CONSTITUTIONAL DEVELOPMENTS

LOCKE V. DAVEY AND THE "PLAY IN THE JOINTS" BETWEEN THE RELIGION CLAUSES

In *Locke v. Davey*,[1] the United States Supreme Court affirmed that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[2] The Court held that there is room for "play in the joints"[3] between the First Amendment's two Religion Clauses,[4] within which the State of Washington may choose to fund a scholarship for all eligible students except those students who choose to pursue a major in devotional theology. Both Chief Justice Rehnquist, writing for the majority,[5] and Justice Scalia in dissent,[6] agreed that the Establishment Clause would allow Washington to provide scholarships to students who major in theology, but the two Justices differed on the question of whether, under the Free

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[1] 124 S. Ct. 1307 (2004).

[2] *Id.* at 1311.

[3] *Id.* ("[W]e have long said that 'there is room for play in the joints' between [the Establishment Clause and the Free Exercise Clause]."). Chief Justice Rehnquist quoted language from *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), in which the Court stated:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts *there is room for play in the joints* productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. (emphasis added).

[4] The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[5] *Davey*, 124 S. Ct. at 1311–12 ("[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . . ." (citing Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986))). Chief Justice Rehnquist authored the majority opinion on behalf of seven members of the Court. Justice Scalia dissented, joined by Justice Thomas, *id.* at 1315–20, and Justice Thomas filed a separate dissent, *id.* at 1320–21.

[6] *Id.* at 1317 (Scalia, J., dissenting) ("The establishment question *would not even be close*, as is evident from the fact that this Court's decision in [*Witters*] was unanimous." (citation omitted)). Justice Thomas previously stated in *Mitchell v. Helms* that the Establishment Clause does not forbid a state from funding religious schools and "other doctrines" may bar a state's refusal to fund religious education. Mitchell v. Helms, 530 U.S. 793, 829 (2000) (plurality opinion) ("In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it."). *Mitchell v. Helms* was a plurality decision that upheld, on Establishment Clause grounds, the use of federal funds channeled through Louisiana educational authorities, even though 30% of them were allocated to private, often religious schools.

Exercise Clause, Washington *may* choose to fund religious scholarships, or whether it *must* do so.

I

Washington awards a "Promise Scholarship,"[7] administered through its Higher Education Coordinating Board ("HECB"), to select students attending post-secondary schools. Eligibility is based on academics, family income, and enrollment requirements.[8] An eligible student may attend any accredited school in the state, whether it be public or private, non-secular or religious; may use the Promise Scholarship to subsidize up to two years of post-secondary education; and may "spend the funds on any education-related expense, including room and board."[9] The only caveat is that qualifying students may not use the Scholarship to pursue a degree in theology.[10]

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[7] Washington initiated the Promise Scholarship in 1999 "to facilitate college attendance by low to middle income students from Washington who ranked among the top 10% of their high school class." Davey v. Locke, No. C00-61R, 2000 U.S. Dist. LEXIS 22273, at *2 (W.D. Wash. Oct. 5, 2000). The value of the Scholarship varies from year to year depending on the level of funding and the number of qualifying applicants. *Id.* For the 1999–2000 academic year, the Scholarship was worth $1,125, *id.*, and increased to $1,542 for 2000–2001, Davey v. Locke, 299 F.3d 748, 750 (9th Cir. 2002).

[8] When Davey filed his case in the district court, the pertinent provision of the Washington law defined "Eligible student" as a person who:

(a) Graduates from a public or private high school located in the state of Washington; and
(b) Is in the top ten percent of his or her 1999 graduating class; or
(c) Is in the top fifteen percent of his or her 2000 graduating class; and
(d) Has a family income less than one hundred thirty-five percent of the state's median; and
(e) Enrolls at least half time in an eligible postsecondary institution in the state of Washington; and
(f) Is not pursuing a degree in theology.

WASH. ADMIN. CODE § 250-80-020(12) (2000); *see also* WASH. REV. CODE § 28B.10.814 (2002) ("No state aid shall be awarded to any student who is pursuing a degree in theology."). The state law has since been altered to require a minimum score on the ACT or SAT, but the restriction on excluding otherwise eligible students who major in theology remains. *See* WASH. ADMIN. CODE § 250-80-020(12)(g) (2004).

[9] *Davey*, 124 S. Ct. at 1310.

[10] HECB's policy provides that "no state aid shall be awarded to any student pursuing a degree in theology." *Davey*, 2000 U.S. Dist. LEXIS 22273, at *5 n.1; WASH. REV. CODE § 28B.10.814 (2002); WASH. ADMIN. CODE § 250-80-20(12)(f) (2000). The student's school of choice must determine whether the student is eligible for the scholarship—i.e., is not pursuing a degree in theology. The school must also confirm that the student enrolls at least half-time. WASH. ADMIN. CODE § 250-80-020(12)(e) (2000). HECB determines whether an applicant is eligible according to income and the student's high school academic record. If the student is initially eligible, HECB submits the funds directly to the recipient's school of choice. WASH. ADMIN. CODE § 250-80-020(12)(a)–(d) (2000).

Washington Governor Gary Locke's current Web page offers a brief general description of the Promise Scholarship, including the program's history since its inception in 1999, and provides the number of scholarship recipients since 1999 and estimates for the number of recipi-

Joshua Davey was preliminarily awarded a Promise Scholarship in the fall of 1999. He chose to attend Northwest College, a private Christian school affiliated with the Assemblies of God.[11] Upon enrollment,[12] Davey declared a double major in Business Management/Administration and Pastoral Ministry.[13] Administrators at Northwest then informed Davey that he was ineligible for the scholarship due to his declared major in Pastoral Ministry,[14] which Northwest determined qualifies as "theology." While Washington's statutes, rules, and regulations do not define the term "degree in theology," both parties conceded that "the statute simply codifies the State's constitutional prohibition on providing funds to students to pursue degrees that are 'devotional in nature or designed to induce religious faith.'"[15]

Davey filed suit under 42 U.S.C. § 1983 in the District Court for the Western District of Washington seeking to enjoin various officials of the State of Washington from denying him the scholarship.[16] The

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ents for 2003 and 2004. It does not mention, however, that the scholarship is not available to eligible students who choose to pursue a degree in theology. *See* Governor Gary Locke, State of Washington, Promise Scholarships, http://www.governor.wa.gov/educate/promise.htm (last visited May 12, 2004).

[11] Northwest College is an eligible school under the Promise Scholarship Program. *Davey*, 124 S. Ct. at 1310.

[12] It is customary for students at Northwest College to declare a major upon enrollment. Brief for Respondent at 5, *Davey* (No. 02-1315).

[13] *Id.* at 5.

[14] Davey's brief emphasized that "Washington disqualifies from the Promise Scholarship those who *declare* a major in *theology*." *Id.* at 6–7. Two students may take "the *very same courseload*," but only the student who *declares* a major in theology is disqualified. *Id.*

[15] *Davey*, 124 S. Ct. at 1310 (citing Brief for Petitioners at 6; Brief for Respondent at 8). Throughout the Court's majority opinion, Chief Justice Rehnquist consistently employs the term "devotional theology," *see id.* at 1309–13, 1315, a term that was not used by either the District Court for the Western District of Washington, which upheld the Scholarship, or the Court of Appeals for the Ninth Circuit, which struck down the Scholarship as a violation of the Free Exercise Clause. Presumably, the Chief Justice intended his syntax to limit the majority's holding to denials of the scholarship for students studying "theology" taught from a religious perspective, and not for students pursuing a more general major in religious studies. In dissent, Justice Thomas noted that "the study of theology does not necessarily implicate religious devotion or faith." *Id.* at 1320 (Thomas, J., dissenting); *see also id.* ("Because the parties agree that a 'degree in theology' means a degree that is 'devotional in nature or designed to induce religious faith,' I assume that this is so for purposes of deciding this case." (quoting Brief for Petitioners at 6; Brief for Respondent at 8)). Davey's brief to the Supreme Court never employed the exact term "devotional theology," preferring instead the phrase "major in theology taught from a religious perspective," Brief for Respondent at i, which was the terminology employed by the Ninth Circuit, *see, e.g.*, Davey v. Locke, 299 F.3d 748, 760 (9th Cir. 2002).

[16] Davey v. Locke, No. C00-61R, 2000 U.S. Dist. LEXIS 22273 (W.D. Wash. Oct. 5, 2000). Davey also brought claims under the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment, as incorporated by the Fourteenth Amendment; the Equal Protection Clause of the Fourteenth Amendment; and article I, §§ 11 and 5 of the Washington Constitution. Article I, § 11, the "Religious Freedom" provision of Washington's constitution, provides that:

district court rejected all of Davey's claims and granted summary judgment in favor of Washington.[17] The Court of Appeals for the Ninth Circuit reversed.[18] The divided panel stated that "denying a Promise Scholarship to a student otherwise qualified for it according to objective criteria solely because the student decides to pursue a

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> Absolute freedom of conscience in all matters of religious sentiment, belief and worship shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. *No public money shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment* . . . .

WASH. CONST. art. I, § 11 (emphasis added). At the district court level, Davey relied on the first portion of this provision, which he argued guaranteed protection to "use Promise Scholarship funds to pursue religious instruction as an expression of his beliefs." *Davey*, 2000 U.S. Dist. LEXIS 22273, at *6. Conversely, HECB argued that the last sentence of this article is a valid prohibition on the use of state money to fund religious education. *Id.*

Article I, § 5 is the free speech clause of Washington's constitution, which provides that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. I, § 5. The district court denied this claim outright noting that neither HECB's policy nor the state statute at issue regulates speech. *Davey*, 2000 U.S. Dist. LEXIS 22273, at *11 ("Davey can still speak freely—he just cannot demand that Washington pay for him to do so.").

[17] *Davey*, 2000 U.S. Dist. LEXIS 22273. The district court concluded that "[b]ecause the Washington Constitution prohibits the funding of religious instruction, both by its express terms and as interpreted by the state's highest court, HECB is entitled to judgment as a matter of law on Davey's Article I, § 11 claims." *Id.* at *9. The court relied on the Washington Supreme Court's decision in *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash.), *cert. denied*, 493 U.S. 850 (1989) (mem.), which was taken on remand from the U.S. Supreme Court. *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986). The U.S. Supreme Court had held that providing state aid, as part of a rehabilitative program, to a student who was using the funds to study to become a minister, did not violate the federal Establishment Clause. On remand, however, the state supreme court held that "the state establishment clause was more restrictive on government funding than the federal provision." *Davey*, 2000 U.S. Dist. LEXIS 22273, at *9. The state court found that, although the Establishment Clause of the U.S. Constitution permitted Washington to fund certain religious aid, the state establishment clause precluded such funding. Thus, the state could permissibly decline to provide aid to Mr. Witters.

The district court rejected Davey's other claim under Washington's constitution. *See Davey*, 2000 U.S. Dist. LEXIS 22273, at *11–12 (rejecting claims under the "free speech" clause of Washington's constitution, WASH. CONST. art. I, § 5). The court also rejected all of Davey's claims under the U.S. Constitution. *See id.* at *12–17 (rejecting claims under the Free Exercise Clause); *id.* at *17–18 (rejecting claims under the Establishment Clause); *id.* at *18–23 (rejecting claims under the Free Speech and Free Association Clauses); *id.* at *24–25 (rejecting claims under the Equal Protection Clause of the Fourteenth Amendment); *id.* at *25–26 (rejecting "vagueness" claims under the Fourteenth Amendment).

[18] Davey v. Locke, 299 F.3d 748 (9th Cir. 2002). The Ninth Circuit held that the policy employed by HECB facially discriminated against religion; since it lacked neutrality on its face, the policy must survive strict scrutiny. *Id.* at 750. Because the court found that Washington did not have a compelling state interest in not violating its own constitution, which prohibits the state from providing tax dollars to fund religious education, it held that denying Davey the scholarship was unconstitutional. *Id.*

degree in theology from a religious perspective infringes his right to the free exercise of his religion."[19]

II

The United State Supreme Court granted certiorari[20] and in a seven-to-two opinion authored by Chief Justice Rehnquist, reversed the Ninth Circuit.[21] The Court addressed the question "whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause."[22] A strong majority of the Court answered that question in the affirmative. It concluded that even though, under the Court's Establishment Clause precedent, Washington could choose to provide Davey a Promise Scholarship to fund his degree in Pastoral Ministry, the Free Exercise Clause does not require Washington to make that "choice."[23] This follows upon *Witters v. Washington Department of Services for the Blind*,[24] in which the Court unanimously held that Washington would not violate the Establishment Clause by providing public funds for rehabilitative education to a student studying to be a minister.[25]

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[19] *Id.* at 760. The Ninth Circuit held that the Promise Scholarship violated the Free Exercise Clause of the U.S. Constitution. *Id.* at 750. Although the court discussed Davey's other constitutional claims, it declined to reach them once it found a free exercise violation. *Id.* at 760.

[20] Locke v. Davey, 123 S. Ct. 2075 (2003) (mem.).

[21] Even though Davey asserted claims under the Free Speech Clause of the First Amendment as well as the Equal Protection Clause of the Fourteenth Amendment, Chief Justice Rehnquist summarily rejected Davey's claims under those two clauses in one footnote. Locke v. Davey, 124 S. Ct. 1307, 1312 n.3 (2004). He stated that "the Promise Scholarship Program is not a forum for speech," thus vitiating Davey's free speech claim, and that the program passes the deferential "rational-basis" review under the Equal Protection Clause. *Id.*

[22] *Id.* at 1312 (citations omitted).

[23] *Id.* at 1311–12.

[24] 474 U.S. 481 (1986).

[25] In a way, *Davey* serves as a "companion case" to *Witters* since, in *Davey*, Davey essentially argued the flip-side of the *Witters* coin. Once the Supreme Court definitively declared that Washington was constitutionally permitted to fund religious education, if the funding was a part of a general funding scheme and not intended to favor religion qua religion, it was only a matter of time before someone like Davey alleged that if Washington provided such aid for secular programs, it was required to provide aid to religious programs as well. *Witters* was decided in the middle of a line of cases that upheld state funding of religious education when public funds flow through a student or parent, before they reach the school. The student's "independent and private choice" to apply scholarship funds toward religious education (since the student is not bound to attend parochial school) breaks the link between church and state for Establishment Clause purposes. *Davey*, 124 S. Ct. at 1311; *see* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding, under the Establishment Clause, a pilot program in Ohio that provided aid to private schools, including religious schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that the Establishment Clause permits a publicly employed sign-language interpreter to accompany a deaf student to classes at a Catholic high school, pursuant to the

The Court reviewed the Free Exercise Clause precedent on which Davey relied and concluded that the Promise Scholarship involved different factual circumstances and "far milder" state disfavor of religion than the Court had invalidated in prior cases.[26] For instance, the Washington program did not involve imposing "criminal [or] civil sanctions on any type of religious service or rite";[27] did not prohibit ministers from participating in "the political affairs of the community";[28] and did not require Davey to make a forced "choice" between adhering to a religious belief and receiving a government benefit.[29]

The Court noted a strong opposition to funding religious instruction throughout the history of the United States[30] that supported Washington's choice to fund one form of "training" while choosing not to fund another, since "training for religious professions and training for secular professions are not fungible."[31] Like the United States Constitution, Washington's constitution draws a line between

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Individuals with Disabilities Act); Mueller v. Allen, 463 U.S. 388 (1983) (upholding, under the Establishment Clause, a Minnesota law that allowed parents to deduct expenses from their children's elementary and secondary school tuition and costs, even though the deduction primarily benefited parents whose children attended religious schools).

[26] *Davey*, 124 S. Ct. at 1312.

[27] *Id.* (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (striking down as unconstitutional city ordinances that criminalized certain types of animal slaughter, which were specifically geared towards suppression of the free exercise of the Santeria religion)).

[28] *Id.* (citing McDaniel v. Paty, 435 U.S. 618 (1978) (striking down a Tennessee statute that forbade ministers from being elected to serve as a delegate at the state constitutional convention as a violation of the Free Exercise Clause)).

[29] *Id.* at 1312–13 (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (holding that the denial of unemployment compensation benefits based on an individual's refusal to work certain times because of her religious beliefs was a violation of the Free Exercise Clause); Thomas v. Review Bd., 450 U.S. 707 (1981) (holding, under the Free Exercise Clause, that Indiana could not deny unemployment compensation benefits to an individual who terminated his job because his religious beliefs forbade him to produce armaments); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the denial of unemployment compensation benefits based on an individual's refusal to work on Saturdays because of her religious beliefs was a violation of the Free Exercise Clause)).

[30] The Court noted that historically, "[s]ince the founding of our country," citizens have opposed using tax dollars to fund religious education. *Id.* at 1313–14; *see also id.* at 1313 n.6 (citing JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785)). Madison's *Memorial and Remonstrance* was written in opposition to a "Bill establishing a provision for Teachers of the Christian Religion," that was proposed in Virginia. MADISON, *supra*, *reprinted in* STEVEN G. GEY, RELIGION AND THE STATE 4 (2001). He stated that providing public funds to support religious teaching would be a "dangerous abuse of power." *Id.*; *see also* Marci Hamilton, *The Supreme Court Issues a Monumental Decision: Equal State Scholarship Access for Theology Students Is Not Required by the Free Exercise Clause*, FINDLAW (Feb. 27, 2004), *at* http://writ.news.findlaw.com/hamilton/20040227.html ("James Madison's important *Memorial and Remonstrance* rested on [the very principle of prohibiting the payment of government funds for ministerial education]. And in its opinion in [*Davey*], the Court points out that most states have—and have had, from the beginning—similar prohibitions to Washington's in their constitutions.").

[31] *Davey*, 124 S. Ct. at 1313.

secular education and religious pursuits, which the Court characterized as "of a different ilk."[32] With both American history and the plain text of the state constitution on its side, Washington is entitled to choose not to fund training for those who wish to pursue a religious calling.[33]

The Court rejected Davey's reliance upon *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[34] refusing to "extend the *Lukumi* line of cases well beyond not only their facts but their reasoning."[35] The Court distinguished the Washington program on the grounds that, in *Lukumi*, the state action at issue had an "impermissible object": it evinced clear hostility toward the Santeria religion.[36] In contrast, the Court did not consider the Promise Scholarship hostile towards religion.[37] Rather, the scholarship "goes a long way toward including religion in its benefits."[38] The only limitation is that students may not *both* major in devotional theology *and* receive a Promise Scholarship. The Court refused to follow *Lukumi* absent a finding that the Washington statute or the HECB policy showed animus toward religion.[39] Since *Lukumi* was inapposite, the Promise Scholarship Program did not warrant the application of strict scrutiny and was not presumptively unconstitutional.[40] Thus, the Court rejected Davey's claims since Washington's "interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars."[41] The Court concluded that the Promise Scholarship, as it currently operated, did not violate the Free Exercise Clause. Even though, under the Establishment Clause, Washington could permissibly allow students to apply

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[32] *Id.* at 1314.

[33] *See id.* at 1313 ("The State has merely chosen not to fund a distinct category of instruction.").

[34] 508 U.S. 520 (1993).

[35] *Davey*, 124 S. Ct. at 1312.

[36] *Lukumi*, 508 U.S. at 524.

[37] *Davey*, 124 S. Ct. at 1314–15; *see id.* at 1314–15 n.8 (citing examples of Washington's "solicitous" attempt to "[ensure] that its constitution is not hostile towards religion").

[38] *Id.* at 1314. First and foremost, students may attend "pervasively religious schools," *id.* at 1315, they may enroll in devotional theology courses, *id.*, and "may have additional religious requirements as part of their majors," *id.*

[39] *See id.* ("In short, we find neither in the history or text of Article I, § 11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion.").

[40] Chief Justice Rehnquist's opinion never specified which type of scrutiny the majority applied; it simply stated that since no presumption of unconstitutionality existed, Davey's claim must fail. *See id.* The Court seemed to engage in some sort of balancing approach in weighing the competing interests at stake since it considered the state's interest in not funding religious education "substantial" and Davey's burden in not receiving the scholarship "relatively minor." *Id.*; *see also id.* at 1318 (Scalia, J., dissenting) (noting parenthetically that the majority opinion is "devoid of any mention of standard of review").

[41] *Id.* at 1315 (majority opinion).

Promise Scholarships towards degrees in theology, the Free Exercise Clause does not force Washington to make that "choice." "If any room exists between the two Religion Clauses, it must be here."[42]

III

Justice Scalia, joined by Justice Thomas,[43] dissented, contending that the Court's decisions in *Lukumi*[44] and *McDaniel v. Paty*[45] required the Court to apply strict scrutiny to Washington's program.[46] Justice Scalia disagreed with the majority's interpretation of precedent and history, which it used to demonstrate that state funding of clergy had historically been disfavored.[47] He relied heavily on the principle of "neutrality" and asserted that the majority's decision, which sustains "a public benefit program that facially discriminates against

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[42] *Id.*

[43] Justice Thomas also filed a separate dissent. *See id.* at 1320–21 (Thomas, J., dissenting); *see also infra* Part IV (analyzing Thomas's dissenting opinion).

[44] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that a law that is neither neutral towards religion nor generally applicable must survive strict scrutiny).

[45] 435 U.S. 618 (1978) (holding that a state may not, consistent with the Free Exercise Clause, preclude ministers from being eligible for election to serve at the state's constitutional convention). Justice Scalia noted that in *McDaniel*, the state had a bona fide interest in remaining faithful to the separation of church and state, but that interest "did not justify facial discrimination against religion." *Davey*, 124 S. Ct. at 1320.

[46] *Davey*, 124 S. Ct. at 1315–20.

[47] Justice Scalia argued that the "history" upon which the majority opinion relied referred to programs that singled out religious groups for aid. He thought that the majority mischaracterized the historical "disfavor" of using tax dollars to fund clergy by not drawing a distinction between laws that favored clergy specifically and laws that included clergy in part of a scheme of generally applicable benefits. *Davey*, 124 S. Ct. at 1316–17 & n.1. He stated, "One can concede the Framers' hostility to funding the clergy *specifically*, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all." *Id.* at 1316. Additionally, Justice Scalia alleged that the majority's reliance on early state constitutions was equally misplaced. *Id.* at 1317 n.1. He believes that these early constitutions only meant to preclude laws that singled-out clergy for aid, not laws that excluded clergy from receiving generally available public benefits. *Id.* The majority's interpretation, he wrote, "has no logical stopping-point short of the absurd." *Id.* Chief Justice Rehnquist on the other hand, uses that very point to strengthen the majority's holding: "That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk." *Id.* at 1314 (majority opinion). The text of article I, § 11 of Washington's constitution prohibits the use of public money for religious education without distinguishing between laws that exclude clergy *specifically* and laws that exclude clergy as part of a general scheme. WASH. CONST. art. I, § 11 ("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 . . . ."). Justice Scalia was not impressed by the majority's reliance upon the "plain text" of such state constitutions. *Davey*, 124 S. Ct. at 1317 n.1 (Scalia, J., dissenting) ("Since the Court cannot identify any instance in which [state constitutional provisions that prohibited the use of tax funds to support the ministry] were applied in such a discriminatory fashion, its appeal to their 'plain text' adds nothing whatever to the 'plain text' of Washington's own Constitution." (citation omitted)).

religion,"[48] is irreconcilable with the Court's decision in *Lukumi*.[49] He cited *Everson v. Board of Education* for the principle that "governs this case":[50] that a state may not exclude members of any religious group, "because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[51]

Justice Scalia criticized the majority's use of the "principle"[52] of "play in the joints."[53] In Justice Scalia's view, "play in the joints" must necessarily cede to neutrality: "If the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones."[54] He argued that Washington could revise its program in numerous ways that would not discriminate on the basis of religion, but that "just happen[] not to subsidize it."[55] Justice Scalia assailed the state's asserted interests in not funding religious education as "pure philosophical preference: the State's opinion that it would violate taxpayers' freedom of conscience *not* to discriminate against candidates for the

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[48] *Davey*, 124 S. Ct. at 1316 (Scalia, J., dissenting).

[49] *Lukumi* held that a statute that was neither neutral nor generally applicable must survive strict scrutiny. 508 U.S. at 546. "Neutrality" at minimum means that "a law not discriminate on its face." *Id.* at 533.

[50] *Davey*, 124 S. Ct. at 1316 (Scalia, J., dissenting) (citing Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)).

[51] *Id.* (quoting *Everson*, 330 U.S. at 16). Neither Justice Scalia nor Chief Justice Rehnquist cited to Justice Black's famous statement in *Everson*, which, if followed, could also "govern this case": "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson*, 330 U.S. at 16. It may be that "this principle [is] now nothing more than a historical artifact[.]" STEVEN G. GEY, RELIGION AND THE STATE 75 (Supp. 2003).

[52] *Davey*, 124 S. Ct. at 1317 (Scalia, J., dissenting) ("I use the term 'principle' loosely, for that is not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives.").

[53] *Id.* at 1317. Justice Scalia states, "There is nothing anomalous about constitutional commands that abut." *Id.* As an example, he provides: "A municipality hiring public contractors may not discriminate *against* blacks or *in favor of* them; it cannot discriminate a little bit each way and then plead 'play in the joints' when haled into court." *Id.* (implicitly referring to, but not citing by name, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 479 (1989), which invalidated Richmond's city council's plan requiring contractors receiving city construction contracts to subcontract at least thirty percent of the dollar amount of its contracts to Minority Business Enterprises). But Justice Scalia's example fails to explain constitutional commands that "abut." In order for there to be "play in the joints" in the race discrimination context, it seems there would have to be a "constitutional command" that conflicts with the Equal Protection Clause. There is no "play in the joints" in Equal Protection Clause jurisprudence because there are no joints: there is just one Equal Protection Clause. "Play in the joints" exists precisely because the Constitution includes two Religion Clauses: "the Establishment Clause and the Free Exercise Clause, [which] are frequently in tension." *Id.* at 1311 (majority opinion). Justice Scalia does not supply any principle that could potentially be "in tension" with the Equal Protection Clause in the example that he cites.

[54] *Id.* at 1317 (Scalia, J., dissenting).

[55] *Id.* Citing Washington's "usually sensitive concern for the conscience of its taxpayers," Justice Scalia offers the suggestion that Washington could make "scholarships redeemable only at public universities" or "only for select courses of study," either of which, he maintains, would comply with the Free Exercise Clause. *Id.*

ministry."[56] He criticized the majority's attempt to justify the Washington policy by claiming that Davey's burden is minimal and that the policy shows no animus toward religion.[57] He countered that Davey's burden is substantial; essentially, denial of the scholarship is equal to a $3,000[58] financial penalty that Davey must pay to *freely* exercise his religion.[59] Secondly, he disagreed that a legislature's motives should have any bearing on whether a law should be struck down as unconstitutional, noting that the Court typically does not require a showing of "substantial harm" before invalidating a discriminatory statute.[60]

Scalia made his view clear towards the end of his opinion: "Let there be no doubt: This case is about discrimination against a religious minority . . . . [T]hose whose belief in their religion is so strong that they dedicate their study and their lives to its ministry . . . ."[61] Washington offered a generally applicable benefit and "carved out a solitary course of study for exclusion: theology."[62] Thus, the Washington policy denied Davey equal protection under the law.[63] Justice Scalia stated:

> When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.[64]

Davey was discriminated against solely because of his religious beliefs, which, according to Justice Scalia, violates the Free Exercise Clause. Washington's policy does not discriminate against members of a particular faith, or favor one religion over another; instead, it favors those who practice "only a tepid, civic version of faith."[65] Justice Scalia analogized Davey's plight to that of "other disfavored groups,"

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[56] *Id.* at 1318. Scalia suggests that this type of "preference" has "no logical limit" and fears that it could be used to exclude religion "from public programs in virtually any context." *Id.* Chief Justice Rehnquist, writing for the majority, responded to Justice Scalia's concern stating, "the only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands." *Id.* at 1313 n.5 (majority opinion).

[57] *Id.* at 1318–19 (Scalia, J., dissenting).

[58] Davey sacrificed $2,667. *See id.* at 1310 (majority opinion) ("The scholarship was worth $1,125 for academic year 1999–2000 and $1,542 for 2000–2001.").

[59] *Id.* at 1319 (Scalia, J., dissenting).

[60] *Id.* ("The Court has not required proof of 'substantial' concrete harm with other forms of discrimination and it should not do so here." (citations omitted)).

[61] *Id.* at 1320.

[62] *Id.* at 1316.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 1320 (Scalia, J., dissenting).

including "blacks,"[66] men ages eighteen to twenty,[67] women,[68] and homosexuals.[69] He implied that because the Court has "come to the aid of" other minority groups in recent years, it should be sensitive to religious "minorities" as well.[70] The analysis he applied, with reference to several equal protection cases, resembled an "equal protection analysis" under the Free Exercise Clause.[71]

IV

Justice Thomas filed a separate dissent[72] to express his concern that the term "theology," which Washington does not define, is capable of a much broader interpretation than the majority narrowly credits it. Generally, he wrote, "the study of theology does not necessarily implicate religious devotion or faith."[73] Rather, "theology" could include study "from a secular perspective as well as from a religious one."[74] Thus, Thomas wrote separately to convey his understanding that the majority's opinion, although in his view

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[66] *Id.* at 1319 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954) (striking down segregation on the basis of race in public schools as a violation of the Equal Protection Clause); Hunt v. Cromartie, 526 U.S. 541 (1999) (reversing a summary judgment order and remanding to district court the issue whether congressional district lines were racially gerrymandered, concluding that a genuine issue of material fact existed as to whether the state's redistricting scheme was racially motivated; Justice Scalia joined the majority)).

[67] *Id.* (citing Craig v. Boren, 429 U.S. 190 (1976) (striking down a Oklahoma law that prohibited sales of three and two-tenths percent beer to men under twenty-one years but only to women under eighteen years of age, as a violation of the Equal Protection Clause)).

[68] *Id.* at 1319 (citing United States v. Virginia, 518 U.S. 515 (1996) (holding that the Virginia Military Institute's male-only admissions policy violated the Equal Protection Clause; Justice Scalia dissented); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidating a federal statute that set fixed wage standards for women on equal protection grounds)).

[69] *Id.* at 1320 (citing Romer v. Evans, 517 U.S. 620 (1996)); *see infra* note 70 (discussing *Romer*).

[70] *Davey*, 124 S. Ct. at 1320 (Scalia, J., dissenting) ("In an era when the Court is so quick to come to the aid of other disfavored groups, its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional."). Justice Scalia cited *Romer v. Evans*, 517 U.S. 620 (1996), a case in which the Court "came to the aid" of homosexuals by invalidating an amendment to Colorado's constitution that forbade any state actor from granting homosexuals "protected status." Justice Scalia "vigorously" dissented from the Court's opinion and criticized the majority for placing "the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias." *Romer*, 517 U.S. at 636 (Scalia, J., dissenting). He lambasted the majority for "imposing" the "elite" view that "'animosity' towards homosexuality is evil." *Id.* (citation omitted).

[71] *Cf.* McDaniel v. Paty, 435 U.S. 618, 643 (1978) (White, J., dissenting) (disagreeing with the plurality and concurring opinions that found the Tennessee statute at issue to violate the Free Exercise Clause, but asserting that the law was unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment).

[72] *Davey*, 124 S. Ct. at 1320–21 (Thomas, J., dissenting).

[73] *Id.* at 1320.

[74] *Id.* at 1321.

erroneous, is limited "to students who pursue a degree in *devotional theology*."[75]

V

In holding that Washington may single out religion for discriminatory treatment, the Court disrupted the seemingly clear split between a permissible neutral, generally applicable law that incidentally burdens the free exercise of religion[76] and an impermissible law that singles out religion on its face for discriminatory treatment.[77] The Court retreated from the broad language it used in *Lukumi* and seemed to limit the application of strict scrutiny to instances when state actions evince hostility towards religion.[78] The Court's holding grants significant deference to states as to which forms of education they choose to fund (or not to fund) and, for the time being, leaves intact numerous state constitutions and statutes that explicitly forbid expenditures of state funds to support religious education.

The Framers of the First Amendment sought to safeguard the freedoms of Americans by protecting them against the threat posed by state-sponsored establishment of religion (the Establishment Clause) and, of equal importance, by securing each citizen's right to freely practice one's chosen faith (the Free Exercise Clause). The Framers "singled out" religion for protection in both contexts,[79] in a sense discriminating both *against* religion (Establishment Clause) and *in favor of* religion (Free Exercise Clause) beginning with the very first

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[75] *Id.* (emphasis added).

[76] *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that a neutral, generally applicable criminal law that prohibited use of peyote, even for use in religious ceremonies, did not violate the Free Exercise Clause); *see also Davey*, 124 S. Ct. at 1318 (Scalia, J., dissenting) (citing *Smith* and noting that the Court is no longer "in the business of reviewing facially neutral laws that merely happen to burden some individual's religious exercise").

[77] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that such laws must survive strict scrutiny, which is nearly impossible); *see also* Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the Generally Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851 (2001) ("[T]he key to understanding the Constitution's protection of religious liberty in the post-*Smith* world is to locate the boundary line between neutral laws of general applicability and those that fall short of this standard.").

[78] *Davey*, 124 S. Ct. at 1314–15 (majority opinion).

[79] *See* Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 331 (1991) ("Those who claim that religion may not be 'singled out' must grapple with the very text of the First Amendment, which refers specifically to 'religion.' *Why* religion is distinguished from other forms of belief is open to many interpretations, but that it *was* distinguished seems undeniable."); *see also Davey*, 124 S. Ct. at 1313 ("[T]he subject of religion is one in which both the United States and 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.").

words of the Bill of Rights.[80] As Chief Justice Rehnquist stated, these clauses are often in tension,[81] and how they should be read in conjunction has often been hotly disputed.[82]

To add to the tension, the Washington Constitution strictly prohibits the use of state funds for religious education. In the larger political context of states' abilities to fund religion, Washington's constitution resembles a version of a "Blaine Amendment,"[83] which have been criticized due to their anti-Catholic motivations.[84] Although Chief Justice Rehnquist denied that the provision in Washington's

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[80] *See* McConnell, *supra* note 79, at 329 ("Both [free exercise and establishment principles] 'single out' religion for special treatment, but sometimes this is an advantage and sometimes a disadvantage.").

[81] *Davey*, 124 S. Ct. at 1311.

[82] *See* Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."); Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961). As Professor Kurland aptly stated:

> The utilization or application of these clauses in conjunction is difficult. For if the command is that inhibitions not be placed by the state on religious activity, it is equally forbidden the state to confer favors upon religious activity. These commands would be impossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause that to the due process clause, *i.e.*, they must be read to mean that religion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations.

Id. Scalia's dissenting opinion resembles Professor Kurland's analysis. He describes Davey's case as a matter of inequality and discrimination, *see Davey*, 124 S. Ct. at 1316, 1318–20 (Scalia, J., dissenting), and believes that any statute that facially discriminates on the basis of religion, like the Washington law, must satisfy strict scrutiny. *Id.* at 1316.

[83] The so-called "Blaine Amendment" was named after James G. Blaine, who was Speaker of the United States House of Representatives from 1869–75. Blaine proposed several versions of an amendment to the House, which, in various forms, strictly forbade state tax funds from being used for religious schools or property. *See* GEY, *supra* note 51, at 75. Following the introduction of Blaine's bill in 1875, several states proposed "baby-Blaine" amendments to their state constitutions, and currently, thirty-seven states have some form of constitutional provision that restricts state aid from flowing to religious education. *Id.* at 76. Chief Justice Rehnquist denied that the provision in Washington's constitution was in fact a Blaine Amendment. *Davey*, 124 S. Ct. at 1314 n.7 ("Neither Davey nor *amici* have established a credible connection between the Blaine Amendment and Article I, § 11 . . . ."). Chief Justice Rehnquist claimed that the Enabling Act of 1889, Act of Feb. 22, 1889, ch. 180, § 4, which authorized the enactment of the Washington Constitution, required the states to provide that public schools should be free from sectarian control. *Id.*; *see also* GEY, *supra* note 51, at 76 (stating same). While the Enabling Act required "free[dom] from sectarian control," however, it did not specifically require states to forbid tax dollars from being spent on religion. Act of Feb. 22, 1889, ch. 180, § 4. The framers of Washington's original constitution went above and beyond the requirement imposed by the Enabling Act by including a provision that specifically prohibits the use of state funds to support religious education. *See* WASH. CONST. art. I, § 11; *supra* note 16 (quoting WASH. CONST. art. I, § 11).

[84] *See, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 298 (paperback ed. 2004) (characterizing the "Blaine Amendment" as an anti-Catholic measure to restrict state funding of Catholic schools while allowing a "generalized Protestantism in public schools").

constitution is a Blaine Amendment,[85] and neither Justices Scalia nor Thomas brought up the subject of Blaine Amendments, it is important to note that laws prohibiting the use of state funds for religious education have a long history in the United States, and have been heavily criticized every step of the way. Nevertheless, states have enjoyed considerable deference in deciding how to appropriate state funds for education.

The use of precedent by both the majority and Justice Scalia in attempting to reconcile what the two Clauses command was "nothing short of bizarre,"[86] and borders on the disingenuous. Chief Justice Rehnquist relied on the factual distinctions between this case and the Court's prior free exercise cases to distinguish this case but did not effectively use precedent to support the majority's holding. Justice Scalia, on the other hand, cited general propositions included in past decisions but gleaned over glaring factual differences. The Chief Justice distinguished several other free exercise cases in an attempt to define what this case is *not*: it is not a city ordinance geared toward suppressing the rituals of one particular religion (citing *Lukumi*);[87] it is not a matter of precluding ministers from participating in state politics (citing *McDaniel v. Paty*);[88] and it does not require a choice between exercising one's religious belief or receiving a public benefit (citing the "unemployment compensation" line of cases).[89] Yet, he failed to cite one case that directly supports the majority's opinion that a state may deny a scholarship to a recipient solely on the basis of religion, or that a statute may, on its face, discriminate against religion.[90] The majority's opinion circumvented the clear language of

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[85] *Davey*, 124 S. Ct. at 1314 n.7; *see also supra* note 83 (discussing the Blaine Amendment and Chief Justice Rehnquist's dismissive arguments).

[86] To borrow a phrase used by Justice Scalia. *See, e.g.*, Brown v. Legal Found., 538 U.S. 216, 252 n.7 (Scalia, J., dissenting) ("The notion that the government can keep the property without compensation, and relegate the owner to his remedies against the private party, *is nothing short of bizarre*." (emphasis added)).

[87] *Davey*, 124 S. Ct. at 1312 (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)); *see also supra* note 27 and accompanying text (discussing *Lukumi*).

[88] *Davey*, 124 S. Ct. at 1312 (citing McDaniel v. Paty, 435 U.S. 618 (1978)); *see also supra* note 28 and accompanying text (discussing *McDaniel*).

[89] *Davey*, 124 S. Ct. at 1312 (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963)); *see also supra* note 29 and accompanying text (discussing the unemployment compensation cases). Justice Scalia disputed this final contention. *See Davey*, 124 S. Ct. at 1319 (Scalia, J., dissenting). He argued that Davey was forced to choose between exercising his religion and receiving state funds. However, Justice Scalia did not cite the "unemployment compensation" cases for support.

[90] As noted above, *see supra* note 3 and accompanying text, Chief Justice Rehnquist did cite to *Walz* to support his application of the principle that there exists room for "play in the joints" between the two Religion Clauses. *Walz* was decided under the Establishment Clause; it held that New York could permissibly grant tax exemptions to religious organizations for properties

Lukumi, which stated that if a law is not neutral or generally applicable, then it is presumptively unconstitutional and must survive strict scrutiny.[91] The majority declined to apply strict scrutiny,[92] however, and instead, effectively limited application of the "neutrality" principle employed by the Court in *Lukumi*, to cases where there is evidence of animus towards religion, or when a statute was enacted to burden religion. When the state's "disfavor of religion (if it can be called that) is of a far milder kind,"[93] strict scrutiny is not warranted.

In dissent, Justice Scalia relies heavily on *Lukumi* and *McDaniel* for the general propositions that a law that uses religion as a classification must satisfy strict scrutiny.[94] But Justice Scalia did not discuss the stark factual differences between *Lukumi*, *McDaniel*, and the case at hand. For instance, in *Lukumi*, there was considerable evidence indicating that the City of Hialeah enacted the ordinances in question *specifically* to suppress religiously-motivated rituals involved in the practices of Santeria.[95] In contrast, at issue in *Locke v. Davey*, was a provision in Washington's original constitution that reflected the political decisions of its framers[96] and the HECB policy that was enacted

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used solely for religious worship. As precedent, *Walz* is inapposite to the Court's holding in *Davey*.

[91] *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny."); *see also Davey*, 124 S. Ct. at 1315–16 (Scalia, J., dissenting) (quoting same); Davey v. Locke, 299 F.3d 748, 753 (9th Cir. 2002) (relying on *Lukumi* in striking down the Promise Scholarship on Free Exercise grounds and quoting it for the proposition that a non-neutral law that burdens religion undergoes the "most rigorous of scrutiny" (quoting *Lukumi*, 508 U.S. at 546)).

[91] *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 93 (1997) ("A strong majority of the Supreme Court had held that legislation enacted for the purpose of burdening or discouraging religious practice violates the Free Exercise Clause." (citing *Lukumi*, 508 U.S. at 532–33)).

[92] As Justice Scalia noted, the majority opinion did not state which standard of review it applied. *See Davey*, 124 S. Ct. at 1318 (Scalia, J., dissenting).

[93] *Id.* at 1312 (majority opinion).

[94] *Id.* at 1315–16 (Scalia, J., dissenting) (discussing *Lukumi*); *id.* at 1319–20 (discussing *McDaniel*).

[95] *Lukumi*, 508 U.S. at 542.

[96] WASH. CONST. art. I, § 11. In previous Religion Clause cases, Justice Scalia has been very sensitive to the history of certain practices. For example, in his dissent in *Lee v. Weisman*, 505 U.S. 577 (1992), Justice Scalia condemned the majority's holding that a prayer delivered at a high school graduation ceremony at a public school was a violation of the Establishment Clause; he criticized the majority opinion as "conspicuously bereft of any reference to history." *Id.* at 631 (Scalia, J., dissenting). He believed that the Establishment Clause should not be used to strike down such a long-standing practice of prayer at graduation and other public ceremonies. *Id.* at 631–32 ("Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution . . . must have deep foundations in the historic practices of our people."). In the gender-discrimination context, he has also shown deep sympathy for "tradition." *See, e.g.*, United States v. Virginia, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting) ("[The majority's opinion] counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government."). In his dissent in *Davey*, however, he characterized the views of the framers of

to comply with the state constitution.[97] Washington evinced no apparent animus toward religion; it just desired to maintain fiscal separation between chuch and state.

McDaniel v. Paty was a narrow holding in which the plurality held that Tennessee could not forbid ministers from running for public office.[98] The crux of the plurality opinion was that Tennessee could not force McDaniel to forgo one right (freely exercising his religious belief) so that he could exercise a different right (running for elected office).

Although no precedent directly supports the majority's decision not to apply strict scrutiny to a non-neutral law, that decision is sensible in light of the particular facts and circumstances surrounding Washington's decision not to fund ministerial training—Washington evinced no animus toward religion but rather only intended to avoid a conflict with the establishment clause in its own constitution. The majority's holding is logically consistent with the Court's decisions in *Lukumi* and *Employment Division v. Smith*.[99] At its core, *Lukumi* is a narrow holding: apply strict scrutiny only when a state specifically seeks to suppress the free exercise of religion. Essentially, *Smith* followed a similar line of reasoning. Justice Scalia, writing for the majority, declined to apply strict scrutiny to a neutral, generally applicable law that criminalized the possession of peyote and did not provide an exception for peyote use in religious rituals.[100] Justice Scalia refused to find that the right to the free exercise of religion outweighed the state's interest in enforcing its criminal laws.

Like in *Davey*, the decision was left up to the states: Each state can decide whether to carve out an exception from its criminal laws to

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Washington's constitution as "pure philosophical preference," 124 S. Ct. at 1318 (Scalia, J., dissenting), and the state's "usually sensitive concern" for its taxpayers, *id.* at 1317, despite the fact that these "preferences" and "concerns" have rested firmly in place since the drafting of Washington's constitution. Many state constitutions, including most state constitutions that were enacted around the time of the founding of this nation, included a provision that formally forbade use of tax funds to support the ministry. *See id.* at 1314 (majority opinion) (citing eight states' constitutions, enacted from 1776 to 1802, the plain text of which "prohibited *any* tax dollars from supporting the clergy").

[97] WASH. ADMIN. CODE § 250-80-020(12) (2000) (restricting an eligible student to one who "[i]s not pursuing a degree in theology"). The Ninth Circuit noted this difference in its opinion, but nevertheless held that the statute "implicates the free exercise interests implicated in *Lukumi*," since the statute referred to religion on its face. Davey v. Locke, 299 F.3d 748, 753 (9th Cir. 2002).

[98] 435 U.S. 618 (1978).

[99] 494 U.S. 872 (1990).

[100] *Id.* at 879 (citing cases for the proposition that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment))).

exempt religious practices; and each state can decide whether to fund religious training. Part of the decisions in both *Smith* and *Davey* were arguably influenced by "free exercise phobia."[101] Justice Scalia narrowly decided *Smith* to prevent everyone under the sun from claiming a religious exemption from having to obey criminal laws.[102] In the same respect, one can argue that Chief Justice Rehnquist narrowly decided *Davey* to prevent states from having to fund every conceivable form of religious education simply because they choose to support higher education in general. If one focused not on the law or policy at issue but instead at the effect on free exercise of religion, the decision in *Smith* is far more restrictive than *Davey*—if a state may criminalize and effectively forbid the "free exercise" of religion, albeit incidentally, by criminalizing peyote use, then a state should be able to make a funding choice, albeit intentionally, that excludes some categories while including others.

Chief Justice Rehnquist made a valid point in noting the Court's Establishment Clause jurisprudence that upheld the "private and individual choice" theory,[103] which is the proposition that the "link between government funds and religious training is broken by the independent and private choice of recipients."[104] This theory has

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[101] Duncan, *supra* note 77, at 853. Professor Duncan argues that this phobia motivated Justice Scalia's wariness of an overly protective Free Exercise Clause:

> In *Smith*, the voice whispering in Justice Scalia's ear warned him that a strongly protective free exercise doctrine would place at risk not only drug laws but also laws dealing with compulsory military service, payment of taxes, manslaughter, child neglect, compulsory vaccination, traffic regulation, minimum wages, child labor, animal cruelty, environmental protection, and racial equality. In short, the social contract itself might not survive a constitutional rule protecting religiously motivated conduct from governmental restrictions.

Id. at 854 (footnotes omitted).

[102] *See Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879), which sought to avoid letting "every citizen . . . become a law unto himself").

[103] *Davey*, 124 S. Ct. at 1311–12; *see* Witters v. Wash. Dep't Servs. for the Blind, 474 U.S. 481, 490–91 (1986) (Powell, J., concurring) (citing Mueller v. Allen, 463 U.S. 388 (1983), for the proposition that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choice of individual beneficiaries." (footnote omitted)); *id.* at 493 (O'Connor, J., concurring in part and concurring in the judgment) ("The aid to religion is the result of petitioner's private choice.").

[104] *Davey*, 124 S. Ct. at 1311–12; *see* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (upholding, under the Establishment Clause, a pilot program in Ohio that provided aid to private schools, including religious schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13–14 (1993) (holding that the Establishment Clause permits a publicly employed sign-language interpreter to accompany a deaf student to classes at a Catholic high school, pursuant to the Individuals with Disabilities Act); *Witters*, 474 U.S. at 487 (holding that Washington could, consistent with the Establishment Clause, provide rehabilitative aid to Witters even though he sought to use those funds for religious education); *Mueller*, 463 U.S. at 399–400 (upholding a tax deduction for parents whose children attended private, mostly sectarian schools, on the grounds that the benefits were equally available to all parents and that the benefit to religion resulted from the individual choice of parents).

withstood the test of time in the Court's Establishment Clause jurisprudence, and it is readily applicable to free exercise cases. In Establishment Clause cases, the state is generally not permitted to use tax dollars to directly support religious education. However, a state may provide money to the student or parents of students so that the "private and individual choice" of an individual breaks the chain between the state and religion: the Court then views the state as directly benefiting the parent and only indirectly benefiting the school, which may or may not be religious. That is why, under *Witters*, Washington clearly could choose to fund Davey under the Establishment Clause.[105] But Davey knew the rules and his individual choice disqualified him from receiving the scholarship—under the Promise Scholarship, it was Davey's choice whether to receive the scholarship or to pursue a major in theology.[106]

Locke v. Davey has been hailed as a "monumental decision" in favor of principles of separation of church and state.[107] As monumental as it may be, however, it is unclear whether the implications of the decision will in fact be "breathtaking,"[108] and to where the logic of this decision could possibly extend. The dissenting Justices explicitly stated that the scope of the Court's decision is narrow, but they were clearly worried about where the majority's logic could lead.[109] At issue in this case was a scholarship that amounted to less than $3,000, but if the surviving principle of this case is that a state law may discriminate

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[105] In *Witters*, the Court found that the Establishment Clause did not preclude the state of Washington from extending aid under a vocational rehabilitation program to a student attending a private, Christian college. But the Court specifically refused to announce that because the Establishment Clause permits Washington to extend such aid, that the Free Exercise Clause required such funding. *Witters*, 474 U.S. at 489 ("We decline petitioner's invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation aid to petitioners regardless of what the State Constitution commands or further factual development reveals, and we express no opinion on that matter.").

[106] Under the Promise Scholarship Program, Davey himself made every choice. He chose to apply for the Scholarship; chose to attend Northwest College, an eligible school; and chose to pursue a major in theology. Davey, therefore, chose to prioritize his "free exercise" of his religion over receiving the Promise Scholarship.

[107] *See* Hamilton, *supra* note 30 (describing the principles of the decision as profound).

[108] *See* Transcript of Oral Argument at 51–52, *Davey* (No. 02-1315) (statement by Justice Breyer) ("[T]he implications of this case are breathtaking . . . if your side wins every program, not just educational programs, but nursing programs, hospital programs, social welfare programs, contracting programs throughout the governments [would all be subject to the challenge] that they cannot be purely secular, that they must fund all religions who want to do the same thing . . . .").

[109] *See Davey*, 124 S. Ct. at 1320 (Scalia, J., dissenting) ("Today's holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go. What next?"); *id.* at 1320–21 (Thomas, J., dissenting) (worrying that the term "theology," since it is not defined by statute, could be extended to mean more than "devotional in nature" thus broadening the scope of the majority's holding).

against religion on its face, and explicitly exclude religion from various funding schemes, then the reach of this decision may indeed be profound. The Court granted considerable deference to the states to determine their own funding preferences. The focus of this case was not simply the Promise Scholarship and the reach of this case could affect the way Washington, or any other state with a similar constitutional or statutory provision, appropriates money for education. After all, the focus of the Court's opinion was the Washington Constitution, which forbids using public funds to support religious education in general, not clerical or ministerial education in particular.[110] States could interpret this decision to allow them free reign to exclude religious education from funding in other contexts, including vouchers.

In *Davey*, the Court drew a clear line: just because a certain funding decision may be constitutional under the Establishment Clause, it is not necessarily required by the Free Exercise Clause. Now that the Supreme Court has reaffirmed that there is room for "play in the joints" between the two Religion Clauses, states may choose to reassess all of their funding decisions in the interests of separation of church and state. States may choose to fund various private school initiatives and explicitly exclude religious training from these appropriations.[111] The Supreme Court has firmly declared that at least one

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[110] WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious . . . instruction . . . .").

[111] Justice Scalia asserts that Washington (and presumably, any other state) could choose to fund a scholarship or religious education in general without violating the Free Exercise Clause. He states that:

> [Washington] could make the scholarships redeemable only at public universities (where it sets the curriculum), or only for select courses of study. Either option would replace a program that facially discriminates against religion with one that just happens not to subsidize it. The State could also simply abandon the scholarship program altogether.

Davey, 124 S. Ct. at 1317 (Scalia, J., dissenting). It is seriously doubtful that Justice Scalia would rather have Washington abandon its scholarship program just to avoid free exercise concerns; he admits that abandoning it "would be a dear price to pay for freedom of conscience." *Id.* It seems odd as well that Justice Scalia would seriously contend that he would prefer that Washington chooses one of the options he provides that "just happen not to subsidize" religious education. Justice Scalia suggests that Washington could exclude from the scholarship students who choose to attend private schools or that Washington could fund just certain courses of study, a scholarship for art students, for example. But the Promise Scholarship is desirable because it offers recipients so many choices: public or private, religious or secular, and every choice of major except one. Justice Scalia notes these advantages in his opinion. *Id.* at 1319. Presumably, Washington could offer a form of scholarship that lists every possible course of study from anthropology to zoology as an available option but that "just happens" to exclude "theology." That Washington could engage in such an undertaking, however, just so that its program would "just happen not to subsidize" religion, borders on the absurd. It could be argued that such an undertaking is "so gerrymandered and devoid of plausible secular purpose," that it evinces an intent to discriminate against religion since deliberate enumeration of every conceivable major except theology would be no accident. *Id.* at 1317. However, since it is facially neutral—it does

choice to fund education in general but to exclude religious education is constitutional under the Free Exercise Clause.

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not mention religion—it should pass muster under Justice Scalia's view of the Free Exercise Clause if Washington shows that it had a secular purpose.

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