings in other areas of constitutional law to free exercise and rightly indicates that excluding religion ought to be constitutional in a variety of circumstances.⁵⁵ The *Davey* Court approved an exclusion of religion—for the first time⁵⁶—by a remarkably lopsided vote of seven to two.⁵⁷ Washington state had established a scholarship program for talented high school students who graduated near the top of their class, who planned to attend an accredited university within the state, and who met certain income requirements. Students could use the awards to defray education-related costs at any accredited institution, whether public or private, religious or secular. One narrow restriction was imposed: awards could not be used to support students who planned to major in devotional theology, a term that everyone understood to mean the study of religion from a faith perspective.⁵⁸ Joshua Davey won a scholarship on the merits but then lost it when he declared a dual major in devotional theology and business administration—a combination designed to prepare him for a career in the clergy.

state constitution did not constitute purposeful discrimination on the basis of religion). Similarly, legislative accommodations driven by an intent to favor a particular religious practice are not proper. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (characterizing the "secular legislative purpose" requirement as preventing lawmakers "from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters").

⁵³ *Locke v. Davey*, 540 U.S. 712 (2004).

⁵⁴ See, e.g., EISGRUBER & SAGER, *supra* note 18, at 226 (taking issue with *Davey*'s rationale); Laycock, *supra* note 14, at 199 (arguing that *Davey* opens the door for the government to "offer[] broad conditional subsidies and buy[] up the right to free exercise of religion").

⁵⁵ For an argument that the *Davey* Court missed an opportunity to declare that equal funding of religious entities is not required, 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, 256 (2004).

⁵⁶ *Davey*'s only harbinger was dicta indicating that a constitutionally required exclusion of sectarian schools from a tuition reimbursement scheme would not itself violate other provisions of the Constitution. See *Sloan v. Lemon*, 413 U.S. 825, 834 (1973) ("[V]alid aid to nonpublic, nonsectarian schools would provide no lever for aid to their sectarian counterparts."). Perhaps because *Sloan* addressed the different question of whether excluding religion was required, not whether it was permitted, it was not even cited in *Davey*.

⁵⁷ *Davey*, 540 U.S. at 713; see also EISGRUBER & SAGER, *supra* note 18, at 223 (calling the seven votes an "overwhelming majority," at least "in this field").

⁵⁸ *Davey*, 540 U.S. at 716.

Everyone acknowledged that the state could have included ministerial training in its scholarship program without violating the federal Establishment Clause.⁵⁹ The issue was whether Washington could pursue a stricter vision of antiestablishment than the federal Constitution required, now as a matter of state policy, or whether it would instead be constitutionally compelled to fund theology majors once it decided to support other exceptional students.⁶⁰

Questions at oral argument revealed a concern among some of the Justices that ruling for Davey would impair the ability of policy-makers to exclude religion in other contexts—especially in school voucher programs. In a particularly illuminating exchange, counsel for Joshua Davey was asked about this issue:

QUESTION: Suppose a state has a school voucher program such as the Court indicated [in *Zelman*] could be upheld Now, if the state decides not to give school vouchers for use in religious or parochial schools, do you take the position it must, that it has to do one or the other? It can have a voucher program, but if it does, it has to fund all private and religious schools with a voucher program?

MR. SEKULOW: No, I think—

. . . .

QUESTION: Well, why not? I mean, why wouldn't it follow from what you are saying today? . . .

. . . .

QUESTION: Can [the state] refrain from making that program available for use in religious schools?

MR. SEKULOW: I—I would think not. I think once it would go towards the private schools, as long as the eligibility—

QUESTION: So what you're urging here would have a major impact, then, would it not, on—on voucher programs?

MR. SEKULOW: Well, it would.⁶¹

⁵⁹ See *id.* at 719 (citing *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986)).

⁶⁰ Of course, states are generally free to provide greater protection for individual rights than what is required by the federal Constitution. See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding that a state law extending free speech and petition rights to the grounds of a privately owned public shopping center is constitutional).

⁶¹ Transcript of Oral Argument at 31-32, *Davey*, 540 U.S. 712 (No. 02-1315).

Subsequently, one Justice worried aloud that "quite a few state laws and constitutional provisions around the country" might be unconstitutional if *Davey* went the wrong way.⁶² From these questions, it appears that the wider practice of excluding religion was itself seen to be at stake.

Given these concerns, it is no surprise that the Court upheld the Washington scholarship program. Chief Justice Rehnquist's majority opinion emphasized that Washington's was a funding program, not a regulation. He therefore applied what he implicitly took to be a general constitutional rule concerning funding, namely, that a government's refusal to subsidize the exercise of a constitutional right is not generally seen as burdening that right. Washington's funding exclusion "impose[d] neither criminal nor civil sanctions on any type of religious service or rite [and did] not deny to ministers the right to participate in the political affairs of the community."⁶³ Instead of enacting any direct prohibition, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction."⁶⁴ Chief Justice Rehnquist reasoned that excluding devotional degrees from the state's funding program "place[d] a relatively minor burden" on students like Davey.⁶⁵ Passages like these support the view that *Davey* turned on an examination of the relationship between government funding and individual liberty or autonomy, and in particular on a judgment that excluding religion from the Washington program did not burden Joshua Davey in the same way that direct regulation might have.⁶⁶

⁶² *Id.* at 33-34.

⁶³ *Davey*, 540 U.S. at 720.

⁶⁴ *Id.* at 721.

⁶⁵ *Id.* at 725.

⁶⁶ Here I agree with Professor Laycock that *Davey* came out the way it did largely because the government's differentiation on the basis of religion did not impose a significant burden on Davey's ability to pursue his calling. See Laycock, *supra* note 14, at 214 ("[T]he unifying theme [in *Davey*] is that facial discrimination against religion is presumptively unconstitutional if, and only if, the discrimination burdens a religious practice. . . . [A] mere refusal to fund does not impose a substantial burden."). I also agree that the Court's no-burden approach is difficult to apply outside the area of funding—as, for instance, in the context of religious speech. See *infra* Part II.

Some experts think the outcome in *Davey* depended not on the absence of a burden, but instead on the lack of governmental "animus" toward religion. See, e.g., Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1101-02. My own reading is that the *Davey* Court probably did not mean to suggest that a showing of antireligious animus was necessary to make out a constitutional claim, though it did indicate that such a showing would be sufficient. See *infra* Part III.C.

Justice Scalia dissented in *Davey*, noting that the Court's holding flew in the face of its longstanding rule that facial discrimination on the basis of religion was presumptively unconstitutional—and not only in the context of regulation.⁶⁷ The *Davey* Court approved a scholarship program that singled out religion for special disfavor, seemingly in blatant violation of that “neutrality” principle. Justice Scalia protested that “[i]f the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones.”⁶⁸ The majority's rule, he said, could justify excluding religion from public programs in a wide variety of contexts.⁶⁹

That *Davey* helps to justify exclusions of religion in a number of circumstances is this Article's contention exactly. In Section D of this Part, I will respond to Justice Scalia's view that discrimination on the basis of religion is always suspect, regardless of whether it appears in the context of regulation or support. That Section will also anticipate and counter a related objection, that the government should avoid influencing private decision making regarding matters of conscience—so that although it may elect not to fund religious exercise generally, it should not do so where it supports some substitute activity that presents a direct alternative to observance.⁷⁰ In contrast to both of these

Others believe *Davey* is limited to funding carve-outs for practices of particular religious intensity, such as training for the clergy. See Laycock, *supra* note 14, at 184-87 (assessing this argument and calling training for the clergy “an essentially religious endeavor” (quoting *Davey*, 540 U.S. at 721)). Although this interpretation is reasonable, it is unlikely to control future cases. *Id.* at 185-86. As Professor Laycock points out, religious intensity has not mattered much in the Court's decisions regarding the question of what a government may fund without violating the Establishment Clause. It is thus less likely that the Justices will rely on that factor when considering what a government must fund. *Id.* at 186. For this Article, the salient point is that a government may legitimately come to believe that refusing to fund religious practices will serve desirable policy ends, even if those practices are not as “essentially religious” as studying to become a cleric.

⁶⁷ *Davey*, 540 U.S. at 726 (Scalia, J., dissenting) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)).

⁶⁸ *Id.* at 728.

⁶⁹ *Id.* at 730.

⁷⁰ Judge McConnell advocates a “presumptive obligation to fund abortions when the government funds childbirth, and to fund religious schools when it funds secular schools, unless there is a plausible, non-hostile reason for the selective funding.” McConnell, *supra* note 18, at 1046. That follows from a general idea that “[g]overnment must keep its hands off” certain protected choices. *Id.* at 995. While he agrees that, ordinarily, merely refusing to subsidize the exercise of a constitutional right will not skew private incentives, funding only one of two “substitute” protected activities may do so and therefore would require special justifications related to the nature of the particular right being excluded. *Id.* at 1001-03.

positions, this Article argues that the government may exclude religion even when doing so influences private choices regarding matters of conscience, so long as it does not violate any of the limits set out in Part III, some of which guarantee basic autonomy in matters of conscience and others of which articulate freestanding commitments to evenhandedness. The remedy for disagreement with government policies that skew private decision making away from religious choices lies in the usual processes of democratic lawmaking, not in a constitutional court.

B. *Other Rights*

Constitutional law commonly allows the government to subsidize the exercise of certain constitutional rights and not others. Selective support in these other areas is analogous to the practice of excluding religion. For instance, legislatures may support childbirth and not abortion, even though a woman's freedom to terminate an early pregnancy is constitutionally protected.⁷¹ In the words of the Court, "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."⁷² Merely electing not to fund the exercise of a liberty or autonomy right leaves its holder roughly as unencumbered as he or she was in the absence of any government benefit program.

Similarly, parents have a constitutional right to send their children to private school.⁷³ A state therefore cannot use its truancy laws to prevent religious parents from opting out of public schools and instead educating their children in a private setting. Yet the government does have the power to encourage public schooling by funding only public schools.⁷⁴ In other words, it is permitted to incentivize only public schooling, even though the freedom to send a child to private school enjoys the status of a constitutional right. Nebraska, for

⁷¹ See *Harris v. McRae*, 448 U.S. 297 (1980); *Maier v. Roe*, 432 U.S. 464 (1977). It is conceivable that a funding exclusion could be overturned if found to impose an undue burden on a woman's ability to obtain an abortion. *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992). Given the Court's view that virtually no abortion funding ought to be considered part of the welfare-state baseline of entitlements, however, it is difficult to imagine a denial of support that, in its view, would impose such a burden. Perhaps the government has some duty to facilitate abortions in the prison context.

This Section is indebted to Eugene Volokh's discussion, in a different context, of what he calls "The No Duty To Subsidize Principle." See Volokh, *supra* note 6, at 1925-27.

⁷² *Maier*, 432 U.S. at 475.

⁷³ *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

⁷⁴ *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

example, was forbidden from criminalizing the teaching of foreign languages to students below the eighth grade in all public and private schools, but nevertheless it remained free to exclude German from the curriculum of its free public schools.⁷⁵ Again, policymakers may not interfere with protected activities, but they may choose to endorse some of those activities and not others, and they may even use government resources to their advantage and thereby incentivize the choices they favor.

Moreover, the government may decline to fund advocacy of abortion, even if it subsidizes advocacy of childbirth or abstinence.⁷⁶ And it need not subsidize lobbying by nonprofit organizations, even when it subsidizes lobbying by veterans' organizations.⁷⁷ Therefore, with respect to speech, as in other areas, the government "can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."⁷⁸ To a significant degree, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."⁷⁹

Is excluding religion really analogous to declining to fund abortion, private schooling, or German classes? Some might resist that analogy, reasoning that excising religious practices is different from omitting these other activities because it involves a more targeted denial from broader support programs. And, admittedly, certain exclusions of religion might come closer to some of these selective funding cases, such as the refusal to offer German classes, than to others, such as a decision not to fund abortions along with childbirth. Yet Chief Justice Rehnquist in *Davey* apparently saw an analogy even to the abortion funding cases. Although he did not explicitly invoke those cases, his implicit references to them were difficult to miss.⁸⁰ Recall, for instance, the way in which he characterized Washington's decision as

⁷⁵ *Meyer v. Nebraska*, 262 U.S. 390, 402-03 (1923).

⁷⁶ *Rust v. Sullivan*, 500 U.S. 173, 196-97 (1990).

⁷⁷ *Regan v. Taxation with Representation*, 461 U.S. 540, 550-51 (1983).

⁷⁸ *Rust*, 500 U.S. at 193. Though again, excluding religious speech raises special concerns under existing law. See *infra* Part II.B.

⁷⁹ *Rust*, 500 U.S. at 194. I will show below that this statement does not apply when the state seeks to appropriate funds to support a wide range of private speech with the exception of a certain viewpoint. Other limitations on this general statement are set out in Part III, *infra*.

⁸⁰ Here I agree with Professor Laycock, who thinks Rehnquist's "paraphrase of *Rust*" was "unmistakable." Laycock, *supra* note 14, at 176.

“merely [choosing] not to fund a distinct category of instruction.”⁸¹ That formulation resonates with the Court’s approval of selective support in these other areas of constitutional law.⁸² At least when they are considered at a high enough level of abstraction, its decisions in those other areas provide some support for the constitutionality of excluding religion.

Of course, many of the Court’s selective funding decisions in the areas of privacy and speech are controversial, not only as a matter of politics but also as a matter of constitutional theory. Again, this Article shares many of those concerns. Yet even critics of those decisions may support the constitutionality of excluding religion for two reasons.

First, the Court’s abortion and speech cases have strategic value. Generally, the lawyers and judges who oppose exclusions of religion tend to be the same people who support selective funding of childbirth and childbirth-friendly speech. As Michael McConnell has observed, these two positions do not easily cohere.⁸³ By analogizing between selective support in those areas and in the context of excluding religion, it is possible to leverage support for the Court’s other decisions in the service of excluding religion.

The second reason draws on independent justifications for allowing selective support of religion. As noted above, antiestablishment considerations support exclusions of religion in ways that do not depend on arguments for selective funding with respect to privacy and speech.⁸⁴ So, for reasons of both strategy and principle, even skeptics of the Court’s selective funding cases like *Maher* and *Rust* might be persuaded to support the constitutionality of targeted denials of aid to religion, at least within certain limits.

C. Examples

Lower courts have upheld funding programs that omit religious actors. Those decisions have followed an approach similar to the one

⁸¹ *Locke v. Davey*, 540 U.S. 712, 721 (2004).

⁸² See Laycock, *supra* note 14, at 176 & n.126 (comparing *Davey*’s language to that of *Rust* and *Harris*).

⁸³ See McConnell, *supra* note 18, at 989-90 (pointing out this inconsistency among commonly held positions on funding of free exercise and abortion). Progressives and conservatives alike, if they are to preserve the ability of the government to influence citizen choices where they care about them most, face pressure to develop positions that treat selective facilitation in a consistent manner across different areas of constitutional law.

⁸⁴ See *supra* Part I.A (laying out the basic argument for excluding religion).

that this Article proposes. Courts have held, for instance, that states may establish voucher programs that fund students who wish to attend nonsectarian public or private schools.⁸⁵ And one court ruled that a state may decide not to include a faith-based addiction treatment program among the choices given to parolees, even though it may fund analogous secular programs.⁸⁶ Declining to subsidize free exercise, according to these decisions, does not amount to an infringement of individual liberty—even though selective funding discriminates facially on the basis of religion and therefore presumptively violates a conception of free exercise according to which the government lacks authority to draw disadvantageous distinctions between religion and irreligion.⁸⁷

Laws excluding religion so far have involved programs of indirect aid—such as school voucher programs—where support flows to religious organizations only via private individuals, who direct it there according to their own genuinely independent choices.⁸⁸ Yet it is now

⁸⁵ See *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004) (upholding the Maine voucher program against a federal constitutional challenge); *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006) (same); see also *Bush v. Holmes*, 886 So. 2d 340, 362-64 (Fla. Dist. Ct. App. 2004) (holding that a provision of the Florida state constitution prohibiting the use of school vouchers at religious schools does not violate the federal Free Exercise Clause).

⁸⁶ See *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 981 (W.D. Wis. 2002) (holding, on summary judgment, that excluding faith-based providers from a program funding certain private-sector substance abuse treatment centers would not violate the Free Exercise Clause, but coming to that conclusion in the context of a ruling that such an exclusion was constitutionally mandated).

⁸⁷ See *Anderson*, 895 A.2d at 959 (holding that merely denying tuition assistance for sectarian schooling does not substantially burden the constitutional right to attend a private religious school).

⁸⁸ Sometimes the Justices draw a further distinction between indirect aid and aid that goes to a religious organization directly, but only because of a genuinely independent choice of a private individual. See *Mitchell v. Helms*, 530 U.S. 793, 815-20 (2000) (plurality opinion) (making such a distinction in reviewing a federal statute under which funds supplied by the federal government were used to lend materials and equipment to public and private schools through state and local agencies); *id.* at 841-42 (O'Connor, J., concurring in the judgment) (defending a similar distinction). The term "indirect" then indicates that aid flows first to the individual, perhaps in the form of a voucher, and only then to a religious entity. Phrases such as "genuinely independent and private choices," *id.* at 810 (quoting *Agostini v. Felton*, 521 U.S. 203, 226 (1997)), by contrast, emphasize the control of a citizen, not the path the aid takes in its journey from the state to a religious entity. Normally, however, indirectness and the private-choice feature get conflated in the Justices' usage. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (juxtaposing "direct aid programs" with "true private choice programs"). Presumably this is because indirect aid programs virtually always channel support according to the wishes of private citizens. Conflation of the terms may also reflect a judgment that there is no constitutionally significant difference between a true voucher program and one in which aid gets steered directly to a

possible to imagine a direct aid program that selectively defunds religious entities. After all, the Court has recently begun to allow some direct support of faith-based entities,⁸⁹ although so far only under rather narrow circumstances.⁹⁰ The doctrine here is awfully messy and may well change now that Justice O'Connor has ceded supervision of this area to Justice Alito and the Roberts Court. There is little doubt, however, that the government will continue to enjoy greater ability to provide direct aid to sacred and secular schools alike.

These shifts in the law surrounding direct aid have opened up another area in which policymakers could decide to exclude religious entities from assistance. Although no case has yet presented the question (at least to my knowledge),⁹¹ it is now easy to imagine one. Picture, for instance, a program that empowered state educational agencies to provide instructional materials to all qualified public and

religious organization according to the free choice of a private citizen. See *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 882 (7th Cir. 2003) (Posner, J.) (holding that, under the Establishment Clause, "there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers").

⁸⁹ See, e.g., *Mitchell*, 530 U.S. at 836 (upholding the appropriation of federal funds to private religious schools); *Agostini v. Felton*, 521 U.S. 203 (1997) (upholding a New York City program providing remedial education in sectarian schools).

⁹⁰ Direct aid may not be used for religious purposes, at least according to Justice O'Connor's controlling opinion in *Mitchell*. 530 U.S. at 867. And under both Justice O'Connor's approach and the *Mitchell* plurality opinion, direct aid in cash raises special constitutional dangers. See *id.* at 818-19 ("Of course, we have seen special Establishment Clause dangers when money is given to religious schools or entities directly rather than . . . indirectly." (citation and internal quotation marks omitted)); *id.* at 844 (O'Connor, J., concurring in the judgment) ("[T]he plurality does not actually hold that its theory extends to direct money payments.").

⁹¹ At first, *McCallum* appears to present an example of excluding religion from a direct aid program. Under the program, the Wisconsin Department of Corrections entered into contracts with private halfway houses under which a defined amount would go to the institution chosen by a supervised offender. *McCallum*, 179 F. Supp. 2d at 959-62. The trial court ruled that excluding faith-based programs from that aid program would not violate either the Free Exercise Clause or the Free Speech Clause. *Id.* at 978-82. Yet the Wisconsin program differed from a direct aid exclusion in two ways. First, any exclusion of religious providers would have been mandated by the Establishment Clause, not adopted as a policy matter. *Id.* at 978. Second, the Wisconsin program may not have qualified as direct aid because, although aid did flow uninterrupted from the state to halfway houses, it did so only following the free choice of supervised offenders, making it arguably equivalent to a voucher program. *McCallum*, 324 F.3d at 882 (Posner, J.). But see *Mitchell*, 530 U.S. at 842-44 (O'Connor, J., concurring in the judgment) (distinguishing between indirect aid and a per capita direct aid program). *McCallum* thus does not evaluate the constitutionality of a policy-based exclusion of religion from a direct aid program.

private schools other than religious ones.⁹² Under this Article's proposal, that sort of program could withstand constitutional scrutiny, so long as it did not violate any of the limits described below.

What about denials of funding to some subset of religious groups—such as those that engage in disfavored practices?⁹³ Such narrow exclusions are quite rare. Although the government does commonly deny support to organizations that discriminate on the basis of religion, gender, sexual orientation, and the like,⁹⁴ those sorts of conditions do not usually target religious entities as such. Instead, they apply evenhandedly to all groups and therefore do not constitute exclusions of religion, as that term is being used in this Article.

Still, instances do occasionally arise where the government declines to support certain practices that are engaged in only by some religious entities. Perhaps the most vigorous controversy surrounding the Bush administration's policy of promoting equal funding of faith-based social service organizations has been over whether funded groups will be able to discriminate on the basis of religion in hiring.⁹⁵

⁹² Cf. *Mitchell*, 530 U.S. at 836 (upholding a program that provided educational materials to all public and private schools).

Could a legislature extend tax exemptions to all nonprofit organizations other than religious ones? Currently, neutral tax exemptions for nonprofit groups may include religious organizations, of course. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (upholding a property tax exemption that included land owned by religious organizations for religious worship). Barring religious groups from such exemptions would count as an exclusion of religion from a direct aid program, because a tax exemption is inherently equivalent to a grant, despite the Court's occasional statements to the contrary. See *id.* at 675 ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."). No such program has confronted the courts, to my knowledge, but one well may. If that happens, it may be argued that singling out religious entities for denial of a tax exemption resonates uncomfortably with a history of hostility toward religion through taxation. See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 793 (1973) (characterizing the *Walz* tax exemption as a guard against government oppression of religion through taxation).

⁹³ Cf. Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (describing new forms of discrimination not against entire suspect classes, but only against members of those classes who engage in certain activities).

⁹⁴ See *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, No. 04-4484, 2006 WL 997217, at *25 (N.D. Cal. May 19, 2006) (upholding Hastings Law School's refusal to recognize CLS on the ground that it violated a general rule against discrimination on the basis of sexual orientation).

⁹⁵ Laycock, *supra* note 14, at 197. The charitable choice provisions that preceded the Bush administration's faith-based initiatives explicitly preserved the ability of religious employers to consider faith when hiring. See 42 U.S.C. § 604a(f) (2000) (noting

Currently, an exception to the federal employment discrimination laws allows religious organizations to take faith into account when selecting employees.⁹⁶ So, a decision to deny government contracts to social service organizations that hire on the basis of faith would only affect religious organizations and could be seen as an exclusion of religion.⁹⁷ At least as a constitutional matter, then, this Article's approach would indeed allow policymakers to decline to fund social service organizations that discriminate against people of certain faiths in hiring in some circumstances.⁹⁸ Just as the government may decide not to fund the exercise of religious liberty generally, so too it may make a policy choice not to support employment discrimination on the basis of religion that is only practiced by sectarian organizations.

D. *Objections*

Even this initial argument is sure to have raised objections. Three deserve immediate attention: (1) excluding religion constitutes facial discrimination on the basis of religion, which is presumptively unconstitutional; (2) even if the government need not always observe facial neutrality as to religion in its support programs, it should avoid favoring religious choices over secular substitutes; and (3) regardless of what the First Amendment requires, statutory and state constitutional provisions bar targeted denials of funding.

1. Discrimination on the Basis of Religion

Perhaps the strongest argument against the practice of excluding religion is simply that the Constitution presumptively prohibits governmental discrimination on the basis of religion.⁹⁹ After all, the Court

that a religious organization's ability to discriminate on the basis of religion in hiring "shall not be affected" by participation in a charitable choice program).

⁹⁶ See 42 U.S.C. § 2000e-1(a) (2000) (exempting religious institutions from a federal law prohibiting employment discrimination on the basis of religion).

⁹⁷ Of course, the policy may be phrased neutrally, but because only religious groups are permitted to discriminate on the basis of religion under federal law, and because policymakers can be presumed to be aware of that, exclusion of such groups from support is properly deemed a targeted exclusion of religion.

⁹⁸ The exclusion would be prohibited if it amounted to preferentialism on the basis of sect or ran afoul of any of the other limits set out in Part III. See *infra* Part III.A (discussing the nonpreferentialism principle).

⁹⁹ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."); EISGRUBER & SAGER, *supra*

has said that the antidiscrimination rule applies not only to regulations but equally to funding.¹⁰⁰ If that principle pertained here, as it would seem to, then the case against excluding religion might be strong.¹⁰¹

A first response is that governmental decisions not to subsidize an autonomy- or liberty-based right are normally not thought to impede the right's exercise in a way that raises constitutional difficulties. Sometimes that is true even where the relevant right includes some sort of equality component. So, for instance, it is permissible for the government to fund counseling about childbirth but not about abortion, even though a regulation that distinguished between the two types of speech might well constitute viewpoint discrimination and therefore be presumptively invalid.¹⁰² The Court has also pointed out that when Congress establishes a program to promote global democracy, it is not also therefore constitutionally required to encourage "competing lines of

note 18, at 222-27 (concluding that *Davey* is likely inconsistent with the authors' principle of "Equal Liberty," though it may be justifiable on pragmatic grounds); Laycock, *supra* note 14, at 199 ("Funding secular programs, but not religious equivalents that provide the same secular benefit, is rank discrimination . . ."); Paulsen, *supra* note 14, at 658 (opposing the common practice of "outright discrimination against religious speakers and groups in terms of . . . public privileges of various kinds"); *see also id.* at 662 ("[T]he essential intellectual battle has been won: There is no 'religion exception' to the Free Speech Clause or the Free Press Clause; religious speakers and groups are entitled to the same equal access to public fora, public facilities, and public funds as other private speakers and groups receive." (footnote omitted)); Volokh, *supra* note 18, at 365-73 (arguing against discrimination on the basis of religion in funding).

There is historical evidence that the Federal Free Exercise Clause was partly directed against discrimination on the basis of religious differences. *See* Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 854-55 (2004). That evidence, however, does not necessarily pertain to selective denials of state aid.

¹⁰⁰ *See* *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) (arguing that ministers may not be excluded from office partly because "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits"); *see also* Volokh, *supra* note 18, at 365 (quoting *McDaniel* and arguing that "equality rules generally apply to government benefits as well as government prohibitions"); Volokh, *supra* note 6, at 1936 & n.67 (noting that the government usually cannot discriminate on the basis of religion in its support so that, for instance, a government hospital that provides secular circumcisions cannot refuse to provide religious ones, but acknowledging *Davey* as "the chief exception" to that rule).

¹⁰¹ *See* Laycock, *supra* note 14, at 173 (arguing that Joshua Davey's case against Washington's scholarship program ought to have been "a slam dunk" under *Lukumi*).

¹⁰² *See* *Rust v. Sullivan*, 500 U.S. 173, 193-94 (1991) (reasoning that in selectively funding counseling concerning childbirth, but not concerning abortion, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other" and that "[t]his is not a case of the Government suppressing a dangerous idea, but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope" (internal quotation marks omitted)).

political philosophy such as communism and fascism.”¹⁰³ Likewise, excluding religion ought to be understood simply as the government defining the limits of its support programs.¹⁰⁴ One way to think about this is as a funding exception to the general rule against governmental discrimination on the basis of religion. An implication is that a constitutional democracy has some limited power to influence citizens’ choices regarding commitments of conscience.¹⁰⁵ Religious freedom protects citizens against government coercion, among other evils, but it does not necessarily entitle them to facilitation on equal terms.

A second way of answering is to consider that there may be important differences between these rights—privacy, speech, and free exercise—and to say that on balance such differences might cut in favor of a constitutional rule that often allows the democratic branches to exclude religion from aid programs.¹⁰⁶ Antiestablishment considerations, again, favor a constitutional approach that is especially tolerant of selective defunding in the area of religion.¹⁰⁷ The government can withhold a subsidy on the basis of religion for good reasons that fall short of constitutional imperatives but can nevertheless inform policy. For instance, it may conclude that excluding religion promotes equal citizenship, that it works to prevent excessive division in the citizenry, and that it protects the conscience of taxpayers.¹⁰⁸ Now, admittedly, Justice Scalia is correct that a freestanding principle prohibits discrimination on the basis of religion—freestanding in the sense that it applies even in the absence of any burden on religious exercise.¹⁰⁹ Yet that guarantee only protects against discrimination on the basis of sect or denomination in the context of government support programs. And

¹⁰³ *Id.* at 194.

¹⁰⁴ *See id.* (“[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”).

¹⁰⁵ For more on this issue, see Part I.A and the Conclusion.

¹⁰⁶ Some, however, draw a stronger distinction between the two rights than this Article does. *See, e.g.,* Laycock, *supra* note 14, at 177 (“The right to choose abortion is a right to be free of undue burdens; the right to religious liberty is a right to government neutrality.”).

¹⁰⁷ *See supra* Part I.A (summarizing the effect of these considerations on policymakers).

¹⁰⁸ *See* FELDMAN, *supra* note 7, at 6 (arguing that Americans are currently deeply divided by divergent visions of the proper relationship between religion and government). *But cf.* Garnett, *supra* note 36 (arguing that religion’s capacity to divide ought not to exert undue influence in antiestablishment decisions).

¹⁰⁹ For instance, a legislature could not pass a resolution declaring “America Is Not a Muslim Nation,” even if the law did not impose any civil or criminal penalties. *See* Tebbe, *supra* note 15, at 727.

even if it applied to religion as a general category, any special concern about discrimination on that basis would be overbalanced by antiestablishment commitments that cut in favor of certain exclusions of religion.

Someone might challenge that judgment, arguing that the commitment to facial neutrality on the basis of religion should trump the government's ability to provide greater antiestablishment protection than the Constitution requires. There is room here for fair differences. But anyone who challenges excluding religion in that way must not only counter the theoretical arguments above but must also confront *Davey*, which allowed Washington to select religious study for non-funding exactly because the state wished to pursue a particularly robust vision of antiestablishment (there set out in the state constitution).¹¹⁰ After all, Justice Scalia's argument in *Davey* lost by a margin that was unusually wide for this area of law and is not likely to be reduced in the Roberts Court.¹¹¹

2. Noninterference with Private Choice

A more nuanced objection to this Article's position is that excluding religion is problematic not in all funding contexts, but only where the government simultaneously supports direct alternatives. That is

¹¹⁰ *Locke v. Davey*, 540 U.S. 712, 719 n.2 (2004) (quoting WASH. CONST. art. I, § 11).

¹¹¹ Why has the Court not applied equal protection principles to excluding religion? After all, modern equal protection jurisprudence prohibits discrimination in the area of funding as well as in regulation, though perhaps not in precisely the same way. Noticing this, Justice Scalia invoked equal protection cases in his *Davey* dissent. He cited them by analogy, arguing that just as no burden need be shown in order to make out a constitutional violation in other areas of law, so too the indignity of suffering discrimination based on religion ought to suffice. See *id.* at 731 (Scalia, J., dissenting) (invoking *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and *Craig v. Boren*, 429 U.S. 190 (1976)). Perhaps he could have gone further and said that excluding religion violates the Equal Protection Clause itself.

This Article does not closely interrogate the relationship between religious liberty and the right to equal protection. It goes only so far as to say that religious freedom is best understood primarily as a right to autonomy or liberty, not neutrality or equality. Certainly, rights to free exercise and antiestablishment build in certain independent neutrality or equality protections for religion, as this Article acknowledges at several points. But those protections are tailored to specific problems surrounding religious freedom and should not be reduced to more general equal protection guarantees. This Article will leave the matter there, since the relationship between religious liberty and equal protection is an exceedingly complex matter worthy of its own careful treatment. Thanks to Philip Hamburger for pressing me to address this point.

the position of Judge Michael McConnell, who is also, of course, a leading scholar in the area.¹¹²

According to Judge McConnell, a state would not be prevented from, say, funding math classes at secular private schools but not at religious ones, because that scheme would skew incentives away from sacred institutions. This Article, by contrast, argues that the government may choose to skew private incentives away from religious entities, subject to certain constraints outlined in Part III. That Part will take up the math class example in greater detail and show that although there is actually a fair degree of overlap between the results that would be reached by Judge McConnell's approach and the outcomes urged by this Article, that particular example presents a point of real divergence.

For now, the fundamental point is that the question of whether substitute activities are funded is irrelevant to this Article, which conceptualizes religious freedom primarily as a right to liberty or autonomy that is not ordinarily burdened by a governmental decision to selectively deny aid in a way that disincentivizes observance. I will draw out some further implications of that argument in the Conclusion.

3. RFRA

A final objection may be that limiting this Article's inquiry to constitutional law is too convenient because excluding religion is likely to run afoul of the Religious Freedom Restoration Act (RFRA) and similar state provisions, regardless of whatever the First Amendment requires. RFRA is a federal statute that provides greater protection for religious freedom than the Free Exercise Clause does. Congress designed RFRA precisely to restore the doctrine that was in place before *Employment Division v. Smith*, which put an end to heightened constitutional scrutiny of laws of general applicability.¹¹³ RFRA directs courts to presume that a "substantial[] burden" on observance is unlawful,

¹¹² Judge McConnell has said that "a government program may be unconstitutional if it funds a *substitute* for a constitutionally protected choice without also funding the individual's preferred choice," unless the government has a reason for the disparity that is not "objectively hostile to the right in question." McConnell, *supra* note 18, at 1046. His rationale seems to be that officials should refrain from attempting to influence the private exercise of constitutional rights in one direction or another.

¹¹³ See 42 U.S.C. § 2000bb(b)(1) (2000) (explaining that a purpose of the law is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened").

even if it is imposed by generally applicable laws.¹¹⁴ The Act has been invalidated as to the states, but it remains in effect with respect to the federal government.¹¹⁵ Moreover, about twelve states have enacted statutes similar to RFRA¹¹⁶ and roughly a dozen more have construed their state constitutions to provide similar protection.¹¹⁷

The objection would proceed like this: Before *Smith*, religious practitioners sometimes did win exemptions—not only from general regulatory prohibitions that incidentally burdened their observance, but even from general conditions attached to funding programs.¹¹⁸ Practitioners who objected on religious grounds to a funding condition would sometimes be entitled to receive the benefit without having to meet the accompanying condition. That was particularly (and perhaps exclusively) true in the context of unemployment benefits. For example, Seventh-Day Adventists were allowed to receive unemployment benefits even though they refused to accept available jobs that required them to work on Saturdays, as the unemployment rules seemed to require,¹¹⁹ and Quakers were relieved of the requirement to

¹¹⁴ The federal RFRA, for example, provides:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1 (2000).

¹¹⁵ See *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997); see also *Guam v. Guerrero*, 290 F.3d 1210, 1221-22 (9th Cir. 2002). A similar law, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), provides analogous protection to religious inmates in federal and state prisons and to religious people and institutions that face certain land use restrictions.

¹¹⁶ Volokh, *supra* note 6, at 1950.

¹¹⁷ *Id.* at 1950 n.116.

¹¹⁸ *Id.* at 1949.

¹¹⁹ *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). In *Smith*, Justice Scalia suggested that the unemployment board in *Sherbert* discriminated purposefully when it granted individualized exemptions on secular grounds but refused to do so on religious grounds. *Employment Div. v. Smith*, 494 U.S. 872, 883 (1990); cf. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (writing

accept available work when the open job required them to build military weapons in violation of their commitment to pacifism.¹²⁰ The Court's rationale was that groups faced with a choice between violating a religious tenet and forgoing state funds faced "unmistakable" pressure to abandon their beliefs.¹²¹ In a sense, these decisions did indeed require the government to subsidize (what was then seen as) a constitutional right to free exercise.¹²² They required the government to provide unemployment benefits to religious actors whom it would have preferred to exclude.¹²³ And laws like RFRA explicitly revive this doctrine and purport to apply it generally, beyond the context of unemployment benefits.¹²⁴ Perhaps such laws also prohibit the practice of excluding religion.¹²⁵

that the state "regards [the plaintiff's] religious claims less favorably than other claims" (internal quotation marks omitted)).

¹²⁰ *Thomas v. Review Bd., Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *see also* *Frazer v. Ill. Dep't of Employment Sec.*, 489 U.S. 829 (1989) (coming to a similar conclusion in another unemployment benefits case); *Hobbie*, 480 U.S. at 141 (same). Even after *Smith*, and even absent RFRA, the employment benefits rule has remained a mainstay of free exercise jurisprudence. *See Smith*, 494 U.S. at 883 (explicitly preserving the *Sherbert* line of unemployment benefits cases).

¹²¹ *Sherbert*, 374 U.S. at 404.

¹²² *See Volokh, supra* note 6, at 1956 ("Under these cases, the government was indeed required to subsidize the exercise of what was then seen as a constitutional right."); *id.* at 1959 ("Whatever one thinks of the merits of *Sherbert*, RFRA does make the *Sherbert* reasoning part of the statutory mandate, and under that reasoning the government must sometimes subsidize religious practice.").

¹²³ *See id.* at 1954-62 (discussing *Sherbert* and *Thomas*). One way to avoid the conclusion that RFRA requires equal subsidies is to read *Sherbert* itself as resting not on a conclusion that the funding condition substantially burdened religious activity, but rather on the fact that the state there had banned only the practices of minority denominations instead of imposing a religion-neutral condition. Christians who observed the Sabbath on Sunday were not affected by the unemployment policy at issue in the case because, at the time, Sunday was set aside by law as a day of rest. Even in times of national emergency, when workers could be required to report for duty on Sundays, people who observed the Sabbath on that day would be exempt. *Sherbert*, 374 U.S. at 406. Therefore, there was some evidence that the *Sherbert* policy discriminated on the basis of denomination, and not just on the basis of religion. This Article's argument would prohibit that sort of discrimination among faiths. *See infra* Part III.A.

¹²⁴ *See* 42 U.S.C. § 2000bb (2000) (affirming explicitly that the law was meant to restore the rule of *Sherbert* and the other unemployment benefits decisions). Excluding religion might be seen as interfering with observance in much the same way—by denying a benefit. *See Laycock, supra* note 14, at 177 (articulating a version of this objection).

¹²⁵ Whether and how RFRA and its cognates will continue to relieve observant people from funding conditions is actually a difficult issue. *See Volokh, supra* note 6, at 1951 ("Should . . . objecting groups prevail and get the benefits while escaping the condition? This turns out to be a murky issue . . ."). There is a strong argument that many such conditions are properly viewed not as "substantial burdens" on free exercise

Yet RFRA does not, in fact, affect this Article's argument. RFRA was not designed to address laws that target religion as such—as exclusions of religion do—but instead to relieve religious people from support conditions that are neutral as to religion but that nevertheless incidentally burden observance. RFRA's objective was to overrule *Smith*, which had changed the rule concerning those sorts of incidental burdens on observance. The Act was not meant primarily to address outright targeting. A condition that requires someone receiving unemployment benefits to accept available work, for instance, applies in the same way to everyone.

Now it should be acknowledged that, by its terms, RFRA does apply to purposeful discrimination as well. To trigger RFRA's presumption of unlawfulness, one would only have to show that selective funding imposed a substantial burden. RFRA and the Free Exercise Clause overlap here and it is therefore possible to make conceptual space for the argument that RFRA provides greater protection against intentional discrimination than the Free Exercise Clause does, just as it provides special protection against incidental discrimination. However, that interpretation is not likely to prevail in any court. Everyone understands that RFRA was primarily directed at incidental burdens on religion, not purposeful ones. Because *Smith* did not markedly alter constitutional law surrounding purposeful discrimination, RFRA has had little effect on that area of doctrine.¹²⁶ Courts therefore will likely conclude that RFRA and its progeny do not provide supraconstitutional protection against purposeful discrimination, including the deliberate exclusion of religion from support programs. As such, RFRA-like laws should not alter this Article's analysis of whether exclusions of religion are lawful.¹²⁷

within the meaning of RFRA, but instead as mere governmental refusals to fund the exercise of a constitutional right. *See id.* at 1957-58. Can it really be said, for instance, that a state's decision to fund only public schools substantially burdens the constitutional right of parents to send their children to religious schools? *See id.* at 1958. And beyond the question of whether a funding condition constitutes a substantial burden, hard questions remain, such as whether the government's interest in the condition is compelling, whether the condition is narrowly tailored, and so forth. *See id.* at 1962-65. Thus, the objection depends on a series of questionable doctrinal moves.

¹²⁶ *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) (striking down Hialeah's ordinance under the *Smith* test after finding purposeful discrimination against Santeria adherents).

¹²⁷ That might raise an awkward possibility. If this Article is correct that purposeful discrimination against religion in government support is permissible in many circumstances, and if RFRA does indeed render presumptively unlawful some general funding conditions, the odd result might be that while incidental burdens imposed by

So far, this Article has argued that excluding religious practices from governmental support should not trigger heightened constitutional concern, at least in certain prevalent circumstances. First, that argument is rooted in theory, both because rights of liberty or autonomy are not normally seen as being burdened when the government selectively funds them, and also because special features of religious liberty—especially certain antiestablishment concerns—make it particularly appropriate to leave the decision of whether to fund religious entities up to elected policymakers. Second, this Article's theoretical argument is supported by existing free exercise precedent (especially the logic of *Davey*) and it resonates with jurisprudence surrounding other constitutional rights. Citizens' decisions surrounding pregnancy and parenting, while protected from regulation, may be selectively funded even though uneven support would have the (intended) effect of influencing private decision making concerning protected activities. Up to this point, the argument has been limited to government support of religious practices. Part II will extend it—in considerably modified form—to state support of religious expression.

II. EXCLUDING RELIGIOUS SPEECH

Speech sometimes may be subsidized selectively without offending the Constitution. This Part argues that the government should have somewhat wider latitude to exclude religious speech from its support than it currently enjoys. It also identifies areas in which exclusions of sacred speech are practically achievable under current legal conditions. Exclusion of religious speech may occur in at least two distinct situations: where the government itself speaks (or pays private parties to promote its messages), and where it subsidizes private speech. The

general conditions are presumptively unlawful, seemingly more egregious purposeful denials of funding would not be. Under that scheme, for instance, it is possible to imagine religious parents arguing that a general denial of funding to private schools incidentally burdened their rights to supply their children with a religious education. Yet other parents would have no claim against a law that specifically targeted religious private schools for denials of funding. This would be an uncomfortable pair of results; but such awkwardness will virtually never arise in practice because that type of disparity will simply not occur. Most often, courts will sensibly find that mere denials of support do not impose substantial burdens on observance and therefore that RFRA's strict scrutiny test is not triggered. The refusal to extend unemployment benefits in *Sherbert* was a rare case, justified by the importance of subsistence support and perhaps other unique circumstances. Even before *Smith*, the Court never extended its exception to any funding condition outside that special context. There is little reason to think that it will do so under RFRA.

practice is usually (but not always) unproblematic in the former instance, where the government is promoting its own views, but it is much more difficult to defend in the latter situation. Where policy-makers facilitate private speech, theoretical concerns over selectivity are stronger and the doctrine is troubled. Consequently, courts have struggled over denials of government support for private religious expression. Today they face the difficult question of whether public facilities may refuse to open their doors to worship as such.

A. *Government Speech*

Of course, the government may be selective when communicating its own views. That idea is commonly accepted among jurists and scholars alike. Officials are elected partly because they favor certain policies over others and wish to promote adoption of those preferences as official government policy.¹²⁸ Private citizens' liberty normally is not seen to be constricted when officials favor certain ideas or ideologies over others in their own official speech.

That is true even though government advocacy of certain views may sometimes be seen as a form of state support of those messages. Though the analogy is not perfect, official expression can amount to government support. For example, a town that erected a "Choose Life" sign on the steps of its municipal building might well be seen to have provided a form of support for the expressive positions of certain citizens rather than others. And in *Rust*, again, the Court upheld a federal program that only funded private organizations advocating family planning techniques other than terminating pregnancies.¹²⁹ That program required any funding recipient who wished to recommend or encourage abortion to segregate those activities "physically and financially" from federally funded counseling on pregnancy and

¹²⁸ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (noting that the government may "say what it wishes" when it promotes particular policies). For an example of viewpoint discrimination in government speech concerning religion, see the various resolutions defending the constitutionality of recitation of the Pledge of Allegiance. S. Res. 292, 107th Cong. (2002) (enacted); H.R. Res. 459, 107th Cong. (2002) (enacted).

¹²⁹ *Rust v. Sullivan*, 500 U.S. 173, 203 (1991); see also *Rosenberger*, 515 U.S. at 833 (reading *Rust* to involve facts where "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program," and recognizing that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes").

childbirth.¹³⁰ Subsequent decisions have interpreted *Rust*'s rule to mean that the government may discriminate among messages when it promotes its own views.¹³¹ *Rust*'s holding has also been described as an instance of the more general principle defended in the last Part—viz., that the government can carve out even protected activities from its funding programs.¹³² The upshot is that government speech sometimes also effectively facilitates private messages, and that even when it performs this function of subsidizing private standpoints, state expression may favor some views over others.¹³³

When the government speaks, it likewise may decide to exclude *religious* messages. That is true even where the exclusion is not mandated by antiestablishment rules. A town that erected a holiday display on the steps of its municipal building, for instance, surely could decide to include only secular images. No case has so held, to my knowledge, but nevertheless the principle seems plain. Similarly, a courthouse composing visual aids to educate citizens about historical influences on our nation's laws could decide to exclude images of the Ten Commandments. It could do so even though the Court has suggested that including the Ten Commandments in such displays will sometimes be perfectly permissible.¹³⁴ The locality could decide that

¹³⁰ *Rust*, 500 U.S. at 180.

¹³¹ See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (interpreting *Rust* as an approval of viewpoint discrimination in government speech, although the government in that case delivered its message through private speakers). Of course, that reading of *Rust* has been criticized, but this Article follows the Court's view. Cf. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2055 n.212 (1994) (discussing contexts in which government funding of private speech may not be equated with government speech, making viewpoint discrimination impermissible).

¹³² See *Rust*, 500 U.S. at 193-94 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government . . . has merely chosen to fund one activity to the exclusion of the other. . . . [W]hen the government appropriates public funds to establish a program it is entitled to define the limits of that program.").

¹³³ See Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 11-12 (2000) (arguing that government speech may often permissibly endorse contested viewpoints).

¹³⁴ See *McCreary County v. ACLU*, 545 U.S. 844, 874 (2005) (suggesting in dicta that certain courtroom displays could include images of the Ten Commandments). A tougher question is whether Congress could explicitly decline to endorse religion as a whole—for instance, by issuing a nonbinding resolution stating that "America Is a Secular Nation." But it is not necessary to take a position on that difficult issue in order to defend simpler exclusions of religious expression from government speech. The only contention here is that it must be permissible for officials to decide to pro-

the wisest course would be to avoid disputes over the proper place of the Decalogue in American public life—and that decision would not be seen to interfere with the free exercise or speech rights of any citizen.

Omission of religious messages is also permitted when the government pays private actors to transmit its own views. There too, neither liberty of conscience nor free expression is offended when the government decides to express only secular viewpoints through private mouthpieces. In programs analogous to the one considered in *Rust*, Congress has enacted statutes allowing the provision of support to counseling organizations that promote abstinence as the only acceptable form of birth control.¹³⁵ Lawmakers could go further and specify that participating organizations could only give nonreligious reasons for preferring abstinence—perhaps because of a policy judgment that religious justifications might alienate some young people or otherwise backfire. Under existing law, prohibiting funded organizations from conveying faith-based messages on behalf of the government would be seen merely as a decision to address the issue of contraception in one way and not another.¹³⁶ Even if targeting religious speech were understood to be viewpoint discrimination, the worst form of state bias concerning speech, it nonetheless would be considered permissible in the context of government expression.¹³⁷

Speech rules like these bolster by analogy the argument in Part I that religious practices generally may be excised from support programs without offending the Constitution. Recall that *Davey* alluded to these speech rules (without citing them directly). Chief Justice Rehnquist wrote that “[t]he State has merely chosen not to fund a distinct category of instruction”¹³⁸ and that “the exclusion of such fund-

mote only secular positions, even where excluding religious messages is not constitutionally required.

¹³⁵ See, e.g., 42 U.S.C. § 710 (2000); *id.* § 300z.

¹³⁶ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (interpreting *Rust* to mean that “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes”); *Rust*, 500 U.S. at 194 (rejecting the petitioner’s argument that government funding choices reflect viewpoint discrimination if the government fails to fund organizations on both sides of an issue).

¹³⁷ See *Rosenberger*, 515 U.S. at 833-34 (“When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak” (citation omitted)).

¹³⁸ *Locke v. Davey*, 540 U.S. 712, 721 (2004).

ing places a relatively minor burden"¹³⁹ on eligible students. Again, the unmistakable reference was to *Rust*, where Chief Justice Rehnquist, writing for the Court, had reasoned that the government had "merely chosen to fund one activity to the exclusion of the other."¹⁴⁰ Excluding religious speech might well have been found to be permissible under the logic of cases approving the government's nonfunding of other speech.

Even critics of *Rust*—of whom there are, of course, many¹⁴¹—may be able to agree that the government should have some discretion to create programs that promote only nonreligious messages. That is because excluding religion may further antiestablishment values that reflect the particular place of religion in American society. Government may choose to exclude religious speech, like religious practice, in order to promote equal citizenship, community harmony, or freedom of conscience.¹⁴² Because of these antiestablishment commitments, which are particular to religious speech, even those who believe that *Rust* was wrongly decided may support the ability of the government to excise supernatural references from its own expression.

The government's power to speak about particular denominations is circumscribed in ways that I will detail in Part III.¹⁴³ For now, it is enough to say that excluding all religious perspectives from state endorsement generally is constitutional.

B. *Private Speech*

Even when the government is not propagating its own views, it retains a measure of control over the sorts of private speech it promotes. Again, a basic principle holds that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."¹⁴⁴ That idea applies even to programs that aid

¹³⁹ *Id.* at 725.

¹⁴⁰ *Rust*, 500 U.S. at 193. Credit for this insight belongs to Douglas Laycock. See Laycock, *supra* note 14, at 176 ("With or without citation, *Davey's* paraphrase of *Rust* is unmistakable.").

¹⁴¹ See, e.g., Dorf, *supra* note 131, at 2055 (acknowledging critics' disagreement with *Rust*); Greene, *supra* note 133, at 59 (same); David A. Strauss, *Principle and Its Perils*, 64 U. CHI. L. REV. 373, 384 (1997) (reviewing RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996)) (agreeing with Professor Dworkin that *Rust* was wrongly decided).

¹⁴² See *supra* Part I.A.

¹⁴³ See *infra* Part III.A.

¹⁴⁴ *Rust*, 500 U.S. at 194.

private speech, albeit in a modified way. Officials usually can choose to subsidize only certain types of speech, just as they can selectively fund rights to abortion and religious practice. Yet because the government enjoys a monopoly on certain fora for speech (the most obvious are streets and sidewalks), its ability to exclude expression there is necessarily limited. Selective exclusion from paradigmatic public spaces may look more like silencing than like a refusal to subsidize. Between these two poles—facilitation of only certain types of speech on the one hand and selective exclusion from traditional public spaces on the other—lies an interim territory that is notoriously difficult to navigate. This Section will first argue, as a matter of theory, that the political branches ought to have greater ability to exclude religious speech than is allowed under the *Rosenberger* line of cases. It will then identify areas where selective support for religious speech may be open to policymakers despite those decisions.

Begin by recalling a principle from general speech law: when the government opens nonpublic property to outside speakers, or otherwise facilitates a range of private expression,¹⁴⁵ it often may choose the type of speech that it wishes to encourage, even if that means limiting access on the basis of content.¹⁴⁶ So, for instance, Congress may single out lobbying organizations for denial of certain tax benefits, although those benefits remain available to a wide range of other political organizations.¹⁴⁷ Everyone recognizes that this sort of exclusion differentiates on the basis of content (that is, against certain types of messages). Yet that sort of selectivity, which would be suspect in direct regulation, is often permissible in aid programs, presumably because

¹⁴⁵ Funding speech and opening public property to speakers have been seen as analogous forms of government support. The Supreme Court, for instance, has treated the former as equivalent to a public forum. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (finding that a funding scheme constitutes a forum “more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable”).

¹⁴⁶ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 55 (1983) (“[O]n government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used.”); see also *Volokh*, *supra* note 6, at 1924, 1930-31 (providing several additional examples).

Of course, this principle intersects with the much-criticized jurisprudence surrounding “designated public forums,” “limited public forums,” and “nonpublic forums”—terms that I avoid in order to circumvent debates that do not directly pertain to the argument here.

¹⁴⁷ See *Regan v. Taxation with Representation*, 461 U.S. 540, 550-51 (1983) (holding that it was not irrational for Congress to choose to subsidize lobbying by veterans’ groups, but not other charities).

denying a subsidy does not interfere with the ability of unsubsidized individuals to convey their messages.

Similarly, the government is under no obligation to extend tax exemptions to contributions toward electioneering and lobbying, even when it provides those subsidies to other types of speech and even though (again) drawing this distinction requires the government to differentiate between messages on the basis of content.¹⁴⁸ Legislators may even prohibit the use of tax-deductible contributions for general lobbying, while permitting their use for lobbying by veterans' organizations.¹⁴⁹ Contributions to political candidates, finally, are not tax-exempt in the same way as contributions to other speakers.¹⁵⁰

Many government programs exclude certain types of private speech from support in this way. Few would dispute, for instance, that public universities can decide to recognize only student associations, refusing to facilitate expression by nonstudent groups, even though both speech and expressive association are constitutionally protected.¹⁵¹ Likewise, nonobscene pornography can be carved out from state aid programs, even though it counts as protected expression.¹⁵² And a President may establish a charitable campaign among federal employees that limits fundraising to voluntary, tax-exempt, nonprofit organizations—without including groups that engage in politics or advocacy.¹⁵³

Despite these holdings, excluding religion from programs that support a range of private speech is difficult to achieve today. That is chiefly due to tension between two long-standing constitutional rules.

¹⁴⁸ Volokh, *supra* note 6, at 1925, 1931 (citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

¹⁴⁹ *Regan*, 461 U.S. at 548.

¹⁵⁰ Volokh, *supra* note 6, at 1925.

¹⁵¹ Paulsen, *supra* note 14, at 666 n.32; Volokh, *supra* note 6, at 1930.

¹⁵² See *United States v. Am. Library Ass'n*, 539 U.S. 194, 201 (2003) (acknowledging that congressionally mandated Internet filters for public libraries could permissibly block websites that are neither obscene nor pornographic); see also Laycock, *supra* note 14, at 178 (citing *American Library Ass'n*).

¹⁵³ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 795, 813 (1985). Interestingly here, a President may exclude such groups out of a policy desire to avoid any appearance of government "favoritism or entanglement" with regard to particular *political* positions. *Id.* at 807. The President can do this even where the entanglement is not constitutionally prohibited, but just undesirable as a matter of wise governance. In much the same way, we might expect that the government would be able to seek special protection against the appearance of a religious establishment, over and above what is required by the First Amendment, by excluding religion from funding programs.

On the one hand, there is the principle just described: when policy-makers set aside funds to facilitate private speech, they may discriminate on the basis of content, even to implement policy judgments and to favor certain categories of speech. On the other hand—and this presents the difficulty—the Court has said that viewpoint discrimination is generally suspect outside the context of government speech, and not only when the state is regulating expression, but even when it is acting as a funder.¹⁵⁴ The rule against viewpoint discrimination limits the ability of the government to exclude speech from public fora, even in situations where it is permissible to define those fora on the basis of content.

Here we see a difference in the cases between speech and other autonomy- or liberty-based rights, such as privacy and free exercise. While such rights generally are not considered impermissibly burdened when welfare-state benefits are not extended to support them, when it comes to expression there is a deeply rooted suspicion of selectively excising points of view from programs that support a diversity of private speech. Congress could not, for instance, set up a fund to support all political campaigns other than those conducted by Green Party candidates (at least not without some extraordinarily good reason). Excluding them from a general fund would skew private ordering in a way that would presumptively violate the Constitution, even though Green Party politicians would remain every bit as free as they were before the government program was initiated.¹⁵⁵

Rosenberger stands for the proposition that excluding religious perspectives from a public forum may qualify as impermissible viewpoint discrimination.¹⁵⁶ There, the University of Virginia established a stu-

¹⁵⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-32 (1995). Note that viewpoint discrimination is presumptively impermissible regardless of the type of forum established. *Id.* at 829-30. Content discrimination, by contrast, is usually permitted in some types of fora, but remains suspect in others. *Id.* Accordingly, a critical question is whether refusing to support all religious expression amounts to discrimination on the basis of content or viewpoint.

¹⁵⁵ The rule against viewpoint discrimination seems less anomalous if it is compared not to excluding all religious practice from state aid, but instead only to excluding particular sects or denominations. That sort of exclusion is presumptively prohibited, even though it does not burden the excluded sects or denominations. See *infra* Part III.A.

¹⁵⁶ *Rosenberger*, 515 U.S. at 845-46; see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (characterizing the selective exclusion of sectarian speakers from government property as viewpoint discrimination); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (same). In two other cases, the Court invalidated selective exclusions of sectarian speakers from government

dent activity fund to support a variety of student groups.¹⁵⁷ One way it supported them was by paying the printing costs for student publications.¹⁵⁸ However, the university denied that printing support to religious publications, defined as those "promot[ing] or manifest[ing]" a belief "about a deity or an ultimate reality."¹⁵⁹ That definition included *Wide Awake*, a magazine that addressed social and religious issues from an evangelical Christian perspective.¹⁶⁰ A divided Court ruled that the university had established a forum from which it could not constitutionally exclude *Wide Awake*.¹⁶¹ Writing for the five-vote majority, Justice Kennedy held that excising religious messages from the student publication program was properly seen as viewpoint discrimination.¹⁶²

That holding went too far. If freedom of speech, like free exercise and privacy, is properly conceptualized primarily as a right to liberty or autonomy, then there are good reasons to think that it will not normally be infringed by an ordinary funding refusal. Under Virginia's original program, religious students remained as able to express their views as they would have been in the absence of any publication assistance for student groups.¹⁶³ Therefore, their freedom—

property, but without explicitly invoking the rule against viewpoint discrimination. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981).

These earlier cases—*Widmar*, *Lamb's Chapel*, and *Pinette*—all addressed the question of whether supporting sectarian speech was prohibited by the Establishment Clause. In each case, the government defended the exclusion at issue on the ground that it could not support religious expression without violating that Clause. Therefore, none of the cases addressed an exclusion of religion, as this Article is using that term, because none involved a policy decision to omit religious expression. Nevertheless, each case held not only that supporting religious speech was constitutionally permissible, but also that it was constitutionally required under the Speech Clause. So, regardless of their antiestablishment holdings, these cases stand for the independent proposition that excluding sectarian expression from a support program may violate free speech rules.

¹⁵⁷ *Rosenberger*, 515 U.S. at 824.

¹⁵⁸ *Id.* at 822.

¹⁵⁹ *Id.* at 825.

¹⁶⁰ *Id.* at 827.

¹⁶¹ *Id.* at 829-30.

¹⁶² *See id.* at 831 ("Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.").

¹⁶³ *Wide Awake* could have continued to exist at the university and would still have had a right to use school facilities. *Id.* at 823-24. It could have relied on other revenue

whether religious or expressive—would not have been implicated directly.¹⁶⁴

Moreover, Virginia may have had perfectly understandable reasons to avoid directing tax funds to religious groups in particular, reasons grounded in a special regard for antiestablishment values.¹⁶⁵ Those rationales might have included a desire to promote equal citizenship, to foster community harmony, or to ensure liberty of conscience for taxpayers. Disagreement with those justifications ought to have been addressed to lawmakers, not judges. So, for many of the same reasons that funding exclusions are permitted with respect to religious practice, so too Virginia ought to have been able to fashion a program that supported one protected activity without triggering an obligation to fund religious expression.¹⁶⁶

Justice Souter, joined by three others, dissented in *Rosenberger*, arguing further that a decision to defund religious publications ought to be seen as a permissible definition of the boundaries of a nonpublic forum using content-based criteria rather than prohibited viewpoint discrimination.¹⁶⁷ Accepting for the moment that the distinction between viewpoint and content makes theoretical sense—something that is far from clear¹⁶⁸—Justice Souter may have been correct that excluding religious speech should not always be seen as viewpoint-based. Selectively defunding only Presbyterians (or some other specific sect) would have been closer to paradigmatic viewpoint discrimination,

sources to print its publication. See *id.* at 826 (noting that *Wide Awake* included advertisements in its publication).

¹⁶⁴ See *supra* Part I.A.

¹⁶⁵ The university argued that the exclusion was necessary for compliance with the federal Establishment Clause, an argument that the Supreme Court rejected. See *Rosenberger*, 515 U.S. at 845-46. Nevertheless, Virginia could have argued that it wished to pursue a stricter vision of antiestablishment than what is required by the federal Constitution. Apparently the students originally raised such an argument, based on the Virginia Constitution, but dropped it on appeal. See *id.* at 827.

¹⁶⁶ Allowing officials to excise religious speech from their programs may well lead to more government support for speech, not less. Faced with the choice between subsidizing all private speech within a certain category, including religious speech, or supporting no speech at all, some government actors at the margins will choose the latter. See, e.g., *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 646 n.1 (9th Cir. 2006) (setting forth a letter from a government administrator who decided to close an agency conference room to all private speech out of a concern that he would not be able to limit the types of expression allowed there). That result may unwisely avoid disparate treatment of religion at the cost of weakening state support for speech generally.

¹⁶⁷ *Rosenberger*, 515 U.S. at 895-96 (Souter, J., dissenting).

¹⁶⁸ See *id.* at 831 (acknowledging that “the distinction [between content and viewpoint discrimination] is not a precise one”).

such as excluding only Green Party candidates from campaign financing. But denying funds to all student publications with a religious perspective may have aligned more closely with excluding all political activities regardless of party affiliation, something that the Virginia program also did without causing any controversy.¹⁶⁹

Of course, real safeguards would remain even if excluding religious speech were not considered to be viewpoint discrimination. For instance, the rule against limiting expression in traditional public spaces like streets and sidewalks, which is acknowledged in Part III.E, would persist. Admittedly, however, distinguishing between programs from which excluding religion is permissible and those traditional public spaces from which exclusion is presumptively prohibited may sometimes be difficult. Extensive welfare-state programs may sometimes alter the baseline of entitlements, so that a funding refusal looks less like mere denial of a subsidy and more like regulation on the basis of content. But that difficulty is not specific to religious speech. And, in any event, *Rosenberger* itself did not involve that sort of traditional public space, nor any sort of speech platform wide enough or broad enough to alter the baseline of speech entitlements. Although the Court did hold that Virginia had created some sort of forum,¹⁷⁰ nothing turned on that observation because the Court had already characterized the exclusion as viewpoint discrimination,¹⁷¹ which is virtually always prohibited when it is directed at private speech.¹⁷² And Virginia's program could not have constituted a traditional public space, because that would have made the exclusion of *political* speech more controversial than it was. Excluding religious expression likewise ought to have been acceptable.

How does *Rosenberger* comport with *Davey*? This Article contends that the two cannot be reconciled, and that the tension between them provides another reason to doubt the wisdom of treating exclusions of religious speech as presumptively impermissible. Simply put, *Rosenberger* prohibits the government from subsidizing a range of student expression other than sectarian speech, while *Davey* holds that certain sectarian education need not be funded simply because other types of

¹⁶⁹ See *id.* at 825 (describing the ban on funding "political activities" by student organizations, a term that was understood to refer to electioneering and lobbying).

¹⁷⁰ *Id.* at 829-30.

¹⁷¹ *Id.* at 831.

¹⁷² See Laycock, *supra* note 14, at 192 (noting that forum analysis is a "distraction" in the presence of viewpoint discrimination, which is presumptively prohibited regardless of the presence of a forum).

education receive funds. That is a real tension. Given the resonance of *Davey* with other areas of constitutional law, that tension strengthens the suspicion that *Rosenberger's* strong rule against excluding religion in the speech context is constitutionally anomalous.

It is no answer to say that *Rosenberger* was a speech case while *Davey* was a free exercise decision. After all, postsecondary education, which was at issue in *Davey*, has an obvious expressive component. Nor is it an answer to say, as the *Davey* Court did, that Washington state did not create a public forum.¹⁷³ Again, viewpoint discrimination is presumptively prohibited whenever the government supports a range of private expression, even if no forum is created.¹⁷⁴ And Washington patently did set out to encourage a diversity of academic thinking and talking.¹⁷⁵

Despite the contradiction, *Rosenberger* does not seem vulnerable to being overruled, considering Justice Kennedy's position and the likely proclivities of other members of the Roberts Court. Nevertheless, policymakers may well retain some ability to exclude certain types of religious speech from government support. The next Section looks at one area in which that may be the case.¹⁷⁶

¹⁷³ See *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004).

¹⁷⁴ Cf. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (striking down a restriction on law-reform suits in a congressional program that paid lawyers to represent indigent clients, even though no forum was created, although not explicitly calling the government's action viewpoint discrimination); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (suggesting that viewpoint discrimination is impermissible in funding, even where no public forum exists); Laycock, *supra* note 14, at 191-93 (critiquing the *Davey* Court's attempt to distinguish the public forum cases and noting that viewpoint discrimination is presumptively prohibited regardless of whether a forum has been created).

Justice Scalia has suggested that viewpoint discrimination ought to be permitted in funding programs so long as the government has not created a public forum. See *Finley*, 524 U.S. at 596-600 (Scalia, J., concurring in the judgment). Without taking a position on the viability of the distinction between viewpoint and content discrimination, or the distinction between public fora and other sorts of fora, this Article simply argues that excluding religious speech normally ought to be constitutionally permissible, except when religious speakers are barred from traditional public spaces and subject to the other limits set out in Part III.

¹⁷⁵ See Laycock, *supra* note 14, at 194 (noting that "[t]he scholarships in *Davey* were available to all within a very broad category" and calling *Davey* an example of "funding (or permitting) nearly all speakers or messages within a broad category and excluding one or a few").

¹⁷⁶ Current law sets out two rules: first, where the state speaks, it is permitted to choose only secular messages; second, where it supports a wide enough range of private utterances, it may not exclude religious viewpoints. Careful readers may have noticed that there is another set of cases in which the government does not itself speak but also does not subsidize a range of private communication. Instead, in these cases it seeks to fund only specific viewpoints. Neither *Rosenberger* nor *Davey* is such a case,

C. *Excluding Worship*

May the government decide not to support worship as such? Nonlawyers might assume that subsidizing worship is prohibited by the Establishment Clause, but that is almost certainly not the case. Instead, the pressing question today is whether government officials are required to include worship in programs that otherwise support civic expression. This Section argues that there may be greater room for the government to deny aid for worship than is often acknowledged.

Officials may want to deny assistance to worship for a variety of good policy reasons, even when they otherwise support expressive activities by a range of secular and religious community groups. Whether they may do so under current law will depend on whether their decision is seen as viewpoint discrimination or merely a way of

since both involve state support of a range of private views, but it is nevertheless worth pausing to consider the matter.

Imagine, for instance, that a state offered \$1000 for the best essay celebrating American independence. That program did not support government speech, of course, and it also plainly discriminated on the basis of viewpoint against essays denigrating independence. Surely such a program would be constitutional despite that discrimination. Now imagine a similar contest that excluded religion by awarding money to the best essay celebrating American secularism. Again, the program would presumably be upheld, even though it involved discrimination against religious viewpoints. (I am grateful to Richard Primus for this hypothetical.)

Aside from the rules already set out, the Court has offered little guidance in this area. It has held that the National Endowment for the Arts (NEA) may award grants to artists based not only on merit but also "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Finley*, 524 U.S. at 572. Yet it did so only by saying that the NEA program did not necessarily involve viewpoint discrimination and did not create a public forum. *Id.* at 582, 586. Importantly, the Court suggested that viewpoint discrimination would not have been allowed despite the fact that no forum had been created. *Id.* at 587.

Similarly, the Court has said that Congress may not pay lawyers to represent indigents and then restrict them from bringing law-reform suits. *Velazquez*, 531 U.S. at 542. The government cannot elect to support normal professional advocacy and then place a distorting restriction on that speech. *Id.* at 544. But while it analogized to *Rosenberger*, the Court stopped short of saying that Congress had supported a diversity of private views or discriminated on the basis of viewpoint. *Id.* at 542.

Until the Court says more, the best sense that can be made of these cases is that they describe a continuum of support and exclusion: as the range of private speech that the government is supporting becomes wider, and the focus of any exclusion becomes narrower, it will become more difficult for officials to base the exclusion on viewpoint. *Cf.* Laycock, *supra* note 14, at 194. With respect to religious speech, the state may not subsidize a range of private expression and then omit religious perspectives, such as from traditional public places like streets and sidewalks. But where it narrowly funds secular speech, so that its program begins to resemble government speech, it may well be able to omit religious viewpoints, as in the essay contest hypothetical.

defining the boundaries of a limited public forum based on content. Government lawyers may argue that religious worship ought to be considered *sui generis* rather than a form of expressive activity with secular analogues—such as community building, moral education, or socializing. If worship were to be understood that way, as something other than a viewpoint, then it might well be excludable. This argument stands some chance of prevailing, though serious obstacles stand in its way.

1. The Case for Allowing Exclusions of Worship

If worship were deemed to constitute a singular form of expression, then it might well be excludable from government programs that support other speech by community groups. The government would only have to show that content discrimination against religious services is “reasonable in light of the [limited] purpose[s] which the forum at issue serves.”¹⁷⁷ Likely it could pass that test. The state would maintain that it wished to exclude worship from public property for good policy reasons—reasons that track the justifications for excluding religion generally—such as protecting against the creation of disfavored classes of citizens, heading off perceived identification of government institutions with a particular church, avoiding community controversy, protecting taxpayers’ freedom of conscience, or vindicating some other especially strong antiestablishment commitment.¹⁷⁸ The government would still be required by *Rosenberger* to welcome religious speech that did relate to the purposes of the program, such as community building or moral education, but it might be able to excise worship itself.

Can worship thus be considered a singular form of expression? One argument for singularity refers to common conceptions and social meanings.¹⁷⁹ Treating it differently, on this view, should be permissible simply because most people think of worship as meaningfully

¹⁷⁷ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983).

¹⁷⁸ *See* *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 104-05 & n.8 (2d Cir. 2007) (Calabresi, J., concurring) (noting reasonable government justifications for excluding worship from a school after hours).

¹⁷⁹ *See, e.g., id.* at 103 (“Worship is adoration, not ritual; and any other characterization of it is profoundly demeaning and false. . . . What the [Boy] Scouts are doing and what worshippers do, are categorically different!”); *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 221 (2d Cir. 1997) (Cabrane, J., concurring in part and dissenting in part) (“[T]here is no real secular analogue to religious ‘services’ . . .”).

distinct from other types of religious speech. People may believe that worship is directed toward the supernatural rather than toward other human beings, for instance.¹⁸⁰ A second argument relies not on the static meaning of the term, but on the social function that it performs in a particular context. In the situation here, the term worship, properly understood, may work to allow the government to protect against a distinct threat to constitutional values. After all, antiestablishment concerns with equal citizenship, identification, division, and the like, may apply differently and with unique force to government involvement with worship itself. The point is not that excluding worship is required by the Establishment Clause, but only that antiestablishment considerations may provide reasons to think that officials should be constitutionally permitted to deny aid to worship as such.¹⁸¹

Imagine, for example, a local school policy that permitted community groups to use school premises whenever they were not being used by the school. The policy encouraged various types of expression, including community building, moral education, and worship itself. As a practical matter, that arrangement could favor groups that worshipped on Sundays if school activities happened to be conducted on weekdays and most Saturdays, leaving only Sundays available for services.¹⁸² Circumstances like these could lead local officials to worry that the school would become identified with groups that worship on Sundays—primarily Christians—so that Muslim and Jewish families might come to consider themselves members of disfavored classes of citizens. Also, permitting worship services under such conditions could sow discord in a manner that allowing all discussion of community issues or all moral instruction, including by religious groups, would not.¹⁸³ Worship might be viewed by citizens as dissimilar to other expression included in the program, and its facilitation could foster discord in the town.

¹⁸⁰ Thanks to Ira C. Lupu for this insight.

¹⁸¹ Cf. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001) (“[I]t is not clear whether a State’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. We need not, however, confront the issue in this case . . .” (citation omitted)). But see *Bronx Household*, 492 F.3d at 131 (Walker, J., dissenting) (rejecting the idea that excluding worship is required by the Establishment Clause).

¹⁸² See, e.g., *Bronx Household*, 492 F.3d at 92 (describing one such school policy).

¹⁸³ See *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 221 (2d Cir. 2007) (Cabrane, J., concurring in part and dissenting in part) (“Unlike religious ‘instruction,’ there is no real secular analogue to religious ‘services’ . . .”).

If excluding worship can function socially to protect antiestablishment values in certain local circumstances, then it might make sense to allow the government to consider worship to be *sui generis*. Policymakers would be free to open public doors to community speech without triggering an obligation to include groups that wished to use a public building as a church, temple, synagogue, mosque, or the like. Allowing officials to elect not to subsidize religious worship itself therefore would comport with the general approach of this Article,¹⁸⁴ but that result faces constitutional obstacles—two in particular.

The first obstacle is that carving out worship from state support necessarily constitutes viewpoint discrimination, not because sacred adoration itself is not unique—it may well be—but because religious services always include other activity that does have secular parallels.¹⁸⁵ As we have seen, excluding religious standpoints, but not analogous secular ones, is constitutionally problematic under the *Rosenberger* line of cases.¹⁸⁶ That seems to be true even if a church's version of, say, moral instruction or community building also includes "quintessentially religious" activity.¹⁸⁷ Where a group's take on allowable content

¹⁸⁴ An assumption here is that worship is inherently religious. In fact, if there were such a thing as secular worship, and if a policy were to exclude from government subsidization all worship—secular *and* religious—then that policy would not be an exclusion of religion, as I have been using that term, because it would not single out religious entities or practices for nonsupport. See *Bronx Household*, 492 F.3d at 104 ("If . . . we treat worship as something that can also be secular, then the . . . exclusion of religious . . . worship is clearly invalid."). Refusing to fund both religious and secular worship would of course greatly strengthen any such program against constitutional challenge because it would not involve discrimination on the basis of belief. But because I find it highly unlikely as a practical matter that any government would deny support for both religious and secular worship, I do not pursue that possibility here.

¹⁸⁵ Cf. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (applying strict scrutiny to an exclusion of religious groups from a public forum); *id.* at 269 n.6 (rejecting the distinction between worship and other forms of religious speech); *Bronx Household*, 492 F.3d at 123-24 (Walker, J., dissenting) (arguing that the school board's exclusion of worship is "a form of invidious viewpoint discrimination").

¹⁸⁶ For examples of cases in which schools violated religious groups' constitutional right of access in an unnecessary attempt to satisfy perceived Establishment Clause mandates, see *Good News Club*, 533 U.S. 98; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

¹⁸⁷ *Good News Club*, 533 U.S. at 111. In *Good News Club*, the Court invalidated an exclusion of a group that used school property for live storytelling and prayer, even though these activities were "quintessentially religious," but without explicitly foreclosing the possibility that an exclusion of actual worship or religious services could survive a constitutional challenge. See *id.* ("We disagree that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint."); *id.* at

is blended with prayer or hymn singing, those sacred activities may have to be swept into a subsidy program in order to avoid a finding of viewpoint discrimination. Subsidizing quintessentially religious activity under such circumstances can be a constitutional requirement.

This first argument goes further and contends that worship always includes valuable standpoints from which to consider questions of politics, morality, philosophy, and other subjects discussed by non-worshipping groups participating in state programs. For adherents of this view, religious services invariably involve community strengthening or moral instruction. Leaving out worship alone would be analogous to barring only the Green Party from a program sponsoring political speech.

The most obvious way to overcome this first obstacle is to demonstrate (along the lines suggested above) that worship has no secular analogue, either by arguing that it has a singular social meaning or by showing that excluding worship performs a unique social function, protecting antiestablishment values in an inimitable way. Arguing anything else may even run up against commitments of conscience. Some religious believers will take offense at the suggestion that worship can be assimilated to some secular activity or even to another type of religious expression.¹⁸⁸ For them, it is important to insist that worship is categorically different from other community discourse.

There is also an argument that the *Rosenberger* line of cases actually does not speak to the exclusion of worship as such. In each of those cases, the Court confronted a policy that denied access to a religious program that did in fact include activity with secular parallels—such as instruction in morality or discussion of childrearing—not a policy that excluded worship *simpliciter*.¹⁸⁹ If anything, the Justices have explicitly

139 (Souter, J., dissenting) (noting that the majority could not have characterized the Good News Club's activities as worship, because "[o]therwise . . . this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque").

¹⁸⁸ See, e.g., *Bronx Household*, 492 F.3d at 103 (Calabresi, J., concurring) ("[H]olding that *worship* is only an agglomeration of rites would be a judicial finding on the nature of worship that would not only be grievously wrong, but also deeply insulting to persons of faith. As one such person, I find the notion that worship is the same as rituals and instruction to be completely at odds with my fundamental beliefs. . . . Worship is adoration, not ritual; and any other characterization of it is both profoundly demeaning and false.").

¹⁸⁹ See *Good News Club*, 533 U.S. at 111 (characterizing the excluded activity as "the teaching of morals and character development from a [religious perspective]"); *Lamb's Chapel*, 508 U.S. at 393 (reasoning that the exclusion affected religious perspectives on family issues and childrearing).

reserved the different question of whether disallowing only worship would be unconstitutional.¹⁹⁰

A second obstacle is that allowing public schools and libraries to exclude worship, but not religious expression with more direct secular analogues, would require officials to draw distinctions between worship and other types of sectarian expression.¹⁹¹ That would be troublesome because defining worship would be at least extraordinarily difficult and at worst constitutionally perilous. It might entangle state actors, including judges, in answering a question that resists objective resolution and about which religious people differ as a matter of conscience.¹⁹² On which side of the line, for example, would a Quaker meeting fall? What about a Buddhist *sangha*? Neither need involve adoration or veneration, but both arguably hold places in their traditions parallel to Christian church services or Jewish synagogue rites. The Court has suggested that it may not be competent to administer a distinction between worship and other religious expression.¹⁹³

Perhaps the best response to this second obstacle is that refusing to allow officials to omit worship might come up against a different religious conviction, namely the belief that worship is exceptional.¹⁹⁴

¹⁹⁰ *Good News Club* assessed facts that came closest to a pure exclusion of religion, but the Court there also specifically declined to decide whether a denial of access for worship itself would be constitutional. See *Good News Club*, 533 U.S. at 112 n.4 (noting that the activities at issue in the case were not “mere religious worship, divorced from any teaching of moral values”); see also *Bronx Household*, 492 F.3d at 130 (Walker, J., dissenting) (voting to strike down an exclusion of worship from public property but recognizing that the *Good News Club* Court explicitly “declined to reach the question presented in this case,” namely, whether excluding only worship itself offends the First Amendment).

¹⁹¹ See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981) (“It is highly doubtful that [the distinction between worship and other sorts of religious speech] would lie within the judicial competence to administer. Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.” (citation omitted)); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 911 (9th Cir. 2007) (holding that it would not be proper for the court to distinguish between worship and other forms of religious speech, but nevertheless upholding an exclusion of worship on the ground that private religious groups themselves had differentiated between worship and their other activities), *cert. denied*, 128 U.S. 143 (2007).

¹⁹² See *Bronx Household*, 492 F.3d at 129-30 (Walker, J., dissenting) (noting that allowing officials to define worship would give them unduly wide latitude and that judges lack competence to offer a legal definition of the term).

¹⁹³ *Widmar*, 454 U.S. at 269 n.6 (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

¹⁹⁴ See *Bronx Household*, 492 F.3d at 103 (Calabresi, J., concurring).

That belief could be offended by a constitutional rule grounded in the view that worship is analogous to certain forms of secular expression. So, arguments based on an interest in avoiding entanglement with religious convictions may stand in equipoise.

In sum, then, it is possible (though not easy) to make a case that government programs supporting a range of private speech ought to be able to selectively defund worship as such. Behind that argument lies a basic intuition: it is difficult to imagine that policymakers who choose to open public property to community or civic organizations are constitutionally compelled to permit sectarian organizations to use that property as a church, temple, synagogue, or mosque.¹⁹⁵ Officials may have greater discretion than is commonly thought to protect against identification of schools and libraries with particular denominations, to avoid community division over official facilitation of religious services, and to prevent citizens from feeling disfavored by a state that, as a practical matter, sponsors the services of a particular sect.

2. Lower Court Debates

Federal appellate judges have differed on the question of whether excluding worship is impermissible viewpoint discrimination. That split, which may draw the attention of the Supreme Court, is worth examining briefly—particularly because the outcomes have often depended on fact-specific determinations, such as whether the excluded activity consisted of worship alone, and partly because they articulate differing conceptions of how worship should be understood by courts.

The Ninth Circuit ruled that church services could be denied support, but it did so over the strong objection of a minority of active judges on the full court.¹⁹⁶ The dispute arose when Contra Costa County decided to open meeting rooms located in public libraries to a variety of civic organizations for “meetings, programs, or activities of educational, cultural or community interest.”¹⁹⁷ The county barred use of its library facilities for two purposes: instruction by schools and

¹⁹⁵ See *Good News Club*, 533 U.S. at 139 (Souter, J., dissenting) (arguing that the majority was compelled to conclude that the activity at issue did not constitute a church service, for “[o]therwise . . . this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque”).

¹⁹⁶ *Glover*, 480 F.3d at 895-902 (Bybee, J., dissenting from denial of rehearing en banc).

¹⁹⁷ *Id.* at 902.

“religious services.”¹⁹⁸ Faith Center Church Evangelistic Ministries sued when it was prohibited from using the library meeting room for what it described as a “praise and worship” service.¹⁹⁹ No one disputed that Faith Center could hold a “wordshop” that did not involve explicit worship, despite the fact that it included prayer instruction and an “End-time call to Prayer for every Believer.”²⁰⁰ The close question was whether Faith Center’s worship service itself could be excluded.

The court ruled that the county could constitutionally ban Faith Center’s worship service from its library facility. “We see nothing wrong,” the court said, “with the County excluding certain subject matter or activities that it deems inconsistent with the forum’s purpose, so long as the County does not discriminate against a speaker’s viewpoint.”²⁰¹ Of course, that begged the really difficult question of whether worship constituted a subject matter rather than a viewpoint. Worship, the court concluded, falls into the former category. It took comfort from the passage in *Good News Club* noted above,²⁰² where the Supreme Court reserved the question of whether a polity could exclude “mere religious worship” from a limited forum.²⁰³

Two difficulties were raised by Judge Bybee in an opinion for seven judges dissenting from the denial of rehearing en banc. First, worship of virtually every type will inevitably include just the sort of community activity that the county set out to encourage. Judge Bybee recalled that even “quintessentially religious” speech must be included in a forum when it blends with types of speech that are otherwise subsidized.²⁰⁴ Because religious services will always include expression analogous to permissible speech by secular civic organizations, singular aspects of worship must be allowed access to public facilities on equal terms. Second, if courts were to permit the government to ex-

¹⁹⁸ *Id.* at 903.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 904.

²⁰¹ *Id.* at 910.

²⁰² See *supra* note 190 and accompanying text.

²⁰³ *Glover*, 480 F.3d at 913 (quoting *Good News Club*, 533 U.S. at 112 n.4).

²⁰⁴ *Id.* at 898 (Bybee, J., dissenting from denial of rehearing en banc) (quoting *Good News Club*, 533 U.S. at 111); see also *Glover*, 480 F.3d at 901 (“Here, the County has opened its library meeting rooms *generally* to community groups for a wide range of cultural and community activities; the distinction between ‘mere religious worship’ and other forms of religious speech is thus utterly irrelevant. Whatever ‘mere religious worship’ involves, it is both a cultural and a community activity and as such certainly constitutes an ‘otherwise permissible subject[.]’ under the County’s policy.” (alteration and emphasis in original) (quoting *Good News Club*, 533 U.S. at 112)).

clude worship, but not other sacred speech, that rule again would put officials, and ultimately judges, in the constitutionally untenable position of having to differentiate among types of religious expression.²⁰⁵ Such a rule would also likely favor sects that tend to include moral teaching or community building in their services over those that are liturgically oriented.²⁰⁶

In 2003, by contrast, the Second Circuit struck down an exclusion of worship, but it did so under significantly different facts. A New York City Department of Education allowed school facilities to be used after hours for civic meetings, socializing, recreation, entertainment, and other activities "pertaining to the welfare of the community"—even including the discussion of "religious material or material which contains a religious viewpoint"—but it disallowed their use for "religious services or religious instruction."²⁰⁷ An evangelical church, the Bronx Household of Faith, sued when the board refused to let it use school space to conduct what amounted to a worship service each Sunday.²⁰⁸ The Second Circuit ruled that excluding Bronx Household from school premises would constitute viewpoint discrimination because its practices blended actual worship with a type of morality instruction analogous to that allowed to secular groups.²⁰⁹ Under *Good News Club*, exclusion of "religious instruction" had to be seen as viewpoint discrimination.²¹⁰ The court bracketed the narrower question of

²⁰⁵ Compare *Glover*, 480 F.3d at 899 (Bybee, J., dissenting from denial of rehearing en banc) (noting that the distinction between worship and other types of religious speech "is not 'within the judicial competence to administer'" (quoting *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981))), with *Glover*, 480 F.3d at 918 (majority opinion) (noting that the distinction between worship and "virtually all other forms of religious speech" is one that "courts are not competent to make," but that the Faith Center itself had drawn such a distinction in this case). But see *Widmar*, 454 U.S. at 284-86 (White, J., dissenting) ("Although . . . the line may be difficult to draw in many cases, surely the majority cannot seriously suggest that no line may ever be drawn.").

²⁰⁶ *Glover*, 480 F.3d at 901.

²⁰⁷ *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 348 (2d Cir. 2003) (emphasis added).

²⁰⁸ *Id.* at 347.

²⁰⁹ *Id.* at 354. The Second Circuit had previously upheld a similar policy against a challenge by the same religious organization. See *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 214-15 (2d Cir. 1997). In 2003, the court instead upheld the policy on the ground that the Supreme Court's intervening decision in *Good News Club* had effectively overturned its previous ruling. *Bronx Household*, 331 F.3d at 355.

²¹⁰ The Ninth Circuit tried to distinguish *Bronx Household* on the ground that the religious practices there had involved a blend of worship and moral instruction, whereas the Faith Center had engaged in pure worship. *Glover*, 480 F.3d at 916. My sense is that this is a difficult line to defend because a great deal of worship includes activities with secular analogues, such as instruction in morality.

whether it could, in some future case, allow the Board of Education to treat religious worship itself—apart from religious instruction—“as an inherently distinct type of activity” that could be excluded from a forum.²¹¹

In 2007, the Second Circuit considered that narrower question. Bronx Household had again been denied permission to use a New York City school for church services, this time under a newly announced policy that excluded not all “religious services or religious instruction,” but only groups that wished to use the school for the purpose of “holding religious worship services, or otherwise using the school as a house of worship.”²¹² A panel ruled for the city in a divided opinion that produced no controlling rationale. Judge Calabresi voted to uphold the exclusion on the merits. To his mind, worship is a distinct category of expression—it is “adoration,” not mere ritual or community-building.²¹³ Moreover, Bronx Household itself seemed to recognize that what it was doing differed significantly from a civic meeting or even a Bible study session, since in the words of its pastor, “[t]he Bible study club would not administer the sacraments of baptism and the Lord’s supper. That would be a big difference.”²¹⁴ Because worship is categorically different from other expressive activities, and because Bronx Household conceded that it was engaged in worship, Judge Calabresi concluded that its worship services could be excluded.

Judge Walker disagreed. Also reaching the merits, he reasoned that a central purpose of the forum, to foster community in the neighborhood, would be served by Bronx Household’s proposed use.²¹⁵ Because that use fit the purpose of the forum, Judge Walker scrutinized the government’s motives closely and concluded that the school board had set out to excise a particular viewpoint from its subsidy program.²¹⁶ He also warned that allowing the exclusion would ei-

²¹¹ *Bronx Household*, 331 F.3d at 355.

²¹² *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 92, 94 (2d Cir. 2007) (Calabresi, J., concurring).

²¹³ *Id.* at 103.

²¹⁴ *See id.* (quoting the testimony of Rev. Robert Hall, pastor of Bronx Household Community of Faith); *see also id.* at 101 (“In applying for a permit to use school facilities, Bronx Household’s pastor described the proposed activities with three words: ‘Christian worship service.’”).

²¹⁵ *Id.* at 126 (Walker, J., dissenting).

²¹⁶ *See id.* at 126-27 (“The Board’s avowed purpose in enforcing the regulation in this case, and its long-standing hostility to religious groups, leads ineluctably to the

ther involve the judiciary in defining worship, a task beyond its competence, or would delegate that job to the school board, which would then be required to interpret religious doctrine.²¹⁷ Judge Leval resolved the outcome—but not the substantive dispute—by voting for the school board, albeit on the ground that Bronx Household's challenge was not ripe.²¹⁸

In sum, the prospect of excluding religious expression is particularly difficult when the government is otherwise promoting a range of private speech. That situation triggers constitutional rules that differ from those involving state support for private religious practices, discussed in Part I, and government speech, discussed in Part II.A. Here, by contrast, officials may have to observe a special prohibition on viewpoint discrimination that has been interpreted—seemingly definitively—to prohibit exclusion of religious perspectives from even limited fora. This Part has argued that the government ought to be able to decline to support religious speech more easily than is possible under *Rosenberger*. Yet even taking *Rosenberger* as given, there may be some room for the government to decline to aid religious messages. In particular, officials might possibly be able to exclude worship even when they open public facilities to civic speech, and even to other forms of sectarian expression.

III. LIMITS

Of course, the state's ability to exclude religion is not absolute. This Part describes five limits, each of which articulates a clear rule that can be administered without excessive judicial discretion.²¹⁹ First, nonpreferentialism among faiths remains an important constraint, even in the context of funding. Second, unconstitutional conditions are prohibited here, as elsewhere in constitutional law. Third, refusals to subsidize may not be attributable to antireligious animus, a term that this Part defines carefully. The remaining constraints apply specifically to the exclusion of religious speech. Fourth, as we have seen, viewpoint discrimination remains suspect as a practical matter, in fund-

conclusion that the Board, in fact, has undertaken to exclude a particular viewpoint from its property." (citation omitted)).

²¹⁷ *Id.* at 129, 131.

²¹⁸ *Id.* at 91 (Leval, J., concurring).

²¹⁹ For arguments against judicial balancing in the free exercise context, see Justice Scalia's majority opinion in *Employment Division v. Smith*, 494 U.S. 872, 882-90 (1990), in which he argues that personal religious belief is inherently incompatible with a balancing test.

ing cases just as in cases of direct regulation. Fifth and finally, religious speech cannot normally be excluded from a traditional public forum.

A. *Nonpreferentialism*

A basic principle of religious freedom holds that officials may not differentiate among particular sects without an exceedingly strong justification.²²⁰ Nonpreferentialism is bedrock constitutional law, long considered a basic feature of American jurisprudence.²²¹ It can be justified in various ways, such as by arguing that allowing the government to draw theological distinctions among groups would cause regrettable damage to the rule of law (understood chiefly as a rule against arbitrariness), or by saying that it promotes equal citizenship regardless of religious identity.²²² However rationalized, the rule against denominational preferentialism is an uncontroverted feature of the American conception of religious freedom. Moreover, it applies not only in the context of direct regulation, but also when it comes to funding and speech.

²²⁰ See *Larson v. Valente*, 456 U.S. 228, 244, 246 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); see also *Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989) (suggesting that policies that "facially differentiate[] among religions" are presumptively unconstitutional); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (disapproving differential treatment of theistic and nontheistic religions). One reading of a famous passage from *Everson v. Board of Education* supports the proposition that the government may not discriminate among religious groups, even in funding:

New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

330 U.S. 1, 16 (1947) (emphasis omitted). That same passage has been cited by Justice Scalia for a broader proposition, namely that believers generally cannot be excluded from a state funding scheme. See *Locke v. Davey*, 540 U.S. 712, 726-27 (2004) (Scalia, J., dissenting). Regardless of whether that broader reading is correct, there is little doubt that, at a minimum, the *Everson* Court would have disallowed denominational preferentialism in funding.

²²¹ Nonpreferentialism has deep historical roots. At least some state constitutions have included prohibitions on laws that discriminated or imposed penalties on the basis of religious differences. See Hamburger, *supra* note 99, at 851 (noting the existence of such provisions in previous versions of the New York and Massachusetts Constitutions). The federal Free Exercise Clause was also likely understood as guaranteeing freedom from discrimination or penalty, though it may also have prohibited discrimination on the basis of religion generally. *Id.* at 855 n.61.

²²² See, e.g., Eisgruber & Sager, *supra* note 33, at 601 (endorsing an equal citizenship component of religious liberty).

1. In Funding

Preferentialism is constitutionally problematic even though it may not burden the exercise of religious liberty. In that sense, nonpreferentialism imposes a requirement of evenhandedness that is freestanding of liberty or autonomy considerations.

First consider situations where denominational discrimination does impose a burden and is obviously problematic. In *Lukumi*, the Court struck down ordinances that effectively banned animal killings only by practitioners of Santeria, even though the town likely could have banned animal killing altogether for neutral reasons of health and safety.²²³ Or recall *Larson v. Valente*, where the Court struck down a religious gerrymander that manipulated state requirements for charitable solicitations in order to exclude the Unification Church.²²⁴ Regulations like the ones struck down in these cases discriminate in a way that also burdens religious practices.

When it comes to funding, in contrast to regulation, excising a particular sect may leave members of that group just as free to observe their faith as they would have been absent the support program. Imagine, for instance, a hypothetical version of *Davey* in which Washington state excluded from the Promise Scholarship not all those majoring in devotional theology but only Presbyterians or Jews. Members of those groups would not be significantly burdened by that exclusion for precisely the same reasons that Davey himself was found not to have suffered an undue restriction of his religious freedom.²²⁵ Merely withholding scholarship aid would leave Presbyterian or Jewish students just as able to pursue their beliefs as they were before the program was enacted.

Nonetheless, sectarian preferentialism is as odious in funding schemes as it is in regulations. Even if specific sects are not burdened by government decisions to eliminate them from support, they nevertheless cannot be selectively defunded. Again, that sort of exclusion would violate a basic constitutional prohibition.

²²³ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

²²⁴ 456 U.S. 228, 244 (1982); *see also* *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) (noting that the Establishment Clause prohibits the government from "favoring . . . one religion over others").

²²⁵ *See Davey*, 540 U.S. at 720-25 (finding that Davey had not been severely restricted in the observance of his faith).

What if a funding exclusion applies not to a particular sect, but instead to a specific sort of religious practice? Could such an exclusion be more permissible than outright preferentialism if it furthered a legitimate policy objective? Take, for instance, a recent decision upholding the State of Colorado's ban on providing tuition-assistance funds to any educational institution that was "pervasively sectarian" or "theological."²²⁶ A Christian college had argued that the exclusion impermissibly discriminated on the basis of denomination, since not all faiths feel religiously compelled to establish colleges and universities that are pervasively sectarian.²²⁷ Nevertheless, the district court upheld the program.²²⁸ If that outcome is justifiable, it would be because Colorado's reasons for not funding pervasively sectarian universities were consonant with the reasons that would drive any government to defund religious institutions generally (to further a particularly robust vision of antiestablishment, to promote unity among the citizenry, and so forth). Whatever the proper outcome in the Colorado case, surely it is possible to imagine instances in which government decisions not to fund particular practices will amount to discrimination on the basis of denomination. A tuition assistance program that denied participation only to universities that instructed students in administration of the Eucharist, for instance, would violate nonpreferentialism.

2. In Speech

Differentiation on the basis of sect is suspect not only in regulation and funding, but also when it appears in government speech. As shown above, the government is free under current law to decide not to promote religion when it speaks (or pays others to further its views).²²⁹ Government must be able to convey a secular message if it wishes. So,

²²⁶ Colo. Christian Univ. v. Baker, No. 04-2512, 2007 WL 1489801, at *1 (D. Colo. May 18, 2007).

²²⁷ *Id.* at *13. Of course, the exclusion could instead be understood simply as a refusal to fund education that would be unavoidably religious, regardless of denomination.

²²⁸ Following *Larson*, the court applied strict scrutiny to the claim of religious preferentialism. *See id.* ("Colorado's tuition assistance programs similarly [i.e., like the program in *Larson*] differentiate among sectarian institutions. . . . In such situations, *Larson* directs that the Court analyze CCU's Establishment Clause claim by applying the strict scrutiny test."). Nevertheless, the court found that Colorado had a compelling interest under the Colorado constitution in not aiding pervasively religious institutions. *Id.* at *14.

²²⁹ *See supra* Part II.A.

again, a school could set out only secular holiday images—reindeer, candy canes, Santa Claus—without including any sacred symbols.

This subsection adds an important limit: although the government can display a wide range of secular and sacred holiday symbols without offending the Constitution,²³⁰ it cannot explicitly exclude only those of a particular religion or denomination. And, of course, that sort of discrimination is equally suspect where the government supports private speech.²³¹

Preferentialism in government speech was an issue in the Second Circuit's decision in *Skoros v. City of New York*.²³² There, the New York City Department of Education had developed a holiday display policy under which schools were directed to display a Chanukah menorah and a Muslim star and crescent, along with various secular symbols, but not a crèche or other unambiguously Christian symbols. When a Roman Catholic parent sued, the court upheld the policy on the ground that a reasonable observer would not have understood the displays to be unconstitutional endorsements of religion.²³³ But that ruling missed the salient point, namely that singling out a particular faith for exclusion violates a basic principle against discrimination among religions, a principle that applies even to government speech.²³⁴

B. *Unconstitutional Conditions*

A second limit on the government's power to exclude religion from support is the rule against unconstitutional conditions. Although the state has no obligation to subsidize the exercise of certain rights, it nevertheless may not deny other benefits solely because a

²³⁰ See *County of Allegheny v. ACLU*, 492 U.S. 573, 620-21 (1989) (allowing the city to display a Christmas tree and Chanukah menorah).

²³¹ Cf. *Sumnum v. Pleasant Grove City*, 483 F.3d 1044, 1052-55 (10th Cir. 2007) (holding that a city that allowed a private group to display the Ten Commandments in a city park could not exclude display of the symbols of a minority religion—albeit arriving at that result using forum analysis under the Speech Clause), *cert. granted*, 76 U.S.L.W. 3562 (U.S. Mar. 31, 2008) (No. 07-665).

²³² 437 F.3d 1 (2d Cir. 2006).

²³³ *Id.* at 32.

²³⁴ Cf. *id.* at 52 (Straub, J., concurring in part and dissenting in part) (“[T]he reasonable parent observer would understand the inclusion of religious symbols of the Jewish holiday of Chanukah and the Muslim commemoration of Ramadan, and exclusion of any religious symbols of the Christian holiday of Christmas, to convey the State’s approval of Judaism and Islam and disapproval of Christianity. The touchstone of the Establishment Clause, its principle of neutrality, forbids such favoritism.”).

private actor chooses to exercise those rights using private funds.²³⁵ Put differently, the government may choose not to aid a protected activity but it may not deny aid to an entity solely because it engages in that activity using its own resources. So, for instance, while Congress may refuse to fund abortions, it may not deny other Medicaid benefits to women who choose to have abortions using private funds.²³⁶ And though the government may refuse to subsidize lobbying, it may not deny tax exemptions to nonprofit organizations simply because they lobby using their own funds.²³⁷ With respect to religious freedom, officials may not penalize people who engage in observance by withholding other government benefits. So, for instance, a state could not deny prescription drug benefits to theology teachers, even though it could supplement the salaries of all teachers except those who taught from a faith perspective.²³⁸ Excluding observance itself from funding programs remains constitutional.

The ban on unconstitutional conditions imposes a real constraint on the state's ability to omit religion from support programs. Imagine, for example, a government office tasked with awarding contracts to social service organizations that meet certain qualifications concerning effectiveness, safety, and the like. Assume further that one of those organizations is religious and also conducts worship services. Those services take place in a different location, are funded separately, and do not affect the organization's social service operation, which is otherwise qualified. The government office could not deny a

²³⁵ See Laycock, *supra* note 14, at 175 ("The Court . . . says that the government cannot respond to an exercise of a constitutional right by withholding money for *other* activities eligible for government funding . . ."); Volokh, *supra* note 6, at 1942 ("The Court has routinely distinguished limits on how government assets are used from limits on . . . what other behavior the user engages in with its own assets Thus, the government may choose not to subsidize abortions, but it may not deny food stamps to all women who have had abortions . . .").

²³⁶ Nor may a state withhold all benefits to broadcasters that engage in editorializing. See *FCC v. League of Women Voters*, 468 U.S. 364, 402 (1984).

²³⁷ Compare *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (disallowing tax deductions on lobbying as a business expense), with *Regan v. Taxation with Representation*, 461 U.S. 540, 551 (1983) (allowing Congress to require nonprofit organizations to separate out unfunded lobbying activities from other supported activities).

²³⁸ Cf. *Locke v. Davey*, 540 U.S. 712, 734 (2004) (Scalia, J., dissenting) (offering a similar hypothetical); *Maher v. Roe*, 432 U.S. 464, 474 n.8 (1977) ("If Connecticut denied general welfare benefits to all women who had obtained abortions, . . . strict scrutiny might be appropriate . . .").

contract to that organization simply because it also engaged in worship in a separate program.²³⁹

Might the prohibition on unconstitutional conditions defeat a voucher program that excluded sectarian schools? The argument would run like this: Religious schools have two components, a secular educational component that is equivalent to the pedagogy of nonreligious private schools, and a religious component that consists not only of observance, but also of religiously inflected instruction in subjects like theology and ecclesiastical history. When a state decides not to allow religious schools to participate in a voucher program, it is doing two things, one permissible and the other not. First, the state is declining to fund worship and theological education. That is best viewed as a permissible decision not to subsidize either free exercise or the right of parents to direct the upbringing and education of their children.²⁴⁰ But, in addition, the state is denying support to the secular component of the school's educational program. That second exclusion constitutes an unconstitutional condition, on this view.

Judge McConnell made a similar argument in an early article, written when most exclusions of religion from government support were still constitutionally mandated.²⁴¹ He asked readers to imagine that the secular aspects of a parochial school education cost \$4000 per pupil each year and that the religious parts cost an additional \$500.²⁴² No one would dispute that it would be proper for the state to refuse to fund the incremental cost of the religious component of the school's educational activities (here, \$500).²⁴³ But Judge McConnell argued that it would be improper to deny the \$4000 for the secular components as well, because that would simply penalize families who had de-

²³⁹ Here I agree with Judge McConnell's argument against the constitutionality of denying grants for the provision of secular public services to organizations simply because they also pursue religious activities. See McConnell, *supra* note 18, at 1027-28 ("[T]he suggestion that religious organizations must categorically be barred from participation in all government-funded programs must be rejected. . . . [D]enying federal money for activities that would otherwise be funded would amount to a substantial penalty for exercising one's constitutional rights.").

²⁴⁰ The Court recognized the latter right in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

²⁴¹ McConnell, *supra* note 18, at 1017-19.

²⁴² *Id.* at 1018.

²⁴³ *Id.*

cided to exercise their constitutional right to educate their children in matters like theology and church history.²⁴⁴

His argument drew on *FCC v. League of Women Voters*, which struck down a statute prohibiting public television stations that received federal funds from engaging in editorializing.²⁴⁵ Though it would have been fine for Congress to defund editorializing, the Court held that Congress could not also refuse to support the station's other activities. Otherwise, even stations that wished to express their opinions using their own funds could not do so without forfeiting all federal support. Forcing them to choose between exercising their constitutional rights and receiving other funding would violate the Constitution.²⁴⁶ Similarly, McConnell's argument ran, states should not be able to deny funding to the secular aspects of education just because schools choose to provide religious aspects using their own funds.²⁴⁷

If that position were to prevail, it would defeat the ability of states to exclude religious practices from perhaps their most important programs: those that educate children. And that would restrict the scope and importance of this Article's proposal.

Yet the Court is not likely to be persuaded to view an exclusion of religious schools from a voucher program as an unconstitutional condition. Religious education often is not easily separable into secular and sacred components in practice. Many religious groups establish their own schools precisely because they do not think that merely supplementing public school education with after-hours religious education is sufficient. They feel that sacred commitments ought to pervade all aspects of their pedagogy.²⁴⁸ Even if religious content

²⁴⁴ *Id.* at 1018, 1047. Professor Laycock has recently endorsed much the same view. See Laycock, *supra* note 14, at 187 ("Refusing state funding for math and reading, because the school also teaches religion, is clearly a penalty on teaching religion and on attending a school that does so. If religious liberty consists of minimizing government influence on religious choices, such a penalty restricts religious liberty."). (As I will explain, however, Laycock realizes that *Davey* poses a significant obstacle to this view of secular-only voucher programs.) And Professor Paulsen likewise seems to suggest that not allowing religious schools to participate in a voucher program would constitute an unconstitutional condition. See Paulsen, *supra* note 14, at 667, 710-17.

²⁴⁵ 468 U.S. 364, 402 (1984).

²⁴⁶ *Id.*

²⁴⁷ See Laycock, *supra* note 14, at 179-81 (discussing the divisibility of federal funds in *League of Women Voters* and *Davey*); McConnell, *supra* note 18, at 1017-19.

²⁴⁸ See *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 379 (1985) (noting the position of certain religious schools that "it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-pervading force in the educational program" (emphasis omitted)), *overruled by* *Agostini*

could be excised from classes in history and math, the religious identity of the school, expressed in mottos and symbols, could still legitimately be seen to color the entire educational experience. Elected policymakers ought to have discretion over whether to fund schools that deliver education in such a context.

Current jurisprudence seems to grant lawmakers discretion to require that unfunded activities be institutionally segregated from funded ones, specifically in the context of schooling. That discretion allows them to selectively deny aid to religious components even when blended with secular ones. The *Davey* Court had a perfect opportunity to view an exclusion of religious education from support as an unconstitutional condition. After all, Joshua Davey had declared a dual major in business administration and devotional theology. It would have been easy for the Court to hold that disallowing Davey from applying a portion of the Promise Scholarship to his business major simply because he also was preparing for the ministry constituted an impermissible penalty on his rights of free exercise and free speech.²⁴⁹ Yet the Court seemed to reject that argument. It reasoned that Washington had not required students to choose between exercising religious freedom and accepting the scholarship.²⁵⁰ Under the program's rules, Davey could have accepted the scholarship for his business major at one university so long as he pursued his clerical training at another school.²⁵¹ Thus, Davey could be required to separate out the secular and sacred components of his education. That made *Davey* less like *League of Women Voters*,²⁵² where the government impermissibly denied funding to all of a broadcaster's activities simply because it engaged in editorializing, and more like *Taxation with Representation*, where the government permissibly required nonprofit organizations to institutionally separate subsidized activities from unsubsidized lobbying.²⁵³ Some such analogy to the unconstitutional conditions cases

v. Felton, 521 U.S. 203, 236 (1997); McConnell, *supra* note 18, at 1019 ("[O]ne of the key purposes of religious primary and secondary schools is integrating religion into the regular curriculum.").

²⁴⁹ See Laycock, *supra* note 14, at 180 ("[Davey] was indeed required to choose between his religious beliefs and a government benefit for his secular courses.").

²⁵⁰ Locke v. Davey, 540 U.S. 712, 720-21 (2004).

²⁵¹ See *id.* at 721 n.4 ("Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology.").

²⁵² FCC v. League of Women Voters, 468 U.S. 364, 402 (1984).

²⁵³ Regan v. Taxation with Representation, 461 U.S. 540, 551 (1983).

remained unarticulated but unmistakable in *Davey*.²⁵⁴ The Court implicitly compared *Davey* to those cases and concluded that “[t]he State has merely chosen not to fund a distinct category of instruction.”²⁵⁵

Accordingly, lower courts ruling after *Davey* have refused to view exclusions of religious schools from voucher programs as unconstitutional conditions. Most recently, Maine’s highest court figured that the state’s “decision not to extend tuition funding to religious schools . . . does not require residents to forgo religious convictions in order to receive the benefit offered by the state—a secular education.”²⁵⁶ Students who wished to benefit from a government-funded secular component to their education could attend a public school or a nonreligious private school. They remained free to use their own funds to receive a religious education elsewhere. That way of thinking brought exclusions from voucher programs into line with *Taxation with Representation* and other cases permitting the government to require citizens to segregate funded and unfunded activities. If families found that segregation unsatisfying, it may have been due to their belief that religious thinking should pervade all aspects of education. Maine’s choice not to fund that sort of inextricably religious instruction constituted selective funding, not a penalty on the exercise of a constitutional right.

C. *Animus*

There is another limit to the ways in which the government may exclude religious persons or practices from state support. It may not engage in exclusions that appear to be driven by simple animus against religion.

By definition, excluding religion always involves differentiation on the basis of faith.²⁵⁷ So, mere differentiation between religion and nonreligion cannot be sufficient to raise a presumption of constitu-

²⁵⁴ Laycock, *supra* note 14, at 180-81.

²⁵⁵ *Davey*, 540 U.S. at 721. Laycock agrees, albeit in protest, that this is so under current law: “*Rust* and *Davey* mean that if you take money from the government, the government acquires full power to prohibit any other activity, including the exercise of constitutional rights, performed by subsidized staff or conducted on the property where the government money is spent.” Laycock, *supra* note 14, at 197.

²⁵⁶ *Anderson v. Town of Durham*, 895 A.2d 944, 959 (Me. 2006) (quoting *Eulitt ex rel Eulitt v. Me. Dep’t of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004)).

²⁵⁷ See *supra* text accompanying note 4.

tional difficulty, despite what is sometimes said to the contrary.²⁵⁸ Some egregious forms of categorization, however, may be suspect. Recently, the Supreme Court has suggested that it will protect against antireligious animus to some degree.²⁵⁹ The *Davey* Court distinguished a Washington program from more nefarious differentiation.²⁶⁰ Washington had simply been following a state constitutional provision that afforded greater antiestablishment protection than the federal Constitution.²⁶¹ The Court implied that Washington could not have acted with animus toward devotional theology without raising some sort of constitutional concern. At the very least, it left itself room to adopt an anti-animus rule in a future case.²⁶²

Yet a rule against governmental animus may raise problems of constitutional theory. First, while there is a long tradition of constitutional concern about state action against particular sects, there is not the same level of concern about differentiation on the basis of religion as a whole.²⁶³ Part of the point of this Article is precisely that the government may act with regard to religion generally in ways that would be much more difficult when directed toward individual sects

²⁵⁸ Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (“[T]he minimum requirement of neutrality is that a law not discriminate on its face.”).

²⁵⁹ The Court uses the terms “animus” and “hostility” interchangeably. This Article limits itself to the word “animus.”

²⁶⁰ See *Locke v. Davey*, 540 U.S. 712, 724 (2004) (“Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits.”); *id.* at 725 (“[W]e find neither in the history or text of . . . the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion.”).

²⁶¹ See *id.* at 722 (“Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State’s antiestablishment interests come more into play.”).

²⁶² In a footnote, the Court said explicitly that it has “sometimes characterized the Establishment Clause as prohibiting the State from disapproving of a particular religion or of religion in general.” *Id.* at 725 n.10 (internal quotation marks and alterations omitted).

At least one prominent commentator has subsequently suggested that animus against religious people or practices is now not only sufficient to show a free exercise violation, as this Article suggests, but also necessary—and not only with respect to funding, but in other contexts as well. See Hamilton, *supra* note 66, at 1101 (arguing that the Court usually “requir[es] obedience to legislative determinations of the public good, unless there is evidence of animus or hostility towards religion”).

²⁶³ The *Davey* Court suggested that *Lukumi* involved an instance of animus, but in that case the government singled out a particular sect, not religion as a whole, for burdensome regulation. See *Davey*, 540 U.S. at 724-25.

or denominations. Second, prohibiting animus, as opposed to more acceptable government motivations, could raise problems of evidence and proof.²⁶⁴ Third, and related, such a rule could involve courts in the difficult task of drawing principled lines between permissible and impermissible government judgments of value or morality.²⁶⁵ As a theoretical matter, then, it is unclear whether a rule against animus can be conceptualized in a satisfying way.

Nevertheless, this Article does insist on some such limit to the government's ability to target religion, even in funding programs. It does so by proposing a narrow approach designed to circumvent the deepest theoretical debates surrounding impermissible government motivations.²⁶⁶ A basic constitutional principle prevents official action that raises an unmistakable inference of distaste for religion, unconnected to any legitimate justification for excising religious groups or entities from funding programs.²⁶⁷ Most exclusions of religion will be somehow justifiable based on, for instance, the antiestablishment values described above: equal citizenship, division avoidance, taxpayer freedom, etc. Yet some may lack any possible ground in legitimate public policy. While the American constitutional tradition worries more about government action that differentiates on the basis of sect or denomination, it seems also to guard against governmental disadvantag-

²⁶⁴ Scholars have suggested, for instance, that it will be difficult to show that a funding denial is connected to a state's Blaine amendment, even if that state constitutional provision was originally enacted out of anti-Catholic sentiment. Lawmakers can easily paper over an impermissible motive by articulating an acceptable rationale for a religious classification. And the *Davey* court itself refused to recognize any connection between Washington's Blaine Amendment and the funding exclusion in the Promise Scholarship program. See Laycock, *supra* note 14, at 187-88 (discussing *Davey*, 540 U.S. at 723).

²⁶⁵ Cf. *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) ("Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct.").

²⁶⁶ For instance, this Article avoids the civic republicanism that sometimes bolsters anti-animus proposals in the religion context and elsewhere. See, e.g., Hamilton, *supra* note 66, at 1101 ("[P]rinciples of republicanism have informed the Supreme Court's Religion Clause jurisprudence . . ." (footnote omitted)); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690-91 (1984) (describing the general antipathy of republicanism toward laws that target politically unpopular groups).

²⁶⁷ Here I agree generally with McConnell, *supra* note 18, at 1046-47, though he treats hostility toward religion as simply a type of government reason that cannot overcome a presumption that a selective defunding of religion is unconstitutional.

ing of religion as a whole in certain extreme circumstances.²⁶⁸ That concern may be particularly acute today, when a prominent fault line in American politics and society lies not between faiths, but instead between those who would purge religion from our public life and those who believe it deserves a fuller place there.²⁶⁹

This Article offers a narrow definition: an animus-based exclusion of religion is one that bars religious groups from exceptionally broad government support programs or otherwise presents a stark mismatch between the scope of the exclusion and the scope of state aid. Some government programs are widely available and normally extended to everyone in the same way. When the state excludes religious groups from these sorts of programs, courts may step in. Other exclusions that are obviously unconnected to the purpose of a benefit may also be disallowed. Much depends on the details of the particular program.

This approach to animus is circumscribed. Notice that it depends only on the relationship between the nature of the exclusion and the nature of the benefit program, not on an attempt to directly discern government motivation. In that way, it aspires to avoid much of the difficulty that normally accompanies such rules—problems of evidence, for instance. A law issued amid indications of actual animus toward religion might still be upheld on the ground that a legitimate justification could be given for the exclusion. This Article's definition of animus therefore would allow government activity that some citizens will find objectionable—preferring that such disputes be resolved in the political process—but it also would provide a needed backstop against particularly egregious exclusions of religion without involving courts in excessive line-drawing.

Because this definition is drawn so narrowly, instances of activity that would come under its purview are difficult to imagine. A paradigmatic example would be a town ordinance that singled out houses of worship for special denials of basic services, such as police and fire protection, access to public water and electricity systems, or use of

²⁶⁸ Cf. Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in *LAW & RELIGION: A CRITICAL ANTHOLOGY* 200, 203-04 (Stephen M. Feldman ed., 2000) (describing the belief that "one's status as a member of our political community ought not to depend in any way upon one's religious beliefs").

Because of the distinctive place of religion in our constitutional tradition, this Article does not rely on the general rule against animus in equal protection law. See *Romer*, 517 U.S. at 634-36; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47 (1985). Principles of religious freedom provide more specific guidance, making reference to general equal protection concepts unnecessary.

²⁶⁹ FELDMAN, *supra* note 7, at 6.

town waste removal services. Excluding religion from general benefits like these ought to be presumptively unconstitutional. Denying such services to churches and synagogues would not further any acceptable policy, such as promoting a particularly strong conception of anties-establishment.

Other instances of mismatch between an excision and the nature of a program could be more contentious. Consider a state university policy that refused to recognize not simply student groups that discriminated on the basis of sexual orientation, but instead only religious groups that did so. Fashioning the antidiscrimination policy in this way arguably would be too disconnected from the nature and purpose of the program to serve any rightful end. If declining to support homophobia were the goal, then the policy would apply evenhandedly to all student groups. And if promoting antiestablishment were the objective, then the policy would simply decline to fund all religious groups. Instead of either of these, such a program arguably would exhibit what this Article defines as animus.

In sum, the rule against antireligious animus comes into play where there is a glaring mismatch between the nature of the exclusion and the nature of the program. That limit is essential to any sensible approach to excluding religion.

D. *Viewpoint Discrimination*

The remaining two limits are specific to the speech context. This Section acknowledges the rule that programs supporting a diversity of private speech presumptively may not discriminate on the basis of viewpoint.²⁷⁰ That rule may be difficult to defend on theoretical grounds, as noted above, but it is settled as a practical matter.

Again, the rule against viewpoint discrimination does not apply in the same way to government speech.²⁷¹ When the government itself communicates, it may choose to endorse certain political positions over others.²⁷² That is intuitive. After all, politicians take positions on matters of public policy all the time—that is central to their job—and they craft government programs to further those policies.²⁷³ Congress

²⁷⁰ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 48-49 (1983).

²⁷¹ This qualification was noted above in Part I.A.

²⁷² *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-34 (1995).

²⁷³ As Justice Scalia has noted,

It is the very business of government to favor and disfavor points of view on

may endorse childbirth over abortion, for instance, and may promote the view that citizens ought to avoid terminating their pregnancies. It may even fund programs to encourage health care professionals to communicate that official position.²⁷⁴ And to the degree that a town's policy constitutes government speech, it may display only secular holiday symbols on the steps of town hall. That rule is relevant to this Article's topic to the degree that government speech can be considered a form of subsidy of religious expression.²⁷⁵

Matters are different when officials do not speak themselves but instead seek to foster a wide range of private expression. Here the presumption against viewpoint discrimination applies—even though the government is not regulating private speech, but merely subsidizing it.²⁷⁶ And the Court has held, mistakenly in this Article's view but enduringly, that a religious perspective often constitutes a viewpoint that cannot be excluded from a program that supports a diversity of private expression without offending the antidiscrimination rule.²⁷⁷

A difficulty with this limit is that it seems to have been challenged in *Davey*. There the Court approved an exclusion of theology majors from a Washington scholarship program that supported a variety of academic speech. Chief Justice Rehnquist attempted to distinguish

(in modern times, at least) innumerable subjects And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doctors perform abortions); or by advocating it officially . . . ; or by giving money to others who achieve or advocate it None of this has anything to do with abridging anyone's speech.

Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment). Justice Scalia goes on to concede that the government cannot skew viewpoints in a limited public forum. *Id.* at 598-99. But he is right to say that, under current law, government retains a great deal of ability to promote the views it favors.

²⁷⁴ *Id.* at 598.

²⁷⁵ See *supra* Part II.A.

²⁷⁶ Rationales for the ban on viewpoint discrimination in funding are not clear to everyone. See, e.g., *Finley*, 524 U.S. at 597-98 (Scalia, J., concurring in the judgment) (questioning the rationale for prohibiting viewpoint discrimination in funding). If the government may subsidize one constitutionally protected *activity* without funding an alternate and equally protected course of action, why must it fund *expression* equally? A deeper theory of the difference between freedom of speech and other liberty-based rights is necessary to account for this difference. This Article simply takes this long-standing distinction as a given.

²⁷⁷ See, e.g., *Rosenberger*, 515 U.S. at 845-46.

Rosenberger in a cursory footnote²⁷⁸ that has failed to satisfy commentators.²⁷⁹ At best, the footnote could be understood to have distinguished between true public fora, such as the University of Virginia program in *Rosenberger*, and more limited subsidies of private speech, such as the one Washington created in *Davey*. But that distinction should not have mattered. As noted above, viewpoint discrimination is prohibited whenever a range of private speech is funded, even if no forum is created.²⁸⁰

The government may retain some leeway to exclude religious expression, however. Part II.C argued that worship itself need not be viewed as providing a viewpoint that must be included whenever the state sets out to support a variety of community speech, though the question is close.

E. *Restricting a Traditional Public Forum*

The government may not single out religious speakers or messages for exclusion from a traditional public forum. This rule follows from the more general doctrine that content-based exclusions are presumptively unconstitutional in quintessential public fora such as sidewalks and parks.²⁸¹ Its underlying theoretical justification sounds in liberty: where government benefits form part of the baseline of public goods that facilitate speech and the exercise of other rights, exclusion from those benefits may work to restrict protected activity. Note that it is not necessary for the purposes of this limit to agree with the *Rosenberger* Court that targeted exclusions of religion should be

²⁷⁸ *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004).

²⁷⁹ Laycock, *supra* note 14, at 191.

²⁸⁰ See *supra* note 154 and accompanying text. A clear distinction persists, in this otherwise muddy area, between government speech and government facilitation of a range of private expression. Regardless of whether Washington's program created a forum in *Davey*, it certainly encouraged a diversity of private communications, and that presumptively precluded it from discriminating on the basis of viewpoint, even in funding. See Laycock, *supra* note 14, at 192 ("[F]orum analysis [in *Davey*] was a distraction, because *Davey* showed viewpoint discrimination."); *id.* at 194 ("The scholarships in *Davey* were available to all within a very broad category . . .").

²⁸¹ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("For the state to enforce a content-based exclusion [from a quintessential public forum,] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."). This presumptive ban on content discrimination applies regardless of whether the public forum is traditional or designated. *Id.* at 45-46; see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (closely scrutinizing an exclusion of religious speech from a traditional public forum without characterizing the exclusion as viewpoint discrimination).

considered instances of viewpoint rather than content discrimination. That distinction matters a great deal in limited public fora, where the state may decide to support certain forms of speech but not others—even on the basis of content—but where it still may not make such decisions on the basis of viewpoint.²⁸² When it comes to traditional public fora, however, exclusions of religion from state support are presumptively unconstitutional, regardless of whether they are regarded as discriminating on the basis of content or viewpoint.

Last year, the Tenth Circuit ruled that a Utah city could not constitutionally refuse to allow Summum, a religious group, to display its symbols in a city park alongside other permanent displays erected by private groups.²⁸³ Summum petitioned the city to erect a monument communicating the Seven Aphorisms of Summum in the city park, which already contained a Ten Commandments monument donated by the Fraternal Order of Eagles.²⁸⁴ The city denied Summum's request on the ground that the proposed display did not meet the city's criteria, which included a requirement that displays relate directly to the history of the city or "be donated by groups with long-standing ties to the [city] community."²⁸⁵ A panel held that the city's denial was a content-based exclusion from a traditional public forum that was presumptively unconstitutional.²⁸⁶ Of course the city did not explicitly target religious expression as a whole for denial of access to the park, and in that sense the case did not involve an exclusion of religion. And Judge McConnell, dissenting from the denial of rehearing en banc, argued powerfully that the existing displays constituted government speech, from which the city could excluded Summum.²⁸⁷ Yet

²⁸² See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."); *Perry*, 460 U.S. at 46 ("[T]he State may reserve [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

²⁸³ *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1052-55 (10th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3562 (U.S. Mar. 31, 2008) (No. 07-665).

²⁸⁴ *Id.* at 1047; *see also id.* at 1047 n.2 (characterizing the Ten Commandments monument as private speech).

²⁸⁵ *Id.* (internal quotation marks and footnote omitted).

²⁸⁶ *See id.* at 1050 ("Because the park is a public forum, the city's restrictions on speech are subject to strict scrutiny."); *id.* at 1055 (finding that the restriction would likely be held unconstitutional).

²⁸⁷ *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175-76 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc).

the point remains that if the city had in fact excluded only religious messages from a traditional public forum, while allowing other private communications, it would have had to justify that restriction with a particularly powerful rationale. The rule restricting such discrimination in traditional public places applies rarely, but it nevertheless imposes an important limit on the ability of public officials to deny state support to religious speakers.

CONCLUSION

Can the government influence citizens' choices among competing commitments of conscience? This Article's argument has implications for that question. After all, welfare-state programs that excise religious observance will sometimes have the foreseeable effect of discouraging sacred activities or encouraging comparable secular ones. Whether those sorts of effects are appropriate in our constitutional system is a matter of significant debate. Does a constitutional democracy lack any power to sway private choices concerning conscience?²⁸⁸ If not, what boundaries limit its ability to do so? This Article has developed a framework that may aid our analysis of such matters.²⁸⁹ One implication of its argument is that policymakers have some power, however limited, to encourage protected activity that they consider socially beneficial. Just as they may encourage childbirth rather than abortion, or nonprofit activity that does not include lobbying, policymakers may in some analogous way encourage community activities that they think will unite citizens around common secular ends or otherwise foster social harmony. Such decisions can be left to the democratic process more often than is sometimes suggested. One influential theory holds that constitutional courts should require the government to remain as neutral as it possibly can be when it comes to matters of conscience.²⁹⁰ This Article takes a somewhat different view.

²⁸⁸ See McConnell, *supra* note 18, at 1035 (noting that *Roe v. Wade* seemed to rest on the view that the government lacked authority to favor claims of conscience, while *Meyer v. Nebraska* relied on the view that the government could favor certain value judgments over others but was limited in its ability to use coercive means to enforce them).

²⁸⁹ For a thoughtful discussion of related questions, see Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1693-1700 (2004).

²⁹⁰ See Laycock, *supra* note 14, at 159-61 (arguing that the neutrality principle favors theology scholarships but opposes the use of "under God" in the Pledge of Allegiance); McConnell, *supra* note 18, at 1003-05 (applying that theory to the examples of abortion and religious education); see also *id.* at 994 ("The theory underlying both *Roe*

From the discussion above, two points seem uncontroverted. First, when the government speaks, it can take positions on matters of political ideology. In fact, it does so all the time. Elected officials regularly craft official messages that favor, say, environmentalism over development, or marriage over cohabitation. As a matter of constitutional law, government speech may discriminate even on the basis of viewpoint.²⁹¹

Does that rule extend to religious expression by the government? Not in any straightforward way, surely. There is some possibility that the government may endorse religion over irreligion in its communications, for instance through legislative prayer.²⁹² We will know more when the Court addresses the phrase "under God" in the Pledge of Allegiance, as it likely will before long.²⁹³ While the Justices have often remarked in passing that the government may not favor religion over irreligion (or vice versa),²⁹⁴ certain members of the Court think that it may express a preference for belief over unbelief.²⁹⁵ To the degree that is true, it is possible for the government to discriminate on the basis of viewpoint even when it speaks about religion.²⁹⁶

Yet there must be a special limit on the ability of official expression to favor a sect or denomination. It would presumably not be permissible for Congress to adopt a resolution declaring that "America Is Not a Muslim Nation." That message would constitute preferentialism, which presumably is impermissible even in a resolution.²⁹⁷ The Court has said, speaking in the context of a case concerning state

and the free exercise clause is that the best solution to the dissension [in value-laden matters] is to 'privatize' the decision . . .").

²⁹¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

²⁹² *See Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (holding that legislative prayer was not an establishment of religion but "simply a tolerable acknowledgement of beliefs widely held among the people of this country").

²⁹³ *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004) (dismissing a challenge to the Pledge without reaching the merits).

²⁹⁴ *See, e.g., McCreary County v. ACLU of Ky.*, 545 U.S. 844, 875 (2005) ("[T]he principle of neutrality has provided a good sense of direction: the government may not favor . . . religion over irreligion . . .").

²⁹⁵ *See id.* at 889 (Scalia, J., dissenting) ("[H]ow can the Court possibly assert that the First Amendment mandates governmental neutrality between religion and nonreligion, and that manifesting a purpose to favor adherence to religion generally is unconstitutional?" (citations, internal quotation marks, and alterations omitted)).

²⁹⁶ Recall that the Court has held that religious expression may constitute a distinct viewpoint. *Rosenberger*, 515 U.S. at 831.

²⁹⁷ *See supra* Part III.A.

expression, that the government “may not favor one religion over another.”²⁹⁸ Now some Justices have suggested that state expression sometimes may discriminate even among sects.²⁹⁹ According to them, officials may endorse monotheism over minority conceptions, including polytheism (e.g., Hinduism), nontheism (e.g., some versions of Buddhism), and atheism.³⁰⁰ Honoring a monotheistic god is historically grounded and commonly accepted by Americans and therefore cannot be understood as government endorsement of a particular religious view.³⁰¹ Under that view, any limit on the ability of government speech to discriminate on the basis of viewpoint in its religious expression would be narrow. The more defensible approach, and the one more likely to prevail in the Court, is that the government may not engage in preferentialism, even in its own expression. And whatever the outcome of that dispute, it will remain true that the state may limit itself to secular messages, even when it knows that doing so will have the effect of encouraging secular discourse in the public sphere.

²⁹⁸ *McCreary*, 545 U.S. at 875; see also *id.* at 884 (O'Connor, J., concurring) (“[The Framers] may not have foreseen the variety of religions for which this Nation would eventually provide a home. . . . But they did know that line-drawing between religions is an enterprise that, once begun, has no logical stopping point.”).

²⁹⁹ As Justice Scalia noted in his *McCreary* dissent,

[T]oday’s opinion suggests that . . . government cannot favor one religion over another. That is indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. . . . With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.

Id. at 893 (Scalia, J., dissenting).

³⁰⁰ According to this reasoning, which relies heavily on practices at the time of the founding, it might also be possible to exclude non-Christian monotheisms—such as Judaism and Islam—from government speech. See *Van Orden v. Perry*, 545 U.S. 677, 728-29 (2005) (Stevens, J., dissenting) (arguing that Justice Scalia’s reasoning would allow the government to exclude Judaism and Islam from its messages).

³⁰¹ Justice Scalia espoused this view in *McCreary*:

Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.

545 U.S. at 894 (Scalia, J., dissenting).

A second point of agreement is that the exercise of constitutional rights presumptively may not be coerced through state regulation. So, for example, lawmakers may not place an "undue burden" on a woman's right to terminate her pregnancy before viability, even though they may express disapproval of abortions.³⁰² And legislators may not require students to salute the flag, even though they may urge citizens to endorse the salute and the patriotic values it expresses.³⁰³ Similarly, in the area of free exercise, officials may not normally burden observance by targeting a religious practice for special civil or criminal penalties.³⁰⁴ Even religious practice as a whole may not be restricted without some strong justification.³⁰⁵ In other words, government regulation, as compared to government expression, faces far greater restrictions on the government's ability to influence the constitutionally protected choices of citizens.

Excising protected activity from government support presents a third case. Again, a prominent theory holds that aid schemes may not sway private choices concerning matters of conscience.³⁰⁶ Creating economic incentives in one direction or another may wrongly compromise state neutrality toward decisions that should remain private. That would be true whenever the state influences a citizen's protected choice between two alternatives—say, secular and religious schooling—even when the citizen remains relatively free to engage in the protected activity. Of course, this view is particularly powerful in the context of the modern welfare state, where government funding programs may be so pervasive and significant that they are thought to alter the baseline of what citizens can legitimately expect, so that exclusions of protected activity from basic programs become constitutionally troublesome. Yet proponents of this theory apply its

³⁰² *Gonzales v. Carhart*, 127 S. Ct. 1610, 1626-27 (2007).

³⁰³ *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *see also* *McConnell*, *supra* note 18, at 1036 ("*Barnette* did not mean . . . that the state was prohibited from encouraging the flag salute and the values it represents.").

³⁰⁴ *See* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (striking down a law prohibiting animal sacrifice).

³⁰⁵ *See id.* at 532 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some *or all* religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." (emphasis added)).

³⁰⁶ *See* *McConnell*, *supra* note 18, at 1004 ("Paying for secular schools without paying for religious schools creates a clear incentive to forgo religious education."); *id.* at 994 (drawing a parallel between individual religious autonomy and the rights to choice recognized in *Roe* and *Pierce*); *see also* *Laycock*, *supra* note 14, at 160 ("[G]overnment should minimize the extent to which it either encourages or discourages religious belief . . ." (internal quotation marks omitted)).

lessons more generally. Evenhandedness, for them, should remain a constitutional commitment even where selectivity affects programs that are not available as broadly, such as state support for halfway houses or local private schools. They argue that funding schemes should leave protected choices as unaffected by public policy as they possibly can be.

This Article, by contrast, takes the view that certain rights—including religious liberty—are best understood as primarily protecting the ability of individuals to engage in valued activity, not in ensuring official evenhandedness for its own sake. Government support programs that fund the choice of one such protected practice rather than another have not been presumed to restrict citizens' ability to engage in the unfunded practice, even though those programs may well influence private choices. Many such programs are therefore more analogous to nonneutral government speech than they are to regulation. (Programs that support an array of private speech, but not religious expression, may present an exception.) That view allows the government greater leeway to take actions that will have a predictable influence on private decision making concerning religion than the evenhandedness approach does. It also gives constitutional courts a reduced role, allowing political actors greater discretion to knowingly influence citizen commitments.

This Article may also suggest a somewhat different view of constitutional democracy from that of the no-influence theory. A democracy need not remain completely neutral among commitments of conscience. In fact, it may make judgments and set policies that affect them, so long as it does not violate certain limits. Several of those limits blend this Article's primary concern regarding liberty or autonomy together with freestanding commitments to evenhandedness, neutrality, or equality. Rules against sectarian preferentialism, animus, and viewpoint discrimination, for instance, impose independent requirements of neutrality or equality. This Article thus offers a nuanced framework for determining when and how public officials may use selective support to influence citizens' choices concerning matters of conscience. That framework may also offer some help in answering the even broader question of when and how it is appropriate for a constitutional democracy to sway citizen choices that are protected by other rights, such as freedom of expression and the right to privacy.

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