Locke v. Davey and the Death of Neutrality as a Concept Guiding Religion Clause Jurisprudence

Shannon Black

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/jcred/vol19/iss2/5
NOTES

LOCKE V. DAVEY AND THE DEATH OF NEUTRALITY AS A CONCEPT GUIDING RELIGION CLAUSE JURISPRUDENCE

SHANNON BLACK*

“And he said, Woe unto you also, ye lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.”

“For this is a heinous crime; yea it is an iniquity to be punished by the judges.”

* J.D. Candidate, St. John’s University School of Law, June 2005; B.F.A. Cinema Studies/Politics, with departmental honors, New York University, 2003. The author wishes to thank Professor Robert Vischer for his patience and guidance regarding this Note, and her parents, George & Cheryl Black, for their unwavering support, even through difficult times."

2 Job 31:11.
I. INTRODUCTION

On February 25, 2004, in Locke v. Davey, the Supreme Court decided that the Free Exercise Clause of the First Amendment did not prevent the State of Washington from denying the Promise Scholarship, a program generally available to all students who have met certain threshold requirements, to students who chose to major in devotional theology. This note criticizes the Court’s holding based on previous Free Exercise jurisprudence, and also explores the potential implications of this Court’s decision for other areas of government funding. Part II of this note will describe the Supreme Court’s previous decisions based on the Constitution’s two Religion Clauses, focusing alternatively on the Establishment Clause, the Free Exercise Clause, and the interaction between the two. Part III will trace the history of the Locke case, describing its basic facts as well as its procedural history, and will wrap up with the rationales of both the majority and dissenting opinions. Part IV will provide analysis of various facets of the case: Part A will argue that the Court’s rationale was incorrect and that, based on prior precedent, the Court should have applied strict scrutiny; Part B will argue that the Religion Clauses should be read together to require neutrality, which would be an effective way to protect religious liberty; Part C will prescribe limits to the applicability of these standards, somewhat implicit in the standards themselves, basically limiting them to educational funding situations; Part D will consider the potential implications of the Court’s decision for another large area of educational funding, school vouchers, and ultimately conclude that the Court’s decision has effectively precluded arguments that state voucher programs must include religious schools in order to comport with the federal Constitution’s Free Exercise Clause.

4 Id. at 1315 (explaining that state’s interest in not funding pursuit of devotional degrees is substantial and therefore cannot be deemed unconstitutional); see Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 22 (1st Cir. 2004) (stating refusal to fund religious schools does not interfere with freedom of religion); Gary J. Simson, The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach, 72 CORNELL L. REV. 905, 912 (1987) (discussing relationship between government and establishment of religion).
II. RELIGION CLAUSE JURISPRUDENCE PRIOR TO LOCKE V. DAVEY

A. The Establishment Clause

Even though this note will primarily be concerned with the function of the Free Exercise Clause, a brief explanation of the current state of the Establishment Clause is important to understand the implications of an extension of religious liberty in the Locke situation and also to understand how the two Religion Clauses work together. The Constitution provides that "Congress shall make no law respecting an establishment of religion." This clause has been incorporated to the states through the Fourteenth Amendment. Some previous Supreme Court language has interpreted the Establishment Clause as setting up a high wall separating church and state; however, in its application of this standard, the Supreme Court has not always struck down the challenged program. In 1971, in Lemon

5 U.S. CONST. amend. I.
6 See Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947) (applying religion clauses to states; also, there is language in previous Supreme Court cases suggesting that both clauses should be incorporated, but this was the first case where the Establishment Clause was actually at issue); Murdock v. Pennsylvania., 319 U.S. 105, 108 (1943) (applying entire First Amendment to states); Cantwell v. Connecticut., 310 U.S. 296, 303 (1940) (suggesting both clauses are applicable to states); Douglas Laycock, A Survey of Religious Liberty in the United States, 47 OHIO ST. L. J. 409, 415-16 (1986) (arguing there has been controversy among scholars over whether Establishment Clause should be incorporated to states, and that Civil War history supports view that states can also threaten liberty, including religious liberty, and that without said Establishment Clause, religious liberty of state citizens would be less secure). But see William K. Lietzau, Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation, 39 DEPAUL L. REV. 1191, 1193 (1990) (arguing Fourteenth Amendment was never intended to incorporate Establishment Clause to states).
7 See Everson, 330 U.S. at 15-16, 18 (holding that "wall between church and state...must be kept high and impregnable," and also noting establishment of religion clause means at very least,

[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . .

No tax in any amount, large or small, can be levied to support any religious activities or institutions.
8 See Everson, 330 U.S. at 17-18. In Everson, the Court upheld, where, despite articulating separationist approach, state program that provided reimbursement for money spent for children riding to school using public transportation, even though some reimbursements went to parents who sent their children to religious schools, because it was "part of a general program under which [the state] pays the fares of pupils attending public and other schools." Furthermore, the Court also found it significant that this state
v. Kurtzman, the Court signaled a move away from strict separation and articulated a three part test to deal with Establishment Clause cases. This test provides that a statute must first have a valid secular purpose, then must neither have the primary purpose or effect of advancing or inhibiting religion, and also must not lead to an excessive government entanglement with religion. This Lemon test was largely a synthesis of various tests the Court had previously articulated in various establishment contexts. Even though Lemon has not been explicitly overruled, the Supreme Court has moved away from this test in many cases.

Over the course of its Establishment Clause jurisprudence, the Court has gradually articulated a more accommodationist approach than Everson suggests. This can be seen even in cases where the Supreme Court has clung to precedent and applied the contributed no money to religious schools themselves. In Sch. Dist. v. Schempp, 374 U.S. 203, 220 (1963) the Court stated that although Establishment Clause reflects ideology that there should be separation between church and state, it does not mean that separation should exist in all aspects. See also Lemon v. Kurtzman, 403 U.S. 602, 615 (1971), in which the Court explained certain instances where government can be involved with religion. The Court further stated that, to determine whether or not this involvement is excessive, look to character and purposes of said benefited institution, nature of aid, and resulting relationship between this religious authority and government.

9 403 U.S. 602 (1971).
11 See Walz v. Tax Comm’n of N.Y., 397 U.S. 664, 674 (1970) (adding last prong, in holding that Supreme Court must be “sure that the end result...is not an excessive government entanglement with religion”); Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) (discussing test’s second prong); Schempp, 374 U.S. at 222 (deriving first two prongs of test by holding “that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion”).
12 See Lee v. Weisman, 505 U.S. 577, 592–93 (1992) (applying ‘coercion’ test, which tests whether government action directs formal religious exercise as to encourage or influence participation of those who object religiously to said exercise); County of Allegheny v. ACLU, 492 U.S. 573, 597 (1989) (adopting “endorsement” test, which looks into context to see if any reasonable observer would deem government to be endorsing religion); Larson v. Valente, 456 U.S. 228, 252 (1982) (holding when government shows denominational preference, law must not only have secular purpose but also survive strict scrutiny).
13 See Bd. of Educ. v. Grumet, 512 U.S. 687, 705 (1994) (explaining that Constitution allows states to accommodate religious needs by alleviating special burdens); Walz, 397 U.S. at 669–70 (postulating that such course of constitutional neutrality cannot be straight line); see also David Felsen, Comment, Developments in Approaches to Establishment Clause Analysis: Consistency for the Future, 38 AM. U.L. REV. 395, 405–06 (1989) (noting development of accommodation to deal with problems associated with strict separation).
*Lemon* test, largely because the Court has often applied this three part test with a certain amount of flexibility.\(^{14}\) In particular, this trend, as well as the important implications of the Court's Establishment Clause precedent for Free Exercise cases, is highlighted by two cases: *Witters v. Washington Department of Services for the Blind*\(^{15}\) and *Zelman v. Simmons-Harris*.\(^{16}\) In *Witters*, applying the *Lemon* test, the Court reversed a Washington Supreme Court holding that the Establishment Clause prohibits state funding, under a general assistance program, to those who would choose to go to a Christian college to become a pastor.\(^{17}\) In doing so, the Court applied the *Lemon* test.\(^{18}\) Of particular import to the Court was the fact that the aid was administered directly to the student and any aid directed toward religious instruction was "only as a result of the genuinely independent and private choice of aid recipients."\(^{19}\)

---

\(^{14}\) See Theologos Verginis, ACLU v. Capitol Square Review and Advisory Board: *Is There Salvation for the Establishment Clause? "With God All Things Are Possible,"* 34 *AKRON L. REV.* 741, 745 (2001) (articulating such endorsement test as more flexible approach to spirit of *Lemon* test); Ashley M. Bell, Comment, *"God Save this Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions*, 50 *AM. U. L. REV.* 1273, 1290 (2001) (explaining that Supreme Court is not completely satisfied with this *Lemon* test and has been willing to apply different tests); Shahin Rezai, Note, County of Allegheny v. ACLU: *Evolution of Chaos in Establishment Clause Analysis*, 40 *AM. U. L. REV.* 503, 505 (1990) (describing manipulation of *Lemon* test by more flexible approaches).

\(^{15}\) *Witters I*.

\(^{16}\) *Zelman*.


\(^{18}\) See *Witters II*, 474 U.S. at 485–89 n.5 (applying three-part *Lemon* test to the facts of case and finding first prong satisfied, as all parties conceded that the program's purpose was secular, and that the second prong, while more difficult, was also satisfied because aid went directly to the student and it was not clear that a significant portion of the aid would be expended for religious education; however, Court declined to reach the third prong, thereby because it remanded case for further findings as to state constitution). See generally Jesse H. Choper, *A Century of Religious Freedom*, 88 *CALIF. L. REV.* 1709, 1729 (2000) (explaining that *Lemon* test's application in *Witters* led to Court's determination that "the provision of financial assistance by the state to enable someone to become a pastor, missionary, or church youth director clearly has the primary effect of advancing religion"); Michael C. Petko & Craig R. Wood, *Assessing Agostino v. Felton in Light of Lemon v. Kurtzman: The Coming of Age in the Debate Between Religious Affiliated Schools and State Aid*, 2000 *BYU EDUC. & L. J.* 1, 5 (2000) (stating that *Witters* Court based its decision on *Lemon*'s second prong).

\(^{19}\) *Witters II*, 474 U.S. at 487 (noting student uses funding for institution of her choice).
In *Zelman*, the Supreme Court’s most recent statement on the Establishment Clause, the Court continued in this trend by upholding a school voucher program that allowed parents to use state aid for their children to attend religious as well as secular private schools.\(^{20}\) The Court resorted to a modified *Lemon* test analysis: whether the law had the purpose or effect of advancing or inhibiting religion.\(^{21}\) The Court noted that the significant distinction to be drawn was between cases where the government aids religion directly and cases where the aid reaches religious schools through “true private choice.”\(^{22}\) The Court found that the voucher program at issue in *Zelman* fell into the latter category,\(^{23}\) finding it particularly significant that “the . . . program is neutral in all respects toward religion.”\(^{24}\) Thus, the most


\(^{21}\) See *Zelman*, 536 U.S. at 648-49 (discussing how other part of this modified test was satisfied, in that there was no dispute that the law was enacted for any valid secular purpose); see also id. at 668 (O'Connor, J., concurring) (citing *Agostini v. Felton*, 521 U.S. 203, 218, 232-33 (1997)) (observing that Supreme Court had folded third *Lemon* prong, or “excessive entanglement” question, into effects inquiry to try to reconcile case with previous Supreme Court precedent); ACLU v. McCreary County, 354 F.3d 438, 464 (6th Cir. 2003) (stating that Court further modified *Lemon* test in *Zelman* with O'Connor's concurrence that folds entanglement inquiry into primary effect inquiry); Sara J. Crisafulli, Comment, *Zelman v. Simmons-Harris: Is the Supreme Court's Latest Word on School Voucher Programs Really the Last Word?*, 71 FORDHAM L. REV. 2227, 2281 n.51 (2003) (explaining *Zelman* Court’s use of modified *Lemon* test found in *Agostini*, “which restated the primary criteria the Court used in Establishment Clause challenges to ‘evaluate whether government aid has the effect of advancing religion’”).


\(^{23}\) *Zelman*, 536 U.S. at 653 (concluding that the program is neutral towards religion); *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 440 (6th Cir. 2002) (noting *Zelman* conclusion that Court's decisions consistently distinguish between those government programs providing directly to religious schools, and programs of true private choice); see also *Prince v. Jacoby*, 303 F.3d 1074, 1093 (9th Cir. 2002) (discussing *Zelman* decision--that programs of true private choice do not offend Establishment Clause).

\(^{24}\) *Zelman*, 536 U.S. at 653-54 (postulating that this is significant because the program does not impermissibly create incentives or preferences for religious schools as
recent Supreme Court precedent suggests that programs that are neutral toward religion, where aid to religion only results from the intermediary choice of the recipient of the funds, will not violate the Establishment Clause. The next question, which was at issue in *Locke v. Davey*, is whether the Free Exercise Clause requires programs that are made generally available on an otherwise neutral basis to be made available to those who would use the funds for religious purposes.

**B. The Free Exercise Clause**

The Constitution provides that, "Congress shall make no law . . . prohibiting the free exercise [of religion]." This provision has, in a similar manner to the Establishment Clause, been incorporated to the states through the Fourteenth Amendment. Generally, the Free Exercise clause is implicated in two different types of cases: those in which the government directly tries to restrict a religious practice or discriminate on the basis of religion and those in which an individual seeks an exemption opposed to secular ones; but instead actually create disincentives for religious (and presumably non-religious) private schools by making students who choose to go to them eligible for less aid than at community or magnet schools.

25 U.S. CONST. amend. I.


from the laws or practices of a state because of his or her religious beliefs.29 The former, given the language of the First Amendment, is a much easier case, and is therefore much rarer than the latter.30 Such cases are not unheard of, however; generally, they arise when the government places a condition on the exercise of a right31 or the conferral of a benefit.32

Early Free Exercise cases were quick to reject requests for religious exemptions.33 The Court shifted from this course in Sherbert v. Verner,34 when it required the government to show a compelling interest in order to sustain a law that places a burden on the free exercise of religion.35 Sherbert involved a Seventh Day Adventist’s challenge to a South Carolina law that required an employee to work on Saturday36 to be eligible for


30 See William P. Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 40 CASE W. RES. L. REV. 357, 374 (1990) (stating there have been few instances where one law has infringed on religious freedom); McConnell, supra note 27, at 1413 (noting how majority of Free Exercise cases dealt with religious exemption claims).

31 See McDaniel, 435 U.S. at 626 (plurality opinion) (holding that states may not condition exercising one right on relinquishing another); Torasco, 367 U.S. at 496 (holding that Maryland law requiring public employees to take oath asserting belief in God violates Free Exercise Clause); Falwell, 203 F. Supp. 2d at 633 (holding that states may not prohibit churches from incorporating).


33 See Braunfeld, 366 U.S. at 609 (holding exemption to Sunday closing laws was not required for those of Jewish Orthodox faith); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (refusing to grant exemption to child labor laws to Jehovah’s witness); Reynolds v. U.S., 98 U.S. 145, 166–67 (1878) (finding no exemption for Mormons on criminalization of polygamy).


35 See id. at 403 (observing that, for South Carolina’s statute to survive constitutional challenge, it must either “represent no infringement” on free exercise or “be justified by a compelled state interest”); see also McConnell, supra note 27, at 1412 (stating that statute cannot enforce its limitations when it conflicts with sincere religious practices); Prabha Sipi Bhandari, Note, The Failure of Equal Regard to Explain the Sherbert Quartet, 72 N.Y.U. L. REV. 97, 97 (1997) (stating that South Carolina’s statute failed compelling state interest’s test).

36 See Sherbert, 374 U.S. at 399 n.1 (noting “there [is no] doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon
unemployment benefits. Finding that strict scrutiny was not satisfied in the case, the Court struck down the law as a violation of the Free Exercise clause as applied to the appellant.

The Court continued on in this vein, requiring religious exemptions to otherwise valid state laws until Employment Division v. Smith, when the Court radically altered its approach to Free Exercise cases. Smith involved an Oregon law that regulated the possession of controlled substances and the

that religion's interpretation of the Holy Bible


See Sherbert, 374 U.S. at 399-400. Specifically, the appellant in the case was fired from her job because she refused to work on Saturdays. Id. After trying to find alternate employment and encountering no employer who would hire her for a five-day work week instead of six, she applied for unemployment benefits. Id. at 399-400. The South Carolina Unemployment Compensation Act provides that to be eligible for benefits, the claimant must show that she was "able to work and is available to work." Id. at 400-01. It also provides that any claimant who "has failed, without good cause... to apply for available suitable work...[or] to accept available suitable work when offered" will be ineligible for benefits. Id. at 401. The Employment Security Commission found that the appellant fit under the second category, finding that her rejection of available work because of her religious beliefs was not "good cause," and denied her unemployment benefits. Id.

See Sherbert, 374 U.S. at 407-09 (finding lack of compelling government interest to support South Carolina law); see also McConnell, supra note 27, at 1412 (forcing state to carve out exception to statute for people who cannot comply because of their religious beliefs); Bhandari, supra note 35, at 97 (stating that South Carolina's statute failed compelling state interest test).


denial of unemployment benefits to two former employees of a drug rehabilitation clinic because they had been discharged from that employment for ingestion of peyote.\textsuperscript{42} The Court granted certiorari to consider whether the state’s regulation of peyote without an exemption for religious use\textsuperscript{43} violated the Free Exercise Clause.\textsuperscript{44} The Court found the prohibition to be constitutional.\textsuperscript{45} In doing so, the Court discarded the “compelling interest” test of Sherbert\textsuperscript{46} and established a new test: laws that are neutral and of general applicability that have only an incidental burden on the practice of religion do not violate the Free Exercise Clause.\textsuperscript{47} The Court found it important that there

\textsuperscript{42} Employment Div. v. Smith, 494 U.S. 872, 874 (1990) (noting Oregon law prohibiting knowing or intentional possession of controlled substances unless prescribed by medical practitioners); see also OR. ADMIN. R. 855-080-0021(3)(v)(2004) (explaining that peyote is one “controlled substance” regulated under Oregon’s criminal possession statute); Peyote Way Church. v. Smith, 742 F.2d 193, 195 (5th Cir. 1984) (defining peyote as “small spineless cactus that grows along the Rio Grande River. Its stems have jointed tubercules or 'buttons' that, when ingested, have a hallucinogenic effect”).

\textsuperscript{43} See Smith, 494 U.S. at 875–76 (vacating and remanding case to Oregon Supreme Court to determine whether respondent’s conduct violated Oregon’s criminal code; therefore, Court heard case once before, but found itself unable to decide it because it did not know whether Oregon penal law distinguished between uses of peyote for religious purposes as opposed to other purposes); see also Smith v. Employment Div., 763 P. 2d 146, 148 (Or. 1988) (announcing that Oregon Supreme Court found that penal law did not make this distinction; as such, this was a violation of the Free Exercise Clause); cf. OR. REV. STAT. § 475.992(5)(a)-(c) (2001) (clarifying that currently, Oregon allows an affirmative defense to its controlled substances law allowing for use of peyote: in connection with a good faith practice of a religious belief, directly associated with a religious practice, and if the use “is not dangerous to the health of the user or others who are in the proximity of the user”).

\textsuperscript{44} See Smith, 494 U.S. at 876–77 (noting that Constitution’s Free Exercise Clause disables Congress from making law that prohibits free exercise of religion); McDaniel v. Paty, 435 U.S. 618, 626 (1978) (noting that “Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs”); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (citations omitted) (emphasis added) (stating that “the door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such”).

\textsuperscript{45} See Employment Division v. Smith, 494 U.S. 872, 878-79 (1990) (noting that Supreme Court has “[n]ever 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”); see also Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940) (holding that “[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs”); Reynolds v. United States, 98 U.S. 145, 166–67 (1879) (rejecting claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded such practice).

\textsuperscript{46} See Sherbert, 374 U.S. at 406 (questioning whether “compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right”).

\textsuperscript{47} See Smith, 494 U.S. at 878 (expressing belief that 'permissible' reading of First Amendment text is 'correct'); see also id. at 881 (noting that Court did allow for some generally applicable laws to violate Free Exercise Clause, but only if law also burdened some other constitutional protection); cf. Kathleen P. Kelly, Note, Abandoning the
was no evidence that the state's regulation of the use of peyote was an attempt to regulate religious belief or conduct, and held that in the absence of such a showing, the rule previously enunciated should control.48

The Court continued to reaffirm the rule of *Smith* without much elucidation49 until it decided *Church of the Lukumi Babalu Aye v. City of Hialeah.*50 That case involved three city ordinances passed in response to the opening of a church associated with the Santeria faith.51 These laws were aimed in particular at animal sacrifice,52 a practice central to the Santeria faith.53 The Court

Compelling Interest Test in Free Exercise Cases: Employment Division, Dep't of Human Resources v. Smith, 40 CATH. U. L. REV. 929, 955–56 (1991) (discussing 'hybrid' cases alluded to in *Smith*). See generally, Jesse H. Choper, Article, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM AND MARY L. REV. 943, 947–48 (1986) (noting divide when "Court has read the establishment clause as saying that if a law's purpose is to aid religion, it is unconstitutional. On the other hand, the Court has read the free exercise clause as saying that, under certain circumstances, the state must aid religion.").

48 See *Smith*, 494 U.S. at 882 (holding "there being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls"). See generally *Gillette*, 401 U.S. at 461 (noting that "our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government"); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 264 (1934) (explaining that "privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress...[which] may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege.").


52 See *Lukumi Babalu Aye*, 508 U.S. at 527–28 (noting that two ordinances defined 'sacrifice' as arguably commensurate with practicing religion and provided exceptions for those killing animals for food); see also *id.* at 528 (explaining that third ordinance prohibited killing animals for food, i.e. 'slaughter,' within certain areas, but also provided exemptions); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 723 F. Supp 1467, 1471 (S.D. Fla. 1989) (explaining that "[a]nimals, including chickens, pigeons, doves, ducks, guinea fowl, goats, sheep, and turtles, are sacrificed as an integral part of the rituals and ceremonies conducted by practitioners of Santeria."). See generally Paul L. Bader, Note, *Church of the Lukumi Babalu v. City of Hialeah*, 44 MERCER L. REV. 1357, 1358 (1993) (nothing how Court "adopted the conclusions of the defendant's expert witness, Dr. Michael Fox ... and found that this was not a reliable or painless method of killing an animal").
began by reaffirming Smith before going on to define more precisely the standard to be applied. The Court noted that, while the words used in the ordinances, i.e. “sacrifice” and “ritual,” are words with “strong religious connotations,” they also have secular meanings; therefore, the ordinances in question could not be deemed not to be neutral on their faces. The Court did consider the use of these particular words significant, especially when coupled with the text of other ordinances referring specifically to certain religious practices as the motivation for the law as well as the fact that the operation of the statute targeted the Santeria religion. The Court concluded


54 See Lukumi Babalu Aye, 508 U.S. at 532-33 (defining religion neutral laws as those without purpose to disapprove of one religion nor purpose to infringe upon practices because of their religious motivation); see also Lupu, Employment Division, supra note 41, at 265 (explaining that neutrality requirement bars both overt and covert discrimination against religious minorities). See generally Lupu, Lingering Death, supra note 53, at 264 (noting that ordinances in Lukumi were “not neutral with respect to religion, nor ... generally applicable”).

55 See Lukumi Babalu Aye, 508 U.S. at 533-34 (noting whether words such as ‘sacrifice’ and ‘ritual’ are of religious or secular origin is inconclusive). But see Kris Banvard, Comment, Exercise in Frustration? A New Attempt by Congress to Restore Strict Scrutiny to Governmental Burdens on Religious Practice, 31 CAP. U. L. REV. 279, 297 (2003) (stating that ordinances in Lukumi “failed to reach a range of secular conduct that had effects similar to those of the religious rituals [of Santerians]”); Renee Skinner, The Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: Still Sacrificing Free Exercise, 46 BAYLOR L. REV. 259, 271 (1994) (stating that ordinances in Lukumi were not facially neutral).

56 See Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993) (debating whether words ‘sacrifice’ and ‘ritual’ are of secular or religious nature); cf. Skinner, supra note 55, at 271 (stating that ordinances in Lukumi “targeted the religion by their own terms”). See generally Banvard, supra note 57, at 296 (noting importance of facial neutrality).

57 See Lukumi Babalu Aye, 508 U.S. at 534-35 (discussing hostility shown to Santeria religion through text and legislative history of such ordinances); see also Skinner, supra note 55, at 271 (stating that ordinances in Lukumi “targeted the religion by their own terms”). See generally Silversmith & Guggenheim, supra note 36, at 474 (discussing likely unconstitutionality of laws that only target religiously-motivated conduct).

58 See Lukumi Babalu Aye, 508 U.S. at 535-36 (noting numerous exceptions to ordinance application, apparently including slaughter for kosher purposes, which seemed to prohibit only Santeria religion’s ritualistic sacrifice); see also Banvard, supra note 55, at 297 (noting that Lukumi held that such ordinances “failed to reach a range of secular conduct that had effects similar to those of the religious rituals [of Santerians]”); Skinner, supra note 55, at 271 (stating that Lukumi found such ordinances had “effect of creating a religious gerrymander”).
that the law was not neutral, nor of general applicability; hence, strict scrutiny should be applied. In applying strict scrutiny, the Court found, largely on the analysis it had already engaged in, that the laws could not withstand such heightened scrutiny.

One question left unresolved by the Court was whether the Free Exercise Clause required a showing of animosity toward religion before a person would have a valid constitutional claim. In the only portion of his opinion not to command a majority of the Court, Justice Kennedy suggested that showing a history that attempts to target certain practices because of religious motivation would be a relevant factor for consideration, but he did not directly state that such a showing would be required. Justice Scalia, in a concurrence explaining his reasons for not joining that portion of Justice Kennedy’s opinion, suggested that such a showing would not be necessary to find a Free Exercise Clause violation. Still, the major dividing line in Free Exercise

59 See Lukumi Babalu Aye, 508 U.S. at 542 (finding city ordinances had aim of suppressing religion); see also Lupu, Lingering Death, supra note 53, at 264 (noting Court’s finding that these ordinances “were not neutral with respect to religion”); see also Lupu, Employment Division, supra note 41, at 265 (stating that Court in Lukumi unanimously agreed that these challenged ordinances were religious gerrymander).

60 See Lukumi Babalu Aye, 508 U.S. at 543 (concluding that these ordinances were not generally applicable); see also Lupu, Lingering Death, supra note 53, at 264 (noting that ordinances in Lukumi were not generally applicable); Elizabeth Trujillo, Note, City of Boerne v. Flores: Religious Free Exercise Pays a High Price for the Supreme Court’s Retaliation on Congress, 36 HOUSTON L. REV. 645, 654-55 (1999) (stating that ordinances targeted one specific religious group).

61 See Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546-47 (1993) (holding ordinances restricting Santerian religious practices were not justified by any compelling government interest nor were they narrowly tailored to any government interest); see also Lupu, Lingering Death, supra note 53, at 265 (noting that ordinances at issue were unconstitutional); Skinner, supra note 55, at 271 (affirming how these ordinances in Lukumi “failed . . . the compelling interest test”).

62 See Lukumi Babalu Aye, 508 U.S. at 540-42 (discussing ordinances’ legislative history that indicated hostility to Santeria religion); see also Lupu, Lingering Death, supra note 53, at 264 (stating that ordinances’ enactment history “made clear that suppression of . . . the Santeria worship service was the object of the ordinances”); Skinner, supra note 55, at 274 (stating that ordinances’ legislative history led to conclusion “that the City of Hialeah’s primary motive was to . . . stop the Santeros from practicing their religion”).

63 See Lukumi Babalu Aye, 508 U.S. at 558–59 (Scalia, J., concurring) (noting that legislative purpose should not be part of First Amendment consideration and that Court should consider only whether “the law . . . in fact singles out a religious practice for special burdens”); see also Jeffrey Williams, Note, Humphrey v. Lane: The Ohio Constitution’s David Slays the Goliath of Employment Division, Department of Human Resources of Oregon v. Smith, 34 AKRON L. REV 919, 941 (2001) (noting relevant criteria are law’s neutrality and general applicability); see also Levine, supra note 53, at 297 (stating that strict scrutiny was not applied to this criminal law because such law was neutral and generally applicable).
Clause jurisprudence up to the time Locke was decided has been the dichotomy drawn between Smith and Lukumi, requiring only a rational basis analysis for laws of general applicability that might impact religious practice, but requiring strict scrutiny of laws that target or otherwise single out a practice that is undertaken for religious reasons.  

C. The Relationship between the Two Religion Clauses

The Court has long observed a certain and inevitable tension between the two religion clauses of the First Amendment. Scholars have also recognized the tension, but have been quick to blame this tension not on the language of the two clauses; instead, they blame it on the Court's interpretation of the two clauses separately, and suggest possible ways to alleviate that Court-created tension. The most definitive statement on the relationship between the two clauses, and perhaps an attempt to

---

64 See Lukumi Babalu Aye, 508 U.S. at 531-32 (holding that laws that are neither neutral nor generally applicable "must be justified by a compelling government interest and must be narrowly tailored to advance that interest"); see also Levine, supra note 53, at 298 (noting applicability of strict scrutiny to laws that are not neutral and not generally applicable); Silversmith & Guggenheim, supra note 36, at 474 (stating that strict scrutiny applies to laws that target only conduct with religious motivation).


66 See Carl H. Esbeck, Religion in the Public Square: Religion and the First Amendment: Some Causes of the Recent Confusion, 42 WM. & MARY L. REV. 883, 893 (2001) (arguing that such conflicts between said Religion Clauses are extrinsic and avoidable); John Witte, Jr., American Legal History: The Integration of Religious Liberty, 90 Mich. L. Rev. 1363, 1369 (1992) (noting that "drafters did not prefer one religion clause over the other or perceive any tension between the two"). See generally William Cox, Jr., The Original Meaning of the Establishment Clause and Its Application and Education, 13 REGENT. U.L. REV. 111, 113 (2000/2001) (claiming that "for the greater part of this century, the Court has been without a principled basis for interpreting the religion clauses of the First Amendment").

67 See Esbeck, supra note 66, at 894 (arguing if Court applies neutrality principles, no tension exists between these two clauses). See generally Hosford, supra note 65, at 645 (alluding "because the First Amendment describes the appropriate relationship between religion and the state in just two short clauses, federal courts have developed detailed tests to guide them in the two distinct areas of jurisprudence concerning religion: establishment and free exercise of religion"); Robert Jackson, Jr., Comment, A Call to Secure Religious Exercise Under the Mississippi Constitution, 62 MISS. L.J. 133, 136 (1992) (claiming Supreme Court has employed balancing processes of respective interests to determine if government must accommodate religious interests by providing exemptions from general rules").
relieve the purported tension between the clauses,\textsuperscript{68} comes from the Court's decision in Walz v. Tax Commissioner of New York.\textsuperscript{69} There, the Court noted that there was room for a "play in the joints" between the two clauses, meaning things prohibited by one clause were not required by the other. This thereby leaves room for the states to experiment with greater free exercise or establishment provisions.\textsuperscript{70} The Court has since, after Walz but prior to Locke, looked with favor upon this principle.\textsuperscript{71} On the other hand, the Court has also recognized that a state's interest in a stricter separation of church and state is limited by other provisions of the Constitution, including the Free Exercise Clause.\textsuperscript{72} Reading the clauses together, the key focus, according to Walz, should be "[a]dherence to the policy of neutrality" that is

\textsuperscript{68} See Rezai, supra note 14, at 514 n.68 (citing Walz for proposition of relieving tension between these two clauses). See generally Hosford, supra note 65, at 644 (claiming this relationship between Constitution's two religious clauses leads to potential contradictory results); Jackson, supra note 67, at 136 (claiming that "the inclusion of both restraints upon the power of Congress to legislate concerning religious matters shows unmistakably that the framers of the First Amendment were not content to rest the protection of religious liberty exclusively upon either clause").

\textsuperscript{69} 397 U.S. 664 (1970).

\textsuperscript{70} See id. at 669 (deducing from court jurisprudence and the First Amendment itself that, "we will not tolerate either governmental establishment of religion or governmental interference with religion...there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference"). See generally Allison Hensey, Comment, A Comparison of Religious Expression Doctrine under the United States and Oregon Constitutions, 75 OR. L. REV. 1253, 1254 (1996) (discussing tension in First Amendment law between "protection of religious expression and worship in the Free Speech and Free Exercise Clause and prohibition against an establishment of religion by the state in the Establishment Clause"); Hosford, supra note 65, at 644 (claiming Free Exercise Clause "requires that government refrain from inhibiting the free exercise of religion, while the Establishment Clause simultaneously requires that government refrain from 'respecting' religion").

\textsuperscript{71} See Witters v. Wash. Dep't of Servs. for the Blind, 493 U.S. 850, 850 (1989) (Witters IV) (denying certiorari after remand of case on question of whether Washington's stricter establishment clause provision violates federal Free Exercise Clause); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 484–85 (1986) (Witters II) (declining to consider Free Exercise question associated with Washington's more restrictive establishment provision). But see McMonagle v. Northeast Women's Ctr., 493 U.S. 901, 903–04 (1989) (White, J., dissenting) (arguing Court should have granted certiorari in Witters IV because the "case presents important federal questions regarding the free exercise rights of citizens who participate in state aid programs...and regarding the extent to which state involvement that does not violate the Establishment Clause is required by the Free Exercise Clause").

\textsuperscript{72} See Widmar v. Vincent, 454 U.S. 263, 276 (1981) (holding that Establishment Clause requires states to distinguish between "religious speech and nonreligious speech, the primary effect of which is not to support an establishment of religion"); Hensey, supra note 70, at 1254 (stating that, under the Free Exercise clause, states "may not impede an individual's freedom of religion expression or workshop"); Hosford, supra note 65, at 644 (stating that Constitution ensures "Congress cannot pass laws that inhibit the free exercise of religion").
required by both clauses with respect to religion. The Court defines this inquiry as considering "whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." The Court, largely because Walz was an Establishment Clause case, focused its "play in the joints" analysis on what it termed the "benevolent neutrality" of the state, which is the state creating accommodations for religious practice without running into an Establishment Clause violation. Still, much of the language of the Court speaks to the interpretation of both clauses, and the Court ultimately articulates a goal of "permit[ting] religious exercise to exist without sponsorship and without interference." This was largely the state of Religion Clause jurisprudence prior to Locke: allowing the states the discretion on whether or not to

---


74 Walz, 397 U.S. at 669 (holding "each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so"). See generally United States v. Lewis, 638 F. Supp. 573, 577 (Mich. S.D. 1986) (noting that "court must determine whether the state action interferes with or burdens the individual's religious belief"); Mohammad v. Sommers, 238 F. Supp. 806, 811 (Mich. N.D. 1964) (holding "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices").

75 See Walz, 397 U.S. at 670–72 (examining prior Establishment Clause jurisprudence). See generally Tex. Monthly v. Bullock, 489 U.S. 1, 8–9 (1989) (holding said "Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization"); Pub. Funds for Pub. Sch. v. Byrne, 590 F.2d 514, 519 (3d Cir. 1979) (noting "analysis required in cases concerning the Establishment Clause has been compared to the adjudication of equal protection cases").

76 Walz, 397 U.S. at 669 (postulating that there is room for play in joints productive of benevolent neutrality). See generally Bailey, supra note 73, at 53 (establishing such phrase "benevolent neutrality" refers to government accommodation of religion); Moens, supra note 73, at 536 (asserting that this neutrality principle "imposes an obligation on federal and state governments to refrain from favoring or disfavoring either sectarianism or secularism").

77 Walz, 397 U.S. at 669 (holding that such benevolent neutrality will permit religious exercise to exist without sponsorship and without interference). See Bailey, supra note 75, at 53 (reiterating "prohibition of governmental interference with religion refers to autonomy of religious individuals and institutions that the First Amendment preserves"); Moens, supra note 73, at 536 (stating that neutrality principle "ineffectively addresses the conflict between the Establishment Clause and the Free Exercise Clause and has largely removed religion from American public life by trivializing its existence").
accommodate religious practices so long as the laws themselves are neutral toward religion.\textsuperscript{78}

III. Locke v. Davey

A. Facts

In 1999, the State of Washington established the Promise Scholarship to assist students who achieved high marks in high school but whose economic status might prevent them from attending college.\textsuperscript{79} This scholarship is made available to all students who have met the criteria.\textsuperscript{80} These criteria require the student applying for the scholarship to meet certain academic,\textsuperscript{81} economic,\textsuperscript{82} and enrollment requirements.\textsuperscript{83} The scholarship

\textsuperscript{78} See Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 394 (1990) (holding that payment of applicable tax imposed no undue burden on religious organization's practices or beliefs and thus, there was no threatened entanglement between state and church); see also Bowen v. Kendrick, 487 U.S. 589, 593 (1988) (stating that Adolescent Family Life Act was constitutional because it was neutral regarding grantee's status); Boyajian v. Gatzunis, NO. 98-11763-DPW, 1999 U.S. Dist. LEXIS 15610, at *20-22 (D. Mass. 1999) (stating that zoning by-law and statute were neutral as applied to church and did not violate Establishment Clause).

\textsuperscript{79} See Locke v. Davey, 540 U.S. 712, 716 (2004) (noting how scholarship was mandated by Washington Legislature after it found "an individual's economic viability...[to be] contingent on postsecondary educational opportunities..." and that students who "complete high school with high academic marks may not have the financial ability to attend college"); see also Tony Mauro, Law School Student is Supreme Court Celebrity, RECORDER, Dec. 1, 2003, at 1 (stating that Promise Scholarship is open to high-achieving low-income high school graduates).

\textsuperscript{80} See Locke, 540 U.S. at 716 (noting how Locke court stated that this scholarship is "evenly prorated among the eligible students"); see also WASH. ADMIN. CODE § 250-80-050(2) (2003) (discussing criteria. See generally 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, 588-89 (2003) (postulating how these criteria include academic and economic requirements).

\textsuperscript{81} See WASH. ADMIN. CODE § 250-80-020(12)(b) (2003) (stating how students have to be in top 15% of his high school graduating class to qualify); see also WASH. ADMIN. CODE § 250-80-020(12)(c-d) (2003) (affirming how, alternatively, students are eligible if they obtain at least 1200 on their Scholastic Assessment Tests or 27 on their American College Test); Axtell, supra note 80, at 588 (discussing 15% requirement).

\textsuperscript{82} See WASH. ADMIN. CODE § 250-80-020(e) (2004) (confirming student's family income must be less than 135% of state's median); Axtell, supra note 80, at 588 (discussing 135% rule); Derek D. Green, Note, Does Free Exercise Mean Free State Funding? In Davey v. Locke, the Ninth Circuit Undervalued Washington's Vision of Religious Liberty, 78 WASH. L. REV. 653, 653 (2003) (elaborating upon scholarship requirements).

\textsuperscript{83} See WASH. ADMIN. CODE § 250-80-020(12)(f) (2004) (affirming that students must enroll at least half-time at 'eligible postsecondary' institutions); see also Axtell, supra note 80, at 588-89 (discussing institutions); WASH. ADMIN. CODE § 250-90-020(13)(a)-(b) (2004) (defining 'eligible postsecondary education' as either "public institution[s] authorized by
funds are not limited to tuition, but may also be spent on any number of educational expenses. The scholarship program is funded by the general fund of the state of Washington, and the amount each recipient receives for a given year is dependent on the appropriation for the program, which is spread evenly among the recipients. Once a student applies for the scholarship and meets the academic and income requirements, that student is informed of his or her eligibility, which is contingent on meeting the enrollment requirements. One of these enrollment requirements is that the student must not be pursuing a degree in theology. This requirement was included to ensure compliance with both state statutory law and with the state constitution, which prohibits 'public money' from going to "religious instruction." The requirement more specifically

the Washington legislature" or any institution "physically located in the state of Washington...[that] is accredited by a nationally recognized accrediting body".)

See WASH. REV. CODE §28B.119.010(7) (2004) (noting "scholarships may be used for any college-related expenses, including but not limited to, tuition, room and board, books, and materials"); Locke v. Davey, 542 U.S. 712, 716 (2004) (stating that if student receives Promise Scholarship, money may used for tuition or other educational expenses); see also Green, supra note 82, at 653 (stating generally that Promise Scholarship was established to provide state funding to qualified students).

See WASH. ADMIN. CODE § 250-80-050(2) (2003) (discussing amount students receive from scholarship); see also WASH. ADMIN. CODE § 250-80-050(1) (2003) (noting maximum annual award is limited to "the representative average annual tuition and fees for resident students attending the state's community and technical colleges"); Locke, 540 U.S. at 717 (enumerating that award amounts at issue in Locke were for 1999-2000 and 2000-2001 academic years, when awards were $1,125 and $1,542 respectively).

See Locke, 540 U.S. at 716 (stating that students that complete enrollment requirements are informed of eligibility); see also Ira C. Lupu & Robert Tuttle, Hitting the Wall; Religion is Still Special Under the Constitution, Says the High Court, LEGAL TIMES, Mar. 15, 2004, at 68 (stating that grants were awarded to qualified college students to use at any accredited college as long as students did not major in 'devotional theology.'); Mike McKee, Justices Say States May Deny Theology Scholarship Funds, LEGAL INTELLIGENCER, Feb. 27, 2004, at 4 (noting that Promise Scholarship was awarded to eligible needy students as long as they did not major in theology).

See WASH. ADMIN. CODE § 250-90-020(12)(g) (2003) (delineating enrollment requirements); Tony Mauro, States Can Ban Scholarships for Theology, LEGAL TIMES, Mar. 1, 2004, at 7 [hereinafter Mauro, States Can Ban] (stating that students that wish to pursue theology degrees are ineligible for said Promise Scholarship); Tony Mauro, State Aid for Divinity Study not Required, Court Rules, RECORDER, Feb. 26, 2004, at 3 [hereinafter Mauro, State Aid] (asserting that Promise Scholarships would be given to needy students as long as they did not major in theology).

See WASH. REV. CODE § 28B.10.814 (2004) (providing that "[n]o aid [from a state student financial aid program] shall be awarded to any student pursuing a degree in theology"); Axtell, supra note 80, at 590 (quoting Washington statute that stated, "No aid shall be awarded to any student who is pursuing a degree in theology"); Green, supra note 82, at 653 (stating that recipients of Promise Scholarships should not pursue theology degrees to comply with state law).

See WASH. CONST., Art. I, § 11 (2004) (requiring protection of religious freedom in that “[n]o public money or property shall be appropriated for or applied to any religious
applies to devotional theology degrees. Upon enrolling at an eligible institution, it is that institution’s responsibility and prerogative to ensure the student meets the enrollment requirements, including that the student is not pursuing a degree in devotional theology. If the student meets these final requirements, the funds are distributed from the state to the school, which then forwards them to the student.

Joshua Davey was awarded the Promise Scholarship upon initial state evaluation of his academic and economic merits. He then decided to attend Northwest College, a private college worship, exercise or instruction”); see also WASH. CONST., Art. IX, § 4 (2004) (noting Washington does have such a constitutional provision: “All schools maintained or supported wholly or in part by public funds shall be forever free from sectarian control or influence”); Locke, 124 S. Ct. at 1314 (debating that this is not one so-called state Blaine Amendment, at least according to the Supreme Court; however, this provision was not at issue in Locke partly because the Washington Supreme Court has interpreted as not applying to institutions of higher education).

See Calvary Bible Presbyterian Church v. Board of Regents, 436 P.2d 189, 193 (Wash. 1967) (noting how this requirement comes not from statute or administrative codes, but from Washington constitution, as interpreted by Washington Supreme Court, which prohibits public money from going to “that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief and conduct; i.e., instruction that is devotional in nature and designed to induce faith and belief in the student”); see also Witters v. Comm'n for Blind, 771 P.2d 1119, 1121 (Wash. 1989) (discussing public money appropriation concerning religious institutions); Wash. Health Care Facilities Auth. v. Spellman, 633 P.2d 866, 867 (Wash. 1981) (elaborating how court has consistently held “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”).

See WASH. ADMIN. CODE § 250-80-060(5) (2003) (stating that university can disburse funds after verifying enrollment requirements); see also Locke, 124 S. Ct. at 1310 (noting institutions’ responsibility to determine whether student is enrolled in devotional major); Carlos S. Montoya, Constitutional Development: Locke v. Davey and the “Play In The Joints” between the Religion Clause, 6 U. PA. J. CONST. L. 1159, 1161 (2004) (clarifying that it was Northwest College which determined Davey did not meet enrollment requirements).

See WASH. ADMIN. CODE § 250-80-060(5) (2003) (noting that “independent university and the private vocational school must disburse the warrant once the student’s half-time or greater enrollment has been verified. The school may not withhold or delay disbursement for any reason other than for less than half-time enrollment”); see also Locke, 124 S. Ct. at 1310 (noting that scholarship funds are sent to institutions for disbursement). See generally Montoya, supra note 93, at 1161 (describing process of disbursing scholarship funds).

See Locke v. Davey, 124 S. Ct. 1307, 1310 (2004) (stating that Davey was initially awarded Promise Scholarship); see also Locke v. Davey, 124 S. Ct. 1307, NAT'L L. J., Aug. 2, 2004, at 1 (noting that Davey initially won scholarship); Vuoto Loredana, Second Class Citizens?, AM. ENTER., June 1, 2004, at 1 (observing that Davey was initially awarded scholarship but then had his scholarship taken away).

See Locke, 124 S. Ct. at 1310 (noting Northwest College as one eligible institution under said Promise Scholarship Program); see also WASH. ADMIN. CODE § 250-80-020 (2003) (listing Northwest Association of Schools and Colleges as one accrediting body specifically recognized by Washington state for Promise Scholarship eligibility); James J. Kilpatrick, High Court Gets Murky Over What's 'Free', AUGUSTA CHRON., March 7, 2004, at 1 (deeming Northwest College one accredited institution).
in Seattle affiliated with the Assemblies of God church. Davey's goal was to become a minister, and pursuant to that goal, he chose a double major in pastoral studies and business management/administration. At the beginning of his first year at Northwest, he met with the director of financial aid for the College, who informed him that he could not use his scholarship in pursuit of the pastoral studies degree. He was told at that time that the Promise Scholarship Program required him to sign a form indicating that he was not pursuing any devotional theology degree. He refused to sign and continued on at Northwest without receipt of the funds.

---

95 See Locke, 124 S. Ct. at 1310 (noting that Northwest College is affiliated with Assemblies of God denomination); see also Kilpatrick, supra note 94, at 1 (mentioning College's affiliation to Assemblies of God); Northwest College, About the College: History, available at http://www.nwcollege.edu/about/history.html (last visited October 6, 2004) (asserting College's founding by Northwest District Council of the Assemblies of God).

96 See Locke, 124 S. Ct. at 1310–11 (asserting that pastoral studies degree was clearly devotional in nature and thus prohibited student from receiving scholarship funds under Washington law); see also Kilpatrick, supra note 94, at 1 (emphasizing that Davey's major in pastoral ministries was considered theology degree and that he was asked to choose another major in order to keep his scholarship); Montoya, supra note 91, at 1161 (noting Northwest College determined that Pastoral Ministry major is considered theology degree).

97 See Locke, 124 S. Ct. at 1310–11 (noting that Davey enrolled for double major in pastoral ministry and business management); Northwest College, Academic Catalog, Business Management & Administration, Overview, available at http://www.nwcollege.edu/catalog/programs/busadmaj.html (last visited October 6, 2004) (noting that even majoring in business administration involves integration of study of business with "Christian value system and perspective"). See generally KILPATRICK, supra note 94, at 1 (observing that Davey's double major in pastoral ministry and business administration was finally considered theology degree by Supreme Court).

98 See Locke, 124 S. Ct. at 1311 (describing Davey's meeting with financial aid director); see also Davey v. Locke, No. C00-61R, 2000 U.S. Dist. LEXIS 22273, *1 (W.D. Wash. October 5, 2000) (stating that school administrators announced to Davey his disqualification from Promise Scholarship); MONTOYA, supra note 91, at 1161 (noting that school administrators announced to Davey that he was not eligible for his scholarship).

99 See Locke v. Davey, 124 S. Ct. 1307, 1311 (2004) (stating that Davey had to sign forms stating he would not pursue theology degree); see also Davey, 2000 U.S. Dist. LEXIS 22273 at *1 (noting how school had to provide certification form that students did not study for theology degrees in order to receive funds). See generally Kilpatrick, supra note 94, at 1 (observing university forced Davey to choose between dropping his ministry major or forfeiting his scholarship).

100 See Locke, 124 S. Ct. at 1311 (noting that Davey did not sign said form and continued at his university without receipt of scholarship funds); see also Axtell, supra note 80, at 602 (stating that Davey continued at school even after his scholarship was withdrawn); Kilpatrick, supra note 94, at 1 (observing that Davey continued studying pastoral ministry without receiving scholarship).
B. Procedural History

After the state's denial of aid, Davey filed an action in federal district court\textsuperscript{101} against several state officials\textsuperscript{102} to enjoin them from refusing to award the scholarship solely on the basis of the pursuit of a degree in devotional theology, alleging violation of his rights under the Free Exercise Clause.\textsuperscript{103} The District Court for Western District of Washington denied Davey's motion for an injunction and then granted summary judgment to defendants.\textsuperscript{104} In doing so, the court specifically held that there was no Free Exercise Clause violation because, while Davey had a right to pursue the degree in pastoral studies, he had no right to have the state of Washington fund that pursuit.\textsuperscript{105} Davey


\textsuperscript{102} See Locke, 124 S. Ct. at 1311 (noting that Davey brought suit against several state officials); Davey, 2000 U.S. Dist. LEXIS 22273, at 1*-2 (noting how, specifically, Davey sued Gary Locke, Governor of Washington, and three members of Higher Education Coordinating Board of Washington: Marcus Gaspard, Executive Director; Bob Craves, Chair; and John Klacik, Associate Director). See generally Montoya, supra note 93, at 1161 (describing procedural history).

\textsuperscript{103} See U.S. CONST. amend. I (enumerating how "Congress shall make no law...prohibiting the free exercise [of religion]"); see also Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding Fourteenth Amendment rendered state legislatures as incompetent as Congress to enact such laws respecting free exercise of religion); Locke, 124 S. Ct. at 1311 (noting how Davey also alleged Establishment Clause violations, as well as violations of Constitution's Free Speech Clause and Equal Protection Clause). See generally Davey, 2000 U.S. Dist. LEXIS 22273, at *5, *11, *25 (affirming how Davey also advanced arguments under Fourteenth Amendment Due Process Clause and under Washington State Constitution's free exercise and free speech provisions).

\textsuperscript{104} See Davey, 2000 U.S. Dist. LEXIS 22273, at *5 (explaining decision to grant summary judgment to defendants was made after carefully reviewing case record and pertinent authority and concluding that there was no genuine issue of material fact). See generally Allied Mktg. Group, Inc. v. CDL Mktg., Inc., 878 F.2d 806, 809 (5th Cir. 1989) (reiterating that injunctions can only be granted when moving party proves 4 factors: "(1) substantial likelihood of success on the merits; (2) substantial threat that failure to grant the injunction will result in irreparable injury; (3) the threatened injury outweighs any damage that the injunction may cause the opposing party; and (4) that the injunction will not disserve the public interest"); Parente v. Univ. of Pa., No. 99-CV-2374, 2001 U.S. Dist. LEXIS 15855, at *2 (E.D. Pa. July 24, 2001) (affirming how under Federal Rule of Civil Procedure 56, federal courts may grant summary judgment as matter of law if movant shows no genuine issue of any material fact).

\textsuperscript{105} See Davey, 2000 U.S. Dist. LEXIS 22273, at *12-13 (noting how Supreme Court pointed out key word in Free Exercise Clause is 'prohibit,' since its main objective is defining what government is prohibited from doing to individual; Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983) (postulating how Supreme Court has held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right"); Crow v. Gullet, 541 F. Supp. 785, 791 (D.S.D. 1982), aff'd, 706 F.2d 856 (8th Cir. 1983) (affirming how many lower courts have abided by standard that while
appealed to the Ninth Circuit, who reversed the district court’s holding. The court concluded that the law lacked facial neutrality and thus should be subject to strict scrutiny. In applying strict scrutiny, the court found that the state’s interest in its constitutional provision preventing state funds from going toward religious instruction was not compelling enough to warrant the exclusion of students who make a personal decision to major in theology. The dissenting judge felt that the majority wrongly analyzed as a free exercise case what was essentially a public funding case and agreed with the district court that the state had no obligation to fund Davey’s exercise of his constitutional rights under the Free Exercise Clause.

Free Exercise Clause prevents states from barring religious acts, it does not “provide the means or the environment for carrying them out”).

106 See Davey v. Locke, 299 F.3d 748, 750 (9th Cir. 2002), rev’d, 540 U.S. 712 (2004) (holding that Higher Education Coordinating Board violated Davey’s rights by not awarding scholarship); see also Edelstein, supra note 20, at 175 (discussing how this violation was due to Davey being denied his scholarship due to his desire to pursue theology degree).

107 See Davey, 299 F.3d at 750–53 (debating how this law is not neutral toward religion because scholarship is made generally available to all and then is specifically denied to those who choose religious majors; furthermore, any law that “refer[s] on [its] face to religion” lacks neutrality and implicates Free Exercise Clause, requiring strict scrutiny); see also Edelstein, supra note 20, at 175 (discussing how court found law at issue lacked neutrality because it ‘unconstitutionally discriminated’ based on religion).

108 See Davey, 299 F.3d at 759–60 (pointing out that Washington’s constitution ordered application of money to religious instruction and such Promise Scholarship did not contain strict criteria for qualification that would prevent Davey from receiving said scholarship; furthermore, specifically deeming state’s interest not compelling enough in this case because of intervening factor of recipient’s individual choice of funds to potentially spend them on religious education and because the state funds could be spent on any number of educational expenses so that their being spent particularly on the tuition for religious classes was tenuous; see also Green, supra note 82, at 654 (affirming how, since state’s interest was not compelling, court found this scholarship requirement “facially discriminated against a class of students on the basis of religion” and “violated the student’s right to free exercise of religion”).

109 See Davey, 299 F.3d at 761 (McKeown, CJ., dissenting) (defining issue as “whether the State of Washington may constitutionally decline to fund pastoral studies as part of its Promise Scholarship” because he believed this was one public funding case: rather than prohibiting exercising activity, this Promise Scholarship revealed state’s willingness to select which activities it would fund); see also id. at 752 (countering her second point by noting line of cases that distinguish between restrictions government puts on funds based on whether government acts as ‘a speaker’ or not; furthermore, government acts as ‘a speaker’ when it “selectively fund[s] a program to encourage activities that it believes are in the public interest” and referring to Promise Scholarship goals as ‘broad,’ majority felt that government was not acting as ‘a speaker’ here, thereby requiring that scholarship administration be viewpoint neutral). Cf. Green, supra note 84, at 655 (discussing how Davey court failed to adequately address conflicting precedent and contradicted Court precedent in conditional funding cases).
C. The Majority Opinion

The Supreme Court granted certiorari in the case to decide the Free Exercise question and reversed the Ninth Circuit's holding.\textsuperscript{110} Chief Justice Rehnquist, in his majority opinion, noted that the tension that exists between the Free Exercise and Establishment Clauses is somewhat counteracted by the Court's precedent of recognizing a "play in the joints" between the two.\textsuperscript{111} This means that there are some state actions that are neither prohibited by the Establishment Clause nor required by the Free Exercise Clause.\textsuperscript{112} The Court held that this case fell in this space between the two Constitutional religion clauses,\textsuperscript{113} and framed the issue as "whether Washington could, pursuant with its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause."\textsuperscript{114} The Court distinguished this case from the line of cases requiring facial neutrality, holding that instead of forcing students to choose between receiving a government benefit and following his


\textsuperscript{111} See Locke, 124 S. Ct. at 1311 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970)) (discussing First Amendment protections and pointing out that two guarantees are often in conflict); see also Walz, 397 U.S. at 669 (noting "we will not tolerate either governmentally established religion or governmental interference with religion...there is room for play in the joints...which will permit religious exercise to exist without sponsorship").

\textsuperscript{112} See Locke, 124 S. Ct. at 1311 (asserting that this "play in the joints" permits but does not require certain state actions); see also Michael W. McConnell, Accommodation of Religion: An Update and Response to the Critics, 60 GEO. WASH. L. REV. 685, 687–88 (1992) (stating that "[t]he Supreme Court's current position is that accommodations are not required under the Free Exercise Clause (with minor exceptions), but are permissible under the Establishment Clause"); Green, supra note 82, at 658 (reiterating that "Free Exercise Clause does not require state action simply because it is permitted under the Establishment Clause").

\textsuperscript{113} See Locke, 124 S. Ct. at 1311 (specifying state action of giving scholarships to those who want to pursue degrees in theology would not violate Establishment Clause under Court's most recent formulations of requirements); see also Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (reaffirming no Establishment Clause violation where government money goes to religious school due to recipient's "genuine and independent private choice"); Witters v. Wash. Dep't. of Servs. for Blind, 474 U.S. 481, 486 (1986) (holding no Establishment clause violation in situation factually similar to Locke).

\textsuperscript{114} Locke, 124 S. Ct. at 1312 (citations omitted) (concluding that "play in the joints" in the federal Constitution allowed Washington to authorize Promise Scholars to obtain theology degrees; however, this court was faced with whether Washington's state constitution would prohibit same).
religious beliefs, "[t]he state has merely chosen to fund a distinct category of instruction."115

The Court then notes the particularity of religious professions, observing that it is not all that strange that states would treat funding them or the education leading up to them differently than other professions because of the unique treatment that religion has received both by the federal and state constitutions. Because of this, the state has not shown "hostility toward religion."116 In fact, the Court notes that the Washington program is actually quite inclusive of religion.117 Specifically, the state allows students to attend "pervasively religious schools," like Northwest College, using the Promise Scholarship.118 Students can also use the scholarship to take devotional theology courses at these schools, so long as they do not major in it.119 Along the same lines, the Court also highlights the importance of antiestablishment concerns, especially when it comes to taxpayer funds to support the clergy, a sentiment which dates back to the founding of the country.120 Once again emphasizing the lack of

115 Locke v. Davey, 124 S. Ct. 1307, 1312-13 (2004) (articulating "th[is] 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").

116 Id. at 1313 (discussing treatment of religion as profession); see Perry v. Sch. Dist., 54 Wn.2d 886, 897 (Wash., 1959) (specifying that unique view of state and federal constitutions towards religion favors freedom and opposes establishment; furthermore, Supreme Court of Washington specifically stated that it was never intended for its state constitution to be construed in any manner that would indicate hostility towards religion). See generally Kyle Duncan, Secularism's Laws: State Blaine Amendments and Religious Persecution, 72 FORDHAM L. REV. 493, 515, 519 n.116 (2003) (defining state Blaine Amendments broadly to include provision at issue in Davey).

117 See Locke, 124 S. Ct. at 1314 (noting Promise Scholarships actually includes religion in its benefits); see also Perry, 54 Wn.2d at 897 (stating Washington's constitution recognizes religion's important influence in all human affairs essential to community's well-being).

118 See Locke, 124 S. Ct. at 1315 (highlighting that Washington program is inclusive of pervasively religious schools provided they are accredited; additionally, pointing out that Washington takes special measures to ensure its constitution protects religion).

119 See Locke, 124 S. Ct. at 1315 n.9 (proposing many students are in fact required to take some religious classes, and extrapolating that it is still an open question whether state constitutions would allow funds to be used toward devotional theology courses for undeclared majors, but that under current Washington state law, such use is permissible); see also Witters v. Dept of Services for the Blind, 474 U.S. 481, 489 (1986) (upholding state funding to student attending private university with religious affiliations); State ex rel. Gallwey v. Grimm, 146 Wn.2d 445, 470–71 (Wash, 2002) (affirming use of state funds by parochial school student pursuing religious education in preparation for career as pastor, missionary, or youth director).

120 See Locke v. Davey, 124 S. Ct. 1307, 1314 (2004) (clarifying that many state constitutions "explicitly exclude[e] only the ministry from receiving state dollars"); see also Ga. CONST. art. IV, § 5 (1789), 2 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 789 (F. Thorpe ed., 1909) (stating , "all persons
animus toward religion in either the history or application of the state constitutional provision, the majority holds that the provision is not "inherently constitutionally suspect" and given the relatively small burden placed on Davey and the great state interest previously endorsed by the Court, they felt that "Davey's claim must fail." The Court concludes by stating "[i]f any room exists between the two Religion Clauses, it must be here" and declining to "venture further into this difficult area."

D. The Dissenting Opinion

Justice Scalia wrote the primary dissent in the case in which he states his belief that the law should have been subject to strict scrutiny and that it would have failed such analysis because the state "facially discriminates against religion." He argues that "[w]hen the state makes a public benefit generally available . . . [and then] withholds that benefit from some individuals solely on

shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own"); Pa. CONST. art. II (1776), 5 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3082 (F. Thorpe ed., 1909) (declaring "no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship or maintain any ministry, contrary to, or against, his own free will and consent").

121 See Locke, 124 S. Ct. at 1315 (asserting exclusion of funding vocational degrees as one minor burden on all Promise Scholars); see also Brief for Petitioner at 24, Locke v. Davey, 124 S. Ct. 1307 (2004) (No. 02-1315) (noting burden on those who want to pursue theology degree comes in different forms, neither of which prevents students from pursuing said degree, and in theory, one student could attend two different institutions, using his Promise Scholarship at one school to get his secular degree and use his own funds to pursue his religious degree somewhere else; in fact, Davey himself was able to pursue said degree, even without this scholarship, by working extra hours each week, though this argument was made in the free speech and association context); Joseph P. Viteritti, Davey's Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom, 27 HARV. J.L. & PUB. POL'Y 299, 336 (2003) (clarifying that discrimination based on religion was Davey's burden).

122 Locke, 124 S. Ct. at 1315 (affirming fate of Davey's argument).

123 Id.

124 Id.

125 See Locke v. Davey, 124 S. Ct. 1307, 1316 (2004) (Scalia, J., dissenting) (asserting immediately that Court's decision is inconsistent with previous cases); see also id. at 1320–21 (Thomas, J., dissenting) (joining Scalia's dissent with his own definition, in his questioning statute's meaning of 'theology,' even though parties did not contest it, it meant degrees that were devotional in nature); Katherine M. Sullivan, Justice Scalia and the Religion Clauses, 22 HAWAII L. REV. 449, 449–50 (2000) (noting how, generally, Scalia is reluctant to state that modern legislation establishes religion). See generally Lee v. Weisman, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting) (arguing that official prayer at public school graduation did not constitute establishment of religion).

126 Locke, 124 S. Ct. at 1316 (Scalia, J., dissenting).
the basis of religion, it violates the Free Exercise Clause.”127 He then decries the Court’s reliance on the “play in the joints” principle as a “refusal to apply any principle when faced with competing constitutional directives.”128 At the very least, he feels that this standard should only apply where there is a “close call whether complying with one of the Religion Clauses would violate the other one.”129 Here, that analysis is not close, since giving aid to Davey would not violate the Establishment Clause.130 He argues a better approach would be for the state to institute some other non-discriminatory means of preventing aid from going to those who plan to pursue careers in the clergy without violating the Free Exercise Clause.131 He criticizes the Court’s lack of explanation concerning the standard of review to be applied and says that the state’s interest here is not compelling enough to survive the strict scrutiny that he feels is appropriate.132

127 Id. (Scalia, J., dissenting) The dissent distinguished situation in Locke from those where plaintiff asks for “a special benefit to which others are not entitled,” noting that Davey "seeks only equal treatment—the right to direct his scholarship to his chosen course of study, a right every other Promise Scholar enjoys." Id. Further, Scalia rejected majority's conclusions regarding founders' fears about taxpayer dollars going to clergy members, noting that those fears were aimed not at excluding ministers from generally available benefits but to prevent them from being singled out for special aid. In a similar vein, he challenges majority's insistence that state constitutional provisions prohibiting taxpayer support for clergy were meant to exclude clergy from receiving generally available benefits.

128 Id. at 1317 (Scalia, J., dissenting).

129 Id. (Scalia, J., dissenting).


131 See Locke v. Davey, 124 S. Ct. 1307, 1317 (2004) (Scalia, J., dissenting) (suggesting two such proposed methods: only allowing scholarships to be used at state universities or allowing use for limited set of courses of study only); see also Richard C. Schragger, The Role of the Local in the Doctrine and Discourse of Religious Liberty, 117 HARV. L. REV. 1810, 1860 (2004) (noting that, during oral argument, Scalia "energetically" expressed his view that states must not make distinctions between religiously and nonreligiously motivated conduct, belief, or action). See generally Sullivan, supra note 125, at 449 (emphasizing how Scalia generally disfavors free exercise and establishment clause enforcement by judiciary).

132 See Locke, 124 S. Ct. at 1318 (Scalia, J., dissenting) (rejecting Washington's contention that state's interest is protecting taxpayer dollars from supporting religion, noting de minimis impact on any individual citizen's taxes, and asserting his belief that Washington's true interest is discrimination against those wishing to pursue ministry careers); see also Schragger, supra note 131, at 1860 (describing Scalia's dissent as
The death of neutrality

He takes exception with the Court's attempts to distinguish Washington's constitution from other non-neutral laws. He first notes that the burden on Davey is light, which has little weight when analyzing a law that is not neutral. He also disputes that the legislature's lack of animus toward religion or religious belief matters and believes that "[i]t is sufficient that the citizen's rights have been infringed." He then cautions that, while the Court's decision here might be limited to the clergy context, "its logic is readily extendable." Next time, because of the decision in this case, Scalia believes the Court will be "less well equipped" to deal with more invidious forms of discrimination.

IV. Analysis

A. The Court Should Have Applied Strict Scrutiny

Using the standards the Court set forth in Smith and expounded upon in Lukumi, Washington's Promise Scholarship is not a neutral law of general applicability. The law in Locke is

'reaching' Court to broaden Religion Clauses' antidiscrimination principle to encompass discrimination between religion and nonreligion. See generally Moens, supra note 73, at 557 (emphasizing Scalia's view that when Religion Clauses demand neutrality, they must be enforced).

See Locke, 124 S. Ct. at 1318 (Scalia, J., dissenting) (noting "[t]he indisputable of being signaled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as substantial" and emphasizing that "[t]he Court has not required proof of 'substantial' concrete harm with other forms of discrimination"). See generally Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (maintaining that where states have undertaken to provide educational opportunities, those opportunities must be made available to all on equal terms); Viteritti, supra note 121, at 336 (describing Davey's burden as being discriminated against on basis of religion).

Locke, 124 S. Ct. at 1319 (Scalia, J., dissenting) (linking both this argument and previous one with Court's precedent in decisions involving gender discrimination, tying animus point to precedent involving gender discrimination, and discussing Court precedent regarding religious discrimination (citing McDaniel v. Paty, 435 U.S. 618, 621 (1978) (plurality opinion) (striking down Tennessee law prohibiting clergy members from sitting in state legislature)).


Id. at 1320 (Scalia, J., dissenting).

Compare Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993) (holding "the minimum requirement of neutrality is that a law not discriminate on its face"), with Employment Div. v. Smith, 494 U.S. 872, 878 (1988) (requiring state laws to be 'generally applicable' with only 'incidental effect' on free exercise to pass constitutional muster). See generally Stuart J. Lark, Religious Expression, Government Funds, and the First Amendment, 105 W. Va. L. Rev. 317, 339 (2003) (reiterating Ninth Circuit's position that state laws that exclude others on basis of religion are not neutral); Moens, supra note 73, at 557 (describing Scalia's view that when states withhold public
incredibly dissimilar from that at issue in Smith. Smith involved an appeal for an exemption from the state of Oregon’s penal law prohibiting possession and use of controlled substances.\textsuperscript{138} Regardless of whether critics feel Smith was properly decided,\textsuperscript{139} it is a far cry from Locke, where a student was merely seeking to be treated equally in his choice of a major to everyone else in the state, a choice that was based on his religious convictions.\textsuperscript{140} Both cases factually involve claimants taking an action based on their religious beliefs.

While the Court takes pains to distinguish the facts of Lukumi and Locke,\textsuperscript{141} if anything, Locke is an easier Free Exercise question because the law at issue therein refers directly to a religious practice protected by the First Amendment and then singles it out for different treatment.\textsuperscript{142} The reference to religious practice in the statute, coupled with the different treatment benefits from some individuals solely on basis of religion, such benefit is not generally available and states violate Constitution’s Free Exercise Clause).

\textsuperscript{138} See Smith, 494 U.S. at 874 (explaining that respondents were fired from their jobs with private drug rehabilitation organization for ingesting peyote for sacramental purposes during religious ceremonies and were later denied unemployment compensation because they had been discharged for work related ‘misconduct’); see also Boerne v. Flores, 521 U.S. 507, 513 (1997) (emphasizing that Oregon statute in Smith was enacted to prohibit socially harmful conduct); Black v. Employment Div., 75 Ore. App. 735, 737 (Or. App. 1985) (adding respondent Black had history of substance abuse).

\textsuperscript{139} See, e.g., Lupu, Employment Division, supra note 41, at 260 (arguing that Smith is "substantially wrong and institutionally irresponsible"); McConnell, supra note 41, at 1111 (challenging Smith decision’s use of legal sources and its theoretical argument); Marin, supra note 41, at 1434 (criticizing Court’s decision in Smith as unjustified departure from established free exercise precedent).

\textsuperscript{140} See Locke v. Davey, 124 S. Ct. 1307, 1310-22 (2004) (Scalia, J., dissenting) (declaring Davey met every Promise Scholarship requirement; however, he was denied funds because he chose to pursue his devotional theology degree); McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion) (suggesting Free Exercise Clause 'unquestionably' protects the right to be a minister, and presumably the right to choose a course of study to prepare oneself for that calling); see also Robert William Gall, The Past Should Not Shackles the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice, 59 N.Y.U. ANN. SURV. AM. L. 413, 431 (2003) (noting, while holding in Davey's favor, that state government is not required to subsidize exercise of fundamental rights, such as the right to education; however, it cannot discriminate against such exercise of that right when it funds general welfare programs).

\textsuperscript{141} See Locke, 124 S. Ct. at 1312 (noting "state's disfavor of religion... is of a far milder kind" in Locke than in Lukumi); see also Moens, supra note 73, at 556 (examining how Supreme Court attempted to distinguish Locke facts); Montoya, supra note 91, at 1165 (stating facts of Locke are distinguishable from facts of Lukumi).

\textsuperscript{142} Compare Locke, 124 S. Ct. at 1310 (excluding those who pursue theology degree) with Lukumi, 508 U.S. at 527 (defining 'sacrifice' banned by city ordinance consonant with but not exclusively related to religion). See generally Moens, supra note 73, at 555 (noting that Supreme Court examines how statute in question treats religion when determining constitutionality of statute); Schragger, supra at note 131, at 1862 (finding that singling out religion is controlling when determining statute's constitutionality).
afforded to those engaged in that religious practice, should be enough to trigger strict scrutiny under *Lukumi*, even absent an ill motive by the state, and despite the state's interest in setting up a stricter separation of church and state than the Federal Establishment Clause provides.

If the Court had applied strict scrutiny, Washington's exclusion of devotional theology majors from receiving scholarship funds would have failed. It is unlikely that any state's greater establishment protections could ever justify such a Free Exercise Clause violation, which was the state interest asserted by Washington in *Locke*. However, even if one concedes that this would be a legitimate interest, it is not narrowly tailored; as Justice Scalia points out in his dissent, there are a number of ways the state could have complied with its stricter separation between church and state and at the same time not implicated the Free Exercise Clause.

---

143 See Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 SAN DIEGO JUST. J. 333 (2004) (discussing Court’s decision in *Locke* and standards used to evaluate said case). *Cf.* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”) *with Locke*, 124 S. Ct. at 1315 (referring to state interest as substantial; the Supreme Court never announces which standard it applies, though it does use language reminiscent of so-called intermediate scrutiny in Equal Protection cases involving gender).

144 See *Locke*, 124 S. Ct. at 1315 (noting certain areas of state action where Establishment Clause will not be violated but Free Exercise Clause does not require state to act); *see also* Employment Div. v. Smith, 494 U.S. 872, 883–84 (1990) (discussing ‘compelling’ level of state interest needed to require individuals to fulfill civic obligations when they conflict with religious beliefs); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (observing “state interest... in achieving greater separation of church and State... is limited by the Free Exercise Clause”).


146 See *Locke*, 124 S. Ct. at 1317 (Scalia, J., dissenting) (articulating ways state could have had ‘play in the joints’ while still complying with Free Exercise Clause); *see also* Tony Mauro, *Supreme Court Debates Religion Case; Justices Show Concern over Fallout from Challenge to Washington State Ban on Theology Scholarships*, LEGAL TIMES, Dec. 8, 2003, at 10 (noting petitioner’s argument that state avoided drawing line any other way because of entanglement issues). *Cf.* WASH. CONST. Art. I, § 11 (requiring no public money to be directed toward religious instruction) *with WASH. REV. CODE § 28B.10.814* (2004) (prohibiting only use of state aid for those majoring in theology; such law could also be said to be not narrowly tailored because it does not, in effect, achieve state’s purported goal).
B. Religion Clauses Should Be Read Together to Require Neutrality

Both religion clauses were originally included in the First Amendment to protect religious liberty.\(^{147}\) The Free Exercise clause was meant to protect individuals from governmental interference with their religious practices.\(^{148}\) The Establishment Clause, by prohibiting government from setting up a state religion or showing a preference for one religion over another, was likewise meant to protect citizens from indirect intimidation to alter their religious beliefs.\(^{149}\)

While the two clauses were originally intended to work together, the Supreme Court has muddied the waters by creating a confusing jurisprudence between the two clauses; this has caused the two clauses to frequently come into tension with one another.\(^{150}\) For example, many state laws that provide accommodations to religion or exemptions based on religious belief could arguably be described as advancing religion, which would make them unconstitutional establishments of religion.

\(^{147}\) See Bd. of Educ. v. Grumet, 512 U.S. 687, 690 (1994) (emphasizing that religion clauses all advance notion that “one’s religion ought not affect one’s legal rights or duties or benefits”); see also Michael Stokes Paulsen, Religion and the Public Schools After Lee v. Weisman: Lemon is Dead, 43 CASE W. RES. L. REV. 795, 798 (1993) (noting that both religion clauses protect liberty from different angles); Lynne A. Rafalowski, Note, Can Public Schools Really Permit Religious Speech without Promoting Religion? The Struggle to Accommodate but Not Establish Religion in Chandler v. James, 45 VILL. L. REV. 547, 548 (2000) (arguing that “religion clauses of the First Amendment were meant to work together to protect religious freedom”).

\(^{148}\) See John Gay, Bowen v. Kendrick: Establishing a New Relationship Between Church and State, 38 AM. U. L. REV. 953, 992 n.2 (1989) (arguing that purpose of both Establishment and Free Exercise Clauses is to secure religious liberty); Wendell J. Sherk, Putting the Fear of God into Bankruptcy Creditors, 7 AM. BANKR. INST. L. REV. 625, 631 n.17 (1999) (noting purpose of Free Exercise Clause is to protect religion from governmental interference); Rafalowski, supra note 147, at 547-48 (describing goals of Free Exercise Clause).

\(^{149}\) See Gay, supra note 148, at 992 (arguing that purpose of Free Exercise and Establishment Clauses is to secure religious liberty); Rafalowski, supra note 147, at 548 (noting that “governmental establishment would hinder rather than protect religious freedom”); Rezai, supra note 14, at 540 n.35 (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 634–36 (1943) (stating purpose of Establishment clause is to protect religious liberties from majorities).

\(^{150}\) See Jay Alan Sekulow, et al, How Much God in the Schools?: Religious Freedom and the First Self-Evident Truth: Equality As a Guiding Principle in Interpreting the Religion Clauses, 4 WM. & MARY BILL OF RTS. J. 351, 360 (1995) (arguing that Supreme Court’s Lemon decision actually exacerbates tension between these two clauses); see also Roberto L. Corrada, Religious Accommodation and the National Labor Relations Act, 17 BERKELEY J. EMP. & LAB. L 185, 253 (1996) (noting how Justice Stewart has commented on such tension in his decisions); Rezai, supra note 14, at 504 (discussing confusion and erratic interpretation of Establishment clause due to Court’s Free Exercise Clause decisions).
under the *Lemon* test. The fact that *Lemon*, in requiring that a state not advance religion, and *Sherbert*, in requiring the states to create exemptions to laws of general applicability for religious practice, co-existed for a time as definitive statements from the Court did little to help the confusion. Most recently, it seemed the Court had settled on a system of neutrality with regard to both clauses, allowing them to work more harmoniously together. But the Court in *Locke* has signaled a retreat from this wise direction by rejecting the "claim of presumptive unconstitutionality" for at least some laws that discriminate

---


155 See *Esbeck, supra* note 66, at 894 (advocating neutrality to alleviate tension between these two clauses); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 34 (1989) (opining that these two clauses "are best interpreted from the standpoint of neutrality. Together they reconcile the broad governmental authority of the modern welfare-regulatory state with the preservation of private choice—a free market—in religion"); Rezai, *supra* note 14, at 505–06 (recognizing suggestion that "the principle of clear neutrality... provides the most appropriate doctrinal framework to preserve harmony between the religion clauses").

156 *Locke v. Davey*, 124 S. Ct. 1307, 1312 (2004); see Moens, *supra* note 73, at 535 (noting *Locke* holding is "incompatible with the free choice line of cases exemplified in *Zelman*, according to which the neutrality principle is violated if a governmental program
on the basis of religion, even while acknowledging that the law is not neutral with respect to religion.\textsuperscript{157}

Neutrality should be the goal of the Religion Clauses, and it should be with an eye toward this end that the Court reviews laws for potential Constitutional violations. This approach largely comports with much current Supreme Court jurisprudence.\textsuperscript{158} The Court’s most recent statements on the Establishment Clause indicate that neutral laws (laws that make money generally available on a non-religious basis to individuals who then choose to spend it consonant with their religious beliefs) are perfectly valid under the Constitution.\textsuperscript{159} Likewise, the Court has interpreted the Free Exercise Clause to require states not to single out religion or religious practice for disfavor while not requiring them to provide religious exemptions from neutral laws of general applicability.\textsuperscript{160}

The neutrality standard is somewhat complicated by the fact that it does not always require the government to refrain from adversely impacts sectarianism and elevates secularism\textsuperscript{157}); Montoya, supra note 91, at 1173 (stating that Locke Court “effectively limited” neutrality principle’s application).

\textsuperscript{157} See Locke, 124 S. Ct. at 1312 (declining to extend Lukumi rule to this situation despite argument that law at issue “is not facially neutral with respect to religion); see also id. at 1318 (Scalia, J., dissenting) (noting “[t]he Court makes no serious attempt to defend the program’s neutrality”); Montoya, supra note 91, at 1174 (indicating that Locke Court decided “not to apply strict scrutiny to a non-neutral law”).

\textsuperscript{158} See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114 (2001) (recognizing neutrality as one central theme in several Supreme Court holdings); Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968) (recognizing that “[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of non-religion; and it may not aid, foster, or promote one religion or religious theory against another”); see also Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839 (1995) (declaring “a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion”).

\textsuperscript{159} See Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) (upholding state program due to its neutrality); see also Witters v. Wash. Dep’t of Services for Blind, 474 U.S. 481, 490–91 (1986) (Powell, J., concurring) (stating that wholly neutral state programs do not violate constitutionality test); John T. Valauri, The Concept of Neutrality in Establishment Clause Doctrine, 48 U. Pitt. L. Rev. 83, 101 (1986) (noting that governmental aid programs that give money to religious groups are categorized under notion of aiding all parties equally, despite incidental benefit to religion).

\textsuperscript{160} See Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 537–38 (1993) (holding that devaluing religious justifications by judging them to be of lesser import than nonreligious justifications amounts to singling out of religious practice for discriminatory treatment); see also Employment Div. v. Smith, 494 U.S. 872, 884 (1990) (recognizing exemptions cannot be withheld from religious hardship cases without compelling reason); Bowen v. Roy, 476 U.S. 693, 708 (1986) (declaring “refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent”).
taking a position with respect to religion. The Court has, and should, allow states to recognize religious beliefs if they choose to do so, without violating the Establishment Clause. This might seem at first to give greater weight to the Free Exercise Clause than the Establishment Clause, which thereby ruins the strict neutrality standard; however, there is a distinction between recognizing that people have religious beliefs and act in accordance with them, and encouraging them to do so. It still comports with neutrality because the state is merely acknowledging that sometimes religious beliefs might come in conflict with the laws of the state and choosing not to punish or burden the choice a person makes between acting in accord with deeply held beliefs and acting in accord with the laws of the state. It would be beyond the realm of neutrality if a state somehow expresses a preference for the choice of the religious belief. Likewise, states should not be able to burden the

161 See Smith, 494 U.S. at 890 (declaring "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well"); see also Rousos v. White, 944 F. Supp. 1447, 1452 (E.D. Cal. 1996) (suggesting that Smith "implicitly approved of statutes according greater protection to the exercise of religion than it was willing to recognize under the First Amendment"); Emily Kawashima, Note, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: Reaffirming the Supreme Court's Religious Free Exercise Jurisprudence, 16 HAWAII L. REV. 401, 439 (1994) (recognizing neutrality standard's 'complicated structure').

162 See Smith, 494 U.S. at 890 (stating that legislation can seek to statutorily protect religious beliefs); Murphy v. Zoning Comm., 289 F. Supp. 2d 87, 121 n.35 (D. Conn. 2003) (suggesting that Smith "implicitly endorsed a statute... that protects somewhat 'more' religious exercise than the Free Exercise Clause itself protects"); Wagering on Religious Liberty, 116 HARV. L. REV. 946, 953 (2003) (describing legislature' ability to "carve out protection for religiously motivated conduct if they wish").


165 See Zelman v. Simmons-Harris, 536 U.S. 639, 650 (2002) (describing Court's historical policy of considering whether state law 'deliberately skewed' incentives towards
religious choice with laws that create incentives to choose against religion instead of for it, for again neutrality would again be sacrificed as the state expresses a preference for one over the other.\textsuperscript{166}

\textbf{C. Limitations on the Applicability of Neutrality Standard}

This neutrality standard should apply to all cases involving the Religion Clauses, but its greatest impact will be in the area of educational funding, and this is as it should be. Education, while not a fundamental right, has been afforded some special significance not extended to other areas of government funding.\textsuperscript{167} Furthermore, the Court has recognized a fundamental right for parents to educate their children in whatever manner they see fit.\textsuperscript{168} An example of this can be seen by looking at one of the alternate ways articulated in the dissenting opinion: the state could have avoided strict scrutiny by allowing the scholarship to be used only at state schools.\textsuperscript{169} The

\textsuperscript{166} See McConnell, supra note 112, at 689 (stating that formal neutrality requires that states not “single out religion for burdensome treatment not visited upon other interests”). See generally Alan E. Brownstein, Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values, 13 ND J. L. ETHICS & PUB POLY 243, 246 (1999) (explaining goal of neutrality as to minimize “government’s influence over personal choices relating to religious beliefs and practices”); Russell L. Weaver, Like a Ghoul in a Late Night Horror Movie, 41 BRANDEIS L.J. 587, 587 (2003) (commenting that government cannot compel belief or disbelief in any religion).


\textsuperscript{168} See Troxel v. Granville, 530 U.S. 57, 60 (2000) (stating “the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the] Court”); see also Meyer, 262 U.S. at 401(holding state statutes that restricted education in certain languages interfered “with the power of parents to control the education of their own”); Cf. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (striking down law requiring elementary age students to attend public school on basis of Meyer).

\textsuperscript{169} See Locke v. Davey, 124 S. Ct. 1307, 1318 (2004) (Scalia, J., dissenting) (finding that “[t]here are any number of ways [Washington] 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”). See generally Richard M. Paul III & Derek Rose, The Clash Between the First Amendment and Student
state has the right to set the curriculum at the schools it has created, and structuring the program in this way would allow the state to effectively bar its funds from going to religious instruction - while at the same time complying with the neutrality required by the Constitution.\(^{170}\) When the state sets the curriculum at the schools it funds, it makes a statement about the types of education that are desirable and which are not.\(^{171}\) When it sets up a program to disburse funds directly to students to spend on whatever educational expenses and choices they see fit, it relinquishes control of the choice of what to spend the money on, and should not be able to discriminate against religious choice while allowing every other motivation. This individual choice thus becomes imperative to neutrality, just as it was in Zelman.\(^{172}\)

It is important to single out situations where the government acts as a speaker, because this applies another limit to the neutrality standard. There, the Court has carved out the ability for the government to declare that no State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof. But see Locke, 124 S. Ct. at 1317 (Scalia, J., dissenting) (noting that state has authority to set curriculum for its schools); see also Epperson, 393 U.S. at 104 (stating "[b]y and large, public education in our Nation is committed to the control of state and local authorities"). But see Matthew D. Donovan, Religion, Neutrality and the Public School Curriculum: Equal Treatment Or Separation, 43 CATH. LAW. 187, 205 (2004) (highlighting "[p]ublic school curricula across the nation have been challenged because, as the Court has suggested, the secular can be hostile to religion. These challenges, however, have not fared well").

Rights: Public University Nondiscrimination Clauses, 60 Mo. L. REV. 889, 915 (1995) (stating "[t]he separation of church and state protected by the Establishment Clause... prevents public universities from favoring one religious group over another").

\(^{170}\) See Locke, 124 S. Ct. at 1317 (Scalia, J., dissenting) (noting that state has authority to set curriculum for its schools); see also Epperson, 393 U.S. at 104 (stating "[b]y and large, public education in our Nation is committed to the control of state and local authorities"). But see Matthew D. Donovan, Religion, Neutrality and the Public School Curriculum: Equal Treatment Or Separation, 43 CATH. LAW. 187, 205 (2004) (highlighting "[p]ublic school curricula across the nation have been challenged because, as the Court has suggested, the secular can be hostile to religion. These challenges, however, have not fared well").


\(^{172}\) See Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002) (upholding distinction between direct government aid to religious schools and aid to individuals who then choose to spend money on religious education); see also Mitchell v. Helms, 530 U.S. 793, 810 (2000) (stating "[p]rivate choice... helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program"); Agostini v. Felton, 521 U.S. 203, 226 (1997) (holding that neutrality is maintained when students use state vocational grants toward religious endeavors).
Constitution in these situations. This situation is inapposite, not only because a state may not condition the receipt of a benefit on the relinquishment of a constitutional right, but also because the funding cases involve areas, like abortion, in which the state not only has a legitimate interest in declining to fund certain activities but also in the activities underlying the funding. This is, by definition, not true in the religion situation, because under the First Amendment, government does not have an interest in religion at all. More specifically, the state has no legitimate interest in preventing Davey from becoming a minister because such a choice would, without question, be protected by his Free Exercise right; it only has

---

173 See United States v. Am. Library Ass'n, 539 U.S. 194, 212 (2003) (stating "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right"); see also Rust v. Sullivan, 500 U.S. 173, 193 (1991) (holding "[the] Government can... selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way"); Harris v. McRae, 448 U.S. 297, 317 (1980) (highlighting that "[governmental] refusal to fund [a] protected activity, without more, cannot be equated with the imposition of a penalty on that activity").

174 See Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983) (stating Supreme Court has "held that the government may not deny a benefit to a person because he exercises a constitutional right"); see also McDaniel v. Paty, 435 U.S. 618, 626 (1978) (noting "to condition the availability of benefits... upon [the] 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"); Cf. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (finding "the modern 'unconstitutional conditions' doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit").

175 Compare Rust, 500 U.S. at 194 (stating government can decide "to fund a program dedicated to advance certain permissible goals") with Planned Parenthood v. Casey, 505 U.S. 833, 846 (1993) (holding "the State has legitimate interests from the outset of the pregnancy in protecting... the life of the fetus that may become a child"). See generally Benton v. Rhodes, 586 F.2d 1, 3 (6th Cir. 1978) (noting states' decision to fund or decline funding to one program is a matter of state policy).

176 See David W. Burcham, School Desegregation and the First Amendment, 59 ALB. L. REV. 213, 239 (1995) (stating "the Court has identified the underlying constitutional value... toward religion... and require[s] that government may neither advance one religion over another, nor all religions over no religion"); see also Devon M. Lehman, The Godless Graduation Ceremony?: The State of Student-Initiated Prayer after Lee v. Weisman and Santa Fe Indep. Sch. Dist. v. Doe, 72 U. COLO. L. REV. 175, 189 (2001) (stating "[t]he Supreme Court and the First Amendment require... that the government remain neutral toward religion"); cf. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 702 (1970) (finding "[t]he general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion").

177 See Witters v. Washington, 474 U.S. 481, 489 (1986) (holding that extension of aid under state vocational rehabilitation program to finance petitioner's training at one Christian college to become a pastor, missionary, or youth director would not advance religion in a manner inconsistent with First Amendment Establishment Clause); see also McDaniel, 436 U.S. at 626 (stating that "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar
an interest in preventing state funds from going to religious education. If this interest is not pursued in a manner that is neutral toward religion, then the state will violate the Constitution.178

D. Impact of Locke v. Davey on School Vouchers

Now that the Supreme Court has ruled that school voucher programs that include religious schools do not violate the Establishment Clause,179 the next big question will be whether school voucher programs can exclude religious schools without violating the Free Exercise Clause.180 The First Circuit has already held that such a law would not violate the Free Exercise Clause,181 but this case was decided on federal Establishment
grounds before the Supreme Court's decision in Zelman. It is not completely certain how the Locke decision will impact school vouchers, but it is likely that the Court will use similar logic to uphold laws that exclude religious schools from voucher programs.

Some have argued that Locke may be limited in its applicability to voucher programs; instead, they argue that the Court took pains to limit Locke to its particular facts. First of all, the Court noted the history since the United States' founding of looking upon benefits to clergy members with disfavor, an interest that would not be implicated in school voucher cases. Secondly, the Court went to great lengths to point out how the Promise Scholarship program actually accommodated students religious schools does not violate Free Exercise Clause; applying Free Exercise analysis that requires protection only of "central belief or practice". Cf. Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (holding that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith") with Strout, 178 F.3d at 65 (observing that "education at parochial school is not [a central belief or practice of Catholicism], for the Roman Catholic Church does not mandate it"). See generally Smith, supra note 180, at 1961 (highlighting that First Circuit's opinion in Strout v. Albanese found no Free Exercise Clause violations).

See Strout, 178 F.3d at 64 (asserting "state's compelling interest in avoiding an Establishment Clause violation requires that the statute exclude sectarian schools from the tuition program"); see also Wanda I. Otero-Ziegler, Note, The Remains of the Wall: From Everson v. Board of Education to Strout v. Albanese and Beyond, 10 TEMP. POL. & CIV. RTS. L. REV. 207, 207 (2000) (arguing "[a]lthough the Strout court considered the constitutionality of [the statute] under various constitutional provisions, the central challenge posed in Strout relates to the Establishment Clause of the First Amendment."). Smith, supra note 180, at 1961 (explaining that if a religious school program was validated by the Court, "the First Circuit indicated that 'plaintiffs might... seek relief on free exercise or equal protection grounds, for... the legislative basis for the exclusion of sectarian schools - the fear that the establishment clause bars their inclusion - will have been negated'").

See Mauro, State Aid, supra note 87, at 3 (noting "other critics of the ruling interpreted the decision as a narrow one limited to divinity training at the college level, with little impact on the voucher issue."); Walter M. Weber, Locke v. Davey: What It Says, and What It Doesn't Say, available at http://www.aclj.org/ussc/daveylocke/weber_says_doesnt_say.pdf, at 2–3 (expressing Locke does not stand for states excluding religious schools from voucher programs); see also What's Next for Vouchers? Recent Ruling Likely to Slow Supporters, YOUR SCHOOL AND THE LAW, March 24, 2004 (finding that "voucher supporters are downplaying the U.S. Supreme Court's recent ruling in Locke... as being narrow and having more to do with higher education").

See Locke v. Davey, 124 S. Ct. 1307, 1313 (2004) (observing "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders"); Recent Development in the Law: Recent Decisions: Supreme Court, 33 J.L. & EDUC. 383, 383–84 (2004) (explaining "prohibitions against using taxpayer's funds to support the ministry has been a hallmark of constitutional jurisprudence. Therefore the State's interest in denying the funding of devotional theology degrees is a compelling state interest and thus the scholarship program does not violate the student's First Amendment rights."). But see McDaniel v. Paty, 435 U.S. 618, 622–25 (1978) (plurality opinion) (recognizing history of disqualification of ministers from holding state office, but ultimately rejecting validity of state interest based on that history).
who choose to go to religious schools. Lastly, the Court noted that the state constitutional provision before them was not one of the so-called Blaine Amendments and those provisions with the anti-Catholic history were not before the Court. These Blaine Amendments would probably be the provisions that states would rely upon; however, should they choose to exclude religious schools from eligibility in voucher programs, the Court at least suggests it might come out differently if such provisions were under consideration. However, assuming the Court's composition stays the same, and recognizing that at least one of

---

185 See Locke, 540 U.S. 124 S. Ct. at 1314–15 (noting that program allows students to attend 'pervasively religious schools' and to take classes in devotional theology); Montoya, supra note 91, at 1165 (arguing "the Court did not consider the Promise Scholarship hostile towards religion. Rather, the scholarship 'goes a long way toward including religion in its benefits.' The only limitation is that students may not both major in devotional theology and receive a Promise Scholarship"); Recent Development, supra note 184, at 383–84 (explaining Court's observation that "on a close look at the history of the scholarship program and the laws surrounding it, there was no evidence of animus towards religion in the scholarship program. Students are able to use the scholarships at accredited religious schools and are still eligible to take devotional theology classes").

186 See Locke, 124 S. Ct. at 1314, n.7 (stating provision in question is not such a Blaine Amendment); see also Montoya, supra note 91, at 1171–72 (stating "Chief Justice Rehnquist denied that the provision in Washington's constitution is a Blaine Amendment, and neither Justices Scalia nor Thomas brought up the subject of Blaine Amendments"); Duncan, supra note 116, at 508–14 (noting how original Blaine Amendment was proposed as addition to Federal Constitution and when it was rejected, several states adopted various versions of it for their own constitutions).

187 See Locke, 124 S. Ct. at 1314, n.7 (noting that "the Blaine Amendment's history is simply not before us"); see also Duncan, supra note 116, at 508–14 (discussing how this Blaine Amendment and its progeny were born of anti-Catholic sentiment toward the end of nineteenth century); Montoya, supra note 91, at 1171–72 (discussing Blaine amendment).

188 See DeForrest, supra note 177, at 554 (highlighting "importance of state law in evaluating the overall legality of vouchers"); see also Dietzel, supra note 180, at 794 (arguing that state Blaine Amendments remain post-Zelman as potential challenges to state voucher programs that include parochial schools); George S. Swan, The Law and Economics of the Blaine Amendments: Zelman v. Simmons-Harris and Romer v. Evans, 80 U. DET. MERCY L. REV. 301, 302 (2003) (noting, despite decision in Zelman, that state Blaine Amendments remain as barriers to voucher availability at religious schools).

189 See Locke v. Davey, 124 S. Ct. 1307, 1314 (2004) (discussing "hostility toward religion;" suggesting, while not directly holding, that animosity toward religion was one important factor in their decision and that state laws evincing such animosity might change such situation); Montoya, supra note 91, at 1164 (concluding after reviewing Free Exercise Clause precedent on which Davey relied, that this Promise Scholarship involved different factual circumstances and 'far milder' state disfavor of religion than Supreme Court had invalidated in prior cases); Recent Development, supra note 184, at 383 (typifying, by example, one city ordinance in prior case criminalized engaging in certain kinds of animal slaughter, causing suppression of ritualistic animal sacrifices characteristic of one particular religion, while in contrast, no criminal or civil sanctions are imposed on any type of religious practice in Locke; and there the state does not deny ministers their rights to participate in community political affairs, nor does it require students to choose between their religious beliefs and receiving government benefits; this implies that if animosity toward religion were present in Locke, the Court would probably have decided otherwise).
the justices in the *Zelman* majority expressed concern about the impact of a decision in Davey’s favor on school voucher plans already in place in several states that do exclude religious schools, it is unlikely that the Court would reverse the trend it started in *Locke* in school vouchers cases.

V. CONCLUSION

*Locke v. Davey* presented the Supreme Court with the opportunity to put the final peg in place with respect to a unified approach to the two First Amendment Religion Clauses. The Court should have held that neutrality in scholarship disbursement in this case was not only permissible under the Establishment Clause, but required under the Free Exercise Clause. This would have joined the two clauses together the way they were intended to be in the protection of individual religious belief and choices and in requiring states not to discriminate on the basis of religion. The Court declined the opportunity to do so, by holding that the state of Washington could directly exclude theology majors from obtaining a scholarship available to those who are majoring in any other course of study. In doing so, the

---

190 See Rob Boston, *Supreme Victory: High Court Thwarts Religious Right Scheme to Require State Funding for Religion*, CHURCH & STATE, Apr. 1, 2004, at 4 (describing Justice O’Connor’s reaction to admission that ruling in Davey’s favor would require government to offer vouchers for private religious schools: “That clearly did not sit well with the justice. A stern-looking O’Connor admonished Sekulow, ‘What you’re proposing here would have a major impact on voucher programs.’”); see also Mauro, *supra* note 146, at 10 (noting that Justice O’Connor “seemed worried that a ruling in Davey’s favor would make it mandatory – not optional – for states to include parochial schools in voucher programs”); see also Luiza Ch. Savage, *Supreme Court Rules that States Need Not Subsidize Religious Studies*, N.Y. SUN, Feb. 26, 2004, at 7 (commenting, “A frequent swing-voter, Justice O’Connor, expressed concern during oral argument that such an equality rule could impose high costs on states that would find themselves forced to fund additional groups and activities”).

191 See *Zelman* v. Simmons-Harris, 536 U.S. 639, 687–717 (2002) (Souter, J., dissenting) (typifying how, presumably, *Zelman’s* four dissenters would not vote that voucher programs must include religious schools after viewing programs that did include religious programs as unconstitutional); see also *Strout* v. Albanese, 178 F.3d 57, 64 n.12 (1st Cir. 1999) (indicating that, under different Establishment Clause understanding from the one this Circuit articulated, states might be required to fund religious programs as well; furthermore, proposing that state interest would not withstand scrutiny if based on false understanding of Establishment Clause); Eulitt v. Me. Dep’t of Educ., No. CV-02-162-B-W, 2004 WL 423981, at *2 (D.Me. March 9, 2004) (refusing to reverse First Circuit holding in *Strout* based on new Supreme Court precedent in *Zelman* and *Locke*; as this was prior to *Locke* as well as *Zelman*, it is unclear whether they would come out differently on this question today).

192 See *Locke*, 124 S. Ct. at 1309 (stating “[i]n accordance with the State Constitution, students may not use the scholarship at an institution where they are pursuing a degree
Court has not only signaled a departure from reading the Religion Clauses together, but also from its Free Exercise precedent standing alone, by no longer requiring neutrality from a law before affording it deferential treatment. This sets a dangerous precedent in the Court's jurisprudence on that part of the First Amendment that is supposed to protect religious liberty by allowing non-neutral laws to avoid strict scrutiny analysis. Though the impact of this case may not be great, that is immaterial when Constitutional principles are at stake. This is one step closer to the death of neutrality as a principle governing the First Amendment Religion Clauses; the first step is always the hardest, and now in *Davey* it has already been made.

in devotional theology. We hold that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment."; see also Beth Hanson, *From Cheney to Guantanamo: Notable Decisions; Supreme Court Review: Highlights of the Term*, LEGAL TIMES, July 5, 2004, at 10 (noting this "holding affirmed that under the establishment clause of the First Amendment, the state of Washington could deny Joshua Davey access to state scholarship funds because Davey chose to major in pastoral ministries at Northwest College near Seattle"); Bernard James, *What 'Locke' Portends*, Nat'L L. J., Aug. 2, 2004, at S10 (discussing how "court ruled, 7-2, that the state of Washington did not violate the First Amendment's protection of free exercise of religion by refusing to provide otherwise applicable scholarships to Joshua Davey, solely because he was pursuing a devotional theology degree").