# ARE WE HEADED FOR A NEW ERA IN RELIGIOUS DISCRIMINATION?: A CLOSER LOOK AT *LOCKE V. DAVEY*

*by*
*Allison C. Bizzano**

*The Supreme Court's recent ruling in* Locke v. Davey *permitted the State of Washington to exclude the study of devotional theology from its scholarship program. The Court found that such an exclusion did not violate the Free Exercise Clause. This Note discusses the reasoning followed by the Court and possible impacts of the decision.*

The United States Supreme Court, in *Locke v. Davey*,[1] held that funds from the State of Washington's Promise Scholarship Program could be denied to students who pursue a degree in devotional theology.[2] The Court held that Washington's exclusion of devotional theology from the scholarship program did not violate the Free Exercise Clause of the First Amendment.[3] This Note will argue that although *Davey* allows states to deny benefits to citizens who pursue religious degrees in seeming violation of the Free Exercise Clause, the Supreme Court has limited its holding to minimize the impact on citizens in the free exercise of religion. It may be too soon, however, to tell how lower courts will apply the holding to issues that arise relating to the public funding of education.

In *Davey*, the State awarded Joshua Davey a scholarship under its scholarship program.[4] Davey chose to attend Northwest College, a private Christian college and eligible institution under the program.[5] Davey planned to pursue a double major in pastoral ministries and business management, but he was denied the scholarship funds because the degree in pastoral ministries is a devotional degree and is excluded under the scholarship program.[6]

Davey brought an action against state officials in federal district court to enjoin the State from denying the scholarship solely on the basis of his plans to

* J.D. Candidate 2005, Lewis & Clark Law School; B.A. 1997, University of Delaware.

[1] 540 U.S. 712 (2004).

[2] *Id.* at 715. Washington created the Promise Scholarship Program to assist "eligible student[s]" who meet academic achievement, income, and enrollment requirements with their college expenses. WASH. ADMIN. CODE § 250-80-020(12) (2004). The requirements include: a rank in the top 15 percent of the graduating class, a minimum SAT or ACT score, a maximum family income, a minimum of half-time enrollment in an accredited institution, and most controversial, the pursuit of a degree in an area other than theology. *Id.*

[3] *Davey*, 540 U.S. at 715.

[4] *Id.* at 717.

[5] *Id.*

[6] *Id.*

pursue a devotional degree.[7] Davey argued that the State's refusal to award the scholarship based upon his plan to pursue a degree in theology violated the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause of the First Amendment.[8] The district court granted summary judgment in favor of the State.[9]

A divided panel of the United States Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit applied strict scrutiny review to the State's decision to "single[] Davey out for unfavorable treatment . . . on account of a religious major" without a compelling state interest.[10] The Supreme Court reversed.[11]

Writing for the majority, Chief Justice Rehnquist acknowledged the tension between the Establishment Clause and the Free Exercise Clause of the First Amendment but reasoned that this tension allows room for "play in the joints" between the two clauses.[12] Justice Rehnquist reasoned that while under federal law the State of Washington could allow students to pursue a degree in devotional studies, the real issue before the Court was whether the State could deny funding to such students without violating the Free Exercise Clause.[13]

The Court rejected Davey's claim that Washington's statute was presumptively unconstitutional because it was facially discriminatory.[14] The Court reasoned that the statute was not presumptively unconstitutional because it did not impose criminal or civil penalties on the exercise of religion.[15] In fact, Justice Rehnquist noted that Washington's statute did not force "students to choose between their religious beliefs and receiving a government benefit."[16] The Court then attempted to distinguish *Davey* from prior decisions in which it held that states had violated the Free Exercise Clause when they forced individuals to choose between religion and receiving government benefits.[17]

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[7] *Id.* at 718.

[8] *Id.*

[9] *Id.*

[10] Davey v. Locke, 299 F.3d 748, 752 (9th Cir. 2002).

[11] *Davey*, 540 U.S. at 718.

[12] *Id.* at 718–19. The Court explained this phrase to mean that some state actions might be "permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 719.

[13] *Id.* at 719; *see also* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986). In *Witters*, a blind individual sought money from the State of Washington for assistance that would allow him to pursue a higher education program. The Court held that a student's use of state aid under a vocational rehabilitation program for religious study at a Christian college to become a pastor, missionary, or youth director did not advance religion in violation of the Establishment Clause. *Id.* at 489.

[14] *Davey*, 540 U.S. at 720.

[15] *Id.*

[16] *Id.* at 720–21.

[17] *Id.* at 721. One such case is *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 146 (1987), in which the Court held that the State of Florida violated the Free Exercise Clause when it denied unemployment benefits to an individual terminated for refusing to work on her Sabbath for religious reasons. In *Davey*, the Court cited additional cases where individuals were denied unemployment benefits for refusing to violate religious principles. 540 U.S. at 721 (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707

One flaw in the majority's decision is its failure to recognize that Davey's religious beliefs created an affirmative obligation to devote his life to the study of theology and become a minister. As Justice Scalia pointed out in his dissenting opinion, Davey was clearly a religious minority against whom the State of Washington discriminated.[18] Further, the Court was unwilling to extend the protection to Davey that it has provided to other religious minorities who were penalized for exercising affirmative obligations according to their religious beliefs.[19] Davey was punished simply because he chose to pursue a degree in theology in order to become a minister. Ironically, the Court both recognized and protected this very right in *McDaniel v. Paty*, when it held that that a Tennessee statute prohibiting clergy from participating in the state constitutional convention violated the Establishment Clause.[20] In a concurring opinion, Justice Brennan opined, "Clearly[,] freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood."[21]

The Court next dismissed Davey's claim that the State of Washington imposed an unconstitutional "viewpoint restriction" on speech, explaining that the scholarship program was not a forum for speech, but instead was created to assist students with education costs.[22] The Court was correct in this assertion, as it is well established that the government creates a public forum only by "purposeful government action," which includes "'intentionally opening a nontraditional public forum for public discourse.'"[23]

Chief Justice Rehnquist then addressed Davey's claim that the State had violated the Equal Protection Clause prohibiting religious discrimination.[24] The analysis was brief, however, as the Court applied rational basis scrutiny to Davey's equal protection claim once it determined that the scholarship program did not violate the Free Exercise Clause.[25] The Court cited to *Johnson v. Robison*[26] for the general rule that courts apply rational basis scrutiny to equal protection claims when the challenged government action involves religious discrimination.[27]

The Court's reliance on *Johnson* appears to be somewhat misplaced. In *Johnson*, a conscientious objector who performed required alternative civilian service in lieu of military service claimed that the Veterans' Readjustment Act ("Act") providing educational benefits solely to veterans violated the First Amendment.[28] While the *Davey* Court applied rational basis review with

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(1981); Sherbert v. Verner, 374 U.S. 398 (1963)).

[18] *Davey*, 540 U.S. at 733 (Scalia, J., dissenting).

[19] *See infra* notes 56–60 and accompanying text; *see also infra* note 71.

[20] McDaniel v. Paty, 435 U.S. 618, 628 (1978).

[21] *Id.* at 631 (Brennan, J., concurring).

[22] *Davey*, 540 U.S. at 721 n.3.

[23] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992)).

[24] *Davey*, 540 U.S. at 721 n.3.

[25] *Id.*

[26] 415 U.S. 361 (1974).

[27] *Davey*, 540 U.S. at 721.

[28] *Johnson*, 415 U.S. at 363–64. This Note does not discuss plaintiff's additional claim

virtually no application of that standard to the facts of the case, the *Johnson* Court went to great lengths to explain why rational basis review was appropriate for that claim of religious discrimination.[29] In fact, the *Johnson* Court stated that it chose not to apply strict scrutiny because of Congress's "solicitious regard . . . for conscientious objectors."[30] The *Johnson* Court also noted that "[u]nlike many state and federal statutes" reviewed by the Court, Congress "responsibly revealed [the] express legislative objectives . . . of the Act."[31] The Court additionally discussed the fact that Congress had a "significant reason" for providing educational benefits to veterans and a "substantial interest in raising and supporting armies."[32] While the *Johnson* Court applied a rational basis standard of review to Congress's classification limiting educational benefits to veterans, the Court did so only after a lengthy discussion of legislative history and recognition of the government's "substantial interest" in promoting military service.[33] Additionally, the *Johnson* Court appears to have considered the deference the Court typically affords Congress when deciding on military matters.[34]

While the Act in *Johnson* was enacted, in part, with goals of encouraging military service and repaying veterans for their service by providing educational assistance, Washington's statute in *Davey* emphasizes the State's interest in "not funding the religious training of clergy."[35] This interest is similarly expressed in the Washington Constitution, which emphasizes "[a]bsolute freedom in conscience in all matters of religious sentiment, belief and worship" so that "no one shall be molested or disturbed . . . on account of religion."[36]

While the Establishment Clause protects the right of Washington citizens to be free from state-sponsored religion, the Free Exercise Clause protects Davey's right to state benefits to which he was otherwise entitled and the right to pursue a degree in theology. This is the "play in the joints" to which the Court has referred.[37] Assuming, as the Court did, that Davey's burden was

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that the educational benefits provided by the Veterans Administration violated the Due Process Clause of the Fifth Amendment. See *id.* at 364.

[29] *Id.* at 375 n.14.

[30] *Id.*

[31] *Id.* at 376. Congress declared four purposes of the Act, including: (1) making the Armed Services more attractive; (2) extending educational assistance to those who could otherwise not afford an education; (3) enabling Service members to better adjust to the professional world and restoring "lost educational opportunities" to Service members whose careers were interrupted by their service; and (4) assisting Service members to obtain educational and professional training they lost because they served their country. *Id.*

[32] *Id.* at 378, 385.

[33] *Id.*

[34] The Court stated that "it would seem presumptuous to subject the educational benefits legislation to strict scrutiny." *Id.* at 375 n.14; *see also* Korematsu v. United States, 323 U.S. 214, 223 (1944) (upholding conviction of defendant who violated exclusion order applicable to individuals of Japanese ancestry during wartime in part because of judgment of "properly constituted military authorities").

[35] Locke v. Davey, 540 U.S. 712, 723 n.5 (2004).

[36] WASH. CONST. art. I, § 11.

[37] *See supra* note 12 and accompanying text.

relatively minor in having to choose between pursuing a degree in theology and remaining eligible for the scholarship, it is hard to imagine that an infringement on the right of Washington citizens to "freedom of conscience" and the right be free from being "molested or disturbed" by state funding of students' pursuit of theology degrees would not also be a minor burden.[38] Given that a holding by the Court for Davey or the State would have resulted in a minor burden either for Davey or Washington citizens, it is noteworthy that the Court denied Davey the right to pursue a degree in theology while remaining eligible for his scholarship to protect the interests of Washington citizens. Ironically, one reason cited by the Court in *Davey* for upholding Washington's statute was that doing so would place only a "relatively minor burden" on students who could not simultaneously pursue a degree in theology and receive funding under the scholarship program.[39] If the burden on both Davey and Washington citizens was minor, why did the Court choose to impose that burden on Davey?

Significantly, Davey's burden likely was more than minor. As Justice Scalia pointed out in his dissent, Davey lost almost $3,000 toward college expenses.[40] The $3,000 loss becomes an even greater burden for Davey when one considers that under the scholarship program, only students with a family income below 135 percent of the median family income for the State of Washington are eligible for the scholarship.[41] The 2002 median family income for a family of four in Washington was $66,531,[42] thus conditioning a student's eligibility on having a family income below $89,816.85. Given these figures, it is likely that the loss of $3,000 in state benefits would be more than a minor burden to a family of four with a total income below $90,000. The loss of this benefit makes Davey's denied scholarship a more ascertainable loss than the loss of freedom of consciousness and the right to not be bothered by state funded religion that some Washington citizens may have suffered had the Court ruled in Davey's favor.

Next, the majority set forth a historical argument for upholding the Washington statute in which the Court noted that throughout United States history, states exhibited a general unwillingness to support or fund religious professions.[43] The Court cited numerous state constitutional provisions denying funding for religious training, including the ministry. The majority sought to refute Justice Scalia's argument that Washington's scholarship program could not fund all secular professions while excluding training for religious

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[38] WASH. CONST. art I, § 11; *see also supra* notes 32–33 and accompanying text.

[39] *Davey*, 540 U.S. at 725.

[40] *Id.* at 731 (Scalia, J., dissenting).

[41] WASH. ADMIN. CODE § 250-80-020(12) (2004).

[42] U.S. CENSUS BUREAU: MEDIAN INCOME FOR 4-PERSON FAMILIES, BY STATE, http://www.census.gov/hhes/income/4person.html (last visited Feb. 2, 2005). The year 2002 is the "calendar year" and refers to the year in which the income was received by survey respondents. *Id.*

[43] *Davey*, 540 U.S. at 722–23.

professions.[44] The Court similarly challenged the notion that the Washington Constitution contained a "Blaine Amendment."[45]

According to the majority, Washington's program was not hostile toward religion, but was instead inclusive of religion for two key reasons. First, students receiving aid under the scholarship program can attend an accredited religious institution without losing their aid.[46] It is true that Davey would have remained eligible to receive scholarship funds while attending Northwest College, a Christian Bible College, as long as he did not pursue a degree in theology. Second, students do not currently lose aid merely because they take theology classes. Instead, only the pursuit of a degree in theology causes a student to become ineligible under Washington's program.[47] For example, Northwest College requires all students to take four "devotional courses," which would not, in and of itself, disqualify a student from receiving funding under the scholarship program.[48] Once again, it is only the *degree* in theology that renders a student ineligible under Washington's statute.

The Court acknowledged that the issue of whether the Washington Constitution prohibited students from taking any theology classes while receiving aid under its scholarship program was an open one.[49] However, the Court noted that Washington law only prohibits students from pursuing a degree in theology while receiving state scholarship funds.[50] If students receiving scholarships were prohibited from taking theology classes, attending an institution such as Northwest College, which requires students to take such classes in order to graduate, would force students to choose between the scholarship and attending such an institution.

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[44] *Id.* at 721–23. The state constitutional provisions prohibited the use of public funds to support the clergy or ministry. *See* WASH. CONST. art. I, § 11.

[45] *Davey*, 540 U.S. at 723 n.7. The Court noted that the State of Washington disputed that its Constitution contained a Blaine Amendment and that Davey himself never claimed that Washington's Constitution contained such an amendment. *Id.* Blaine Amendments were enacted when anti-Catholic attitudes were especially strong during the early 19th century. Protestant groups pushed for the enactment of these amendments to prevent Catholic schools from receiving state aid. They are known as Blaine Amendments because they were written very similarly to a federal constitutional amendment that Maine Congressman James Blaine proposed. After 1875, when Congressman Blaine lost his bid for federal office, Congress passed a law requiring new states to include Blaine-like amendments in their constitutions. As a result, many western states have them. "[A]t least 14 states, including Washington state, explicitly bar theology students from receiving state scholarships." Tony Mauro, *High Court Agrees to Settle Part II of Voucher Battle*, FIRST AMENDMENT CTR. (May 20, 2003), *at* http://www.firstamendmentcenter.org/analysis.aspx?id=11498. The Court acknowledged that the enabling Act of 1889, which allowed the Washington Constitution to be drafted, required a constitutional provision specifying that the State would maintain public schools "free from sectarian control," but disputed that article I, section 11 of the Washington Constitution contained a Blaine Amendment. *Davey*, 540 U.S. at 723 n.7 (quoting Act of Feb. 22, 1889, ch. 180, § 4).

[46] *Davey*, 540 U.S. at 724.

[47] *Id.* at 725 n.9.

[48] *Id.* at 725.

[49] *Id.* at 725 n.9.

[50] *Id.*

In the end, the majority relied on history and what it referred to as a "substantial state interest" to hold that Washington State did not violate the Establishment Clause by refusing to fund the pursuit of theology degrees.[51] The majority also relied on the "relatively minor burden" placed on students like Joshua Davey.[52] The Court opined that the Establishment Clause merely prohibits states from "disapproving of a particular religion or religion in general," which Washington did not do in this case.[53]

Justice Scalia, with whom Justice Thomas joined,[54] dissented in an opinion that relied heavily upon precedent. Justice Scalia concluded that prior Supreme Court decisions were "irreconcilable" with the majority holding.[55] In particular, Justice Scalia cited to *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* for the holding that "[a] law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny."[56] While it is undisputed that the majority in *Church of Lukumi Babalu Aye* applied strict scrutiny to the laws challenged under the Free Exercise Clause, *Church of Lukumi Babalu Aye* and *Davey* are distinguishable. First, the ordinances in *Church of Lukumi Babalu Aye* targeted a particular religion, in contrast to the statute in *Davey*, which targets all religions.[57] Second, the ordinances in *Church of Lukumi Babalu Aye* imposed civil and criminal penalties for engaging in religious practices.[58] As the majority explained in *Davey*, students are not penalized for engaging in specific religious practices.[59]

The analysis does not end here, however, because while the ordinances in *Church of Lukumi Babalu Aye* were facially neutral, Washington's statute in *Davey* was discriminatory on its face, making it more offensive.[60] Additionally, while *Davey* technically did not involve civil fines or criminal penalties, the

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[51] *Id.* at 725.

[52] *Id.*

[53] *Id.* at 725 n.10 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993)).

[54] In a separate dissent, Justice Thomas noted that the study of theology does not always mean the study of religious theology or faith. Justice Thomas discussed several definitions of the word "theology" because Washington's statute did not define the term. *Id.* at 734–735 (Thomas, J., dissenting).

[55] *Id.* at 726 (Scalia, J., dissenting).

[56] *Id.* at 726 (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 532). In *Church of Lukumi Babalu Aye*, the city of Hialeah, Florida adopted three ordinances that addressed the issue of animal sacrifice only after the Church of the Lukumi Babalu Aye leased land and announced plans to establish a place of worship in the city. The Church was comprised of members who practiced the Santeria religion. One of the main forms of devotion in the Santeria religion is animal sacrifice. The city ordinances imposed fines up to $500 or imprisonment up to 60 days, or both. *Church of Lukumi Babalu Aye*, 508 U.S. at 525–28.

[57] *Church of Lukumi Babalu Aye*, 520 U.S. at 533–34. The city ordinances in *Church of Lukumi Babalu Aye* were written to proscribe the religious rituals prescribed by the Santeria religion. *See supra* note 56.

[58] *See supra* note 53.

[59] *Davey*, 540 U.S. at 720.

[60] According to the City of Hialeah, the ordinances challenged in *Church of Lukumi Babalu Aye* were enacted to protect "public morals, peace or safety." 508 U.S. at 535. In contrast, Washington's regulation provided that students pursuing a degree in theology were not eligible to receive scholarships. WASH. ADMIN. CODE § 250-80-020(12)(g) (2004).

loss of $3,000 in government financial assistance in *Davey* may be viewed as a penalty imposed on students for pursuing a theology degree, just as the civil fines were considered a penalty imposed on the followers of the Santeria religion for engaging in certain rituals.

Justice Scalia also cited *Everson v. Board of Education*[61] in an attempt to illustrate that *Davey*'s holding was inconsistent with precedent.[62] *Everson* involved a challenge of a New Jersey statute under the Establishment Clause.[63] The challenged statute authorized a school district to reimburse parents of school children for transportation to and from school, including children attending private Catholic schools.[64] The *Everson* Court acknowledged the tension between the Free Exercise Clause and the Establishment Clause and concluded that while it was mindful of "protecting the citizens of New Jersey against state-established churches . . . [it could] not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."[65] In other words, as Justice Scalia explained,

> When the State makes a public benefit generally available, that benefit becomes the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it imposed a special tax.[66]

Though Justice Scalia's point is a good one, the facts of *Everson* can be distinguished from those in *Davey*. In particular, the *Everson* Court acknowledged that parents of children attending elementary school sent their children, in part, to fulfill "their duty under state compulsory education laws [and] send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose."[67] In contrast, the Washington statute in *Davey* applies primarily to adult students who are not required to attend school.

Additionally, the *Everson* Court emphasized that the New Jersey statute in question did "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[68] The same cannot be said for the scholarship program in *Davey*. The state-paid transportation to and from school at issue in *Everson* is quite different from the state funds at issue in *Davey*. In contrast to the public benefit in *Everson*, the state funds in *Davey* would have been used to fund religious instruction and an education in pursuit of a religious career.

It should be emphasized, however, that *Everson* clearly supports Justice Scalia's argument that public benefits generally available cannot be provided based on one's religious beliefs. Justice Scalia is right—*Everson* cannot be

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[61] 330 U.S. 1 (1947).
[62] *Davey*, 540 U.S. at 726.
[63] 330 U.S. at 3.
[64] *Id.*
[65] *Id.* at 16.
[66] *Davey*, 540 U.S. at 726–27.
[67] *Everson*, 330 U.S. at 18.
[68] *Id.*

reconciled with *Davey*. The *Everson* Court held that once a state creates a public benefit, it cannot deny the benefit to some recipients based on religious criteria. *Davey* allows a public benefit to be denied to students wishing to use a public benefit to train for the clergy.

Justice Scalia additionally pointed out that the Court's reference to history was "misplaced" because the "popular uprisings" and state constitutional provisions to which the majority referred were designed to prevent states from providing financial assistance to particular religious groups.[69] In contrast to state provisions enacted in the 19th century to prohibit favoritism towards religion through public funding for particular groups, *Davey* involved the challenge to a statute that excluded theology students from the same state benefits to which non-theology students were entitled.

Justice Scalia proposed three alternatives to Washington's scholarship program: (1) making the scholarships redeemable only at public universities; (2) allowing students to redeem the scholarships for specific degrees; and (3) ending the program entirely.[70] Justice Scalia's first suggested alternative appears to be inconsistent with the Court's holding in *Zelman v. Simmons-Harris*, in which the Court upheld the constitutionality of an Ohio voucher program that allowed students to use scholarship money for parochial school education.[71] The *Zelman* Court held that a program that is "entirely neutral with respect to religion" does not violate the Establishment Clause because individuals are able to exercise "true private choice," in which government funds are provided to a "broad class of individuals" who then choose where to spend those funds.[72] The key to private choice is that individual recipients of government funding choose how to spend the money—not the government. Justice Scalia's suggestion that Washington prohibit students from choosing to use state aid at a private college would eliminate the private choice emphasized by the *Zelman* Court.[73]

The second option appears to be a viable alternative to Washington's current scholarship program. In fact, many states currently offer scholarships to students who choose particular professions such as nursing and teaching.[74]

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[69] *Davey*, 540 U.S. at 727 (Scalia, J., dissenting).

[70] *Id.* at 729.

[71] 536 U.S. 639 (2002).

[72] *Id.* at 649.

[73] It should be noted that *Davey* and *Zelman* can be distinguished. *Zelman* involved tuition assistance to public school students in Cleveland, whose school district was under state control following a court order. *Id.* at 644. In contrast, *Davey* dealt with state aid to students at a point at which the state was no longer obligated to educate its citizens. From a broader perspective, *Davey* may be viewed as consistent with *Zelman* in that both cases ultimately give states the power to determine how their funds are used for education purposes, within the confines of the Establishment Clause.

[74] *See, e.g.*, AM. FED'N OF TEACHERS, LOAN FORGIVENESS & TEACHER SCHOLARSHIP PROGRAMS, *at* http://www.aft.org/teachers/loanforgiveness.htm (last visited Feb. 2, 2005). For example, Washington State currently offers three scholarship programs for students studying education at the undergraduate or graduate level. *Id.* Many other states provide students pursuing education degrees or teaching careers with scholarships or loan forgiveness programs. *Id.* A number of states also offer scholarships for nursing students. *See, e.g.*, MICHIGAN.GOV, PAYING FOR COLLEGE: MICHIGAN NURSING SCHOLARSHIP, *at*

Justice Scalia's third suggestion, that Washington's scholarship program be eliminated, would hurt both eligible students, who might no longer be able to afford college, and the State, which clearly has an interest in educating its highest achieving students with the least ability to pay for the costs of higher education.

Justice Scalia accurately described the reasoning of the *Davey* majority, which opined that states are justified in discriminating against individuals such as Davey under the Establishment Clause because they themselves are prohibited from violating the Establishment Clause.[75] In fact, the Court explicitly rejected such a defense in *McDaniel v. Paty*.[76] As Justice Scalia pointed out, the Establishment Clause "discriminates against religion by singling it out as the one thing a State may not establish. All this proves is that a State has a compelling interest in not committing *actual* Establishment Clause violations."[77] In an effort to comply with its own Constitution and establishment concerns, it appears that Washington State discriminated against students pursuing theology degrees.

Justice Scalia correctly pointed out flaws in the majority's analysis of whether Davey's burden under Washington's law was minor and whether Washington lacked the intent to discriminate or held contempt towards religion.[78] Justice Scalia also was correct in arguing that a minor burden on one's religious beliefs does not justify or excuse religious discrimination—especially in the context of a facially discriminatory statute.[79]

Justice Scalia asserted that the legislature's intent to discriminate is irrelevant when the Court examines a discriminatory law. As Justice Scalia explained, "It is sufficient that the citizen's rights have been infringed."[80] The Court broke with precedent in shifting its focus away from a facially discriminatory statute to whether the State had discriminated against Davey out of contempt for religion.[81] Notably, the Court in *McDaniel v. Paty* did not ask whether the Tennessee legislature was motivated by hostility towards religion when it analyzed a claim of discrimination based on a facially discriminatory statute.[82]

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http://www.michigan.gov/mistudentaid/0,1607,7-128-1724-54524--,00.html (last visited Feb. 2, 2005).

[75] *Davey*, 540 U.S. at 730 (Scalia, J., dissenting).

[76] 435 U.S. 618, 628 (1978). In *McDaniel v. Paty*, the Court held that a Tennessee statute violated the Establishment Clause because it prohibited clergy from participating in the state constitutional convention. In finding the statute unconstitutional, the Court expressly rejected Tennessee's argument that "its interest in preventing the establishment of a state religion [was] consistent with the Establishment Clause and thus of the highest order." *Id.*

[77] *Davey*, 540 U.S. at 730 (citing Widmar v. Vincent, 454 U.S. 263, 271 (1981) (Scalia, J., dissenting)).

[78] *Id.* at 731–32.

[79] *Id.* at 731.

[80] *Id.* at 732.

[81] *Id.*

[82] *See supra* note 76.

In conclusion, it is important to note that the holding in *Davey* is a limited one because it deals only with discrimination in the context of "training the clergy."[83] Additionally, as the Court pointed out, its holding does not prevent other states from funding student scholarships differently from Washington. In other words, *Davey* does not mean that states cannot fund religious degrees with public funding—only that *they are not required* to train the clergy. In fact, the Court acknowledged that "there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology."[84]

While the holding technically may be limited to the context of using public funding for the training of clergy, there is a danger that lower courts will now hesitate to allow public funding for religious education following *Davey*.[85] Additionally, given a nationwide trend of cuts or paltry increases in funding for education, states may now more readily choose to cut public funding that could be used by students for religious education.[86] Finally, unanswered questions remain following *Davey*. For example, as the Court noted, may a state now prohibit students pursuing non-theology majors from taking theology courses as a condition of state scholarship funds?[87]

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[83] *Davey*, 540 U.S. at 734 (Scalia, J., dissenting).

[84] *Id.* at 719.

[85] In a recent case, a Florida appellate court held that a no-aid provision in Florida's Constitution prohibited the use of public funding to directly or indirectly benefit religious schools through the use of Florida's school voucher program. The court additionally held that the State's no-aid provision did not violate the Free Exercise Clause. Notably, the court cited extensively to *Locke v. Davey* and appeared to rely on the Court's holding to provide "historical context." Bush v. Holmes, 886 So. 2d 340, 350–51 (Fla. Dist. Ct. App. 2004).

[86] *See, e.g.*, Anne Marie Chaker, *Family Finance: Public Schools Pile on Fees*, WALL ST. J., Sept. 3, 2003, at D1, available at 2003 WL-WSJ 3978627 (discussing the impact of state cuts or minimal increases in funding on academic and extracurricular activities in public schools).

[87] *Davey*, 540 U.S. at 725 n.9.