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Constitutional Law: Funding the Free Exercise Clause

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CASE COMMENT

CONSTITUTIONAL LAW: FUNDING THE FREE EXERCISE CLAUSE*

Locke v. Davey, 124 S. Ct. 1307 (2004)

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Respondent qualified for the Washington Promise Scholarship,[1] a state-funded college scholarship designed to assist students with educational expenses when attending an eligible in state institution.[2] To comply with the Washington State Constitution,[3] the Promise Scholarship guidelines prohibited use of awarded funds for Respondent's pursuit of a degree in devotional theology.[4] Respondent filed suit against the State of

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1. Locke v. Davey, 124 S. Ct. 1307, 1310 (2004). Washington established the Promise Scholarship program in 1999 to assist academically gifted students who may lack the financial ability to go to college. To be academically eligible, a student must graduate in the top 15% of the student's Washington high school class, or attain a certain standardized test score (1200 on the SAT or 27 on the ACT). To be financially eligible, the student's family must have an income below 135% of the state's median income. Respondent applied for and was awarded a Promise Scholarship of $1125. *Id.*

2. *Id.* Scholarship students must enroll at an accredited public or private post-secondary institution (including those religiously affiliated) in the state of Washington. *Id.* Respondent enrolled at Northwest College, a private Christian college, to pursue a double major in pastoral ministries and business management and administration. *Id.*

3. Article I, Section 11 of the Washington Constitution states in pertinent part:

> 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 . . . . 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.

WASH. CONST. art. I, § 11.

4. WASH. ADMIN. CODE § 250-80-020(12)(g) (2000). "'Eligible student' means a person who . . . [i]s not pursuing a degree in theology." *Id.*

Washington in the U.S. District Court for the Western District of Washington,[5] alleging that denial of scholarship funds based on Respondent's chosen course of study violated the Free Exercise Clause of the First Amendment.[6] The district court rejected Respondent's claims, and granted summary judgment.[7] The U.S. Court of Appeals for the Ninth Circuit reversed the district court's decision,[8] holding that denying an otherwise eligible student a scholarship based on the student's chosen major singled out religious instruction, and constituted a violation of the Free Exercise Clause.[9] The U.S. Supreme Court granted certiorari,[10] and in reversing the Ninth Circuit's decision, HELD, that Washington's refusal to fund Respondent's devotional theology instruction did not violate Respondent's rights under the Free Exercise Clause.[11]

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[12] Separately, the Establishment Clause and the Free Exercise Clause serve different purposes,[13] and state action regarding religion often places the two clauses in tension with one another.[14] However, some state actions fall within "the joints"[15] and are permitted by the Establishment Clause but not required by the Free Exercise Clause.[16]

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5. Davey v. Locke, 299 F.3d 748, 751 (9th Cir. 2002). Respondent wished to use the scholarship to fund a pastoral ministries major, designed to prepare students for Christian ministry. *Id.* Respondent initially named defendants as Washington Governor Gary Locke and members of Washington's Higher Education Coordinating Board (HECB). *Id.* at 752 n.4. Respondent sought damages and an injunction preventing the HECB from refusing to award funds, based on a chosen major, to an otherwise eligible student. *Id.* at 751.

6. *Id.* at 750. The First Amendment states in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Fourteenth Amendment of the U.S. Constitution extends this requirement to each state.

7. *Davey*, 299 F.3d at 751-52. Both parties moved for summary judgment, but the district court moved in the state's favor. *Id.* Respondent timely appealed. *Id.* at 752.

8. *Id.* at 760. "We conclude that HECB's policy lacks neutrality on its face . . . ." *Id.* at 750.

9. *Id.* at 760.

10. Locke v. Davey, 124 S. Ct. 1307, 1311 (2004).

11. *Id.* at 1315.

12. U.S. CONST. amend. I.

13. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (observing that "the Free Exercise Clause 'protects religious observers against unequal treatment.'"); *see also Locke*, 124 S. Ct. at 1313-15 (discussing the historical foundation and the purposes of the Establishment Clause).

14. *Locke*, 124 S. Ct. at 1311 (citing Norwood v. Harrison, 413 U.S. 455, 469 (1973)).

15. *Id.*

16. *Id.*

In *Witters v. Washington Department of Services for the Blind*,[17] the U.S. Supreme Court reviewed whether a Washington state commission could refuse vocational assistance to a blind student pursuing a religious education at a Christian college.[18] The vocational assistance was paid directly to students.[19] Students could then apply the aid to the educational institution of their choice.[20] The Court acknowledged that some religious institutions might benefit from the state aid program,[21] but found that such benefits would be the result of the independent choice of the aid recipient.[22] The Court held that because the state was not directly contributing to religiously affiliated institutions, the program did not violate the Establishment Clause.[23]

Just as the Court has recognized that not all state action benefiting religion violates the Establishment Clause,[24] it has also recognized that not all action inhibiting religious expression violates the Free Exercise Clause.[25] In *Employment Division v. Smith*,[26] Respondents were refused unemployment benefits after they were fired from their jobs for illicit drug use.[27] Respondents used peyote,[28] a controlled substance under Oregon law,[29] for ceremonial purposes in accordance with Native American religious practices.[30] The Court acknowledged that a neutral and generally applicable law restricting the free exercise of religion is not automatically

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17. 474 U.S. 481 (1986).

18. *Id.* at 483.

19. *Id.* at 488. The program provided aid to assist visually handicapped persons to obtain training "in the professions, business or trades." *Id.* at 483.

20. *Id.* at 488.

21. *Id.*

22. *Witters*, 474 U.S. at 488. "In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not the state." *Id.*

23. *Id.* at 488-89. Under this holding, the Court did not require that Washington extend aid to comply with the Free Exercise Clause, and declined to consider whether the program would violate Washington's "far stricter" Establishment Clause. *Id.* at 489.

24. *See supra* text accompanying notes 13-22.

25. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

26. *Id.*

27. *Id.* at 874. Respondents were fired from a private drug rehabilitation organization in Oregon. Respondents then applied for unemployment compensation, but were found ineligible for such benefits due to work "misconduct." *Id.*

28. *Id.* Peyote is a hallucinogen derived from the plant *Lophophora williamsii Lemaire* and is ingested to produce a euphoric effect. *Id.*

29. *Id.* In Oregon, peyote is a Schedule I controlled substance, possession of which is a Class B felony. The only exception exists for controlled substances that are medically prescribed. *Id.*

30. *Smith*, 494 U.S. at 874. Respondents were members of the Native American Church. *Id.*

void,[31] and refused to require a compelling government interest to withstand scrutiny.[32] Because the interference with Respondents' religious expression was an incidental effect of regulating otherwise unlawful conduct,[33] the Court held that the Free Exercise Clause had not been offended.[34] The Court relegated the decision to excuse sacramental peyote use to the states.[35]

In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,[36] the Court considered whether city ordinances prohibiting the practice of animal sacrifice violated the Free Exercise Clause.[37] Facing the prospect of a Santeria church in its community,[38] a city council passed laws essentially criminalizing animal sacrifice,[39] a key component of the Santeria religious practice.[40] Before analyzing the claim, the Court restated its holding in *Smith*.[41] The Court then stated the logical antithesis: a law failing to satisfy the neutrality or general applicability requirements of *Smith* must be justified by a compelling government interest.[42]

In determining whether the city ordinances satisfied the neutrality requirement, the Court evaluated whether the laws targeted suppression of the Santeria religion.[43] The first test used to evaluate the objective of the

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31. *Id.* at 878. "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79. The Court also explained that previous decisions invalidating a neutral, generally applicable law restricting religious expression also involved other constitutional protections. *Id.* at 881.

32. *Id.* at 885. However, in her concurrence, Justice O'Connor urged that all neutral laws of general applicability burdening religious expression should be subject to compelling interest scrutiny. *Id.* at 898 (O'Connor, J., concurring).

33. *Id.* at 882.

34. *Id.* at 890. "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required." *Id.*

35. *Smith*, 494 U.S. at 890. The Court also noted that many states have made an exception to their drug laws for sacramental peyote use. *Id.*

36. 508 U.S. 520 (1993).

37. *Id.* at 520.

38. *Id.* at 526. The Santeria religion originated in the nineteenth century in Cuba. Members express their devotion to *orishas*, spirits that aid in the fulfillment of God's intended destiny. *Id.* at 524.

39. *Id.* at 527.

40. *Id.* at 525. Sacrifices of chickens, guinea pigs, and other animals are performed to nurture the *orishas*, and are performed at numerous occasions and celebrations throughout the year. *Id.*

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

42. *Id.*

43. *Id.* at 533.

laws began with a facial examination of the text itself.[44] Although the Court found that the ordinances were facially neutral,[45] it noted that facial neutrality alone is not determinative.[46] The Court continued its analysis by examining the circumstances surrounding the application of the ordinances.[47] While the ordinances advanced concerns unrelated to religious animosity,[48] the Court concluded the overall objective of the laws singled out the Santeria religion.[49] The Court also found the ordinances were not generally applicable.[50] The Court determined the ordinances were underinclusive because they targeted conduct motivated only by religious belief.[51]

The Court then applied strict scrutiny,[52] evaluating whether the laws served compelling government interests and were narrowly tailored.[53] The Court determined the ordinances failed both standards,[54] noting that any law that targets religious conduct for distinctive treatment only survives strict scrutiny in rare cases.[55] After, determining the ordinances failed strict scrutiny, the Court held the ordinances were enacted contrary to the Free Exercise Clause and were thus void.[56]

Before analyzing the instant case under the Free Exercise Clause, the Court noted the implication of previous decisions based on the

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44. *Id.* The Court noted there are many ways to determine whether a law purposely suppresses religion, the first of which is an examination of the law's text. Any textual references to religious practice without discernible secular meaning meant the law lacked facial neutrality, and would be presumptively unconstitutional. *Id.*

45. *Id.* at 534. The Court determined in particular that the words "sacrifice" and "ritual" appearing in the ordinances, although religious in origin, also have a secular meaning.

46. *Lukumi*, 508 U.S. at 534. "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.*

47. *Id.* at 535.

48. *Id.* The Court noted concerns unrelated to religious animosity, including animal cruelty and health hazards. *Id.*

49. *Id.* Analyzing the ordinances in tandem, the Court determined that the laws devalued religious reasons for killing animals over nonreligious reasons. *Id.* at 537.

50. *Id.* at 545-46. In order to be generally applicable, a law cannot selectively impose burdens on religious conduct based on belief. *Id.* at 543.

51. *Lukumi*, 508 U.S. at 542-43. The Court rejected the Respondent's claim that the ordinances advanced public health and animal cruelty protection, finding the laws failed to prohibit nonreligious conduct endangering those interests. *Id.* at 543.

52. *Id.* at 546.

53. *Id.* (citing McDaniel v. Paty, 435 U.S. 618, 628 (1972)).

54. *Id.* at 546. Acknowledging that failing either standard would invalidate the ordinances, the Court determined that the ordinances were both overbroad and lacked compelling government interests. *Id.*

55. *Id.* at 546.

56. *Lukumi*, 508 U.S. at 547.

Establishment Clause.[57] The Court described the instant case as a "play in the joints" between state actions permitted under the Establishment Clause,[58] but not required by the Free Exercise Clause.[59] Thus, the Court did not question whether Washington could permit scholarship funding for students' use pursuing degrees in devotional theology without violating the Establishment Clause.[60] Rather, the Court focused its analysis on whether Washington could deny that funding without violating the Free Exercise Clause.[61]

Relying on *Lukumi*, the Respondent argued that the Washington Promise Scholarship lacked facial neutrality and was therefore presumptively unconstitutional.[62] The Court rejected this argument.[63] Rather than analyze the instant case according to the standards set forth in *Lukumi*,[64] the Court distinguished the factual circumstances and found the disfavor of religion to be "far milder" than that found in *Lukumi*.[65] Thus, the Court's refusal to hold the program unconstitutional despite potential facial bias ended the analysis of the scholarship program's validity.[66] The Court continued by rejecting the argument that funding must be equally available for both secular and religious endeavors,[67] noting that training for secular and religious professions are inherently different.[68]

Acknowledging that the Washington Promise Scholarship program purposely excluded religion,[69] the Court refused to consider this exclusion

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57. Locke v. Davey, 124 S. Ct. 1307, 1311 (2004).

58. *Id.*

59. *Id.* at 1311-12.

60. *Id.* The Court found there was no question that the Washington Promise Scholarship program could fund devotional theology education under the U.S. Constitution because the link between state funds and religious training was broken by the recipient's independent and private choice. *Id.*

61. *Id.* at 1312.

62. *Locke*, 124 S. Ct. at 1312.

63. *Id.* The Court also rejected the Respondent's claims that the Promise Scholarship program was unconstitutional under free speech and equal protection basis. *Id.* at 1312 n.3.

64. *Id.* The Court declared that relying on *Lukumi* would extend the case beyond its reasoning and its factual limits. *Id.*

65. *Id.* The Court distinguished the instant case since it did not impose "sanctions" on an expression of religion. *Id.*

66. *Id.* at 1315. The Court declined to further explore neutrality or general applicability. *Id.*

67. *Locke*, 124 S. Ct. at 1313. Justice Scalia argues that generally available benefits are part of the "baseline against which burdens on religion are measured." *Id.* at 1316 (Scalia, J., dissenting).

68. *Id* at 1313. Emphasizing that training for secular professions and religious professions were not "fungible," the Court likened a degree in devotional theology as a religious "calling" to lead a congregation. *Id.*

69. *Id.* at 1312.

as hostile toward religion.[70] The Court found that many religiously affiliated benefits were still available to the Respondent under the program guidelines.[71] Therefore, the Court concluded that the burden placed on the Respondent's exercise of religion was relatively minor and did not outweigh Washington's interest in maintaining a strong policy against state established religion.[72] The Court ultimately held that without facial bias and therefore a presumption of unconstitutionality, the scholarship program did not violate the Free Exercise Clause.[73]

In analyzing whether Washington's Promise Scholarship program violated the Free Exercise Clause, the Court limited the holding in *Lukumi*,[74] yet maintained policy principles set forth in *Smith*,[75] and answered questions left open in *Witters*.[76] The Court declined to follow the clear language of *Lukumi* requiring strict scrutiny in instances of discriminatory laws.[77] Rather than inquiring whether the Washington Promise Scholarship program was neutral and generally applicable,[78] the Court instead focused on the factual consequences and impacts on the Respondent.[79] The Court ignored the previously followed principle that laws lacking facial neutrality were presumptively unconstitutional,[80] and found that the consequences of denying the Respondent funding for a devotional theology degree was insignificant.[81] Thus, the Court created an ambiguous new standard requiring "substantial harm" to justify strict scrutiny in Free Exercise challenges.[82] As Justice Scalia points out, had the

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70. *Id.* at 1313. The Court noted that occurrences of dealing with ministerial education differently than secular training was a result of the unique place religion holds in constitutional law, and was not evidence of state hostility toward religion. *Id.*

71. *Id.* at 1315. The Court notes scholarship students may still take devotional theology classes. *Id.*

72. *Locke*, 124 S. Ct. at 1315. Justice Scalia describes Washington's interest as a "philosophical preference" to protect a taxpayer's "freedom of conscience." *Id.* at 1318 (Scalia, J., dissenting).

73. *Id.* at 1315.

74. 508 U.S. 520 (1993).

75. 494 U.S. 872 (1990).

76. 474 U.S. 481 (1986).

77. *See Lukumi*, 508 U.S. at 531-33.

78. *Locke*, 124 S. Ct. at 1316 (Scalia, J., dissenting).

79. *Id.* at 1314-15.

80. In his dissent, Justice Scalia noted that the majority did not cite to any authority approving a facially discriminatory law. *Id.* at 1318 (Scalia, J., dissenting).

81. *Id.* at 1315.

82. *Id.* at 1319 (Scalia, J., dissenting). Justice Scalia noted that the Court has never required proof of harm with other forms of discrimination. *Id.* Scalia then analogized the refusal of scholarship funds to a financial penalty, thereby meeting any requirement of actual harm under the majority's opinion. *Id.* (Scalia, J., dissenting).

instant court invalidated the Promise Scholarship program by following *Lukumi*, Washington could have created a neutral and generally applicable scholarship program that still only funded secular education.[83] Instead, states are no longer required to recognize the broad neutrality principles established in *Lukumi* and are now invited to single out religious conduct.[84]

Despite the unexplained loss of a standard of review, the Court maintained consistent policy between the instant case and *Smith*.[85] Similar to the Court's refusal in *Smith* to recognize an affirmative right to religious peyote use,[86] the instant Court refused to recognize an affirmative right to subsidized religious training.[87] Thus, both *Smith* and the instant decision allow individual states to decide whether to recognize such rights.[88] Had the instant Court affirmed the lower court's decision, it would have ignored a long history of state concern regarding established religion.[89] Instead, the instant Court reaffirmed the existence of a middle ground between the Establishment and Free Exercise Clauses.[90]

The decision also answered a question left open in *Witters*:[91] although states can indirectly fund religious training through a citizen's private and individual choice,[92] states can now also limit that choice to purely secular pursuits.[93] Thus, the instant court places the issue squarely within the "joints" of the Religion Clauses.[94]

The Court's refusal to apply strict scrutiny to Washington's Promise Scholarship program deviated from previous logic concerning Free

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83. *Locke*, 124 S. Ct. at 1317 (Scalia, J., dissenting). Justice Scalia gives examples of how Washington can still avoid funding religious education without facially discriminating against religion. *Id.* (Scalia, J., dissenting).

84. *Id.* at 1320 (Scalia, J., dissenting). Justice Scalia warns, "When the public's freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression." *Id.* (Scalia, J., dissenting).

85. Employment Div. v. Smith, 494 U.S. 872, 879-80 (1990).

86. *Id.* at 879-80.

87. *Locke*, 124 S. Ct. at 1313.

88. *Id.* Each state can decide to fund religious training just as each state can make exceptions for sacramental peyote use in its criminal codes. *See supra* text accompanying notes 33 & 58.

89. *See Locke*, 124 S. Ct at 1313-15.

90. *Id.* at 1315. "If any room exists between the two Religion Clauses, it must be here." *Id.*

91. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489-90 (1986). Although holding the Establishment Clause did not prohibit rehabilitation program participants from using vocational aid for religious instructions, the Court declined to consider whether the Free Exercise Clause required Washington to extend such aid to the program participants. *Id.* at 489.

92. *See id.* at 488-89; *see also Locke*, 124 S. Ct. at 1311-12.

93. *Locke*, 124 S. Ct. at 1315.

94. *Id.*

Exercise challenges.[95] Instead of determining if a program singles out religious conduct, the threshold issue now becomes a question of how much suppression a state may inflict on religious freedom before a court must step in; the state's burden is significantly less. The implications this decision will have on future state and federally funded programs remains to be seen.[96] As it stands, the question of whether a state program may allow state funding to go to a religious education program is answerable by the states themselves. This poses a potential risk to state-funded programs such as school vouchers.[97] It is foreseeable that states with stricter constitutional standards regarding the establishment of religion will now refuse to enact such programs. In trying to keep its decision "between the joints"[98] of establishment and religious freedom, the Court has unknowingly narrowed the gap.

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95. *See supra* text accompanying notes 43-52.

96. This case established a profound principle that government may discriminate against religion on its face. *Locke*, 124 S. Ct. at 1315. If the holding is extended beyond educational funding issues, the scope of acceptable facial discrimination against religion may be broad. *Id.* at 1320 (Scalia, J., dissenting).

97. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding constitutionality of a state-funded program providing educational vouchers for secular education when used at religiously affiliated schools).

98. *Locke*, 124 S. Ct. at 1311.