Casenote

Locke v. Davey: The Fine Line Between Free Exercise and Establishment

In ***Locke*** *v. Davey*,[1] the United States Supreme Court held that a state-sponsored scholarship program that excluded students who were majoring in devotional theology did not violate the Free Exercise Clause of the United States Constitution.[2] The Court's holding left a great deal of uncertainty on when states may withhold benefits on the basis of religion.

I. FACTUAL BACKGROUND

In 1999 Washington State began offering the "Promise Scholarship" to low and middle income students with superior academic records. The scholarship was not available to students seeking theology degrees. Joshua Davey was awarded a Promise Scholarship in the summer of 1999. He chose to attend a private Christian college. Davey decided to pursue a double major in Pastoral Ministries and Business Management. Davey, a Christian, planned to seek a career in the "ministry."[3] At the

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1. 540 U.S. 712 (2004).
2. *Id.* at 715; U.S. CONST. amend. **I.**
3. Davey v. Locke, 299 F.3d 748, 750-51 (9th Cir. 2002), *rev'd*, Locke v. Davey, 540 U.S. 712 (2004). Students could receive the scholarship **for up** to two years. The amount of the

beginning of Davey's first academic term, a university official informed him that he could not use the scholarship to pursue a theology degree. Davey learned that he would have to declare that he was not pursuing a theology degree at the university in order to keep the scholarship. Davey refused to make such a declaration, and therefore, did not receive the scholarship money.[4]

Davey sued the State of Washington to stop the state from withholding scholarship funds from students pursuing theology degrees. Davey argued that the state's policy violated the Free Exercise Clause of the First Amendment.[5] The District Court for the Western District of Washington granted summary judgment for the state. The United States Court of Appeals for the Ninth Circuit reversed, determining that because the state had singled out religion for negative treatment, the state's scholarship program would have to meet strict scrutiny. The court of appeals also held the state's anti-establishment interests were not compelling, and the scholarship program was unconstitutional. The United States Supreme Court granted certiorari.[6]

II. LEGAL BACKGROUND

The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[7] The First Amendment was made applicable to state governments through the Fourteenth Amendment.' Colonists' concerns over restrictions on religious liberty and persecution towards dissenters caused by government-sponsored churches provided the basis for the First Amendment.[9] Colonists hated taxes imposed to pay for ministers' salaries and for the benefit of churches." Even before the Fourteenth Amendment applied

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scholarship was $1125 for the first year and $1542 for the second year. To be eligible for the scholarship, students had to graduate from a Washington high school, enroll in an accredited college or university in Washington, and meet academic and income-level requirements. Id. at 751-52.

4. Locke, 540 U.S. at 717.
5. Id. at 718; U.S. CONST. amend. I.
6. *Locke*, 540 U.S. at 718.
7. U.S. CONST. amend. I.
8. Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947) (citing Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943)); U.S. CONST. amend. XIV.
9. See *Everson*, 330 U.S. at 8-11.
10. *Id.* at 11.

the First Amendment to the states, many states included protection of religious liberty in their constitutions."

Washington State's constitution provides, "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 . . . ."[12] The Washington statute regarding qualifications for student financial aid codified Washington's constitutional prohibition on public funding of religious instruction.[13] That provision states, "No aid shall be awarded to any student who is pursuing a degree in theology."[14]

A. Cases Involving the Restriction of Activities on the Basis of Religion

The Supreme Court has struggled to balance the Free Exercise Clause with the Establishment Clause."[15] The Court in *McDaniel v. Paty*[16] held that a Tennessee statute that barred ministers from being delegates to the state's limited constitutional convention violated the Free Exercise Clause.[17] The Court noted that ministers had a right to the free exercise of religion and had a right to seek and hold elected offices and delegate posts in Tennessee."[18] Therefore, the clergy disqualification provision kept McDaniel from being able to exercise his free exercise right and his right to seek elected office simultaneously.[19]

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11. *Id.* at 13-14. For example, Georgia's Constitution of 1789 provided that "[a]ll persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own." GA. CONST. of 1789, art. IV, § 5.

12. WASH. CONST. art. I, § 11.

13. *Locke,* 540 U.S. at 716; WASH. REV. CODE § 28B.10.814 (2004) (recodified at WASH. REV. CODE § 28B.92.100 (2004)).

14. WASH. REV. CODE § 28B.10.814 (2004) (recodified at WASH. REV. CODE § 28B.92.100 (2004)).

15. U.S. CONST. amend. I.

16. 435 U.S. 618 (1978).

17. *Id.* at 629. The court noted that the provision had been maintained from Tennessee's original Constitution and that it prevented clergymen from becoming legislators. The provision was applied in 1977 when the state held a limited constitutional convention. *Id.* at 621.

18. *Id.* at 626.

19. *Id.* Tennessee asserted an interest in avoiding the establishment of a state religion. *Id.* at 628. The concern was that if ministers were allowed to hold public office they would "exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality." *Id.* at 628-29. The Court dismissed this rationale by stating it was not supported by the "American experience" and that there was no reason to believe that ministers would be less careful than others in protecting anti-establishment interests. *Id.* at 629.

The Court has not limited its protection of the free exercise of religion to situations where individuals must choose between exercising different rights. In *Widmar v. Vincent,*[20] the Court held that a state university could not exclude student groups wishing to use its facilities for religious activities when the facilities were otherwise generally available to student groups.[21] The Court applied strict scrutiny because it determined the state was regulating speech on the basis of content.[22] The Court determined that the state's interest in providing a greater separation of church and state than provided for in the United States Constitution was not "sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech."[23]

The Court has also protected religious groups from laws that prohibit specific religious activities. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[24] the Court held that a series of city ordinances that forbade religious animal sacrifices was unconstitutional.[25] The Church of the Lukumi ("Lukumi") was devoted to the Santeria religion and planned to open a church in Hialeah. Animal sacrifice was a part of the Santeria rituals. City leaders became concerned and enacted ordinances that made the type of sacrifices the church performed illegal.[26] The Court concluded that the laws were not neutral and "had as their object the suppression of religion."[27] The Court reached this decision because the laws: (1) evidenced animosity toward the practitioners of Santeria; (2) were crafted to forbid the sacrifices while allowing most secular killings of animals; and (3) prohibited more conduct than was necessary to meet their asserted ends.[28] The Court also determined that the laws were not of general applicability because the state pursued its alleged ends by strictly going against religious conduct.[29] Thus, because the law was neither neutral nor of general applicability, the Court deter-

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20. 454 U.S. 263 (1981).

21. *Id.* at 277. The university claimed that it could not make the facilities available to religious groups without violating the Establishment Clause. *Id.* at 270-71. The Court acknowledged that the religious groups might get some incidental benefits from having access to the facilities, but that incidental benefits did not mean advancement of religion. *Id.* at 273.

22. *Id.* at 276.

23. *Id.*

24. 508 U.S. 520 (1993).

25. *Id.* at 527-28, 546-47.

26. *Id.* at 525-28. The church, and its leader Pichardo, sued the city and the city council, alleging violation of the Free Exercise Clause. *Id.* at 528. The district court and the court of appeals upheld the laws. *Id.* at 530.

27. *Id.* at 542.

28. *Id.*

29. *Id.* at 545-46.

mined that strict scrutiny applied.[30] The Court held that the city's interests were not compelling and that the laws were not narrowly tailored to meet those interests.[31]

B. *Cases Involving Government Benefits*

In *Everson v. Board of Education:'* the Court held that there was no First Amendment violation when a township provided reimbursements for transportation expenses incurred by students, including students attending Catholic schools.[33] The Court noted that while New Jersey could not directly give money to religious institutions without violating the Establishment Clause, it could not interfere with the free exercise of religion either.[34] The Court asserted that the state is to be neutral with regard to religious groups, and "[s]tate power is no more to be used so as to handicap religions, than it is to favor them."[35] The Court acknowledged that some parents might have been unable to send their children to parochial schools without reimbursement for transportation.[36] However, the Court noted the possibility of a similar effect, of parents not sending their children to parochial schools, if state paid police did not protect parochial school students from traffic hazards, or if the state did not provide services such as fire protection, sewage disposal, and public services to those schools.[37] The Court held that there was no breach of the First Amendment, reasoning that the state neither gave money to nor supported parochial schools.[38] Rather, the

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30. *Id.* at **546.**

31. *Id.* at **546-47.** To **be** consistent with the First Amendment, the laws had to serve compelling interests and be narrowly tailored to meet those interests. *Id.* at **546.** The Court held that the ordinances were invalid because each of the ordinances was either underinclusive or overbroad and that "[t]he proferred objectives [were] not pursued with respect to analgous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Id.* The Court also held that the ordinances were not supported by compelling interests because "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Id.* at 546-47.

32. **330** *U S.* 1 (1947).

33. *Id.* at **3, 18.**

34. *Id.* at **16.**

35. *Id.* at **18.**

36. *Id.* at **17.**

37. *Id.* at **17-18.**

38. *Id.* at **18.**

program merely aided parents in getting their children to and from accredited schools, regardless of the religion involved.[39]

The Court has also considered programs that have the effect of benefiting religious organizations. In *Walz v. Tax Commission of New York*,[40] the Court determined that New York's policy of providing tax exemptions to religious organizations did not violate the First Amendment.[41] In reaching its decision, the Court noted that the purpose of the First Amendment's religion clauses was to "insure that no religion be sponsored or favored, none commanded, and none inhibited."[42] The Court stated that its general principle in dealing with the First Amendment had been to forbid the government from establishing or interfering with religion.[43] The Court added that, "[s]hort of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[44]

In considering tax exemptions, the Court noted that historically those individuals writing constitutions and statutes had been wary of the dangers involved in imposing property taxes, and that exemption was a way of preventing those dangers.[45] The Court concluded that New York did not establish religion by providing the exemption; rather, New York spared religious institutions from the tax burden faced by for-profit organizations.[46] The Court said that, without exemption, the state would become more involved with the religious institutions through, for example, tax valuations.[47] The Court noted that the potential dangers of churches supporting government were no less than the dangers of the government supporting churches and that "each relationship carries some involvement rather than the desired insulation and separation."[48]

While the Court has allowed some programs that have the effect of benefiting religious groups and their followers, the Court has not required states to make such benefits available in all situations. In *Johnson v. Robison*,[49] the Court held that a federal policy that disqualified conscientious objectors who performed alternative service from

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39. *Id.*
40. **397** U.S. **664** (1970).
41. *Id.* **at 680.**
42. *Id.* **at 669.**
43. *Id.*
44. *'Id.*
45. *Id.* **at 673.**
46. *Id.*
47. *Id.* **at 674.**
48. *Id.* **at 675.**
49. **415** U.S. **361 (1974).**

receiving veterans' educational benefits was constitutional.[50] Robison completed two years of alternative service because he was a conscientious objector for religious reasons. He later filed for educational benefits and those benefits were denied. He then sued, claiming that the decision violated his First Amendment rights.[51] The Court applied the rational basis scrutiny test because Robison was not part of a suspect class nor did the government violate his free exercise rights.[52] The Court asserted that any burden on the free exercise of religion was incidental.[53] Additionally, the Court determined that the rational basis test was met because there was a distinction between military veterans and persons completing alternative service.[54]

The Court has not allowed states to withhold benefits in cases where individuals would have to violate their religious convictions in order to receive the benefits. In *Thomas v. Review Board of Indiana Employment Security Division*,[55] the Court held that the state violated the free exercise rights of an adherent to the Jehovah's Witness faith when it denied him unemployment compensation after he quit his job because his religious beliefs did not allow him to work in a position that involved producing armaments.[56] In reversing the Indiana Supreme Court decision to allow the denial of benefits to Thomas, the Court noted that

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby

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50. Id. at 362-64, 385-86.

51. *Id.* at 364.

52. *Id.* at 375 n.14.

53. Id. at 385.

54. *Id.* at 381-82. Military service was a much longer disruption than civilian service to the lives **of** those involved. Military veterans had to serve for *six* years, while the alternative service only lasted for two years. *Id.* at 378. Additionally, military veterans suffered "a far greater loss of personal freedom during their service careers." *Id.* at 379. The Court also noted that the classification was rationally related to the government's objective of making military service more attractive. *Id.* at 382. The Court concluded that "[a]ppellee and his class were not included in this class of beneficiaries, not because of any legislative design to interfere with free exercise of religion, but because to do so would not rationally promote the Act's purposes." *Id.* at 385.

55. 450 U.S. 707 (1981).

56. *Id.* at 709, 720. When the plant where Thomas was working closed, he was sent to a department that worked in producing military armaments. Thomas quit because his religious beliefs did not permit him to do such work. He then applied for unemployment benefits from the state. Indiana determined that Thomas did not leave **for** "good cause," as Indiana law required, and thus, denied benefits to Thomas. *Id.* at 710-12.

> putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.[57]

The Court then applied strict scrutiny to the Indiana law.[58] The Court determined that the state's interest in preventing the burden on funding that would occur if people were allowed to receive benefits after leaving jobs for "personal reasons" and in avoiding employers examination of job applicants' religious beliefs were not sufficient to justify the burden on free exercise of religion.[59]

The Court has allowed the states some discretion in their administration **of** benefits. In *Witters v. Washington Department of Services for the Blind,"* the Court held that providing aid to finance a blind student's education for the ministry would not advance religion in a way that would violate the Establishment Clause." The Washington Supreme Court held that the state could not provide aid to the student because of the Establishment Clause. The Washington court reasoned that providing such aid to a student preparing for the ministry would have the primary effect of advancing religion.[62] The Supreme Court disagreed with the Washington Supreme Court and stated that "the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution."[63] By way of example, the Court noted that some state employees might choose to donate parts of their paychecks to religious institutions without violating the Constitution.[64] The Court also noted that the state program did not provide greater benefits to those applying their aid to religious education; rather, recipients could choose from a full range of secular education opportunities.[65] The Court determined that the petitioner's decision to use state aid to pay for his religious education did not "confer any message of state endorsement of religion."[66]

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57. Id. at 717-18.
58. Id. at 718.
59. Id. at 718-19.
60. 474 U.S. 481 (1986).
61. Id. at 489. The **Court** noted that Washington was still free to consider its case under the Washington State Constitution, which provided stricter guidelines. *Id.* The Washington Supreme Court later considered the case again and denied aid based on the Washington Constitution. Witters v. Washington, 711 P.2d 1119, 1123 (Wash. 1989).
62. Witters, 474 U.S. at 485.
63. Id. at 486.
64. Id. at 486-87.
65. *Id.* at 488.
66. Id. at 488-89.

Additionally, in *Zelman v.* the Court held that an Ohio program that provided financial assistance for students to attend public or private schools that met certain geographic, academic, and nondiscrimination requirements was The Supreme Court noted that because the program had a valid secular purpose, the question they had to determine was whether the law had the "forbidden 'effect' of advancing or inhibiting religion."[69] The Court held that the program did not violate the Establishment Clause because it was a program of true private The Court reasoned that

> the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and

Therefore, because the program did not advance religion, the Court once again allowed state discretion in deciding how to administer the

III. COURT'S RATIONALE

In ***Locke v. Davey***,[73] the Court said that Washington's alleged disfavor of religion was milder than that found in previous The Court distinguished the state's scholarship program from ***Church of the Lukumi*** *Babalu* ***Aye, Inc. v. City of*** by noting that under Washington's scholarship program, no criminal or civil sanctions were imposed on religious The Court also noted that the program did not exclude ministers from participation in political activities as

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67. 536 U.S. 639 (2002).

68. *Id.* at 645-46, 662-63. The program was designed to allow parents to make educational choices. The program was open to religious or nonreligious private schools that met certain qualifications. *Id.* at 645-46. A group of taxpayers sued on various grounds; the court of appeals affirmed the district court's finding in favor of the taxpayers. *Id.* at 648. The court of appeals held that the program violated the Establishment Clause by advancing religion. *Id.*

69. *Id.* at 649.

70. *Id.* at 662-63.

71. *Id.* at 662.

72. *Id.* at 662-63.

73. 540 U.S. 712 (2004).

74. *Id.* at 720.

75. 508 U.S. 520 (1993).

76. Locke, 540 U.S. at 720; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US. 520 (1993).

happened in *McDaniel v.* Additionally, the program, unlike the benefit scheme in *Thomas v. Review Board of Indiana Employment Security Division* did not require students to choose between receiving the scholarship and following their religious The Court stated that Washington merely chose not to fund a particular type of instruction."

The Court discussed the historical basis of Washington's interest in preventing establishment of religion." The Court noted that both the "United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—thatfind no counterpart with respect to other callings or Therefore, the Court asserted that Washington's distinction between religion and other professions was due to concerns over avoiding establishment rather than hostility towards

Along the same lines, the Court cited a number of examples of early state constitutions that contained provisions that prohibited the use of public funds for the The majority supported its conclusion that religious instruction was different from other callings by noting that some early state constitutions excluded *only* the ministry from receiving public

The Court also asserted that the absence of hostility toward religion in the Washington program was apparent in the fact that religion was included in its Indeed, the Court noted that the scholarship allowed students to take devotional theology courses at religious

Due to the apparent lack of animus toward religion and the state's interest in avoiding establishment of religion, the Court determined that the scholarship program was not "inherently constitutionally
The Court concluded that the state had a substantial interest in not

77. 438 U.S. 618 (1978); *Locke*, 540 U.S. at 720.
78. 450 U.S. 707 (1981).
79. *Locke*, 540 U.S. at 720-21.
80. *Id*. at 721.
81. *Id.* at 722-23.
82. *Id*. at 721.
83. *Id*.
84. *Id*. at 723.
85. *Id.* at 722-23.
86. *Id*. at 724.
87. *Id*. at 725.
88. *Id*.

funding education for the ministry and that withholding the funds placed only a minor burden on the

B. Scalia Dissent (joined by Thomas)

In his dissent Justice Scalia contended that the Court should have used strict scrutiny because the law facially discriminated against religion." In reaching that conclusion, Scalia cited *Church of the Lukumi Babalu Aye, Inc.* and noted that the majority and concurring opinions in that case supported his contention."

Scalia argued that the decision should have been based on the principle articulated in *Everson v. Board of* namely that states cannot withhold public benefits solely on the basis of Scalia stated that when a state provides benefits that are generally available, that state violates the Free Exercise Clause when it withholds those benefits solely because of religion, "no less than if it had imposed a special Scalia contended that Washington had done exactly that by excluding only one course of study:

Scalia answered the majority's reference to the nation's history of disfavor toward the funding of the Scalia distinguished the earlier laws from the Washington law; the earlier laws that were disfavored were laws that gave preferential treatment to ministers.[97] The Washington law, Scalia contended, merely involved the inclusion of ministerial students in public benefit Scalia added:

> One can concede the Framers' hostility to funding the clergy ***specifically***, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all. No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to

Scalia argued that the Court did not defer to an Establishment Clause violation or budget constraints; it deferred to "pure philosophical

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89. *Id.*
90. *Id.* at 726 (Scalia and Thomas, JJ., dissenting).
91. *Id.* (Scalia and Thomas, JJ., dissenting).
92. 330 US. 1 (1947).
93. *Locke*, 540 U.S. at 726-27 (Scalia and Thomas, JJ., dissenting).
94. *Id.* at 727 (Scalia and Thomas, JJ., dissenting).
95. *Id.* (Scalia and Thomas, JJ., dissenting).
96. *Id.* at 727-28 (Scalia and Thomas, JJ., dissenting).
97. *Id.* (Scalia and Thomas, JJ., dissenting).
98. *Id.* (Scalia and Thomas, JJ., dissenting).
99. *Id.* at 727-28 (Scalia and Thomas, JJ., dissenting).

preference: the State's opinion that it would violate taxpayers' freedom of conscience *not* to discriminate against candidates for the minis-

Scalia added that this argument could lead to discrimination against religion in relation to almost any type of public program."'

Scalia criticized the majority for authorizing facial discrimination by referring to the lightness of the burden on Scalia said that no harm should be considered insubstantial when someone has been singled out on the basis of that person's religious calling.[103] Scalia also criticized the majority's conclusion that the scholarship program was not inspired **by** animus against He noted that when a state denies an individual a right, such as the right to a trial by jury, there is no need to look at whether that state was trying to accomplish that evil, rather, "[i]t is sufficient that the citizen's rights have been in-

Scalia concluded by speculating on possible extensions of the court's He posited one hypothetical of the government denying priests and nuns prescription drug benefits because it offends taxpayers to support the clergy at public Scalia predicted that "[w]hen the public's freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression."'''

IV. IMPLICATIONS

The Court, with its holding in Locke *u.* changed the way in which states can deal with benefit distribution in relation to religion. The Court will apparently not find an infringement of the Free Exercise Clause,"' and thus, will not use strict scrutiny when programs are: **(1)** not motivated by animosity towards religion; and (2) do not require a choice between fulfilling religious obligations and receipt of the benefit. The Court's holding, however, stopped far short of establishing a clear test for when states may withhold benefits on the basis of religion.

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100. *Id.* at 730 (Scalia and Thomas, JJ., dissenting).
101. *Id.* (Scalia and Thomas, JJ., dissenting).
102. *Id.* at 731 (Scalia and Thomas, JJ., dissenting).
103. *Id.* (Scalia and Thomas, JJ., dissenting).
104. *Id.* at 732 (Scalia and Thomas, JJ., dissenting).
105. *Id.* (Scalia and Thomas, JJ., dissenting).
106. *Id.* at 734 (Scalia and Thomas, JJ., dissenting).
107. *Id.* (Scalia and Thomas, JJ., dissenting).
108. *Id.* (Scalia and Thomas, JJ., dissenting).
109. 540 U.S. 712 (2004).
110. U.S. CONST. amend. I.

A. Animosity Towards Religion

The Court seemed to place particular importance on the fact that although the Washington scholarship program was not facially neutral, there was no animus toward religion on the part of the state.[111] It can be inferred that the result might have been different if there had been evidence of hostility towards religion. Such evidence might have been found if there had been criminal or civil sanctions for religious activity.[112] The Court said Washington had "merely chosen not to fund a category of

This distinction could be quite troubling in dealing with future cases. Proving hostility towards religion will be quite difficult in many cases. Any state or government could easily run to the historical concern over avoiding establishment of religion, regardless of its actual reason for denying benefits. States could conceivably reach the type of result that Scalia feared: "What next? Will we deny priests and nuns their prescription-drug benefits on the ground that taxpayers' freedom of conscience forbids medicating the clergy at public expense?"[113] The only defense against such results, absent evidence of animus towards religion, is through the second way the Court could reach strict scrutiny: when a law forces people of a given faith to choose between following their religion and receiving a government benefit.

B. Choosing Between Religion and Receiving Benefits

The Court also seemed to indicate that another case in which it would apply strict scrutiny would be if individuals had to choose between following their religion and receiving Based on the reasoning from *Thomas v. Review Board of Indiana Employment Security Division,*[114] such a choice would represent a burden on free exercise The Court claimed there was no such choice required in Washington's scholarship program. However, one can easily foresee cases where students will say that they will not be true to their religion if they do not pursue a career in the ministry. Therefore, assuming they do not have independent means to pay for school, they will either have

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111. *Locke*, **540** U.S. at **725.**
112. *See id.* at **720.**
113. *Id.* at **721.**
114. *Id.* at **734** (Scalia and Thomas, JJ., dissenting).
115. *See Locke,* **540** U.S. at **720-21.**
116. **450** U.S. **707 (1981).**
117. *Id.* at **717-18.**
118. *Locke*, **540** U.S. at **720-21.**

to choose between following their religious calling or receiving scholarship aid; they will not be able to do both. Students may argue that having to work in *any* field other than the ministry would represent a violation of their religious beliefs. On the other hand, states will argue that they are not causing the students to choose between engaging in offensive conduct and receiving benefits, as was the case in Rather, the states will argue that they are refusing to sponsor the students' affirmative steps to follow their religious beliefs.

Scalia's hypothetical situation in which a government refuses to provide prescription drug benefits to clergy is an excellent example of the conflict here. A government may argue that it does not want to establish religion by extending benefits to clergy members. The government will also contend that it is not proscribing religious conduct, it is merely refusing to support religious endeavors. Members of the clergy will likely respond by saying that if they do not have prescription drug benefits, they will be unable to follow their calling. Therefore, they will be forced to work in a secular job and thereby violate their religion. Is this different from the choice that was present in *Thomas,* when Thomas had to choose between doing offensive work and receiving

C. *The Broader Ramifications of Locke*

The consequences of the Court's holding will likely be limited to questions of whether states can exclude individuals from benefits on the basis of religion. The Court in no way endorsed laws that would directly prohibit specific religious conduct or that would have no other purpose than to burden religious activities. The Court's holding does not prohibit states from providing scholarships to theology students; it merely allows states to refuse funding if they have a reasonable purpose for doing so. Nothing in the Court's reasoning indicates that providing funding to theology students in scholarship programs similar to Washington's would violate the Establishment Nevertheless, many states may choose to follow Washington's lead and refuse funding to theology students in programs that are similar to Washington State's scholarship program. States now know they can refuse funding based on the guidelines set forth by the Court.

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119. 450 U.S. at 717-18.

120. Locke, 540 U.S. at 734 (Scalia and Thomas, JJ., dissenting).

121. See Thomas, 450 at 710, 717-18.

122. In fact the Court has already held that a similar program was constitutionally permissible. ***See*** Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481, 489 (1986).

While it is likely that the Court will apply its holding to a fairly narrow set **of** circumstances, states may interpret the holding in very different ways. Conceivably,the holding could extend much further than benefit programs like the one the Court addressed in For example a state could decide to refuse to provide public services such as fire protection to churches. The state could argue that the purpose of the exclusion was to avoid establishment rather than to suppress religion. The state could make this argument even if the movement were secretly led by an anti-religious group that wanted to force churches to close down. The state would only have to suppress evidence of animus towards religion. The state could also argue that the law does not force individuals to choose between being faithful to their religion and enjoying the benefits of public fire protection. They would contend that individuals are still free to carry out their religion in their homes. Furthermore, individuals could still attend religious services if they like; the only difference is that the state would not support that endeavor by providing public services. The church groups would respond by asserting that the law does require a choice; most organized religions emphasize the importance of regular church attendance. Without regular church attendance, church members would be left with a choice between attending worship services, as required by their faith, and enjoying the benefit of public fire protection.

While such doomsday scenarios are barely within the realm of possibility, a more likely battleground will be school voucher programs that provide vouchers for students to attend private religious States can now exclude students desiring to use vouchers to attend religious schools, as long as there is no evidence of animus towards religion. In those states parents desiring to use vouchers to send their children to private schools will have to argue that the exclusion causes them to make a choice between raising their children as required by their religion and receiving the voucher. Parents will have to argue that attending a nonparochial school will expose their children to content and activities that will be offensive to their religion. However, it is not clear what will be required to reach the level of a choice that will be constitutionally offensive.

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123. *Locke*, **540** U.S. at **715-17.**

124. ***See*** Brian **C.** Anderson, ***Soundings: "If Not Vouchers?,"*** INST. (DBA) CITY J., Spring **2004,** at 8-9. In *Zelman v. Simmons-Harris,* **536** U.S. **639** (2002), the Court held that voucher programs that provide for a true private choice between secular and religious schools do not violate the Establishment Clause. ***Id.*** at **662-63.** ***See*** discussion *supra* notes **67-72.** Future cases will likely address programs that exclude, rather than include, students desiring to use vouchers to attend religious schools.

It is difficult to predict what impact the Court's holding will have. However, the holding is not likely to bring an end to conflicts over the exclusion of benefits on the basis of religion in the near

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125. It is worth noting that Joshua Davey's story has a happy, albeit ironic ending. Davey majored in religion and philosophy in undergraduate school but ended **up** attending Harvard Law School instead of pursuing a career in the ministry. Davey decided that the law was another way to live his faith. Beth Hanson, ***Losing*** *Before* ***High*** *Court Part of Journey* ***for*** *Davey*, RECORDER, July *6, 2004*, at **3.**