

Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 02–1315

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.,
PETITIONERS *v.* JOSHUA DAVEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[February 25, 2004]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The State of Washington established the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses. In accordance with the State Constitution, students may not use the scholarship at an institution where they are pursuing a degree in devotional theology. We hold that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment.

The Washington State Legislature found that “[s]tudents who work hard . . . and successfully complete high school with high academic marks may not have the financial ability to attend college because they cannot obtain financial aid or the financial aid is insufficient.” Wash. Rev. Code §28B.119.005 (Supp. 2004). In 1999, to assist these high-achieving students, the legislature created the Promise Scholarship Program, which provides a scholarship, renewable for one year, to eligible students for postsecondary education expenses. Students may spend their funds on any education-related expense, including room and board. The scholarships are funded through the

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State's general fund, and their amount varies each year depending on the annual appropriation, which is evenly prorated among the eligible students. Wash. Admin. Code §250-80-050(2) (2003). The scholarship was worth \$1,125 for academic year 1999-2000 and \$1,542 for 2000-2001.

To be eligible for the scholarship, a student must meet academic, income, and enrollment requirements. A student must graduate from a Washington public or private high school and either graduate in the top 15% of his graduating class, or attain on the first attempt a cumulative score of 1,200 or better on the Scholastic Assessment Test I or a score of 27 or better on the American College Test. §§250-80-020(12)(a)—(d). The student's family income must be less than 135% of the State's median. §250-80-020(12)(e). Finally, the student must enroll "at least half time in an eligible postsecondary institution in the state of Washington," and may not pursue a degree in theology at that institution while receiving the scholarship. §§250-80-020(12)(f)—(g); see also Wash. Rev. Code §28B.10.814 (1997) ("No aid shall be awarded to any student who is pursuing a degree in theology"). Private institutions, including those religiously affiliated, qualify as "eligible postsecondary institution[s]" if they are accredited by a nationally recognized accrediting body. See Wash. Admin. Code §250-80-020(13). A "degree in theology" is not defined in the statute, but, as both parties concede, the statute simply codifies the State's constitutional prohibition on providing funds to students to pursue degrees that are "devotional in nature or designed to induce religious faith." Brief for Petitioners 6; Brief for Respondent 8; see also Wash. Const., Art. I, §11.

A student who applies for the scholarship and meets the academic and income requirements is notified that he is eligible for the scholarship if he meets the enrollment requirements. *E.g.*, App. 95. Once the student enrolls at an eligible institution, the institution must certify that the

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student is enrolled at least half time and that the student is not pursuing a degree in devotional theology. The institution, rather than the State, determines whether the student's major is devotional. *Id.*, at 126, 131. If the student meets the enrollment requirements, the scholarship funds are sent to the institution for distribution to the student to pay for tuition or other educational expenses. See Wash. Admin. Code §250–80–060.

Respondent, Joshua Davey, was awarded a Promise Scholarship, and chose to attend Northwest College. Northwest is a private, Christian college affiliated with the Assemblies of God denomination, and is an eligible institution under the Promise Scholarship Program. Davey had “planned for many years to attend a Bible college and to prepare [himself] through that college training for a lifetime of ministry, specifically as a church pastor.” App. 40. To that end, when he enrolled in Northwest College, he decided to pursue a double major in pastoral ministries and business management/administration. *Id.*, at 43. There is no dispute that the pastoral ministries degree is devotional and therefore excluded under the Promise Scholarship Program.

At the beginning of the 1999–2000 academic year, Davey met with Northwest's director of financial aid. He learned for the first time at this meeting that he could not use his scholarship to pursue a devotional theology degree. He was informed that to receive the funds appropriated for his use, he must certify in writing that he was not pursuing such a degree at Northwest.¹ He refused to sign the form and did not receive any scholarship funds.

Davey then brought an action under 42 U. S. C. §1983 against various state officials (hereinafter State) in the

¹The State does not require students to certify anything or sign any forms. App. 86, 89.

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District Court for the Western District of Washington to enjoin the State from refusing to award the scholarship solely because a student is pursuing a devotional theology degree, and for damages. He argued the denial of his scholarship based on his decision to pursue a theology degree violated, *inter alia*, the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, as incorporated by the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. After the District Court denied Davey's request for a preliminary injunction, the parties filed cross-motions for summary judgment. The District Court rejected Davey's constitutional claims and granted summary judgment in favor of the State.

A divided panel of the United States Court of Appeals for the Ninth Circuit reversed. 299 F. 3d 748 (2002). The court concluded that the State had singled out religion for unfavorable treatment and thus under our decision in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993), the State's exclusion of theology majors must be narrowly tailored to achieve a compelling state interest. 299 F. 3d, at 757–758. Finding that the State's own anti-establishment concerns were not compelling, the court declared Washington's Promise Scholarship Program unconstitutional. *Id.*, at 760. We granted certiorari, 538 U. S. 1031 (2003), and now reverse.

The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. See *Norwood v. Harrison*, 413 U. S. 455, 469 (1973) (citing *Tilton v. Richardson*, 403 U. S. 672, 677 (1971)). Yet we have long said that "there is room for play in the joints" between them. *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664, 669 (1970). In other words, there are some state

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actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

This case involves that “play in the joints” described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. See *Zelman v. Simmons-Harris*, 536 U. S. 639, 652 (2002); *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1, 13–14 (1993); *Witters v. Washington Dept. of Servs. for Blind*, 474 U. S. 481, 487 (1986); *Mueller v. Allen*, 463 U. S. 388, 399–400 (1983). As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology, see *Witters*, *supra*, at 489, and the State does not contend otherwise. The question before us, however, is whether Washington, pursuant to its own constitution,² which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, see *Witters v. State Comm’n for the Blind*, 112 Wash. 2d 363, 369–370, 771 P. 2d 1119, 1122 (1989); cf. *Witters v. State Comm’n for the Blind*, 102 Wash. 2d 624, 629, 689 P. 2d 53, 56 (1984) (“It is not the role of the State to pay for the religious education of future ministers”), *rev’d*, 474 U. S. 481, *supra*, can deny them such funding without violating the Free Exer-

²The relevant provision of the Washington Constitution, Art. I, §11, states:

“Religious Freedom. 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.”

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cise Clause.

Davey urges us to answer that question in the negative. He contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, *supra*, the program is presumptively unconstitutional because it is not facially neutral with respect to religion.³ We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. 508 U. S., at 535. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. See *McDaniel v. Paty*, 435 U. S. 618 (1978). And

³Davey, relying on *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech. The purpose of the Promise Scholarship Program is to assist students from low- and middle-income families with the cost of postsecondary education, not to "encourage a diversity of views from private speakers." *United States v. American Library Assn., Inc.*, 539 U. S. 194, 206 (2003) (plurality opinion) (quoting *Rosenberger*, *supra*, at 834). Our cases dealing with speech forums are simply inapplicable. See *American Library Assn.*, *supra*; *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 805 (1985).

Davey also argues that the Equal Protection Clause protects against discrimination on the basis of religion. Because we hold, *infra*, at ___, that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to his equal protection claims. *Johnson v. Robison*, 415 U. S. 361, 375, n. 14 (1974); see also *McDaniel v. Paty*, 435 U. S. 618 (1978) (reviewing religious discrimination claim under the Free Exercise Clause). For the reasons stated herein, the program passes such review.

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it does not require students to choose between their religious beliefs and receiving a government benefit.⁴ See *ibid.*; *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U. S. 136 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Sherbert v. Verner*, 374 U. S. 398 (1963). The State has merely chosen not to fund a distinct category of instruction.

JUSTICE SCALIA argues, however, that generally available benefits are part of the “baseline against which burdens on religion are measured.” *Post*, at 2 (dissenting opinion). Because the Promise Scholarship Program funds training for all secular professions, JUSTICE SCALIA contends the State must also fund training for religious professions. See *ibid.* But training for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit. See *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash. 2d 912, 919, 436 P. 2d 189, 193 (1967) (holding public funds may not be expended for “that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct”); App. 40 (Davey stating his “religious beliefs [were] the only reason for [him] to seek a college degree”). And the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the

⁴Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology.

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ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State's antiestablishment interests come more into play.⁵ Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion.⁶ See R. Butts, *The American Tradition in Religion and Education* 15–17, 19–20, 26–37 (1950); F. Lambert, *The Founding Fathers and the Place of Religion in America* 188 (2003) ("In defending their religious liberty against overreaching clergy, Americans in all regions found that Radical Whig ideas best framed their argument that state-supported clergy undermined

⁵JUSTICE SCALIA notes that the State's "philosophical preference" to protect individual conscience is potentially without limit, see *post*, at 5; however, the only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its "philosophical preference" commands.

⁶Perhaps the most famous example of public backlash is the defeat of "A Bill Establishing A Provision for Teachers of the Christian Religion" in the Virginia Legislature. The bill sought to assess a tax for "Christian teachers," reprinted in *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 74 (1947) (supplemental appendix to dissent of Rutledge, J.); see also *Rosenberger, supra*, at 853 (THOMAS, J., concurring) (purpose of the bill was to support "clergy in the performance of their function of teaching religion"), and was rejected after a public outcry. In its stead, the "Virginia Bill for Religious Liberty," which was originally written by Thomas Jefferson, was enacted. This bill guaranteed "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." A Bill for Establishing Religious Freedom, reprinted in 2 *Papers of Thomas Jefferson* 546 (J. Boyd ed. 1950).

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liberty of conscience and should be opposed”); see also J. Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 65, 68 (1947) (appendix to dissent of Rutledge, J.) (noting the dangers to civil liberties from supporting clergy with public funds).

Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry. *E.g.*, Ga. Const., Art. IV, §5 (1789), reprinted in 2 Federal and State Constitutions, Colonial Charters and Other Organic Laws 789 (F. Thorpe ed. 1909) (reprinted 1993) (“All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own”); Pa. Const., Art. II (1776) in 5 *id.*, at 3082 (“[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent”); N. J. Const., Art. XVIII (1776), in *id.*, at 2597 (similar); Del. Const., Art. I, §1 (1792), in 1 *id.*, at 568 (similar); Ky. Const., Art. XII, §3 (1792), in 3 *id.*, at 1274 (similar); Vt. Const., Ch. I, Art. 3 (1793), in 6 *id.*, at 3762 (similar); Tenn. Const., Art. XI, §3 (1796), in *id.*, at 3422 (similar); Ohio Const., Art. VIII, §3 (1802), in 5 *id.*, at 2910 (similar). The plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy. We have found nothing to indicate, as JUSTICE SCALIA contends, *post*, at 3, that these provisions would not have applied so long as the State equally supported other professions or if the amount at stake was *de minimis*. That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a

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different ilk.⁷

Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits.⁸ The program permits

⁷The *amici* contend that Washington’s Constitution was born of religious bigotry because it contains a so-called “Blaine Amendment,” which has been linked with anti-Catholicism. See Brief for United States as *Amicus Curiae* 23, n. 5; Brief for Becket Fund for Religious Liberty et al. as *Amici Curiae*; see also *Mitchell v. Helms*, 530 U. S. 793, 828 (2000) (plurality opinion). As the State notes and Davey does not dispute, however, the provision in question is not a Blaine Amendment. Tr. of Oral Arg. 5; see Reply Brief for Petitioners 6–7. The enabling Act of 1889, which authorized the drafting of the Washington Constitution, required the state constitution to include a provision “for the establishment and maintenance of systems of public schools, which shall be . . . free from sectarian control.” Act of Feb. 22, 1889, ch. 180, §4, ¶Fourth, 25 Stat. 676. This provision was included in Article IX, §4, of the Washington Constitution (“All schools maintained and supported wholly or in part by the public funds shall be forever free from sectarian control or influence”), and is not at issue in this case. Neither Davey nor *amici* have established a credible connection between the Blaine Amendment and Article I, §11, the relevant constitutional provision. Accordingly, the Blaine Amendment’s history is simply not before us.

⁸Washington has also been solicitous in ensuring that its constitution is not hostile towards religion, see *State ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 470, 48 P. 3d 274, 286 (2002) (“[I]t was never the intention that our constitution should be construed in any manner indicating any hostility toward religion.” (citation omitted)), and at least in some respects, its constitution provides greater protection of religious liberties than the Free Exercise Clause, see *First Covenant Church of Seattle v. Seattle*, 120 Wash. 2d 203, 223–229, 840 P. 2d 174, 186–188 (1992) (rejecting standard in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), in favor of more protective rule); *Munns v. Martin*, 131 Wash. 2d 192, 201, 930 P. 2d 318, 322 (1997) (holding a city ordinance that imposed controls on demolition of historic structures inapplicable to the Catholic Church’s plan to demolish an old school building and build a new pastoral center because the facilities are intimately associated with the church’s religious mission). We have found nothing in Washington’s overall approach that indicates

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students to attend pervasively religious schools, so long as they are accredited. As Northwest advertises, its “concept of education is distinctly Christian in the evangelical sense.” App. 168. It prepares *all* of its students, “through instruction, through modeling, [and] through [its] classes, to use . . . the Bible as their guide, as the truth,” no matter their chosen profession. *Id.*, at 169. And under the Promise Scholarship Program’s current guidelines, students are still eligible to take devotional theology courses.⁹ Davey notes all students at Northwest are required to take at least four devotional courses, “Exploring the Bible,” “Principles of Spiritual Development,” “Evangelism in the Christian Life,” and “Christian Doctrine,” Brief for Respondent 11, n. 5; see also App. 151, and some students may have additional religious requirements as part of their majors. Brief for Respondent 11, n. 5; see also App. 150–151.

In short, we find neither in the history or text of Article I, §11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion.¹⁰ Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.

it “single[s] out” anyone “for special burdens on the basis of . . . religious callings” as JUSTICE SCALIA contends, *post*, at 6.

⁹The State notes that it is an open question as to whether the Washington Constitution prohibits nontheology majors from taking devotional theology courses. At this point, however, the Program guidelines only exclude students who are pursuing a theology degree. Wash. Admin. Code §250–80–020(12)(g) (2003).

¹⁰Although we have sometimes characterized the Establishment Clause as prohibiting the State from “disproving of a particular religion or religion in general,” *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 532 (1993) (citing cases), for the reasons noted *supra*, the State has not impermissibly done so here.

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

The judgment of the Court of Appeals is therefore

Reversed.