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DOES FREE EXERCISE MEAN FREE STATE FUNDING? IN *DAVEY V. LOCKE*, THE NINTH CIRCUIT UNDERVALUED WASHINGTON'S VISION OF RELIGIOUS LIBERTY

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Abstract: In *Davey v. Locke*, a panel of the United States Court of Appeals for the Ninth Circuit ruled that Washington violated the Free Exercise Clause by refusing to allow a scholarship recipient to use state funds to pursue a theology degree. The court held that the state's scholarship requirements facially discriminated against religion, and that the state's interest in not violating its constitution did not serve as a compelling reason for the discrimination. In so holding, the *Davey* court ignored Ninth Circuit precedent and embraced a theory of the Religion Clauses at odds with United States Supreme Court jurisprudence. Furthermore, as explained in the dissent, the scholarship requirements are analogous to permissible limitations placed on other government funding programs. Based on U.S. Supreme Court precedent in other conditional funding cases, *Davey* should be overturned.

Washington's Promise Scholarship program provides state funding to qualified students who plan to attend college within the state.[1] As with other financial aid programs, the state placed conditions on the eligibility and use of the Promise Scholarship to ensure that the public's money is spent as the state intended.[2] These conditions include graduating from a Washington high school, achieving a certain high school class rank, and demonstrating financial need.[3] The Promise Scholarship also requires that recipients not pursue a theology degree with the state funds.[4] This last requirement is necessary to comply with state law[5] as well as the Washington State Supreme Court's interpretation of the state constitution.[6] Since its founding, Washington's constitution has provided that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction."[7]

1. *See* WASH. ADMIN. CODE § 250-80-010 (2001).

2. *See* 1999 Wash. Laws 309 § 611(6); WASH. ADMIN. CODE § 250-80-020.

3. WASH. ADMIN. CODE § 250-80-020.

4. *Id.* § 250-80-020(12)(f).

5. WASH REV. CODE § 28B.10.814 (2002) ("No aid shall be awarded to any student who is pursuing a degree in theology.").

6. *See* Witters v. State Comm'n for the Blind, 112 Wash. 2d 363, 771 P.2d 1119 (1989) [hereinafter Witters III].

7. WASH. CONST. art I, § 11 (as amended 1993). The amendment did not alter this language.

Joshua Davey received a Promise Scholarship in 1999.[8] He enrolled at Northwest College, an accredited private school in Washington State.[9] Under the terms of the Promise Scholarship, Davey was allowed to use the state funds at a religiously affiliated college such as Northwest, which emphasized teaching from a "distinctly Christian" perspective.[10] However, because state law prohibited funding a theology degree, Davey lost his Promise Scholarship when he decided to pursue Northwest's "Pastoral Ministries" major, a program designed to train students to become ministers.[11] Davey challenged the state's policy,[12] arguing among other claims[13] that the refusal to fund his theology degree violated his First Amendment right to the free exercise of religion.[14]

Davey's challenge raised an unresolved issue involving the First Amendment's Religion Clauses, which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[15] In *Davey v. Locke*,[16] the U.S. Court of Appeals for the Ninth Circuit had to consider whether an area exists between the Establishment and Free Exercise Clauses in which a state is free to define its own vision of religious liberty.[17] Based upon the court's holding, if such an area exists, then it does not encompass a state's refusal to fund religious degrees.[18] The Ninth Circuit held that the state's Promise Scholarship requirement facially discriminated against a class of students on the basis of religion.[19] Because the state did not have a compelling reason for the selective treatment, the court ruled that the program violated the student's right to the free exercise of religion.[20]

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8. *See* Davey v. Locke, 299 F.3d 748, 751 (9th Cir. 2002).

9. *See id.*

10. *See id.*

11. *See id.*

12. *Id.*

13. Davey also argued that the program violated the Establishment Clause, as well as his rights to free speech, association, and equal protection under the federal and state constitutions. *See id.* at 750; Appellant's Brief at 11–15, Davey v. Locke, 299 F.3d 748 (9th Cir. 2002) (No. 00-35962). This Note focuses on the Free Exercise Clause challenge, which was the basis of the court's decision in *Davey*. *See* 299 F.3d at 750.

14. *Davey*, 299 F.3d at 750.

15. U.S. CONST. amend. I. The Religion Clauses are made applicable to the states through the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

16. 299 F.3d 748 (9th Cir. 2002).

17. *See id.* at 760–61 (McKeown, J., dissenting).

18. *See id.* at 750.

19. *Id.*

20. *Id.*

According to Judge McKeown's dissent, however, the majority misconstrued the issue.[21] The state's program did not prohibit the exercise of anything; rather, it simply reflected a decision by the state to fund certain activities and not others.[22] Relying on U.S. Supreme Court precedent involving state funding and fundamental rights, the dissent maintained that the Promise Scholarship's requirements were permissible.[23]

This Note agrees with the dissent and argues that Washington's Promise Scholarship complies with the Free Exercise Clause. In holding otherwise, the *Davey* court failed to adequately address conflicting precedent in the Ninth Circuit, as well as other courts, and contradicted Supreme Court precedent in conditional funding cases. Part I provides an overview of the Supreme Court's historical treatment of the Religion Clauses in educational funding. Part II discusses the Court's general framework for deciding Free Exercise Clause challenges. Part III examines the Court's analytic approach to cases involving the conditional funding of other fundamental rights. Part IV provides a summary of the *Davey* case and an explanation of the Ninth Circuit's evaluation of the case. Finally, Part V argues why the Ninth Circuit's holding in *Davey* was incorrect, and Part VI concludes that Washington's scholarship program does not violate the Free Exercise Clause. In practice, the Promise Scholarship does not suppress religion; it simply reflects a rational choice by the state to fund activities that conform with its constitution.

I. A HISTORY OF THE RELIGION CLAUSES IN EDUCATIONAL FUNDING CASES

The U.S. Supreme Court has not directly addressed the extent to which a state, consistent with both of the First Amendment's Religion Clauses, can exclude private religious schools and students from educational funding programs available to others.[24] However, the Court has decided a number of cases involving the Religion Clauses and

21. *See id.* at 761 (McKeown, J., dissenting).

22. *Id.* (McKeown, J., dissenting).

23. *Id.* at 761, 764–66 (McKeown, J., dissenting).

24. *Cf.* Columbia Union Coll. v. Clark, 527 U.S. 1013, 1014–15 (1999) (mem.) (denying cert.) (Thomas, J., dissenting) (noting the "growing confusion among the lower courts" surrounding the permissibility of denying state funding to religious schools).

educational funding.[25] This part summarizes the principles from these cases. The first section frames the current debate by discussing the Court's decision nearly twenty years ago in a case very similar to the one at issue in *Davey*. The second section provides an overview of the Court's past decisions involving the Religion Clauses and educational funding.

A. *Setting the Stage:* Witters v. Washington Department of Services for the Blind

Joshua Davey was not the first to raise the issue of educational funding and the Religion Clauses in the state of Washington.[26] In *Witters v. Washington Department of Services for the Blind*,[27] the U.S. Supreme Court reviewed the state of Washington's refusal to allow Larry Witters to use vocational assistance monies to fund his religious training.[28] Witters argued that the Establishment Clause did not prohibit the state from funding this training, and that the Free Exercise Clause required it.[29] Although the U.S. Supreme Court declined to address Witters' Free Exercise Clause challenge, it agreed with Witters' Establishment Clause argument.[30] Foreshadowing the reasoning of future Establishment Clause cases,[31] the Court concluded that the government's role was sufficiently independent from religion because it provided money to individuals instead of directly to religious organizations.[32] As a result, the Establishment Clause did not prohibit the state from paying for Witters' training.[33]

However, the Court noted that a state could come to a different conclusion based on its own constitution.[34] On remand, the Washington State Supreme Court did just that and held that the Washington

25. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 868–99 (2000) (Souter, J., dissenting) (summarizing Establishment Clause challenges to educational funding programs).

26. *See, e.g.*, Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) [hereinafter Witters II], *rev'g sub nom.* Witters v. Comm'n for the Blind, 102 Wash. 2d 624, 689 P.2d 53 (1984) [hereinafter Witters I].

27. 474 U.S. 481 (1986).

28. *See id.* at 483–84.

29. *See id.* at 489–90.

30. *Id.*

31. *See infra* Part I.B.

32. *See Witters II*, 474 U.S. at 488–89.

33. *Id.*

34. *Id.* at 489.

Constitution prohibited the "use of public moneys to pay for such religious instruction."[35] The state high court noted a "major difference" between the Washington and federal prohibitions on public funding of religion: the federal Establishment Clause prohibited "the *appropriation* of public money for religious instruction," while the Washington Constitution also prohibited "the *application* of [state] funds to religious instruction."[36] Because Witters would apply the state funding towards religious education, the state was justified in denying him financial assistance.[37]

The Washington State Supreme Court concluded that its reading of the state constitution did not violate the Free Exercise Clause.[38] To the court, the major issue was whether a government action coerced the individual into violating a religious belief.[39] The court held that it did not.[40] In the court's words, the recipient "chose to become a minister, and the Commission's only action was to refuse to pay for his theological education. The Commission's decision may make it financially difficult, or even impossible, for [the applicant] to become a minister, but this is beyond the scope of the free exercise clause."[41] The U.S. Supreme Court declined to review the state court decision,[42] and has not directly addressed the Free Exercise Clause issue left open in *Witters II*.[43] However, the Court's multiple rulings on educational funding programs in other contexts do provide some guidance on the question.

B. U.S. Supreme Court Jurisprudence on the Funding of Religious Education

The U.S. Supreme Court's decisions involving state funding of religious education reflect the Court's "struggl[e]"[44] to navigate between

35. Witters III, 112 Wash. 2d 363, 369, 771 P.2d 1119, 1121 (1989).
36. *Id.* at 370, 771 P.2d at 1122 (emphasis in original).
37. *Id.* at 365, 771 P.2d at 1119–20.
38. *Id.* at 371, 771 P.2d at 1123.
39. *Id.*
40. *Id.*
41. *Id.* (quoting Witters I, 102 Wash. 2d 624, 631, 689 P.2d 53, 57 (1984)).
42. Witters v. Wash. Dep't of Servs. for the Blind, 493 U.S. 850 (1989) (mem.) (denying cert).
43. *See supra* note 24.
44. *Cf.* Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).

the Free Exercise and Establishment Clauses.[45] Both clauses are written in "absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[46] Yet despite their "internal tensions,"[47] the Religion Clauses work together to ensure religious liberty.[48]

Numerous cases involving state funding of religious education have focused on the Establishment Clause.[49] In determining whether a funding program violates the Establishment Clause, the U.S. Supreme Court has considered factors that include whether a program fosters neutrality through private choice, distributes funds equally to students attending religious and non-religious schools, and uses state funds for a permissible purpose.[50] The Court's review of educational funding on Free Exercise Clause grounds is more limited. Although its opinions do not provide clear precedent, the Court has affirmed one ruling that the Free Exercise Clause does not require state action simply because it is permitted under the Establishment Clause.[51]

1. The Establishment Clause in Educational Funding Cases

The U.S. Supreme Court has interpreted the Establishment Clause as reflecting a belief that "a union of government and religion tends to destroy government and degrade religion."[52] The Court's jurisprudence involving religion and educational funding has historically reflected this view.[53] For example, in the first of the modern school funding cases, *Everson v. Board of Education*,[54] the Court approved the use of funds to subsidize the transportation of students, including those attending

45. *See* Mitchell v. Helms, 530 U.S. 793, 844 (2000) (O'Connor, J., concurring) (commenting on the "difficult questions" confronted at the intersection of the Establishment Clause and other First Amendment rights).

46. *Walz*, 397 U.S. at 668–69.

47. Tilton v. Richardson, 403 U.S. 672, 677 (1971).

48. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 256 (1963) (Brennan, J., concurring).

49. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 868–99 (2000) (Souter, J., dissenting) (summarizing cases).

50. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 12.2, at 1190–94 (2d ed. 2002).

51. Luetkemeyer v. Kaufmann, 419 U.S. 888 (1974) (mem.).

52. Engel v. Vitale, 370 U.S. 421, 431 (1962).

53. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 589–90 (1992) ("It must not be forgotten then, that [the Religion Clauses also] exist to protect religion from government interference."); *Engel*, 370 U.S. at 431; Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

54. 330 U.S. 1 (1947).

parochial schools, to and from school.[55] However, the Court commented that there were limits to this kind of interaction, stating that the "First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[56] More recently, the Court has gradually allowed more interaction between state funds and private religious education,[57] although it has not explicitly refuted *Everson*'s warning.[58]

The Court's recent Establishment Clause decisions have increasingly focused on whether a program fosters government "neutrality" through "private choice."[59] Disbursing public funds directly to students instead of religious institutions conveys neutrality because it leaves the decision whether to apply funds towards a religious education to "private choice" and not government action.[60] For example, in *Zelman v. Simmons-Harris*,[61] the Court ruled that Cleveland's school voucher program was permissible because it promoted private choice by giving money directly to students for use at either religious or non-religious schools.[62]

In addition, the Court has considered other factors as well in determining a program's permissibility.[63] The Court has upheld aid programs that are available to students of both public and private schools[64] or that fund solely non-religious uses[65] under the Establishment

55. *Id.* at 17.

56. *Id.* at 18.

57. *See* CHEMERINSKY, *supra* note 50. The Court devised a three-part test for Establishment Clause cases in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, the Court considers if a program (1) has an actual secular purpose, (2) has a principal effect of advancing or restricting religion, and (3) creates excessive government entanglement with religion. *See id.* at 612–13. The *Lemon* factors helped to shape the Court's opinions in school aid cases, but the Court's reliance on the *Lemon* test has wavered in recent years. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 807–09 (2000) (plurality opinion) (stating that under *Agostini v. Felton*, 521 U.S. 203 (1997), the Court relies upon only the first two *Lemon* factors in school aid cases).

58. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 687 (2002) (Souter, J., dissenting).

59. *See id.* at 648–54; *Helms*, 530 U.S. at 809–10 (2000) (plurality opinion). *See generally* CHEMERINSKY, *supra* note 50.

60. *See Zelman*, 536 U.S. at 622.

61. 536 U.S. 639 (2002).

62. *Id.* at 662–63.

63. *See Mitchell*, 530 U.S. at 839–40 (O'Connor, J., concurring) (stating that the Court has "never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid") (emphasis in original).

64. *Compare* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973) (striking down a tuition-grant program that favored private over public school students), *with* Mueller v. Allen, 463 U.S. 388, 397 (1983) (approving of an aid program benefiting public and private school students).

65. *See* Tilton v. Richardson, 403 U.S. 672, 674–75 (1971).

Clause.[66] For example, the Court rejected a funding program that favored students attending non-public schools over students attending public schools as an impermissible establishment of religion,[67] but ten years later upheld a program that distributed funding evenly to students attending public and private schools.[68]

The Court has also approved of programs with "no aid" to religion provisions, which restrict the use of public funds to solely secular purposes.[69] For example, in *Tilton v. Richardson*,[70] the Court reviewed a federal program that subsidized the cost of constructing new facilities at colleges and universities.[71] The program permitted religious institutions to participate, but "expressly prohibit[ed] use of the facilities for religious purposes."[72] The plurality decision upheld the funding program based on the program's explicit secular use requirement,[73] but struck down a provision that allowed organizations to convert the facilities to religious use after twenty years, reasoning that it would violate the Establishment Clause.[74]

However, the importance placed on these "no-aid" provisions varies in the Court's opinions.[75] The plurality and concurring opinions in *Mitchell*

66. *See generally* CHEMERINSKY, *supra* note 50. Although more recent decisions have not emphasized these factors as much, lower courts are still required to consider them when applicable. *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decision, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (internal quotations and citations omitted).

67. *See Nyquist*, 413 U.S. at 782 n.38, 794.

68. *See Mueller*, 463 U.S. at 397.

69. *See* Tilton v. Richardson, 403 U.S. 672 (1971); *accord Agostini*, 521 U.S. at 211–12, 235 (allowing public school teachers to teach secular subjects at religious schools); *Mitchell*, 530 U.S. at 838 (O'Connor, J., concurring).

70. 403 U.S. 672 (1971).

71. *See id.* at 674–77.

72. *Id.* at 677.

73. *See id.* at 679–81.

74. *Id.* at 682–84. All Justices reviewing the case agreed that this provision violated the Establishment Clause. *See id.* at 692 (Douglas, J., dissenting in part); Lemon v. Kurtzman, 403 U.S. 602, 660–61 (1970) (Brennan, J., concurring in part with *Lemon* and concurring in part and dissenting in part with *Tilton*) (concluding that providing grants to "sectarian institutions" violates the Establishment Clause); *id.* at 665 n.1 (White, J., concurring in part and dissenting in part with *Lemon* and concurring in judgment with *Tilton*) (agreeing that allowing government-subsidized buildings to be used for religious purposes after twenty years is impermissible).

75. *Compare Tilton*, 403 U.S. at 682–84 (rejecting a statutory provision allowing buildings constructed with public funds to be used for religious purposes after a set amount of time), *with* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (1993) (allowing sign language interpreters at religious schools).

v. Helms[76] reflect this divide. In *Mitchell*, the Court upheld a program providing funds for schools to purchase equipment and supplies.[77] The program required the use of "neutral, secular criteria"[78] for all purchases. The plurality opinion noted that the program satisfied precedent by not providing "religious schools [with] aid that has an impermissible content,"[79] but stated that diversion of funds towards religious indoctrination was otherwise permissible.[80] In contrast, Justice O'Connor, joined by Justice Breyer, concurred in judgment only, and stated that she "disagree[d] with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."[81] Instead, Justice O'Connor emphasized the program's secular requirements, including the prohibition on making payments for religious worship or instruction.[82]

As the above cases reflect, the emphasis placed on "private choice," availability of funds for both private and public school students, and "no aid" provisions varies in the Court's Establishment Clause cases. Although recent school aid cases have focused on private choice, the Court has warned against concluding that its reasoning has "by implication" overruled earlier precedent.[83] Absent clear direction to the contrary, lower courts should continue to consider all relevant factors.[84]

2. *The U.S. Supreme Court's Limited Review of the Free Exercise Clause in Educational Funding Cases*

The U.S. Supreme Court has rejected the claim that excluding religious school students from receiving educational benefits violates the Free Exercise Clause.[85] However, the Court did so in a memorandum

76. 530 U.S. 793 (2000).

77. *Id.* at 801.

78. *Mitchell*, 530 U.S. at 848 (O'Connor, J., concurring).

79. *Id.* at 831.

80. *Id.* at 820.

81. *Id.* at 840 (O'Connor, J., concurring). Justice O'Connor also stated that these programs, even if they require "secular" use, conform with the Court's definition of "neutrality." *See id.* at 838.

82. *Id.* 848–49.

83. *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

84. *See id.*

85. Luetkemeyer v. Kaufmann, 419 U.S. 888 (1974) (mem.), *aff'g* 364 F. Supp. 376 (W.D. Mo. 1973).

opinion without comment.[86] In *Luetkemeyer v. Kaufmann*,[87] the Court affirmed a three-judge district court decision holding that providing busing services only to students attending public schools was permissible under the Free Exercise Clause.[88] A federal district court for the Western District of Missouri ruled that the Free Exercise Clause did not require transporting students to parochial schools simply because the Establishment Clause permitted it.[89] Instead, the district court concluded that the state's policy fell within an area "between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former nor inaction, the latter."[90]

The *Luetkemeyer* district court also held that the state's "long established constitutional policy" of requiring a strict separation of church and state served as a "compelling state interest" justifying "any possible infringement of the Free Exercise [C]lause."[91] Seven years later, however, the U.S. Supreme Court stated that First Amendment rights can limit a state's ability to ensure a greater separation of church and state than provided under the Establishment Clause.[92] In *Widmar v. Vincent*,[93] the Court held that a state university could not exclude student religious groups from using public facilities open to other organizations.[94] The Court limited its holding to free speech and association grounds,[95] however, and refused to consider whether "a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment."[96] The *Widmar* Court also did not address the

86. *Id.*

87. 419 U.S. 888 (1974) (mem.).

88. Luetkemeyer v. Kaufmann, 364 F. Supp. 376, 377 (W.D. Mo. 1973) (three-judge panel), *aff'd*, 419 U.S. 888 (1974) (mem.).

89. *See Luetkemeyer*, 364 F. Supp. at 386. The U.S. Supreme Court held in *Everson v. Board of Education*, 330 U.S. 1, 17 (1947) that providing transportation to school for both parochial and non-parochial school students would not violate the Establishment Clause. *See also supra* notes 54–56 and accompanying text (discussing *Everson*).

90. *Luetkemeyer*, 364 F. Supp. at 386.

91. *Id.*

92. Widmar v. Vincent, 454 U.S. 263, 276 (1981) (noting that the state's interest in achieving a greater separation of church and state "is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well").

93. *Id.*

94. *Id.* at 265–66.

95. *Id.* at 273 n.13. Although the Court did not base its ruling on Free Exercise Clause grounds, the Court did comment that the Free Exercise Clause can limit a state's ability to require a greater separation of church and state than provided under the First Amendment. *See id.* at 276.

96. *Id.* at 275–76.

district court's conclusion in *Luetkemeyer* that a permissible area exists between the Establishment Clause and the Free Exercise Clause in which the states are free to legislate.[97]

In sum, the U.S. Supreme Court has not directly ruled on the permissibility of excluding religious schools and students from educational funding under the Free Exercise Clause. However, as the Establishment Clause's "no aid" cases reflect, the Court has used the fact that state programs exclude religious schools and students from educational funding as a justification for upholding programs against Establishment Clause challenges. These cases indicate the Court's understanding of the narrow role the government should play in religious education, and serve as a reminder of the limitations placed on the Free Exercise Clause by the Establishment Clause.

II. THE PRINCIPLES OF FREE EXERCISE CLAUSE REVIEW

Outside of the educational funding context, the U.S. Supreme Court has decided a number of Free Exercise Clause cases.[98] These cases have established some clear principles. First, the Free Exercise Clause provides absolute protection for religious beliefs, and offers some protection for religious practices.[99] Second, laws lacking "neutrality" and "general applicability" toward religion are subject to closer review than those that do not.[100]

Other principles of Free Exercise Clause review, however, are less clear. Lower courts are split on the proper standard of review required when a state program or law lacks facial neutrality but does not have as its purpose the suppression of religion.[101] Further, the U.S. Supreme Court has distinguished between programs that directly prohibit the

97. *Cf.* Tilton v. Richardson, 403 U.S. 672, 677 (1972) (plurality opinion) (discussing the Court's historic attempts to find the "neutral area" between the Religion Clauses "within which the legislature may legitimately act").

98. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 876–80 (1990) (summarizing cases). The principles of the Free Exercise Clause apply to both federal and state actions. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (referencing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

99. *See, e.g.*, *Hialeah,* 508 U.S. at 533; *see generally* CHEMERINSKY, *supra* note 50, § 12.3.1.

100. *See id.* at 546.

101. *Compare* KDM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050–51 (9th Cir. 1999) (refusing to apply strict scrutiny to a non-neutral program that did not reflect hostility as applied), *with* Peter v. Wedl, 155 F.3d 992, 996–97 (8th Cir. 1998) (applying strict scrutiny to similar program).

exercise of religion and those that condition funding on restricting a practice of religion.[102]

A. Established Principles of Free Exercise Clause Review

The U.S. Supreme Court's Free Exercise Clause jurisprudence has established two clear principles. The first is that a government cannot directly regulate "religious *beliefs* as such."[103] For example, the state cannot require government officials to declare their belief in God, regardless of the state's reasons for the requirement.[104] As a result, most Free Exercise Clause cases do not involve direct attempts to regulate religious beliefs, but rather government actions affecting the practice of religion.[105] Although the Free Exercise Clause does not provide absolute protection for religious conduct, it does offer some protection.[106] *McDaniel v. Paty*[107] provides an example. In *McDaniel*, a plurality held that prohibiting ministers from holding public office did not amount to a regulation based on religious beliefs, but still constituted an impermissible regulation of religious conduct.[108]

The second principle of Free Exercise Clause jurisprudence is distinguishing between laws that are "neutral"[109] and "of general applicability"[110] and those that are not.[111] A government action that is neutral and generally applicable does not require strict scrutiny review.[112] For instance, the respondents in *Employment Division v. Smith*[113] lost their jobs after using peyote in a religious ceremony.[114] The state refused

102. *Cf. Smith*, 494 U.S. at 883–85.

103. *Id.* at 877 (1990) (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)) (emphasis in original); *accord* McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion) (stating that restricting beliefs is "categorically prohibit[ed]" by the First Amendment).

104. *McDaniel*, 435 U.S. at 626 (plurality opinion) (citing Torasco v. Watkins, 367 U.S. 488 (1961)).

105. *See, e.g.*, *Smith*, 494 U.S. at 877–80 (summarizing cases).

106. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

107. 435 U.S. 618 (1978).

108. *Id.* at 626–27.

109. *See Hialeah*, 508 U.S. at 531.

110. *See id.*

111. *Compare Hialeah*, 508 U.S. at 546 (requiring strict scrutiny for a law lacking neutrality), *with Smith*, 494 U.S. at 890 (effectively requiring only rational basis review for a neutral, generally applicable law).

112. *See Hialeah*, 508 U.S. at 531.

113. 494 U.S. 872 (1990).

114. *Id.* at 874–75.

to grant unemployment benefits to the respondents because they had violated a criminal law against the abuse of controlled substances.[115] Although the Court acknowledged the effect of the law on the respondents' exercise of religion, it stated that the Oregon law was generally applicable and neutral towards religion.[116] Accordingly, the Court refused to require a "compelling interest" for the law, and instead relied upon the highly deferential rational basis standard.[117] Because the state had a legitimate interest in regulating peyote, the law's infringement upon the exercise of religious beliefs was inconsequential under rational basis review.[118]

In contrast to neutral government actions, courts review laws lacking neutrality or general applicability towards religion more closely.[119] If the object of the law is to suppress religion, it must be justified by a compelling state interest.[120] In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[121] the Court held that a city's attempt to prohibit the use of animal sacrifices in sacred rituals violated the Free Exercise Clause.[122] The Court identified the lack of neutrality and general applicability of the law as indications of impermissible government hostility towards religion.[123] As such, the Court applied strict scrutiny review and held that the city did not have a compelling reason for such discrimination.[124]

B. Circuit Split on Laws Lacking an Object of Suppressing Religion

Two divergent theories have emerged in the federal circuit courts about the proper level of review required when a law lacks facial neutrality towards religion but does not have the object of suppressing religion.[125] The first theory holds that the *Hialeah* decision requires any

115. *Id.*

116. *See id.* at 878.

117. The Court did not explicitly state that it was using the "rational basis" standard, but commentators have interpreted it as such. *See, e.g.*, CHEMERINSKY, *supra* note 50, § 12.3.

118. *See Smith*, 494 U.S at 890.

119. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

120. *See id.* at 533–34, 546. Although the focus in *Davey* is on neutrality rather than general applicability, "[n]eutrality and general applicability are interrelated . . . failure to satisfy one requirement is a likely indication the other has not been satisfied." *Id.* at 531.

121. 508 U.S. 520 (1993).

122. *Id.* at 524.

123. *See id.* at 542.

124. *Id.* at 546–47.

125. *Compare* KDM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050–51 (9th Cir. 1999), *with* Peter v. Wedl, 155 F.3d 992, 996–98 (8th Cir. 1998).

law that is not facially neutral to be justified by a compelling state interest.[126] In contrast, under the second theory the *Hialeah* decision's strict scrutiny analysis only applies if a court determines that the object of the law is to suppress religion.[127] Lacking this purpose, heightened scrutiny is required only if the law places a "substantial burden" on the exercise of religion.[128]

Under the first approach, a law that is not facially neutral towards religion is automatically subject to strict scrutiny.[129] In *Peter v. Wedl*,[130] the Eighth Circuit reviewed a Minnesota school district's refusal to provide a paraprofessional assistant to an otherwise eligible disabled student because he attended a private religious school.[131] Underlying the school district's decision was a state law that prohibited public funding of religious education.[132] The *Wedl* court determined that the state law "explicitly discriminated against children who attended private religious schools,"[133] and was not justified by a compelling state interest.[134] Concluding that the state law lacked facial neutrality, the court implicitly assumed it was motivated by animus towards religion.[135]

In contrast, other federal circuit courts have looked beyond the face of a government action to determine if it reflected a purpose to suppress religion.[136] The Ninth Circuit adopted this approach in 1999, three years prior to *Davey*. In *KDM v. Reedsport School District*,[137] the Ninth Circuit ruled that an Oregon school district's application of a state regulation prohibiting religious schools from receiving government-funded special education services did not violate the free exercise of religion.[138] The

126. *See, e.g.*, *Wedl*, 155 F.3d at 996–98.

127. *See* Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999).

128. *Id.* (citing Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

129. *See Wedl*, 155 F.3d at 996–98; Hartmann v. Stone, 68 F.3d 973, 978–79 (6th Cir. 1995).

130. 155 F.3d 992 (8th Cir. 1998).

131. *Id.* at 994.

132. *See id.* at 996–97.

133. *Id.* at 996.

134. *Id.* at 996–97 (rejecting the contention that by attempting to comply with the Establishment Clause, the law served a compelling interest). The Court also held that the law violated the student's rights to equal protection and free speech. *Id.* at 997.

135. *See id.* at 998; *cf. id.* at 1001–02 (refusing to consider whether the school district's decision to deny assistance would be permissible if it were based on a reason other than a state law "motivated by religious animus").

136. KDM v. Reedsport Sch. Dist, 196 F.3d 1046, 1050–51 (9th Cir. 1999) (reviewing statute as applied); Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999).

137. 196 F.3d 1046 (9th Cir. 1999).

138. *Id.* at 1051.

court acknowledged that the regulation was not facially neutral.[139] As applied, the rule required those students attending religious schools to travel to religiously neutral settings in order to receive the same government benefits provided to public school students on-site.[140] Yet the court concluded that, as applied through this program, the regulation did not "reflect a purpose to 'suppress[] religion or religious conduct.'"[141] Thus, the Ninth Circuit did not apply *Hialeah's* strict scrutiny analysis.[142] The court further ruled that the regulation in practice did not impose an "impermissible burden" on the exercise of religion.[143] By not subjecting the law to heightened scrutiny, the court in effect only required a rational basis for the law.

The court's opinion in *KDM* agreed with a decision by the First Circuit in a case quite similar to *Davey.*[144] In *Strout v. Albanese*,[145] the First Circuit addressed the issue of whether Maine's practice of providing funding to private secular schools—but not to religious schools—violated the Free Exercise Clause.[146] The First Circuit held that the practice did not violate the Free Exercise Clause[147] in part because, unlike the ordinances in *Hialeah*, Maine's program did not reflect "a substantial animus" toward religion.[148]

Consequently, the First Circuit in *Strout* relied on a test from *Hernandez v. Commissioner*,[149] in which the Supreme Court ruled that heightened scrutiny was only required if a law imposed a "substantial burden" on a "central religious belief or practice."[150] Under the

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139. *Id.* at 1050.

140. *Id.*

141. *Id.* at 1050–51.

142. *Id.* Although the court left open whether the regulation could violate the Free Exercise Clause as applied to another situation, the framework for determining if a law has an impermissible purpose would remain the same. *Cf. id.* at 1054 (Kleinfeld, J., dissenting) ("The majority says *Lukumi* does not apply here because Oregon's regulation does not have as its object suppression of religion or religious conduct.").

143. *Id.* at 1050–51.

144. *Id.* at 1051 (citing Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999)).

145. 178 F.3d 57 (1st Cir. 1999).

146. *See id.* at 59. *See also* Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999) (holding that Maine's tuition-funding program did not violate the Free Exercise Clause).

147. *Strout*, 178 F.3d at 65 (listing four reasons for rejecting the Free Exercise challenge, including the lack of animus towards religion).

148. *Id.*

149. 490 U.S. 680 (1989).

150. *Id.* at 697–700. Although the Court warned against judging the "centrality of particular beliefs or practices," it stated that it was the Court's duty to determine how substantial the burden is

Hernandez ruling, a law is permissible if it supports a "broad public interest."[151] Applying the test from *Hernandez*, the *Strout* court held that Maine's program was constitutional because the plaintiff could not demonstrate how a state's refusal to fund attendance at a religious school resulted in a substantial burden on a central belief.[152] In addition, the First Circuit reasoned that the government's action did not prohibit the exercise of religion because it did not prevent the plaintiffs from attending religious schools—rather, "[a]ll it means is that the cost of religious education must be borne by the parents and not the state."[153]

The U.S. Supreme Court has not resolved this split in the federal circuit courts. Prior to *Davey*, both the Ninth and First Circuits first determined if a law had the object of suppressing religion before applying strict scrutiny analysis.[154] In other circuits, any law lacking facial neutrality has required strict scrutiny review, regardless of intent.[155] At least one Justice has recognized this conflict, and urged the Court to settle the issue.[156]

C. *Direct Prohibition versus Conditional Funding*

A second issue which remains unclear in Free Exercise Clause jurisprudence is whether direct prohibitions on religious conduct and conditional funding of religious conduct should be subject to the same standards.[157] Direct prohibitions, such as the ordinances prohibiting ritualistic sacrifices of animals at issue in *Hialeah*,[158] are different than programs that place conditions on the receipt of federal aid, such as requiring individuals receiving unemployment benefits to be available for work on particular days of the week.[159] Both can result in a Free

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on the religious practice. *Id.* at 699. *But see* Employment Div. v. Smith, 494 U.S. 872, 887 n.4 (1990) (rejecting this approach as contradictory).

151. *Hernandez*, 490 U.S. at 699–700 (quoting United States v. Lee, 455 U.S. 252, 260 (1982)).

152. Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999).

153. *Id.* The First Circuit also determined that, alternatively, the state's interest in avoiding an Establishment Clause violation justified any potential free exercise violation. *Id.*

154. *See id.* at 65; KDM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050–51 (9th Cir. 1999).

155. *See* Peter v. Wedl, 155 F.3d 992, 996–97 (8th Cir. 1998).

156. *See* Columbia Union Coll. v. Clark, 527 U.S. 1013, 1015 (1999) (mem.) (denying cert.) (Thomas, J., dissenting) (commenting that *Wedl* and *Strout* illustrate that lower courts are "struggling to reconcile our conflicting First Amendment pronouncements").

157. *See* Employment Div. v. Smith, 494 U.S. 872, 883–85 (1990).

158. 508 U.S. 520, 524 (1993).

159. Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

Exercise Clause violation.[160] However, as the U.S. Supreme Court stated in *Lyng v. Northwest Indian Protective Cemetery Association*,[161] "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."[162]

A funding restriction can qualify as a violation of the Free Exercise Clause.[163] In fact, in *Sherbert v. Verner*,[164] the Court held that a state unemployment law that only provided benefits to those willing to work on Saturdays violated the Free Exercise Clause.[165] The Court focused on the fact that the state law required some individuals to forego a central tenet of their religion in order to qualify for the state funding.[166] Yet in more recent cases, the Court has limited the applicability of *Sherbert*.[167] In *Smith*, for example, the Court rejected the use of the *Sherbert* test for challenges to generally applicable criminal laws,[168] and noted its reluctance to expand *Sherbert* outside the unemployment benefits context.[169]

Consequently, the two issues most relevant to the *Davey* case are unsettled. First, does a law lacking facial neutrality and general applicability automatically require strict scrutiny review, even if it does not have a purpose to suppress religion? As noted above, the Circuit Courts are split on this issue.[170] Second, should Free Exercise Clause precedent that involves government prohibitions on religion apply to Free Exercise Clause challenges based on government funding decisions? With these uncertainties, courts must seek guidance from other fundamental rights decisions.[171]

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160. *Compare id.* at 403, *with Hialeah*, 508 U.S. at 524.

161. 485 U.S. 439 (1988).

162. *Id.* at 451 (quoting *Sherbert*, 374 U.S. at 410 (Douglas, J., concurring), in upholding logging public land that is sacred to some Native Americans).

163. *See, e.g., id.* at 450.

164. 374 U.S. 398 (1963).

165. *See id.* at 410.

166. *See id.* at 406.

167. *See* Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

168. *Id.*

169. *Id.* at 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation . . . . In recent years we have abstained from applying the *Sherbert* test [outside the unemployment compensation field] at all.").

170. *See supra* Part II.B.

171. *Cf.* Davey v. Locke, 299 F.3d 748, 761 (McKeown, J., dissenting) (concluding that the Supreme Court's free exercise jurisprudence did not provide "sufficient guidance" for the *Davey* case).

III. LOOKING BEYOND THE RELIGION CLAUSES: FUNDING VERSUS PROHIBITING THE EXERCISE OF FUNDAMENTAL RIGHTS

The distinction between a direct prohibition of conduct and the conditional funding of conduct exists in cases involving other fundamental rights as well.[172] Supreme Court precedent indicates that the state has broad discretion to place restrictions on the use of its own funds.[173] Because "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law," proving that a funding program infringes upon a fundamental right is difficult.[174] There are limits, however, on a state's ability to selectively fund activities. Most notably, the purpose of a state's action cannot be to "suppress dangerous ideas" by coercing individuals into refraining from expressing a disfavored viewpoint.[175]

Although the "government may not deny a benefit to a person because he exercises a constitutional right,"[176] it may refuse to fund the exercise of that right.[177] *Harris v. McRae*[178] is a case on point. In *Harris*, a statute prohibited the use of Medicaid funding to pay for certain "medically necessary abortions" while allowing funding of other necessary procedures.[179] The Court acknowledged that an individual has a constitutionally protected right to terminate a pregnancy,[180] but still upheld the program against both First Amendment and Equal Protection challenges.[181] The Court stated that although the liberty interest protected

172. "Fundamental rights and liberty interests" include both those guaranteed in the Constitution and Bill of Rights, and those found within the "liberty" guarantee of the Due Process Clauses of the Fifth and Fourteenth Amendments. *See* Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) (consolidating cases).

173. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 477 (1977).

174. *Id.* at 476.

175. *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).

176. *Id.* at 545; *accord* Speiser v. Randall, 357 U.S. 513, 529 (1958) (holding a state cannot deny a general tax benefit to those that speak out against the government).

177. *See, e.g., Regan*, 461 U.S. at 545–56 (upholding preferential tax treatment conditioned on restricting lobbying efforts); Harris v. McRae, 448 U.S. 297, 326 (1980) (prohibiting Medicaid to pay for abortions); *see* CHEMERINSKY, *supra* note 50, §11.2.4.4.

178. 448 U.S. 297 (1980).

179. *See id.* at 301–02.

180. *See id.* at 312.

181. *See id.* at 321. The Court applied rational basis review to the Equal Protection claim. *Id.* at 324.

"against unwarranted government interference," it did not "confer an entitlement" to the funds needed to "realize all the advantages" of that right.[182]

The Court has upheld programs that restrict state funding for abortion-related services on other occasions as well.[183] For example, in *Rust v. Sullivan*,[184] the Court upheld a law that prohibited medical providers receiving government funding from even discussing abortion with their patients.[185] The Court's rationale was unambiguous: "[a] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[186]

The Court has applied this distinction between selectively subsidizing a constitutionally protected right and prohibiting its exercise outside of the abortion context. For example, in *Regan v. Taxation with Representation of Washington*,[187] the Court denied both free speech and equal protection challenges to a program that granted tax-exempt status to certain veteran's organizations engaged in lobbying while refusing the status to other lobbying organizations.[188] The Court permitted this selective funding based upon group status, and dismissed "the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State."[189]

The *Regan* Court, however, did note one limit placed upon the government's conditional subsidizing of speech: the law cannot be "aimed at the suppression of dangerous ideas."[190] This limit prevents a state from using subsidies to coerce individuals into refraining from expressing a disfavored viewpoint.[191] The Court relied on this reasoning in *Rosenberger v. Rector and Visitors of the University of Virginia*.[192] In

182. *Id.* at 317–18.

183. *See* Rust v. Sullivan, 500 U.S. 173, 192–93 (1991); Maher v. Roe, 432 U.S. 464, 480 (1977).

184. 500 U.S. 173 (1991).

185. *See id.* at 192–93.

186. *Id.* at 193 (internal citations omitted).

187. 461 U.S. 540 (1983).

188. *Id.* at 545–56.

189. *Id.* at 546 (internal citations omitted) (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas J., concurring)).

190. *Id.* at 550 (quoting *Cammarano*, 358 U.S. at 513). *But cf.* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 596 (Scalia, J., concurring) ("It is preposterous to equate the denial of taxpayer subsidy with measures aimed at the *suppression* of dangerous ideas.") (quotations omitted) (emphasis in original).

191. *See Finley*, 524 U.S. at 587.

192. 515 U.S. 819 (1995).

Rosenberger, the Court held that a state university's refusal to provide funds to publish religiously-oriented student newsletters, while funding the publication of non-religious student newsletters, violated the right to free speech.[193] The Court explained that the program created a "public forum" for speech, but then placed a restriction on the exercise of speech within that forum solely based on viewpoint.[194] Acknowledging that the Court had upheld other programs that declined to fund certain speech, the Court distinguished the University's program by referencing the "suppression of dangerous ideas" exception.[195] Although "preferential treatment of certain speakers" based on group status is permissible under *Regan*, placing restrictions on the "content or messages" of the speech is not.[196]

However, the Court has not consistently addressed what qualifies as the suppression of disfavored viewpoints in conditional funding cases. The *Rust* opinion stated that prohibiting doctors that receive federal funds from discussing abortion with their patients was not impermissible viewpoint discrimination.[197] Instead, it simply reflected government's choice "to fund one activity to the exclusion of the other."[198] Yet in *Legal Services Corp. v. Velazquez*,[199] the Court struck down a law restricting legal aid attorneys' ability to bring suits challenging welfare programs.[200] The Court ruled that the law was designed to insulate government programs from Constitutional challenges by excluding "certain vital theories and ideas" from funding.[201] Although the programs in *Rust* and *Legal Services* both conditioned the receipt of federal funds on agreeing to comply with speech-based restrictions, they resulted in opposite outcomes in the Court.[202]

Commentators have noted the difficulty in reconciling the Court's decisions in these cases.[203] One distinction suggested in *Legal Services* is whether the government was acting as a speaker through its funding, or

193. *Id.* at 837.

194. *Id.* at 830–35. For a description of public forums, see, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993).

195. *Rosenberger*, 515 U.S. at 834–35.

196. *Id.*

197. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

198. *Id.*

199. 531 U.S. 533 (2001).

200. *Id.* at 537.

201. *Id.* at 548.

202. *See* CHEMERINSKY, *supra* note 50, §11.2.4.4.

203. *See id.*

was attempting to "facilitate private speech."[204] For example, in *Rosenberger* the Court explained that the University's funding was intended to encourage private speech by creating a public forum (in which the government could not engage in viewpoint discrimination), whereas the program in *Rust* was intended to convey the government's objectives.[205] Not all justices, however, have agreed with this distinction between these cases.[206] As Justice Scalia commented, if "private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech."[207]

Another potentially distinguishing factor is the extent to which the government condition "distort[s]" the "usual functioning" of an "existing medium of expression."[208] In *Legal Services*, the Court expressed concern about the impact on the court system of not allowing lawyers to present potential constitutional issues.[209] In *Rosenberger*, the Court was concerned with the restriction's impact on what the Court had determined was an open forum.[210] In contrast, the *Rust* Court rejected the concern that the program infringed upon the physician-patient relationship.[211]

In sum, U.S. Supreme Court precedent indicates that while a state is not required to subsidize the exercise of a fundamental right, it cannot use selective funding as a means of suppressing dangerous ideas. These principles are clearly established. However, as *Rust* and *Legal Services* indicate, in practice their application has proven more difficult to reconcile.

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204. 531 U.S. at 542.

205. *See* Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 833–34 (1995) (distinguishing *Rust v. Sullivan,* 500 U.S. 173 (1991), as a government-based speech program).

206. *See Legal Servs.*, 531 U.S. at 554 (Scalia, J., dissenting).

207. *Id.* (emphasis in original).

208. *Id.* at 543.

209. *Id.* at 545–46.

210. *See Rosenberger*, 531 U.S. at 529–31; *cf. Legal Servs.*, 531 U.S. at 543–44 (discussing *Rosenberger*).

211. *See* Rust v. Sullivan, 500 U.S. 173, 200 (1991).

IV. IN *DAVEY V. LOCKE*, THE NINTH CIRCUIT HELD THAT THE PROMISE SCHOLARSHIP VIOLATES THE FREE EXERCISE CLAUSE

Although the Ninth Circuit's decision in *Davey v. Locke* referenced many other constitutionally-protected rights, the court based its ruling solely on the violation of the Free Exercise Clause.[212] The Ninth Circuit held that Washington's Promise Scholarship program facially discriminated against religion, and was not justified by a compelling state interest.[213] As such, the program violated the plaintiff's right to the free exercise of religion.

The Ninth Circuit's decision in *Davey* reversed a ruling by a federal district court in the Western District of Washington granting summary judgment in favor of the state. The district court had rejected Davey's claims that the state policy violated the First Amendment's Establishment Clause as well as his rights to the free exercise of religion, free speech, and equal protection under the state and federal constitutions.[214] Reviewing the free exercise challenges, the district court concluded that Davey's state claim was substantially the same as that rejected by the Washington State Supreme Court in *Witters III*.[215] Because the state constitution prohibited the appropriation of state funds to subsidize religious training, the court rejected Davey's state law claim.[216] Further, the district court held that the Promise Scholarship's requirements did not violate the First Amendment's Free Exercise Clause,[217] noting the distinction between prohibiting an activity and refusing to fund an activity.[218] Finding that Davey "mistakenly presumes that he has a right to have Washington fund his religious instruction," the district court denied his Free Exercise Clause claim.[219]

A panel on the Ninth Circuit reversed the district court's decision.[220] The court began its analysis by acknowledging *Church of Lukumi Babalu*

212. 299 F.3d 748, 760 (9th Cir. 2002).

213. *Id.* at 750.

214. Davey v. Locke, 2000 U.S. Dist. LEXIS 22273, at *4–5 (W.D. Wash. 2000), *rev'd*, 299 F.3d 748 (9th Cir. 2002).

215. *Id.* at *18.

216. *Id.*

217. *Id.*

218. *Id.* at *14.

219. *Id.* at *16.

220. Davey v. Locke, 299 F.3d 748, 760 (9th Cir. 2002).

Aye, Inc. v. City of Hialeah as controlling.[221] The Ninth Circuit viewed the *Hialeah* decision as holding that a court must strictly scrutinize any law lacking facial neutrality towards religion.[222] The court stated that the Promise Scholarship was not neutral under the *Hialeah* standard because both the Promise Scholarship's implementing policy and underlying statutory prohibition on state funding of religious education "refer on their face to religion."[223]

The Ninth Circuit then determined that the state's policy of prohibiting funding for religious majors imposed an unconstitutional disability based on religious status.[224] The court relied on *McDaniel v. Paty*[225] for the proposition that a law cannot offer a general benefit to all, but then deny that benefit to a select group based solely on religion.[226] Comparing the state law at issue in *McDaniel*, which prohibited clergy from serving in the legislature, to the funding restriction in *Davey*, the Ninth Circuit stated that "[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."[227]

The *Davey* majority also rejected the state's argument that the Promise Scholarship was consistent with other conditional funding programs approved by the U.S. Supreme Court.[228] The Ninth Circuit distinguished the Promise Scholarship from these cases by relying on the *Rosenberger* decision, which focused on the First Amendment right to free expression in a public forum.[229] The Ninth Circuit took from *Rosenberger* the premise that a "restriction based on religion is aimed at 'suppression of dangerous ideas,'" and as such was impermissible.[230] Moving from the free speech realm of the *Rosenberger* case to the free exercise issue in *Davey*,[231] the Ninth Circuit held that the Washington program was an

221. *Id.* at 753.

222. *Id.*

223. *Id.*

224. *Id.* at 754.

225. 435 U.S. 618 (1978) (plurality opinion).

226. *Davey*, 299 F.3d at 754.

227. *Id.* (emphasis in original).

228. *Id.* at 754–55.

229. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995).

230. *Davey*, 299 F.3d. at 755.

231. *See id.* at 764 (McKeown, J., dissenting) (describing the majority's "reach[] across the First Amendment divide").

attempt to "suppress a particular point of view,"[232] making the program "presumptively unconstitutional."[233]

Having determined that the Promise Scholarship program fell under the *Hialeah* standard and thereby required strict scrutiny, the court held that the state lacked a compelling interest in the discrimination.[234] The court recognized that Washington's interest in complying with its own constitution was "indisputably strong."[235] However, the Ninth Circuit ruled that the Free Exercise Clause trumped this interest.[236]

The *Davey* dissent, on the other hand, disagreed with the majority's analysis of both the Free Exercise Clause[237] and conditional funding cases.[238] The dissent first asserted that U.S. Supreme Court precedent in Free Exercise Clause challenges was inconclusive on the issue at hand.[239] Second, the dissent noted that the majority's decision was inconsistent with the Court's analysis in other fundamental rights cases, and explained that the Promise Scholarship's rules simply reflected a permissible conditioning on the use of state funds.[240]

As a result of *Davey*, a state supporting higher education through scholarships cannot exclude theology degrees without violating the Free Exercise Clause.[241] It is irrelevant whether the object of the law is to promote a separation of church and state or simply to suppress religion. As the dissent noted, this decision curtails a state's ability to define its own understanding of religious liberty.[242]

V. WASHINGTON'S PROMISE SCHOLARSHIP DOES NOT VIOLATE THE FREE EXERCISE OF RELIGION

In holding that Washington's Promise Scholarship violated the free exercise of religion, the *Davey* court misapplied Ninth Circuit and U.S. Supreme Court precedent. First, the court ignored Ninth Circuit

232. *Id.* at 755 (quoting *Rosenberger*, 515 U.S. at 830).

233. *Id.*

234. *Id.* at 758–60.

235. *Id.* at 759.

236. *Id.* (citing Widmar v. Vincent, 454 U.S. 263 (1981)).

237. *Id.* at 761–64 (McKeown, J., dissenting).

238. *See id.* at 761 (McKeown, J., dissenting) (concluding that "the Supreme Court's jurisprudence in the abortion funding cases guides our decision here").

239. *Id.* at 761–64 (McKeown, J., dissenting).

240. *Id.* at 764–68 (McKeown, J., dissenting).

241. *See id.* at 760.

242. *See id.* at 760–61, 768 (McKeown, J., dissenting).

precedent by applying strict scrutiny analysis without determining if the law reflected an attempt to suppress religion.[243] Had the court followed *KDM* and performed its analysis, the *Davey* court would have concluded that the Promise Scholarship did not have an object of suppressing religion, and was therefore not subject to strict scrutiny.[244] Second, the Ninth Circuit failed to adequately distinguish the Promise Scholarship from permissible funding programs. As the dissent in *Davey* correctly explained, the state's refusal to pay for religious training does not prohibit the exercise of religion any more than the state's refusal to pay for an abortion prohibits the exercise of a fundamental right.[245] As a result, the court's decision contradicts U.S. Supreme Court precedent involving the funding of constitutionally-protected rights.

A. Washington's Promise Scholarship Does Not Impermissibly Discriminate Against Religion

Washington's refusal to fund a religious degree does not violate the Free Exercise Clause. Based on Ninth Circuit precedent, *Hialeah's* strict scrutiny review is only required if the object of the law is to suppress religion.[246] Because the Promise Scholarship does not have a purpose of targeting religion, the *Hialeah* test is inapposite.[247] Further, the *Davey* court erred in relying on *McDaniel* because the Promise Scholarship does not discriminate based on religious status.[248]

1. The Ninth Circuit Ignored its Own Precedent by Applying Hialeah *'s Strict Scrutiny Analysis in* Davey

Prior to subjecting the Promise Scholarship to strict scrutiny review, the Ninth Circuit should have first determined if the program's policies had an object of suppressing religion.[249] Only three years prior to *Davey*, the Ninth Circuit in *KDM* did not apply strict scrutiny to a law lacking facial neutrality because the law as applied did not reflect an object or

243. *See* KDM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050–51 (9th Cir. 1999).

244. *See* 96 F.3d 1046, 1050–51 (9th Cir. 1999).

245. *See* 299 F.3d at 761, 764–68 (McKeown, J., dissenting).

246. *See KDM*, 196 F.3d at 1050–51.

247. *See id.*; *accord* Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999).

248. *See Davey*, 299 F.3d at 753.

249. *See supra* notes 137–142 and accompanying text (discussing the Ninth Circuit's approach in *KDM* to determining if a law lacking facial neutrality required strict scrutiny review).

purpose of suppressing religion.[250] The court cited this lack of purposeful hostility as a distinguishing factor from *Hialeah*.[251] Yet the *Davey* court failed to address the court's reasoning in *KDM*.[252] Although the laws at issue in *Davey* and *KDM* were different,[253] the free exercise question was substantially the same: must a law that is not facially neutral towards religion be justified by a compelling state interest? The *KDM* court answered this question in the negative, instead first reviewing if the government action burdened the plaintiff and had as an object the suppression of religion.[254] The *Davey* court, however, ignored this precedent and concluded that the *Hialeah* decision controlled because the Promise Scholarship's policies "refer on their face to religion."[255]

Although both the *KDM* and *Davey* courts can draw some support from the *Hialeah* opinion,[256] the *KDM* approach is more consistent with Supreme Court jurisprudence. As indicated by the *Hialeah* decision, the Court's concern was preventing laws "designed to persecute or oppress a religion or its practices."[257] The Court even couched its discussion of facial neutrality in terms of deciphering if the object of a law was the suppression of religion.[258] Summarizing why the ordinances at issue in *Hialeah* failed the neutrality requirement, the Court came to "one conclusion: The ordinances had as their object the suppression of religion."[259]

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250. *KDM*, 196 F.3d at 1051.

251. *Id.* (citing *Strout*, 178 F.3d 57).

252. The majority opinion in *Davey* only refers to *KDM* once, and does not discuss how its analysis of the *Hialeah* decision is distinguishable. *See Davey* 299 F.3d at 759.

253. The Oregon statute did not require choosing between the pursuit of a religious practice and state funding—it only affected the manner of receiving those benefits. *See KDM*, 196 F.3d at 1050–51.

254. *Id.*

255. 299 F.3d at 753.

256. For example, the *Hialeah* opinion states both that "the minimum requirement of neutrality is that a law not discriminate on its face," 508 U.S. at 533, and that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id.*

257. *Id.* at 547; *see also id.* at 533, 542.

258. *See id.* at 533 (commenting that "the minimum requirement" of facial neutrality is one of "many ways" of determining the object of a law).

259. *Id.* at 542. Justice Kennedy, joined by Justice Stevens, also pointed to Equal Protection cases for guidance in the neutrality inquiry. 508 U.S. at 540–42 (Kennedy, J., concurring). The Court's Equal Protection decisions support the view that the Court's concern is with preventing animus towards particular groups. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446–47 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

The *Davey* court's emphasis on whether laws "refer on their face to religion"[260] is also at odds with the Supreme Court's approach in *Smith.* The Court noted in *Smith* that amending neutral laws in order to create "nondiscriminatory religious-practice exemption[s]," such as allowing peyote use in religious ceremonies, may be permissible.[261] Under the *Davey* court's approach,[262] however, these exemptions would qualify as non-neutral, and would be subject to strict scrutiny review.

Had the *Davey* court followed the reasoning of *KDM,* it would have concluded that the Promise Scholarship did not require strict scrutiny review.[263] Contrasting the facts of the *Davey* and *Hialeah* cases, it is clear that the Promise Scholarship's requirements are not designed to suppress religion. Unlike the city ordinances at issue in *Hialeah,* the object of Washington's policy does not indicate "substantial animus" against any practice of religion.[264] In *Hialeah,* the Supreme Court emphasized that the city had specifically created ordinances in order to suppress certain religious practices.[265] The Promise Scholarship has no similar purpose. In fact, the Ninth Circuit in *Davey* even recognized that the purpose of the Washington law was to respect the separation between church and state.[266]

A government's desire to ensure the separation of church and state does not indicate an attempt to suppress religion.[267] As Justice Brennan explained, courts should not "underestimate[] the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious

260. *Davey,* 299 F.3d at 753.

261. 494 U.S. 872, 890 (1990).

262. *See* 299 F.3d at 753.

263. *See* KDM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050 (9th Cir. 1999); *see also Hialeah,* 508 U.S. at 534, 542 (looking beyond an ordinances' facial neutrality to determine the object of the laws).

264. *See* Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999); *See also Davey,* 299 F.3d at 762 (McKeown, J., dissenting) (concluding there should be "no such suspicion of animosity in this case").

265. 508 U.S. at 542. In addition, the ordinances at issue in *Hialeah* also showed their discriminatory intent by carving out exceptions to certain religions, but not all. *See id.* at 535–36.

266. 299 F.3d at 758–59 (acknowledging Washington's "indisputably strong interest" in not violating the state's constitutional separation of church and state); *see also id.* at 761 (McKeown, J., dissenting) ("In the State of Washington's case, it has assiduously avoided violating the first tenet of the Religion Clauses, and in doing so has not overstepped the bounds of the latter.").

267. *See, e.g.,* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 217–22 (1963) (summarizing cases).

beliefs to either clause alone."[268] Neither did the Framers of the Washington Constitution.[269] Article I, Section 11 of the Washington Constitution, which contains the prohibition on state funding of religion, is entitled "Religious Freedom." It begins: "[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual."[270] This is not the language of hostility towards religion.[271] In deciding not to fund religious training, Washington is not attempting to suppress religion, but to respect the separation of church and state.

2. *The Ninth Circuit Incorrectly Analogized the Promise Scholarship in* Davey *to the Statute in* McDaniel

The majority's reliance on the *McDaniel* Court's religious status doctrine is also misplaced. The majority reasoned that the Promise Scholarship discriminated based on religious status in a manner similar to the Tennessee law in *McDaniel* that prohibited clergy from holding public office because of their religious status.[272] Yet the two cases are dissimilar. In *McDaniel*, Tennessee penalized the plaintiff—took away a right to hold public office—because of his status as a minister.[273] In contrast, the plaintiff in *Davey* demanded that the state pay for an activity

268. *Id.* at 256 (Brennan, J., concurring).

269. *See, e.g.*, Witters III, 112 Wash. 2d 363, 386–89, 771 P.2d 1119, 1130–32 (1989) (Utter, J., dissenting) (discussing the history of the state's constitutional provision).

270. WASH. CONST. art. I, § 11 (as amended 1993).

271. Commentators have suggested that, at the time of their passage in the late 1800's and early 1900's, similar provisions in state constitutions were based on hostility towards Catholic schools. *See, e.g.*, JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 151–68 (1999). *But cf.* Noah Feldman, *Non-sectarianism Reconsidered,* 18 J. L. & Politics 65, 112 (2002) (acknowledging that "opposition to state funding of Catholic schools" played a role in the creation of these state provisions, but arguing that "non-sectarianism was broadly understood as a plausible and correct solution to the problem of moral education and religious heterogeneity"). Other commentators have concluded that the passage of Washington's establishment clause, while repudiating "government-backed sectarianism," also reflected a "lack of hostility toward religion generally." 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, 472 (1988). Of note, Washington's statutory prohibition on state funding for theology students was enacted in 1969, see 1969 WASH. LAWS EX. SESS. 222 § 15, long removed from the time period of "religious tensions that plagued the United States during the latter third of the nineteenth century." *See* Toby J. Heytens, Note, *School Choice and State Constitutions,* 86 VA. L. REV. 117, 140 (2000).

272. Davey v. Locke, 299 F.3d 748, 754 (9th Cir. 2002).

273. *See* McDaniel v. Paty, 435 U.S. 618, 620, 626–27 (1978).

it had chosen not to subsidize—regardless of religious status.[274] The plaintiff in *Davey* was not being penalized for pursuing a religious degree any more than the plaintiff in *Harris v. McRae* was penalized by Medicaid's refusal to pay for an abortion.[275] As the Supreme Court stated in *Harris*, the funding decision simply represents "a refusal to subsidize certain protected conduct."[276]

The Court's rationale in *Harris* indicates why the Promise Scholarship must be reconciled with the Court's review of other funding programs. As explained below, the Court has distinguished between those programs that penalize the exercise of a constitutionally protected right, and those programs that simply refuse to fund the exercise of one's constitutionally protected right.[277] The former is impermissible, the latter is not.[278] *Davey* falls into the latter permissible category.

B. *The Ninth Circuit Failed to Adequately Distinguish the Promise Scholarship's Requirements from Permissible Government Funding Programs*

Comparing the Promise Scholarship to similar programs involving the conditional funding of protected activities demonstrates that the Promise Scholarship's requirements are permissible.[279] As the dissent in *Davey* asserted, the requirements placed on the Promise Scholarship by Washington are similar to those approved by the U.S. Supreme Court in other conditional funding cases.[280] Although the Ninth Circuit attempted to distinguish the Promise Scholarship based on *Rosenberger*, analysis of that case demonstrates that the cases are dissimilar.

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274. *See Davey*, 299 F.3d at 751.

275. *Compare* Harris v. McRae, 448 U.S. 297, 301 (1980) (reviewing the constitutionality of "denying public funding for certain medically necessary abortions"), *with Davey*, 299 F.3d at 749 (reviewing the constitutionality of denying public funding of theology degrees). *See also Davey*, 299 F.3d at 764–65 (McKeown, J., dissenting) (noting the "indistinguishable similarity between this case and those that address the abortion funding cases").

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

277. *See infra* Part V.B.

278. *See infra* Part V.B.

279. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 201–03 (1991).

280. *Davey*, 299 F. 3d at 761, 764–68 (McKeown, J., dissenting).

1. *The Promise Scholarship's Requirements are Analogous to Other Permissible Limitations Placed on Government Funding Programs*

As illustrated by similar funding programs upheld by the U.S. Supreme Court, the Promise Scholarship's requirements are permissible. On a funding basis, the government action at issue in *Davey* is similar to the law in *Regan v. Taxation with Representation of Washington.*[281] In both cases, the plaintiff claimed that the government's decision to selectively fund certain activities violated their First Amendment rights and the Equal Protection Clause.[282] In *Regan*, the First Amendment right was to free speech;[283] in *Davey* the court focused on the right to the free exercise of religion.[284] Both claimed that once the state decided to generally subsidize an activity (lobbying in *Regan*; education scholarships in *Davey*), the state could not then selectively decline to fund other activities.[285] The *Regan* Court rejected this view, stating that "although government may not place obstacles in the path of a [person's exercise of a liberty], it need not remove those not of its own creation."[286] The same logic applies to the scholarship program at issue in *Davey.* Washington cannot prohibit students from studying theology, but it can decide not to fund those studies.

As noted above, the Court's decision in *Harris* also supports this conclusion.[287] The Promise Scholarship excepted religious degrees from an otherwise general funding program; the law at issue in *Harris* similarly excepted specific procedures, involving constitutionally protected rights, while funding other procedures in general.[288] The Court in *Harris* determined that this policy was permissible, stating that the program's condition left a woman with "at least the same range of choice" regarding an abortion as she would have had if Congress did not subsidize health care at all.[289]

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281. *Compare* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 542 (1983) (reviewing statute providing tax exemptions to certain nonprofit groups), *with Davey,* 299 F.3d at 750 (reviewing statute and policy providing scholarship to certain students); *see also* Appellees' Brief at 18–20, Davey v. Locke, 299 F.3d 748 (9th Cir. 2002) (No. 00-35962).

282. *Compare Regan,* 461 U.S. at 542, *with Davey,* 299 F.3d at 750.

283. 461 U.S. 540, 545 (1983).

284. 299 F.3d at 760.

285. *Compare Regan,* 461 U.S. at 545, *with Davey,* 299 F.3d at 753.

286. 461 U.S. at 549 (quoting Harris v. McRae, 448 U.S. 297, 316 (1980)).

287. *See supra* Part V.A.2.

288. *See* 448 U.S. at 301–02.

289. *Id.* at 317.

The law at issue in *Davey* is indistinguishable. The state opted in general to subsidize students that met the requirements of the Promise Scholarship, but not the pursuit of a theology degree.[290] The Promise Scholarship's requirements leave students "with at least the same range of choice"[291] in deciding upon a major as they would have had if the legislature had decided not to have the scholarship in the first place.[292]

Justice White's concurring opinion in *Harris* also supports this assertion. According to Justice White, the government's refusal to fund abortion procedures was not intended "to interfere with or to impose any coercive restraint" on a woman's liberty.[293] Because there was no coercive restraint, the state's acknowledged "legitimate interest in a potential life" was enough to rationally justify the conditional funding.[294] This same reasoning applies equally to the Promise Scholarship. The majority in *Davey* acknowledged that the state has an "indisputably strong interest in not appropriating or applying money to religious instruction as mandated by its constitution."[295] Far from seeking "to interfere with or impose any coercive restraint"[296] on Davey's pursuit of a theology degree, the state attempted to comply with its own constitution by not getting entangled in religious training.[297]

The *Davey* case is distinguishable from the *Legal Services* case as well. In striking down the restriction on federally-subsidized attorneys challenging the constitutionality of welfare programs, the Court in *Legal Services* emphasized the concern over manipulating the proper functioning of the courts.[298] Attorneys could not raise potential issues to the court, suggesting a separation of powers issue by requiring judges to rule on the constitutionality of programs without the benefit of hearing all possible arguments.[299] The Promise Scholarship raises no such separation of powers concerns. Rather, it is more analogous to the government restrictions on the advice family planning doctors receiving

290. *See* WASH. ADMIN. CODE § 250-80-020 (2001).

291. *See Harris*, 448 U.S. at 317.

292. *Cf. Davey*, 299 F.3d at 768 (McKeown, J., dissenting) ("Davey is just as reliant on private sources of aid for his education as he was before he applied for the scholarship funds.").

293. *Harris*, 448 U.S. at 328 (White, J., concurring).

294. *Id.*

295. Davey v. Locke, 299 F.3d 748, 759 (9th Cir. 2002).

296. *Harris*, 448 U.S. at 328 (White, J., concurring).

297. *See Davey*, 299 F.3d. at 761 (McKeown, J, dissenting).

298. 531 U.S. 533, 546 (2001).

299. *Id.*

federal funding could give to their patients in *Rust v. Sullivan*, which the Court upheld.[300] In so holding, the Court noted that participants could reasonably be expected to know the conditional nature of the program.[301] According to the Court, the program's restrictions did not compromise the physician-patient relationship because the participants should have known the bounds of the program and that they were free to go outside of the program to get abortion-related services.[302] In a similar manner, students receiving the Promise Scholarship were free to pursue a theology degree,[303] just not as a Promise Scholar. Thus, Washington's Promise Scholarship fell within the bounds of permissible funding programs under Supreme Court precedent.

2. *Washington's Refusal to Fund a Religious Degree Does Not Suppress Dangerous Ideas*

The majority in *Davey* also mistakenly concluded that a restriction on the funding of a religious degree is aimed "at the suppression of dangerous ideas."[304] The court's reliance on the *Rosenberger* decision fails because the *Davey* case did not involve a state-created public forum in which the state attempted to regulate speech based on viewpoint.[305] As a recipient of the Promise Scholarship, Davey could speak as freely on religious matters as he could if he were not a recipient.[306] This was not the case in *Rosenberger*, where the school conditioned funds on agreeing to not use the money for religious speech within the public forum.[307] As noted, the Promise Scholarship allows recipients to use state funds to

300. *See* 500 U.S. 173, 178 (1991).

301. *See id.* at 200 (noting the program does not "justify an expectation on the part of the patient of comprehensive medical advice").

302. *Id.* at 196–200; *accord Legal Servs.*, 531 U.S. at 546.

303. Washington law prohibited the state from providing scholarships to students pursuing theology degrees; it did not prohibit students from pursuing theology degrees. *See* WASH. REV. CODE § 28B.10.814 (2002).

304. Davey v. Locke, 299 F.3d 748, 755 (9th Cir. 2002).

305. *See Davey*, 299 F.3d at 766–68 (McKeown, J., dissenting); *accord* Davey v. Locke, 2000 U.S. Dist. LEXIS, 22273, at *21 (W.D. Wash. 2000), *rev'd*, 299 F.3d 748 (9th Cir. 2002).

306. In addition, to distinguish the *Rosenberger* and *Regan* cases, the U.S. Supreme Court, in *Rosenberger*, noted that the *Regan* decision was based on the "preferential treatment" of certain groups (veterans), and not the content of the speech as in *Rosenberger*. 515 U.S. at 834. Similarly, the Promise Scholarship's requirements are based on group status, not the content of that group's speech. *See* WASH ADMIN. CODE § 250-80-020(12)(f) (2001); WASH REV. CODE § 28B.10.814 (2002).

307. *See* 515 U.S. at 825.

enroll in religion classes and to attend religiously affiliated schools; it simply declines to fund an education culminating in a theology degree. As such, it doesn't attempt to close or limit access to a public forum based on viewpoint.[308]

Further, if the *Davey* court was correct and the Promise Scholarship's conditions are aimed at the suppression of dangerous ideas, then so are all "no aid" conditions supported by a half century of Establishment Clause decisions.[309] Over that time, the U.S Supreme Court has consistently approved of government funding programs that required secular or religiously-neutral use of state funds, while frequently striking down programs without these restrictions.[310] Under the Ninth Circuit's rationale in *Davey*, a program could not subsidize the construction of academic facilities generally but "expressly prohibit[] use of the facilities for religious purposes."[311] Yet in *Tilton*, a similar type of program survived an Establishment Clause challenge specifically *because* it had this requirement.[312] In fact, the Court struck down the portion of this law that allowed religious schools to use these buildings for religious purposes after twenty years as a violation of the Establishment Clause.[313]

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308. In non-public forum cases, a funding restriction is permissible unless it threatens "to drive certain ideas or viewpoints from the marketplace." *See* Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 587 (1998) (internal citations omitted); *see also* Legal Servs. Corp. v. Velazquez, 531 U.S 533, 552 (Scalia, J., dissenting). Considering that Promise Scholars are free to express religious opinions and views openly, it is doubtful that Davey could meet this requirement. *See Davey*, 299 F.3d at 766–68 (McKeown, J., dissenting).

309. *See supra* part I.B.1 (discussing Supreme Court precedent involving "no aid" to religion provisions).

310. *See supra* part I.B.1. In *Mitchell v. Helms*, 530 U.S. 793 (2000), Justice Thomas' plurality opinion commented that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it." *Id.* at 840. Yet a majority of the Court has never accepted this view. *Cf. id.* at 840 (O'Connor, J., concurring in judgment) (stating she "disagree[d] with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause").

311. *See* Tilton v. Richardson, 403 U.S. 672, 677 (1971) (plurality opinion); *accord* Hunt v. McNair, 413 U.S. 734, 759 (1973); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 759 (1976) (plurality opinion) (stating that "institutions are not so permeated by religion that the secular side cannot be separated from the sectarian") (citation omitted).

312. *See* 403 U.S. at 679–80; *cf.* Agostini v. Felton, 521 U.S. 203, 211–12, 235 (1997) (allowing public teachers to provide remedial instruction at religious schools, noting that "safeguards" ensured that no religious aid was provided through the program).

313. *Tilton*, 403 U.S. at 683. All justices agreed with the plurality that allowing religious use of the facilities after twenty years violated the Establishment Clause. *See id.* at 692 (Douglas, J., dissenting in part); Lemon v. Kurtzman, 403 U.S. 602, 660–61 (1970) (Brennan, J., concurring in part with *Lemon* and concurring and dissenting in part with *Tilton*); *id.* at 665 n.1 (White, J., concurring and dissenting in part with *Lemon* and concurring in judgment with *Tilton*).

Although the Ninth Circuit borrowed from other areas of First Amendment jurisprudence in its *Davey* opinion,[314] it did not address this Establishment Clause precedent. Instead, the *Davey* court relied heavily on the *Rosenberger* Court's analysis of the Establishment Clause in public forum cases.[315] But as Justice O'Connor stated in a concurring opinion in *Rosenberger*, that decision did not "signal[] the demise of the funding prohibition in Establishment Clause jurisprudence."[316] Had the Ninth Circuit looked at the Establishment Clause jurisprudence, it would have concluded that the Promise Scholarship does not impermissibly suppress "dangerous ideas."[317]

C. *Absent a "Free Exercise Problem," Strict Scrutiny is Not Required*

Assuming that there is no free exercise problem with the conditions of the Promise Scholarship, Washington did not need to establish a compelling government interest.[318] The Ninth Circuit acknowledged in *Davey* that "[t]he cases upon which [the state] relies . . . indicate that states may rely on their own (or the federal) establishment clause if there is *no* free exercise problem."[319] The *Davey* majority justified not following these cases because it found that a free exercise "problem" existed. Thus, it follows that if the Promise Scholarship's requirements did not indicate a free exercise "problem,"[320] then the Ninth Circuit should not have used strict scrutiny analysis. Instead, the court should

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314. *See supra* notes 228–233 and accompanying text.

315. *Davey*, 299 F.3d. at 755–56.

316. 515 U.S. 819, 852 (1995) (O'Connor, J., concurring).

317. *See supra* Part I.B.1.

318. *See, e.g.*, KDM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050–51 (9th Cir. 1999). Strict scrutiny would not be required under the *Hernandez* test because Davey could not prove a "substantial burden on the observation of a *central belief or practice.*" *See* Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999) (citing Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)) (emphasis in original). As discussed in the conditional funding cases, see *supra* Part V.B.1, the fact that Washington refuses to fund the pursuit of a religious degree does not place Davey in a worse position than he would have otherwise been. *See* Davey v. Locke, 299 F.3d 748, 768 (9th Cir. 2002) (McKeown, J., dissenting); *cf.* Harris v. McRae, 448 U.S. 297, 316–17 (1980) (concluding that Congress's refusal to pay for a medically necessary abortion "leaves an indigent woman with at least the same range of choice . . . as she would have had if Congress had chosen to subsidize no health care costs at all"). In addition, as the dissent in *Davey* makes clear, Davey has not factually shown that the restriction substantially burdened his exercise of religion. 299 F.3d at 764 (McKeown, J., dissenting). Indeed, Davey continued to pursue his studies, "finding *available* after-school work to make up the difference" of the scholarship. *Id.* (McKeown, J., dissenting) (emphasis in original).

319. *Davey*, 299 F.3d at 759 (emphasis in original).

320. *See supra* Parts V.A.1–V.A.2.

only have applied rational basis review to determine the Promise Scholarship's constitutionality.[321]

Under a rational basis review, Washington's funding decision is justified. The decision is rationally related to legitimate government interests, including ensuring the degree of church and state separation required under the Washington constitution.[322] Although the Ninth Circuit held that Washington's interest in not violating its own constitution could not survive strict scrutiny,[323] the court nevertheless acknowledged that this interest was "indisputably strong."[324] Consequently, Washington has a legitimate interest in not violating its own constitution and satisfies rational basis review. The Ninth Circuit came to a similar conclusion in *KDM*.[325] Addressing the petitioner's Equal Protection Clause claim in *KDM*, the Ninth Circuit held that the state's interest in not violating its own state constitution was a legitimate government interest.[326] If strict scrutiny is not required of this law and the Promise Scholarship is subject to rational basis review, then it follows that Washington's Promise Scholarship is constitutional.[327]

VI. CONCLUSION

Davey has the right to pursue a theology degree, but Washington has no duty to subsidize it. Washington believes that using state funds to subsidize religious training erodes the religious liberty that its state constitution attempts to protect. Because the object of the Promise Scholarship is to support higher education within the confines of the state

321. *See KDM*, 196 F.3d at 1050–51.

322. *See Davey*, 299 F.3d at 759.

323. *Id.* at 759–60.

324. *Id.* at 759.

325. 196 F.3d 1046, 1052 (9th Cir. 1999).

326. *Id.*

327. The Promise Scholarship might also be able to survive strict scrutiny analysis, if required. The U.S. Supreme Court in *Widmar v. Vincent* did not rule out the possibility that a state's attempt to comply with the mandates of its own constitution could ever rise to the level of a "compelling interest" justifying an infringement on the Free Exercise Clause. *See* 454 U.S. 263, 275 (1981). If it is possible, the Promise Scholarship would be a good candidate. First, the state's long history of ensuring religious liberty through the separation of church and state can be regarded as government action "protecting an interest of the highest order," as required by *Hialeah*. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (internal citations omitted). Second, the Promise Scholarship's rules are narrowly tailored to conform with the state's Constitution without being overly broad, as evidenced by the fact that students can use the scholarship at religiously affiliated schools. The Court's federalism jurisprudence and emphasis on state's rights might also support this conclusion. *See Davey*, 299 F.3d at 768 (McKeown, J., dissenting).

constitution and not to suppress religion, it should not be subject to strict scrutiny. The Promise Scholarship's conditions represent a rational choice by the state legislature to comply with the state constitution. Compared to other conditional funding programs approved by the Supreme Court, Washington's Promise Scholarship is constitutional.

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