SUPREME COURT OF THE UNITED STATES

No. 02–1315

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

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

[February 25, 2004]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah,* 508 U. S. 520 (1993), the majority opinion held that "[a] law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny," *id.*, at 546, and that "the minimum requirement of neutrality is that a law not discriminate on its face," *id.*, at 533. The concurrence of two Justices stated that "[w]hen a law discriminates against religion as such, . . . it automatically will fail strict scrutiny." *Id.*, at 579 (Blackmun, J., joined by O'CONNOR, J., concurring in judgment). And the concurrence of a third Justice endorsed the "noncontroversial principle" that "formal neutrality" is a "necessary conditio[n] for free-exercise constitutionality." *Id.*, at 563 (SOUTER, J., concurring in part and concurring in judgment). These opinions are irreconcilable with today's decision, which sustains a public benefits program that facially discriminates against religion.

I

We articulated the principle that governs this case more than 50 years ago in *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1 (1947):

> "New Jersey cannot hamper its citizens in the free ex-

> ercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.*, at 16 (emphasis deleted).

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.

That is precisely what the State of Washington has done here. It has created a generally available public benefit, whose receipt is conditioned only on academic performance, income, and attendance at an accredited school. It has then carved out a solitary course of study for exclusion: theology. Wash. Rev. Code §28B.119.010(8) (Supp. 2004); Wash. Admin. Code §250–80–020(12)(g) (2003). No field of study but religion is singled out for disfavor in this fashion. Davey is not asking for a special benefit to which others are not entitled. Cf. *Lyng* v. *Northwest Indian Cemetery Protective Assn.,* 485 U. S. 439, 453 (1988). He seeks only *equal* treatment—the right to direct his scholarship to his chosen course of study, a right every other Promise Scholar enjoys.

The Court's reference to historical "popular uprisings against procuring taxpayer funds to support church leaders," *ante*, at 8, is therefore quite misplaced. That history involved not the inclusion of religious ministers in public benefits programs like the one at issue here, but laws that singled them out for financial aid. For example, the Virginia bill at which Madison's Remonstrance was directed provided: "[F]or the support of Christian teachers . . . [a]

sum payable for tax on the property within this Commonwealth, is hereby assessed . . . ." A Bill Establishing a Provision for Teachers of the Christian Religion (1784), reprinted in *Everson*, *supra*, at 72. Laws supporting the clergy in other States operated in a similar fashion. See S. Cobb, The Rise of Religious Liberty in America 131, 169, 270, 295, 304, 386 (1902). One can concede the Framers' hostility to funding the clergy *specifically*, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all. No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church.[1]

The Court does not dispute that the Free Exercise Clause places some constraints on public benefits programs, but finds none here, based on a principle of "'play in the joints.'" *Ante*, at 4. I use the term "principle" loosely, for that is not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives. There is nothing anomalous

[1] Equally misplaced is the Court's reliance on founding-era state constitutional provisions that prohibited the use of tax funds to support the ministry. *Ante*, at 9–10. There is no doubt what these provisions were directed against: measures of the sort discussed earlier in text, singling out the clergy for public support. See *supra*, at 2–3. The Court offers no historical support for the proposition that they were meant to exclude clergymen from general benefits available to all citizens. In choosing to interpret them in that fashion, the Court needlessly gives them a meaning that not only is contrary to our Religion Clause jurisprudence, but has no logical stopping-point short of the absurd. No State with such a constitutional provision has, so far as I know, ever prohibited the hiring of public employees who use their salary to conduct ministries, or excluded ministers from generally available disability or unemployment benefits. Since the Court cannot identify any instance in which these provisions were applied in such a discriminatory fashion, its appeal to their "plain text," *ante*, at 9, adds nothing whatever to the "plain text" of Washington's own Constitution.

about constitutional commands that abut. A municipality hiring public contractors may not discriminate *against* blacks or *in favor of* them; it cannot discriminate a little bit each way and then plead "play in the joints" when haled into court. If the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones.

Even if "play in the joints" were a valid legal principle, surely it would apply only when it was a close call whether complying with one of the Religion Clauses would violate the other. But that is not the case here. It is not just that "the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology." *Ante*, at 5. The establishment question *would not even be close*, as is evident from the fact that this Court's decision in *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986), was unanimous. Perhaps some formally neutral public benefits programs are so gerrymandered and devoid of plausible secular purpose that they might raise specters of state aid to religion, but an evenhanded Promise Scholarship Program is not among them.

In any case, the State already has all the play in the joints it needs. There are any number of ways it could respect both its unusually sensitive concern for the conscience of its taxpayers *and* the Federal Free Exercise Clause. It could make the scholarships redeemable only at public universities (where it sets the curriculum), or only for select courses of study. Either option would replace a program that facially discriminates against religion with one that just happens not to subsidize it. The State could also simply abandon the scholarship program altogether. If that seems a dear price to pay for freedom of conscience, it is only because the State has defined that freedom so broadly that it would be offended by a program with such an incidental, indirect religious effect.

What is the nature of the State's asserted interest here?

It cannot be protecting the pocketbooks of its citizens; given the tiny fraction of Promise Scholars who would pursue theology degrees, the amount of any citizen's tax bill at stake is *de minimis*. It cannot be preventing mistaken appearance of endorsement; where a State merely declines to penalize students for selecting a religious major, "[n]o reasonable observer is likely to draw . . . an inference that the State itself is endorsing a religious practice or belief." *Id.*, at 493 (O'CONNOR, J., concurring in part and concurring in judgment). Nor can Washington's exclusion be defended as a means of assuring that the State will neither favor nor disfavor Davey in his religious calling. Davey will throughout his life contribute to the public fisc through sales taxes on personal purchases, property taxes on his home, and so on; and nothing in the Court's opinion turns on whether Davey winds up a net winner or loser in the State's tax-and-spend scheme.

No, the interest to which the Court defers is not fear of a conceivable Establishment Clause violation, budget constraints, avoidance of endorsement, or substantive neutrality—none of these. It is a pure philosophical preference: the State's opinion that it would violate taxpayers' freedom of conscience *not* to discriminate against candidates for the ministry. This sort of protection of "freedom of conscience" has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context. The Court never says whether it deems this interest compelling (the opinion is devoid of any mention of standard of review) but, self-evidently, it is not.[2]

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[2] The Court argues that those pursuing theology majors are not comparable to other Promise Scholars because "training for religious professions and training for secular professions are not fungible." *Ante*, at 7. That may well be, but all it proves is that the State has a *rational basis* for treating religion differently. If that is all the Court requires,

II

The Court makes no serious attempt to defend the program's neutrality, and instead identifies two features thought to render its discrimination less offensive. The first is the lightness of Davey's burden. The Court offers no authority for approving facial discrimination against religion simply because its material consequences are not severe. I might understand such a test if we were still in the business of reviewing facially neutral laws that merely happen to burden some individual's religious exercise, but we are not. See *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U. S. 872, 885 (1990). Discrimination *on the face of a statute* is something else. The indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial. The Court has not required proof of "substantial"

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its holding is contrary not only to precedent, see *supra*, at 1, but to common sense. If religious discrimination required only a rational basis, the Free Exercise Clause would impose no constraints other than those the Constitution already imposes on all government action. The question is not whether theology majors are different, but whether the differences are substantial enough to justify a discriminatory financial penalty that the State inflicts on no other major. Plainly they are not.

Equally unpersuasive is the Court's argument that the State may discriminate against theology majors in distributing public benefits because the Establishment Clause and its state counterparts are themselves discriminatory. See *ante*, at 7–8, 9–10. The Court's premise is true at some level of abstraction—the Establishment Clause discriminates against religion by singling it out as the one thing a State may not establish. All this proves is that a State has a compelling interest in not committing *actual* Establishment Clause violations. Cf. *Widmar* v. *Vincent,* 454 U. S. 263, 271 (1981). We have never inferred from this principle that a State has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns.

concrete harm with other forms of discrimination, see, *e.g.*, *Brown* v. *Board of Education,* 347 U. S. 483, 493–495 (1954); cf. *Craig* v. *Boren,* 429 U. S. 190 (1976), and it should not do so here.

Even if there were some threshold quantum-of-harm requirement, surely Davey has satisfied it. The First Amendment, after all, guarantees *free* exercise of religion, and when the State exacts a financial penalty of almost $3,000 for religious exercise—whether by tax or by forfeiture of an otherwise available benefit—religious practice is anything *but* free. The Court's only response is that "Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology." *Ante*, at 7, n. 4. But part of what makes a Promise Scholarship attractive is that the recipient can apply it to his *preferred* course of study at his *preferred* accredited institution. That is part of the "benefit" the State confers. The Court distinguishes our precedents only by swapping the benefit to which Davey was actually entitled (a scholarship for his chosen course of study) with another, less valuable one (a scholarship for any course of study *but* his chosen one). On such reasoning, any facially discriminatory benefits program can be redeemed simply by redefining what it guarantees.

The other reason the Court thinks this particular facial discrimination less offensive is that the scholarship program was not motivated by animus toward religion. The Court does not explain why the legislature's motive matters, and I fail to see why it should. If a State deprives a citizen of trial by jury or passes an *ex post facto* law, we do not pause to investigate whether it was actually trying to accomplish the evil the Constitution prohibits. It is sufficient that the citizen's rights have been infringed. "[It does not] matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens." *Lukumi*, 508 U. S., at

559 (SCALIA, J., concurring in part and concurring in judgment).

The Court has not approached other forms of discrimination this way. When we declared racial segregation unconstitutional, we did not ask whether the State had originally adopted the regime, not out of "animus" against blacks, but because of a well-meaning but misguided belief that the races would be better off apart. It was sufficient to note the current effect of segregation on racial minorities. See *Brown*, *supra*, at 493–495. Similarly, the Court does not excuse statutes that facially discriminate against women just because they are the vestigial product of a well-intentioned view of women's appropriate social role. See, *e.g.*, *United States* v. *Virginia,* 518 U. S. 515, 549–551 (1996); *Adkins* v. *Children's Hospital of D. C.,* 261 U. S. 525, 552–553 (1923). We do sometimes look to legislative intent to smoke out more subtle instances of discrimination, but we do so as a *supplement* to the core guarantee of facially equal treatment, not as a replacement for it. See *Hunt* v. *Cromartie,* 526 U. S. 541, 546 (1999).

There is no need to rely on analogies, however, because we have rejected the Court's methodology in this very context. In *McDaniel* v. *Paty,* 435 U. S. 618 (1978), we considered a Tennessee statute that disqualified clergy from participation in the state constitutional convention. That statute, like the one here, was based upon a state constitutional provision—a clause in the 1796 Tennessee Constitution that disqualified clergy from sitting in the legislature. *Id.*, at 621, and n. 1 (plurality opinion). The State defended the statute as an attempt to be faithful to its constitutional separation of church and state, and we accepted that claimed benevolent purpose as bona fide. See *id.*, at 628. Nonetheless, because it did not justify facial discrimination against religion, we invalidated the

restriction. *Id.*, at 629.[3]

It may be that Washington's original purpose in excluding the clergy from public benefits was benign, and the same might be true of its purpose in maintaining the exclusion today. But those singled out for disfavor can be forgiven for suspecting more invidious forces at work. Let there be no doubt: This case is about discrimination against a religious minority. Most citizens of this country identify themselves as professing some religious belief, but the State's policy poses no obstacle to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far narrower set. One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction. In an era when the Court is so quick to come to the aid of other disfavored groups, see, *e.g.*, *Romer* v. *Evans,* 517 U. S. 620, 635 (1996), its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional.

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Today's holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go. What next? Will we deny priests and nuns their prescription-drug benefits on the ground that taxpayers' freedom of conscience forbids medicating the clergy at public expense? This may seem fanciful, but recall that France has proposed banning religious attire from schools, invoking interests in secularism no less benign than those

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[3] *McDaniel* had no opinion for the Court, but nothing in the separate opinions suggests disagreement over the issues relevant here. Cf. 435 U. S., at 636, n. 9 (Brennan, J., concurring in judgment) (noting dispute over statute's purpose but deeming it irrelevant).

the Court embraces today. See Sciolino, Chirac Backs Law To Keep Signs of Faith Out of School, N. Y. Times, Dec. 18, 2003, p. A17. When the public's freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression. Having accepted the justification in this case, the Court is less well equipped to fend it off in the future. I respectfully dissent.