

From Brest, Levinson, Balkin, Amar and Siegel, *Processes of Constitutional Decisionmaking* (5th edition 2006):

LOCKE v. DAVEY, 124 S.Ct. 1307 (2004). [The State of Washington established the Promise Scholarship Program to assist needy students with their college expenses. Recipients of Promise Scholarships are allowed to use their funds in any college located within the state, including religious colleges, so long, however, as they are not majoring in “theology.” One rationale for this limitation is found in the Washington State constitution, Art. I, §11, which states, in relevant part, “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.”

The statute establishing the Program, in stating that “No aid shall be awarded to any student who is pursuing a degree in theology,” does not define “theology,” but there was agreement among the litigants that the statute simply codifies the State’s constitutional prohibition on providing funds to students to pursue degrees that are “devotional in nature or designed to induce religious faith.”

Joshua Davey chose to use his Promise Scholarship at Northwest College, a private Christian college affiliated with the Assemblies of God. Given his long-time desire to become a pastoral minister, he attempted to pursue a double major in pastoral ministries and business management/administration. “There is no dispute,” according to the Supreme Court, “that the pastoral ministries degree is devotional and therefore excluded under the Promise Scholarship Program.” Davey was therefore informed at the beginning of the 1999-2000 academic year that he could not use his Promise Scholarship to major in the pastoral ministries program. Indeed, a condition of his receiving the scholarship funds was his certification in writing that he was not pursuing such a degree as part of his studies at Northwest. Upon his failure to sign the form, he was denied the scholarship funds to which he would otherwise have been entitled.

Davey sued and prevailed in the Ninth Circuit Court of Appeals. The Supreme Court, in an opinion by Chief Justice Rehnquist, reversed.]

REHNQUIST, C.J.:

[T]he Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that “there is room for play in the joints” between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

This case involves that “play in the joints” described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. See *Zelman v. Simmons-Harris*. As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology, see *Witters*. The question before us, however, is whether Washington, pursuant to 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.

Davey . . . contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah* the program is presumptively unconstitutional because it is not facially neutral with respect to religion. . . . In *Lukumi*, the city of Hialeah made it a

crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

Justice Scalia argues, however, that generally available benefits are part of the "baseline against which burdens on religion are measured." Because the Promise Scholarship Program funds training for all secular professions, Justice Scalia contends the State must also fund training for religious professions. But training for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit. And the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion.

Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry. The plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy. We have found nothing to indicate, as Justice Scalia contends, that these provisions would not have applied so long as the State equally supported other professions or if the amount at stake was *de minimis*. That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk.^a

Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively

^a The *amici* contend that Washington's Constitution was born of religious bigotry because it contains a so-called "Blaine Amendment," which has been linked with anti-Catholicism. As the State notes and Davey does not dispute, however, the provision in question is not a Blaine Amendment. The enabling Act of 1889, which authorized the drafting of the Washington Constitution, required the state constitution to include a provision "for the establishment and maintenance of systems of public schools, which shall be . . . free from sectarian control." This provision was included in Article IX, §4, of the Washington Constitution ("All schools maintained and supported wholly or in part by the public funds shall be forever free from sectarian control or influence"), and is not at issue in this case. Neither Davey nor *amici* have established a credible connection between the Blaine Amendment and Article I, §11, the relevant constitutional provision. Accordingly, the Blaine Amendment's history is simply not before us.

religious schools, so long as they are accredited. . . . And under the Promise Scholarship Program’s current guidelines, students are still eligible to take devotional theology courses. Davey notes all students at Northwest are required to take at least four devotional courses, “Exploring the Bible,” “Principles of Spiritual Development,” “Evangelism in the Christian Life,” and “Christian Doctrine,” and some students may have additional religious requirements as part of their majors.

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

Without a presumption of unconstitutionality, Davey’s claim must fail. The State’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.

Justice SCALIA, with whom Justice THOMAS joins, dissenting:

I

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

That is precisely what the State of Washington has done here. It has created a generally available public benefit, whose receipt is conditioned only on academic performance, income, and attendance at an accredited school. It has then carved out a solitary course of study for exclusion: theology. No field of study but religion is singled out for disfavor in this fashion. Davey is not asking for a special benefit to which others are not entitled. He seeks only *equal* treatment—the right to direct his scholarship to his chosen course of study, a right every other Promise Scholar enjoys.

The Court’s reference to historical “popular uprisings against procuring taxpayer funds to support church leaders” is therefore quite misplaced. That history involved not the inclusion of religious ministers in public benefits programs like the one at issue here, but laws that singled them out for financial aid. For example, the Virginia bill at which Madison’s Remonstrance was directed provided: “[F]or the support of Christian teachers . . . [a] sum payable for tax on the property within this Commonwealth, is hereby assessed” A Bill Establishing a Provision for Teachers of the Christian Religion (1784). Laws supporting the clergy in other States operated in a similar fashion. One can concede the Framers’ hostility to funding the clergy *specifically*, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all. No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church.^a

^aEqually misplaced is the Court’s reliance on founding-era state constitutional provisions that prohibited the use of tax funds to support the ministry. There is no doubt what these provisions were directed against: measures of the sort discussed earlier in text,

The Court does not dispute that the Free Exercise Clause places some constraints on public benefits programs, but finds none here, based on a principle of “ ‘play in the joints.’ ” I use the term “principle” loosely, for that is not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives. There is nothing anomalous about constitutional commands that abut. A municipality hiring public contractors may not discriminate *against* blacks or *in favor of* them; it cannot discriminate a little bit each way and then plead “play in the joints” when haled into court. If the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones.

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

In any case, the State already has all the play in the joints it needs. There are any number of ways it could respect both its unusually sensitive concern for the conscience of its taxpayers *and* the Federal Free Exercise Clause. It could make the scholarships redeemable only at public universities (where it sets the curriculum), or only for select courses of study. Either option would replace a program that facially discriminates against religion with one that just happens not to subsidize it. The State could also simply abandon the scholarship program altogether. If that seems a dear price to pay for freedom of conscience, it is only because the State has defined that freedom so broadly that it would be offended by a program with such an incidental, indirect religious effect.

What is the nature of the State’s asserted interest here? It cannot be protecting the pocketbooks of its citizens; given the tiny fraction of Promise Scholars who would pursue theology degrees, the amount of any citizen’s tax bill at stake is *de minimis*. It cannot be preventing mistaken appearance of endorsement; where a State merely declines to penalize students for selecting a religious major, “[n]o reasonable observer is likely to draw . . . an inference that the State itself is endorsing a religious practice or belief.” Nor can Washington’s exclusion be defended as a means of assuring that the State will neither favor nor disfavor Davey in his religious calling. Davey will throughout his life contribute to the public fisc through sales taxes on personal purchases, property taxes on

singling out the clergy for public support. The Court offers no historical support for the proposition that they were meant to exclude clergymen from general benefits available to all citizens. In choosing to interpret them in that fashion, the Court needlessly gives them a meaning that not only is contrary to our Religion Clause jurisprudence, but has no logical stopping-point short of the absurd. No State with such a constitutional provision has, so far as I know, ever prohibited the hiring of public employees who use their salary to conduct ministries, or excluded ministers from generally available disability or unemployment benefits. . . .

his home, and so on; and nothing in the Court’s opinion turns on whether Davey winds up a net winner or loser in the State’s tax-and-spend scheme.

No, the interest to which the Court defers is not fear of a conceivable Establishment Clause violation, budget constraints, avoidance of endorsement, or substantive neutrality—none of these. It is a pure philosophical preference: the State’s opinion that it would violate taxpayers’ freedom of conscience *not* to discriminate against candidates for the ministry. This sort of protection of “freedom of conscience” has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context. The Court never says whether it deems this interest compelling (the opinion is devoid of any mention of standard of review) but, self-evidently, it is not.^b

II

The Court makes no serious attempt to defend the program’s neutrality, and instead identifies two features thought to render its discrimination less offensive. The first is the lightness of Davey’s burden. The Court offers no authority for approving facial discrimination against religion simply because its material consequences are not severe. The indignity of being singled 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 insubstantial. The Court has not required proof of “substantial” concrete harm with other forms of discrimination, see, *e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954); cf. *Craig v. Boren*, 429 U.S. 190 (1976), and it should not do so here.

Even if there were some threshold quantum-of-harm requirement, surely Davey has satisfied it. The First Amendment, after all, guarantees *free* exercise of religion, and when the State exacts a financial penalty of almost \$3,000 for religious exercise—whether by tax or by forfeiture of an otherwise available benefit—religious practice is anything *but* free. The Court’s only response is that “Promise Scholars may still use their

^bThe Court argues that those pursuing theology majors are not comparable to other Promise Scholars because “training for religious professions and training for secular professions are not fungible.” That may well be, but all it proves is that the State has a *rational basis* for treating religion differently. If that is all the Court requires, its holding is contrary not only to precedent, but to common sense. If religious discrimination required only a rational basis, the Free Exercise Clause would impose no constraints other than those the Constitution already imposes on all government action. The question is not whether theology majors are different, but whether the differences are substantial enough to justify a discriminatory financial penalty that the State inflicts on no other major. Plainly they are not.

Equally unpersuasive is the Court’s argument that the State may discriminate against theology majors in distributing public benefits because the Establishment Clause and its state counterparts are themselves discriminatory. The Court’s premise is true at some level of abstraction—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. We have never inferred from this principle that a State has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns.

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

The other reason the Court thinks this particular facial discrimination less offensive is that the scholarship program was not motivated by animus toward religion. The Court does not explain why the legislature’s motive matters, and I fail to see why it should. If a State deprives a citizen of trial by jury or passes an *ex post facto* law, we do not pause to investigate whether it was actually trying to accomplish the evil the Constitution prohibits. It is sufficient that the citizen’s rights have been infringed. “[It does not] matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens.”

The Court has not approached other forms of discrimination this way. When we declared racial segregation unconstitutional, we did not ask whether the State had originally adopted the regime, not out of “animus” against blacks, but because of a well-meaning but misguided belief that the races would be better off apart. It was sufficient to note the current effect of segregation on racial minorities. Similarly, the Court does not excuse statutes that facially discriminate against women just because they are the vestigial product of a well-intentioned view of women’s appropriate social role. We do sometimes look to legislative intent to smoke out more subtle instances of discrimination, but we do so as a *supplement* to the core guarantee of facially equal treatment, not as a replacement for it.

There is no need to rely on analogies, however, because we have rejected the Court’s methodology in this very context. In *McDaniel v. Paty*, 435 U.S. 618 (1978), we considered a Tennessee statute that disqualified clergy from participation in the state constitutional convention. That statute, like the one here, was based upon a state constitutional provision—a clause in the 1796 Tennessee Constitution that disqualified clergy from sitting in the legislature. The State defended the statute as an attempt to be faithful to its constitutional separation of church and state, and we accepted that claimed benevolent purpose as *bona fide*. Nonetheless, because it did not justify facial discrimination against religion, we invalidated the restriction.

It may be that Washington’s original purpose in excluding the clergy from public benefits was benign, and the same might be true of its purpose in maintaining the exclusion today. But those singled out for disfavor can be forgiven for suspecting more invidious forces at work. Let there be no doubt: This case is about discrimination against a religious minority. Most citizens of this country identify themselves as professing some religious belief, but the State’s policy poses no obstacle to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far narrower set. One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction. In an era when the Court is so quick to

come to the aid of other disfavored groups, see, *e.g.*, *Romer v. Evans*, its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional.

Discussion

1. *Vouchers for private schools*. After *Zelman v. Simmons-Harris*, a key question was no longer whether states could include sectarian schools in voucher programs, but whether they could exclude sectarian schools from voucher programs if they included secular private schools, or if they allowed formation of privately run charter schools. Does *Locke v. Davey* help to answer that question? Note Justice Scalia's assumption that Washington "could make the [Promise] scholarships redeemable only at public universities." What if the scholarships could not be used in religiously affiliated private schools? Pervasively religious private schools?

2. Recall Justice Brennan's vigorous dissent in *Harris v. McRae*, which upheld the federal government's refusal to fund abortions except in very limited situations. Many political liberals sympathized with Brennan's argument that the state had a duty to fund abortions if it, for example, also funded childbirth. Yet we have also seen Justice Brennan consistently vote with majorities, such as those in *Nyquist*, that strike down the distribution of governmental funds to religious schools. Is there a tension—indeed, a contradiction—here? Consider then-Professor Michael McConnell's "revised" version of Justice Brennan's dissent in *Harris*, in which McConnell changes the issue in *Harris* from abortion funding to the provision of funds to parents who wish to exercise their constitutional right, see *Pierce v. Society of Sisters*, to send their children to religious schools.¹

A poor woman [with school-age children] confronts two alternatives: she may elect either to [send them to secular schools] or to [send them to religious schools]. In the abstract, of course, the choice is hers alone, and the Court rightly observes that [*Lemon*] "places no governmental obstacle in the path of a woman who chooses to [send her children to religious school]." But the reality of the situation is that [the Supreme Court in its decisions] has effectively removed this choice from the indigent woman's hands. By funding all of the expenses associated with [secular education] and none of the expenses incurred in [religious education,] the Government literally makes an offer that the indigent woman cannot afford to refuse. It matters not that in this instance the Government has used the carrot rather than the stick. What is critical is the realization that as a practical matter, many poverty-stricken women will choose to [send their children to secular schools] simply because the Government provides funds for [this,] even though these same women would have chosen [religious schools] if the Government had also paid for that option, or indeed if the Government had stayed out of the picture altogether and had defrayed the costs of neither.

Consider also the implications of Justice Brennan's dissent in *DeShaney*, in which he emphasized the consequences of state decisions for private decisionmaking. Does not the

¹ Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 *Harv. L. Rev.* 989, 990 (1991).

burden of state taxation to fund public education make it difficult even for nonindigent families to afford private secular and parochial education? If you think this is constitutionally relevant, would you agree as well that the burdens of state education taxes also make it more difficult to purchase health care or any other goods of life or make it less likely that other people will have enough disposable income to contribute to scholarship funds or charities that look after the indigent? Is the state responsible, after all, for the plight of those without sufficient material resources to purchase necessary services?