

# Court mends part of church-state wall: State support of religious education

News in the [March 23, 2004](#) issue

The implications of Supreme Court decisions are often in the eye of the beholder. That observation was borne out recently by discussions of legal scholars and a White House official on the court's latest major church-state decision. Yet, on balance, the ruling seemed to replace a few bricks in the wall of separation.

The decision by a surprising 7-2 margin February 25 appeared to bolster provisions in state constitutions that bar direct state support of religious education. However, the faith-based initiative programs of the Bush administration were said by a key advocate to be unaffected by the ruling.

With Chief Justice William Rehnquist writing the majority opinion in the *Locke v. Davey* case from the state of Washington, the court ruled that the First Amendment permits—but does not require—states to fund scholarships to religious schools. Justices Antonin Scalia and Clarence Thomas dissented.

The case pitted Washington state against a resident who was denied a state-funded college scholarship because he had chosen ministerial studies as part of his double major. The court ruled that the state had the right to deny Joshua Davey the scholarship by appealing to a section of its constitution that forbids government funding of religious instruction.

The justices had said in 2002 that state scholarship programs that include religious schools do not violate the constitutional ban on government establishment of religion if the funding is done indirectly—through genuine private choices of where to spend the scholarship funds. Davey asked the court to decide whether state bans on such indirect funding violate the First Amendment's assurance of freedom of religious exercise.

The court said it didn't, and cited similar state laws from the earliest stages of American history that set more specific limits on government funding of religion than the First Amendment does. Advocates of government funding for religious schools and religious charities weighed in on Davey's side in the case, asking the justices to overturn such state constitutional provisions.

Jim Towey, director of the White House Office of Faith-Based and Community Initiatives, said the decision didn't affect the president's efforts to expand government funding of religious charities on the federal level. "It really turned on a unique characteristic of Washington state's constitution," he said in a February 26 telephone press conference. "The decision yesterday did not change at all the landscape for President Bush's faith-based initiatives."

In a February 27 event sponsored by the Pew Forum on Religion and Public Life and by the Roundtable on Religion and Social Welfare Policy, three experts analyzed the high court's ruling and the contention by some groups that religious individuals and institutions may not be refused benefits otherwise open to all.

Anthony Picarello, general counsel of the Becket Fund for Religious Liberty and a proponent of Davey's case, said the justices decided wrongly on those grounds. "You can't give a benefit to everybody and rescind it only—only—for religious people," he said. "There should be limits on religion getting the back of the hand" from the government.

Nonetheless, Ira Lupu, a George Washington University Law School professor, and other legal scholars said one of the decision's most significant aspects is that it revives a legal idea that had eroded due to previous church-state decisions: the doctrine that religion has a special constitutional role.

In this case, Rehnquist wrote, "the subject of religion is one in which both the United States and the state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a state would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion."

The Baptist Joint Committee, which had filed a friend-of-the-court brief along with the American Jewish Congress, hailed the ruling. "This is an extremely significant decision, especially in the ongoing debates about school vouchers and the

president's faith-based initiatives," said K. Holly Hollman, BJC general counsel. "The court soundly dismissed the claim that to treat religion differently necessarily amounts to hostility to religion," she said in a February 25 statement.

The AJC's Marc Stern said in the Pew-Roundtable discussion that the argument of White House lawyers and others for "neutrality" or "equality" can be a two-edged sword for religious groups. He cited recent federal court decisions in which special accommodations for religious groups—such as exemptions to local zoning laws that many houses of worship enjoy—were overturned on the basis of neutrality.

"Therefore, religion doesn't get special protection," said Stern, whose organization wrote a brief opposing Davey's position. -*Associated Baptist Press*