

Constitutional Law—States Must Protect, but Not Sponsor, Free Exercise of Religion—*Locke v. Davey*, 540 U.S. 712 (2004)

The First Amendment to the Constitution of the United States guarantees that the Government will neither establish a religion, nor prohibit its citizens from the free exercise of their chosen religion.¹ The Establishment and Free Exercise Clauses prohibitions apply to state governments through the Fourteenth Amendment.² In *Locke v. Davey*,³ the Supreme Court considered whether the State of Washington may prohibit the distribution of a state-funded scholarship to a student enrolled in a devotional theology degree program.⁴ The Court held that the statute codifying the scholarship did not violate the Free Exercise Clause of the First Amendment.⁵

In 1999, the Washington State Legislature created the Promise Scholarship to assist qualified high school students in meeting the financial burden of paying for college.⁶ Joshua Davey graduated from high school in 1999 and qualified for the Promise Scholarship on academic and economic bases.⁷ As a scholarship recipient, Davey could use the funds to pay for his educational expenses at any eligible post-secondary institution in the state, provided that he did not enroll to pursue a degree in theology.⁸ After enrolling in the fall of 1999, Davey learned that he would not receive the scholarship because his declared major was Pastoral Ministries, which made him ineligible.⁹

1. U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”

2. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating First Amendment religion clauses through Fourteenth Amendment Due Process Clause).

3. 540 U.S. 712 (2004).

4. *Id.* at 715 (discussing issue before Court). The scholarship was created to help students from low- to middle-income families pay for college. WASH. REV. CODE § 28B.119.005 (2004). Washington Legislature’s intent, as codified, did not address the issue of students seeking a degree in devotional theology, however, the provision flows from the general prohibition in the State Constitution. WASH. CONST. art. I, § 11.

5. 540 U.S. at 720 (rejecting argument statute as presumptively unconstitutional).

6. *Id.* at 715-16 (discussing purpose of scholarship). The state legislature created the scholarship with the understanding that future success is often dependent upon a person receiving a post-secondary degree. WASH. REV. CODE § 28B.119.005 (2004).

7. *Davey v. Locke*, 299 F.3d 748, 750 (9th Cir. 2002) (describing scholarship qualifications), *rev’d*, 540 U.S. 712 (2004). Students are entitled to receive the scholarship if they graduate from a Washington State high school, graduate in the top 15% of their high school class, and their families income is no greater than 135% of the state median. WASH. ADMIN. CODE § 250-80-020(12) (a)-(e) (2004).

8. WASH. ADMIN. CODE § 250-80-020(12) (f)-(g) (2004) (describing parameters for disbursement). The scholarship program does not prohibit recipients from attending a school affiliated with a religious group provided that the school is accredited by a national accrediting body. *Id.* The scholarship recipient may use the proceeds for school-related expenses, such as tuition, fees, room and board, books, and materials. WASH. REV. CODE § 28B.119.010 (2004).

9. 540 U.S. at 717 (reviewing denial of benefit). Davey chose to attend Northwest College, an

The State Constitution, statutes or regulations do not define the term “theology”, however, both parties concede that Davey’s selected major, Pastoral Ministries, qualifies as a degree in theology.¹⁰ Northwest College notified Davey that the State would not award him the Promise Scholarship if he did not change his declared major.¹¹ Davey did not change his major, therefore the State refused to distribute the scholarship funds to him.¹²

Davey brought suit in federal district court claiming the State’s denial of the scholarship violated his First and Fourteenth Amendment rights to free exercise of religion and due process.¹³ The district court granted the state’s motion for summary judgment on the grounds that the Washington State Constitution provides greater protection against state funding of religious pursuits than the United States Constitution.¹⁴ The Ninth Circuit Court of Appeals reversed and held that the statute is facially discriminatory, and the only reason the State denied benefits was because Davey’s choice of major was religiously motivated.¹⁵ The Ninth Circuit held that the State’s interest in following its own constitutional protections against state-sponsored religious education was not compelling and failed to pass the strict scrutiny analysis required for a facially-discriminatory statute.¹⁶

institution affiliated with the Assemblies of God denomination. *Id.* Davey stated that his primary purpose for attending college was to become a pastor. Brief for Respondent at 4-5, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315). Davey claimed that his religious beliefs required him to become a minister of his church. *Id.* at 5-6.

10. 540 U.S. at 717 (reviewing stipulated facts); *see also* Brief for Respondent at 8, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315) (noting program’s religious viewpoint pivotal in Davey’s selection).

11. 540 U.S. at 717 (listing options school presented Davey). The statute only prohibits distribution of funds to students who have declared a major in devotional theology. Oral Arguments at 7-10, *Locke v. Davey* 540 U.S. 712 (2004) (No. 02-1315) (differentiating sectarian religious study from secular religious study). Davey testified that declaring a different major in order to receive the scholarship would not only be untruthful, but would violate his religious beliefs. Brief for Respondent at 6, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315).

12. 540 U.S. at 717 (stating Davey’s decision).

13. *Id.* at 718 (describing procedural history).

14. *Davey v. Locke*, No. C00-61R, 2000 U.S. Dist. LEXIS 22273, at *9 (W.D. Wash. Oct. 5, 2000) (granting state’s motion based on supreme court’s interpretation of State Constitution), *rev’d*, 299 F.3d 748 (9th Cir. 2002), *rev’d*, 540 U.S. 712 (2004). The district court also refused to extend the reasoning of the unemployment cases to cover state funding for religious education. *Id.* at *12-15; *see also infra* note 27 and accompanying text.

15. *Davey v. Locke*, 299 F.3d 748, 756 (9th Cir. 2002) (holding scholarship statute facially discriminates against theology students), *rev’d*, 540 U.S. 712 (2004). The circuit court compared the benefit denied in *McDaniel v. Paty* with the benefit denied to Davey. *Id.* at 754; *see also* *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). In *Paty*, the State of Tennessee barred ministers from serving in the state legislature and constitutional convention. 435 U.S. at 621; *see also* Derek D. Green, Note, *Does Free Exercise Mean Free State Funding? In Davey v. Locke, the Ninth Circuit Undervalued Washington’s Vision of Religious Liberty*, 78 WASH. L. REV. 653, 677 (2003) (arguing misapplication of strict scrutiny analysis in *Davey*). The Ninth Circuit held that a statute that is facially discriminatory but does not have the objective of suppressing religion does not require strict scrutiny review. Green, *supra*, at 677-78; *infra* note 19.

16. *Davey v. Locke*, 299 F.3d 748, 759-60 (9th Cir. 2002) (discussing interplay between Free Exercise and Establishment Clauses of First Amendment), *rev’d*, 540 U.S. 712 (2004). The court recognized the state’s interest in preserving its anti-establishment clause, but held that it should not come at the expense of creating

Congress included the religion clauses of the First Amendment in the Bill of Rights as a protection against government interference with religion.¹⁷ The Establishment Clause ensures that the Federal Government will not entangle itself in religion by sponsoring religion or by supporting one sect over another.¹⁸ The Free Exercise Clause guarantees individuals the freedom to believe in any or no faith without fear of the Government penalizing them for their beliefs.¹⁹ The Free Exercise Clause also guarantees that the Government will not coerce individuals to believe in any particular faith.²⁰ These First Amendment prohibitions against government action also apply to the states through the Fourteenth Amendment, thereby restricting states from passing laws discriminatory against religion.²¹

Most challenges to the religion clauses arise from alleged violations of state or federal establishment of religion.²² When reviewing a claim implicating the

free exercise violations. *Id.*

17. See U.S. CONST. amend. I; THE CONSTITUTION & RELIGION: LEADING SUPREME COURT CASES ON CHURCH AND STATE 16-26 (Robert S. Alley ed., 1999) (discussing James Madison's role in drafting religion clauses).

18. See MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14 (1978) (articulating Madison's desire to prohibit all forms of governmental aid). James Madison advocated for religious freedom in drafting the Virginia Declaration of Rights of 1776 and assuring the passage of Thomas Jefferson's Bill Establishing Religious Freedom in Virginia in 1786. *Id.*; see also THE CONSTITUTION & RELIGION, *supra* note 17, at 24-25 (explaining suggested language for First Amendment). The religious persecution Madison saw in his home state of Virginia motivated his desire to promote religious freedom. THE CONSTITUTION & RELIGION, *supra* note 17, at 16-17.

19. See *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 15-16 (1947) (explaining minimal protections provided by Establishment Clause). By interpreting the Establishment Clause to mean that "no person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance," Justice Black's opinion also applies to the Free Exercise Clause. *Id.*; see also DAVID G. SAVAGE, THE SUPREME COURT & INDIVIDUAL RIGHTS 92 (4th ed. 2004) (noting Free Exercise Clause prohibition on government action against religious beliefs).

20. See *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (citing prohibitions of government action relating to religion). There is little evidence to suggest the Framers' intent in including the Free Exercise Clause in the First Amendment, however, the Supreme Court has authoritatively interpreted its meaning. MALBIN, *supra* note 18, at 19-20 (commenting on lack of congressional debate over clause); see, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (observing Free Exercise Clause violated when law discriminates against religiously-motivated conduct); *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (finding exclusion of ministers from state constitutional convention violates Free Exercise Clause); *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 16 (1947) (holding state prohibited from refusing public welfare benefits based on religious beliefs). Writing for a unanimous Court in *West Virginia State Board of Education v. Barnett*, Justice Jackson summarized the freedoms guaranteed by the First Amendment: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. 624, 642 (1943).

21. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding state statute deprived appellant of religious liberty without due process).

22. James C. Knicely, "First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?, 52 DRAKE L. REV. 171, 173 (2004) (describing large number of Establishment Clause cases after *Everson*). *Cantwell v. Connecticut*, a case involving a violation of the Free Exercise Clause, is widely recognized as incorporating the religion clauses into the protections created by the Fourteenth Amendment. 310 U.S. 296, 303 (1940). It was not until *Everson*, however, that the Court applied the

Establishment Clause, courts rely on a three-part test to evaluate the constitutionality of the statute in question: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion []; finally, the statute must not foster ‘an excessive government entanglement with religion.’”²³ The first prong of the test is satisfied if the statute is facially neutral and serves a secular purpose.²⁴ A facially-neutral statute will not pass constitutional scrutiny if its underlying aim is to hinder or help a particular religion or religion generally.²⁵ Conversely, a court will likely uphold a statute if it has a legitimate secular purpose and only tangentially affects religion through its general application.²⁶ The third and final prong of the test balances the involvement of the government in religion against the legitimate interests that the statute serves.²⁷

The Free Exercise Clause is implicated when a statute requires a person to choose between the free exercise of his religion and receiving a governmental benefit.²⁸ If a statute burdens religious freedom, a court will use strict scrutiny in evaluating its constitutionality.²⁹ If a statute is facially discriminatory, it is presumed to be unconstitutional unless the state can show a compelling interest for the discrimination.³⁰ A free exercise violation can occur when the state either requires a person to act in contravention of his religious beliefs in order to obtain generally-available benefits or when a person may be criminally or

prohibitions of the Establishment Clause to the states. See THE CONSTITUTION & RELIGION, *supra* note 17, at 16 (discussing decisions to use Clause to declare unconstitutional statute allowing religious education in public schools). Since its *Everson* decision, the Court has heard approximately two cases per year that deal with the religion clauses. *Id.*

23. *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (using *Lemon v. Kurtzman* test to evaluate Minnesota tax provisions benefiting families sending children to religious school); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); see also *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) (adding free-exercise question to *Lemon* test). The *Tilton* case, setting forth the *Lemon* test, considered Establishment and Free Exercise Clause violations stemming from government funding for college facilities. *Tilton v. Richardson*, 403 U.S. 672, 674 (1971).

24. See *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (finding secular purpose in conditioning receipt of benefits on requirement to provide Social Security number).

25. See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (stating indirect violation of Free Exercise constitutionally invalid). In *Sherbert*, the Court held that the state’s denial of unemployment benefits imposed a burden on *Sherbert*’s ability to observe the Sabbath. *Id.*

26. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 649-50 (2002) (noting citizen’s private choice interrupts chain of benefit from government to religious schools).

27. See *Walz v. Tax Comm’n of the City of N.Y.*, 397 U.S. 664, 674-75 (1970) (holding property tax exemption for churches constitutional). In *Walz*, the Court theorized that the government would become more involved in religion, not less, if it required churches to pay the property tax. *Id.* at 675.

28. *Thomas v. Rev. Bd. of the Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (holding termination based on religious beliefs not disqualifying event for unemployment benefits); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding state prohibited from conditioning unemployment benefits on religious practice).

29. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (examining standard of review for constitutional burdens on religious freedom); *Thomas v. Rev. Bd. of the Employment Sec. Div.*, 450 U.S. 707, 718 (1981) (holding encroachment on religious liberty only justified by narrowly-tailored compelling state interest).

30. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (describing implication of neutrality or general applicability violations in constitutional review).

civily punished for acts that are religiously motivated.³¹

In *Locke v. Davey*, the Court held that the statute creating the Promise Scholarship was constitutional and did not violate Davey's free exercise of religion.³² The Court rejected Davey's claim that the scholarship was presumptively unconstitutional because it was discriminatory towards religion.³³ In its holding, the Court distinguished denying a college scholarship from denying ministers the right to participate in state government, denying unemployment benefits, or prohibiting animal sacrifices that are part of a religious ritual.³⁴

The Court held that Washington's denial of the scholarship to Davey represented the State's valid choice not to fund a particular field of study.³⁵ Because the Court denied Davey's free exercise claims, it declined to use strict scrutiny in analyzing his Fourteenth Amendment Equal Protection claims, opting instead to use rational basis review.³⁶ While the Court's decision is the correct one, it failed to properly support its reasoning with precedent.³⁷ The Court dismissed Davey's argument, concluding that the *Lukumi* test did not apply to these facts, but did not elaborate further.³⁸ A statute that denies a

31. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526-29 (1993) (describing city ordinances prohibiting animal sacrifice for religious purposes); *Thomas v. Rev. Bd. of the Employment Sec. Div.*, 450 U.S. 707, 720 (1981) (finding Jehovah's Witness erroneously denied unemployment benefits for refusing to make weapons of war); *Sherbert v. Verner*, 374 U.S. 398, 399-401 (1963) (condemning denial of unemployment benefits to Sabbatarian).

32. See 540 U.S. at 720 (rejecting presumption of unconstitutionality); Carlos S. Montoya, Note, *Constitutional Development: Locke v. Davey and the "Play in the Joints" Between the Religion Clauses*, 6 U. PA. J. CONST. L. 1159, 1174 (2004) (arguing facts did not require strict scrutiny analysis). The court made clear that the operation of the scholarship was not in hostility toward religion because it does not suppress the free exercise of religion. Montoya, *supra*, at 1174.

33. See 540 U.S. at 722 (denying state constitution violates Free Exercise Clause by refusing indirect funding to religion). The Court recognized that the Washington State Constitution is more restrictive than the United States Constitution in its prohibition against funding religion. *Id.*; see also Katie Axtell, Note, *Public Funding for Theological Training Under the Free Exercise Clause: Pragmatic Implications and Theoretical Questions Posed to the Supreme Court in Locke v. Davey*, 27 SEATTLE U. L. REV. 585, 615 (2003) (noting stronger protections in State Constitution). Since Congress granted Washington statehood in 1889, the state has maintained a strict separation between church and state. Axtell, *supra*, at 615.

34. See 540 U.S. at 720 (describing prohibited forms of free exercise constraints); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (invalidating statutes discriminating against practicing religious animal sacrifice); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 142-43 (1987) (holding unemployment benefits erroneously-denied to Seventh-Day Adventist); *McDaniel v. Paty*, 435 U.S. 618, 621 (1978) (discussing State Constitution disqualifying minister from state legislature).

35. See 540 U.S. at 720 (asserting Washington's "disfavor" of religion mild).

36. See *id.* at 720 n.3 (articulating level of review). The Court reviewed the State's interest in preserving the anti-establishment protections provided by the State Constitution. *Id.* at 722-23. Finding that the State's interest in refusing to fund the clergy with state taxpayer dollars was substantial, and the burden imposed on recipients denied the scholarship was minor, the Court held that the State's action passed the rational basis test. *Id.* at 721, 723-24.

37. See *id.* at 730 n.2 (Scalia, J., dissenting) (criticizing majority's standard of review).

38. See *id.* at 720 (differentiating criminal sanctions in *Lukumi* from scholarship denial). The Court did not clearly explain why the *Lukumi* test did not apply; it simply compared the prohibited practices to those discussed in *Lukumi* and then addressed the consequences of violating the respective statutes. *Id.*; cf. *Davey v.*

scholarship to a student who would otherwise qualify because the student's selected course of study is theology, seems to fit squarely within the *Lukumi* threshold test of facial discrimination.³⁹ In *Locke*, the Court failed to explain that, unlike animal sacrifice or Saturday observance of the Sabbath, pursuit of a college degree is not a religious practice.⁴⁰

Instead of highlighting this important distinction, the Court enumerated the ways in which the denial of the Promise Scholarship was less discriminatory than the factual circumstances present in cases in which free exercise violations actually occurred.⁴¹ Using this reasoning, the Court ignored its own precedent by focusing on the effects of the discrimination rather than actual discrimination.⁴² Further, the Court simply listed lines of cases as a type of precedential shorthand to explain why the Washington statute did not require Davey to choose between his religious beliefs and receiving the scholarship.⁴³ The Court seems to infer that although Davey's choice of major was religiously motivated, it was not protected religious practice.⁴⁴ Unlike workers who were forced to choose between working under conditions that violated their religious beliefs or forgoing unemployment benefits, Davey's choice was to select a

Locke, 299 F.3d 748, 753 (9th Cir. 2002) (finding Promise Scholarship lacked neutrality and distinguishing *Lukumi*) *rev'd*, 540 U.S. 712 (2004). The Ninth Circuit agreed that the statute did not prevent religious practice or rely on the religious motivations of the students, but found that the statute did violate the Free Exercise Clause because it discriminates on the basis of a student's status. *Davey*, 299 F. 3d at 753; *see also* *McDaniel v. Paty*, 435 U.S. 618, 627 (1978) (holding minister status prevented civic participation violated of Free Exercise).

39. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (explaining facial discrimination threshold issue). The Court looks to the text of the statute to consider whether it refers to a religious practice without secular meaning. *Id.*

40. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (stating discrimination test requires statute to address specific religious practice); *Sherbert v. Verner*, 374 U.S. 398, 399-402 (1963) (observing Saturday work violates religious requirement); *cf.* 540 U.S. at 724 (holding statute not hostile towards religion).

41. *See* 540 U.S. at 720 (comparing scholarship denial to jail, fines, prohibited actions). In *Lukumi*, the practitioners of Santeria could be fined or jailed if they practiced ritualistic animal sacrifice, a central rite of their religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525, 528 (1993). In contrast, Davey's choice to major in theology may have caused him to lose scholarship money, but the loss did not punish or sanction Davey for his choice, because electing theology as a major is not a religious practice. 540 U.S. at 720.

42. *See* 540 U.S. at 731 (Scalia, J., dissenting) (criticizing majority's de minimus standard). Justice Scalia appropriately highlighted the majority's lack of precedent for claiming that a minor burden on Davey signaled supposed discrimination. *Id.*; *see also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 142-43 (1987) (rejecting government's lower-burden argument).

43. *See* 540 U.S. at 721 (citing unemployment cases to contrast choice between following tenets of faith and choice of college major). The Court cites to *Sherbert* and its progeny to distinguish the denial of governmental aid. *Id.* *Sherbert* and subsequent cases involved workers who were fired because their religious beliefs prevented them from performing some aspect of their jobs. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 142-43 (1987) (reviewing denial of unemployment benefits for Seventh-Day Adventist); *Thomas v. Rev. Bd. of the Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981) (reviewing unemployment eligibility for Jehovah's Witness who refused to manufacture weapons); *Sherbert v. Verner*, 374 U.S. 398, 401 (1963) (reviewing unemployment eligibility for Seventh-Day Adventist unable to work on Saturdays).

44. *See* 540 U.S. 721 (explaining denial based on category of instruction not choice of religious practice).

major other than theology or forgo the scholarship.⁴⁵ No matter how strongly Davey felt that he was called to major in theology, opting not to do so could not be characterized as the state forcing him to violate the precepts of his religion in order to receive a scholarship.⁴⁶

Instead of focusing its holding on why the Promise Scholarship does not require strict-scrutiny analysis, the Court spent considerable time buttressing its opinion that Washington's interest in enforcing its anti-establishment goals does not rise to the level of hostility towards religion.⁴⁷ The Establishment Clause issue is tangential to Davey's other claims, and analysis of hostility toward religion only begs the question of whether there is a free exercise violation.⁴⁸ Given that the United States and Washington State Supreme Courts have both authoritatively decided this issue, it is surprising that the Court focused so heavily on Washington's Constitution for hostility towards religion.⁴⁹

By not clearly explaining why Washington did not violate Davey's right to free exercise, the Court confused, rather than clarified, the issue of when religiously-motivated actions are protected and when they are not. Although the Court's conclusion is correct, its lack of explanation opens the door for future violations resulting from careless drafting of statutes or incorrect interpretation of precedent. The Court failed to make clear its rationale for why it found no violation. The Court should have articulated that the statute did not require strict scrutiny judicial review because it is not discriminatory on its face and does not cause students to choose between practicing their faith and receiving the scholarship; not because harm done was minimal or because the state satisfied its burden to prove that it had a rational basis for denial.

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45. See *Thomas v. Rev. Bd. of the Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981) (deciding religiously-motivated refusal to manufacture weapons protected under free exercise); *Sherbert v. Verner*, 374 U.S. 398, 401 (1963) (holding unemployment program prohibited from requiring choice between religion and benefit).

46. See *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) (noting Free Exercise violation measured by interference with religious conscience and not degree of injury). In his concurrence, Justice Douglas summed up the limits of free exercise: "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Id.*; see also *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (holding government not required to assist spiritual development).

47. See 540 U.S. at 722-23 (reviewing American anti-establishment history). The Court discussed antiestablishment in terms of laws that specifically aided the ministry. *Id.* at 722. As Justice Scalia points out in his dissent, there is a wide gap between laws enacted to pay clergy from taxpayer funds and a general benefit that coincidentally aids some clergy. *Id.* at 1316 (Scalia, J., dissenting).

48. See 540 U.S. at 718 (reciting Davey's claims). The Court's review of legislative intent for hostility is not an analysis that the Court has utilized in deciding past discrimination or Free Exercise cases. *Supra* text accompanying notes 23-27, 30-31 (discussing review standard); see also 540 U.S. at 731 (Scalia, J., dissenting) (contrasting discrimination analysis in school desegregation cases).

49. See 540 U.S. at 722-23 (reviewing anti-establishment history not hostile towards religion).