Spring 2004

Supreme Court Watch

Reginald Oh
Cleveland-Marshall College of Law, Cleveland State University, r.oh@csuohio.edu

SUPREME COURT WATCH

By Reginald C. Oh

In its 2003–04 Term, the U.S. Supreme Court, in an attempt to clarify its First Amendment jurisprudence on the religion clauses, handed down its decision in *Locke v. Davey,* No. 02-1315, 2004 WL 344123 (U.S. Feb. 25, 2004). In a 7–2 decision, the Court held that the State of Washington did not violate the First Amendment Free Exercise Clause by denying government financial aid to college students seeking to pursue a course of study in religious devotional studies.

In clarifying its free exercise jurisprudence, the Court in *Davey* properly held that the mere fact that a law facially discriminates against religion should not automatically render the law presumptively unconstitutional and therefore trigger heightened judicial review. This holding is consistent with the Court's institutional role to not intervene into state political processes unless the state is significantly burdening and infringing upon fundamental constitutional rights. In other words, under *Davey,* the fact that a statute facially discriminates against religion does not, *by itself,* create a constitutionally cognizable burden on the right to freely exercise religion.

At issue in this case was the State of Washington's "Promise Scholarship Program," which was established in 1999 to provide financial assistance to gifted low-income students pursuing a postsecondary education. The program provides students who meet certain eligibility requirements with scholarships, renewable for one year, which students can use to defray postsecondary education-related expenses. The scholarships are funded through the state's general fund and the amount varies from year to year. For the academic year 1999–2000, the scholarship was worth $1,125. For the academic year 2000–01, the scholarship was worth $1,542. Under the program, students are eligible for the scholarship if they meet certain academic, income, and enrollment requirements. The program even permits students who are eligible to receive a Promise Scholarship to attend a religiously affiliated private institution of higher education.

Reginald C. Oh is an assistant professor of law at the Appalachian School of Law in Grundy, Virginia.

The program, however, prohibits otherwise eligible students from receiving a Promise Scholarship if they decide to pursue a course of study in religious devotional studies. The statute states, "No aid shall be awarded to any student who is pursuing a degree in theology." WASH. REV. CODE § 28B.10.814 (1997). Although the term "a degree in theology" is not defined in the statute, the statute codifies the Washington Constitution's own Establishment Clause, which states, "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." WASH. CONST. art. I, § 11.

Respondent Joshua Davey, a Promise Scholar recipient, enrolled at Northwest College to pursue a double-major in pastoral ministries and business management/administration. Northwest College is a private, religiously affiliated school. At the beginning of the 1999–2000 academic year, Davey was informed by the school's director of financial aid that he could not use his scholarship if he decided to pursue a major in religious devotional studies. He was told that in order to receive his scholarship funds, he must sign a form stating that he would not be pursuing a degree in devotional studies at the school. He refused to sign the form and was denied the scholarship.

Davey then brought an action under 42 U.S.C. § 1983 alleging that the denial of his scholarship based on his decision to pursue a pastoral ministries major violated the First Amendment Establishment, Free Exercise, and Free Speech Clauses, and that it violated the Fourteenth Amendment Equal Protection Clause. The district court rejected his constitutional claims, but on appeal, the Ninth Circuit reversed and held that Washington's statute denying public funds to students pursuing devotional studies violated the Free Exercise Clause. The State of Washington appealed the decision to the U.S. Supreme Court, and the Court granted certiorari.

The Court held that Washington's statute did not violate the Free Exercise Clause. In an opinion written by Chief Justice Rehnquist, the Court framed the issue as one involving a tension or "play in the joints" between the command of the Establishment Clause and the protections of the Free Exercise Clause. The conflict arises when a state's attempt to avoid an establishment of religion seemingly discriminates against religion and arguably burdens the right to freely exercise religion. Thus, in *Davey,* respondent Davey argued that the State of Washington, in denying scholarships to people pursuing religious devotional studies, infringed upon his right to freely exercise religion. The State of Washington responded that it had to exclude funding religious studies in order to prevent an establishment of religion breach according to the state's constitution.

Although the state could have decided to fund religious studies without violating the federal Establishment Clause, *see Witters v. Washington Dep't of Services for the Blind,* 474

U.S. 481 (1989), the question before the Court in *Davey* was whether the State of Washington could follow the command of its own more restrictive establishment clause and deny public funding of religious studies without running afoul of the federal Free Exercise Clause.

The Court concluded that the State of Washington may properly exclude religious studies from its scholarship program without violating the Free Exercise Clause, even though the program facially discriminates with respect to religion. For the Court, there were two key factors that it used to conclude that the State of Washington did not violate the Free Exercise Clause: first, the Court emphasized that the program created minimal burdens on the right to freely exercise religion, and second, the Court concluded that the State of Washington did not act with animus toward religion and religious groups in excluding religious training studies from its scholarship program.

The Court concluded that Washington's statute did not create significant burdens on the right of free exercise. The Court distinguished the state's denial of public funding for religious studies from the law in *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993), which the Court held was unconstitutional because it unreasonably burdened religious rights by making it a crime to engage in certain forms of ritualistic animal slaughter. In that case, the Court reasoned that the criminal prohibition against animal slaughter suppressed a practice central to that of a particular religion, and therefore the Court concluded that the law not only facially discriminated against religion, but it also created an unreasonable burden on the right to freely exercise religion.

In contrast, in *Davey,* the Court emphasized that Washington's law denying scholarships to students pursuing religious devotional studies has only a "minimal" burden on religious rights. The program's exclusion does not impose any criminal or civil sanctions on a religious rite, as did the law in *Lukumi.* Moreover, the law does not absolutely deny or deprive a person a right or entitlement based on his or her religious beliefs or course of religious study. The student is still free to pursue his choice of study, but in doing so, he or she may not receive government funding to subsidize his choice.

Second, the Court emphasized that the program's exclusion of religious studies does not indicate the state's hostility or animus toward religion or religious groups. The state's desire to treat training for religious professions differently from training for secular professions reflects the state's goal of preserving a strict separation between the state and religion, rather than an overt hostility toward religion. This conclusion was supported by the fact that, overall, the Promise Scholarship Program "goes a long way toward including religion in its benefits." For example, the Court noted that the program permits scholarships to be granted to students attending "pervasively religious schools," and that a student like Davey could still take devotional theology courses even if they may not study theology as majors.

Thus, the Court concluded that mere facial discrimination of religion does not automatically give rise to a presumption of unconstitutionality. Rather, to determine whether a law that facially discriminates on the basis of religion should be subject to strict scrutiny for purposes of free exercise doctrine, the Court effectively held that it must conduct a two-part inquiry into (1) whether the facially discriminatory law unreasonably burdens the right of religious expression and (2) whether the law reflects hostility or animus against religion or religious groups. In *Davey,* the Court concluded that the Promise Scholarship Program's exclusion of funding for religious studies did not burden the right of religious expression and was not motivated by animus toward religion. Accordingly, the law was not presumed to be unconstitutional, and the Court reviewed the Scholarship Program under rational basis review rather than under strict scrutiny review.

Justice Scalia wrote a dissenting opinion, an opinion joined by Justice Clarence Thomas. Justice Scalia contended that the program violated the Free Exercise Clause because it facially discriminates against religion, and because the state has no compelling interest to justify its discrimination. For Justice Scalia, the key to a free exercise analysis is whether the law facially discriminates against religion. If a law is not facially neutral with respect to religion, Justice Scalia contends that, under *Lukumi,* the Court must apply strict scrutiny to determine the constitutionality of the law. Under strict scrutiny analysis, Justice Scalia concluded that the law was not narrowly tailored to further a compelling state interest. The law singled out religion for denial of funding, and he could find no compelling interest to justify such discrimination against religion.

Justice Scalia characterized the paradigmatic harm that the Free Exercise Clause seeks to protect as the dignitary harm caused by "being singled out for special burdens on the basis of one's religious calling. . . ." *Davey,* 2004 WL 344123 at 8. He called such a dignitary burden "so profound that the concrete harm produced can never be dismissed as insubstantial." Id. Justice Scalia's reasoning is consistent with his reasoning in equal protection jurisprudence dealing with racial classifications. In fact, he even cites to *Brown v. Board of Education,* 347 U.S. 483 (1954) (holding that public schools segregated on the basis of race violates equal protection), to support his proposition that facial discrimination, whether on the basis of race or religion, by itself creates a constitutionally cognizable harm, regardless of whether or not the law actually has a significant burden on fundamental rights.

Essentially, Justice Scalia seems to consider the abstract, formal "dignitary harm" caused anytime the state facially discriminates on the basis of religion as being the central concern of the Free Exercise Clause. Yet, curiously, he is less concerned about whether the right to freely exercise religion is *actually* harmed or burdened by facially discriminatory or facially neutral government regulations. For example, he wrote the majority decision in *Employment Div., Dep't of Human Res. of Oregon v. Smith,* 494 U.S. 872 (1990), in which the Court held that a facially neutral law with general application does not implicate the Free Exercise Clause even if the effect of the law is to substantially interfere with religious practices and beliefs.

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Justice Rehnquist's majority opinion, however, effectively rebuts Justice Scalia's contention that a facially discriminatory law presumptively creates a dignitary burden on religion. The Court emphasized that Washington's Promise Program was not borne out of animus toward religion and religious groups, especially since the program permits students to attend religiously affiliated schools and still receive a Promise scholarship. The lack of animus toward religion on the State of Washington's part minimizes any concern that the law's purpose or effect is to demean religion in any significant way. In other words, the majority concluded that any dignitary harm caused by application of a facially discriminatory law does not arise from the mere fact that a law facially discriminates, but arises only if the discrimination is a manifestation of the state's animus or hostility to religion. Thus, although Washington's program discriminates against religion, it does not *invidiously* discriminate against religion, and therefore the majority in *Davey* concluded that the program does not truly give rise to substantial free exercise dignitary harms that required its invalidation.