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Free Exercise: Neutrality, Animus and a Breath of Life into Substantial Burden

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FREE EXERCISE: NEUTRALITY, ANIMUS AND A BREATH OF LIFE INTO SUBSTANTIAL BURDEN

I. INTRODUCTION

Prior to *Locke v. Davey*,[1] modern Free Exercise jurisprudence consisted of two contextual poles. At one pole, a neutral criminal statute prohibiting the use of peyote that incidentally affected religion was upheld under a rational-basis review in *Employment Division, Department of Human Resources of Oregon v. Smith*.[2] Conversely, at the other pole, a reactionary prohibition of animal sacrifices, directed toward the religious practices of a specific group, was invalidated under strict scrutiny in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[3] The doctrine left uncertain the appropriate standard of review—rational-basis or strict scrutiny—for a contextual middle-ground between the two poles. *Davey* rid Free Exercise jurisprudence of this uncertainty and elucidated an appropriate standard of review for a non-neutral provision that is less hostile to religion than the challenged law in *Lukumi*.[4]

Ostensibly, *Davey* split the distance between the existing contextual poles by introducing an animus distinction, distinguishing benign discriminatory intent from animus.[5] Having created this new category, *Davey* applied a rational-basis review to a non-neutral law because the law evinced no animus toward religion.[6] Yet, there appears to be a subsurface battleground in *Davey* that reintroduces an erstwhile doctrine to the forefront of modern Free Exercise jurisprudence.[7] This Comment argues that: (1) *Davey* represents a resuscitation of a substantial burden test that, combined with the modern intent test of *Smith* and *Lukumi*, provides a comprehensive Free Exercise doctrine; (2) the animus distinction introduced in *Davey* may be problematic as a doctrinal tool; and (3) the animus distinction is unnecessary because the outcome of *Davey* hinges on a substantial burden consideration.

Part II of this Comment provides a background and explanation of Washington's challenged Promise Scholarship Program, along with its effect on Joshua Davey. Part III reviews the development of Free Exercise jurisprudence prior to *Davey*, first surveying the historic substantial

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1. 124 S. Ct. 1307 (2004).
2. 494 U.S. 872, 888-90 (1990).
3. 508 U.S. 520, 545-46 (1993).
4. *See* Locke v. Davey, 124 S. Ct. 1307, 1314-15 (2004) (citing *Lukumi*, 508 U.S. at 520 (1993)).
5. *See id.* at 1315.
6. *See id.*
7. *See id.* at 1312-13 (discussing the effect of the Promise Scholarship Program on Joshua Davey).

burden inquiry and then surveying the modern intent approach. In Part IV, this Comment discusses the procedural history of *Davey* in the federal courts. This discussion reviews arguments made by the parties and rationales used by both the majority and dissenting opinions in federal court.

Part V of this Comment provides a comprehensive analysis of the *Davey* decision and its contribution to Free Exercise jurisprudence. First, the analysis outlines six conceptual categories of Free Exercise challenges and discusses the appropriate standard of review for each category. This discussion demonstrates that the "effect" inquiry reintroduced in *Davey* is necessary, combined with an "intent" inquiry, to account for all Free Exercise circumstances. Next, the analysis argues that there are potential pitfalls associated with an animus distinction. Finally, the analysis proposes an approach to Free Exercise challenges called the "intent/effect" test that considers both the intent and effect of a challenged law. The proposed approach achieves the doctrinal goals of *Davey* while circumventing the precarious distinction between animus and non-animus discrimination.

II. FACTS

In 1999, the Washington State Legislature found that students who were successful in their high school pursuits may not have the financial means to obtain higher education because of difficulty in securing financial aid and the potential insufficiency of that financial aid.[8] Because the legislature found that "increasingly, an individual's economic viability is contingent on postsecondary educational opportunities," it sought to develop a state program that would assist higher education students.[9] To achieve that goal, the legislature enacted the Promise Scholarship Program, available to students who met the "academic, income, and enrollment requirements."[10] The Promise Scholarship provided an eligible student a once-renewable scholarship to attend Washington higher education institutions accredited by a nationally recognized accrediting organization.[11] The scholarship neither distinguished between public and private nor secular and religious institutions; rather, the scholarship was

8. WASH. REV. CODE ANN. § 28B.119.005 (West 2004).

9. *Id.*

10. *Davey*, 124 S. Ct. at 1307, 1310 (citing WASH. ADMIN. CODE § 250-80-020(12)(a)-(g) (2003)). To be eligible for the Promise Scholarship, a student must meet the following requirements: (1) graduate from a Washington high school, and (a) graduate in the top 15% of her class, or (b) attain a cumulative score of 1200 or better on her first attempt on the Scholastic Assessment Test I, or (c) attain a cumulative score of 27 or better on her first attempt on the American College Test; and (2) have a family income less than 135% of the state's median; and (3) enroll in an eligible postsecondary institution in the state of Washington pursuing any degree other than a degree in theology. *Id.* Joshua Davey met these requirements and, thus, was eligible for the Promise Scholarship. *Davey*, 124 S. Ct. at 1310.

11. *Davey*, 124 S. Ct. at 1310 (citing WASH. ADMIN. CODE § 250-80-020(13) (2003)).

designed to be used at any accredited higher education institution within the state of Washington.[12]

Joshua Davey graduated from high school in May 1999 and was notified in August 1999 of his eligibility to receive $1,125 from the Promise Scholarship Program for the upcoming school year.[13] Davey enrolled at Northwest College, a private Christian college, to pursue a double major in pastoral ministries and business management/administration.[14] Required classes for a pastoral ministries major at Northwest College are taught from the viewpoint that the Bible is foundational and represents truth, rather than merely a historical and scholarly point of view.[15] Moreover, the pastoral ministries major at Northwest College is "designed to prepare students for a career as a Christian minister."[16]

In October 1999, Washington's Higher Education Coordinating Board (HECB) informed financial aid administrators at institutions throughout the state that students pursuing a degree in theology were not eligible for the Promise Scholarship.[17] Each college or university is responsible for the classification of its programs, and Northwest College determined that its pastoral ministries major was a degree in theology.[18] Thus, the institution could not certify Davey's eligibility as required by the HECB.[19] Davey, faced with a choice of either accepting the scholarship or pursuing the pastoral ministries major, decided to forego the scholarship to pursue his chosen field of study.[20]

III. LEGAL BACKGROUND

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[21] To provide context to the development of Free Exercise jurisprudence, this Comment analyzes the circumstances and rationale of four often discussed cases that shaped the structure of Free Exercise in-

12. *Id.*

13. Katie Axtell, Note, *Public Funding for Theological Training Under the Free Exercise Clause: Pragmatic Implications and Theoretical Questions Posed to the Supreme Court in* Locke v. Davey, 27 SEATTLE U. L. REV. 585, 589 (2003).

14. *Davey*, 124 S. Ct. at 1310.

15. Davey v. Locke, 299 F.3d 748, 751 (9th Cir. 2002), *rev'd* 124 S. Ct. 1307 (2004).

16. *Locke*, 299 F.3d at 751.

17. *Id.* "A 'degree in theology' is not defined in the statute, but, as both parties concede, 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.'" *Davey*, 124 S. Ct. at 1310; *see also* WASH. CONST. art. I, § 11 (prohibiting the use of State funds to devotional education). "There is no dispute that the pastoral ministries degree is devotional and therefore excluded under the Promise Scholarship Program." *Davey*, 124 S. Ct. at 1310-11.

18. *Locke*, 299 F.3d at 751; *see also Davey*, 124 S. Ct. at 1310.

19. *Locke*, 299 F.3d at 751.

20. *Id.*

21. U.S. CONST. amend. I.

quiries before *Locke v. Davey*.[22] By no means all-encompassing, this background merely provides a basic review of the underlying Free Exercise issues that will surface in the Supreme Court's consideration of *Davey*.[23]

A. Sherbert v. Verner[24]

The Supreme Court first established "a simple, standard test for evaluating free exercise claims" in its 1963 decision in *Sherbert v. Verner*.[25] In *Sherbert*, a member of the Seventh-day Adventist Church was denied unemployment benefits because she was unavailable to work on Saturday, the Sabbath Day of her faith.[26] The South Carolina Employment Security Commission found that she was ineligible for benefits because the restriction on her Saturday work availability was equivalent to "fail[ing], without good cause," to accept work when offered.[27]

The Court enunciated a test balancing the protection of the free exercise of religion with the protection of compelling state interests.[28] First, the Court considered the effect of the law in *Sherbert*, and held that forcing an individual to choose between following her religion and forfeiting benefits inflicts "the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship."[29] Applying strict scrutiny, the Court held that the possibility of fraudulent claims was insufficient to justify such a substantial burden on an individual's First Amendment rights.[30]

According to the *Sherbert* doctrine, once a court determines that a governmental action imposes a substantial burden on religion, strict scrutiny is applied.[31] Under strict scrutiny, a law will be invalidated as unconstitutional unless the government is able to demonstrate that the ac-

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22. 124 S. Ct. 1307 (2004). *See also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990); McDaniel v. Paty, 435 U.S 618 (1978); Sherbert v. Verner, 374 U.S. 398 (1963); *see generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 12.3 (2d ed. 2002) (providing a general background to the Free Exercise doctrine).

23. *See also* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that timber harvesting and road construction by the government in an area traditionally used for religious purposes by Native American Indian tribes did not violate the Free Exercise Clause because the government was not "prohibiting" the exercise of religion); Wisconsin v. Yoder, 406 U.S. 205 (1972) (recognizing that a state's interest in universal compulsory education was insufficient to justify interfering with Amish children's religious beliefs by compelling them to attend school).

24. 374 U.S. 398 (1963).

25. Axtell, *supra* note 13, at 595.

26. *Sherbert*, 374 U.S. at 399-401.

27. *Id.* at 401.

28. *Id.* at 401-06.

29. *Id.* at 404.

30. *Id.* at 406. "[I]n this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

31. Axtell, *supra* note 13, at 595.

tion was the least restrictive means of accomplishing a compelling state interest.[32] Thus, the *Sherbert* doctrine is essentially an effect test, focusing the key inquiry on whether the challenged law imposes a substantial burden, or a sufficient effect, on religion.[33]

B. McDaniel v. Paty[34]

In *McDaniel v. Paty*, a Tennessee statute disqualified clergy from participating in the legislature.[35] Appellant McDaniel, an ordained minister of a Baptist Church, filed candidacy for a position with the constitutional convention.[36] An opposing candidate sued for a declaratory judgment, contending that the Tennessee statute disqualified McDaniel from serving as a delegate to the convention.[37] The issue before the Supreme Court was whether the statute barring ministers from serving as delegates deprived McDaniel "of the right to the free exercise of religion guaranteed by the First Amendment."[38]

The majority in *McDaniel* held that the statute prohibiting ministers from participating as delegates to the constitutional convention did, indeed, violate McDaniel's protected right to the free exercise of religion.[39] The majority noted that under the provision, "McDaniel cannot exercise [his right to be a minister and his right to seek and hold office] simultaneously because the State has conditioned the exercise of one on the surrender of the other."[40] The majority used the *Sherbert* analysis to conclude that this statute imposed a substantial burden, stating "'[[t]o] condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties.'"[41] Having found a substantial burden, the majority applied strict scrutiny and invalidated the Tennessee statute.[42]

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32. Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirements*, 3 U. PA. J. CONST. L. 850, 851-52 (2001).

33. *See Sherbert*, 374 U.S. at 403.

34. 435 U.S. 618 (1978).

35. *McDaniel*, 435 U.S. at 620.

36. *Id.* at 621.

37. *Id.*

38. *Id.* at 620.

39. *Id.* at 629.

40. *Id.* at 626. The Court noted that "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions . . . ." *Id.* The Court also mentioned that Tennessee "acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention." *Id.*

41. *Id.* (quoting *Sherbert*, 374 U.S. at 406) (alteration in original).

42. *Id.* at 628-29. The majority held that Tennessee's interest was not compelling, stating that there is "no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." *Id.* at 629.

McDaniel supplements the doctrine outlined in *Sherbert* by once again applying an effect test and focusing the determinative inquiry on whether the challenged law imposes a substantial burden on religion.[43] *McDaniel* suggests that a generally available benefit cannot be conditioned on any action or inaction relating to religion.[44]

C. Employment Division, Department of Human Resources of Oregon v. Smith[45]

The Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith* limited the application of *Sherbert* and created the modern structure for evaluating Free Exercise infringement claims.[46] In *Smith*, the respondents were fired from their positions with a drug rehabilitation organization after they consumed peyote at a sacramental ceremony of the Native American Church.[47] Subsequently, the respondents were determined to be ineligible for unemployment benefits by the Employment Division because their employment discharge resulted from misconduct.[48] The respondents relied upon the "compelling state interest" test outlined in *Sherbert*[49] in their assertion that their religious motivation for the use of peyote placed them beyond the reach of Oregon's criminal law.[50]

The majority in *Smith* severely limited the *Sherbert* doctrine, excepting neutral laws of general applicability from strict scrutiny, even where there is a substantial burden on religion.[51] The majority opined that "incidental effect[s] of . . . generally applicable and otherwise valid provision[s]," which burden the free exercise of religion do not offend the Free Exercise Clause.[52] In an "attempt[] to cabin [*Sherbert's*] significance somewhere on the musty shelves of history,"[53] the majority declined "to breathe into *Sherbert* [any] life beyond the unemployment compensation field."[54]

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43. *See id.* at 626.
44. *Id.*
45. 494 U.S. 872 (1990).
46. Colleen Carlton Smith, Zelman's *Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs*, 89 VA. L. REV. 1953, 1968 (2003).
47. *Smith*, 494 U.S. at 874 (peyote is a controlled substance prohibited by Oregon law); *see* OR. REV. STAT. § 475.992(4) (1987).
48. *Smith*, 494 U.S. at 874.
49. *See generally Sherbert*, 374 U.S. at 398.
50. *Smith*, 494 U.S. at 878 ("'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)") (alteration in original).
51. Axtell, *supra* note 13, at 595-96.
52. *Smith*, 494 U.S. at 878; Axtell, *supra* note 13, at 595-96.
53. Davey v. Locke, 299 F.3d 748, 763 (9th Cir. 2002) (McKeown, J., dissenting), *rev'd* 124 S. Ct. 1307 (2004).
54. *Smith*, 494 U.S. at 884.

The doctrine developed in *Smith* denotes a significant shift from the effect test applied in *Sherbert* and *McDaniel*.[55] Rather than applying strict scrutiny to a law that imposes a substantial burden on religion, *Smith* declines to consider effect, applying a rational-basis test where a law is neutral and generally applicable.[56] Thus, the *Smith* doctrine focuses on the overall purpose, or intent, of a provision.[57] This novel intent test suggests that the effect inquiry of *Sherbert* is misplaced and inapplicable, instead focusing the determinative inquiry on the neutrality of the challenged provision.[58]

D. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah[59]

In 1993, the Court affirmed *Smith* and applied it to a fundamentally different set of facts, demonstrating the effect the test would have on a non-neutral and non-generally applicable law.[60] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Lukumi Babalu Church, whose members practice the Santeria religion and employ animal sacrifice as a "principal form[] of devotion," leased land and announced plans to create a place of worship in the city of Hialeah.[61] In response, the city council held an emergency session and passed an ordinance that prohibited animal sacrifice.[62] Once the city adopted the ordinance, the church filed a suit alleging that the ordinance was unconstitutional under the Free Exercise Clause.[63]

The Court made clear that the requirements of neutrality and general applicability articulated in *Smith* continued to apply,[64] and any law that failed to meet those requirements would be subjected to strict scrutiny.[65] The Court held that the ordinances were neither neutral nor gen-

55. *See* Axtell, *supra* note 13, at 595-96.

56. *Smith*, 494 U.S. at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the *effects* of a governmental action on a religious objector's spiritual development'") (emphasis added) (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)). Moreover, comparing Free Exercise jurisprudence to racial discrimination and free speech, the majority concluded "that generally applicable, religion-neutral laws that have the *effect* of burdening a particular religious practice need not be justified by a compelling governmental interest . . . ." *Id.* at 886 n.3 (emphasis added).

57. *See id.* at 885.

58. *Id.*

59. 508 U.S. 520 (1993).

60. *Lukumi*, 508 U.S. at 531.

61. *Id.* at 520.

62. *Id.*

63. *Id.*

64. *See generally Smith*, 494 U.S. at 872. The Court in *Lukumi* explained the neutrality inquiry: "the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533. Additionally, the Court explained the general applicability inquiry: "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43.

65. *Id.* at 533 ("[a law] is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.").

erally applicable.[66] Further, in applying strict scrutiny, the Court held that the interests presented by the city failed to justify the ordinance.[67]

Lukumi provides the logical extension to *Smith*, applying strict scrutiny to a non-neutral law, as might have been anticipated from the *Smith* opinion.[68] Once again, in *Lukumi*, the Court declined to consider the effect of the law, instead resting its fundamental inquiry on the overall purpose, or intent, of the challenged law.[69] *Lukumi* demonstrated that the Court planned to adhere to the doctrine developed in *Smith*.[70] In addition, *Lukumi* suggested that the Court was satisfied with avoiding the effect inquiry of *Sherbert*, instead focusing on intent and hinging its application of strict scrutiny on a neutrality determination.[71]

IV. *LOCKE V. DAVEY*[72]

A. Federal District Court

In January 2000, Davey filed an action in the United States District Court for the Western District of Washington against Governor Locke and officials of the HECB, seeking to reinstate his Promise Scholar-

66. *Id.* at 532.

67. *Id.* at 547. The city claimed the ordinances "advance[d] two interests: protecting the public health and preventing cruelty to animals." *Id.* at 543.

68. *See id.* at 531-32; *see also Smith*, 494 U.S. at 886 n.3.

69. *See Lukumi*, 508 U.S. at 533. The Court stated "that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has an incidental *effect* of burdening a particular religious practice." *Id.* at 531 (emphasis added). However, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest . . . ." *Id.* at 533 (citations omitted). In his concurring opinion Justice Scalia, with whom Chief Justice Rehnquist joined, voiced his concern for the intent approach that the majority adopted, noting that "it is virtually impossible to determine the singular 'motive' of a collective legislative body . . . ." *Id.* at 558. This concern seems disingenuous because Justice Scalia rid Free Exercise jurisprudence of an effect inquiry and introduced an intent inquiry in his majority opinion in *Smith*. *See generally Smith*, 494 U.S. at 872 (1990).

70. *Lukumi*, 508 U.S. at 531.

71. Although this Comment focuses on the Free Exercise Clause, commentators have often discussed the Establishment Clause in relation to *Davey*. *See, e.g.*, Carlos S. Montoya, Constitutional Developments, Locke v. Davey *and the "Play in the Joints" Between the Religion Clauses*, 6 U. PA. J. CONST. L. 1159, 1170-72 (2004); Axtell, *supra* note 13, at 606-11; Joseph P. Viteritti, *Davey's Plea: Blain, Blair, Witters, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL'Y 299 (2003). However, because the crux of the issue in *Davey* is a Free Exercise question and because the Promise Scholarship Program passes muster under the Establishment Clause, this Comment avoids an exhaustive background of Establishment Clause jurisprudence. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding a school voucher program that provided tuition assistance for students to attend either public or private schools where the program is "neutral with respect to religion" and provides assistance "to a broad class of citizens"); Witters v. Dep't. of Serv. for the Blind, 474 U.S. 481 (1986) (upholding vocational assistance for a blind student pursuing a bible studies degree). *Zelman* and *Witters* demonstrate that state sponsorship of a general scholarship that incidentally directs some state funds toward students pursuing devotional theology degrees is permissible so long as there is an "independent private choice" involved. *Zelman*, 536 U.S. at 640; *Witters*, 474 U.S. at 481; *see also* Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (holding that providing an interpreter to a student at a Catholic high school did not violate the Establishment Clause).

72. 124 S. Ct. 1307 (2004).

ship.[73] Davey moved for summary judgment, claiming that Washington's "prohibitions on the use of state funds for religious instruction violate[d] [the right to free exercise of religion] secured by the First and Fourteenth Amendments to the U.S. Constitution . . . ."[74] The HECB also moved for summary judgment, arguing that allowing Davey to use state funds to pursue a degree in devotional theology would violate Washington's establishment clause,[75] and arguing that withdrawal of Davey's scholarship "did not violate any of Davey's constitutional rights."[76]

The court ruled in favor of the HECB on summary judgment, dismissing all of Davey's claims for relief.[77] Judge Rothstein dismissed Davey's Free Exercise claim because the HECB had not prohibited Davey from pursuing a degree in pastoral ministries, and because Davey had no right to have Washington fund his higher education.[78]

B. The Ninth Circuit Court of Appeals

On appeal, Davey contended that by singling him out for unfavorable treatment by his choice of a religious major, the HECB policy violated the rules of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[79] and *McDaniel v. Paty*.[80] He argued that a government offering a benefit may not condition the benefit on the basis of religious status.[81] Accordingly, Davey contended that the restriction is subject to strict scrutiny.[82] Conversely, the HECB contended that strict scrutiny is inapplicable because, in refusing to subsidize the education of students pursuing a degree in theology, Washington did not prohibit Davey from freely practicing his religious beliefs.[83] The HECB contended that declining to finance a right is permissible and that "[t]he focus in free exercise inquiries is on what the government prohibits rather than on what the individual can exact."[84]

In determining that the HECB's policy failed the neutrality test and, thus, was subject to strict scrutiny, the majority first applied an effect

73. Davey v. Locke, U.S. Dist. LEXIS 22273 (Wash. 2000), *rev'd* 299 F.3d 748 (9th Cir. 2002), *rev'd* 124 S. Ct. 1307 (2004).
74. *Davey*, 2000 U.S. Dist. LEXIS 22273, at *4.
75. WASH. CONST. art. I, § 11.
76. Axtell, *supra* note 13, at 591.
77. *Id.*
78. *Id.*
79. 508 U.S. 520 (1993).
80. 435 U.S. 618 (1978).
81. Davey v. Locke, 299 F.3d 748, 752 (9th Cir. 2002).
82. *Locke*, 299 F.3d at 752 ("Washington's restriction may not stand unless it is narrowly tailored to advance a compelling state interest.").
83. *Id.*
84. *Id.* (citing Rust v. Sullivan, 500 U.S. 173 (1991); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)).

inquiry and relied heavily on an analogy with *McDaniel*.[85] Applying this analogy, the court stated that "[a] state law may not offer a benefit to all . . . but exclude some on the basis of religion . . . ."[86] The majority acknowledged that Washington is not required to fund the exercise of Davey's religious rights.[87] However, relying upon *Rosenberger v. Rector & Visitors of University of Virginia*,[88] the majority analogized Davey's situation to an abridgement of speech and concluded that the government's provision of financial benefits must meet the requirement of viewpoint neutrality, an inquiry reminiscent of the intent test in both *Smith* and *Lukumi*.[89] The "bottom line" of viewpoint neutrality "is that the government may limit the scope of a program that it will fund, but once it opens a neutral 'forum' (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion."[90] Applying this "bottom line," the majority determined that the HECB's policy was facially discriminatory and, thus, subject to strict scrutiny.[91] The majority held that the Promise Scholarship Program did not pass muster under strict scrutiny and reversed the lower court's judgment.[92]

Dissenting, Judge McKeown opined that Washington "neither prohibited nor impaired Davey's free exercise of his religion."[93] First, Judge McKeown discussed the intent of the Promise Scholarship and distinguished Davey's claim from *Lukumi*, emphasizing that a constitutional provision as old as the state itself was far different from a reactionary city ordinance with likely discriminatory objectives.[94] Additionally, Judge McKeown argued that the majority mischaracterized the Promise Scholarship Program as viewpoint discrimination.[95] Next, Judge McKeown applied an effect test reminiscent of *Sherbert v. Verner*,[96] comparing

85. *Id.* at 754 (comparing the benefit of holding a public office to the benefit of holding a Promise Scholarship). *See also McDaniel*, 435 U.S. at 626.

86. *Id.* The court went on to state: "Washington's restriction disables students majoring in theology from the benefit of receiving the [Promise] Scholarship just as Tennessee's classification disabled ministers from the benefit of being a delegate." *Id.*

87. *Id.*

88. 515 U.S. 819 (1995) (holding that denial of funding of a student organization that published a Christian editorial amounted to viewpoint discrimination).

89. *Locke*, 299 F.3d at 755-56.

90. *Id.* at 756.

91. *Id.* at 757-58.

92. *Id.* at 759-60.

93. *Id.* at 761 (McKeown, J., dissenting).

94. *Id.* ("Washington's decision not to fund religious education simply reflects its strong desire, as reflected in its constitution since ratification in 1889, to insulate itself from the appearance of endorsing religion—a concern cut from cloth wholly distinct from . . . the city ordinances in *Lukumi*."). This discussion by Judge McKeown in the Ninth Circuit foreshadowed the Supreme Court's introduction of an animus inquiry as the Supreme Court, like Judge McKeown, sought to distinguish the facts of *Davey* from *Lukumi*. *See* Locke v. Davey, 124 S. Ct. 1307 (2004).

95. *Id.* at 767 (arguing that "[n]o aspect of [the Promise Scholarship] chills Davey's 'individual thought and expression'") (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995)). She further argued that because the Promise Scholarship Program fails to drive viewpoints from the educational marketplace at Northwest, the majority's viewpoint concerns "are simply unfounded in this case." *Id.*

96. 374 U.S. 398 (1963).

Davey's financial dilemma with that of an indigent woman seeking an abortion.[97] She noted that the state has no obligation to fund a woman's right to an abortion, even when it funds other medical procedures.[98] Following this analogy, Judge McKeown concluded that if a state's decision to not fund an indigent woman's abortion does not substantially burden her, then Washington has not substantially burdened Davey by refusing to fund his pastoral ministries degree.[99]

C. The United States Supreme Court

Initially, the Court disposed of any Establishment Clause concerns[100] and framed the issue as whether Washington can deny the Promise Scholarship to students preparing for the ministry "without violating the Free Exercise Clause."[101] Curiously, in light of the intent approach enunciated in *Smith* and *Lukumi*, the Court first distinguished the effect of *Davey* from the effect of *Lukumi*.[102] Yet, the majority seemed to revert back to the intent test of *Smith* and *Lukumi*, resting its holding on a distinction between the facts of *Davey* and *Lukumi*.[103] The majority acknowledged that Washington treats devotional theology students differently from students pursuing a secular education; however, it distinguished those facts as "[f]ar from evincing the hostility toward religion which was manifest in *Lukumi* . . . ."[104] Because there was nothing in the history, text or operation of the Promise Scholarship Program that sug-

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97. *Locke*, 299 F.3d at 764-65 (McKeown, J., dissenting).

98. *Id.* at 765 (citing Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980)).

99. *Locke*, 299 F.3d at 765. Similar to the indigent woman in the abortion funding analogy, Davey's pursuit of his chosen degree is no "more difficult than it would have been in the absence of [the scholarship] funding." *Id.*

100. The majority emphasized that "[the Court] ha[s] long said that 'there is room for play in the joints between [the Free Exercise Clause and the Establishment Clause].'" Locke v. Davey, 124 S. Ct. 1307, 1311 (2004) (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970)). In the anti-establishment history of the United States, there have been numerous uprisings against using "taxpayer funds to support church leaders . . . ." *Id.* at 1313. Initially many states sought to avoid this sensitive issue of established religion and, thus, embodied in their constitutions provisions against using tax dollars in support of the ministry. *Id.* at 1314. Some states (such as Washington) drew a more stringent anti-establishment line in their constitutions than the one drawn by the Establishment Clause. *Id.* at 1313. A more stringent state anti-establishment provision is permissible so long as it does not go so far as to infringe upon rights protected by the Free Exercise Clause. *Id.*

101. *Id.* at 1312. The Court declined to adopt the Ninth Circuit's reliance upon viewpoint neutrality, stating: "[t]he purpose of the Promise Scholarship Program is . . . not to 'encourage a diversity of views from private speakers.'" *Id.* at 1313 n.3 (quoting United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 206 (2003) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995)). Thus, the speech forum cases are "simply inapplicable." *Id.* Moreover, the Court applied "rational-basis scrutiny to [Davey's] equal protection claims," and determined that Davey's Equal Protection Clause rights were not violated. *Id.* (citing Johnson v. Robinson, 415 U.S. 361, 375 (1974); McDaniel v. Paty, 435 U.S. 618 (1978)).

102. *Id.* at 1312. The majority emphasized that the policy does not impose criminal or civil sanctions on the free exercise of religion, it does not interfere with participation in political affairs, and it does not force students to choose between receiving a government benefit and practicing their religious beliefs. *Id.* at 1312-13.

103. *Id.* at 1313-14.

104. *Id.* at 1314.

gested animus toward religion, the majority concluded that the law should be subjected to a rational-basis test.[105] Under rational-basis review, Davey's claim failed, and the Court reversed the Ninth Circuit judgment.[106]

Dissenting, Justice Scalia, with whom Justice Thomas joined,[107] argued for adherence to the plain language of *Lukumi*, and argued against the introduction of an animus inquiry that would apply rational-basis to some non-neutral laws.[108] He contended that "'[a] law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny . . . .'"[109] Next, attacking the majority's discussion of the effect of the Promise Scholarship Program, Justice Scalia argued that there was no authority for "approving facial discrimination against religion simply because its material consequences are not severe."[110] Yet, he argued, even if there was a substantial burden requirement in Free Exercise jurisprudence, the Promise Scholarship Program has met that threshold.[111] Finally, Justice Scalia argued that the Court's animus inquiry will create a slippery slope of discrimination justifications, stating that "[w]hen the public's freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression."[112]

Thus, the Court in *Davey* was able to apply a rational-basis test to a non-neutral law by relying on a new Free Exercise inquiry.[113] Conversely, Justice Scalia would have continued to apply strict scrutiny to non-neutral laws, regardless of whether there was evidence of animus.[114] Whether the majority's new animus test is a much-needed supplement to

105. *Id.* at 1315. The majority contends that the Promise Scholarship is actually amiable to religion, noting that the program permits students to attend religious schools and take classes in devotional theology. *Id.* at 1314-15.

106. *Id.* at 1315.

107. Justice Thomas also wrote separately to note that "the study of theology does not necessarily implicate religious devotion or faith." *Id.* at 1320 (Thomas, J., dissenting).

108. *See id.* at 1315-21 (Scalia, J., dissenting).

109. *Id.* at 1315-16 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993)) (alterations in original). He further argued that "'the minimum requirement of neutrality is that a law not discriminate on its face.'" *Id.* at 1316 (quoting *Lukumi*, 508 U.S. at 533).

110. *Id.* at 1318. Justice Scalia suggested that he is opposed to considering the effect of a facially discriminatory law at all. *Id.* He argued that the Court is "[no longer] in the business of reviewing facially neutral laws that merely happen to burden some individual's religious exercise . . . ." *Id.* (citing Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990)). Justice Scalia's critique of the majority's use of a burden analysis is especially interesting considering that he introduced his dissent with a burden discussion. *Id.* at 1316. He stated that by "mak[ing] a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when [Washington] 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." *Id.*

111. *Id.* at 1319 (arguing that "when the State exacts a financial penalty of almost $3,000 for religious exercise—whether by tax or by forfeiture of an otherwise available benefit—religious practice is anything *but* free").

112. *Id.* at 1320.

113. *See id.* at 1315.

114. *See id.*

the Free Exercise doctrine or whether the test is a divergence from the established doctrine is uncertain. The analysis portion of this Comment will consider the new animus inquiry and the possible problems with an animus distinction. Moreover, the analysis will discuss the outcome of *Davey* and whether it is possible to achieve the doctrinal goals of the majority without addressing animus at all.

V. ANALYSIS

The effect of *Locke v. Davey*[115] is to add a guidepost onto the contextual continuum of Free Exercise jurisprudence. The factual circumstances of *Davey* fall on the continuum somewhere between the reactionary prohibition of animal sacrifices of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[116] and the non-discriminatory criminal statute prohibiting the use of peyote of *Employment Division, Department of Human Resources of Oregon v. Smith*.[117] However, because the facts of *Davey* forge a middle-ground between the poles of the existing doctrine, the majority created an additional inquiry—declining to apply strict scrutiny to a non-neutral law, as might have been anticipated from the doctrine developed in *Lukumi*.[118] Instead, the majority limited its application of strict scrutiny to those laws evincing animus toward religion.[119] This limitation of strict scrutiny effectively expanded the use of a rational-basis test to cover facially discriminatory laws evincing no animus, as well as neutral laws.[120]

Prior to *Davey*, Free Exercise jurisprudence relied fundamentally on an intent inquiry, as outlined in *Smith* and *Lukumi*.[121] This inquiry sought to place a challenged law into one of two categories: neutral or non-neutral, with little regard to the effects of the law on religious practice.[122] On its face, the *Davey* Court split the existing non-neutral category into two subcategories—applying strict scrutiny where there is evidence of animus but applying a rational-basis test to facially discriminatory laws that evince no animus toward the free exercise of religion.[123] Thus, the Free Exercise doctrine after *Davey* seems to focus on intent, seeking to place a law into one of three categories: (1) neutral laws of general applicability ("neutral"); (2) facially discriminatory laws that fall

115. 124 S. Ct. 1307 (2004).

116. 508 U.S. 520 (1993).

117. 494 U.S. 872 (1990). *See Davey*, 124 S. Ct. at 1309-11; *see also Lukumi*, 508 U.S. at 526-28; *Smith*, 494 U.S. at 874-75.

118. *See Lukumi*, 508 U.S. at 533 (applying strict scrutiny to a non-neutral law). Because the Promise Scholarship Program is non-neutral, a strict adherence to the *Lukumi* doctrine would apply strict scrutiny. *See Davey*, 124 S. Ct. at 1312 (rejecting Davey's contention that the law is presumptively unconstitutional but declining to reject Davey's argument that the law is not facially neutral).

119. *See Davey*, 124 S. Ct. at 1314-15; *see also* Montoya, *supra* note 71, at 1173.

120. *See Davey*, 124 S. Ct. at 1314-15.

121. *See supra* notes 56, 69.

122. *See Smith*, 494 U.S. at 885; *Lukumi*, 508 U.S. at 532.

123. *See Davey*, 124 S. Ct. at 1314-15 (distinguishing the discriminatory intent of the Promise Scholarship from the animus demonstrated in *Lukumi*).

short of evincing animus toward religion ("non-animus discrimination"); (3) laws that demonstrate a hostility toward religion ("animus"). However, Justice Scalia and Justice Thomas condemned the majority's distinction between non-animus discrimination and animus.[124] Rather, the dissent would have subjected the Promise Scholarship Program to strict scrutiny because the law was not facially neutral.[125]

The introduction of an animus test in *Davey* does not necessarily limit the doctrine developed in *Smith* and *Lukumi*.[126] Instead, *Davey* serves to supplement the doctrine, presenting an appropriate standard of review for a factual middle-ground. After *Davey*, a neutral law of general applicability will be subjected to a rational-basis review, as in *Smith*.[127] Moreover, a reactionary law directed at prohibiting the activities of a religious group will continue to be subjected to strict scrutiny, as in *Lukumi*.[128] Thus, instead of destroying the doctrine of *Smith* and *Lukumi*,[129] *Davey* elucidated a distinct standard of review for non-animus discriminatory provisions, applying a rational-basis review to a law that "goes a long way toward including religion in its benefits."[130]

Although the majority purported to rest its holding on this intent characterization, some of the discussion in the majority[131] and dissent[132] suggested that effect considerations were key to the outcome of *Davey*. Below, this analysis argues that: (1) *Davey* represents a resuscitation of an effect test similar to *Sherbert*[133] that, when combined with the intent test introduced in *Smith*, will provide a comprehensive Free Exercise doctrine; (2) the animus distinction introduced in *Davey* may be problematic as a doctrinal tool; and (3) the animus distinction is unnecessary because the outcome of *Davey* hinges on an effect consideration.

A. Conceptual Categories of Free Exercise Challenges

To demonstrate the tools necessary for a comprehensive Free Exercise doctrine, it is helpful to consider the six conceptual categories of Free Exercise challenges. These categories are: (1) neutral without substantial burden; (2) neutral with substantial burden; (3) non-animus dis-

124. *Id.* at 1315-16 (Scalia, J., dissenting). Justice Scalia reiterates language from *Lukumi*, stating that "[a] law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny," and noting that "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* (quoting *Lukumi*, 508 U.S. at 533, 546).

125. *Id.* at 1315-21.

126. *See* Montoya, *supra* note 71, at 1172 (contending that the use of precedent by the majority was "'nothing short of bizarre,' and borders on the disingenuous").

127. *See Smith*, 494 U.S. at 885, 888.

128. *See Lukumi*, 508 U.S. at 533.

129. *See* Montoya, *supra* note 71, at 1172.

130. *Davey*, 124 U.S. at 1314.

131. *See id.* at 1312-13 (discussing the insubstantiality of the burden imposed on Joshua Davey by the Promise Scholarship Program).

132. *See id.* at 1316 (Scalia, J., dissenting) (arguing that it is a substantial burden on religion to withhold a generally available public benefit "solely on the basis of religion").

133. 374 U.S. 398 (1963).

crimination without substantial burden; (4) non-animus discrimination with substantial burden; (5) animus without substantial burden; and (6) animus with substantial burden. The Court's modern Free Exercise precedent provides some guidance for applying the appropriate standard of review to each of these categories. *Smith* addressed a neutral law having a substantial burden on religion, applying a rational-basis review to Category 2.[134] *Lukumi* applied strict scrutiny to Category 6, a law evincing animus toward religion that imposed a substantial burden.[135] Finally, the majority placed the facts of *Davey* into Category 3 and applied rational-basis review to a non-animus discriminatory law where there was no substantial burden on religion.[136] The context provided by modern Free Exercise precedent provides a good baseline for discussion of the appropriate standard of review for the remaining three conceptual categories—Categories 1, 4 and 5.

1. Neutral without substantial burden

Although this category does not precisely align with the circumstances presented in *Smith*,[137] consideration of that case is insightful. If a rational-basis review is appropriate for a neutral law imposing a substantial burden on religion, the logical extension of that doctrine is that rational-basis would also be appropriate for a neutral law imposing *no* substantial burden. Thus, the standard of review applicable to Category 1 is rational-basis review.

2. Neutral with substantial burden

As noted above, *Smith* addressed this situation.[138] Thus, the appropriate standard of review for this category is rational-basis review.

3. Non-animus discrimination without substantial burden

The majority suggested that the facts of *Davey* fit into this category, rather than Category 4, in their discussion of the effect of the Promise Scholarship Program.[139] Seemingly discussing substantial burden, the majority observed that "[the Promise Scholarship Program] imposes neither criminal nor civil sanctions . . . ."[140] Moreover, the majority stated that "[i]t does not deny . . . the right to participate in the political affairs of the community."[141] Finally, the majority asserted that the scholarship "does not require students to choose between their religious beliefs and

134. *See Smith*, 494 U.S. at 885, 888.
135. *See Lukumi*, 508 U.S. at 533.
136. *See Davey*, 124 S. Ct. at 1314-15.
137. *See supra* Part III.C. and accompanying text.
138. *See supra* note 134.
139. *See Davey*, 124 U.S. at 1312-13.
140. *Id.* at 1312 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).
141. *Id.* (citing McDaniel v. Paty, 435 U.S. 618 (1978)).

receiving a government benefit."[142] Apparently concluding that the Promise Scholarship imposed no substantial burden on religion, the majority noted that "[Washington] has merely chosen not to fund a distinct category of instruction."[143] Thus, the holding in *Davey* demonstrates that a rational-basis review is the appropriate standard for this conceptual category.[144]

4. Non-animus discrimination with substantial burden

Unlike the conceptual categories of Free Exercise reviewed thus far, this category proves problematic. Initially it seems valid to presume that a rational-basis review should be applied to this category because the Court's holding in *Davey* applied rational-basis to a non-animus discriminatory law. This presumption is well-founded because in modern Free Exercise jurisprudence, the Court has gone to great lengths to dispose of the residual substantial burden inquiry from *Sherbert*.[145] Thus, without an effect inquiry, the appropriate standard of review should stem from an intent categorization as in *Smith*, *Lukumi*, and, arguably, *Davey*.

However, as discussed in Category 3, the *Davey* majority analogized the *effect* of the Promise Scholarship Program with the *effect* of pre-*Smith* Free Exercise precedent.[146] This extensive discussion seems to be more than inconsequential dicta.[147] Rather, the effect considerations were likely demonstrative of a fundamental inquiry, dispositive of the outcome of *Davey*. Although the Court stopped short of expressly advocating a reintroduction of a *Sherbert*-like effect analysis, Justice Scalia acknowledged the subtlety introduced by the majority's effect discussion.[148]

After briefly objecting to the animus distinction introduced by the majority, Justice Scalia embarked on an effect discussion of the Promise Scholarship Program.[149] He argued that Washington had substantially burdened Joshua Davey by denying him a generally available public benefit on the basis of religion.[150] Later in his dissent, Justice Scalia again suggested that the Promise Scholarship Program imposed a substantial burden on religion, stating: "[t]he indignity of being singled out for special burdens on the basis of one's religious calling . . . can never

142. *Id.* at 1312-13 (citing Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963)).

143. *Davey*, 124 U.S. at 1313.

144. *See id.* at 1315.

145. *Smith*, 494 U.S. at 884 (declining "to breathe into *Sherbert* [any] life beyond the unemployment compensation field . . . ."). Along with limiting *Sherbert*, the majority in *Smith* suggests that effect should be ignored altogether. *See id.*; *see also Lukumi*, 508 U.S. at 533.

146. *See Davey*, 124 S. Ct. at 1312-13.

147. *See id.*

148. *See id.* at 1318 (Scalia, J., dissenting).

149. *Id.* at 1316 (Scalia, J., dissenting).

150. *Id.* (Scalia, J., dissenting).

be dismissed as insubstantial."[151] Next, Justice Scalia argued that a substantial burden consideration was misplaced in Free Exercise challenges because other forms of discrimination require no proof of substantial burden.[152] Finally, Justice Scalia argued that if there was such a requirement, Joshua Davey had been substantially burdened because of the $3,000 financial penalty imposed by the Promise Scholarship Program.[153]

This tension over substantial burden plausibly demonstrates that the majority considered an effect inquiry fundamental to the doctrine developed in *Davey*. At the very least, the majority limited its holding in *Davey* to non-animus discriminatory provisions that fail to substantially burden religion. It would be beyond the scope of the majority's opinion to suggest that substantial burden is inconsequential and that a rational-basis review should be applied to all non-animus discriminatory laws. The majority's limitation suggests that they would have decided *Davey* differently had the substantial burden inquiry returned a different result. Because the outcome of *Davey* likely hinged upon a determination of substantial burden, where there is substantial burden and non-animus discrimination, strict scrutiny should be applied.

5. Animus without substantial burden

This conceptual category consists of laws evincing animus toward religion that fail to effectively impose a substantial burden. At first glance, it would seem that this form of ineffectual bigotry should be subjected to strict scrutiny because the law targets religion. Yet, analogizing this situation with Equal Protection jurisprudence, it is evident that a rational-basis review would be sufficient to strike down an ineffectual bigotry provision. For instance, in *Romer v. Evans*,[154] the Court demonstrated the effect of a rational-basis review of a law evincing animus.[155] The Court stated that "[b]y requiring that [a discriminatory classification] bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging [a group of people]."[156] Similarly, ineffectual bigotry in the Free Exercise arena would fail to demonstrate any relationship to a legitimate legislative purpose.[157]

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151. *Id.* at 1318-19 (Scalia, J., dissenting).

152. *Id.* at 1319 (Scalia, J., dissenting). He noted that "[t]he Court has not required proof of 'substantial' concrete harm with other forms of discrimination . . . and it should not do so here." *Id.* (Scalia, J., dissenting) (citing Brown v. Bd. of Educ., 347 U.S. 483, 493-95 (1954); Craig v. Boren, 429 U.S. 190 (1976)).

153. *Id.* (Scalia, J., dissenting).

154. 517 U.S. 620 (1996).

155. *Evans*, 517 U.S. at 633; *see also* Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating a homosexual sodomy prohibition because the statute failed to further a legitimate state interest under a Due Process challenge).

156. *Evans*, 517 U.S. at 633 (citing R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980)).

157. *See id.*

Moreover, applying a textual analysis, it could be argued that ineffectual bigotry is beyond the scope of the Free Exercise Clause.[158] Justice Scalia made this argument in his concurring opinion in *Lukumi*, contending that the Court is not "in the business of invalidating laws by reason of the evil motives of their authors."[159] Because strict scrutiny might be inconsistent with a textual interpretation of the Free Exercise Clause and because a rational-basis review is sufficient to invalidate ineffectual bigotry, the appropriate standard of review for Category 5 is likely rational-basis review.

6. Animus with substantial burden

As noted in the introduction of this analysis, this conceptual category was accounted for in *Lukumi*.[160] The appropriate standard of review for Category 6 is strict scrutiny.

B. Resuscitation of Substantial Burden

The above discussion of the six conceptual categories of Free Exercise challenges demonstrates the insufficiency of a doctrine that focuses strictly on intent. An interpretation of *Davey* that suggests that an appropriate standard of review can be determined by a characterization of neutrality, non-animus discrimination, or animus alone ignores a fundamental inquiry in the opinion. It is beyond the scope of *Davey* to suggest that rational-basis review is appropriate for all non-animus discriminatory laws, even laws that impose a substantial burden on religion. Quite the contrary, the Court limited its holding, noting the insubstantial burden imposed by the Promise Scholarship Program.[161] In doing so, the Court demonstrated the necessity of a substantial burden inquiry in Free Exercise jurisprudence and strongly suggested that the result of the inquiry was outcome-determinative in *Davey*.[162]

On the other hand, a doctrine that attempts to determine an appropriate standard of review based entirely on an effect inquiry is equally insufficient. This approach would altogether ignore *Smith*, once again applying strict scrutiny wherever there is a substantial burden, reversing the exception for neutral laws.[163] A strictly effect inquiry was also beyond the scope of the majority opinion in *Davey*. Had the majority intended to completely rid Free Exercise jurisprudence of an intent inquiry, its discussion of *Lukumi* would have been superfluous and misleading

158. *See Lukumi*, 508 U.S. at 558-59 (Scalia, J., dissenting) (arguing that the First Amendment refers to the effects of laws rather than the "purposes for which legislators enact laws").

159. *Id.* at 558 (Scalia, J., dissenting). Moreover, "[h]ad the [lawmakers] set out resolutely to suppress the practices of [a religious group], but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to 'prohibit the free exercise' of religion." *Id.* at 558-59.

160. *See supra* note 135.

161. *See Davey*, 124 S. Ct. at 1312-13.

162. *See id.*

163. *See Smith*, 494 U.S. at 885, 888.

dicta.[164] Instead, the *Davey* opinion indicates a two-prong Free Exercise approach.[165] First, the majority distinguishes the factual middle-ground of *Davey* from its intent inquiry precedent and creates a new category, allowing a rational-basis review for a non-animus discriminatory law.[166] Second, and of equal importance, the majority gave a breath of life to an effect inquiry reminiscent of *Sherbert*[167] and limited its holding to a law that imposes *no* substantial burden on religion.[168]

C. Potential Pitfalls of an Animus Inquiry

The Court in *Davey* was clear that a rational-basis review is available, even to non-neutral laws, so long as there is no animus and no substantial burden.[169] The animus inquiry was useful to distinguish the Promise Scholarship Program in *Davey* from the reactionary prohibition on animal sacrifices in *Lukumi*.[170] Yet, whether an animus inquiry will be useful as a doctrinal tool in future Free Exercise challenges is uncertain. To demonstrate the potential problems associated with an animus distinction, it is helpful to consider Equal Protection jurisprudence, where pursuing an animus inquiry produces some surprising results.

In the Equal Protection arena, it has been argued that the relevant intent should be the "intent to discriminate, [rather than] the intent to harm."[171] The most notable and convincing argument against animus in Equal Protection "is that [an animus distinction] cannot account even for [past Equal Protection precedent]."[172] For instance, in race discrimination, it could be argued that the drafters of segregation laws failed to demonstrate animus toward African-Americans.[173] Perhaps the drafters desired to promote social stability, or held a sincere, albeit misguided, belief that segregation aided African-Americans.[174] Even if they recognized the harmful effects of discrimination, perhaps they considered the

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164. *See Davey*, 124 S. Ct. at 1314.
165. *See id.* at 1312-15.
166. *See id.* at 1314-15.
167. *See supra* Part III.A; *see also Sherbert*, 374 U.S. at 404.
168. *See Davey*, 124 S. Ct. at 1312-13.
169. *See id.* at 1312-15.
170. *See id.* at 1314 (citing *Lukumi*, 508 U.S. at 520).
171. *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 962-64 (1989). Strauss contends that a discriminatory intent standard, much less the narrower malice approach, is inadequate "as a comprehensive account of discrimination." *Id.* at 1014. Instead, to provide an adequate account of discrimination, the Court must consider some effect inquiries, in addition to the intent inquiry of discriminatory intent. *Id.* The government should not be "free to undervalue the interests of a class of citizens, to treat them with indifference, to ignore the burdens it imposes on them, so long as it does so in order to achieve an objective other than injuring the group." *Id.* at 963. Under an animus approach, "[n]o matter how little weight the government accords to the interest of a class of its citizens, it acts properly so long as it does not set out to inflict injury on them." *Id.*
172. *Id.* at 964; *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Gomillion v. Lightfoot, 364 U.S. 339 (1960).
173. Strauss, *supra* note 171, at 964.
174. *Id.*

effects "a regrettable byproduct of a system that was the best for society as a whole."[175] None of the aforementioned hypothetical situations would have amounted to animus.[176] However, in the context of race discrimination, it would be unacceptable to allow discriminatory segregation, regardless of whether the discrimination reached the threshold of animus.[177]

In the area of sex discrimination, the inadequacy of an animus inquiry is even more apparent.[178] In many instances, people not intending to harm women may have promoted sex discrimination.[179] Some may have thought that women enjoyed and benefited from their traditional roles; others may have thought that women were harmed as an unfortunate byproduct of a successful system.[180] Once again, permitting the discrimination of women because of misguided benevolence, or at least misguided discriminatory intent not amounting to animus, would be unacceptable.[181] Thus, "[s]ince we cannot assume that overt and covert segregation and discrimination against [African-Americans] and women always reflect a desire to harm them, the [animus] definition . . . will not always condemn even the kinds of statutes invalidated in [segregation and discrimination precedent]."[182]

Considering that an animus inquiry presents such complex problems in Equal Protection, it is questionable whether animus will be useful as a doctrinal tool in Free Exercise. The usefulness of animus in Free Exercise jurisprudence will be determined by its application to future challenges. To survive as a doctrinal tool, animus must provide a meaningful distinction and account for all Free Exercise discrimination, instead of being rendered impotent by inadequacy as it was in Equal Protection. In any event, an animus inquiry alone, without a supplemental consideration of substantial burden, fails to provide "a comprehensive account of [Free Exercise] discrimination."[183]

D. The Animus Distinction is Unnecessary

Although the majority in *Davey* was successful at creating a comprehensive two-prong approach to Free Exercise challenges, a careful consideration of the six conceptual categories provides a useful tool. Most notably, Categories 3[184] and 5[185] have identical standards of review,

175. *Id.*
176. *See id.*
177. *See id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 1014.
184. Category 3 represents non-animus discrimination without substantial burden. *See supra* Part V.A.3.
185. Category 5 represents animus without substantial burden. *See supra* Part V.A.5.

as do Categories 4[186] and 6.[187] This commonality demonstrates that the animus inquiry introduced in *Davey* is unnecessary to achieve the doctrinal results of the majority. For non-animus discriminatory laws, a rational-basis review should be applied where there is no substantial burden (*Davey*),[188] and strict scrutiny should be applied where there is substantial burden.[189] Similarly, for laws evincing animus toward religion, strict scrutiny should be applied where there is substantial burden (*Lukumi*),[190] and a rational-basis review should be applied where there is no substantial burden on religion.[191] In light of the potentially problematic nature of an animus inquiry, this discovery uncovers a useful doctrinal approach. A comprehensive Free Exercise doctrine could have been developed without introducing animus at all. Perhaps the Court should have explicitly endorsed the resuscitation of substantial burden and combined that inquiry with the intent inquiry of *Smith*, to create an approach that could have avoided unnecessarily exposing the complexities of animus.

For the sake of discussion, this Comment will name the proposed approach the "intent/effect" test. The first prong of the intent/effect test will focus on the intent inquiry from *Smith* and *Lukumi*.[192] This prong will consider whether the challenged provision is neutral. If the law is neutral, a rational-basis review will be applied, just as in *Smith*, and no further inquires will be required.[193] However, if the law is non-neutral, the second prong of the intent/effect test will be invoked to determine the appropriate standard of review. The effect inquiry will consider whether the challenged law substantially burdens religion. This prong of the intent/effect test will act much like the doctrine developed in *Sherbert*[194] and discussed in *Davey*.[195] On the one hand, if a non-neutral law substantially burdens religion, the provision will be subject to strict scrutiny, as in *Lukumi*.[196] On the other hand, if a non-neutral law does not substantially burden religion, the provision will be subject to a rational-basis review, as in *Davey*.[197] By considering both intent and effect, the proposed two-prong test provides a comprehensive doctrinal approach to Free Exercise challenges without consideration of an animus distinction.

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186. Category 4 represents non-animus discrimination with substantial burden. *See supra* Part V.A.4.
187. Category 6 represents animus with substantial burden. *See supra* Part V.A.6.
188. *See Davey*, 124 S. Ct. at 1315.
189. *See supra* Part V.A.4.
190. *See Lukumi*, 508 U.S. at 533.
191. *See supra* Part V.A.5.
192. *See supra* Part III.C-D; *see also Smith*, 494 U.S. at 885, 888; *Lukumi*, 508 U.S. at 533.
193. *See Smith*, 494 U.S. at 885, 888.
194. *See supra* Part III.A; *see also Sherbert*, 374 U.S. at 404.
195. *See supra* Part IV.C; *see also Davey*, 124 U.S. at 1312-13.
196. *See Lukumi*, 508 U.S. at 533.
197. *See Davey*, 124 S. Ct. at 1312-13.

Far from a reversion to the doctrine of *Sherbert*, the intent/effect test incorporates the modern intent inquiry developed in *Smith* and *Lukumi* as the first prong to a comprehensive approach.[198] Nor does the intent/effect test strictly adhere to the doctrine of *Smith* and *Lukumi*, ignoring effect.[199] Instead, the proposed doctrine applies a substantial burden inquiry as its second prong, determining the appropriate standard of review for non-neutral provisions.

E. Application of the Intent/Effect Test to the Facts of Davey

For the purposes of demonstration, this discussion will walk through the two-prong approach of the intent/effect test as applied to the facts of *Davey*. This proposed test provides a coherent approach to addressing future Free Exercise challenges.

1. Intent inquiry

The first prong of the intent/effect test is an intent inquiry, as in *Smith* and *Lukumi*, which distinguishes between neutral and non-neutral laws.[200] The Promise Scholarship Program, as acknowledged by the majority and argued by the dissent in *Davey*, is facially non-neutral toward religion.[201] A program that withholds scholarship funds from students on the basis of their religious educational preference is far from the general non-discriminatory ban on peyote use in *Smith*.[202] Had the Promise Scholarship Program passed a neutrality inquiry under the first prong of the intent/effect test, no further inquiries would be necessary. A rational-basis review would apply to a neutral law, regardless of whether the law imposed a substantial burden on religion, just as in *Smith*.[203] However, because the Promise Scholarship Program failed a neutrality inquiry, it must be subjected to the second prong of the intent/effect test to determine an appropriate standard of review.

2. Effect inquiry

Because the Promise Scholarship Program is non-neutral, an effect inquiry is necessary to determine the appropriate standard of review. This second prong of the intent/effect test will determine whether the law imposes a substantial burden on religion. If there is a substantial burden, as in *Lukumi*,[204] strict scrutiny is applied. Where there is no substantial burden, a rational-basis review is applied.[205]

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198. *See Smith*, 494 U.S. at 885, 888; *Lukumi*, 508 U.S. at 533.
199. *See supra* notes 56, 69.
200. *See Smith*, 494 U.S. at 885, 888; *Lukumi*, 508 U.S. at 533.
201. *See Davey*, 124 S. Ct. at 1314-16.
202. *See Smith*, 494 U.S. at 874.
203. *See id.* at 885, 888.
204. *See Lukumi*, 508 U.S. at 533.
205. *See generally Davey*, 124 S. Ct. at 1307.

Whether a denial of $3,000 in scholarship funds to students pursuing degrees in devotional theology constitutes a substantial burden on religion is not obvious. On the one hand, as the *Davey* majority articulated, denial of funding for higher education is dissimilar to those provisions in *Lukumi* and *McDaniel v. Paty*[206] that imposed a substantial burden.[207] On the other hand, as Justice Scalia argued in the dissent, the denial of scholarship funds could be construed as imposing a special tax on religion.[208] Because analysis of Free Exercise precedent provides little in the form of a guiding context here, it is helpful to consider other areas of constitutional law.

The precedent most analogous to *Davey* is the state-funding of abortion services.[209] Much as it is a violation to substantially burden the free exercise of religion with a non-neutral law, "the Constitution 'protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.'"[210] As articulated in Judge McKeown's Ninth Circuit dissent, the abortion funding cases hold that denial of funding for an abortion does not amount to an "unduly burdensome interference" with a woman's Constitutional right to have an abortion.[211] Rather, the cases suggest that a state is free to fund medical procedures such as childbirth while it chooses to deny funding to abortion.[212] This holds true even where the woman is indigent and the funding policy effectively leaves her with "no choice in terms of exercise of her constitutional right."[213]

In abortion funding cases, "a woman has a constitutionally-protected right to an abortion, but the state has no obligation to fund that

206. 435 U.S. 618 (1978).

207. *Davey*, 124 S. Ct. at 1312-13.

208. *Id.* at 1316 (Scalia, J., dissenting).

209. Davey v. Locke, 299 F.3d 748, 764 (9th Cir. 2002) (McKeown, J., dissenting), *rev'd*, 124 S. Ct. 1307 (2004); *see generally* Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980). School voucher case law provides a consideration of funding decisions within the Religion Clause arena. However, because the crux of the school voucher program involves consideration of the Establishment Clause and because *Davey* hinges upon a Free Exercise analysis, school vouchers are probably not the most helpful analogy. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (holding that an Ohio school voucher program was not a violation of the Establishment Clause).

210. *Locke*, 229 F.3d at 765 (McKeown, J., dissenting) (quoting *Maher*, 432 U.S. at 473-74).

211. *Id.* at 764-65; *see also Maher*, 432 U.S. at 473-74; *Harris*, 448 U.S. at 316; Roe v. Wade, 410 U.S. 113 (1973).

212. *See Locke*, 229 F.3d at 765 (McKeown, J., dissenting).

> The [state regulation prohibiting abortion funding] places no obstacles absolute or otherwise in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the state's] decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. *The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there.* The indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the [state's] regulation.

Id. (McKeown, J., dissenting) (alterations in original) (quoting *Maher*, 432 U.S. at 474).

213. *Id.* at 764.

right, even when it has chosen to fund other medical procedures."[214] Similarly, Joshua Davey has a constitutionally protected right to the free exercise of religion.[215] However, by creating a generally available state scholarship that is not available to devotional theology students, the state of Washington has not violated that right because, arguably, the state has no obligation to fund it.[216] Even if Washington made the pursuit of a non-theology degree more attractive, applying the analogy from abortion funding case law, it has not made Joshua Davey's situation any more difficult than it would have been had the state chosen not to provide a scholarship at all.[217]

This analogy demonstrates that denial of a scholarship to students pursuing degrees in devotional theology was not a substantial burden on their free exercise of religion because: (1) Washington had no obligation to fund their pursuit; and (2) the Promise Scholarship Program did not make attaining the degree in devotional theology any more difficult. Finding no substantial burden, the second prong of the intent/effect test applies a rational-basis review, even where the law is non-neutral. This result is consistent with the outcome of *Davey*. Applying the proposed intent/effect test to the facts of *Davey* illustrates that there is a comprehensive approach available in Free Exercise jurisprudence that avoids the precarious animus distinction altogether.

VI. CONCLUSION

The *Davey* decision provides Free Exercise doctrine with a distinct standard of review for a contextual middle-ground between *Smith* and *Lukumi*. On its face, this new doctrine maintains the modern tradition of focusing on the intent of the provision and ignoring the burden it imposes on religion. *Davey* accomplishes this result by creating an animus distinction, distinguishing benign discriminatory provisions from those evincing animus toward religion.

Yet, a deeper analysis of *Davey* suggests that there was an intense debate between a doctrine that reintroduced a substantial burden inquiry and a doctrine that continued to focus strictly on intent. Along with creating an animus distinction, the majority seemingly reintroduced substantial burden as a supplement to its intent-focused doctrine. This resuscitation of substantial burden was a necessary addition because the intent doctrine alone failed to account for all forms of Free Exercise discrimination.

Despite the apparent utility of animus in *Davey*, the distinction is both potentially problematic and unnecessary as a doctrinal tool. Ani-

214. *Id.*
215. *Id.* at 764.
216. *Id.* at 764-65.
217. *Id.* at 765.

mus is potentially problematic because it is uncertain that animus is actually required for a law to be invalidated as a violation of the Free Exercise Clause. As in Equal Protection jurisprudence, there may be situations in Free Exercise where an unacceptable law falls short of evincing animus; this remains to be seen. Moreover, the animus distinction is unnecessary because the standard of review for both non-animus discrimination and animus hinges on substantial burden.

The Free Exercise approach proposed by this Comment circumvents an animus inquiry altogether, instead focusing on neutrality and substantial burden. The intent/effect test first applies a rational-basis review to neutral laws, applying the doctrine developed in *Smith*. Non-neutral laws will be subjected to an effect inquiry under the intent/effect test and strict scrutiny will be applied where a substantial burden exists. This proposed approach accounts for all of the six conceptual categories of Free Exercise challenges and applies the appropriate standard of review to each. The two-prong test accomplishes the doctrinal objectives of *Davey* without applying a potentially problematic animus distinction.

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