AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion/Establishment and Free Exercise (and Free Speech)

Locke v. Davey, 540 U.S. 712 (2004)

Joshua Davey was a student at Northwest College in Kirkland, Washington. At the time, the state of Washington offered Promise Scholarships to students who met certain academic and financial criteria, but were not pursuing degrees in theology. Davey had been awarded a Promise Scholarship. He discovered in the fall of 1999, however, that he could not receive the funds if he pursued his chosen major, devotional theology. Davey sued the governor of Washington, Gary Locke, claiming that the restriction on scholarship funds violated the free exercise, establishment, free speech, and equal protection clauses of the Constitution. A federal district court rejected that claim, but that decision was reversed by the Court of Appeals for the Ninth Circuit. The state of Washington appealed to the Supreme Court of the United States.

Numerous government officials and organizations filed amicus briefs. While liberal interest groups generally sided with Washington and conservative interest groups generally sided with Davey, sharp divisions emerged between different religious groups and different states. The brief for the United States Conference of Catholic Bishops asserted,

> *The Bishops of the United States have long recognized and supported quality education at all levels and the right of individuals to pursue the education of their choice free from governmental discrimination. For the State of Washington to deny a Promise Scholarship to respondent, who met all the neutral criteria to receive such an award, solely because he declared a major in Pastoral Ministries, clearly presents just such a case of governmental discrimination.*

The Anti-Defamation League brief responded,

> *In advancing the argument here that the Free Exercise Clause does not require government funding of religious education on the same terms as the funding of non-religious education, ADL emphatically rejects the notion that this separation is in any way hostile to religion. To the contrary, the wall of separation permits religious practices and beliefs to flourish in America, and protects minority religions and their adherents. The decision of the court of appeals would destroy that separation forever, and would ineluctably entangle state and pulpit.*

The Supreme Court by a 7–2 vote sustained the Washington law. Chief Justice Rehnquist's majority opinion maintained that "some state actions [are] permitted by the Establishment Clause but not required by the Free Exercise Clause." How did he define the area between the two clauses and why did he think the Promise Scholarship Program occupied this middle ground? Suppose the Promise Scholarship program excluded persons who took courses in religion. Would that be constitutional under the Rehnquist majority opinion? How did Justice Scalia define that middle ground and why did he think the Promise Scholarship Program violated the free exercise clause? Suppose the Promise Scholarship program excluded only religion and philosophy majors? Would that be constitutional under the Scalia dissent?

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

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The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. . . . Yet we have long said that "there is room for play in the joints" between them. . . . In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

This case involves that "play in the joints" described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. . . . As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . . and the State does not contend otherwise. The question before us, however, is whether Washington, pursuant to its own constitution, . . . can deny them such funding without violating the Free Exercise Clause.

Davey . . . contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah (*1993) . . . the program is presumptively unconstitutional because it is not facially neutral with respect to religion. We reject his claim of presumptive unconstitutionality. . . In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. . . . In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. . . . And it does not require students to choose between their religious beliefs and receiving a government benefit. . . . The State has merely chosen not to fund a distinct category of instruction.

. . . [T]raining for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit. . . . And the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited. . . . And under the Promise Scholarship Program's current guidelines, students are still eligible to take devotional theology courses. . . .

In short, we find neither in the history or text of Article I, §11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.

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JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah* . . . (1993), the majority opinion held that "[a] law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny," . . . and that "the minimum requirement of neutrality is that a law not discriminate on its face." . . . [This opinion is] irreconcilable with today's decision, which sustains a public benefits program that facially discriminates against religion.

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

That is precisely what the State of Washington has done here. It has created a generally available public benefit, whose receipt is conditioned only on academic performance, income, and attendance at an accredited school. It has then carved out a solitary course of study for exclusion: theology. . . .

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Even if "play in the joints" were a valid legal principle, surely it would apply only when it was a close call whether complying with one of the Religion Clauses would violate the other. But that is not the case here. It is not just that "the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology." The establishment question *would not even be close*. . . . Perhaps some formally neutral public benefits programs are so gerrymandered and devoid of plausible secular purpose that they might raise specters of state aid to religion, but an evenhanded Promise Scholarship Program is not among them.

In any case, the State already has all the play in the joints it needs. There are any number of ways it could respect both its unusually sensitive concern for the conscience of its taxpayers *and* the Federal Free Exercise Clause. It could make the scholarships redeemable only at public universities (where it sets the curriculum), or only for select courses of study. Either option would replace a program that facially discriminates against religion with one that just happens not to subsidize it.

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. . . The First Amendment . . . guarantees *free* exercise of religion, and 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. The Court's only response is that "Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology." . . . But part of what makes a Promise Scholarship attractive is that the recipient can apply it to his *preferred* course of study at his *preferred* accredited institution. That is part of the "benefit" the State confers. The Court distinguishes our precedents only by swapping the benefit to which Davey was actually entitled (a scholarship for his chosen course of study) with another, less valuable one (a scholarship for any course of study *but* his chosen one). On such reasoning, any facially discriminatory benefits program can be redeemed simply by redefining what it guarantees.

The other reason the Court thinks this particular facial discrimination less offensive is that the scholarship program was not motivated by animus toward religion. The Court does not explain why the legislature's motive matters, and I fail to see why it should. If a State deprives a citizen of trial by jury or passes an *ex post facto* law, we do not pause to investigate whether it was actually trying to accomplish the evil the Constitution prohibits. It is sufficient that the citizen's rights have been infringed. . . .

The Court has not approached other forms of discrimination this way. When we declared racial segregation unconstitutional, we did not ask whether the State had originally adopted the regime, not out of "animus" against blacks, but because of a well-meaning but misguided belief that the races would be better off apart. It was sufficient to note the current effect of segregation on racial minorities. . . .

. . . Let there be no doubt: This case is about discrimination against a religious minority. Most citizens of this country identify themselves as professing some religious belief, but the State's policy poses no obstacle to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far narrower set. One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction. In an era when the Court is so quick to come to the aid of other disfavored groups, see, *e.g.*, *Romer* v. *Evans* . . . (1996), its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional.

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