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The Davey Case and the Future of Religious Freedom

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The Blaine Amendments are a classic example of the Law of Unintended Consequences. An ardent Protestant, Blaine was concerned about waves of Catholic immigration and the rise of Catholic power in the United States. Most particularly, he wanted to prevent any tax dollars from going to the support of Catholic schools. The Blaine Amendments –originally driven by animus towards Roman Catholics–now pose what may be the greatest threat to religious liberty in the United States.

Thus, the Law of Unintended Consequences rises up to remind us once again that when the religious liberties of one group are compromised, religious liberty is diminished for all. Over time, the Blaine Amendments have become a weapon in the hands of the secularists rather than a bulwark to protect the Protestant majority.

Enter Joshua Davey. Unlike James Blaine, Joshua Davey has sought no political office and, for all we can tell, has had no great ambition to reshape the relationship between church and state in America–at least not until lately. As a student at Northwest College in Kirkland, Washington, Davey had applied for the State of Washington's "Promise Scholarship" program available to all Washington high-school students who graduate in the top ten percent of their high school class. Without question, Davey qualified for this scholarship and had every expectation of receiving its support. All this changed when Mr. Davey changed his major to theology and pastoral ministries. At that point, the state of Washington withdrew the scholarship, claiming the constitutional separation of church and state.

When the State of Washington entered the union, it adopted a state constitution establishing an absolute prohibition on any aid to religion. This statement, in effect a Blaine Amendment, sent a clear message: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

This head-on collision between Joshua Davey's hope for a scholarship and the State of Washington's refusal led to a legal battle that has now landed at the U. S. Supreme Court. Davey lost his original case in the state courts, but won on appeal to the Ninth U. S. Circuit Court of Appeals. In a two-to-one ruling, the federal court found that the State of Washington's refusal to award the scholarship represented an unconstitutional discrimination against religion. The State of Washington appealed to the Supreme Court, and the oral arguments for this case were presented on December 2. Intentionally or not, Joshua Davey and the State of Washington have presented a constitutional time-bomb to the Supreme Court.

As Justice Stephen Breyer noted from the bench: "The implications of this case are breathtaking." The reason for this is simple. This case calls the constitutionality of the Blaine Amendments into direct question. Warren Richey of the

Christian Science Monitor explains the case concisely: "If Davey wins, it will mark an important step in eliminating what some analysts view as state-authorized hostility toward religion." But, "if Washington wins, it would represent a major victory for those who believe that the best way to preserve religious liberty in America is by maintaining strict separation between church and state."

The strict separationists are clearly worried. Recent Supreme Court decisions have moved, however awkwardly, toward an increased accommodation of the right of citizens to choose–on their own–to use government benefits and aid to obtain services from religious schools and institutions. This is crucial to the "faith-based" approach of the Bush administration and is crucial to the use of vouchers in school choice. Nevertheless, the Supreme Court has sent so many mixed and confusing messages on the church-state separation issue that no one should presume to know how the court will rule in this case. Confusing and contradictory precedents abound in the court's recent history.

In reality, the strict separationists are not alone in their anxiety over this case. If the Supreme Court should rule that Davey does not deserve the scholarship, this would effectively concede the legitimacy of the Blaine Amendments and the entire question of school vouchers, not to mention a host of related issues, is then thrown into doubt.

The question presented to the court is this: "Where a State chooses to award scholarships based on neutral criteria to financial needy, academically gifted students, does the State violate the First and Fourteenth Amendments to the U. S. Constitution when it discriminatorily strips the scholarship from an otherwise eligible student for the sole reason that the student declares a major in theology taught from a religious perspective?" Joshua Davey's attorneys respond with an emphatic yes to this question. Jay Sekulow, chief counsel for the American Center for Law and Justice argued the case before the court. In the brief presented to the court, Sekulow argued, "when a state adopts a scholarship program to support students seeking higher education at private colleges and universities, that state program must remain free from invidious state discrimination against private religious choices and private religious viewpoints."

Effectively, Sekulow argues that the State of Washington has declared those studying for the ministry to be second-class citizens. This example of "invidious state discrimination" is, he argues, precisely what the founders wanted to avoid. Why should the state care if a student wants to major in theology, biology, business, or art?

This was precisely the case made by Joshua Davey when he was informed that his scholarship had been withdrawn. "I felt that I was a second-class citizen in the eyes of the state. Somehow, apparently because my religious beliefs require me to pursue a degree in pastoral ministries and to eventually become a minister, my academic achievements were no longer worthy of official recognition, nor were my future contributions to the state of Washington worthy of honor."

In petitioning the court on appeal, the State of Washington claimed that the state was entirely in its rights to deny the scholarship. Even so, the state was forced to acknowledge that its constitution differs from the U.S. Constitution's First Amendment guarantee of religious liberty. Washington Solicitor General Narda Pierce told the court that Washington "has a somewhat different, but concurrent, scheme for religious freedom." The court will have to decide if this "somewhat different" guarantee is superceded by the First Amendment. This is no small question, and that is why the Blaine Amendments are on the line.

Controversies at the intersections of church and state are almost never uncomplicated. The case of Joshua Davey raises a host of related issues. Northwest College is affiliated with the Assemblies of God. The school requires all students to profess belief in Jesus Christ and to attend mandatory chapel services. A good percentage of the school's graduates become ministers in the Assemblies of God. The State of Washington is in the strange predicament of funding students who attend Northwest College who major in anything but theology. Given the Christian character of the institution –regardless of major–what sense does this make?

Some observers just hope that the court will rule narrowly. E. J. Dionne of the Washington Post dislikes the Blaine Amendments, but fears what would happen if they are ruled unconstitutional. On the other hand, he recognizes "a long history of allowing individuals who get public money to pursue their own path in higher education." Looking back, Dionne laments: "We would all be better off if the state of Washington had given Joshua Davey his state scholarship to study theology at an evangelical college." Sorry Mr. Dionne, we can't reverse history.

Evangelical Christians should recognize the importance of this case. If the State of Washington is successful in its appeal, and if the Supreme Court rules broadly in Washington's favor, we may enter a new era of state-enforced

secularism that will make past controversies look pale by comparison. This could mean not only the end of school voucher programs, but a season of hostility toward religion itself.

The famous "G.I. Bill" should offer an illustration of how such benefits should work. Veterans who earn educational benefits can choose the institution, choose their major, and use the federal benefits to pay their expenses. So long as the veteran qualifies for the benefits and the school is properly accredited as an educational institution, the government does not control where the veteran may study or limit the fields of study available.

As is so often the case, Justice Sandra Day O'Connor sits right in the middle of the controversy. With the justices divided between four strict seperationists and four justices more inclined to accommodation, Justice O'Connor is once again the crucial swing vote. For this reason, some court observers have labeled Justice O'Connor the most powerful figure in America.

A decision from the Court is expected by next summer. At that time, we will discover how Justice O'Connor–and the rest of the Court–rules in this case. Make no mistake: This case could reshape the entire landscape of religious liberty in America.
