NOTES

Public Funding for Theological Training Under the Free Exercise Clause: Pragmatic Implications and Theoretical Questions Posed to the Supreme Court in *Locke v. Davey*

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I. INTRODUCTION

An indigent woman goes into a clinic to have an abortion. A young man goes to college to become a Christian minister. Would you be willing to pay for either pursuit? Regardless of your politics, it is likely that you would react strongly to your tax dollars funding one of the above activities, but not the other. While both the indigent woman and the young man have a constitutional right to engage in each activity,[1] whether a state has an obligation to fund either or both activities is debatable.[2]

States have limited and dwindling resources to allocate to promote their interests. Whether a state's choice to fund one interest while refusing to fund another rises to the level of interference with protected rights, and therefore violates the state or federal

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1. The freedom of a woman to decide whether to terminate her pregnancy is a personal liberty protected by the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1; Roe v. Wade, 410 U.S. 113 (1973). The freedom of a person to pursue his or her religious beliefs and practices is protected by the First Amendment. U.S. CONST. amend. I.

2. *See, e.g.*, Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991).

constitution, is the central question. However, the line between promotion of an interest and interference with protected rights is delicate and easily distorted. An inaccurate characterization of a state's choice may force that state to fund an activity that its legislature explicitly forbade.

The religion clauses of the First Amendment provide an interesting framework in which to explore these questions. The Constitution requires that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ."[3] The operation of the Establishment Clause, which forbids the government from either aiding or formally sponsoring religion, and the operation of the Free Exercise Clause, which prohibits the government from inhibiting religious observers' beliefs or most practices, results in a seemingly inherent enmity.[4] Courts are charged with the burdensome duty of protecting an individual's religious liberty in a religiously diverse and changing nation while balancing other societal interests;[5] the ultimate objective is to maintain government neutrality towards religion.

In 2002, in *Davey v. Locke*,[6] a Ninth Circuit panel held that Washington State could not refuse to fund the educational expenses of a student pursing a theology degree, in accordance with the Washington Constitution's Establishment Clause,[7] because that refusal violated the student's right to free exercise of religion.[8] On May 19, 2003, the U.S. Supreme Court granted Washington State's petition for review. The Court's impending decision in *Davey* will not

3. U.S. CONST. amend. I. The Establishment and Free Exercise Clauses of the First Amendment are applied to state and local governments through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1; *see, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (applying the federal Free Exercise Clause to the states through the Fourteenth Amendment); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (applying the federal Establishment Clause to the states through the Fourteenth Amendment).

4. *See* Phillip E. Johnson, *Concepts and Compromise in the First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817 (1984). *But see* Comment, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PA. L. REV. 1175 (1983).

5. Justice Scalia stated in *Employment Division, Department of Human Resources of Oregon v. Smith*:

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," . . . and precisely because we value and protect religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

494 U.S. 872, 888 (1990) (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

6. Davey v. Locke, 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (May 19, 2003).

7. WASH. CONST. art. I, § 11.

8. *Davey*, 299 F.3d at 760.

only affect the scope and application of the federal Free Exercise Clause, it will also implicate overarching questions of federalism and the role of states in fashioning their own constitutional jurisprudence.

The Supreme Court should reverse the Ninth Circuit's decision in *Davey v. Locke*. In *Davey*, the Ninth Circuit equated Washington's refusal to allow its Promise Scholarship funds to be used to support Joshua Davey's theology degree with an affirmative prohibition of his right to free exercise of religion.[9] In so doing, the Ninth Circuit wrongly construed the State's restraint of Davey's free exercise.[10] First, the court sidestepped a true "prohibition" analysis by incorrectly relying on Joshua Davey's status as a theology student. Second, by importing free speech criteria into a free exercise examination based on an establishment neutrality paradigm, the court wrongly held that the Washington law restricting state funds from theology students was not neutral. If, applying strict scrutiny, the Supreme Court affirms the Ninth Circuit's holding that Washington's Establishment Clause does not provide a compelling justification for the state to deny funding, the decision could call into question every

9. *Id.*

10. *Cf.* Derek D. Green, *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 (2003). Green argues that the Ninth Circuit failed to adequately address conflicting Ninth Circuit precedent, other circuit precedent, and U.S. Supreme Court precedent in conditional funding cases. *Id.* at 655. First, Green proposes that the Ninth Circuit should have followed the analysis of *KDM ex rel. WJM v. Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999), and concludes that the Promise Scholarship does not violate free exercise because it did not have the object of suppressing religion, and that it should not have been subject to strict scrutiny. Green, *supra* at 676–81. Second, Green argues that the Ninth Circuit failed to adequately distinguish the Promise Scholarship from permissible funding programs. *Id.* at 681–84. While the author of this Note agrees with Green that the Ninth Circuit's decision was incorrect and that Washington's scholarship program does not violate the Free Exercise Clause, this Note presents a different analysis to reach that conclusion. The author argues that the Promise Scholarship did not violate free exercise rights because Davey sustained no burden on his belief or practice as a result of Washington's decision not to fund his theological training. Unlike the author, Green does not address a "prohibition" analysis.

Although the author agrees with Green that the Promise Scholarship did not have the object of suppressing religion, the author argues that the Ninth Circuit was incorrect in its analysis in *Davey* because the court imported free speech criteria through an establishment neutrality paradigm to determine that the law was not neutral, rather than arguing that the Ninth Circuit determined that the law was not neutral on its face. Further, the author agrees with Green that Washington did not close or limit a public forum; however, this Note focuses on *how* the Ninth Circuit used a free speech forum analysis to justify its application of strict scrutiny and *why* that use was improper. Green also argues that the Ninth Circuit's reliance on *McDaniel v. Paty*, 435 U.S. 618 (1978), is misplaced because the penalty imposed on Paty was due to his status as a minister, while Davey was not penalized but demanded the state to pay for an activity it chose not to subsidize. The author argues that the *McDaniel* decision is inapposite because the protected practices encompassed by a minister's status are not equivalent to a theology student's, not penalties.

state's right to enforce its own more protective establishment provisions in the space provided them by the federal religion clauses.

Following this Introduction, Part II of this Note presents the factual background and procedural history of *Davey v. Locke*. The analysis that follows is divided into three components. Each component first presents the legal framework, and then applies that framework to *Davey*.

Part III discusses the Free Exercise Clause of the First Amendment. Section A provides a basic background on the Supreme Court's free exercise jurisprudence. Section B applies the Court's precedent to *Davey*, and concludes that the Ninth Circuit sidestepped a true "prohibition" analysis.

Sections A, B, and C of Part IV discuss the differing neutrality examinations within free exercise, free speech, and establishment jurisprudence, respectively. Section D discusses the overlapping application of neutrality criteria in establishment and free speech funding cases. Section E concludes that in *Davey* the Ninth Circuit improperly grafted free speech criteria under an establishment neutrality paradigm onto its free exercise neutrality examination in *Davey*.

Part V discusses the federalism implications of the impending Supreme Court decision. Section A explains Washington's asserted interest in the separation of church and state. Section B proposes that states' more protective establishment provisions should provide a compelling justification for an incidental burden of a religious observer's free exercise sufficient to survive strict scrutiny. Section C argues that Washington State's Establishment Clause is a sufficiently compelling justification for Washington not to fund Davey's theological education. Part VI concludes the Note.

II. DAVEY V. LOCKE

A. Factual Background

In 1999, the Washington Legislature and Governor Gary Locke created the Promise Scholarship.[11] Eligibility for the Promise Scholarship (Scholarship) was based on the following criteria: (1) the student must graduate in the top ten percent of his or her high school class; (2) the student's family income must be equal to or less than 135 percent of the state's median income; and (3) the student must be attending an accredited public or private university, college, or

11. WASH. REV. CODE § 28B.119 (2002).

accredited post-secondary institution in Washington State.[12] The purpose of the Scholarship was to "recogniz[e] and encourag[e] the aspiration for superior academic achievement of high school students who attend and graduate from Washington high schools."[13]

In May 1999, Joshua Davey graduated from University High School in Spokane, Washington.[14] He applied for the Promise Scholarship and was notified in August 1999 of his eligibility to receive $1,125 for the 1999–2000 school year.[15] Davey enrolled at Northwest College in Kirkland, Washington, and declared a double major in Business Management/Administration and Pastoral Studies.[16] He believed that this combination of majors would "best prepare [him] for the complex management and spiritual tasks that comprise contemporary Christian ministry."[17] At Northwest College, Pastoral Studies majors take general classes in the humanities, sciences, and social science; however, the bulk of required courses for that major consist of biblical and pastoral studies,[18] including classes in evangelism,[19] apologetics,[20] and Pentecostal doctrines.[21]

12. WASH. ADMIN. CODE § 250-80-020(12) (2001). Graduates in 2000 needed to be in the top fifteen percent of their class. *Id.*; *see* Decl. of Joshua Davey in Supp. of Pl.'s Mot. for Prelim. Inj., Ex. A, Davey v. Locke, 2000 U.S. Dist. LEXIS 22273 (D. Wash. Oct. 5, 2000) (No. C00-0061) [hereinafter Decl. of Davey, Ex. A].

13. WASH. ADMIN. CODE § 250-80-010.

14. Decl. of Davey, Ex. A, *supra* note 12, at 2.

15. *Id.* at 3, 5.

16. *Id.* at 4. Northwest College is a Christian college located in Kirkland, Washington, founded by the Assemblies of God in 1934. Assemblies of God, Colleges & Universities, Northwest College, *at* http://colleges.ag.org/college_guide/nc.cfm (last visited Nov. 17, 2003). The Assemblies of God is a Christian denomination from the Pentecostal tradition, which emphasizes the importance of the baptism of the Holy Spirit on the day of Pentecost. This baptism is manifested by spiritual gifts, such as speaking in tongues and the gift of prophecy. Doctrinally, apart from Pentecostalism, it is in the Baptist tradition. OXFORD DICTIONARY OF WORLD RELIGIONS 100 (John Bowker ed., Oxford Univ. Press 1997) [hereinafter WORLD RELIGIONS].

17. Decl. of Davey, Ex. A, *supra* note 12, at 5.

18. Decl. of Joshua Davey in Supp. of Pl.'s Mot. for Prelim. Inj., Ex. B, Davey v. Locke, 2000 U.S. Dist. LEXIS 22273 (D. Wash. Oct. 5, 2000) (No. C00-0061).

19. "Evangelism" is defined as "the winning or revival of personal commitments to Christ." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 429 (Merriam-Webster 1983).

20. "Apologetics" is defined as "the branch of theology concerned with the defense of the divine origin of Christianity." *Id.* at 95.

21. "Pentecostal" is defined as:

> Groups of Christians who emphasize the decent of the Holy Spirit on the apostles at the first (Christian) Pentecost. . . . There is thus a strong eschatological emphasis, exalting spiritual experience over intellectual reflection. It is characterized by participatory forms of worship—hand-clapping, dance, raised arms, prophesy—and has had a strong appeal to the poor and less educated . . . .

WORLD RELIGIONS, *supra* note 16, at 744.

In October 1999, the college's financial aid administrator received a letter from the Washington State Higher Education Coordinating Board (HECB), stating that "[s]tudents who are pursuing a degree in theology are not eligible to receive *any* state-funded financial aid, including the new Washington Promise Scholarship."[22] The HECB's decision to send the letter was prompted by a Washington statute that states, "No aid shall be awarded to any student who is pursuing a degree in theology."[23] The statute was enacted in 1969 in accordance with the Establishment Clause of the Washington Constitution.[24] Northwest College's financial aid office notified Davey that students majoring in "theology-related fields" were not eligible for the Promise Scholarship.[25]

B. Procedural History

In January 2000, Davey filed an action in federal district court against Governor Locke and the officials of HECB to enjoin HECB from withdrawing the scholarship funds.[26] Davey claimed that the prohibition of state funds being applied toward a degree in theology violated his federal and state constitutional rights of freedom of speech, equal protection, and free exercise. In his declaration, Davey stated: "It seemed to me like the state [by withdrawing the scholarship money] was simply imposing a back-door tax on religious believers, and I knew that was wrong."[27] As a result of the withdrawal of the scholarship money, Davey claimed that an imposed burden would be placed on him because he would be forced to work an additional eighty hours in the academic year,[28] which is less than three hours per week during the school year. He stated that during this time he would not be able to "study, attend class, or associate with [his] fellow believers for worship."[29]

22. Decl. of Joshua Davey in Supp. of Pl.'s Mot. for Prelim. Inj., Ex. H, Davey v. Locke, 2000 U.S. Dist. LEXIS 22273 (D. Wash. Oct. 5, 2000) (No. C00-0061) [hereinafter Decl. of Davey, Ex. H].

23. WASH. REV. CODE § 28B.10.814 (2002); *see* Decl. of Davey, Ex. H, *supra* note 22.

24. WASH. CONST. art. I, § 11; WASH. REV. CODE § 28B.10.814.

25. Decl. of Davey, Ex. A, *supra* note 12, at 5.

26. Verified Compl. for Decl. & Inj. Relief & Damages, Davey v. Locke, 2000 U.S. Dist. LEXIS 22273 (D. Wash. 2000) (No. C00-0061). In addition to Gov. Gary Locke, other named defendants are Marcus S. Gaspard, Executive Director of HECB; Bob Craves, Chair of HECB; and John Klacik, Associate Director of HECB. *Id.*

27. Decl. of Davey, Ex. A, *supra* note 12, at 7.

28. *Id.* at 8.

29. *Id.*

The HECB argued that its withdrawal of the Promise Scholarship did not violate any of Davey's constitutional rights.[30] The HECB further argued that allowing Davey to use state funds toward a degree in pastoral ministries would violate Washington law and the Establishment Clause of the Washington Constitution.[31] The Washington Constitution specifically provides that "[n]o public money or property shall be apportioned for or applied to any religious worship, exercise, or instruction . . . ."[32]

Judge Rothstein, of the U.S. District Court for the Western District of Washington, in response to cross motions for summary judgment, held in favor of the HECB and dismissed all of Davey's claims.[33] Particularly, the district court held that withdrawing the scholarship money did not violate Davey's right to free exercise as guaranteed by the First Amendment because Washington was not prohibiting Davey from pursuing a degree in pastoral ministries; Washington was merely refusing to fund that pursuit.[34]

In a 2-1 decision, the Ninth Circuit overturned Judge Rothstein's order dismissing Davey's claims.[35] The panel majority held that once the Promise Scholarship was available to all students who met the objective criteria, the financial benefit needed to be available on a viewpoint-neutral basis.[36] Further, the court held that limiting the scholarship to students who were not pursuing a degree in theology violated Davey's right to free exercise and must be subjected to strict scrutiny. Finally, the court held that Washington's interest in adhering to its own constitutional prohibition against application of state funds toward religious instruction was not a compelling justification for the violation.[37] Judge McKeown disagreed with the

30. Def.'s Mem. of Authorities in Supp. of Mot. for S.J. at *9–23, 2000 U.S. Dist. LEXIS 22273 (D. Wash. 2000) (No. C00-0061).

31. *Id.* at *4–9.

32. WASH. CONST. art. I, § 11.

33. *Davey*, 2000 LEXIS 22273 at *26. Judge Rothstein rejected Davey's free speech and free association claims on the grounds that Davey did not identify any restriction on his speech, and that the right to association does not include a right to have the state underwrite his religious education in order to "free him of the real world obligations of supporting himself during school." *Id.* at *23. Furthermore, the district court rejected Davey's equal protection claims on the basis that the Washington statute denying funding for a degree in theology was enacted to prevent violation of the Washington State Establishment Clause, and that the treatment satisfies the requirement that it be "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of legislation." *Id.* at *24–25 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).

34. *Id.* at *18–19.

35. Davey v. Locke, 299 F.3d 748, 760 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (May 19, 2003).

36. *Id.* at 756.

37. *Id.* at 760.

panel majority, stating: "This is a funding case, not a free exercise case or a free speech case."[38]

C. *The Dissent: Is Refusing to Fund Tantamount to Prohibiting Belief or Practice?*

The counter argument to the panel majority's decision in *Davey* is that a refusal to fund Davey's pursuit of a degree in theology is not equivalent to prohibiting his right to free exercise. Judge McKeown's dissent illustrates the difference between a funding inquiry and a free exercise inquiry by drawing an analogy between Washington's decision not to fund Davey's religious study with states' decisions not to fund abortions for indigent women.[39] The dissent argued that the abortion cases "represent an inescapable conclusion as to the lack of a burdensome effect of funding decisions, a conclusion that should have even more purchase in the context of the Religion Clauses."[40]

The abortion funding cases distinguish between situations in which a state places barriers that inhibit a person from exercising a protected right and situations where the state merely refuses to fund a person's pursuit of a protected right.[41] For example, in *Maher v. Roe*,[42] two indigent women brought a suit challenging a Connecticut Welfare Department regulation that limited state-funded Medicaid benefits to medically necessary first trimester abortions as a violation of their Equal Protection rights.[43] Neither of the plaintiffs received the

38. *Id.* at 761.

39. *Id.* at 764–66.

40. *Id.* at 765.

41. Harris v. McRae, 448 U.S. 297, 317 (1980). The abortion funding cases present the same difficult questions posed by *Davey* regarding the possibility of governmental coercion and prohibition through fund distribution. This is not to purport that inquiries under free exercise and abortion funding are equivalent. That the right to free exercise involves freedom to act and believe, and that abortion is protected as a right to privacy, is a fundamental difference between the two. However, abortion funding is important to keep as a reference point. Particularly within the context of *Davey*, it is easy to muddle the difference between affirmative governmental action and coercion that prohibits or hinders religion, and a simple choice by the government not to fund religious pursuits due to other legislative policies. Thinking of a state's refusal to fund in a different context enables one to separate the specific facts of the *Davey* case from the underlying fundamental principles of the inquiry. Admittedly, the withdrawal of a $1125 scholarship appears to effectuate an unfair result as applied to Joshua Davey on the surface, leaving one with the sense that the withdrawal of the scholarship implicates some First Amendment violation. It would seem to be rather innocuous for Washington to bend the restriction in its constitution and apply the funds toward Davey's theological training. However, it is precisely for this reason that it is important to keep the abortion funding cases as a reference point and revisit the fundamental questions posed in both contexts.

42. 432 U.S. 464 (1977).

43. *Id.* at 467. Three years later, the Supreme Court ruled that a federal statute denying funding to medically necessary abortions was not unconstitutional. *Harris*, 448 U.S. at 326.

necessary doctor's certificates that would have allowed the cost of their abortions to be covered by Medicaid under the statute.[44] The Supreme Court held that the Connecticut statute was not a violation of the women's Fourteenth Amendment rights.[45] Justice Powell stated: "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[46] Thus, the Court acknowledged that, while women have a constitutionally protected right to an abortion, the government is allowed to encourage childbirth as long as it did not inhibit that right.[47] Furthermore, in a later abortion funding case, the Court opined that the refusal to fund an activity, without more, is not equivalent to a state-imposed penalty on that activity.[48]

D. The Question Comes Before the U.S. Supreme Court

Washington's Governor Locke and the HECB petitioned for a writ of certiorari to the U.S. Supreme Court after the Ninth Circuit denied their petition for rehearing.[49] On May 19, 2003, the Supreme Court granted the petition to hear the case.[50] Oral arguments were heard before the Court on December 2, 2003.[51] Washington presented the question before the Court as whether the Free Exercise Clause of the First Amendment to the U.S. Constitution requires the state to fund religious instruction if the state provides college scholarship for other secular instruction.[52] Conversely, Davey framed the question as follows:

> Where a State chooses to award scholarships based on neutral criteria to financially needy, academically gifted students, does the State violate the First and Fourteenth Amendments to the

44. *Maher*, 432 U.S. at 467.

45. *Id.* at 479.

46. *Id.* at 475.

47. *Id.* at 474.

48. *Harris*, 448 U.S. at 317.

49. Brief for Petitioners at 1, Locke v. Davey, 123 S. Ct. 2075 (2003) (No. 02-1315).

50. Davey v. Locke, 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (May 19, 2003).

51. At oral argument, Justice Breyer stated to Solictor General Theodore Olson, who argued on behalf of Davey, that the implications of this case were "breathtaking." Oral Arguments to U.S. Sup. Ct. in *Locke v. Davey* (Dec. 2, 2003). The Court seemed particularly concerned with the potential effect of a decision favorable to Davey on voucher cases. Surprisingly, the justices asked very few questions regarding the alleged violation of Davey's free exercise and aimed their questions more toward establishment principles. Justice O'Connor, however, opened questioning on Davey's counsel, asking how Davey's free exercise was violated. Justice Ginsberg repeatedly inquired about the space between the Free Exercise Clause and the Establishment Clause, pointing counsel to the federalism implications of the case.

52. Brief for Petitioners, *supra* note 49, at i.

U.S. Constitution when it discriminatorily strips the scholarship from an otherwise eligible student for the sole reason that the student declares a major in theology taught from a religious perspective?[53]

The Supreme Court is expected to issue its decision in *Locke v. Davey* sometime in May 2004.[54]

III. THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

In Part III, the theoretical underpinnings of the Free Exercise Clause and the structure of a free exercise inquiry will be discussed, specifically focusing on the prohibition requirement. This discussion will be followed by a comparison of the objective of neutrality within the free exercise, free speech, and establishment inquiries to the federalism problem posed by the Supreme Court's impending decision.

A. Background on the Free Exercise Clause

The Free Exercise Clause of the First Amendment protects individuals' ability to engage in religious practice without governmental interference.[55] It "embraces two concepts—freedom to believe and freedom to act."[56] Generally, free exercise cases involve religious believers refusing to follow laws that are in conflict with their religious beliefs or practices, [57] and where courts create religious exemptions in otherwise generally applicable laws or regulations.[58] Free exercise interests may also be implicated when the government mandates specific conduct that one's religious practices or beliefs prohibit,[59] or when government action imposes a substantial burden

53. *Id.*

54. Robert Marshall Wells & Janet I. Tu, *Supreme Court to Hear State Religious Rights Case*, SEATTLE TIMES, May 20, 2003, at A1, *available at* http://seattletimes.nwsource.com/html/localnews/134775189_studyreligion20m.html.

55. U.S. CONST. amend. I.

56. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

57. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 (1878) (holding that a federal law prohibiting polygamy applied to a Mormon, who stated his religion required him to engage in the practice, as long as the law did not prohibit the belief).

58. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that a Seventh-day Adventist was exempt from a state statute requiring willingness to work on Saturdays in order to qualify for unemployment benefits).

59. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that because of religious beliefs, the Amish are constitutionally exempt from a state law requiring compulsory education through age sixteen); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the law cannot compel school children to salute the American flag when it is against their religious beliefs).

on one's religious belief or practice.[60] While the government is never allowed to regulate religious belief,[61] it may prohibit or hinder a practice if the regulation of that practice can be justified by a compelling governmental interest.[62]

Until the 1960s, the Supreme Court's jurisprudence did not contain a simple, standard test for evaluating free exercise claims.[63] In 1963, beginning with its decision in *Sherbert v. Verner*,[64] the Court began employing a balancing test that weighed the importance of the governmental interest in enforcing a challenged law against the burden placed on those who were required to comply with the law by acting in conflict with their religious beliefs.[65] In *Sherbert*, the South Carolina Employment Security Commission declared a Seventh-day Adventist[66] woman ineligible for unemployment benefits because she would not work on Saturdays.[67] The South Carolina Unemployment Compensation Act required that a claimant be able to and available for work on Saturdays or when assigned, and that a refusal to accept suitable work disqualified a claimant from receiving unemployment benefits.[68] The Court held that the statutory condition infringed on the woman's right to free exercise, and that there was no compelling state interest shown to justify such infringement.[69] Based on the Court's analysis in *Sherbert*, any government action that imposes a substantial burden on religious observers' beliefs or practices is subject to strict scrutiny.[70]

In 1990, in *Employment Division, Department of Human Resources of Oregon v. Smith*,[71] the Court restricted the application of *Sherbert*, holding that neutral laws of general applicability are not subject to

60. *See, e.g.*, *Sherbert*, 374 U.S. at 406 (The government imposed a substantial burden on a Seventh-day Adventist's religious practice by disqualifying her from unemployment benefits for not being available to work on Saturdays.).

61. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute.").

62. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

63. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

64. 374 U.S. 398 (1963).

65. *Id.* at 403, 406.

66. Seventh-day Adventists are "[m]embers of Christian sects who believe that the Second Coming of Jesus Christ is literal and imminent." WORLD RELIGIONS, *supra* note 16, at 22.

67. *Sherbert*, 374 U.S. at 399.

68. *Id.* at 400 n.3; S.C. CODE ANN. §§ 68-1 to -404 (Law. Co-op. 1962).

69. *Sherbert*, 374 U.S. at 404, 408–09. The Court has repeatedly confined this holding to the unemployment compensation line of cases. *See, e.g.*, Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

70. *Sherbert*, 374 U.S. at 403.

71. 494 U.S. 872 (1990).

strict scrutiny, even if those laws have the incidental effect of burdening a particular religious practice.[72] In *Smith*, members of the Native American Church were discharged from their jobs at a drug rehabilitation organization after ingesting peyote, a controlled substance under Oregon law.[73] The Oregon Employment Division determined that the ingestion of peyote constituted work-related misconduct and disqualified the members from eligibility for unemployment benefits.[74] The Court, refusing to extend an exemption to the members of the Native American Church, found that the prohibition against the use of peyote was constitutional because Oregon law was a neutral law of general applicability.[75] Justice Scalia, writing for the majority, stated: "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[76]

The *Smith* test was affirmed and applied in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (Lukumi)*.[77] The Church of the Lukumi Babalu, whose members are practitioners of the Santeria religion,[78] filed an action against the City of Hialeah challenging the constitutionality of an ordinance outlawing animal sacrifice.[79] The Court expanded the *Smith* holding, stating that laws failing to be neutral and of general applicability must "be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[80] The Court held that the Hialeah ordinance was neither neutral nor of general application, and therefore was subject to strict scrutiny.[81]

72. *Id.* at 884–86.

73. *Id.* at 874; OR. REV. STAT. § 475.992(4) (1987); OR. ADMIN. R. 855-80-021(3)(s) (1988).

74. *Smith*, 494 U.S. at 874.

75. *Id.* at 881–82.

76. *Id.* at 885 (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 493, 451 (1988)).

77. 508 U.S. 520 (1993).

78. Santeria means "way of the saints." WORLD RELIGIONS, *supra* note 16, at 856. The religion has both Yoruba African and Spanish Catholic roots. *Id.* Practitioners may have a personal *orisha* ("spirit") of a saint, whose survival depends on the power of animal sacrifice. *Lukumi*, 508 U.S. at 525.

79. *Lukumi*, 508 U.S. at 527–28.

80. *Id.* at 531–32.

81. *Id.* at 540–46.

B. Government Prohibition of Belief or Practice

Section B discusses the archetypal settings in which the Court has found governmental prohibitions that violate the Free Exercise Clause. Section C concludes that Washington State's withdrawal of the Promise Scholarship neither prohibited nor imposed a substantial burden on Joshua Davey's religious belief or practice. Part IV will then discuss the neutrality inquiry of a governmental regulation that prohibits or substantially burdens religious belief or practice.

The threshold question in any free exercise inquiry is whether state action has prohibited a religious observer's belief or practice. The Free Exercise Clause of the First Amendment fundamentally protects against government prohibition of religious belief or practice: "Congress shall make no law . . . *prohibiting* the free exercise [of religion]."[82] As Justice O'Connor has stated, "The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'"[83] Within free exercise jurisprudence, the term "prohibit" can be defined simply as "to forbid or prevent," [84] or the term can be defined as limitedly encompassing substantial burdens placed on religious observers by the government.[85] In addition to outright prohibitions, indirect coercion or penalties that discourage the free exercise of religion are subject to First Amendment scrutiny.[86] However, as Justice O'Connor notes,

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to

82. U.S. CONST. amend. I (emphasis added).

83. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S 439, 451 (1988) (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). *Lyng* was a free exercise case involving Native American tribes in Northwest California contesting the Forest Service's plans to allow timber harvesting and road construction in a national forest that the tribes used for spiritual development. *Id.* The Court held that the Free Exercise Clause did not prohibit the government from permitting timber harvesting and road construction in the area because the government's actions did not coerce tribal members from acting contrary to their beliefs. *Id.* at 458.

84. "Prohibit" is defined as "(1) to forbid by authority; and (2) to prevent from doing something." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, *supra* note 19, at 940. For a textual analysis of "prohibit" and the Free Exercise Clause, see Allan Ides, *The Text of the Free Exercise Clause as a Measure of* Employment Division v. Smith *and The Religious Freedom Restoration Act*, 51 WASH. & LEE L. REV. 135, 143–51 (1994).

85. Justice Scalia, writing for the majority in *Smith*, warned that, "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." *Smith*, 494 U.S. 872, 884 (1990).

86. *Lyng*, 485 U.S. at 450.

> practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.[87]

Government actions that constitute a prohibition under the First Amendment can be illustrated by analyzing state-instituted barriers, as interpreted by the Supreme Court in two seminal free exercise cases, *Smith* and *Sherbert*.[88] First, the classic setting of government prohibition of a religious observer's belief or practice is where an enacted law specifically outlaws a particular practice. In *Smith*, for example, state law prohibited the plaintiffs from ingesting peyote, a hallucinogenic drug from the stem of the peyote cactus.[89] Possession of peyote is a Class B felony under Oregon law.[90] However, members of the Native American Church use peyote for sacramental purposes in a Saturday all-night ritual of prayers and songs.[91] The act of eating, smoking, or drinking peyote "brings peace and healing, resists alcoholism, and gives visions of the Peyote Spirit who is regarded either as Jesus or an Indian equivalent."[92] By outlawing the use of peyote, Oregon placed an affirmative barrier between the members of the Native American Church and their sacramental ingestion of peyote, which is a central tenet of their religious practice.

The second setting in which the Court has found a barrier to free exercise is where the government imposes a substantial burden on a religious observer's belief or practice. In *Sherbert*, the plaintiff was a Seventh-day Adventist, who, because of religious beliefs, would not work on Saturdays;[93] she was thus declared ineligible for state unemployment benefits.[94] In the Seventh-day Adventist tradition, Saturday is reserved as the Sabbath, a day of rest for practitioners when working is forbidden.[95] The Court held that this disqualification prohibited her free exercise because the plaintiff's "declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is

87. *Id.* at 450–51.

88. *See* discussion *supra* Part III.A.

89. OR. REV. STAT. §§ 475.005(6), .992(4)(a) (1987).

90. *Id.* § 475.992(4); OR. ADMIN. R. 855-80-021(3)(s) (1988).

91. *Smith*, 494 U.S. at 874; WORLD RELIGIONS, *supra* note 16, at 747.

92. WORLD RELIGIONS, *supra* note 16, at 747.

93. *Sherbert*, 374 U.S. 398, 399 (1963).

94. *Id.* at 401.

95. Observation of the Sabbath has its roots in Judaism and is in honor of God's rest on the seventh day of creation. Jewish tradition, similar in this respect to Seventh-day Adventist tradition, teaches that if Jews keep the Sabbath, the Messiah will come. WORLD RELIGIONS, *supra* note 16, at 829.

unmistakable."[96] *Sherbert* represents a limited broadening of the scope of the term "prohibit" to include laws that substantially burdened a particular practice but did not prohibit it outright.[97]

The underlying rationale for *Sherbert's* expansion of the term "prohibit" to encompass substantial burdens imposed by the government was that "[t]he ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[98] Seventh-day Adventists believe that Christ's second coming is delayed because of the failure of practitioners to keep the Sabbath on Saturdays.[99] The South Carolina law set before the Seventh-day Adventists a choice between collecting unemployment benefits and contributing to, according to her beliefs, delaying the second coming of Christ; the necessity of this choice imposed a substantial burden upon the practitioner.

C. *The Ninth Circuit Sidestepped a True "Prohibition" Analysis in Davey v. Locke*

Rather than inquiring whether Washington's withdrawal of the scholarship prohibited or imposed a substantial burden on Joshua Davey's religious belief or practice, the Ninth Circuit panel sidestepped a true prohibition analysis altogether. In place of the prohibition analysis, relying on *McDaniel v. Paty*,[100] the court artificially crafted a prohibition based on Davey's status as a theology student.[101] In *McDaniel*, a plurality of the Supreme Court found that a Tennessee statute disqualifying ministers from serving as delegates at a Tennessee constitutional convention violated a minister's right to free exercise.[102] The Court framed the violation as the state forcing Paty to have to choose between one guaranteed right and anther.[103] In *Davey*, the Ninth Circuit analogized Washington's withdrawal of the Promise Scholarship on the basis of Davey's status as a theology student to Tennessee's disqualification of Paty as a constitutional

96. *Sherbert*, 374 U.S. at 404.

97. *See Smith*, 494 U.S. at 884. For a discussion of the limitations of *Sherbert*, see City of Boerne v. Flores, 521 U.S. 507, 513–16 (1997).

98. *Sherbert*, 374 U.S. at 404.

99. WORLD RELIGIONS, *supra* note 16, at 22.

100. 435 U.S. 618 (1978).

101. Davey v. Locke, 299 F.3d 748, 753–54 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (May 19, 2003).

102. *McDaniel*, 435 U.S. at 629.

103. *Id.* at 626. The right of Tennessee's citizens to seek and hold office is guaranteed by the Tennessee Constitution. TENN. CONST., art. 2 §§ 9, 25, 26.

delegate on the basis of his status as a minister.[104] The Ninth Circuit crafted the analogy as follows: "A minister could not be *both* a minister *and* a delegate in Tennessee any more than Davey can be both a student pursuing a degree in theology and a Promise Scholar in Washington."[105]

The Ninth Circuit erred in this analogy because the *McDaniel* court was concerned not with Paty's disqualification from the delegation because of his *status* as a minister alone, but with the constitutionally protected practices that create that status.[106] The choice made Paty abandon either the practices that define a person as a minister, such as preaching and proselytizing, or his right to be a delegate.[107]

While it may be a permissible characterization that the Washington law required Davey to choose between a being Promise Scholar and a theology student, the law cannot be construed as forcing Davey to abstain from activities that define his status as a theology student to pursue some other guaranteed right as the plaintiff in *McDaniel*. First, there is a fundamental difference between being a constitutional delegate and a Promise Scholar. While the former is a right guaranteed by a state's constitution, the latter is a categorization of someone as a recipient of state funds: the two are not equivalent or even analogous. Second, while Paty was forced to abstain from the protected practices of preaching and proselytizing if he became a delegate, Davey would not be similarly forced to abstain from any protected practices if he were to accept the scholarship and resign his status as a theology major. Unlike performing religious practices such as baptizing and administering the sacraments as a minister, a theology student studies these practices. To be a Promise Scholar, Davey would not be required to abandon his intellectual pursuit of theology; he simply could not use Washington State funds to do it. Thus, the reliance on *McDaniel* as a foundation for the decision in *Davey* is inapposite.

The Supreme Court should reject the Ninth Circuit's free exercise analysis for three reasons. First, the Free Exercise Clause does not protect the pursuit of an academic degree. Second, Washington's refusal to help fund Davey's theological training neither prohibited Joshua Davey from his religious belief or practice nor substantially burdened it. Third, by construing a refusal to fund

104. *Davey*, 299 F.3d at 754.
105. *Id.* (emphasis in original).
106. *Cf.* Green, *supra* note 10, at 680–81.
107. *McDaniel*, 435 U.S. at 626.

theological training as a prohibition of belief or practice, *Davey* expands the term "prohibition" within the free exercise inquiry, and paints free exercise in terms of what religious believers may exact from government.

There is a fundamental difference between pursuing an academic degree, even one leading to the profession of ministry, and activities that are pillars of one's religious practice.[108] Majoring in theology is not a Christian belief or practice.[109] Davey's belief may have prompted his selection of major, but the pursuit of a theology degree itself is not tantamount to baptism, accepting the sacraments, or prayer.

Despite the Court's refusal to investigate "centrality" of religious belief,[110] the Court has only extended free exercise protection to practices around which a particular religion is based. For example, in *Sherbert*, North Carolina's unemployment law imposed a substantial burden on a Seventh-day Adventist's practice because it made her choose between observing the Sabbath on Saturdays and collecting unemployment benefits.[111] Seventh-day Adventists believe that Christ's second coming is delayed because of the failure of practitioners to keep the Sabbath.[112] *Lukumi*, where the practice of animal sacrifice was prohibited, is also instructive on the centrality of religious practice protected by free exercise and on the threshold at which free exercise protection will be extended.[113] Animal sacrifice within the Santeria religion, the practice at issue in *Lukumi*, is a type of devotion to *orishas*, or spirits, that ensures their survival.[114] The *orishas* help Santeria practitioners fulfill their destiny from God.[115]

Washington's refusal to fund Davey's theological training did not prohibit Davey from any constitutionally protected belief or practice. The Ninth Circuit panel failed to identify a barrier erected by Washington because there is none. Davey does not argue that such a barrier exists; rather, he characterizes the restriction as a "religious

108. Incidentally, Joshua Davey is no longer pursuing a profession in the ministry, but has decided to go to law school. In fall 2003, he enrolled at Harvard University School of Law. Robert Marshall Wells & Janet I. Tu, *Supreme Court to Hear State Religious Rights Case*, SEATTLE TIMES, May 20, 2003, at A1, *available at* http://seattletimes.nwsource.com/html/localnews/134775189_studyreligion20m.html.

109. *See generally* Ken Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984) (discussing how courts should define "religion" when the presence of religion is seriously controverted).

110. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990).

111. *Sherbert*, 374 U.S. at 403–04.

112. WORLD RELIGIONS, *supra* note 16, at 22.

113. *Lukumi*, 508 U.S. 520 (1993).

114. *Id.* at 525.

115. *Id.* at 524.

gerrymander."[116] Joshua Davey made the decision to attend a private Christian college and to use his college education to pursue a career in the Christian ministry before being notified of his receipt of the Promise Scholarship.[117] Moreover, Davey continued to pursue a major in theology even after the money was withdrawn.[118] The Washington law establishing the restriction that State funds not be applied to theological training did not regulate Davey's practice. Rather, the law regulated the distribution of Washington taxpayer's money in accordance with the Washington State Constitution.

By withdrawing the scholarship funds, Washington did not impose a substantial burden on Davey's belief or practice comparable to that imposed on the plaintiff in *Sherbert*. Davey was no worse off after the Scholarship money was withdrawn than he was before being notified that he had received the scholarship. Although the Scholarship would have subsidized Davey's major course of study, its revocation did not restrict Davey's right to pursue his religion or coerce him from its practice. Rather, revoking the Scholarship made Davey's choice of major slightly more expensive; after the revocation, Davey had to work fewer than three additional hours a week.[119] During these three hours, Davey could not go to class, study, or associate with his fellow believers for worship.[120] This burden pales when compared to the threshold burden imposed on the plaintiff in *Sherbert*, who was forced to choose between collecting unemployment benefits, her only income, and disobeying a tenet of her religious practice.[121] Any burden imposed on Davey was an incidental effect of the Washington law, not a coercive purpose of it.

Finally, the Supreme Court should not expand the protection of the Free Exercise Clause to include benefits exacted from the government. The plurality in *McDaniel* cautions that expanding the scope of the First Amendment's protection might leave the government powerless to advance compelling government interests.[122] Davey's right to religious practice and belief without governmental interference is fundamentally guaranteed by the Free Exercise Clause. These rights should be zealously protected. However, Washington's refusal to fund Davey's theological training does not violate the Free

116. Brief of Respondent at 18–24, Locke v. Davey, 123 S. Ct. 2075 (2003) (No. 02-1315).

117. Decl. of Davey, Ex. A, *supra* note 12, at 4; Brief of Respondent, *supra* note 116, at 3–4.

118. Brief of Respondent, *supra* note 116, at 6.

119. Decl. of Davey, Ex. A, *supra* note 12, at 8.

120. *Id.*

121. *Sherbert*, 374 U.S. at 399–402.

122. *McDaniel*, 435 U.S. at 627 n.7.

Exercise Clause unless it clearly prohibits or substantially burdens Davey's religious beliefs or practices. By precluding the government's denial of an educational subsidy, the Ninth Circuit extends free exercise protection significantly beyond a level neither originally envisioned nor currently understood.

IV. THE NEUTRALITY INQUIRY

In addition to sidestepping a true prohibition analysis, the Ninth Circuit panel incorrectly conducted the neutrality inquiry under a free exercise analysis. Part IV examines the neutrality requirements within the inquiries of free exercise, free speech, and establishment, positing that the Ninth Circuit improperly imported free speech criteria through an establishment neutrality paradigm into its free exercise inquiry.

Traditional examination of the relationship between the Establishment Clause and the Free Exercise Clause has articulated the goal of neutrality: the government must remain neutral toward religion, and it must not favor one religion over another or unnecessarily burden or discourage religious practice.[123] However, the inquiry into neutrality and the process of achieving it are not identical in each examination. Before examining the analytical error of the Ninth Circuit's construction of neutrality and the implications of a possible Supreme Court decision affirming that construction, it is important to discuss the neutrality understandings within free exercise, free speech, and establishment jurisprudence.

A. The Neutrality Inquiry Under the Free Exercise Clause

While the concept of neutrality underlies many free exercise decisions, it was formally imported into the analysis of free exercise in *Lukumi* and *Smith*.[124] Laws examined in free exercise analyses are generally regulatory in nature.[125] A law is not facially neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation."[126] To determine its object, the law must be examined, beginning with its text, to determine if the law is discriminatory on its face.[127] The law is found to be not facially neutral if "it refers to a religious practice without a secular meaning

123. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).
124. *Lukumi*, 508 U.S. 520, 533–34 (1993); *Smith*, 494 U.S. 872, 879 (1990).
125. *See Smith*, 494 U.S. at 880.
126. *Lukumi*, 508 U.S. at 533.
127. *Id.*

discernable from the language or context."[128] The purpose of this inquiry is clear: the Court is attempting to protect individual free exercise from government "hostility which is masked, as well as overt."[129]

This inquiry was conducted in *Lukumi* and is instructive on its application.[130] In *Lukumi*, the Court found that the law outlawing animal sacrifice was facially discriminatory.[131] The Court examined the words "sacrifice" and "ritual" in the text of the city ordinance outlawing animal sacrifice, as well as looking at the ordinance's operation.[132] The Florida law, purporting to regulate cruelty to animals, applied to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed."[133] The Court found that the purpose of the ordinance was to suppress the exercise of the Santeria religion by targeting practices that were central to its belief.[134]

Strict scrutiny applies if a law is not one of general applicability.[135] While all laws are selective to some extent, the "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."[136] General applicability of a law regulating animal sacrifice failed in *Lukumi* because it targeted Santeria animal sacrifice without targeting all other animal killings.[137]

B. The Criteria of Neutrality under the Free Speech Clause

The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[138] The core protection of this provision is that the government may not restrict expression based on "its message, its ideas, its subject matter, or its content."[139] While content-based regulations on speech are presumptively invalid,[140] content-neutral regulations are only subject

128. *Id.*
129. *Id.* at 534.
130. *Id.* at 533–34.
131. *Id.* at 534.
132. *Id.* at 534–35.
133. *Id.* at 527.
134. *Id.* at 542.
135. *Id.* at 546.
136. *Id.* at 542.
137. *Id.* at 542–46.
138. U.S. CONST. amend. I.
139. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972).
140. *See, e.g.*, RAV v. City of St. Paul, 505 U.S. 377, 382 (1992).

to intermediate scrutiny.[141] "Laws [regulating speech] pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[142] The government may impose restrictions on the time, place, and manner of speech when the speech takes place in a public forum.[143]

Restrictions on speech in a traditional public forum are subject to stricter scrutiny than restrictions on speech in a limited public forum.[144] In a limited public forum, the government may reserve the forum for certain groups or topics;[145] however, the government's restriction may not "discriminate against speech on the basis of the speaker's viewpoint, and the 'restriction must be reasonable in light of the purpose served by the forum.'"[146]

The Court has used a forum analysis in connection with a case involving religious viewpoint only when the case has involved free speech violations.[147] For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*,[148] the Court held that the University of Virginia had opened a limited public forum by authorizing the payment of printing costs for a variety of student publications to outside contractors.[149] The university's denial of reimbursement by the Student Activities Fund for printing a student publication based on religious viewpoint offended the Free Speech Clause of the First Amendment.[150] The Court distinguished content discrimination from viewpoint discrimination, stating: "Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[151] Thus, the refusal to fund student publications

141. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

142. *Id.* at 641.

143. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799–800 (1985). There are three types of fora: (1) the traditional public forum; (2) the public forum created by government designation; and (3) the nonpublic forum. *Id.* at 802.

144. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

145. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

146. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (quoting *Cornelius*, 473 U.S. at 806).

147. For an overview of government funding for religious expression, see Stuart L. Lark, *Religious Expression, Government Funds, and the First Amendment*, 105 W. VA. L. REV. 317 (2003).

148. 515 U.S. 819 (1995).

149. *Id.* at 822, 830.

150. *Id.* at 837.

151. *Id.* at 829.

expressing a religious viewpoint was impermissible viewpoint discrimination because it was directed against speech that otherwise fell within the limitations of the forum.[152]

C. The Neutrality Paradigm of the Establishment Clause

The federal Establishment Clause is based on the principle that the government cannot sponsor or formally establish religion.[153] The purpose of this clause is to prevent any form of indoctrination or symbolic union between the state and religion.[154] It is well established that "government inculcation of religious beliefs has the impermissible effect of advancing religion."[155] The Court has acknowledged that "[it] can only dimly perceive the boundaries of permissible government activity in this sensitive area."[156]

In interpreting the underlying objectives of the Establishment Clause, the Court has shifted its emphasis from protecting liberty to guaranteeing equality.[157] When the Establishment Clause was first made applicable to the states through *Everson v. Board of Education of Ewing Township*[158] in 1947, the Court's opinion indicated that the aim of the Establishment Clause was to protect religious minorities from persecution through a strict separation of church and state.[159] In the decades that followed, this purpose evolved from protecting the religious minority from exclusion,[160] to protecting against political divisiveness along religious lines by avoiding excessive entanglement between church and state.[161] In *Lemon v. Kurtzman*,[162] decided in

152. *Id.* at 829–30.

153. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000) (holding that the religious liberty protected by the Establishment Clause is abridged when the State affirmatively sponsors the religious practice of prayer).

154. Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985) ("It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.").

155. Agostini v. Felton, 521 U.S. 203, 223 (1997).

156. Tilton v. Richardson, 403 U.S. 672, 678 (1971).

157. *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002) (Professor Feldman provides a comprehensive history of the development of the modern Establishment Clause.).

158. 330 U.S. 1 (1947).

159. *Id.* at 11. Justice Black, writing for the majority, heralded the famous maxim of Thomas Jefferson, stating: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Id.* at 18.

160. *See* Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 227–28 (1948) (Frankfurter, J., concurring); Feldman, *supra* note 157, at 684–85.

161. *See* Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

162. 403 U.S. 602 (1971).

1971, the Court established new criteria by which to assess whether a law violates the federal Establishment Clause.[163] In order to satisfy the *Lemon* test, a law had to satisfy the following three criteria: (1) the law had to have a secular purpose; (2) the law's primary effect neither advanced nor inhibited religion; and (3) the law did not create an excessive entanglement between the church and the state.[164] The policy behind *Lemon* was that the government remained neutral toward religion in a separationist sense; a strict separation between church and state was needed to guard against religious persecution and to avoid excessive entanglement. While not yet overruled, the *Lemon* test has been widely criticized by members of the Court.[165] For example, Justice Scalia likened the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ."[166]

Despite the criticism, the separationist sentiment underlying the *Lemon* test was evident in subsequent Establishment cases. For example, the Court applied the *Lemon* test in *Tilton v. Richardson*,[167] where it allowed public funds to go to private religious colleges and universities.[168] The Court distinguished *Tilton* from *Lemon* on the grounds that these institutions of higher learning are not as infused with religious doctrine as elementary and secondary schools, but rather are places where free-thinking and expression is encouraged.[169]

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163. *Id.* at 612–13.

164. *Id.*

165. Professor Feldman posited that "[p]erhaps the perceived inadequacy of *Lemon* has something to do with the relatively thin connection between the three-pronged test and an expressly articulated theory of the purposes of the Establishment Clause." Feldman, *supra* note 157, at 693.

166. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

167. 403 U.S. 672 (1971).

168. *Id.* at 689.

169. *Id.* at 686–89. "Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by high degree of academic freedom and seek to evoke free and critical responses from their students." *Id.* at 686; *see* Davey v. Locke, 299 F.3d 748, 755–56 (9th Cir. 2002). The Ninth Circuit attempted to compare *Davey* with cases in which there was a "suppression of dangerous ideas." *Davey*, 299 F.3d at 755. The court was equating expressive conduct to educational preference, explaining that "the university is a traditional sphere of free expression." *Id.* at 765 (citing Rust v. Sullivan, 500 U.S. 173, 199–200 (1991)). This statement in *Davey* is interesting considering that the students who attend Northwest College pledge to live in a Christ-centered environment in which they are not allowed to drink alcoholic beverages, cohabitate, have sexual relations, engage in public displays of affection, wear spaghetti straps, expose their midriffs, or hang "inappropriate literature or posters" on their walls. Students who do not follow these rules are subject to disciplinary action by the school. The students are held to these rules both during school term and also during their

Particularly, the Court impressed that an important aspect of the law granting funding to these institutions was that it "was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions."[170] Thus, despite the grant of public aid to a religious institution, *Tilton* demonstrated a continuing separationist mentality threaded into the Court's construction of the Establishment Clause.

However, in the decades that followed *Lemon*, competing theories of the purpose underlying the Establishment Clause developed within the Court. In *Lynch v. Donnelly*,[171] Justice O'Connor used the *Lemon* test as fodder to develop the endorsement test.[172] In her concurring opinion in *Lynch*, Justice O'Connor outlined the following interpretation of the *Lemon* test:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.[173]

Justice O'Connor's formulation moved away from the secular-religious distinction emphasized in *Lemon* and *Tilton* to a focus on government endorsement or disapproval.[174] The endorsement test was aimed at not making "a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'"[175]

The Court has recently transformed this non-endorsement understanding of the Establishment Clause into an understanding that the government must treat the beliefs and conduct of the religious and

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breaks. NORTHWEST COLLEGE, STUDENT HANDBOOK: LIVING IN COMMUNITY, *available at* http://www.nwcollege.edu/handbooks/11community.html (last visited Nov. 9, 2003).

170. *Tilton*, 403 U.S. at 679.

171. 465 U.S. 668 (1984)

172. *Id.* at 687–94 (1984) (O'Connor, J., concurring).

173. *Id.* at 690.

174. *See* Feldman, *supra* note 157, at 694–95.

175. County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)). Justice Kennedy, joined by Chief Justice Rehnquist, Justice White, and Justice Scalia, criticized the endorsement test in a separate opinion in *Allegheny*, in which he stated:

> Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent. Neither result is acceptable.

Id. at 674 (Kennedy, J., concurring in part and dissenting in part).

non-religious equally. This new interpretation was seen in *Mitchell v. Helms*,[176] a case involving government aid in the form of materials and equipment to public and private schools.[177] In *Mitchell*, a plurality of the Court held that such aid did not offend the Establishment Clause because the aid did not result in religious indoctrination, program eligibility was determined neutrally, and the aid program did not involve providing prohibited content nor define its recipients by reference to religion.[178] Justice Thomas, writing for the plurality, stated: "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."[179] *Mitchell*, therefore, represents a subtle shift in the Court's conception of the Establishment Clause. While the endorsement test provides that the government may not favor one particular religion over another, the *Mitchell* formulation of the Establishment Clause made "evenhandedness neutrality" the principal inquiry for school aid.[180]

However, some of the members of the *Mitchell* Court expressed concern with the emphasis on neutrality. This concern was seen in Justice O'Connor's concurring opinion, which was joined by Justice Breyer,[181] and in Justice Souter's dissent, which was joined by Justices Stevens and Ginsburg.[182] Justice Souter argued that the plurality's conception of evenhandedness neutrality as a sufficient test of constitutionality would eliminate the inquiry into the law's effects.[183] Justice Souter articulated the establishment prohibition of government aid to religious funding as the following:

> It is meant to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes."[184]

176. 530 U.S. 793 (2000).

177. *Id.* at 801.

178. *Id.* at 835.

179. *Id.* at 809.

180. *Id.* at 838.

181. *Id.* at 836–40.

182. *Id.* at 878–85.

183. *Id.* at 869. Specifically, Justice Souter argued that "[a]dopting the plurality's rule would permit practically any government aid to religion so long as it could be supplied on terms ostensibly comparable to the terms under which aid was provided to nonreligious recipients." *Id.* at 901 n.19.

184. *Id.* at 868.

While agreeing that aid was permissible under the Establishment Clause because it could not reasonably be viewed as endorsing religion,[185] Justice O'Connor aligned with Justice Souter in his concern with the supremacy placed on neutrality by the plurality.[186] The following section will discuss how the Court's evenhanded neutrality within establishment operates in funding cases involving free speech claims.

D. The Crossover Between Free Speech Criteria and Establishment Neutrality

In recent free speech cases, the Court has intermingled Establishment Clause neutrality criteria with those found in a free speech examination.[187] This blending can be seen in *Good News Club v. Milford Central School*,[188] a case that involved an elementary school that opened its facilities to the community for after-school activities.[189] However, the school did not allow the facilities to be utilized for religious purposes.[190] The Supreme Court held that this restriction was unconstitutional because the elementary school opened up a limited public forum to activities that served a variety of purposes and therefore, it could not discriminate because of viewpoint.[191] Although the Court acknowledged that a state interest in avoiding an Establishment Clause violation might be a sufficiently compelling interest to justify content-based discrimination, the Court stated it was unclear whether it would justify viewpoint discrimination.[192]

185. *Id.* at 867.

186. *Id.* at 838–41. Justice Souter argued that while neutrality is a prominent concern in an Establishment inquiry, the definition of "neutrality" has changed since *Everson v. Board of Education*, 330 U.S. 1 (1947). *Mitchell*, 530 U.S. at 878–84. In *Everson*, Justice Souter argues, "neutrality" connoted the government's "required median position between aiding and handicapping religion." *Mitchell*, 530 U.S. at 879. The Court then redefined "neutral" to characterize a benefit or aid as secular. *Id.* at 879–81. In the 1980's, "neutral" was again redefined to mean "evenhandedness" when allocating aid on some common basis to religious and secular recipients. *Id.* at 881.

187. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that a school district's policy against opening school facilities to groups for religious purposes, where a group desired to show a film relating to family values from a "Christian perspective," violated the First Amendment because it was viewpoint discrimination); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that the federal or Missouri Establishment Clause was not a compelling justification to allow a state university to violate students' free speech rights by excluding religious groups from university facilities that were generally available for activities of registered students).

188. 533 U.S. 98 (2001).

189. *Id.* at 102.

190. *Id.* at 103.

191. *Id.* at 107–12.

192. *Id.* at 112–13.

Nevertheless, the *Good News* Court found that the school's reliance on the Establishment Clause was "unavailing."[193] Likening *Good News* to its prior decisions in *Lamb's Chapel* and *Widmar*, the Court held there was no establishment violation because the school made its forum available to other organizations, the religious club's meetings were held after school hours, the meetings were open to any students who obtained parental consent, and the meetings were not sponsored by the school.[194] Thus, the Court's free speech analysis was underlain by the establishment objective of evenhandedness neutrality; the religious club wanted "nothing more than to be treated neutrally and given access to speak about the same topics as are other groups."[195] Together *Good News*, *Lamb's Chapel*, and *Widmar* establish that governmental suppression of private religious expression that would otherwise fall within the scope of a government program is viewpoint discrimination.[196]

The next section will discuss how the Ninth Circuit improperly imported a forum analysis into its decision in *Davey v. Locke* and distorted the free exercise neutrality inquiry. The court executed the importation by relying on an establishment neutrality paradigm.

E. The Ninth Circuit's Inaccurate Construction of Neutrality in Davey v. Locke

As discussed in Part III, the Ninth Circuit sidestepped a true prohibition analysis by artificially crafting a prohibition of Davey's free exercise based on his status as a theology student. The Ninth Circuit ultimately subjected the Washington law to strict scrutiny because it found that the law disqualifying theology students from state funds was not neutral;[197] moreover, it found that the law on its face discriminated on the basis of religious pursuit.[198] The Ninth Circuit reached this conclusion by applying a free speech forum analysis, concluding that "[t]he bottom line is that the government may limit the scope of a program that it will fund, but once it opens a neutral 'forum' (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion."[199]

193. *Id.* at 113
194. *Id.*
195. *Id.* at 114.
196. Lark, *supra* note 147, at 329.
197. Davey v. Locke, 299 F.3d 748, 758 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (May 19, 2003).
198. *Id.* at 757.
199. *Id.* at 756.

The Ninth Circuit improperly grafted the free speech forum analysis on to the free exercise analysis through use of an establishment neutrality paradigm similar to the Supreme Court's funding analysis in *Good News*.[200] In addition, in determining whether Washington infringed on Davey's right to free exercise, the Ninth Circuit distorted the *Lukumi* analysis of neutral laws of general applicability.[201] While the Supreme Court in *Lukumi* indicated that a free exercise analysis has parallels to free speech analysis, it did not import the categories of the analysis into determinations of free exercise.[202]

The neutrality required in the free exercise analysis is that the *object* of the law is not to prohibit, hinder, or burden religious practices or belief; whether the law is viewpoint-neutral is not within the analytical framework of the Free Exercise Clause.[203] *Davey* frames the argument that the Washington law prohibiting the application of state funds to theology students as not neutral—as Washington offering a benefit to all, but excluding some on the basis of religion.[204] The Ninth Circuit held that the effect of this exclusion was coercive suppression of religious ideas.[205] In support of its holding, the Ninth Circuit subjected the Washington law to a limited public forum analysis within a free speech context.[206] In such an analysis, once the government opens a limited public forum it cannot exclude access on the basis of viewpoint.[207] In contrast, the paramount inquiry in a free exercise analysis is not assessing the government's inclusion or exclusion of religion alone, as it is in a forum analysis, but rather how that inclusion or exclusion may coerce or hinder religious practice or belief.[208]

The current conception of government neutrality in establishment jurisprudence runs through *Davey*'s formulation of Washington's prohibition of Davey's free exercise. Not only did the Ninth Circuit inappositely use free speech criteria in its formulation in *Davey*, it also imported those criteria on the theory that Davey's interest in pursuing a major in theology should be equally regarded as

200. *See Good News*, 533 U.S. 98.

201. *Cf.* Green, *supra* note 10, at 677–79.

202. *Lukumi*, 508 U.S. at 543.

203. *Id.* at 533; *see* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 865–66 (2001); *cf.* Green, *supra* note 10, at 677–80.

204. *See Davey*, 299 F.3d at 757–58.

205. *Id.* at 760.

206. *Id.* at 756.

207. *See supra* Part IV.B.

208. *See supra* Part IV.A.

any other major pursued by any other student eligible for the Scholarship, religious or nonreligious.[209] The Ninth Circuit's opinion pivots on the theory that by "singling out" a theology student to be exempt from the Scholarship, Washington was discriminating on the basis of religion.[210]

While this form of analysis was appropriate in *Good News*, where the Supreme Court determined whether a religious club's inclusion in a limited public forum at a public school would offend the federal Establishment Clause,[211] it is not appropriate in analyzing whether a law exhibits overt or masked hostility to religion. In *Davey*, the object of section 28B.10.814 of the Revised Code of Washington, the statute that restricted the application of state funds toward theology majors, was to avoid violating Washington's Establishment Clause requirement that "[n]o public money . . . shall be appropriated for or applied to any religious worship, exercise or instruction,"[212] not to single-out theology students or to coerce those students from majoring in theology.

In sum, rather than adopting the Ninth Circuit's muddled neutrality analysis, there are three reasons the Supreme Court should follow the *Lukumi* analysis to determine whether Washington's Promise Scholarship had the object of prohibiting or burdening religious belief or practice. First, if the Supreme Court extended a forum analysis to the free exercise arena in cases where rights of free speech are not implicated, it would distort the free exercise inquiry to protect state actions that do not offend the historical understanding of the Free Exercise Clause. While the underlying principles of free exercise and free speech inquiries are analogous, each attempting to protect individuals from government coercion, the application of those inquiries differs. The forum analysis is inapposite because it focuses on how the government may coerce individuals' speech through restrictions on availability of limited public forums. In contrast, a free exercise inquiry does not focus on availability of government benefits, but rather on how non-neutral laws prohibit religious observers' belief or practice.

Second, if the Supreme Court imported a free speech forum analysis into a free exercise analysis it would, of necessity, be through an establishment neutrality paradigm. It would transfer the emphasis in the free exercise inquiry from whether the object of government

209. *Davey*, 299 F.3d at 754.
210. *Id.* at 760.
211. *Good News*, 533 U.S. at 112–13 (2001).
212. WASH. CONST. art. I, § 11.

action was coercive to whether religious observers were treated evenhandedly. If the Court were to characterize all laws that refer to religion on their face as not viewpoint neutral, and violating evenhandedness neutrality principles under the Establishment Clause, it would preclude the government from ever imposing incidental burdens on religious practitioners regardless of the underlying interest—any government action that touched religious practitioners would be construed as not evenhanded and not neutral. Regardless of whether there was a prohibition on religious belief or practice or whether a substantial burden was imposed on the religious practitioner, the action would be subject to strict scrutiny.

Finally, if the Supreme Court adopted a free exercise analytical scheme similar to that executed by the Ninth Circuit in *Davey v. Locke*, the outcome would infringe on the right of states to fashion their own more protective establishment provision in the space allotted between the federal Free Exercise Clause and the Establishment Clause.

V. THE FEDERALISM PROBLEM: THE WASHINGTON STATE ESTABLISHMENT CLAUSE SHOULD BE A COMPELLING JUSTIFICATION IF STRICT SCRUTINY IS APPLIED

This Part discusses compelling interest under strict scrutiny and Washington's undisputed interest in abiding by its own more protective establishment provision.

> The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in [a constitutionally protected right] against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal.[213]

Justice Thomas recently quoted this statement in his concurring opinion in *Zelman v. Simmons-Harris*.[214] His concurrence stated that federal courts should strike a proper balance between the demands of a federal constitutional amendment and "the federalism prerogatives of States on the other."[215] Justice Thomas's discussion suggests that states should be allowed room to experiment with their own

213. Roth v. United States, 354 U.S. 476, 503–04, (1957) (Harlan, J., dissenting).

214. 536 U.S. 639, 679 n.3 (2002) (Thomas, J., concurring).

215. *Id.* at 679.

approaches to religion.[216] Achieving this desired balance between the demands of the Free Exercise Clause and the federalism prerogative of Washington in applying its own stricter establishment provision are heavily implicated in the impending Supreme Court decision in *Locke v. Davey*.

A. Washington's More Protective Establishment Clause

While a state constitution may not provide less protection than the federal constitution, it may provide more.[217] In *State v. Gunwall*,[218] the Washington Supreme Court set out neutral criteria for determining whether, in certain circumstances, the Washington Constitution would be considered as extending broader rights to its citizens than the U.S. Constitution.[219] The court stressed that the Supreme Court has allowed for state's broader protection of rights because "each state has the 'sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.'"[220] The Washington Supreme Court has noted that "the constitution is the expression of the people's will, adopted by them,"[221] and Justice Utter of the Washington Supreme

216. *See* Davey v. Locke, 299 F.3d 748, 768 (9th Cir. 2002) (McKeown, J., dissenting), *cert. granted*, 123 S. Ct. 2075 (May 19, 2003).

217. The analogy of a floor and ceiling is often made when discussing the interplay between the Federal Constitution and state constitutions. *See, e.g., Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1408 (1982). The Federal Constitution provides the "floor" and the "ceiling" for a certain personal liberties; states may operate as they choose in the space between. *Id.*

218. 106 Wash. 2d 54, 720 P.2d 808 (1986).

219. *Id.* at 58, 720 P.2d at 811. The criteria are: (1) the textual language; (2) differences in the texts; (3) Constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *Id.*

220. *Id.* at 59, 720 P.2d at 811 (quoting Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980)). In addition to Washington's Constitution, nineteen state constitutional provisions provide broader protection than the U.S. Constitution, specifically banning the application of government funds toward religious education. CAL. CONST. art. XVI, §5; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 2, ¶ VII; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; KY. CONST. § 189; MASS. CONST. art. XLVI, § 2; MO. CONST. art. IX, § 8; MONT. CONST. art. X, § 6; NEV. CONST. art. XI, § 10; N.M. CONST. art. XII, § 3; N.D. CONST. art. VIII, § 5; OKLA. CONST. art. II, § 5; OR. CONST. art. I, § 5; S.D. CONST. art. VI, § 3; TEX. CONST. art. I, § 7; VT. CONST. ch. 1, art. 3; WYO. CONST. art. I, § 19; Briefs of States of Vt., Mass., Mo., Or., & S.D. & of Commws. of N. Mariana Is. & Puerto Rico Amici Curiae in Supp. of Pet'rs at 24 n.8, Locke v. Davey, 123 S. Ct. 2075 (2003) (No. 02-1315) [hereinafter States Amici Curiae].

221. State *ex rel.* Albright v. Spokane, 64 Wash. 2d 767, 770, 394 P.2d 231, 233 (1964); *see* Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 511 (1984). Justice Utter argues that Washington's Declaration of Rights is the primary guarantor of the rights of Washingtonians and that Washington State judges have a duty to "examine it first whenever a state law, regulation, or action is alleged to violate the fundamental rights of a

Court distinguished the Washington Constitution from the U.S. Constitution as "a more 'political' document" because it may be easily amended to reflect current local values.[222]

The Washington Constitution maintains a strong division between church and state, reflecting Washingtonians' steadfast desire to uphold a firm separation in this area. Article I, section 11 of the Washington Constitution provides one of the more restrictive provisions regarding the separation of church and state,[223] reflecting Washingtonians' desire to maintain a firm separation between church and state.[224] Washington's original Establishment Clause was adopted in 1889.[225] Its initial composition reflected the federal requirement that states seeking Union admission must adopt a constitution containing a division between church and state.[226] In 1904, article I, section 11 was amended to provide that the clause should not be "construed as to forbid the employment by the state of a chaplain for the state penitentiary and for such of the state reformatories. . . ."[227] Additional amendments in 1958 and 1993 added "state custodial,

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Washington citizen, and to interpret it in the truly independent manner that history, logic, and the principles of federalism require." *Id.* at 524.

222. Utter, *supra* note 221, at 495.

223. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 591 (2003).

224. Article I, section 11 should be read together with article IX, section 4, which states: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." WASH. CONST. art. IX, § 4; *see* ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 25, 159 (2002).

225. As originally adopted in 1889, article I, section 11 read:

> Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person, or property, on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. 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. No religious qualification shall be required for any public office, or employment, nor shall any person be incompetent as a witness, or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

WASH. CONST. art. I, § 11 (1889). For a history of the Establishment Clause of the Washington State Constitution, see Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451 (1988).

226. DeForrest, *supra* note 223, at 590. Provisions in state constitutions requiring the separation between church and state are called Blaine Amendments. Approximately thirty states have Blaine Amendments incorporated into their constitutions. *Id.* at 554.

227. WASH. CONST. art. I, § 11 (amended 1904).

correctional, and mental institutions,"[228] and "county's or public district's hospital, health care facility, or hospice"[229] to the list of permissible state institutions that may employ chaplains. In addition to illustrating the malleable nature of the Washington Constitution in adapting to changing mores and needs of the citizens of Washington, these amendments also expose the absence of any modification in the original amendment's prohibition against the application of state funds toward religious instruction. While the Washington Constitution has been amended to allow for chaplains, these changes are minor, and have never been funding modifications. Washingtonians have not exhibited a desire to follow the federal lead in draining the Establishment Clause of its force.

The Washington Supreme Court has repeatedly enforced Washington's stricter Establishment Clause, simultaneously providing a broader protection for free exercise and enforcing greater protection between church and state.[230] In 1989, the Washington Supreme Court decided a case very similar to *Davey*. In *Witters v. Commission for the Blind*,[231] a blind man applied to receive vocation rehabilitation funds to study at a private religious school to become a pastor, missionary, or youth director.[232] The U.S. Supreme Court overturned the first Washington Supreme Court decision denying aid based on a violation of the federal Establishment Clause.[233] The Supreme Court reversed, stating that while the federal Establishment Clause was not offended, "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution."[234] On remand, the Washington Supreme Court held that the grant of aid to Witters would violate article I, section 11 of Washington's Constitution and the "applicant's individual interest in receiving a religious education must therefore give way to the state's greater need to uphold its constitution."[235] The court stated: "[O]ur state constitution prohibits the taxpayers from

228. *Id.* (amended 1957).

229. *Id.* (amended 1993).

230. UTTER & SPITZER, *supra* note 224, at 25.

231. 102 Wash. 2d 624, 689 P.2d 53 (1984), *rev'd*, 474 U.S. 481 (1986).

232. *Id.* at 626, 689 P.2d at 54–55.

233. Witters v. Comm'n for the Blind, 474 U.S. 481, 489 (1986), *rev'g*, 102 Wash. 2d 624, 689 P.2d 53 (1984).

234. *Witters*, 474 U.S. at 489.

235. Witters v. Comm'n for the Blind, 112 Wash. 2d 363, 373, 771 P.2d 1119, 1123 (1989). The Washington Supreme Court made this finding within its discussion of the Equal Protection Clause of the Fourteenth Amendment, not within its free exercise inquiry. *Id.* at 372–73, 771 P.2d at 1123–24. The court did not find that Witters's right to free exercise was violated. *Id.* at 370–72, 771 P.2d at 1121–22.

being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree."[236]

The Washington Supreme Court continues to uphold the prohibition on the application of state funds toward religious education articulated in the *Witters* decision. That court recently held in *State ex rel. Gallwey v. Grimm*[237] that article IX, section 4 of the Washington State Constitution, which provides that all schools maintained by public funds must be free from sectarian influence, [238] does not apply to institutions of higher education.[239] The court allowed a state grant disbursement to students who attended religiously affiliated colleges. While this holding seems to reduce the force of Washington's prohibition against the application of state funds to religious education, the majority carefully distinguished *Gallwey* from *Witters*, noting that the state grants were contingent on a student's adherence to the grant program's religious exclusion.[240] The grant exclusion required that a student not be enrolled in any program that includes religious instruction, worship, or exercise.[241]

The *Gallwey* holding confirmed the *Witters* holding by revisiting the prohibition against the application of state funds to religious instruction provided by article I, section 11 of the Washington Constitution.[242] The court stated that:

> In interpreting the phrase "religious . . . instruction," as used in article I, section XI, this court stressed "that the words appear after two or more specific terms: 'worship' and 'exercise.' This, we believe, is an indication that the framers of our constitution did not intend the word 'instruction' to be construed without limit, but that the proscribed field be confined 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."[243]

Though the court conceded that the purview of instruction implicated by article I, section 11 is limited, the court would not weaken the

236. *Id.* at 365, 771 P.2d at 1120.

237. 146 Wash. 2d 445, 48 P.3d 274 (2002).

238. WASH. CONST. art. IX, § 4.

239. *Gallwey*, 146 Wash. 2d at 474, 48 P.3d at 288.

240. *Id.* at 468, 48 P.3d at 285.

241. *Id.*

242. *Id.* at 467–69, 48 P.3d at 285–86.

243. *Id.* at 467, 48 P.3d at 285 (quoting Calvary Bible Presbyterian Church v. Bd. of Regents, 72 Wash. 2d 912, 919, 436 P.2d 189 (1967)).

Witters holding which prohibits state funds from being applied to religious instruction that is devotional in nature and designed to induce faith and belief.

B. May an Establishment Violation Provide a Compelling Justification?

The Supreme Court has been reluctant to hold that the violation of government establishment of religion, whether under the federal or a state constitution, is a compelling justification for a state to violate the Free Exercise Clause.[244] In *Widmar v. Vincent*,[245] the court stated that a state interest in upholding a greater separation between church and state than is provided under the Establishment Clause of the Federal Constitution is limited by the Free Exercise and the Free Speech Clauses of the First Amendment.[246] However, Justice White, in his dissent in *Widmar*, cautioned that the "[t]he majority's position will inevitably lead to . . . contradictions and tensions between the Establishment and Free Exercise Clauses . . . ."[247] He argued that because the burden on the party's free exercise was minimal, the state should only need to show that the regulation furthered some permissible state end.[248] Justice White believed that "just as there is room under the Religion Clauses for state polices that may have some beneficial effect on religion, there is also room for state polices that may incidentally burden religion."[249]

There is a dearth of precedent for the proposition that a state Establishment Clause provides a compelling interest. However, in a 1973 case, *Luetkemeyer v. Kaufmann*,[250] the court found that the Missouri Constitution's more protective establishment clause was a compelling justification for a possible infringement of Free Exercise.[251] In *Luetkemeyer*, a Missouri county refused to transport children to attend a Catholic school because, absent a specific statutory authority

244. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 273 (1981) (holding that neither the federal nor the Missouri Establishment Clause was a compelling justification to allow a state university to violate students free speech rights by excluding religious groups from university facilities that were generally available for activities of registered students).

245. 454 U.S. 263 (1981).

246. *Id.* at 276.

247. *Id.* at 282 (White, J., dissenting). Justice White was echoing the "double-barreled dilemma" Justice Stewart addressed in his concurrence in *Sherbert*, 374 U.S. 398, 413 (1963) (Stewart, J., concurring).

248. *Widmar*, 454 U.S. at 288–89. Justice White disagreed with the majority that the exclusion of religious groups from student facilities was a violation of the student's free speech rights. *Id.* at 285–86. He argued, rather, that, if anything, it was a violation of the student's free exercise. *Id.* at 288.

249. *Id.* at 282.

250. 364 F. Supp. 376 (W.D. Mo. 1973).

251. *Id.* at 386.

to use state funds, the Missouri Constitution prohibits the use of such funds to aid religions or religious institutions.[252] The court unequivocally stated: "[T]he long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling state interest' . . . ."[253] The Court allowed Missouri to refuse to fund transporting the children in order for the state to obey the confines of its own constitution.

C. Washington's More Protective Establishment Clause Is a Sufficiently Compelling Justification to Survive Strict Scrutiny

Even if the Supreme Court follows the Ninth Circuit's reasoning, concluding that Davey's right to free exercise was in fact violated, the Supreme Court should reject the Ninth Circuit's holding that the prospect of violating the Washington State Constitution is not a sufficiently compelling interest to justify the incidental burden Davey sustained as a result of his disqualification from the scholarship program.

First, the Ninth Circuit's conclusion unnecessarily expands the Free Exercise Clause to fill the vacuum between it and the Establishment Clause, leaving no room for states to formulate a more protective understanding of establishment.[254] It is precisely this "room" that is in jeopardy of being engulfed by a bloated understanding of free exercise in *Davey*. As discussed above, by sidestepping a prohibition analysis and misapplying the neutrality inquiry under the Free Exercise Clause, the Ninth Circuit filled the space between the Free Exercise Clause and the Establishment Clause. This space has been the traditional sphere open to states to formulate their own understanding of the religion clauses.

If the Court fails to recognize states' establishment clauses as compelling, not only will it exclude states from the dialogue,[255] but also the more protective establishment clauses will become superfluous. If the Supreme Court affirms the Ninth Circuit decision in *Davey v. Locke*, the analytical basis for Washington Supreme Court decisions like *Witters* and *Gallwey* will be weakened if not obliterated. State courts will not be able to interpret and apply their own more

252. *Id.* at 377.

253. *Id.* at 386.

254. *See* Brief of Amicus Curiae of ACLU, ACLU of Wash. et al., in Supp. of Pet'rs at 9–14, Locke v. Davey, 123 S. Ct. 2075 (2003) (No. 02-1315).

255. *See* States Amici Curiae, *supra* note 220 (arguing that a Supreme Court decision upholding the Ninth Circuit in *Davey* would "remove States from the policy debate concerning the proper role of government viz religion").

protective establishment provisions because they will be constrained at every turn by the federal Free Exercise Clause.

Second, the Ninth Circuit's decision disables Washington, and other states with more protective establishment provisions, from resting on what has historically been an important interest asserted by the Washington legislature and affirmed by the Washington Supreme Court. Washington should not be forced to apply money toward pursuit of a theology degree in violation of its own constitution where the burdens imposed on the religious observer are incidental.[256] This result places Washington in the position of responsibility for religious observers' spiritual development, which is outside the protection provided either by the federal Free Exercise Clause or the Washington State Constitution.

Joshua Davey's theological training is precisely the kind of religious instruction which, according to the Washington Constitution, cannot be funded by the state. Davey's declaration submitted to the district court stated that each course at Northwest College "is taught from the viewpoint of what Christians believe to be absolute truth, as conveyed in the Bible."[257] Northwest's instruction of Davey as a theology major is devotional in nature and designed to induce faith and belief. Although Davey believed that withdrawing the scholarship money imposed a "back-door tax" on him because of his religious beliefs,[258] applying the scholarship money to his theological degree at Northwest College would force Washington taxpayers to pay for Davey's religious instruction with which they may disagree.

VI. CONCLUSION

The Supreme Court should reverse the Ninth Circuit's decision in *Davey v. Locke*. The right to free exercise should be zealously guarded, and laws that have the object of prohibiting or hindering religious belief or practice should be subject to strict scrutiny. However, when examining potential violations of free exercise, courts should not distort the traditional analysis by unnecessarily importing theories from other categories of First Amendment inquiries. Not all government action that has the effect of imposing incidental burdens on religious observers offends the right to free exercise. To characterize free exercise protection as such paints the right of what

256. *See Davey*, 299 F.3d 748, 768 (9th Cir. 2002) (McKeown, J., dissenting).

257. Decl. of Davey, Ex. A, *supra* note 12, at 4.

258. *Id.* at 7.

religious observers may exact from the government, not as what the government may not do to religious observers.

Washington's Promise Scholarship program may have "singled-out" Joshua Davey, a theology student, as ineligible for the Scholarship. However, it does not necessarily follow that the state's funding decision encroached on Davey's right to free exercise. In reaching its decision in *Davey v. Locke* the Ninth Circuit sidestepped a true prohibition analysis under the Free Exercise Clause. Instead, the court devised an entitlement to state funds by relying on Davey's status as a theology student, rather than examining whether the state action prohibited or imposed a substantial burden on his religious belief or practice.

The Ninth Circuit also incorrectly determined that the Washington law restricting the application of scholarship funds to theology students was not neutral. The court improperly imported a forum analysis from a free speech examination into its determination of whether Washington violated Davey's right to free exercise. This importation was executed through an establishment neutrality paradigm, asking whether the government has taken an evenhanded approach toward religion, not whether the object of the law in question prohibits or hinders religious belief or practice.

In addition to reversing the Ninth Circuit based on the inapposite mixing of analytical categories described above, the Supreme Court should reverse the Ninth Circuit because Washington has a firmly entrenched desire to uphold a greater separation between church and state than that minimally required by the U.S. Constitution. If the Court holds that Washington's law restricting the application of funds toward degrees in theology violates free exercise, it should also hold that the state's observance of its own more protective establishment clause is a compelling justification for the law to withstand strict scrutiny. There is room between federal Establishment Clause and the Free Exercise Clause in which states may fashion their own more protective establishment provisions. States should be allowed the opportunity to experiment with their own approaches to religion within that space. The Washington Constitution is an expression of the will of the people of Washington State. Until Washingtonians decide to amend their state constitution to allow for the application of taxpayers' funds to religious education, the Supreme Court should respect that expression.