

AN ANALYSIS OF FIRST AMENDMENT JURISPRUDENCE
ON THE SUPREME COURT CASE OF LOCKE V. DAVEY

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ABSTRACT

An Analysis of First Amendment Jurisprudence On the Supreme Court Case of *Locke v. Davey*

by

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Scholarship programs authored by state legislatures may conflict with a state's constitution. In the case of *Locke v. Davey* 540 U.S. 807 (2003), Joshua Davey challenged the State of Washington's withdrawal of his Promise Scholarship claiming violation of his First Amendment rights under the United States Constitution.

This historical case study analyzes the Supreme Court jurisprudence regarding legal issues concerning the issuance of state funded scholarships for the purpose of religious studies. The study included a review of all relevant court cases, court filings, legal journals and legal briefs.

Synthesizing this information provided a refined understanding of the implications of the Establishment Clause and Free Exercise Clause of the First Amendment and the impact of this case on federal and state funded scholarship programs. An analysis of the impact of *Locke* and other relevant decisions is offered to state administrators of scholarships that are publicly funded so that administrators may review and adjust their policies in accordance with legal precedent.

A micro legal analysis of Justice Rehnquist's opinion was also performed using the judicial decision making template formulated by Judge Benjamin N. Cardozo describing a general process for judicial decision making. Chief Justice Rehnquist's opinion in the *Locke v. Davey* case was examined using the template to determine whether his decision making approach is congruent with the advice of Judge Cardozo. (Cardozo 1921) The micro analysis of the decision indicated that Justice Rehnquist utilized the decision making template developed by Judge Cardozo.

A macro legal analysis was also implemented to determine if the decision in *Locke v. Davey* supported or refuted Jeffery Rosen's theory that the Supreme Court makes decisions based on public sentiment.(Rosen 2006). The macro legal analysis determined that the decision in *Locke v. Davey* could be credibly argued as supporting and refuting Rosen's theory thereby highlighting the imprecision of the theory and the need for further development of Rosen's theoretical framework.

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CHAPTER I

INTRODUCTION

Overview

Attending college today can be a costly endeavor. In 2007-08, the average annual tuition for private schools was \$20,492 per year; for public institutions, it averaged \$5,685 per year nationwide (Chronicle of Higher Education Almanac, 2007-08). However, if a student desires to attend an institution of higher learning, there are avenues for making the pursuit of a higher education financially possible.

Financial aid to pursue higher education is available in three forms: grants, loans, and employment through the use of the Federal Work-Study Program. (Free Application for Federal Student Aid <http://www.fafsa.ed.gov/> ,2008) Grants are often called scholarships, prizes, awards, or grants-in-aid and represent a transfer of resources to students and involve no repayment. They can be funded by federal or state dollars or from private entities and can be need-based, merit-based, or issued without any stipulations attached. (Panel on Student Financial Need Analysis, 1971)

The United States federal government offers Pell Grants to undergraduate students pursuing a degree in higher education based on demonstrated financial need. In the fiscal year 2004-05, the United States federal government issued \$13 billion in Pell Grants to 5, 302,000 students seeking college educations. In fiscal year 2005-06, the government provided \$12.8 billion in Pell Grants to 5,387,000 students. These funds are to be used by student's to attend

institutions of higher education. (Chronicle of Higher Education Almanac, 2006-07; 2007-08).

The U.S. National Center for Education Statistics reported that in 2007 the average tuition for public four year higher education institutions was \$4,102 per year and private four year tuition average \$20,048 per year. The Statistical Abstract of the United States published by the U.S. Census Bureau (2010) shows that estimates of grant awards from the Federal Government for 2008 were at 90.7 billion dollars and in 2009 the estimate is 94.3 billion dollars. (Digest for Education Statistics, Table 282, 2010) (Statistical Abstract of the United States, Table 280, 2010)

Grants and scholarships may also be available through individual state programs. For example, the State of Nevada subsidizes tuition through a program called the Millennium Scholarship. Initially, these scholarships were available to graduates of Nevada's high schools with a grade point average (GPA) of at least a 3.1 on a 4.0 scale in a core curriculum. Beginning in 2007, Nevada high school graduates needed a 3.25 GPA to be eligible for the Guinn Millennium Scholarship. In addition to the required grade point average, applicants must pass all areas of the Nevada high school proficiency examination. Students who earn the Millennium Scholarship must attend a Nevada System of Higher Education (NSHE) post secondary institution. A student who elects to attend a NSHE community college will receive \$40 per enrolled lower division credit hour and \$60 per enrolled upper division credit hour. Those students that attend a NSHE state college will receive \$60 per

enrolled credit hour. Students enrolled at UNR or UNLV will receive \$80 per enrolled credit hour. Non-profit, non-sectarian institutions of higher education in the state of Nevada such as Sierra Nevada College are also eligible to receive scholarship funds. Such an institution must also be established under the laws of the state and accredited by a regional accrediting agency recognized by the U.S. Department of Education (NSHE Board of Regents, 2006).

The State of Washington also offered aid to students seeking higher education. The state established the Promise Scholarship in 1999 (Washington State Statute in 2002 Senate / House Bill 2807, 2002) to allow low-income eligible students the opportunity to attend college.

Students receiving the scholarship were required to meet the following criteria:

- Be reported by their public or private high school in the top 15% of their graduating class or earn a combined score of at least 1,200 on the SAT or at least 27 on the ACT on their first attempt;
- Have a family income equal to or less than 135% of the state median; and
- Enroll at least half-time at an accredited college, university, or vocational school in Washington state

(State of Washington Higher Education Coordinating Board
Policy Manual, 1999)

The actual amount awarded for each student's first year in Washington was \$1,125 in 1999-2000. Students could then reapply for the award for a second year and were eligible for \$1,542 in 2000-01 (Ibid).

The funds were sent to the student's college or university of choice and held in the qualifying student's name. Once the institution certified that the student was enrolled in the institution at least half-time and eligible to receive the award, the scholarship funds were released. The funds could be used for education-related expenses including tuition, books, and/or room and board. The funds were applied to the expenses at the institution first and the rest distributed to the student to be used at his/her discretion (Ibid).

The mission of Washington's Promise Scholarship was similar to many other states that provide a program specifically to provide higher education opportunities to bright individuals who otherwise could not attend college due to financial constraints (Ibid).

Joshua Davey Background

Joshua Davey was a high school senior living in the State of Washington. Joshua's dream was to be a minister someday. He met the criteria of Washington's Promise Scholarship and applied for the aid in the spring of 1999. He was awarded the scholarship to start college that fall. He applied to and was accepted at Northwest College, an accredited, private, religious institution. In his first year of college, Davey declared a double major in business administration and pastoral studies.

The Promise Scholarship awarded to Davey was student-directed aid, which means that as long as the person for whom the scholarship was intended abides by and uses the money in accordance with the criteria set forth by the

state, the money can be issued to the student for his or her educational needs.

Davey adhered to all the guidelines established when he applied for and received the scholarship.

After he commenced his first semester of college, the State of Washington revised the Promise Scholarship policy. The state revision denied scholarship eligibility to students who selected a major of pastoral studies. In the revision, the state claimed that issuing scholarship money to such students violated the State of Washington Constitution.

In October 1999, Northwest College received notice from the Washington Higher Education Coordinating Board stating that the Promise Scholarship recipients who had declared a major of theology (pastoral studies) were no longer eligible to receive the scholarship funds. This notice explained the state's position that funding religious education was prohibited by the state of Washington's constitution. As a result of the change in policy, Davey's scholarship was revoked.

Washington Constitution

The State of Washington's constitution Article I, section 11 states:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be

appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. (Washington State Constitution AMENDMENT 88, 1993 House Joint Resolution No. 4200, p 3062. Approved November 2, 1993)

In the State of Washington's constitution, the written phrases, "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," has its origins in the Blaine Amendment proposal of 1876.

In 1875, Senator James G. Blaine proposed an amendment to the United States Constitution. His proposal was popularly identified as the Blaine Amendment. Senator Blaine wanted to be sure that there would be no spending of state tax dollars for the benefit of religious organizations. At the time, the First Amendment, as interpreted, only governed actions by the federal government, not state governments. Several states were providing funding to religious schools

and activities and in some cases were even recognizing official state churches (Boston, 2002). During this time, the United States Catholic population was growing at rapid rate and benefited greatly from states that funded religious schools. Scholars have argued that Blaine's (a Protestant) motivation for drafting the proposed amendment was a personal resentment of the Catholic Church and its influence on state governments (National Association of Secondary School Principals, 2003).

Blaine's proposal would have added the following amendment to the U.S. Constitution:

"No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations."

Senator James Blaine 1875

The amendment was passed by the House (180 -07) but failed to pass the Senate by four votes. (The Becket Fund for Religious Liberty, 2003) Supporters of the proposal were not deterred. They adopted another strategic method to impose the requirements of the Blaine Amendment on the states. States that were seeking admission into the Union were pressured into including language similar to the Blaine amendment in their state constitutions as a precondition for favorable congressional action (Boston, 2002).

Senator Blaine’s proposed amendment was to protect the integrity of public school funding, the obligation of states to provide universal education, the role of ensuring and funding education at the state level, and to curb the funding of religious instruction and training (Hamburger, 2002).

Phillip Hamburger writes in his book, *Separation of Church and State* (2002), that some contend that the Blaine Amendment came about from an anti-Catholic movement to prevent federal or state funding of parochial schools. Hamburger further states however, that other historians argue that there is no significant proof that the Blaine Amendment came about as an anti-Catholic movement (Hamburger, 2002 p.. 298).

Locke v. Davey

Having been denied his scholarship, Davey filed a lawsuit against the State of Washington in the United States District Court Western District of Washington at Seattle (Docket No. C00-61R). Davey challenged the policy of the Higher Education Coordinating Board on the grounds that it violated the Free Exercise and Free Speech clauses of the First Amendment of the U.S. Constitution. He also claimed his right to Equal Protection of the law was violated.

On October 5, 2000, U.S. District Court Judge Barbara Rothstein issued an order granting the state’s motion for summary judgment. Judge Rothstein’s decision held that “as a matter of law, the Higher Education Coordinating Board was entitled to complete dismissal of Davey’s complaint” (Davey v. Locke 2000

Lexis 22273, p.. 4). Judge Rothstein denied Davey's claim of violation of the Free Exercise clause stating, "While a citizen may not be unduly prohibited from practicing his religion, he may not demand that the government pay for those religious pursuits" (Ibid p. 11). Furthermore, she wrote that "religion-based conduct is not entitled to a Free Exercise exception to generally applicable regulations" (Ibid p. 12). According to Judge Rothstein, the Free Exercise clause in the U.S. Constitution did not give Davey the ability to avoid the State of Washington's constitutional provision that prohibits the state from paying for religious training. (Ibid)

Davey appealed Judge Rothstein's decision to the Ninth Circuit Court of Appeals. Arguments in the case were presented May 6, 2002. The Ninth Circuit reversed the lower court's decision on a 2-1 vote. Circuit Judge Pamela Ann Rymer wrote the majority opinion stating, "The Higher Education Coordinating Board's policy lacks neutrality on its face," and "HECB impermissibly deprived Davey of his scholarship" (Ibid, p. 3). Rymer added that the Washington constitutional provision prohibiting the funding of religious training did not supply a compelling government interest. "Washington's interest in avoiding conflict with its own constitutional constraint against applying money to religious instruction is not a compelling reason to withhold scholarship funds for a college education from an eligible student just because he personally decides to pursue a degree in theology" (Ibid, p. 20).

Washington Governor Gary Locke petitioned for a rehearing by the full court. The petition for a rehearing en banc was denied and Locke filed a petition

for a writ of certiorari to the United States Supreme Court on February 24, 2003. The Supreme Court granted the petition on May 19, 2003, and scheduled oral argument for December 2, 2003.

Overview of First Amendment Religion Clauses

The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances

(U.S. Constitution, 1791).

This amendment of the Constitution, written more than 200 years ago, prohibits Congress from adopting laws interfering with the exercise of religion. It also prohibits Congressional action in establishing a religion. The U.S. Constitution, as currently interpreted, prevents both federal and state governments from interfering with civil liberties protected by the First Amendment.

However, that same document fails to resolve the inherent tension between the right of free exercise and admonition to refrain from adopting laws respecting the establishment of religion. In his book, *Separation of Church and State* (2002), Harvard professor Philip Hamburger traces the history of the premise that citizens of the United States have held for many years: that the First Amendment requires separation of church and state (Hamburger, 2002).

Hamburger explains that the phrase “separation of church and state” was first used in a letter written by Thomas Jefferson in 1802 to the Danbury Baptist Association. Jefferson stated, “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and state” (Ibid, p. 1). Hamburger further explains that Jefferson’s intention in claiming the First Amendment erects a wall of separation between church and state was based on his distaste for the Federalist clergy of New England. Hamburger writes that historians claim Jefferson’s letter was written because he was writing to a congregation of a denomination of which he was not a member (Ibid p. 7). Jefferson wanted to remove all fears that the federal and state governments would make dictates to the church and vice versa. Jefferson’s words were actually derived from the words of Roger Williams, a Baptist and a prominent preacher. The “wall” Jefferson referred to was understood as one-directional; its purpose was to protect the church and the church to be free to teach the people Biblical values (Eidsomoe, 1987).

Williams’ original words were:

“When they have opened a gap in the hedge or wall of separation between the garden of the Church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made his garden a wilderness, as at this day. And that therefore if He will eer to please to restore His garden and paradise again, it must of necessity be

walled in peculiarly unto Himself from the world.”

Roger Williams (Eidsomoe, 1987, p.14).

Mark DeWolfe Howe supports Jefferson’s statement. “The First Amendment was seen in the eighteenth century as a way religion and churches would be protected from the state while Jefferson sought to protect the state from the demands of churches,” he said (Howe, 1965, p.19).

Since the First Amendment was adopted, scholars have debated its meaning and intent. The task of interpreting and applying the First Amendment religion clauses has fallen on the shoulders of the U.S. Supreme Court since *Marbury v. Madison* 5 U.S. 137 (1803). First Amendment jurisprudence is complex. But as the *Locke v. Davey* case approached the court, Chief Justice Rehnquist was leading a majority of justices insisting that religious organizations and activities must be judged in a viewpoint neutral manner.

A columnist for the *National Review Magazine*, Richard Garnett, wrote this on the U.S. Supreme Court’s view on the First Amendment: “Under the leadership of Chief Justice Rehnquist, the court has made it increasingly clear that the First Amendment forbids viewpoint discrimination in the administration of public-welfare programs and also that religious believers and institutions may not be singled out for special disadvantages and burdens” (Garnett, 2003, p.2). The basis for Davey’s argument is that as a religious believer, he was being singled out for special disadvantages and burdens. A divided panel of the Ninth Circuit agreed.

Higher Education and Religion

Generally speaking, institutions of higher education support two models of operation. They are either public institutions that depend on direct taxpayer support or they are private institutions that operate on private or non-public funds. Private institutions may also have a religious affiliation; however there are a number of private colleges and universities, such as Vassar College in New York and Beloit College in Wisconsin, that have no sectarian affiliation. Private institutions with religious affiliations include Notre Dame in Indiana and Brigham Young University in Utah, among others. Private sectarian institutions often promote their religious affiliation in their institutional mission, operation, or within their curriculum.

The relationship between public institutions and religion has proven to be a controversial issue. A number of cases highlight this issue.

Some key cases formulate and identify the Supreme Court's view on the religion clauses, further explained in chapter two, of the First Amendment and provide a foundation for this study. These cases were referred to in the merit briefs presented by the petitioner and respondent in the *Locke v. Davey* case.

In 1940, the Supreme Court decided a case that addressed the First Amendment but set the stage for the Court's stance on the Fourteenth Amendment. It was the first case that applied the First Amendment religion clause to a state, in this case a local ordinance. Jesse Cantwell, a Jehovah's Witness, and his sons often preached on street corners and distributed religious material in support of their beliefs. The event that spurred the case occurred

when the father and sons were proselytizing in a predominantly Catholic neighborhood. Two pedestrians, who happened to be Catholic, heard an anti-Roman Catholic message on Cantwell's portable phonograph and reacted angrily. The Cantwells were arrested for violating a local ordinance requiring a permit for solicitation and pursuing activities inciting a breach of the peace (Cantwell v. State of Connecticut 310, U.S. 296, 1940).

The local statute read as follows:

No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both.

New Haven, Connecticut Ordinance (126 Conn. 8 A.2d 535.)

The Supreme Court ruled unanimously in favor of the Cantwell family. The court held that while general regulations on solicitation were legitimate,

restrictions based on religious grounds were not. The statute allowed local officials to determine which causes were religious and which ones were not religious; therefore it violated the First and Fourteenth Amendments.

Although the message the Cantwells professed was offensive to many, it did not entail any threat or bodily harm. Therefore the Court concluded the expression was protected as religious speech (Cantwell v. State of Connecticut 310 U.S. 296, 1940 p.. 309). This was the first case where the First Amendment was applied to states through the Fourteenth Amendment.

The next case that we examine involves the Free Exercise of religion as it conflicts with the administrative policies of a public institution of higher education. In the case of Widmar v. Vincent (1981), a religiously-affiliated student group called Cornerstone had been using the University of Missouri–Kansas City’s facilities to hold its meetings. The university instituted a policy that its facilities could not be used by student groups for purposes of religious worship or religious teaching.

The policy read as follows:

4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering

of prayer or other appropriate recognition of religion at public functions held in University facilities.

4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group.

University of Missouri--Kansas City Student Union Policy, 1970

The university's argument for enforcing this policy was based on the institution's obligation to respect the Establishment Clause of the First Amendment and therefore refrain from supporting religion. The student group sued the university and eventually the U.S. Supreme Court decided in their favor (*Widmar v. Vincent* 454 U.S. 263 1981). The Supreme Court found that the institution violated viewpoint neutrality by treating a religious organization differently than other student groups. The Court ruled that the University of Missouri--Kansas City could not prevent a student religious group from using university facilities for the purpose of meeting. In this case, we see the beginning of the viewpoint neutrality jurisprudence principle as it applied to public university policy. An institution of higher education cannot discriminate against religion in its practices.

The case of *Rosenberger v. Rector and Visitors of the University of Virginia* 515 U.S. 819 (1995) further illustrates the Supreme Court's viewpoint neutrality jurisprudence applicable to a university setting. A student group called

Wide Awake Productions (WAP), whose members attended the University of Virginia, was denied funding for the printing of a campus magazine that “offers a Christian perspective on both personal and community issues” (Rosenberger v. University of Va. 515 U.S. 819, 1995 p.. 6). The University of Virginia had funded printing expenses of a number of student groups, but denied the WAP’s funding request claiming the rejection was due to the religious activities the group promoted. The students challenged the denial as a violation of their First Amendment speech and press rights (Ibid) arguing the institution’s policy must be neutral in awarding of funding to student groups. The U.S. Supreme Court ruled that a public institution that funds student organizations may not refrain from funding religiously affiliated student organizations that meet all the institution’s criteria for funding (Ibid).

These three cases reflect the struggle that administrators and civic leaders sometimes encounter when trying to interpret the First Amendment religious clauses. The case of *Cantwell v. State of Connecticut*, which noted that the state must apply the religion clauses to state actions, set a precedent. In the later cases, we find the inception of the viewpoint neutrality doctrine for judging state action influencing religion.

Research Problem

This decision presents three opportunities to add to the research literature. First, a careful analysis of the courts’ rulings will be performed to identify the implications of the precedent for post secondary institutions with state student aid

programs. A thorough analysis of this decision is necessary to formulate and provide guidance to states that provide scholarships from public funding sources or for those states contemplating establishing such a scholarship through the use of public funds. Next, the decision offers an opportunity to examine the judicial decision making styles of Chief Justice Rehnquist utilizing a micro lens of judicial decision making proposed by Benjamin Cardozo in *The Nature of the Judicial Process* (reprinted 2005). Cardozo discusses at length the decision making process that a judge should employ when making decisions. The decision making process of Chief Justice William Rehnquist has not yet been reviewed utilizing the Cardozo decision making template. Third, *Locke v. Davey* (2003) will be analyzed using a macro lens provided by Jeffery Rosen in his recent treatise entitled *The Most Democratic Branch* (2006). Rosen addresses the role of the U.S. Supreme Court's decision making in our system of governance and offers a theory to suggest that the Supreme Court's decisions are largely dependent on the sentiment of the American public. *Locke v. Davey* will be assessed to determine whether the ruling in the case supports or refutes Rosen's thesis.

Research Questions

- How did the Supreme Court resolve the Free Exercise and Establishment clause issues presented in the *Locke v. Davey* case?
- What were the major cases the Supreme Court used to reach their decision?

- What was the rationale of the justices who disagreed with the Court's holding?
- What additional concerns have emerged due to the Supreme Court's decision?
- What is the potential impact of the Supreme Court's decision on institutions of higher education and how will the court's decision impact the 37 states that have Blaine Amendments in their state constitutions?
- How does the Supreme Court's decision in *Locke v. Davey* fit into the theory proposed by Jeffrey Rosen in his book *The Most Democratic Branch* (2006) regarding the role of the Supreme Court in our system of government?
- Does the Opinion of Justice Rehnquist in *Locke v. Davey* indicate that he uses the judicial decision making template prescribed by Benjamin Cardozo in his book *The Nature of the Process* (1921)?

Method of the Study

“Legal research is the process of identifying the law that governs an activity and finding materials that explain or analyze that law” (Cohen & West, 2000, p.. 2). This study will use traditional methods of legal research in order to find and analyze cases that are relevant to the study. All the court cases identified by the petitioners, respondents, and briefs will be examined and studied. The precedents will be presented in case brief format to assess their impact on the case.

The *amicus briefs* (a brief submitted by outside parties interested in the dispute) will also be examined and filtered to identify particular arguments they thought would assist the Supreme Court in determining a resolution to the case. Furthermore, the Supreme Court's oral arguments and the court's opinion will also be reviewed and analyzed. Finally, legal journals and news articles will be reviewed for arguments that were presented on the case.

Content Analysis

The research will be conducted by an internal and external evaluation. "An internal evaluation involves reading the particular legal authority you have found and determining whether, on its own terms, it applies to the fact situation in your research problem." (Wren & Wren, 1986, p. 79).

Once an internal evaluation is completed, then an external evaluation will be conducted to determine the validity of the research evaluated (Wren & Wren, 1986). The external evaluation examines the current validity of laws and rulings of legal cases through the use of Shepardizing cases. Shepardizing a case involves looking up a particular case to determine if a ruling is still relevant to the current time period. In addition, the external evaluation examines what change, if any, was addressed in the courts and other factors that may have been involved with the case. (Wren & Wren, 1986, p. 90).

The researcher attended the oral arguments before the United States Supreme Court. Observing the oral argument enriched the writer's perspective

on Supreme Court decision making and informed the content analysis of the decision.

Synthesizing the precedent, petitions, merit briefs, amicus briefs and oral arguments will provide a refined understanding of the impact of the *Locke v. Davey* decision on Free Exercise and Establishment Clause jurisprudence. Careful analysis of the Court's decision may also reveal the impact on federal and state-funded scholarship programs. It will also provide guidance to higher education leaders and policy makers' regarding establishing state-funded scholarship programs.

Definition of Terms

For the purpose of this study, the following definitions of terms are provided:

Amicus curiae: Friend of the court brief. One who gives information to the court on some matter of law, which is in doubt. The function of amicus curiae is to call the court's attention to some matter which might otherwise escape its attention (Gifis, 1997).

Bill of Rights: The first 10 amendments of the U.S. Constitution, which articulate the fundamental rights of citizenship. They were added to the U.S. Constitution in 1791. It is a declaration of rights that are substantially immune from governmental interference, and constitutes reservations of limited individual sovereignty. Among such rights guaranteed in the federal Constitution are the rights to speak, assemble, and practice religion free from federal government

regulations; and the right to be free from unreasonable searches and seizures and the right to a trial when tried for a criminal offense. Originally, the Bill of Rights was intended to be restrictive upon federal power; however, the various amendments have mostly been incorporated to apply to state governments through the due process clause of the Fourteenth Amendment to the U.S. Constitution (Gifis, 1997).

Certiorari: Gaining appellate review. An order issued from a superior court to one of inferior jurisdiction, commanding the latter to certify and return to the former a record in the particular case. In the U. S. Supreme Court, the writ is discretionary with the court and will be issued to any court in the land to review a federal question if at least four of the nine justices vote to hear the case (Gifis, 1997).

Declaratory relief: Also known as declaratory judgment. This is a judgment of the court for the purpose of establishing the rights of the parties or expressing the opinion of the court on a question of law without ordering anything to be done. The distinctive characteristics of a declaratory judgment are that it stands by itself, and that no executory process follows as a matter of course (Gifis, 1997).

En banc: A number of appellate courts sit in divisions of three or more judges from among a larger number on the full court. These parts will generally decide a particular case but sometimes either on the court's motion or at the request of one of the litigants, the court will consider the matter sitting as the full court. This is called a rehearing en banc (Gifis, 1997).

Equal protection of the laws: Constitutional guarantee embodied in the Fourteenth Amendment to the U.S. Constitution, which states in relevant part that “no state shall... deny to any person within its jurisdiction the equal protection of the laws” (Gifis, 1997).

First Amendment: The first of 10 amendments to the U.S. Constitution (otherwise known as the Bill of Rights). Originally intended to restrict federal power, the various rights of political and religious freedom articulated in the amendment have been held applicable to state government through the due process clause of the Fourteenth Amendment to the U.S. Constitution. The First Amendment guarantees freedoms of speech, press, assembly, petition, free exercise of religion, and non-establishment of religion (Gifis, 1997).

Petitioner: One who presents a petition to a court to take an appeal from a judgment. The adverse party is called the respondent (Gifis, 1997).

Public Policy: A general plan of action adopted by government to solve a social problem, counter a threat, or pursue an objective (Janda, Berry, & Goldman, 2000).

Rational basis test: A method of constitutional analysis under the equal protection clause used to determine whether a challenged law bears a reasonable relationship to the attainment of some legitimate governmental objective. The principle is that the constitutionality of a statute will be upheld, if any rational basis can be conceived to support it. If the violation of a fundamental right, such as the right to vote, right to free speech, or the creation of a suspect classification such as color, religion, national origin, or indigence, is alleged then

the law is subject to strict scrutiny and may only be upheld if the government shows a compelling interest in sustaining the statute (Gifis, 1997).

Remand: When a judgment is reversed, the appellate court usually remands the matter for a new trial to be carried out consistent with the principles announced in its opinion. Often, the court will simply direct that the matter be remanded to the lower court for further proceedings not inconsistent with the opinion (Gifis, 1997).

Respondent: Any one who answers or responds may properly be called a "respondent." The term also refers to the party against whom an appeal is brought (Gifis, 1997).

Stare Decisis: ("Let the decision stand") A rule by which common law courts are reluctant to interfere with principles announced in a former decision and therefore rely upon judicial precedent as a compelling guide to decision of cases raising issues similar to those in a previous case. (Gifis, 1997).

Strict scrutiny test: A test to determine the constitutional validity of a statute that creates a classification of persons. Under this test, if a classification scheme affects fundamental rights, it requires a showing that the classification is necessary to, and the least intrusive means of, achieving the compelling state interest. The governmental body passing the legislation in the question bears a heavy burden of justification to show that the law is necessary to promote a compelling state interest and is being accomplished by the least drastic and intrusive means (Gifis, 1997).

U.S. Federal Courts: These courts derive their legitimacy from Article III of the U.S. Constitution. The U.S. District Courts are the general courts of original jurisdiction or the federal trial courts. The U.S. Courts of Appeal (formerly circuit courts of appeal) are the appellate review courts. The U.S. Supreme Court is the only court directly created by the U.S. Constitution, and is the court of last resort in the federal system. The U.S. Supreme Court has the final appellate review of lower federal courts and of state court decisions involving questions of federal law (Gifis, 1997).

Viewpoint neutrality: When opening a public forum, government may not restrict speech at that forum based upon the view of the speaker (*Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 1993).

Limitations of the Study

All studies have limitations. This study is no different. This study will be limited by the amount of relevant case history, and the accessibility of historical documentation and information available to the researcher. The researcher's content analysis is a personal interpretation of the data presented surrounding the case and will also limit the nature of this study. An effort to reduce the role of personal analytical bias was grounded in utilizing standard legal research methods and content analysis.

Significance of the Study

The purpose of this dissertation is to provide a historical case study about the legal controversies over the issuance of state-funded scholarships for the purpose of religious studies. To accomplish this task, the study explored the application of First Amendment jurisprudence to the use of public funds for religious study. The *Locke v Davey* decision was also analyzed using micro and macro analytical lenses. Judge Benjamin N. Cardozo's landmark book entitled *The Nature of the Judicial Process* (1921) provided the micro lens for judicial decision-making. The study offers clues regarding the decision making process employed by Justice Rehnquist when compared to advice given by Justice Cardozo regarding the judicial process. The clues should be of value to scholars wishing to further analyze the means and methods employed by the Chief Justice in reaching his judgments.

The macro analytical lens was based on Rosen's book *The Most Democratic Branch* (2006). The study provides an analysis of first impression into the vitality of Rosen's theory of the Supreme Court's role in our government system.

Finally, the analysis of the *Locke* decision's impact on post secondary institutions should prove valuable to policy makers and higher education administrators implementing state funded scholarships in jurisdictions where the state constitution includes Blaine language.

Summary

The researcher has presented an introduction to the importance of financial aid in higher education, a case synopsis of the *Locke v. Davey* an overview of relevant First Amendment religion clauses and the relevant history of case law that involved the religion clauses in higher education. The research problem and research questions were presented. The method of the study was also introduced in Chapter 1. In addition, the Chapter defined legal terms relevant to the study. The limitations of the study and the significance of the study were also described.

CHAPTER 2

REVIEW OF LITERATURE

The Bill of Rights

The span of time when the Constitution and the Bill of Rights were established saw much turmoil. The U.S. had just come together as a nation and fought Great Britain in the Revolutionary War. The colonists were still reeling from Great Britain's harsh rule of the colonies and the violation of civil rights before and during the Revolution by the British (Patrick, 2003).

With the memories of being ruled by a monarchy still fresh in the minds of the founders of the newly founded United States of America, discussions surrounding the creation and sustainability of a democratic society were plentiful. One such discussion concerned the creation of a Bill of Rights for the newly adopted United State of America Constitution.

The first mention of creating a Bill of Rights for the U.S. Constitution was made by George Mason of Virginia during the Constitutional Convention in 1787. Mason wanted a federal Bill of Rights designed to limit the federal government's power. The 13 newly founded states included a "Declaration of Rights" in their state constitutions. The State of Virginia was one of the first states to do so. Consequently their state constitution became a model for other states as they adopted their own Declarations of Rights (Patrick, 2003)

Robert Sherman from Connecticut opposed the idea of including a Bill of Rights to the U.S. Constitution. He contended that the various State Declaration's of Rights were sufficient. His motivation was to ensure that the U.S. Constitution

would not be able to override the state declaration of rights in state constitutions. Mason's argument favoring the establishment of a federal Bill of Rights failed to convince the delegates and was opposed by every state delegation at the Constitutional Convention. (Patrick, 2003).

As a result of the vote against his proposed Bill of Rights, Mason voted against the Constitution on the grounds that it had no "Declaration of Rights." Mason registered his disapproval on his copy of the proposed Constitution as follows (Patrick, 2003):

There is no declaration of any kind for preserving the Liberty of the press, the Trial by Jury in civil Causes, nor against the danger of standing Army in the time of Peace. This Government will commence in a moderate Aristocracy, it is at present impossible to foresee whether it is will, in its Operation, produce a Monarchy, or a corrupt, oppressive Aristocracy, it will most probably vibrate some years between the two, and then terminate in the one of the other.

George Mason, 1787

In October 1788, James Madison took up the cause of adding a Bill of Rights to the U.S. Constitution. Originally opposed the idea of a Bill of Rights as first proposed, he now supported it. Madison could now see the value of a Bill of Rights as one that could aid citizens in rallying against a future oppressive government (Patrick, 2003).

There is potential tyranny of the majority as the main threat to individual rights in a government based on sovereignty." The primary purpose of a

constitution he thought was to limit power from any source, including the power of the majority, in order to protect the rights of individuals against tyranny.

James Madison, 1878

Madison wanted government to embody majority rule of elected representatives, but he felt that the majority's power must be limited. Otherwise, the rights of those the majority disliked would be compromised and worst yet, lost (Patrick, 2003).

In 1789, Madison, a Congressman from the State of Virginia, drafted a Bill of Rights and presented it to the first Congress of the United States. His work on the draft was influenced by the 1776 Virginia Declaration of Rights in the Virginia State Constitution. Madison's draft Bill of Rights included 12 articles. It was his intent that the proposed articles be inserted into sections of the U.S. Constitution. However, the House of Representatives decided that the proposal should be treated as an amendment to the Constitution. (Patrick, 2003).

After many debates and changes to the original proposal, the first Congress ratified 10 of the 12 proposed articles in 1791. The first two proposed articles, which concerned the number of constituents for each Representative and the compensation of Congressmen, were not ratified. Articles three through 12, however, ratified by three-fourths of the state legislatures, constitute the first 10 amendments of the Constitution, and are now known as the Bill of Rights (Patrick, 2003).

The following are the 10 amendments to the Constitution in their original form, as ratified in 1791.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

Amendment III

No Soldier shall, in time of peace, be quartered in any house without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(U.S. Constitution - Bill of Rights Adopted 1791)

First Amendment Historical Perspective

The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

(United States of America Constitution, 1791).

The religion decrees are known as the Establishment clause and the Free Exercise clause. The Establishment clause was created to separate religion and government in an effort to avoid the church becoming an influence in government

operations. The Free Exercise clause guaranteed the American citizens that the government would not interfere with religious practice (Hamburger, 2002).

As simple as the First Amendment seems to be, applying it to circumstances implicating government action and individual practices, kept the courts busy. Written more than 200 years ago, the First Amendment grants citizens of the United States the freedom to exercise religious beliefs and the freedom from government intervention in establishing a religion. Philip Hamburger traces the history of the premise that citizens of the United States have held for many years, that the First Amendment establishment requires separation of church and state (Hamburger, 2002).

There are scholars who believe that the creation of the U.S. Constitution's First Amendment religion clause came about due to centuries of religious oppression (Flowers, 1994). Many of the founders of America traveled a long way through perilous conditions to be able to practice religious freedom. In addition, many of the first settlers were members of the Anglican Church, which was the established church in England at the time. Their purpose for coming to the new world was to explore its economic potential (Hamburger, 2002).

One of the first established the Anglican Church as the official religion of the colony. While there were other churches in the colony, the government provided the clergy of the church with tax dollars for salaries and other support (Hamburger, 2002).

Another group emigrating from England and whose ideas on religion did not conform to those of the Anglican Church: the national Church of England.

The Puritans, as they called themselves, felt that the Anglican Church was too closely aligned with Roman Catholicism. The Puritans came to the new world in 1620, landing in Plymouth Mass. Their motivation was to create an ideal church-state colony (Hamburger, 2002).

The founder of Pennsylvania was a Quaker named William Penn. The Quakers believed that there was an inner light inside each person that represented God. Each person's experience and involvement with God was to be unique and direct. They believed that the "imposition of governmental conformity in religious ideals disparaged each person's unique experience and involvement with God" (Hamburger, 2002).

As a result of the number and diversity of religious beliefs in the new world and the past experiences with religious strife that existed in Europe during previous centuries, our founding fathers kept these issues in mind as they developed and wrote the U.S. Constitution. Therefore, there is no mention of religion in the Constitution except for Article IV, Clause 3, which states, "No religious test shall ever be required as a qualification to any office or public trust under the United States." This clause is referred to at times as the "religion test" and its premise is that no U.S. citizen would be required to belong to any specific religion order to hold an appointed or elected office (Levy, 1986).

Within the U.S. Constitution and the Bill of Rights there is no direct mention of separation of church and state. The question then arises as to where the concept of separation of church and state originated? Hamburger points out that it is actually a letter written by Thomas Jefferson, in 1802, to the Danbury

Baptist Association that first addresses the concept of a separation between church and state. Jefferson wrote, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State" (Hamburger, 2002).

Hamburger also argues that Jefferson's intention in claiming a separation of church and state was based on his distaste for the Federalist clergy of New England. Other historians claim Jefferson wrote as he did because he was addressing the congregation of a denomination of which he was not a member (Eidsomoe, 1987). Jefferson wanted to remove all fears that the state would seek to impose its will upon the church. His words were actually derived from the words of Roger Williams, a Baptist preacher from Rhode Island. The "wall" Jefferson referred to was understood as one-directional; its purpose was to protect the church, yet the church was to be free to teach the people Biblical values (Ibid). Williams had said:

When they have opened a gap in the hedge or wall of separation between the garden of the Church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made his garden a wilderness, as at this day. And that therefore if He will eer to please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world.

(Eidsomoe, 1987)

Mark DeWolfe Howe makes a good point in supporting Jefferson's statement with this view:

The First Amendment was seen in the eighteenth century as a way religion and Churches would be protected from the state while Jefferson sought to protect the state from the demands of Churches. (Howe, 1965).

The topic of religion in schools was also addressed by theorists Alexis De Tocqueville and Horace Mann. In 1835, De Tocqueville observed American society and culture, and noted that his theories were similar to those of Mann's ideals (De Tocqueville, 1835, p. 315).

De Tocqueville stated:

In New England, every citizen receives the elementary notions of human knowledge; he is taught, moreover, the doctrines and the evidences of his religion, the history of his country, and the leading features of its Constitution. In the states of Connecticut and Massachusetts, it is extremely rare to find a man imperfectly acquainted with all the things and a person wholly ignorant of them is a sort of phenomenon

(De Tocqueville 1835, p. 315).

De Tocqueville did not believe a republic could exist without morals. He stated, "I do not believe that a people can have morals when it has no religion" (Ibid, p. 290).

In 1837, Horace Mann served as secretary to the Board of Education for the state of Massachusetts. His relentless efforts to change public education not only affected the state itself but the young and growing United States. He felt

strongly that education constituted preparation for life and he believed in the need for teaching morals. Although he felt strongly on the matter, he did not advocate that public schools teach one religious creed. He was also opposed by church officials for advocating nonsectarian education. Their opposition, however, only served to arouse public sentiment for reform of the public school system. In his Final Report to the Massachusetts State Board of Education (1848), Mann wrote:

If a man is taxed to support a school where religious doctrines are inculcated which he believes to be false, and which he believes that God condemns, then he is excluded from the school by divine law, at the same time he is compelled to support by the human law. This is a double wrong. (Religious Fundamentalism and American Education, 1990, p. 92).

Mann did not oppose the use of Bible readings in the classroom. However, he resisted any notion that schools use sectarian books (Kniker, 1997).

The U.S. Supreme Court, over the years, has examined a large number of cases presented by petitioners claiming that their rights under the First Amendment have been violated. This is evident in cases that have been decided by the Supreme Court throughout history. There is still a need for interpretation of the First Amendment and for the Court to define where the line for separation of church and state needs to be drawn. The original intent of framers' of the U.S. Constitution is still continually debated. Scholars argue that this is because the language is ambiguous.

Americans are generally known to be a spiritual / religious people. An on-going study of American public opinion conducted since 1944 (Gallup's Princeton Religious Research Center, 1996) has shown that Americans consider themselves religious. According to the study, 90% of Americans state that they believe in a God. With such a strong showing, one can conclude that there is significant religious influence in American life. However, we also see through today's media a nation that is committed to protecting its public institutions from religious influence (Bishop, 1999).

Richard Garnett summarized the courts recent approach to the religion clauses relevant to this study:

Under the leadership of Chief Justice Rehnquist, the court has made it increasingly clear that the First Amendment forbids viewpoint discrimination in the administration of public-welfare programs and also that religious believers and institutions may not be singled out for special disadvantages and burdens (Garnett, 2003).

The Blaine Amendment

In 1875, Senator James G. Blaine, Republican for the state of Maine, submitted a proposal to add an amendment to the U.S. Constitution. Blaine, who attempted three times to seek the Republican nomination for the candidacy for President of the United States, wrote the proposed amendment to read as follows:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public fund there for, nor any public lands devoted there to, shall ever be under the control of any religious sect; nor shall any money so be raised of lands so devoted be divided between religious sects of denominations.

(Proposed U.S. Constitution Amendment written by Senator James Gillepsie Blaine, 1875).

Senator Blaine wanted to be sure that there would be no spending of United States tax dollars on any religious organizations. At the time, the First Amendment only regulated actions by the federal government and not state governments. Several states were providing funding to religious schools and activities and in some cases were recognizing official state churches (National Association of Secondary School Principals, 2003). According to the NASSP organization, the United States Catholic population was growing at rapid rate and benefited greatly from states that funded religious schools. Scholars have argued that Blaine's (a Protestant) motivation for creating the proposed amendment was personal resentment towards the Catholic Church and its stronghold on state governments (National Association of Secondary School Principals, 2003).

The Blaine Amendment passed the House of Representatives (180 -07) but failed to pass in the Senate by four votes (The Becket Fund for Religious Liberty, 2003). After the proposal died in Congress, supporters of the proposal made efforts to modify state constitutions pushing to have versions of the

proposed Blaine Amendment in every state constitution. The strategy employed by Blaine supporters was most forcefully directed at states seeking admission to the union after 1875. These states were pressured by supporters of Blaine to include a version of the proposal in their state constitution in order to gain necessary support for ratification from Congress (Boston, 2002).

State constitutions that were ratified after 1875 have constitutional language that is similar to Blaine's amendment proposal. Currently there are 37 states with Blaine language in their constitutions (Ibid). In 1982, the State of Massachusetts, a heavily Catholic-populated state, made an effort twice through the pro-voucher forces to repeal the Blaine Language in its constitution. In 1982, the vote was 62% against changing the language. In 1986, the vote was 70 % against changing the language (Brnovich, 2003).

Ohio is another example of state that is finding conflict with the Blaine language in its constitution. In *Zelman vs. Simmons-Harris* (536 U.S. 639, 2002), the U.S. Supreme Court ruled that the states had the right to decide whether or not to legally adopt school voucher programs as long as they maintained a neutral stance toward religion. School vouchers are designed to allow students the option of choosing to attend a private sectarian elementary or high school and have the state pay an equal share of the tuition that they would receive from attending a public elementary or high school education (*Zellman v. Simmons-Harris*, 536 U.S. 639 2002). This case will be examined in more depth later in this chapter.

The Blaine Amendment language in the Washington constitution was a point of contention in the Locke v. Davey case. The State of Washington argued that the state's voter-ratified constitution contained a form of the Blaine Amendment prohibiting the state from funding religious training. The argument from Davey that refusing to pay on an issued scholarship, to a student who had declared religion as a major was a violation of the U.S. Constitution First Amendment.

History of the Promise Scholarship

In 1999, Washington Governor Gary Locke signed the Promise Scholarship legislation. The Promise Scholarship law was designed to serve high school students who were ranked in the top 10% of their graduating classes and were identified as having a financial need. The award was valued at \$1,225 annually. During the 2000 Washington legislative session, the program was expanded to include students graduating in the top 15% of their class and those scoring 1,200 or above on their first attempt at the national Scholastic Aptitude Test. In the 2000-2001 academic year, the award was increased to \$1,542 from the previous \$1,225. Finally, in 2002, the legislature voted to make the program permanent. (Higher Education Coordinating Board of the State of Washington Website, <http://www.hecb.wa.gov/index.asp> 2006).

Background of the Locke v. Davey Case

Joshua Davey was an above average high school student from a single parent home. In August 1999, Davey was awarded Washington's Promise Scholarship in an amount of \$1125. In the spring of 1999, he was accepted to Northwest College, an Assembly of God affiliated institution located in Kirkland, Washington. He began attending there that fall. In his first year of college, Davey declared a double major in business administration and pastoral ministries. He had always planned to attend a sectarian institution and hoped to become a minister.

Northwest College's pastoral ministry program was designed to "help men and women develop their gifts so that these students can become leaders who have the tools to make a difference in communities, whether in their local neighborhood or overseas. The school prepares students for all areas of vocational ministry, including pastoral ministries, youth ministry, children's ministry, and missions" (Northwest College Catalog, 2004 p. 3).

While attending college in the fall of 1999, Davey was informed by the college that they received notice from the Higher Education Board of the State of Washington that students receiving the Promise Scholarship that were majoring in pastoral studies would no longer be eligible for the scholarship. The college notified Davey that he was deemed ineligible for the scholarship, but if he dropped his pastoral ministries major he would again qualify. Davey felt strongly that maintaining his scholarship eligibility by dropping his pastoral ministries

major, would not be ethical. Instead, he decided to challenge the ruling of the HECB Board and take up the matter in court (Locke v. Davey, 2003).

In January 2000, Davey brought suit in the U.S. District Court for the Western District of Washington against the governor of Washington and members of the HECB. He sought reinstatement of the scholarship, damages and fees. Davey's suit claimed violations of his First and Fourteenth Amendment rights, as well as the Washington State Constitution.

Davey cited the decision of Church of Lukumi Babalu, INC. v. City of Hialeah, (508 U.S. 520, 1993) in support of his position. In Church of Lukumi Babalu, INC. the Court addressed an ordinance that subjected a law to strict scrutiny where the law in effect prohibited the killing of animals when done for religious purposes. Davey also cited *McDaniel v. Paty* (435 U.S. 618, 1978) for the proposition that a state may not use a person's religious exercise as a criterion for denial of a benefit, absent a compelling state interest. These cases are examined in depth later in the chapter.

The judge in the district court granted HECB's motion for summary judgment, ruling that while a state may not discriminate against a student on the basis of religion, it is not required to pay for his religious pursuits. The court cited *Harris v. McRae* (448 U.S. 297, 1980) and *Rust v. Sullivan* (500 U.S. 173, 1991) in which the U.S. Supreme Court had upheld the power of governments to selectively fund the exercise of Constitutional rights (Davey v. Locke 2000 U.S. DIST. LEXIS 22273).

The district court also rejected Davey's freedom of speech and association claims because he did not point to any restriction on his right to free speech.

The court also rejected Davey's claim that his due process was violated (Ibid)

Davey appealed the decision of the U.S. District Court to the United States Court of Appeals for the Ninth Circuit. The Court ruled in a split decision 2-1 in favor of Davey. Judge Pamela Ann Rymer and Judge Ronald M. Gould were in the majority. Judge M. Margaret McKeown voted in dissent (Ibid).

The panel majority reasoned that Davey's Free Exercise rights were violated. The majority acknowledged the selective funding cases such as Rust and Regan, but the court found them not applicable to the current case because they involved programs set up for the government's own purposes.

Washington's Promise Scholarship had a broader purpose: to fund the educational pursuits of outstanding students. Invoking the "public forum" reasoning of *Rosenberger v. Rector and Visitors of the University of Virginia* 515 U.S. 819 (1995), which focused on Free Speech rather than Free Exercise, the majority held that the theology exclusion was impermissible view point discrimination allegedly aimed at the suppression of dangerous ideas. Rymer wrote, "The bottom line is that the government may limit the scope of a program that it will fund, but once it opens a neutral forum, with secular criteria, the benefits may not be denied on account of religion" (Ibid p. 10152).

The Governor and HECB argued that even if strict scrutiny applies, the policy survives such scrutiny because there is a compelling state interest in upholding the Establishment Clause of its state constitution. The Ninth Circuit

majority determined, however, that the state's interest was less compelling because the scholarship funds do not directly go to the institution, but are awarded to the student on the basis of secular criteria and are applied to religious studies only indirectly as a result of independent student choice.

Judge Rymer also reasoned that the restriction on theology majors is similar to an unconstitutional condition, penalizing the exercise of a Constitutional right, because the scholarship would not necessarily pay for religious studies, but might instead be used for any education-related expense, such as food and housing. The majority, however declined to rule on Davey's other Constitutional claims. Judge Rymer stated, "A state law may not offer a benefit to all ... but exclude some on the basis of religion. Washington's restriction disables students majoring in theology from the benefit of the scholarship." (Ibid p. 10148)

Justice M. Margaret McKeowan dissented concluding that the Washington statute "has successfully navigated the tensions between the free exercise of religion and the prohibition of its endorsement." Justice McKeown also wrote:

The simple truth is that Washington has neither prohibited nor impaired Davey's free exercise of religion. He is free to believe and practice his religion without restriction ... The only state action here was a decision consonant with the state Constitution, not funding 'religious instruction. Davey is free to use his scholarship at a religious institution. He is absolutely free to discuss religion and study it for purposes of becoming a minister. He suffers no disadvantage as a consequence of the State's decision to fund other educational pursuits.

Justice M. Margaret McKeowan (Davey v. Locke No. C00-61R 2000 p. 10161).

Governor Locke appealed the decision petitioned the court for a rehearing en banc. The request was denied and the Governor then filed a petition with the U.S. Supreme Court for a writ of certiorari in February 2003. The Supreme Court granted certiorari on May 19, 2003 and established a briefing schedule and scheduled oral argument for December 2, 2003.

Relevant Judicial Precedent

The briefs presented to the court in behalf of Governor Locke and Joshua Davey cited numerous prior cases to support their legal positions. The following past Supreme Court cases were presented by the petitioner and the respondent. These cases are presented in legal brief format and in chronological order to assist in analysis of the Supreme Court religion clause jurisprudence. A detailed explanation of the legal brief format will be discussed in Chapter 3.

Name of case: Reynolds v. United States

Citation: 98 U.S. 145

Date of decision: 1878

Vote: 9-0

Author of opinion: Chief Justice Morrison Waite

Legal topics: Constitutional Law & First Amendment

Facts: This case involved a Mormon polygamist, George Reynolds, who was convicted under a federal bigamy statute. He argued that he had married again in accord with his religious obligations and that therefore his criminal conviction violated the First Amendment. At the trial, the accused proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church "that it was the duty of male members of said Church, circumstances permitting, to practice polygamy" (Reynolds v. United States 98 U.S. 145 1878).

Question presented: Whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land.

Answer: No

Court's reason: Chief Justice Morrison R. Waite declared that federal statute constitutionally could punish criminal activity regardless of religious beliefs. Simply, religious practices that impaired the public interest did not fall under the protection of the First Amendment (Reynolds v. United States 98 U.S. 145 1878).

Significance: This case is the first time the Supreme Court had to address the scope of the Free Exercise Clause of the Constitution.

Name of case: Cantwell v. State of Connecticut

Citation: 310 U.S. 296

Date of Decision: 1940

Vote: 9-0

Author of opinion: Justice Owen Roberts

Legal topics: Constitutional Law & First Amendment

Facts: In 1940, Jesse Cantwell, a Jehovah's Witness, and his sons often preached on street corners and distributed religious material in support of their beliefs. The event that spurred the case occurred when the father and sons were proselytizing in a predominantly Catholic neighborhood. Two pedestrians, who happen to be Catholic, heard an anti-Roman Catholic message on Cantwell's portable phonograph and reacted angrily. The Cantwells were arrested for violating a local ordinance requiring a permit for solicitation and pursuing activities inciting a breach of the peace.

Question presented: Are general regulations on solicitation legitimate when restrictions are enforced against religious speech?

Answer: The court held that while general regulations on solicitation were legitimate, restrictions based on religious grounds were not.

Court's reason: The statute allowed for local officials to determine which causes were religious and which ones were not religious, therefore it violated the First and Fourteenth Amendments. Although the message the Cantwell's professed was offensive to many, it did not entail any threat or bodily harm, therefore it should be protected as religious speech. The Supreme Court's opinion in this case rejected the State of Connecticut's argument that the First Amendment did not apply to the State of Connecticut. The

Due Process clause of the Fourteenth Amendment--which reads that no state shall "deprive any person of life, liberty, or property without due process of law," makes the First Amendment applicable at the state level. (Cantwell v. State of Connecticut 310 U.S. 296, 1940).

Significance: For the first time, the Supreme Court specifically stated that the Free Exercise of Religion clause of the First Amendment applies to states as well as to the federal government. The Supreme Court had to decide on a case that addressed the First Amendment but set the stage for the court's stance on the Fourteenth Amendment.

Name of case: Lemon v. Kurtzman

Citation: 403 U.S. 620

Date of decision: (1971)

Vote: 7-0

Author of opinion: Chief Justice Warren Burger

Legal topics: Constitutional Law & First Amendment

Facts: The Lemon case involved controversies over laws in Pennsylvania and Rhode Island. In Pennsylvania, a statute provided financial support for teacher salaries, textbooks, and instructional materials for secular subjects to non-public schools. The Rhode Island statute provided direct supplemental salary payments to teachers in non-public elementary schools. Each statute made aid available to "church-related educational institutions" (Lemon v. Kurtzman 403 U.S. 620 1971).

Question presented: Do the Rhode Island and Pennsylvania statutes violate the First Amendment's Establishment clause by making state financial aid available to church-affiliated educational institutions?

Answer: Yes

Court's reason: The Supreme Court ruled that to be constitutional, a statute must have a secular legislative purpose, it must have principal effects which neither advance nor inhibit religion, and it must not foster an excessive government entanglement with religion. The court found that the subsidization of parochial schools furthered a process of religious inculcation, and that the continuing state surveillance necessary to enforce the specific provisions of the laws would inevitably entangle the state in religious affairs. The court also noted the presence of an unhealthy divisive political potential concerning legislation which appropriates support to religious schools (*Lemon v. Kurtzman* 403 U.S. 620 1971).

Significance: In the *Lemon* decision, the court created the "Lemon test" as a template for determining whether state action violated the Establishment clause of the First Amendment. The court applied the test by asking and answering three questions. 1) Does the statute or action have a secular legislative purpose? 2) Is the principle and primary effect of the state actions neutral regarding religion? 3) Does the statute or action entail an excessive government entanglement with religion? The statute or action must have a secular purpose, be neutral regarding religion, and not entail excessive entanglement to pass constitutional muster.

Name of case: McDaniel v Paty

Citation: 435 U.S. 618

Date of decision: 1978

Vote: 8-0

Author of opinion: Justice Warren E. Burger

Legal topics: Constitutional Law & First Amendment

Facts: McDaniel was an ordained minister who was barred from serving in the Tennessee's constitutional convention. A statute prevented ministers of the gospel, or priest(s) of any denomination whatever from taking part in the state's convention. McDaniel alleged that his First Amendment rights were violated by the restriction.

Question presented: Can the State of Tennessee prohibit ordained ministers or priests from holding a public office?

Answer: No

Court's reason: Tennessee's statute improperly forced citizens to choose between exercising two of their fundamental rights: freedom to practice religion and the ability for citizens to hold public office. The disqualification of clergy from holding public office had a historical basis as 11 of the original 13 colonies had such provisions. However, the Court ruled that the State of Tennessee's statute prevented McDaniel from simultaneously exercising two of his fundamental rights. While Tennessee may have originally had a legitimate interest in keeping clergy from participation, this interest has not been shown to exist any longer. Safeguards exist to

ensure that, if elected, clergy will not create too close an alliance between church and state. The decision by the Supreme Court begins by establishing that the exclusion of clergy from public office was initially justifiable and that the right's of ministers to hold public office is not an absolute right. However the Tennessee statute was struck down because the state failed to prove a compelling need to have the restriction (McDaniel v Paty 435 U.S. 618, 1978).

Significance: The Supreme Court accepted that original exclusion of clergy from public office may have been justifiable, but that this was no longer true. The fact that a practice goes back to the colonial period is not sufficient to allow it today. This principle is not followed consistently. Legislative chaplains were found permissible almost entirely on the basis of their traditional place. This case established that a state law cannot violate the U.S. Constitution. A state cannot establish a law that would ban a candidate because he/she was an ordained minister. This statute was discriminatory towards religion. The Court also applied the Lemon test and found that the restriction was not neutral towards religion.

Name of case: Norwood v. Harrison

Citation: 413 U.S. 455

Date of decision: 1973

Vote: 7-2-0

Author of opinion: Chief Justice Warren Burger

Legal topics: Constitutional Law & First Amendment

Facts: A three-judge District Court sustained the validity of a Mississippi statutory program under which textbooks were purchased by the state and lent to students in both public and private sectarian schools, without reference to whether any participating private school had racially discriminatory policies. Appellants, parents of four schoolchildren, filed a claim alleging that by supplying textbooks to students of sectarian private schools, the state therefore was providing direct aid to racially segregated education.

Question presented: Whether a state program under which textbooks are loaned to racially segregate sectarian private schools violates the Establishment clause.

Answer: Yes

Court's reason: Private secular schools have the right to exist and to operate, but the state is not required by the Equal Protection clause to provide assistance to private schools equivalent to that it provides to public schools without regard to whether the private schools discriminate on racial grounds. Free textbooks, like tuition grants directed to students in private schools, are a form of tangible financial assistance benefiting the schools themselves, and the state's constitutional obligation requires it to avoid not only operating the old dual system of racially segregated schools but also providing tangible aid to schools that practice racial or other invidious discrimination (Norwood v. Harrison 413 U.S. 455, 1973).

Significance: The constitutional obligation of the State "requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."(Norwood v. Harrison 413 U.S. 455, 1973 p. 467). States need to abide by their constitutions as well as the U.S. Constitution.

Name of case: Widmar v. Vincent

Citation: 454 U.S. 263

Date of decision: 1981

Vote: 8-1

Author of opinion: Justice Lewis F. Powell Jr.

Legal topics: Constitutional Law & First Amendment

Facts: The University of Missouri at Kansas City adopted a policy providing that its facilities could not be used by student groups "for purposes of religious worship or religious teaching." (Widmar v. Vincent 454 U.S. 263 1981 p. 265) The school believed that the action was required under the Establishment clause. A student religious group that had previously been permitted to use the facilities sued the school after being informed of the change in policy. They asserted that their First Amendment rights to religious free exercise and free speech were being violated.

The policy read as follows:

4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or

religious teaching by either student or nonstudent groups. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities.

4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group. University of Missouri--Kansas City Student Union Policy, 1970 (Widmar v. Vincent 454 U.S. 263 1981).

Question presented: Does the Establishment Clause require state universities to limit access to their facilities by religious organizations?

Answer: No

Court's reason: Because the university had generally permitted its facilities to be used by student organizations, it must demonstrate that its restrictions are constitutionally permitted. An equal access policy would not necessarily violate the Establishment clause. The three-pronged Lemon test would not be violated by such a policy. It would have a secular legislative purpose

and not foster excessive government entanglement. The second part, that the policy's primary effect would advance religion, is what the university claimed, "...This Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion" (Widmar v. Vincent 454 U.S. 263 1981 p. 267). The state does not necessarily approve of all groups who use the open forum, and the forum is open to non-religious as well as religious groups.

Justice White dissented arguing that not allowing the religious group would only have a minimal impact upon members' free exercise:

Respondents complain that compliance with the regulation would require them to meet "about a block and a half" from campus under conditions less comfortable than those previously available on campus. I view this burden on free exercise as minimal. Because the burden is minimal, the State need do no more than demonstrate that the regulation furthers some permissible state end. The State's interest in avoiding claims that it is financing or otherwise supporting religious worship - in maintaining a definitive separation between church and State - is such an end. That the State truly does mean to act toward this end is amply supported by the treatment of religion in the State Constitution. Thus, I believe the interest of the State is sufficiently strong to justify the imposition of

the minimal burden on respondents' ability freely to exercise their religious beliefs (Widmar v. Vincent 454 U.S. 263 1981p. 289).

Significance: This case plays a significant role in how the courts and government agencies understand the concept of equal access when it comes to allowing religious groups to use government facilities. Government agencies that open their buildings to be used by community organizations must open their buildings to religious organizations on an equal basis. This case initiated the Supreme Court's philosophy on viewpoint neutrality. Viewpoint neutrality is a basic legal guideline that the Supreme Court created to ensure that government actions applied to all groups on a nondiscriminatory basis. The government may not discriminate and favor a specific group over another.

Name of case: Witters v. Washington Department of Services for the Blind

Citation: 474 U.S. 481

Date of decision: 1986

Vote: 9-0

Author of opinion: Justice Thurgood Marshall

Legal topics: Constitutional Law & First Amendment

Facts: The plaintiff was a State of Washington blind resident who wanted to use his state financial assistance to attend a religious college. The petitioner was suffering from a progressive eye condition and applied to the Washington Commission for the Blind for vocational rehabilitation

assistance pursuant to a Washington statute. At the time, he was attending a private Christian college seeking to become a pastor, missionary, or youth director. The Commission denied aid on the ground that it was prohibited by the state constitution, and this ruling was upheld on administrative appeal. Witters then brought an action in state superior court, which affirmed the administrative ruling on the same state-law grounds. The Washington Supreme Court upheld the ruling but based it on the Establishment clause of the First Amendment, holding that the provision of aid to petitioner would have the primary effect of advancing religion in violation of that clause

Question presented: Can the state refuse public funding to an individual who chooses to use the funds to attend a religious college under the First Amendment Establishment clause?

Answer: No

Court's reason: The court ruled that this did not violate the First Amendment's Establishment clause since the money did not go directly from the state to the religious institution, but to an individual who determined its use. Justice Thurgood Marshall applied the Lemon test and concluded that there was no violation. The question that had to be determined was whether the funding of grant money had the effect of promoting religion. In analyzing the claim, the court scrutinized the Washington program and its awarding procedure to determine how the aide was applied. The court concluded that, "As far as the record shows, vocational assistance

provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice" (Witters v. Washington Department of Services for the Blind 474 U.S. 481, 1986 p. 487).

Significance: This case established the defining difference in self directed student aid versus institutional directed financial aid. The court examined whether or not the State of Washington's program had a "primary or principal effect" of advancing religion and ruled that it did not. In relations to the Locke v. Davey case this was a significant outcome as Davey's complaint argued the same point. (Witters v. Washington Department of Services for the Blind 474 U.S. 481, 1986 p. 484).

Name of case: Church of the Lukumi Babalu Aye Inc. v. City of Hialeah

Citation: 508 U.S. 520

Date of decision: 1993

Vote: 9-0

Author of opinion: Justice Anthony Kennedy

Legal topics: Constitutional Law, First Amendment

Facts: In South Florida, many Cuban refugees practice the Santeria religion, which combines a traditional African religion with elements of Roman Catholicism. An important Santeria ritual is animal sacrifice. When a Santeria church announced plans to open in Hialeah, Florida, the city

council enacted three ordinances designed to prohibit any animal sacrifices by the church. The ordinances were as follows:

Ordinance 87-40, which incorporates the Florida animal cruelty laws and broadly punishes "whoever unnecessarily or cruelly kills any animal," and has been interpreted to reach killings for religious reasons; Ordinance 87-52, which defines "sacrifice" as "to unnecessarily kill an animal in a ritual not for the primary purpose of food consumption," and prohibits the "possession, sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts "any licensed food establishment" if the killing is otherwise permitted by law.

Ordinance 87-71, which prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87-52; and Ordinance 87-72 which defines "slaughter" as "the killing of animals for food" and prohibits slaughter outside of areas zoned for slaughterhouses, but includes an exemption for "small numbers of hogs and/or cattle" when exempted by state law. (*Church of the Lukumi Babalu Aye Inc. v. City of Hialeah* 508 U.S. 520, 1993).

The church sued the city and city officials, claiming that the ordinances violated its rights under the Free Exercise clause of the First Amendment. The district court found that the ordinances were not directed solely at the church and that the prohibition of ritual sacrifice was Constitutional (*Church of the Lukumi Babalu Aye Inc. v. City of Hialeah* 508 U.S. 520, 1993).

Question presented: Can a city constitutionally enact ordinances that are designed to prohibit certain religious practices?

Answer: No

Court's reason: The Supreme Court found that the ordinances were not neutral and that they were directed solely at the Santeria church. Justice Kennedy noted, "Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context" (Church of the Lukumi Babalu Aye Inc. v. City of Hialeah 508 U.S. 520, 1993 p. 528).

The court then held that the ordinances were not narrowly tailored to discourage the Santeria ritual because they advanced the preferred governmental interests; the health risk of animal sacrifices to participants, the emotional injury to children who witnessed the sacrifices, the need to protect animals from unnecessary killings, and the need to restrict the slaughter of animals to areas zoned for slaughterhouse use. The exception was only when the conduct was motivated by religious beliefs.

The Free Exercise clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its

practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.

Justice Kennedy

(Church of the Lukumi Babalu Aye Inc. v. City of Hialeah 508 U.S. 520 1993 p. 529).

Significance: The court's decision determined that a law must be generally applicable and neutral. A state government cannot pass laws which unfairly burden a religious group. This case also demonstrated that the Supreme Court's philosophy on viewpoint neutral doctrine under the First Amendment by showing that the ordinances that were enacted were not neutral, they were biased towards one particular group. In this case it was biased towards the Santeria church. Religious rituals involving animal sacrifices are legal according to the court but how and where they are conducted that has a compelling government interest.

Name of case: Rosenberger v. Rector & Visitors of the University of Virginia

Citation: 515 U.S. 819

Date of decision: 1995

Vote: 5-4

Author of opinion: Justice Anthony Kennedy

Legal topics: Establishment clause

Facts: Rosenberger, a University of Virginia student, asked the University

Student Activities Program for \$5,800 from a student activities fund, which

got its funding from mandatory contributions from students (called a student activity fee), to subsidize the publishing costs of Wide Awake: A Christian Perspective at the University of Virginia. The University Student Activity Program refused to provide funding for the publication on the grounds that publication “primarily promotes or manifests a particular belief in or about a deity or an ultimate reality as prohibited by Student Activity Fee Guidelines” (Rosenberger v. Rector & Visitors of the University of Virginia 515 U.S. 819, 1995 p. 823).

Question presented: Whether the University of Virginia violated the First Amendment rights of its Christian magazine staff by denying them the same funding resources that it made available to secular student-run magazines.

Answer: Yes

Court’s reason: The University of Virginia’s denial of funding to Rosenberger, due to the content of his message, imposed a financial burden on his speech and amounted to viewpoint discrimination. The court noted that no matter how scarce university publication funding may be, if it chooses to promote speech at all, it must promote all forms of it equally. Further more, because it promoted past publications regardless of their religious content, the court found the university's publication policy to be neutral toward religion and, therefore, not in violation of the establishment clause. The court concluded by stating that the university could not stop all funding of religious speech while continuing to fund an atheistic

perspective. The exclusion of several views is as offensive to free speech as the exclusion of only one. The university must provide a financial subsidy to a student religious publication on the same grounds or criteria as other student publications. Whether or not the publication primarily promotes or manifests a particular belief about a deity or an ultimate reality is immaterial. Viewpoint discrimination as in this case is an egregious form of content discrimination (*Rosenberger v. Rector & Visitors of the University of Virginia* 515 U.S. 819, 1995).

The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.... Viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles (*Justice Kennedy, Rosenberger v. Rector & Visitors of the University of Virginia* 515 U.S. 819 1995 p. 829).

Justice Souter, Justice Stevens, Justice Ginsburg and Justice Breyer joined in the dissent. Justice Souter wrote the dissent. He held that *Wide Awake* was a religious magazine promoting a specific religious

agenda which they argued to support with activity funds was an outright violation of the Establishment clause.

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money.... The Court is ordering an instrumentality of the State to support religious evangelism with direct funding. This is a flat violation of the Establishment Clause. (Justice Souter, *Rosenberger v. Rector & Visitors of the University of Virginia* 515 U.S. 819, 1995 p. 832).

Significance: Funding programs in college must be viewpoint neutral when applied to religious and non religious organizations.

Name of case: *Zelman v. Simmons-Harris*

Citation: 536 U.S. 639

Date of decision: 2002

Vote: 5-4

Author of opinion: Chief Justice William Rehnquist

Legal topics: Establishment Clause

Facts: The City of Cleveland, Ohio's school district enrolled 75,000 children. The majority of the children were from low income and minority families. The school district had failed to meet any of the State of Ohio's 18 standards for minimal acceptable performance. The district initiated the Pilot Project Scholarship Program that worked as a school voucher program. Parents could take a set amount of money awarded to them and apply it to another

school—including sectarian schools—that met the program’s criteria (Zelman v. Simmons-Harris 536 U.S. 639, 2002).

Question presented: Whether an Ohio school voucher plan, in which the vast majority of participating students in the program attend sectarian schools, violated the Establishment clause of the First Amendment.

Answer: No

Court’s reason: Justice Rehnquist writing for the majority reasoned that the voucher program helped lower income children receive a better education without reference to religion. The program is neutral on its face and does not favor religious over nonreligious schools. True private choice programs do not violate the Establishment clause of the First Amendment. A government program does not violate the Establishment clause if the government aid is provided directly to the individual student or parent, who then makes a choice of schools. The Ohio voucher program was a neutral, private choice program that did not violate the Establishment clause (Zelman v. Simmons-Harris 536 U.S. 639, 2002).

That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause" (Chief Justice Rehnquist – Majority Opinion, Zelman v. Simmons-Harris 536 U.S. 639 2002 p. 8).

Justice Souter’s dissented. He reasoned that the majority undermined the very point of prohibiting a religious establishment. Justice

Stevens also dissented. He wrote that the educational crisis in Cleveland was not something which should influence a constitutional question. He also argued that the range of public school choices was not relevant to the point that there is no real range of choices among private schools. Finally he reasoned;

The voluntary character of the private choice to prefer a parochial education over an education in the public school system seems to me quite irrelevant to the question whether the government's choice to pay for religious indoctrination is constitutionally permissible. Today, however, the Court seems to have decided that the mere fact that a family that cannot afford a private education wants its children educated in a parochial school is a sufficient justification for this use of public funds (Justice Stevens (*Zelman v. Simmons-Harris* 536 U.S. 639 2002)).

Significance: This decision reaffirmed the Supreme Court's philosophy on viewpoint neutrality and self directed aid versus institution directed aid. The decision appears particularly relevant to *Locke v. Davey*. The Washington aide was deposited to the students account at the institution. The student then decided how to apply the aide. The dissent however provides a template for the majority in the *Locke v. Davey* case. This case's outcome supported Davey's argument in regards to his claim of violation of his rights under the First Amendment Free Exercise clause, in particular to the violation of the viewpoint neutrality philosophy so set by the Supreme Court to date.

Gary Locke, et al., v. Joshua Davey 2003

Petition for a Writ of Certiorari.

On February 24, 2003, Governor Gary Locke filed a petition for writ of certiorari. The Supreme Court controls its docket and therefore petition arguments address the national importance of the dispute. The question addressed by the petitioners to the U.S. Supreme Court was whether the Free Exercise clause of the First Amendment required a state to fund religious instruction if it provided college scholarships for secular instruction. The petitioners were Gary Locke, governor of the State of Washington; Marcus S. Gasoard, executive director of the Higher Education Coordinating Board; Bob Craves, chair of the Higher Education Coordinating Board; and John Klacik, associated director of the Higher Education Coordinating Board. Christine O. Gregoire, attorney general of the State of Washington; William Berggren Collins Sr., assistant attorney general counsel of record of the State of Washington; and Michael J. Shinn, assistant attorney general of the State of Washington acted as counsel for the petitioners (Petition for Writ of Certiorari, Locke, 2003).

The defendant noted in the proceedings was Joshua Davey, student at Northwestern College and recipient of the State of Washington's Promise Scholarship. Representing Joshua Dave were Jay Alan Sekulow, counsel of record and director of the American Center for Law & Justice. He was assisted by Walter M. Weber, David Cortman, Stuart Roth, Colby M. May, and James M. Hendersen Sr. also of the American Center for Law & Justice. Also assisting with the defense, Richard Bersin of the Law Office of Richard Bersin.

The petitioners argued that the decision rendered by the Ninth Circuit's conflicted with the State of Washington's Supreme Court's decision in *Witters v Washington Commission for the Blind* (112 Wash. 2d 363, 771 P.2d 1119, 1989). The *Witters* case held that the state did not violate the Free Exercise clause of the First Amendment when it followed the command of the state constitution and refused to provide public funds for religious instruction. The Ninth Circuit court concluded the exact opposite (P. Locke, 2003).

The petitioners argued that *Davey vs. Locke* and *Witters v. Washington Department of Services for the Blind*, were very similar according to the petitioner's argument, which asserted that a precedent had been set with the *Witters* case. The Washington Supreme Court's decision held that providing funds to *Witters* would violate the Washington State constitution, which prohibits the funding of religious instruction through the use of public funds. The Washington Supreme Court used its ruling in the *Witters* case to resolve another case, *State ex rel. Gallwey v. Grimm*, 146 Wash 2d 445, 48 P.3d 274 (2002). In the *Gallwey* case, The Washington Supreme Court discussed *Witters* with approval and upheld that a student aid program could not be used to attend religious colleges because public funds could not be used to pay for religious instruction (P. Locke, 2003).

In an effort to persuade the court, the petitioners contended that the conflict between the Ninth Circuit Court and the Washington Supreme Court was significant, and needed immediate resolution by the U.S. Supreme Court, stating that the proper rule of law to be applied to Washington was unknown. Petitioners

asserted that resolving the conflict between the courts on the state and federal level would establish national uniformity and eliminate confusion (P. Locke, 2003).

The petitioners further argued that the case needed to be heard because it involved the validity of a provision in the Washington constitution, which prohibits funding religious instruction and imposes a stricter separation of church and state than the Establishment clause of the First Amendment of the U.S. Constitution. The petitioners argued that the provision to not have the state fund religious education had been in existence and an exercise of legislative power since 1889. They emphasized that 14 other states had the same or similar restrictions in their constitutions restricting financial aid for students thereby establishing the national significance of the case (P. Locke, 2003).

In their petition for a hearing, the Locke group highlighted the dissenting opinion of the Ninth Circuit Court to further support their claim. They asserted that the dissent rejected the notion that the denial of the funds was a violation of the Free Exercise clause. Under this analysis, Davey still had the right to pursue a theology degree, but the state would not be required to pay for it.

The petitioners asserted that the dissent was correct in concluding that in the cases of *The Church of Lukumi Babalu Aye Inc. v. City of Hialeah* and *Mc Daniel v. Paty* (435 U.S. 618, 1978), were inapplicable to the dispute.

“Washington has neither prohibited nor impaired Davey’s free exercise of his religion. He is free to believe and practice his religion without restriction.” wrote Justice Mc Keown (Locke v Davey, 299 748 9th Cir. 2002 p. 10161).

The petitioners pleaded in their written arguments for the Supreme Court to hear this case in an attempt to clear the confusion that the Ninth Circuit Court majority opinion had created in ruling in favor of Davey.

Response to the Petitioner

On April 10, 2003, the respondents filed their brief in response to the petition. The respondents replied that the Ninth Circuit Court correctly decided the case and that there was no need for the Supreme Court's attention.

The argument presented by the respondent focused on the Court's viewpoint neutrality jurisprudence. Respondents posed the issue presented by the petition as follow: "If a state chose to award scholarships based on neutral criteria to students based on financial need and academic performance, does the state violate the First and Fourteenth Amendments to the U.S. Constitution when it withdraws the scholarship from a student who is otherwise eligible except for the fact the student chooses to declare a major in theology taught from a religious perspective?" (Respondent, Davey 2003 p. 40)

The respondents argued that this case need not be reviewed by the Supreme Court because the alleged conflict presented by the petitioners, the Ninth Circuit Court's ruling in *Locke v. Davey* and decision rendered by the *Washington Supreme Court on Witters v. State Commission for the Blind* (112 Wash. 2d 363, 771 P.2d 1119, 1989,) was nonexistent. Simply stated, any conflict between state constitutional law and federal constitutional law defers to the well established rule of federal supremacy (Respondent, Davey 2003).

In the respondent's brief, the Petitioners argued that the U.S. Supreme Court overturned the decision of the Washington Supreme Court in the *Witters v Washington case* (474 U.S. 481, 1986) by rejecting the supreme court's first holding that the federal Establishment clause posed no bar to a neutral education that allowed recipients, by their own independent choice, to pursue religious studies (*Witters v State Commissions for the Blind* 474 U.S. 481, 1986, pp. 485-89).

The respondents further asserted that the *Witters* case was used by the Washington Supreme Court as a tool to gauge issues that came before them that dealt with the Washington constitutional law prohibiting using public funds to pay for religious instruction. However, the respondent argued that a number of cases that the Washington Supreme Court had ruled on wandered from the strict separation that they used to set said precedent. (Respondent, Davey 2003)

The case of *Maylon v Pierce County* (131 Wash. 2d 779, 935 1271, 1997) was one example in which the Washington Supreme Court did not abide by the *Witters* ruling. The Washington Supreme Court ruled in *Maylon* that "only appropriations with a religious purpose violate the state Constitution. Thus, a state scholarship program with a secular purpose like the assistance program in *Witters* and the Promise Scholarship awarded to Davey would satisfy Constitutional review. Any money used to accomplish any objective other than worship, exercise, instruction, or religious establishment is not within prohibition" (*Maylon v Pierce County*, 131 Wash. 2d 779, 935 p.2d 1271, 1997).

In *State ex rel. Gallwey v. Grimm* (146 Wash. 2d 445, 48 P.3d 274, 2002), the respondents argued, the Washington Supreme Court used the Maylon case above the Witters case, giving it only small acknowledgment, in helping to decide the Gallwey case, and stated that the Maylon case governed educational assistance cases. Basically, while the Washington Supreme Court claimed that the Witters case was their steadfast ruling on the public funding of religious training, cases ruled on by the Washington Supreme Court show that this was not always true, thus invalidating the state's conflict argument.

The respondents also made the point that the petitioners cited *Luetkemeyer v. Kaufman* (419 U.S. 888, 1974) in which the respondent denied bus transportation to all non-public schools, whether they were religious or not. This meant that the state denied the benefit to students because of their enrollment in non-public schools, not because they were enrolled in a religious school. If the State of Washington were to restrict the Promise Scholarship to state schools only, then the *Luetkemeyer v. Kaufman* (419 U.S. 888, 1974) case would have some Constitutional merit. However, here the State of Washington discriminated on the basis of religious viewpoint of the student's selected major, and not the public/non-public nature of the institution the student attended.

Furthermore, the respondents argued that this case was an especially poor candidate for review because the real issue is that if a state chooses to award a scholarship on a neutral basis to financially-needy, academically-gifted college students, it may not discriminate and remove the scholarship just because the student declares a major in a religious subject taught from a

religious viewpoint. Under settled law such an act was unconstitutional undermining the necessity for Court Review.

Under the Promise Scholarship, the courses a student chooses are irrelevant. The major the student declared led to the removal of scholarship funds. Thus, a Promise Scholarship recipient could take many theology courses, as long as the student's major was not theology. If you reverse the argument, and a Promise Scholarship recipient declares a major in theology, however, and only takes courses such as English, math, science, or social studies during his first two years of college, he is no longer eligible for the scholarship according to the State of Washington, simply because they declared a theology major.

In addition, the respondents argued that the criterion set forth by the State of Washington pointed out that it was the declaration of a major that put the student in jeopardy of losing the scholarship. Since the scholarship was for the first two years of a recipient's education, that student could wait until his/her third year to declare a theology major and could have even taken all the courses for said major but still be eligible for the Promise Scholarship. For that student an obvious way to keep the scholarship would be to circumvent the system by deferring the declaration of a major.

The respondents concluded their arguments by pointing out that the petitioners had not demonstrated an argument in that the State of Washington's had a compelling state interest in a separation of church and state

Petitioner Reply

The Petitioner filed a reply on April 21, 2003. However, after a complete and exhaustive search of several law libraries and databases, this brief could not be located.

Petition Granted

On May 19, 2003, the U.S. Supreme Court granted petition to Gary Locke and Joshua Davey to argue the case before the Supreme Court. Petitioner briefs on the merits on the case were filed by both parties.

Merit Brief for the Petitioner

On July 17, 2003, the Petitioner, Gary Locke, filed a brief on the merits of the dispute. The petitioner argued that the Washington constitution provided that no public money shall be appropriated or applied to religious instruction. Following this constitutional command, Washington does not grant college scholarships to otherwise eligible students who are pursuing a degree in theology.

The petitioners continued their argument asserted that this provision has long been interpreted as establishing a clear separation of church and state. This provision prohibits both religious exercises or instruction in public schools and the public funding of such activities. The exclusion of a theology degree from the scope of Washington's Promise Scholarship program does not violate the Free Exercise clause of the First Amendment (Merit Brief for Petitioner, p. 20).

The Petitioner also contended that the Supreme Court has held that the government's decision not to fund the exercise of a fundamental right does not infringe that right. The petitioners cited: *Maher v. Roe* (432 U.S. 464, 1977); *Harris v. McRae*, (448 U.S. 297, 1980); *Regan v. Taxation With Representation* (461 U.S. 540, 1983); *Rust v. Sullivan*, 500 U.S. 173 (1991) to support their assertion. (Merit Brief for Petitioner, p. 20).

The petitioners then argued that Washington's decision not to subsidize religious instruction to implement its state constitutional policy of separation of church and state did not infringe Davey's right to seek a theology degree. The Petitioner continued contending the Promise Scholarship did not impose "unconstitutional conditions" on the recipient of the funding. Rather, it limited only the uses to which the program's funds may be applied. Students pursuing a theology degree at one institution may still use the scholarship to pursue a separate secular degree at a second school. Thus, there was no requirement for a relinquishment of rights that prohibited the recipient from engaging in protected conduct, but only a limit on the scope of the funding program (Merit Brief for Petitioner, p. 21).

Petitioners also claimed that enrollment requirements of the Promise Scholarship program did not prohibit or burden Davey's religious beliefs or practices in violation of the Free Exercise clause. The state did not impose regulatory requirements or impact Davey's practice of religion beyond the choice not to fund his degree in theology. However, the Ninth Circuit majority held that Washington's Promise Scholarship law was not neutral and was subject to strict

scrutiny under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (508 U.S. 520, 1993). It concluded that the Promise Scholarship program was discriminatory because it funded the secular study of religion and excluded only theology “taught from a religious perspective” (Merit Brief for Petitioner, p. 21). This 9th Circuit ruling follows the precedent the U.S. Supreme Court has been setting on the philosophy of view point neutral doctrine in which the Petitioner argues that the Promise Scholarship is not a forum

The Ninth Circuit majority concluded that the Promise Scholarship program constituted a limited fiscal forum that must be administered on a viewpoint neutral basis under *Rosenberger v. Rector & Visitors* (515 U.S. 819, 1995). However, the purpose of the Promise Scholarship was not to create a forum for the exchange of views, but to facilitate the education of low and middle income students. *Rosenberger* did not apply, just as it did not apply to a library’s acquisition of internet terminals and books to facilitate research and learning in *United States v. American Library Association* (123 S. Ct. 2297, 2003) (Merit Brief for Petitioner, p. 22).

In summary, the petitioner presented their arguments to support their view that the Ninth Circuit Court ruled in error to the case. The State of Washington Constitution is clear on its no funding of religious training with State funds, not subsidizing religious instruction does not infringe on Davey’s right to seek a theology degree. The Promise Scholarship program did not prohibit Davey’s beliefs and in final the Promise Scholarship was not a forum to exchange views but a way to facilitate the education of low to middle income students.

Respondents Brief on the Merits

On September 8, 2003, the respondent, Joshua Davey, filed his brief on the merits. In it he argued that the state's expressed, discriminatory disqualification of otherwise eligible scholarship recipients, solely because they declare a major in pastoral studies violated the Free Exercise clause of the First Amendment. He cited, *Church of the Lukumi Babalu Aye v. City of Hialeah*, (508 U.S. 520, 1993) and *McDaniel v. Paty*, (435 U.S. 618, 1978) to support his argument. He asserted that the state's discrimination against religious viewpoints is explicit and undisputed. (Merit Brief for Respondent, p. 15).

Addressing the Petitioner's argument, Respondent contended that Davey could have simultaneously attended two colleges, each part time, and received the Promise Scholarship at one college while pursuing a theology degree at the other. The respondent rebutted this claim by asserting that aside from the logistical nightmare in doing so, the fact of discrimination remains. The state forces only theology majors to undertake such complicated measures to maintain scholarship eligibility. The state's interest in enforcing what it claims are more strictly separationist requirements in its state constitution cannot trump federal constitutional rights. This anti-religious, viewpoint-based discrimination clearly offends the First and Fourteenth Amendments to the U.S. Constitution (Merit Brief for Respondent, p. 16).

Davey continued his argument addressing how the State of Washington violated the Free Speech clause. The State of Washington's discrimination against those students who declare a major in theology that is taught from a

religious viewpoint. Respondent reasoned that the outcomes in *Rosenberger v. Rectors and Visitors of Univ. of Va.* (515 U.S. 819, 1995) supported this argument. Discrimination against the religious viewpoint of private speakers is unconstitutional regardless of how one characterizes the forum at issue. The State of Washington penalized the exercise of personal religious choices with the forfeiture of over \$2,500 worth of state scholarship funds to which the recipient would otherwise be entitled. Because the state's anti-religious discrimination embodies hostility, not neutrality, toward religion, and because a disqualification tied to private religious choices yields impermissible state entanglement with religion, the challenged restriction also violates the Establishment clause of the First Amendment (Merit Brief for Respondent, p. 16).

Finally, Davey argued that the state's expressed, intentional discrimination against those persons who chose to pursue a theology degree taught from a religious perspective failed both strict scrutiny and rational basis review under the Equal Protection clause of the Fourteenth Amendment (Merit Brief for Respondent, p. 17).

Petitioners Reply Brief

The petitioners countered arguments in Davey's brief that claimed the State of Washington violated the Establishment clause of the First Amendment. The petitioners wrote that the Establishment Clause does not provide protection in religious matters prohibited by the Washington constitution. In *Witters v. Washington Department of Services for the Blind* (474 U.S. 481, 488, 1986), the

U.S. Supreme Court ruled that Washington did not violate the Establishment clause when it provided state aid to a student to be used to support his religious education. However, the Washington Supreme Court ruled in the Witters case that the state constitution prohibits the use of public moneys to pay for such religious instruction. (Witters v. Washington Department of Services for the Blind 474 U.S. 481, 488, 1986) The difference in these decisions reflects the fact that the Washington constitution protects individual conscience in religious matters that are not protected by the Establishment clause has established a broader separation of church and state (Ibid).

The petitioners agreed to the fact that the aid to the student in Witters was used for religious education. However, the Supreme Court concluded that the program did not violate the Establishment clause because the neutrally available state aid did not “confer any message of state endorsement of religion” (Ibid p. 488).

The petitioners argued that Davey claimed that article I, section 11 in the Washington constitution was hostile to religion because it arose out of anti-Catholic bigotry related to the Blaine Amendment. (Merit Brief Reply by Petitioners, 2003)

The history of the adoption of article I, section 11 does not suggest in any way that the language in the Washington constitution was not the product of anti-Catholic prejudice, as Davey suggests.

(Merit Brief Reply by Petitioners, 2003 p. 6)

Furthering their arguments, the petitioners wrote that the eligibility requirement in the Promise Scholarship did not violate Davey's right to freely exercise his religion. The Petitioner disputed Davey's statement that *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (508 U.S. 520,1993) addressing a city ordinance that prohibited the church members from practicing rituals of their religion was similar (Ibid).

This statement is erroneous, as we find that not funding Davey's scholarship so that he may study to be a minister does not prohibit or regulate Davey's practice of his religion. The scholarship stipulation does not impose an unconstitutional condition on Davey.

(Merit Brief Reply by Petitioners, 2003 p. 9)

The petitioners next addressed Davey's claim that his amici argued that the scholarship discriminated against religion on its face and is, therefore, subject to strict scrutiny. Davey made essentially two arguments. First, Davey seemed to argue that any law that refers to religion is facially discriminatory. Second, Davey argued that the scholarship discriminates on its face because they claim it only prohibits teaching theology from a religious point of view (Ibid, 2003).

In Davey's view, teaching comparative religion in public colleges and universities constitutes teaching theology from the non religious point of view. Thus, Davey claims viewpoint discrimination as if public universities taught Protestant theology but the state would not permit scholarships to teach Catholic theology.

(Merit Brief Reply by Petitioners, 2003 p.12)

The petitioners claimed that Davey's comparison was erroneous: Theology and comparative religion do not represent different viewpoints about the same subject. Theology is the study of the nature of God and religious truth. It is designed to inculcate belief (or disbelief) in God. A degree in theology prepares students for positions of religious leadership. There is no dispute that this was the degree Davey was seeking. In contrast, courses involving religious ideas in public colleges and universities in Washington are studied as an aspect of the general intellectual and cultural history of societies and civilizations

(Merit Brief Reply by Petitioners, 2003 p. 13).

Davey argued that Washington Rev. Code § 28B.10.814 was biased because it would apply to individuals who seek a degree in theology who never intend to pursue a career in the ministry. The petitioners pointed out that Davey's argument ignores the fact that the use of public funds for religious instruction in itself is objectionable.

Petitioners were puzzled by Davey argument that a program that facilitates a broad spectrum of educational activity is a forum, yet his argument did not define the purpose of a forum, which is to encourage a diversity of views from private speakers (Merit Brief Reply by Petitioners, 2003).

The purpose of the Promise Scholarship is not to facilitate diversity of views from students or teachers. It is to provide education. Since the Promise Scholarship does not establish a forum, it does not violate

the Free Speech clause for Washington to adhere to the neutral line between secular and religious instruction

(Merit Brief Reply by Petitioners, 2003 p. 18)

The petitioners concluded their reply by stating that Davey's claim that the state's refusal to contribute to a student choosing to seek a degree in theology demonstrates hostility toward religion that violates the Establishment clause. The State of Washington's refusal to pay for religious instruction due to its constitutional mandate does not translate into proof that the state is hostile toward religion (Merit Brief Reply by Petitioners, 2003).

In summary, we have heard from both parties, examined the argument of both parties through analysis of the documents submitted in support and against the Petition for Writ of Certiorari and the Briefs on the Merits. The dispute aroused interest in various organizations not directly involved the case. The briefs expressing those views will be examined next.

Amicus Curiae Briefs

An amicus curiae brief is Latin term that means "friend of the court." Chief Justice William Rehnquist once wrote that an amicus curiae is, "Someone who is not a party to the litigation, but who believes that the court's decision may affect its interest" (Rehnquist, 2001, p. 89). An amicus curiae brief can often provide valuable information about legal arguments or in some cases how a decision might affect people other than the parties to the case.

The petition for certiorari by Gary Locke was filed February 24, 2003. The Institute for Justice filed an amicus brief on April 10, 2003, prior to the court's decision on the petition. Twenty-four additional amicus briefs were filed following the court's decision granting the petition.

Amicus Curiae Briefs in Support of the Petitioner - Gary Locke

Amici curiae briefs were filed in support of petitioner Gary Locke, governor of the State of Washington. The Amici included the ACLU, the American Jewish Congress, the Anti Defamation League, the Historians and Law Scholars, the National School Board and the States of Vermont, Massachusetts, Missouri, Oregon and South Dakota. All the arguments presented a similar theme. Simply, history supported the State of Washington in denying funding for religious training and that the State of Washington's denial of funding did not infringe Davey's right to Free Exercise, since he remained free to pursue his religious calling at the school of his choice, at his expense.

The amicus curiae brief of the American Civil Liberties Union et al. was one of the first to be filed. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan, membership organization dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws (Amicus Curiae ACLU et al., 2003). The ACLU contended that the State of Washington did not engage in viewpoint discrimination or violate Joshua Davey's right to Free Exercise when it declines to use state tax dollars to subsidize clergy training

One of the issues the ACLU felt was not being addressed was in defining what it means to study theology. In an attempt to define the word theology, the ACLU defined it as that which “encompasses training to become a religious minister, it does not include a course of study in which one learns about one or more religions, such as that pursued in obtaining a comparative religion or religious studies degree” (Amicus Curiae, ACLU et al., 2003).

The ACLU also argued that by holding that Washington state must either abandon its scholarship program or make it available on an equal basis to students who wish to use public funds for clergy training, the Ninth Circuit Court proceeded on the assumption that, at least in this context, any state expenditure that is permitted by the Establishment clause is constitutionally required by the Free Exercise clause. Yet, the U.S. Supreme Court has never endorsed that view. Instead, the court has held that so long as they do not violate either the Free Exercise clause or the Establishment clause, states are entitled to exercise their own best judgment on how to structure the complex relationship between government and religion. Just like in *Zelman v. Simmons-Harris* (536 U.S. 639, 2002), the court’s opinion stated that states can choose to include parochial schools within a public voucher program. (Amicus Curiae, ACLU et al., 2003).

The amicus curiae of the American Jewish Congress, an association of Jewish Americans organized to defend Jewish interests at home and abroad through public policy advocacy using diplomacy, legislation, and the courts. They argued that the “constitutional roots of a ban on aid to religious education and the rule that the bare denial of a subsidy to a constitutionally protected

activity is not a penalty” (Amicus Curiae, ACLU et al., 2003). As a result, the refusal to fund theology majors by the State of Washington, is constitutional.

The American Jewish Congress further argued that Davey’s brief states that history tells us that the Blaine Amendment included in Washington’s constitution came about due to the controversy over funding Catholic education. However, the American Jewish Congress contended that it is difficult to prove that the Blaine Amendments were instituted due to anti-Catholic motives. Therefore, the court should see this as a non-issue (Amicus Curiae, ACLU et al., 2003).

Finally, the American Jewish Congress argued that history and court precedent are against constitutionally mandated financial subsidies. In invalidating a single aspect of one state’s college aid program, the question in financial aid to religion cases will no longer be, as it has been, “is this aid permissible or forbidden?” It will be instead “is this aid forbidden or required?” That fundamental restructuring of the legal framework for deciding Establishment clause cases would startle generations of judges, lawyers, politicians and academics (amicus curiae, American Jewish Congress, 2003).

The Anti-Defamation League (ADL) submitted a brief in support of Locke. The group identifies itself as one of the world’s leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. The ADL claims to maintain a deep commitment to the principles of religious liberty that are enshrined in the religion clauses of the First Amendment.

Their brief of amicus curiae (Anti Defamation League et al., 2003), claims that the State of Washington protected the religious exercise rights of all its citizens by providing greater anti establishment protections than does the United States Constitution. In doing so, the State of Washington did not fund the respondent's educational training to become a minister. Davey's Free Exercise rights were not violated as he was able pursue his religious calling at the school of his choice.

Unlike the *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah* (508 U.S. 520, 1993) case, Davey's religious practice has not been outlawed by the state. He could attend the school of his choice and study the ministry of his choice.

If Davey's educational pursuit to become a minister was funded, then a state could be required to fund a broad range of religious activity under circumstances that may threaten Establishment clause goals. At risk was a tipping of the balance between the religion clauses, with Free Exercise being given unprecedented importance at the expense of Establishment clause principles (Amicus Curiae, Anti Defamation League et al., 2003).

By refusing to fund Davey's pursuit of a Pastoral Ministries Degree, Davey was not harmed and he was not unduly suppressed from practicing his religion. "Davey is free to pursue his calling as a minister of his faith. Unlike the *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah* (508 U.S. 520, 1993) case, Davey's religious practice has not been outlawed by the state; he can attend the school of his choice and study for the ministry. Unlike Minister Paul McDaniel,

Davey is not forced to choose between a fundamental civil right and his religious worship,” the ADL wrote in its amicus curiae brief. (Amicus Curiae, Anti Defamation League et al., 2003 p. 5).

As for addressing the history of the non-funding of religious training and the Blaine Amendments in the United States of America, the Anti Defamation League argued that to say “as diversity of religious beliefs and practices has grown in this country, so too has the important protections that the Blaine Amendments offer” (Ibid p. 26).

The Blaine Amendment of 1876 arose as a result of a complex dynamic of forces that intersected over the issue of American public schooling. Supporters and opponents were motivated by concerns about universal free public education, protecting the integrity of public school funding, the obligation of states to provide universal education, the federal role in ensuring and funding education at the state level, and the funding of religious instruction and training (Ibid 2003).

An amicus brief was filed by Historians and Law Scholars, a group of legal and religious historians and legal scholars who have studied, taught, and written in the area of constitutional and religious history and the First Amendment. They focused on the history of the evolution of the no-funding and nonsectarian principles during the nineteenth century and the incorporation of those principles in the law (Amicus Curiae, Historians and Legal Scholars, 2003).

Historians and Legal Scholars argued that the no-funding principle, that was based on notions of religious liberty and liberty of conscience, came about

prior to and independently of the advent of Catholic parochial schooling. The no-funding principle was incorporated into many state constitutions during the nineteenth century for reasons unrelated to anti-Catholic dislike (Ibid).

They continued by addressing the Blaine Amendment of 1876. The argued that the amendment supporters and opponents were motivated by concerns about universal free public education, protecting the integrity of public school funding, the obligation of states to provide universal education, the federal role in ensuring and funding education at the state level, and the funding of religious instruction and training (Ibid).

The Historians and Legal Scholars conceded that there may have been some resentment against Catholic immigrants and parochial schools which may have motivated some supporters during the time the amendment was being presented. However, that was not the only basis for the amendment or rationale for its support (Ibid).

There is no evidence that the framers of the Washington Constitution were motivated by anti- religious or Catholic animus in enacting Article I, section 11. As can best be determined, no delegate to the 1889 state convention expressed any animus toward Catholic or religious schooling in voting on Article I, section 11 or Article IX, section 4. On the contrary, the framers of the Washington Constitution revealed a sensitivity to religious issues by securing “perfect toleration of religious sentiment” in the state’s organic act (Ibid p. 26).

Amicus Curiae Briefs in Support of the Respondent – Joshua Davey

Amicus briefs in support of the respondent, Joshua Davey, also had similar arguments yet some took different approaches to presenting them. The underlying theme presented by the supporters of the respondent was the State of Washington's lack of viewpoint neutrality in the Promise Scholarship and the discriminatory principles of the Blaine Amendments.

The Becket Fund for Religious Liberty et al., a bi-partisan, interfaith, public-interest law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people in public life and public benefits.

The Fund started their argument in support of the respondent by focusing on the evolution of viewpoint neutrality.

Laws that single out the religious generally (or those of a particular religion) for exclusion from government educational benefits are widespread in this country and share a common and pernicious heritage.

(amicus curiae, Becket Fund for Religious Liberty et al., 2003 p. 3)

The Becket Fund continued its argument with the notion that religion in this country has a tradition of being discriminated against. The brief pointed out that its roots don't come from James Madison, Thomas Jefferson, or the Constitution, but instead have come about due to a societal change that responded to a growing sub culture of American society that held religious beliefs that rivaled the dominant religious beliefs of the time. They posited that those Americans with ancestral roots in America were able to make the law and

disguise it as religious freedom and to use such tools to create a hostile environment for incoming immigrant Catholics (Ibid).

When Catholics and other religious minorities threatened that dominance by growing in numbers and resisting religious assimilation, the result was a nativist movement that urged the passage of laws – including the federal Blaine Amendment and similar state laws that targeted “sectarian” schools for special disadvantage to enforce the movement’s hostility to these religious newcomers. They argued that Washington State’s constitutional exclusion of “sectarian” schools from government educational funding is a classic example (Ibid).

The Black Alliance for Educational Options took a different angle in its argument. The Black Alliance for Educational Options is a non-profit, intergenerational organization of educators, parents, students, community activists, public officials, religious leaders, and business people. The mission of the Black Alliance for Educational Options is to actively support parental choice to empower families and increase educational options for black children (amicus curiae, Black Alliance for Educational Options, 2003).

In its approach, the Black Alliance for Educational Options demonstrated with new found research that the Supreme Court’s decision in *Zelman v. Harris* was showing that young black Americans are really benefiting from the opportunity to use school vouchers. “School choice programs of the sort approved in *Zelman* particularly benefit the minority and low-income children,” it said (Ibid p. 8). As in the *Locke v. Davey* case, this ruling should be upheld because if a “state establishes a comprehensive program by which it chooses to

fund private educational options, it may not, consistent with the obligation of even-handedness inhering in both the First Amendment and Equal Protection Clauses, selectively refuse to provide funding for otherwise eligible students opting for a private religious education” (Ibid p. 6).

The Black Alliance for Educational Options contended that in order for African American children to be given equal opportunity, they must secure a quality education. If public schools cannot provide this, then they should be allowed access to private schools that do.

A growing body of research suggests that vouchers are having a positive impact on participating students and their families (largely African-Americans) and on the public school systems that now are required to compete for students. Although the programs are still in their infancy and the studies reporting progress are preliminary, the results achieved thus far strongly indicate that the school choice experiments should be allowed to continue, without the invidious sword of Blaine Amendment-inspired jurisprudence hanging over them (Ibid).

The Black Alliance for Educational Options points out that by the State of Washington trying to create a higher wall of separation between church and state, it actually discriminated against religion. “The state can choose not to fund private schools at all, but it cannot withhold from religious schools the assistance it is prepared to extend to all other private schools comparably situated, without violating the core nondiscrimination guarantee of the Free Exercise and Equal Protection Clauses” (Ibid p. 7).

The United States Department of Justice also filed a brief in support of the respondent explaining the appropriate application of the First Amendment and its clauses in conjunction with the Equal Protection clause of the Fourteenth Amendment. The Justice department argued that a state is required to “maintain a position of neutrality with respect to religion and forbidding discrimination on account of religious beliefs or practices” (amicus curiae, United States, 2003 p. 6).

The provision of the Washington program that disqualified otherwise eligible students from a Promise Scholarship based solely on their decision to pursue a theology degree taught from a religious perspective directly contravenes those constitutional commands. Indeed, that provision engages in quintessential viewpoint discrimination against the study of religion from a religious perspective and sends the stigmatizing message that the State disfavors promising students who choose to pursue such religious studies (ibid).

The Common Good Legal Defense Fund is a not-for-profit organization dedicated to the conversion of culture. Common Good serves its mission through four pillars of participation: the dignity of all human life, primacy of the family, authentic human freedom, and solidarity with the poor. The Your Catholic Voice Foundation is dedicated to the social teaching of the Catholic Church and serves the same four mission points.

The amicus curiae of the Common Good Legal Defense Fund and Your Catholic Voice Foundation supports the argument that the Blaine Amendments are the cause of the prejudices against religion that we see in today’s society.

When they were enacted, public schools were of Protestant influence, which is no longer the case today. These amendments, they argued, are old and no longer hold true to their original intent. (Amicus Curiae of the Common Good Legal Defense Fund, et al., 2003)

They continued their brief by arguing that the majority of citizens support the accommodation and tolerance of religion, recognizing that religious persons and institutions play a vital role in society and promote the common good. As professor John Jeffries Jr. has written concerning the Blaine amendments, “The right response is not refinement but repudiation”. (Jeffries & Ryan, 2001) The time has come to put Blaine and a century of discrimination wholly behind us once and for all. The treatment of Mr. Davey is repugnant to the legacy of authentic freedom protected by the Constitution of the United States of America (Ibid p. 18)

The State of Alabama also filed in behalf of the Respondent. In its brief, the state outs itself as a holder of the Blaine Amendments in its own constitution and calls upon the Supreme Court to uphold the Ninth Circuit Court’s ruling and allow states to begin the process of removing these Blaine Amendments from their state constitutions, believing them to be discriminatory (amicus curiae, State of Alabama, 2003).

Alabama also claims it is a long a vocal proponent of federalism as a bedrock feature of the United States Constitution. Alabama has a strong interest in ensuring that principles of federalism are not distorted to justify state-sponsored religious discrimination (amicus curiae, State of Alabama, 2003).

The State of Alabama had a similar state grant program to the Promise Scholarship. Alabama's program also excluded religious participants to comply with the Blaine provision of the Alabama constitution. The program defined an "eligible student" as one that "is not enrolled and does not intend to enroll in a course of study leading to an undergraduate degree in theology or divinity" (Ala. Code § 16-33A-1(4)(f), 1975).

The exclusion of religious participants was thought to be required by the Blaine Amendments that were in Alabama's constitution. This was in result of an opinion of the Alabama Supreme Court Justices that expressed that a proposed students grant program in 1973 violated Alabama's Blaine provision, as well as the First Amendment of the United States Constitution because it did not stipulate that the award couldn't go to a student who was pursuing a degree in theology or divinity. In 1978, a revised student aid program was designed and included such verbiage to exclude those students pursuing a degree in divinity or theology based on the past opinion of the State of Alabama Supreme Court. (Ala. Code § 16-33A-1(4)(f), 1975).

The Institute of Justice, the Center for Education Reform, CATO Institute, Citizens for Educational Freedom, and the Goldwater Institute amicus brief also supported the petitioner. The Institute for Justice is a nonprofit, public interest law firm dedicated to protecting individual liberties. The Center for Education Reform is a national voice for more choices in education and more rigor in education programs. The CATO Institute is nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free

markets, and limited government. The Citizens for Educational Freedom is a national organization dedicated to supporting parents' rights to choose schools for their own children. The Goldwater Institute is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of public policy. One of the central missions of the Goldwater Institute is studying and promoting parental decision making and control in education.

The amicus curiae by this group argued that Washington has violated “no less than four provisions of the federal Constitution.” First, the state’s denial of a scholarship to Davey solely because he opted to pursue pastoral studies at a religious college violated his rights under the Free Exercise clause of the First Amendment. Second, Washington’s action constituted viewpoint discrimination under the Free Speech clause. It was only because Davey’s college “taught theology from the perspective of religious truth that Washington disqualified him from state aid.” Third, in excluding theology majors, the state “plainly draws a line on the basis of religion, a suspect classification under the Equal Protection clause of the Fourteenth Amendment.” Finally, it asserted that Washington deliberately hindered religion as against non-religion, violating the principle of neutrality that the court invoked in its Establishment clause cases (amicus curiae, CATO Institute, 2003).

The Council for Christian Colleges & Universities et al., a group of religious educational institutions that are concerned about the protection of religious liberty for themselves and their students, including protection against discrimination on religious grounds. The Council argued that “any program

funded under neutral criteria will result in differential impacts because of the differences in the choices and personal characteristics of students of different faiths. These varying disparate impacts do not justify purposeful, facial discrimination against religious choices compared with all other choices of major” (amicus curiae, Council for Christian College & Universities et al., 2003).

Oral Arguments

Once the Supreme Court grants a request for certiorari, it establishes a briefing schedule and sets a date for oral arguments. The oral argument was heard on December 2, 2003. The court provides transcripts of the argument. However, the transcripts did not identify the justice that posed a particular question. When identified, the justice name is given. Only one attorney may argue for each side unless the court grants the ability to have more than one argue prior to the oral arguments. Each side has 30 minutes to argue. Additional time may be requested but is rarely given by the court. (Rules of the Supreme Court of the United States, 2007)

This researcher wrote a letter to the Clerk of the U.S. Supreme Court requesting permission to attend the oral argument for the purpose of research for this dissertation. The researcher’s request was approved. The Clerk provided a special pass and seat for the oral argument in *Locke v. Davey*. Per the courts instruction, no recording devices are allowed in the chambers during arguments except for paper and writing instrument. The following discussion of the oral

argument were taken from the transcription of the arguments provided by the Court.

The researcher was present for the oral arguments. Narda Pierce, Esq., argued the case for the State of Washington in support of the petitioners. Jay Sekulow, Esq., and Theodore B. Olsen, Esq., of the United States solicitor general's office argued in support of the respondent.

The first to present was Ms. Pierce in support of the petitioner. Counsel Pierce began her argument by discussing the State of Washington's constitutional limits on funding religion in or funding religious activities and in its ability to regulate religious activities. However, the Justices interrupted Counsel Pierce's argument with questions. Chief Justice Rehnquist began by asking if Ms. Pierce thought that the provision in Washington State Constitution prohibiting the funding of religious activities meant more than if it was just a statute.

Ms. Pierce replied that the Supreme Court has recognized that a state constitution is adopted by all the voters of the state as opposed to the adoption of a statute. The next Justice quickly interrupted Ms. Pierce questioning the program itself. "Was the Promise Scholarship similar to a voucher program?" the Justice inquired. Ms. Pierce answered by explaining that the Promise Scholarship worked like a voucher to the extent that it would be used for educational expenses. However, she argued that it was not like a paycheck where a person has those funds as his/her private funds and may apply those funds however the student decided.

Justice Sandra Day O’Conner then asked if it was known how many states had similar provisions or laws in their constitution. Ms. Pierce replied it varied, depending on the particular provision, but that the provision prohibiting use of public funds for religious instruction was in approximately 36 state constitutions.

The next question asked was whether or not these provisions in state constitutions came about due to the Blaine Amendment. Ms. Pierce argued that the Washington provision was not the Blaine Amendment, which refers to the use of public funds in schools under sectarian control. The current provision under discussion was a separate provision from those put forward by the Blaine Amendment proponents. While the provision was not in the original proposed constitution set forth by the framers of the State of Washington, it was added during the constitutional convention. In addition, Ms. Pierce argued there is no evidence that suggests the State of Washington had any anti-Catholic motive when the provisions were added to the state’s constitution.

Justice Scalia interrupted and quickly began probing the logic behind her arguments. He asked if a state prohibited only the study of theology from a Catholic perspective, would that survive? Ms. Pierce stated no, it would not. What the state did here was prohibit public funds for religious instruction whenever it occurs. Justice Scalia then asserted the state is not permitted to discriminate between religion in general and non-religion.

Ms. Pierce argued that the line between funds for secular purposes and for religious purposes is a line recognized by the Supreme Court in past cases. The line recognizes both the values of the Establishment clause and the Free

Exercise clause of the Constitution. Justice Scalia continued to argue that it still treats religion different from non-religion. You can study anything you like and get it subsidized except religion. How does this not violate the principle of neutrality?

Is the State of Washington trying to make the distinction between the training of how to be religious and the study of what people believe? Was that the distinction the State of Washington was trying to make? Ms. Pierce then agreed.

Justice Souter furthered the discussion. Justice Souter pressed the argument by stating “if you agree then you must agree that if Washington funded a school of Atheism but wouldn’t fund a school of religious nature then there would be a violation of one or both of the clauses in the First Amendment.”

(Locke v. Davey Oral Arguments p. 9) Ms. Pierce stated yes, saying it is the difference between being religious and studying religion that has been the courts line over the years. In particular, the Schempp case that referred to the study about religion versus the study of religion.

Another Justice then asked this question: “If Davey had not declared a double major, could he have taken all the religious perspective courses. This would have been permissible under the statute.” (Ibid p. 14) Ms. Pierce stated that the statute focuses on whether a student is pursuing a degree in theology. He could have taken all the courses under the ministry studies major as long as he didn’t declare it as a major. But because he chose it as a major the state denied the funding because it is an inherently religious program. The focus is on the religious nature of the instruction and to look at the core course of study and determine if it is in compliance.

The Justices then pushed Ms. Pierce to establish the State's interest in refusing funding to a student if he/she selects a religious major. She stated that the State of Washington's interest was expressed in 1889 to protect the freedom of conscience of all its citizens and in doing so to not compel its citizens to provide public funds to support the promotion of religious beliefs with which they may not agree.

Justice Scalia then asked if this meant that the state could decline to provide fire protection to churches and synagogues since a firehouse is funded through public funds. This public benefit is provided to both religious and non-religious institutions equally yet citizens do not protest its use.

Ms. Pierce responded that the Supreme Court has already drawn that distinction. Justice Souter then remarked that it seems as though the State of Washington will certainly put out the fire in a church but it won't spend public funds for the purpose of persuading people that they ought to be inside the church. Ms. Pierce responded that the distinction between providing police and fire services to an organization and providing funding to assist in the educational purpose of that organization was made in *Norwood v. Harrison*.

Ms. Pierce continued to argue for the State of Washington's provision that there is a rational basis for not funding religious instruction wherever it occurs, to include a theology course. In this case, not providing funding does not infringe on the student's right to practice their religion.

Attorney Jay Sekulow initially argued for the respondents. He opened up his argument by addressing neutrality as it is applied to the law and how the Promise Scholarship violates neutrality by discriminating against religion.

Mr. Sekulow continued his argument with how the State of Washington had awarded the scholarship to Mr. Davey with no stipulations or restrictions as to what major he may choose or what course of study to avoid. Mr. Davey followed all the preset guidelines of the scholarship and was two months into his classes when he was told that majoring in pastoral studies would negate his Promise Scholarship. The scholarship check is sent directly to the student. It is not written to the school nor can a school use it for any expenditure. The institution's role is to verify the student is enrolled. Therefore the restricting of funds for this student is a violation of the Free Exercise clause.

The Justices then asked how the denying of funds was a violation of Davey's right to the Free Exercise of religion. While it might cost more to attend college, it doesn't restrict his ability to exercise his religion.

Mr. Sekulow responded that the State of Washington had acknowledged the fact that Davey has the free exercise right to pursue a degree in theology. The real question is the burden that the free exercise clause is placed under. The benefit of the Promise Scholarship was available to a student however a religious classification was utilized to deny the student access to those funds even though he met the state's criteria.

A Justice then asked then asked a question pertaining to the effect this case would have on the school voucher decision that the Supreme Court ruled

on in the previous year. Mr. Sekulow argued that under the voucher program ruling that was rendered in the *Zelman v. Simmons-Harris* (Zellman v. Harris 2002), a state that offered a voucher program would have to include religious schools in that program. A state may also choose to fund public schools only. The gist of it, Mr. Sekulow argued, is that a state with a school voucher program cannot say it will fund private schools and not fund religious private schools. According to the respondent, this is a contradiction to the 37 States that hold Blain Amendment type laws in their constitutions.

Justice Ginsburg then asked Mr. Sekulow to respond to the argument that if a state were to issue funding to all professions, such as lawyers, doctors, etc. but not for ministers would this be a violation of free exercise clause? Mr. Sekulow responded that it would in fact be a violation and that he would argue the same point, a violation of neutrality.

Mr. Sekulow was then asked if a student who studied literature from instructors who taught literature from a religious perspective at a sectarian school be funded? He responded with a yes. He added that what we are truly presented with here today is that a statute which on its face states that a student who qualifies based on academic requirements and economic need can go to any qualified school, be it private, religious affiliated or state supported, and major in any offered course of study except one, religion.

Mr. Sekulow then stated that the “play in the joints” statement, made by a Justice during the oral arguments, between the Establishment clause and the Free Exercise clause, gives states broad flexibility in establishing or not

establishing programs. However, it is not permissible to use the “play in the joints” to exclude religion, at least according to the prior precedent set forth by the Supreme Court.

Theodore B. Olsen, Esq., solicitor general then proceeded to the podium to present his argument in support of the respondent. Olsen argued that the State of Washington was practicing religious discrimination by not funding a student who studied religion. The Justices argued back that for centuries this country had observed the notion that religious instruction not be funded by tax dollars. Davey can practice his religion and still become a minister, he just has to pay for it. He must practice it without subsidy.

Mr. Olsen continued to argue that this was discrimination, in the same way that a Tennessee minister (McDaniel v Paty 435 U.S. 618, 1978) was removed from office because he was a minister, and in the same way saying everyone will have expenses paid for except for ministers.

The Court then asked Mr. Olsen if he would agree that if a school voucher system excluded parochial schools, based on his stance, would be a violation? Mr. Olsen replied that it would depend on how the program was structured but strict scrutiny would be necessary.

Counsel Pierce reserved three minutes for rebuttal. Ms. Pierce reaffirmed her original argument and challenged the statement, made by one of the justices, that statute in which no aid shall be given to a student pursuing a degree in theology was a matter of administrative ease. She argued that the statute presented a question of entanglement. Should the state be involved in a class by

class assessment of course work to determine if it is religious instruction or not? The State of Washington does not operate that way. She continued her rebuttal citing the Court's decision in *Witters v. Washington Department of Services for the Blind* (*Witters v. Washington* 474 U.S. 481, 1986) as supportive of her position.

The State of Washington does not discriminate against religion because it refuses to fund religious education she insisted. It merely extends that one principle beyond what the Establishment clause requires.

Ms. Pierce concluded her argument asserting that the U.S. Supreme Court has set precedence in allowing wide latitude in deciding on funding issues allowing states to make their own policy statements. Justice Scalia argument that a student awarded the Promise Scholarship and taking all religious courses, but not declaring religious studies a major while he/she got funding, would be in compliance with the statute was not rebutted by Counsel Pierce. Instead she stated her belief that the problem would be a rare.

Justice Scalia got the last word. He addressed Ms. Pierce and reminded the Court that Northwest College is a religious institution and theology classes are a required part of the curriculum. This however is permitted by the Washington State statute to be funded. Ms. Pierce attempted to argue back but had run out of time.

The Locke v Davey Decision

The Locke v Davey decision will be presented in the legal brief format.

Name of case: Locke v. Davey

Citation: 540 U.S. 712

Date of decision: February 25, 2004

Vote: 7-2

Author of opinion: Chief Justice William Rehnquist

Facts: The State of Washington had established the Promise Scholarship program to assist academically gifted students within certain economic stature, with funds to attend qualified post-secondary institutions. In accordance with the State of Washington constitution, “students may not use those funds at an institution where they are pursuing a degree in devotional theology” (Locke v Davey 540 U.S. 712, 2004 p. 716).

In creating the Promise Scholarship in 1999, the State of Washington legislature concluded it could help bridge that financial gap and allow students such as Davey the opportunity to attend college. According to the initial guidelines of the scholarship, students could spend their funds on any educational related expenses, including room and board (Ibid).

The funding for the scholarship came through appropriation from the state legislature; the actual amount of the funding depended on the total amount allocated to the program. In the 1999-2000 academic year, that amount was \$1,125; in 2000-01, that amount was \$1,542 per school year (Ibid).

Eligibility for the Promise Scholarship required that students meet four criteria. First, a student had to graduate from a private or public high school within the State of Washington. Second, the student had to graduate in the top 15% of his/her graduating class or attain a combined score of 1200 on the Scholastic Assessment Test (SAT) or a score of 27 or better on the American College Test (ACT). Third, the student's family income must have been less than 135% of the state's median income. The final criterion was that the student must attend at least half-time in an eligible post-secondary institution in the State of Washington and may not pursue a degree in theology at the enrolled institution while receiving the scholarship (State of Washington Higher Education Coordinating Board Policy Manual, 1999).

Private institutions in the State of Washington qualified if they were accepted by a nationally-recognized accreditation body (*Locke v Davey* 540 U.S. 712, 2004). Pursuing a degree in theology was not defined in the statute; however both parties in the suit agreed that the statute as adopted was consistent with the State of Washington's constitution, which prohibited the issuance of public funds to pursue degrees that are "devotional in nature or designed to induce religious faith" (*Ibid* p. 716).

If a student met all the requirements and the institution the student attended determines that the student was not pursuing a degree in devotional theology, then the scholarship funds were sent to the institution

for distribution to the student, to be used for payment of tuition and other related educational expenses (Ibid).

Joshua Davey met the criteria set forth for the Promise Scholarship. He applied for and was awarded the scholarship. He chose to attend a private Christian college, Northwest College, which is affiliated with the Assembly of God denomination, and was an eligible institution under the Promise Scholarship criteria set forth for eligible institutions. According to Joshua Davey, he had always wanted to attend a Bible college and one day become a minister, more specifically a church pastor. He selected a double major in business management and pastoral ministries. However, pastoral ministries is considered devotional study and therefore, Davey was ineligible for the Promise Scholarship (Ibid).

In the fall semester of 1999, Davey met with the director of financial aid at Northwest College and learned for the first time that he could not use the Promise Scholarship if he was going to pursue a devotional theology degree. He was advised that in order to receive the Promise Scholarship, he must certify in writing that he was not pursuing such a degree and in doing so must drop the pastoral ministries major. Davey refused to do so (Ibid).

Davey then filed a lawsuit against various state officials in the district court against the governor of Washington and members of the Higher Education Coordinating Board (HECB), seeking reinstatement of the scholarship, damages, and fees.

Davey's suit claimed violations of his First and Fourteenth Amendment rights, as well as the Washington State constitution. Davey cited in his brief the decision of *Church of Lukumi Babalu, INC. v. City of Hialeah* 508 U.S. 520 (1993) to support his position. The case involved a state law that prohibited the killing of animals when done for religious purposes. The Court rejected Davey's argument that the Supreme Court ruling in this case made the Promise Scholarship Program actions unconstitutional because it was not viewpoint neutral with respect to religion. The Court stated that in the *Locke v Davey* case, the State of Washington's disfavor of religion is of a far milder kind and it imposes neither criminal nor civil sanctions on any type of religious service or rite. (Ibid)

Davey also cited *McDaniel v. Paty* for the proposition that a state may not use a person's religious exercise as a criterion for denial of a benefit, absent a compelling state interest. Davey's argument was that denial of his scholarship based on his decision to pursue a degree in pastoral studies violated, the Free Exercise clause, Establishment clause, and Free Speech clause of the First Amendment as incorporated by the Fourteenth Amendment (*Locke v Davey* 540 U.S. 712, 2004).

The judge in the State of Washington's District Court granted HECB's motion for summary judgment, ruling that while a state may not discriminate against a student on the basis of religion, it is not required to pay for his religious pursuits. The court relied upon cases such as *Rust v.*

Sullivan, Harris v. McRae and *Regan v. Taxation With Representation* in which the Supreme Court had upheld the power of governments to selectively fund the exercise of Constitutional rights. The district court also rejected Davey's Freedom of Speech and association claims because he did not point to any restriction on his ability to speak, and the court rejected Davey's claim that his due process was violated (Ibid).

Davey appealed the decision of the U.S. District Court to the United States Court of Appeals for the Ninth Circuit, which then ruled 2-1 in favor of Davey. The majority held that Davey's Free Exercise rights were violated. The panel acknowledged the selective funding in cases such as *Rust* and *Regan*, but the court found them not applicable to the current case as they involved programs set up for the government's own purposes. Washington's Promise Scholarship had a broader purpose: to fund the educational pursuits of outstanding students. Invoking the "public forum" reasoning of *Rosenberger v. Rector and Visitors of the University of Virginia* (focusing on Free Speech rather than Free Exercise), the court held that the theology exclusion was impermissible viewpoint discrimination allegedly aimed at the suppression of religious ideas. Judge Ryemer wrote, "The bottom line is that the government may limit the scope of a program that it will fund, but once it opens a neutral forum, with secular criteria, the benefits may not be denied on account of religion" (Davey v Locke 299 F.3d 748; 2002 U.S. App. LEXIS 14461 p. 10152)(Locke v Davey 540 U.S. 712, 2004).

The HECB board argued that even if strict scrutiny applies, the policy survives such scrutiny because there is a compelling state interest in upholding the establishment clause of its state's constitution. The Ninth Circuit Court found that the state's interest was less compelling because the scholarship funds do not directly go to the institution, but are awarded to the students on the basis of secular criteria and are applied to religious studies only indirectly as a result of independent student choice. The court also reasoned that the restriction on theology majors is similar to an unconstitutional condition, penalizing the exercise of a Constitutional right, because the scholarship would not necessarily pay for religious studies, but might instead be used for any education-related expense, such as food and housing. The court, however declined to rule on Davey's other Constitutional claims (Davey v. Locke Ninth Circuit Opinion No. 00-35962 2002).

The dissenting judge in the Ninth Circuit, Justice M. Margaret McKeowan, had noted this that the Washington statute "has successfully navigated the tensions between the free exercise of religion and the prohibition of its endorsement." Justice McKeown also wrote that "the simple truth is that Washington has neither prohibited nor impaired Davey's free exercise of religion. He is free to believe and practice his religion without restriction ... The only state action here was a decision consonant with the state constitution, not funding 'religious ... instruction' "

(Ninth Circuit Justice M. Margaret McKeowan Davey v. Locke No. 00-35962 2002 p.10161).

Question Presented: Does prohibiting a state funded scholarship to an individual who chooses to use the funds to study theology when the state's constitution clearly states that no public monies shall be appropriated or applied to religious instruction violate the First Amendment's Free Exercise clause? (Locke v Davey 540 U.S. 712, 2004).

Answer: No

Court's reason: (Majority Opinion)

Writing for the majority, Chief Justice Rehnquist's opinion stated that the U.S. Supreme Court is said to have always agreed that the two clauses, The Establishment clause and the Free Exercise clause are "frequently in tension." However, there has been long-standing talk that "there is room for play in the joints between them" (Locke v Davey 540 U.S. 712, 2004 p. 718).

What the Court means by this term "play in the joints," is that there are some actions that a state may prohibit that are allowed by the Establishment clause but not required by the Free Exercise clause. In this case, "the link between government funds and religious training is broken by the independent and private choices of recipients" (Locke v Davey 540 U.S. 712, 2004 p. 719). Davey had a choice in declaring a major of pastoral ministries and of the institution he decided to attend.

The State of Washington could in fact permit Promise Scholarship recipients to pursue a degree in devotional theology and be consistent with the federal Constitution. The question that the Court felt was most pressing was whether or not the State of Washington could deny funding to Promise Scholars based on the State of Washington's constitution, which prohibits funding religious instruction that will prepare students for the ministry (Ibid).

The Court rejected Davey's claim of unconstitutionality due to the Promise Scholarship program not being "facially neutral with respect to religion." Chief Justice Rehnquist dismissed applicability of the *Lukumi* precedent. In the *Lukumi* case (Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 1993), the city of Hialeah made it a crime to engage in certain kinds of animal slaughter and the U.S. Supreme Court found that the law was created to "suppress ritualistic animal sacrifices of the Santeria religion" (Ibid p. 720). Rehnquist distinguished *Lukumi* writing the opinion of the court that the State of Washington does not disfavor religion as it does not impose criminal or civil sanctions on any type of religious service or rite. The Promise Scholarship does not prohibit ministers the right to participate in the political affairs of the community (McDaniel v. Paty, 435 U.S. 618 1978). It also does not force a student to choose between his/her religious beliefs and receiving a government benefit. In this case, the State of Washington has simply decided not to fund with state tax dollars a "distinct category of instruction" (Ibid p. 721).

Chief Justice Rehnquist noted that the State of Washington's constitution draws a more stringent line on the funding of religious education than does the United States Constitution. Georgia, New Jersey, Delaware, and Vermont, decided to prohibit establishment of an official state religion and further placed in their state constitutions formal prohibitions against using public tax funds to support the ministry (Ibid p. 722). Rehnquist argued that this reinforces the conclusion that early on, states found no problem in excluding ministries from receiving state dollars. Furthermore, Rehnquist notes that the State Of Washington allows the Promise Scholarship to be used at an institution that promoted a Christian educational philosophy and students can still take devotional theology courses while receiving the Promise Scholarship. The State of Washington merely intended to refrain from supporting the training of ministers (Ibid p. 723).

The seven member majority concluded that the State of Washington's constitution and the Promise Scholarship did not discriminate against religion. Therefore, the U.S. Supreme Court could not conclude that the denying the funding for vocational religious instruction is unconstitutional and Davey's claim must fail (Ibid p. 725).

In summary, the Court ruled that disqualifying Joshua Davey, from the State of Washington's Promise Scholarship did not constitute a violation of the Free Exercise clause of the First Amendment.

Dissenting Opinions:

Justice Scalia wrote the dissenting opinion; Justice Thomas joined the opinion. Justice Scalia started the dissent discussing the case of *Church of Lukumi Babalu Aye, Inc v. Hialeah* (508 U.S. 520,1993) in which the court held that “a law burdening religious practice that is not neutral must undergo the most rigorous of scrutiny.” He argued that the Promise Scholarship discriminated against religious training (Ibid p. 726).

To support his conclusion, Justice Scalia cited *Everson v. Board of Education of Ewing* (330 U.S. 1, 1947), where the Court stated “the State of New Jersey cannot hamper its citizens in the free exercise of their own religion.” The State of New Jersey cannot withhold public welfare benefits from any one individual because of religion preference. In the case presented here, the state had adopted a generally public benefit and has refused to allow an otherwise completely qualified student to use that benefit because the student is majoring in theology. Justice Scalia finds this is an outright violation of the Free Exercise clause (Ibid p. 726).

Historically, states have argued the premise of providing financial means to fund religious education. The State of Virginia, for example, had a bill in its legislature that provided for the support of Christian teachers. Other states have similar laws that allowed for the funding of clergy from state funds. While funding such endeavors from federal coffers has been viewed negatively, such funding from state coffers is not barred. Justice Scalia pointed out that “no one would seriously contend, for example, that

the Framers would have barred ministers from using public roads on their way to church!” (Ibid p. 729).

Justice Scalia continued that while the U.S. Supreme Court did not dispute that the Free Exercise clause places some limits on public benefits programs, the court did not find any violations of Davey’s rights based on the contention of “play in the joints.” In simplest terms, a municipality cannot discriminate. Justice Scalia pointed out in his example that a municipality cannot discriminate against Black Americans, nor can it hire in favor of them then argue “play in the joints” when sued. The Religion clause must be neutral as well (Ibid p. 728).

Justice Scalia also used a practical argument that the State of Washington was not protecting the pocketbooks of its citizens because the tiny fraction of amount that would be affected by those Promise Scholarships recipients that decided to choose to study theology would be minuscule. In addition, Davey would graduate and give back to the community through taxes paid for the rest of his life (Ibid, 2004).

Justice Scalia closed his opinion with the thought that this case is about discrimination against a religious minority. The decision in this case was limited to the training of the clergy, but its logic was extendable. “Will we deny priests and nuns from prescription drugs benefits on the grounds that taxpayers freedom of conscience forbids medicating the clergy at public expense?” (Ibid p. 733).

Justice Thomas also issued his dissent on the *Locke v. Davey* case. Justice Thomas pointed out that both parties in the case agreed that a “degree in theology” means a degree that is “devotional in nature or designed to induce religious faith” (Ibid p. 734). Justice Thomas used this as the basis for his dissent argument.

Justice Thomas wrote that it is his understanding that the study of theology does not necessarily imply religious devotion or faith. The Washington statute that prohibits the spending of public monies for religious instruction does not define the term theology. Justice Thomas used two dictionaries to define the term theology: the American Heritage Dictionary 1794 (4th edition 2000) and Webster’s Ninth New Collegiate Dictionary 1223 (1991). In the American Heritage Dictionary, the term “theology” is defined as the study of the nature of God and religious truth. In the Webster’s Ninth New Collegiate Dictionary, the term theology is defined as the study of religious faith, practice and experience. Justice Thomas wrote that using these two definitions, he concluded that the term theology includes study from a secular point of view as well as a religious one (Ibid, 2004 p. 735).

Justice Thomas surmised that in the case here, the state’s denial of a Promise Scholarship to a student who is pursuing a degree in devotional theology as both parties agreed to early on in their briefs, was then a violation of the neutrality principle set forth by the courts and was evident (Ibid, 2004).

Summary

In this chapter, significant court decisions associated with the Establishment clause and Free Exercise clause were reviewed and analyzed. Presented in the chapter was an introduction to the history of the First Amendment, an overview of the Bill of Rights, a historical overview of the Blaine Amendment, History of the Promise Scholarship, a Background of the *Locke v. Davey* case, relevant judicial precedent for impacting the outcome of *Locke v. Davey*, the petition for writ of certiorari by Gary Locke, the response to petitioner by Joshua Davey, the merit brief by Gary Locke, the respondents merit brief by Joshua Davey, the merit brief reply to respondent by Gary Locke, the amicus curiae briefs in support of petitioner, the amicus curiae briefs in support of respondent, the oral arguments at the U.S. Supreme Court were reviewed and analyzed and in final the opinion of the court was presented.

The *Locke v. Davey* case surrounded the issuance of a state funded scholarship that was being used for the purpose of religious instruction. The question the Supreme Court needed to address was if a state provides college scholarships for secular instruction, does the First Amendment's Free Exercise clause require a state to fund religious instruction? The advocates for the State of Washington claimed that the state's constitution prohibited the funding of religious training. The advocates for Davey argued that not providing funds violated the Free Exercise clause and Establishment clause of the First Amendment of the U.S. Constitution and the viewpoint neutrality principle set forth by the Supreme Court. In this case the Supreme Courts rejected Davey's

invitation to extend the doctrine of viewpoint neutrality to circumstances where a states constitution strictly prohibited the use of public money religious training.

CHAPTER 3

METHODOLOGY

A Qualitative Legal Research Design

The purpose of this study was to analyze and consider the impact of the U.S. Supreme Court's decision in the *Locke v. Davey* (2003). This case examines the Constitutional dimension of a state's right to decide whether or not public funds awarded as a scholarship to a student be withdrawn if the student elects to use the funds for pastoral studies. The study entails the investigation of First Amendment Religion clauses jurisprudence.

In an effort to analyze constitutional jurisprudence, one must understand the nature of legal research. This study employs legal research methods. These methods include locating relevant Supreme Court decisions, party briefs, amicus briefs, treatises, and scholarly journal articles. Supplementary materials are utilized to understand legal precedents and attempt to explore the implications of judicial decisions.

Specific legal issues and court cases from both the federal and state levels were reviewed for relevance. A review of the State of Washington's constitution and statutes was also pursued. To amass facts for legal research, one must understand the nature of educational legal research method to determine what sources are available for such research.

Understanding and employing methods of legal research was an essential ingredient in answering the research questions posed by this study. To prevent flawed educational policymaking, administrators must understand the sources of

law under which they operate. Administrators should take care not to institute educational policy that is not based on appropriate legal authority such as federal or state constitutions or state boards of education (LaMorte, 2008).

At the federal level of law making, one must study the United States Constitution and amendments as a legal and primary source of information. Case law would complement the study on the Constitution, as one should examine the outcomes and rulings of court cases and the precedents set by the courts' decisions in interpreting constitutional conflicts and issues as they arise. Statutes also play an important role in creating educational policy for the administrator. Statutes are enacted by Congress and take the form of a law. Finally, under the federal level, an researcher should review executive orders issued by the President of the United States that may apply to education and attorney general opinions. The attorney general opinion is thought more to be advisory in its role in education as it is an opinion based on case law and not a court ruling (LaMorte, 2008).

At the state level of law making, a higher education researcher must consult the state's constitution as we see in the lawsuit that occurred in the *Locke v. Davey* case (2003). Case law and state statutes are also important sources for review in assisting with creating sound educational policies. Case law review assists by revealing legal precedent set by the courts. Courts are not obligated to follow precedents or distinguish prior rulings so that the law offers guidance for decision making.

State statutes are a significant source for educational researchers as they identify the will of the state legislatures regarding appropriate state policy. Consulting these resources within a state structure can assist a researcher in identifying current state legislative policy. A state's attorney general is also an important source for opinion in regards to researching potential legal pitfalls in educational policy making, as the attorney general is charged with providing an provide advisory opinion on legal issues and legal precedent to help reveal the state of current law. (LaMorte, 2008).

Legal research is an essential ingredient in this investigation. It is a process that identifies the law that governs an issue and then assists in the search for material that may explain or analyze that law. Successful identification of these resources aides scholars in understanding the applicable jurisprudence and analyzing the implications of the current decision to that jurisprudence (Cohen & Olsen, 2000).

In implementing legal research, the researcher used *The Legal Research Manual: A Game Plan for Legal Research and Analysis* (1984) by Christopher G. Wren and Jill R. Wren. The text presents a procedure for legal research that breaks it down to components that allow a researcher to better organize and conduct a legal study (Wren & Wren, 1984).

To thoroughly research the law on a particular topic, one must tap many resources. These sources include legislative activity, judicial decisions, and legal scholarship. Good legal research requires one to understand which resources to consult, as every situation is unique. This requires the researcher to be flexible

as experienced researchers know which sources are more useful or most effective (Cohen & Olsen, 2000).

In the United States, laws are derived from numerous sources from the U.S. Constitution to the promulgation of municipal agencies. It is a system based on federalism both federal and state governments have law making powers. Each level has its own legislative, judicial and executive branches which share the responsibility of creating laws.

The legislative branch lawmakers are elected by citizens to represent their views in the policy making. The legislature's role is to raise money through taxation, spend it on the needs of the people, define crime, regulate commerce, and determine public policy by enacting statutes (Cohen & Olsen, 2000).

The executive branch of the U.S. government is charged with the enforcement of the law. However, it also has the power to create legally binding rules. For instance, the President and most state governors can issue executive orders and administrative agencies can provide detail regulations governing activity within their areas of expertise such as the Environmental Protection Agency (Cohen & Olsen, 2000).

The concept of Federalism is also apparent in the structure of our judicial system. In addition to the Federal Court system, each state has its own judicial structure. Both federal and state courts interpret and apply the law. They also measure laws against provisions of state and or federal Constitution. The term used to identify the later function is judicial review. So the judicial branch determines the Constitutionality of laws adopted by the legislative and executive

branch. It also interprets and applies laws to various situations. Judges apply the language of the Constitution and statutes to court cases, often involving circumstances that could not have been foreseen when the laws were enacted. By doing so, Judges shape and create common law. Through established court cases or precedent, the courts evaluate legal issues and pass judgment. Over time, laws may change; however using precedent allows the court to be both fair and create stability. The decisions rendered by the courts are important, as they impact future court decisions. This is called *stare decisis* (Latin) which means to stand by that which is decided (Cohen & Olsen, 2000).

Article III of the U.S. Constitution establishes the Supreme Court. The power to create additional federal courts is vested with Congress. The Supreme Court controls its docket by selecting the cases it will hear. Four Justices must vote to hear the dispute for it to be placed on the courts docket for decision.

Educational researcher's needs are somewhat different than those of attorneys, law students, and judges. Attorneys engage in legal research to practice law, while educators seek out answers or reasons laws were created or supported in the courts. Scholars also include journal articles and other non-law related resources as secondary research material to the study of their legal subject (Lowe & Watters 1984).

The legal research pursued in this study will be an analysis of the *Locke v. Davey* briefs, petitions, *amicus curiae* briefs, oral arguments, and all relevant court cases that are deemed to be relative to this research.

A petition of writ of certiorari is a document filed by a losing party, from a lower appellate court, with the Supreme Court asking it to review and reconsider the decision of the lower court. It includes a list of the parties, a statement of the facts of the case, the legal questions presented for review, and arguments as to why the court should grant the petition a hearing (Wren & Wren, 1986).

Merit briefs are written arguments that are submitted by the petitioner and the respondent before presenting their oral arguments. The brief summarizes the facts of the case, as well as the legal reasoning behind their arguments (Wren & Wren, 1986).

Amicus curiae is a Latin term that means “friend of the court.” These briefs provide complementing information in many Supreme Court matters, both at the petition for writ of certiorari stage and when the court is deciding a case on its merits. These briefs provide valuable information about legal arguments or how a case might affect people other than the parties to the case. These briefs attempt to persuade the Supreme Court by providing legal arguments that support and supplement the position of the party they are filing on behalf of. Only those individuals and/or organizations that receive permission from the Court may submit an amicus brief. (Wren & Wren, 1986).

Relevant jurisprudence was analyzed using the case brief format to assist in making the case analysis more efficient, orderly and reduce the potential for personal bias. Briefing a case involves placing relevant case information in a specific order. A case brief is a legal research technique that allows the researcher a more efficient method of note taking of cases and can aid the

researcher as an analytical tool. The case brief format follows:

Name of case: The Case Name

Court citation: The court citation assigned to the case

Date of decision: The date of the decision

Vote: How the justices voted

Author of opinion: Who wrote the opinion?

Legal topics: What area of law was addressed by the case?

Facts: Facts of the case.

Question presented: What question to be answered by the court?

Answer: How did the court answer it?

Court's reason: What were the court's reasons/arguments for the answer they gave?

Significance: What kind of impact does the decision on the case make?

(Wren & Wren, 1986)

Reading a case requires a researcher to extract all of the implications of a court's decision and, using the case brief technique, the researcher can then focus on crucial aspects of the case and sorting through the arguments (Wren & Wren, 1986).

Micro / Macro Analysis

The decision in Locke v. Davey will be analyzed using a micro and macro analysis. Using the works of two legal scholars, the researcher will attempt to

draw conclusions on the justices ruling, based on their theoretical and philosophical legal observation and experience.

The micro analytical lens is offered by Benjamin Cardozo in his classic work entitled *The Nature of the Judicial Process*. Benjamin Nathan Cardozo was born May 24, 1870. At the age of fifteen, Cardozo entered Columbia University and graduated in 1889. He then entered immediately Columbia Law School. After two years of law school, Cardozo left Columbia to practice law. He did not obtain his degree in law. From 1891-1914, Benjamin Cardozo practiced law in New York City. (Polenberg, 1997)

In the November 1913 elections, Cardozo was narrowly elected to the New York County Supreme Court, the same trial court on which his father had served. Cardozo took office on January 5, 1914. Less than a month later, Cardozo was designated to sit on the New York Court of Appeals, the highest court in the state. Cardozo was appointed to a seat on the Court of Appeals in 1917, and was elected to that seat the same year. Cardozo remained on the Court of Appeals until 1932, becoming Chief Judge on January 1, 1927. In 1921, Cardozo gave the Storrs lectures at Yale, which were later published as *The Nature of the Judicial Process*. This book enhanced greatly Cardozo's reputation, and the book remains valuable today for the light it throws on judging. Cardozo, was nominated by President Herbert Hoover to the U.S. Supreme Court after Justice Oliver Wendell Holmes resigned from the Supreme Court due to age. Approximately two weeks later, the Senate unanimously approved Cardozo's nomination. (Polenberg, 1997)

While serving on the Supreme Court, Justice Cardozo wrote the decisions that upheld the Social Security Act in May 1937. In late 1937, Cardozo suffered another heart attack, and in early 1938, he suffered a stroke. He died on July 9, 1938. (Polenberg, 1997)

The text, *The Nature of the Process* by Benjamin N. Cardozo, was based on four lectures he gave before the law school at Yale University. Cardozo provides a judicial decision making template. The template is composed of a number of components. Cardozo suggests that in order to be an effective judge, one must not just consider the written law and past legal precedence but they must also have deeper understanding of the law and must create a personal philosophy about legal decision making. Cardozo calls this “The Method of Philosophy” in his first lecture, and asserts that a Judge needs to consider many things when contemplating a decision, including the ability to understand what areas provide more weight than others do. Cardozo writes that a judge’s judicial philosophy needs to be a blend of logic and experience; in doing so, a judge will have a basis for judicial decision-making. (Cardozo, 1921 p. 27)

In Cardozo’s second lecture entitled “The Method of History Tradition and Sociology,” he addresses other areas a judge should give credence to. They are, in summary, the spirit of the law, history or customs, past court rulings, and importance of justice. (Cardozo, 1921 p. 47)

In Cardozo’s third lecture, he discusses the method of sociology and the judge as legislator. He examines at length the quandaries of decision making

with the many outside influences that a judge will face. A justice must look to establishing social justice. (Cardozo, 1921 p. 94)

In his fourth lecture, Cardozo addresses the topic “adherence to precedent.” It is Cardozo’s viewpoint that “precedent should be the rule not the exception” (Cardozo, 1921, p.145). Following of judicial precedent is the “laying of ones own course of bricks on the secure foundation of the courses laid by others” (Cardozo,1921, p.145). Cardozo is referring to previous judges who have ruled on cases of similar nature. Keeping judicial precedent in mind however, a judge must also realize that while a ruling may have met judicial review in one generation, the same ruling may be outdated and not applicable in more recent generations.

The researcher read Judge Benjamin Cardozo’s text and interpreted the judicial making process as described earlier. As it pertains to this study, the decision of Chief Justice Rehnquist will be analyzed to determine if there is evidence the chief justice subscribes to the judicial decision making template offered by Judge Cardozo. This will give some insight into the decision making process used by Justice Rehnquist. (Cardozo, 1921).

The macro analytical lens is provided by the legal scholar Jeffery Rosen in his recent work entitled *The Most Democratic Branch* (2006). Jeffery Rosen is currently a Professor of Law at George Washington University and he is the legal affairs editor of *The New Republic*. He has authored numerous legal books; *The Supreme Court: The Personalities and Rivalries that Defined America*, *The Most Democratic Branch*, *The Naked Crowd*, and *The Unwanted Gaze*. Rosen is a

graduate of Harvard College (B.A.), summa cum laude; Oxford University (B.A.), where he was a Marshall Scholar; and Yale Law School. (Rosen, 2006)

In his book, *The Most Democratic Branch*, Rosen submits the theory that while the Supreme Court is perceived as an independent entity making rulings based on Constitutional interpretation not based on political or popular views, it has not entirely held tight to this conventional wisdom. Rosen theorizes that the Supreme Court has rested its rulings of American public sentiment towards important issues that face the nation. He also contends that the court often will follow public opinion. Rosen reasons that failing to defer to public opinion means that the Supreme Court engages in “judicial unilateralism.” Rosen defines this as “a court’s decision to strike down federal or state laws in the name of a Constitutional principle that is being actively and intensely contested by a majority of the American people” (Rosen, 2006, p.8). According to Rosen, when the Supreme Court engages in judicial unilateralism, its decision will usually result in adverse results (Rosen, 2006, p. 8).

Rosen argues that the Supreme Court has issued rulings in the wake of public opinion with case example *Korematsu v United States* (323 U.S. 214,1944). In the *Korematsu* case, it was decided that many Japanese Americans, who were American citizens, were placed in fortified encampments because of their ancestry was of Japanese heritage. Due to the fears of the general American public (those not of Japanese ancestry) and in correlation to the Japanese attack on Pearl Harbor in 1941, the order was generally supported by the American public (Rosen, 2006).

Rosen argues that there other cases that show that the Supreme Court does not always act as an independent institution, but does tap the pulse of the politics at the present time as well (Rosen, 2006).

Using Rosen's work, *The Most Democratic Branch*, the researcher will apply Rosen's theory of Supreme Court Decision making using the *Locke v. Davey* case. If Rosen's theory is accurate, then the decision of the case will reflect the public sentiment at the time.

Oral Argument Attendance

In addition, this researcher attended the oral argument of the *Locke v Davey* case before the United States Supreme Court. This experience provided an invaluable perspective in the case as a participant observer. As a participant observer in a qualitative research design, a researcher must consider his own reactions to events to be a legitimate part of the study and worthy of reporting (Gall, 1996).

In preparing for oral arguments, each of the Supreme Court Justices prepare in their own way. According to the late Chief Justice Rehnquist in his book *The Supreme Court* (2001), several Justices are provided with "bench memos" by their law clerks. These memos give the Justices that they work for a summarized version of the case with pros and cons of the arguments. Other Justices, such as Rehnquist, chose to read the cases themselves including the lower court's opinion. They then discuss the case's merits and arguments with their law clerks. Allowing enough time to think about a case, its impact, and the

Constitution, is an important part of the preparation for Justices as the oral argument date approaches (Rehnquist, 2001).

The oral argument process at the Supreme Court adheres to strict time constraints. Attorneys have only 30 minutes to argue their case. (Unless further time is granted pursuant by leave of the court.) During the argument Justices pose questions that counsel are obliged to respond to. The amount of time given for argument has changed over time, and according Chief Justice Rehnquist, a good lawyer should be able to make his point in 30 minutes (Rehnquist, 2001).

As witnessed by the researcher, each attorney was constantly interrupted by the Supreme Court Justices during the oral arguments. The questioning seemed to be an intense experience and the attorneys' answers reflected examples of their arguments applied to the law. This experience presented to the researcher just how prepared and how strong the arguing skills of the representing attorneys were. Attending the oral arguments allowed the researcher to understand the problems some of the Justices were having in resolving the dispute. It also gave some insight as to which judges seemed to side with the petitioners or respondents.

The researcher used the oral argument transcript of the case to derive the significance of the arguments. The transcript was also helpful in determining their impact, if any, that they had on the court's decision.

Scholars often debate the need for oral arguments. The Justices appeared to the researcher to be very prepared and astute. He was able to witness history

being made and marveled as the Justices hammered away at the lead attorneys, sometimes asking multiple simultaneous questions.

Summary

In this chapter, we examined the design of the research project. Education legal research is conducted through the examination of such sources such as past cases, petitioner and respondent briefs, amicus briefs, and journal articles. An overview of where the law comes from was presented, to give the reader a better understanding of the presentation of the *Locke v. Davey* case. Case briefs were discussed and explanations as to why they are used in legal research were presented. An explanation of how the researcher was going to analyze the case using a macro lens via the text by Jeffery Rosen and using micro lens via the text by Benjamin Cardozo was presented. Finally, the role of participant observer was explained and presented, as the researcher attended the oral arguments and used his observations to further his analysis of the case.

CHAPTER 4

FINDINGS OF THE STUDY

This chapter answers the research questions posed in Chapter I. This chapter will also present the United States Supreme Court's decision in *Locke v. Davey* (No. 02-1315, 2003). Additionally, this chapter will examine the decision making process by Justice Rehnquist by using the text *The Nature of the Process* (1921) by Benjamin Cardozo and the Supreme Court decision making philosophy using the text *The Most Democratic Branch* (2006) by Jeffery Rosen. This chapter will also examine the impact of the *Locke v. Davey* (2004) decision on higher education.

Research Questions and Answers

How did the Supreme Court resolve the Free Exercise and Establishment clause issues presented in the *Locke v. Davey* case?

The Court issued its opinion. Justice Rehnquist, writing for the majority, reversed the Ninth Circuit ruling that Davey's Constitutional rights to the Free Exercise and Establishment clause of the First Amendment were not violated. The majority dismissed the possibility that hostility toward religion was evident in the withdrawal of the Promise Scholarship awarded from Davey. The Court found that the Promise Scholarship program actually "goes a long way toward including religion in its benefits" (*Locke v Davey* 540 U.S. 712, 2004 p. 724). Since Northwest College, an eligible institution under the Promise Scholarship program, has a Christian perspective and requires its students to take at least four

devotional classes, the program is considered by the majority to accommodate religion (Ibid p.724).

Chief Justice Rehnquist found a tension between the Establishment and Free Exercise clauses and looked to the “play in the joints between them” in order to resolve the issue in this case (Locke v Davey 540 U.S. 712, 2004 p. 719). An example of the term “play in the joints,” is if a state would permit the funding of religious training, it does not mean it is required to do so by the First Amendment. Just because something is allowed does not imply it is required. Chief Justice Rehnquist acknowledged that this “play in the joints” would allow a state to fund religious education without violating the Establishment clause. This ruling really supports a state’s right to adopt a more “stringent establishment provision standard than demanded by the First Amendment” (McCarthy, 2004) without interfering with the right to Free Exercise (Locke v Davey 540 U.S. 712, 2004 p. 719).

The term of “play in the joints” has irked some scholars--in particular Carl H. Esbeck , a professor of law at the University of Missouri - Columbia, School of Law. Professor Esbeck writes that the Supreme Court sees the Free Exercise clause as pro-religion and the Establishment clause as not anti- religion, or a way to keep religion in check (Esbeck, 2006).

Such a view places the nine Justices in the power seat, balancing free-exercise against no-establishment, in whatever manner a five to four majority deems fair and square on any given day. Such unguided

balancing accords maximum power to the Court (or worse, power to one “swing” justice), while trenching into the power of the elected branches.

(Carl H Esbeck, 2006 p.1333)

Sahrah M. Lavigne, a 2007 University of Maine School of Law graduate, wrote that the “Supreme Court has struggled with the countervailing directives of the Free Exercise clause and the Establishment clause for decades in particular in the area of public funding of religious schools” (Lavigne, 2007, p. 511).

Lavigne’s assessment of the struggle is that funding of religious schools is a comingling of church and state which in turn violates the Establishment clause. The counter-argument is that withholding public funds that fund religious schools would “place a burden on those wishing to send their children to religious schools” (Lavigne, 2007, p. 512). As a result of this lack of funding, children are denied the ability to practice their faith and thus violating the Free Exercise clause. However, she asserts, the ruling in *Locke v. Davey* is clear, since the government does not provide funding it does not hinder an individual’s ability to practice his or her religion (Lavigne, 2007)

What were the major cases the Supreme Court used to reach their decision?

The major cases that influenced the court’s decision were *Rosenberger v Rector and Visitors of the University of Virginia* 515 U.S. 819 (1995), *Widmar v Vincent* 454 U.S. 263 (1981), *Witters v. Washington Dept. of Services for the Blind* 474 U.S. 481 (1986), *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and *Lukumi Babalu, INC. v. City of Hialeah* 508 U.S. 520 (1993). These cases

embodied concepts related to the Fourteenth Amendment (states' rights) and the Free Exercise clause of the First Amendment. Chief Justice Rehnquist found a tension between the Establishment and Free Exercise clauses and looked to the "play in the joints between them" in order to resolve the issue in this case (*Locke v Davey* 540 U.S. 712, 2004 p. 719)(*Walz v. Tax Commission of City of New York* 397 U.S. 664, 1970). Chief Justice Rehnquist acknowledged, however, that this "play in the joints" would allow a state to fund religious education without violating the Establishment clause. Justice Rehnquist appears to have rejected viewpoint neutrality even though he embraced the concept in similar cases that involved government funding religion during his tenure on the Supreme Court.

The court rejected Davey's argument that because the program is not facially neutral, it is presumptively unconstitutional. Rehnquist rejected the arguments because it "would extend the *Lukumi* line of cases beyond not only their facts but their reasoning" (*Locke v Davey* 540 U.S. 712, 2004 p. 720). In the *Lukumi* decision, the court held that the law refusing to pay for ministerial studies sought to suppress the customs of a particular religion, while the burden on Davey's Free Exercise is "far milder" *Church of Lukumi Babalu, INC. v. City of Hialeah* 508 U.S. 520 (1993). Specifically, the court found that the Promise Scholarship program "does not require students to choose between their religious belief and receiving a government benefit." Chief Justice William H. Rehnquist wrote, "Training someone to lead a congregation is an essentially religious endeavor... Indeed, majoring in devotional theology is akin to a religious

calling as well as an academic pursuit" (Locke v Davey 540 U.S. 712, 2004 p, 721).

The majority rejected Justice Scalia's argument that generally available government benefits should be part of the "baseline against which burdens on religion are measured," asserting that religious and secular education are fundamentally different (Ibid p. 721). Since training a minister is a "religious endeavor," is motivated by a "calling," and involves an issue explicitly addressed in the constitution, Rehnquist concluded that it was reasonable that Washington would treat this education differently from its secular counterpart (Ibid p. 721). To demonstrate the extent of anti-establishment concerns, Rehnquist referenced revolts provoked by taxes collected to support church leaders and numerous state statutes prohibiting the use of government funds to support the ministry. (Ibid p, 722)

The Court held, based on the state's substantial interest in avoiding Establishment problems and the absence of any animus toward religion, that prohibiting use of a government scholarship funds for vocational religious instruction imposes a relatively minor burden and is not "inherently constitutionally suspect" (Locke v. Davey, 540 U.S. 712, 2004 p. 721).

The outcome of the Locke v. Davey case rested on the Fourteenth Amendment defining a state's jurisdiction to fund or not fund religious education. In the Locke v. Davey case, the State of Washington's constitution barred the legislature from funding the training of any religious education and, as such, the Supreme Court ruled that a state can decide if it wishes to fund religious training.

What was the rationale of the justices who disagreed with the Courts holding?

Justice Scalia dissented and filed an opinion in which Justice Thomas joined. Justice Scalia argued that a law that burdens religious practice which is not neutral on its face must face the “most rigorous of scrutiny” (Locke v. Davey, 540 U.S. 712, 2004 p. 726). Furthermore, he cited a longstanding principle that states “cannot exclude individual[s] ... because of their faith, or lack of it, from receiving the benefits of public welfare legislation” (Everson v. Board of Ed. of Ewing, 1947). He continued, “When the state makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured” (Locke v Davey 540 U.S. 712, 2004 p. 727). Scalia concluded that exclusion from those benefits based on religion constitutes a Free Exercise violation.

Scalia charged that the majority’s use of historical “uprisings” is “misplaced.” Since the laws involved in those events were laws that singled out ministry for support, and not laws which concerned the inclusion of them for financial aid, public reaction to them is irrelevant. As Scalia pointed out, “No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church” (Ibid p. 727-728).

Justice Scalia concluded, if there were any “play in the joints,” it would not be implicated by this case, as the Promise Scholarship program did not present a “close call,” since the program was not neutral on its face. Highlighting the absence of any attempt by the majority to defend the neutrality of the Promise Scholarship program, Scalia rejected the notion that the minimal burden imposed

and its benevolent purpose “render its discrimination less offensive.” He argued that, assuming there is some threshold harm requirement (which he contended there is not), Davey certainly met it when he was unable to apply his Promise Scholarship to the course of study he wished to pursue (*Locke v Davey* 540 U.S. 712, 2004 p. 728).

Chief Justice Rehnquist countered Justice Scalia’s argument by stating that Justice Scalia believes that training for religious professions and training for secular professions are interchangeable. Chief Justice Rehnquist argued that studying religion is akin to a religious calling as well as an academic pursuit and the subject of religion is unique in its study. Every religion has a different viewpoint to its core belief. Therefore, Rehnquist concluded that the training of religious professionals and secular professionals are not interchangeable (*Ibid* p. 729).

In closing, the dissent warned that the ruling in the *Locke* case could be extended beyond training of clergy to denial of prescription drug benefits to ministers and the like.

Justice Thomas also wrote a dissent. He noted that the statute implementing the Promise Scholarship program did not exclude through definition a degree in theology. Were the term construed broadly to apply to devotional and non-devotional study of theology, this would raise a different Constitutional question. Because the parties had stipulated that the language of the statute means to exclude devotional study only, Thomas joined in Scalia’s interpretation of the law. "Let there be no doubt: This case is about discrimination

against a religious minority," Justice Thomas wrote. "In an era when the court is so quick to come to the aid of other disfavored groups, its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional" (Locke v Davey 540 U.S. 712, 2004 p. 733).

What additional questions have emerged as a result of the
Supreme Court's decision?

Confusion over the status of the Blaine Amendments will continue to rise from the Supreme Court's decision. The Blaine Amendments argument that Davey brought forward claiming a violation of the First Amendment of the Constitution was not addressed by the Supreme Court's decision. Therefore issues regarding the Blaine Amendment's constitutionality were not addressed by the court.

In 2004, the State of Florida was faced with a similar Blaine Amendment predicament. In the case of Holmes v. Bush (No. 04-2323, 2006) the Florida Supreme Court addressed the constitutionality of their state's school voucher program. The State of Florida constitution has a provision in it that obligates the state to provide "a uniform, efficient, safe, secure, and high quality system of free public schools" (Holmes v. Bush No. 04-2323, 2006). The program permitted the use of voucher funds at religious schools. In a 5 – 2 vote, the Florida Supreme Court (Holmes v. Bush, No. 04-2323, 2006) invalidated the program under the Florida constitution, claiming that the program violated the provision because it "diverts public dollars into separate private systems parallel to and in competition

with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children" (Holmes v. Bush No. 04-2323, 2006). Currently a commission in the State of Florida is seeking to amend their constitution to allow for the school voucher program to exist. There is the potential that more of this type of litigation will arise due to failure of the courts in addressing the Blaine Amendment issue.

Second, the Court's decision also raises the question of the nature and scope of a state's power. Does this decision grant states the power or right to exclude religious providers from state-financed programs for education or social service if the providers' activities include some form of religious instruction? Can a state be free to exclude faith-intensive drug treatment programs from a state-financed voucher arrangement for substance abuse treatment? Perhaps a state could exclude a faith-based organization from state-funded programs even if those organizations are only offering secular services in their publicly funded activities (Lupu & Tuttle, 2004).

The Locke v. Davey (2004) case has been often referred to as the "voucher two case" in the media. The case has similar tones to the Zelman voucher case that the court previously addressed. The Zelman decision removed the Establishment clause's barrier to publicly funded school vouchers. State law is the only remaining legal hurdle to implementing vouchers programs and providing many other types of public assistance for religious schools.

If the Locke decision had gone the other way, it may have severely affected the school vouchers issue and other state aid to sectarian schools. If

individuals had the right to free exercise, free speech, or equal protection right to use government aid in religious schools when the aid is available in other private schools, then a removal of state barriers to publicly funded vouchers would be imminent (McCarthy, 2004).

The Supreme Court's decision also raised the issue of the impact this case will have on the potential that those supporting school choice programs. Blaine Amendments or other state constitutional provisions surrounding support for such programs may be presented with arguments from school choice opponents. The Supreme Court's decision in this case raises issues regarding any federally required affirmative obligation by a state to include children attending sectarian schools in school choice programs (Liekweg, 2004). In addition, the Supreme Court may have undermined the use of the neutrality principle philosophy that the Court had used in cases involving indirect benefit to religion.

Another concern is the increase efforts states will witness to circumvent the letter of the law. As in the case with *Locke v. Davey*, other students in Davey's class could have been in all the pastoral ministry classes that Davey was in and received the Promise Scholarship. The difference being, they would wait to declare their pastoral ministries degree till after their first two years in college. The Promise Scholarship was only awarded to student the first two years of their academic career. Student's who wished to major in pastoral studies did not have to declare that major until after their first two years (McCarthy, 2004).

Therefore, students could delay their selection of a pastoral ministry major since the Promise scholarship funded only the first two years of their education.

A number of concerns have been identified since the Supreme Courts Ruling on Locke v. Davey. These questions will most likely be addressed sometime by the Court as new situations arise.

What impact did the Supreme Court's decision have on institutions of higher education and how did the court's decision impact the 37 states that have Blaine Amendments in their state constitutions?

With the U.S. Supreme Court's ruling in favor of the State of Washington, the impact on public institutions of higher education is minimal depending on a States Constitutional interpretation. Many Christian colleges and universities were cautious; fearing a decision in favor of Washington would affect state-based financial aid for students. The president of the Council for Christian College issued this statement about the ruling:

Today's decision does not jeopardize the right of students at Christian colleges and universities, or those of other religious faiths, to continue receiving state and federal student aid. Nor does it jeopardize other forms of state support to religious educational institutions. The decision imposes no new limits on the power of states to provide such support. Indeed, nothing in federal law forbids states from removing existing restrictions on the use of student aid for clergy training. The Supreme Court held 18 years ago that states may permit students to direct state aid to clergy

training (*Witters v. Washington Department of Services*). Today's decision reaffirms that well-settled precedent. Today's decision does not give states a green light to discriminate against religion in other funding contexts. It merely protects those 13 states that deny student aid to students training for the clergy from lawsuits brought under the federal Free Exercise clause. The Council calls upon those states to eliminate their discrimination against these students through amendments to their regulations, statutes or constitutions.

Robert C. Andringa
President of the Council of Christian Colleges
February 27, 2004

If the ruling had been in favor of Davey it is likely that the government would be required to fund religious education. The government would have to consider funding everything equally even if it involved the training of ministers as the neutrality principle requires.

In the United States, religion is funded through voluntary contribution. In Europe, churches are partially funded through government taxation. Not that this case would lead the U.S. towards taxation for religious entities, but the logic it travels on could lead it to that destination. This would have been a blow to the separation of church and state so revered by Thomas Jefferson and endorsed the founding fathers of the United States of America. Thomas Jefferson was vocal among the founding fathers of the United States, who were careful to include a separation of church and state in our Constitution. Moving towards a requirement to fund minister training could nullify that intent.

Higher education administrators should become more aware of public funded scholarships. In particular, those administrators at private religious affiliated institutions that receive state funds. This case examined a state funded scholarship; however, it is not too far to reach a conclusion that other forms of financial aid, such as Pell Grants, may be jeopardized if a student receives public-sourced funds and studies a major of religious training. At the very least some states would be discouraged from offering scholarships to avoid funding religions studies or expensive litigation.

Since the ruling of the Court was in favor of Locke, there was no impact on the 37 states that have Blaine Amendments in their state constitutions. Davey's argument addressed the Blaine Amendments arguing they were a violation of the First Amendment's Free Exercise clause. By withdrawing his Promise Scholarship for choosing a major that was religion focused Davey argued that it was a violation of the Free Exercise clause of the First Amendment. The Supreme Court made it clear that it was not passing judgment on Washington's Blaine Amendment. The Supreme Court majority opinion stated that since the case was determined by merits other than the Blaine Amendments, they did not wish to address them. The ruling in this case is simply that the State Constitution prohibits the funding of religious instruction therefore they did not need to rule on the larger federal question of the Blaine Amendments.

This decision by the Court is in contrary to the Becket Fund amicus brief that provided an extensive historical description of the Blaine Amendment (Brief for the Becket Fund for Religious Liberty, The Catholic League for Religious and

Civil Rights, and Historians and Legal Scholars). The Supreme Court concluded that the Blaine Amendment was not at issue in this case. The Promise Scholarship provision excluding theological study was based on a different provision of the state constitution, which prohibits funding for degrees that are "devotional in nature or designed to induce religious faith" (*Locke v Davey* 540 U.S. 712, 2004 p. 716).

Studying the history and evolution of the Blaine Amendments shows that they were heavily influenced by anti-Catholic animosity (Hamburger, 2002). In a legal viewpoint, the letter of the law of the Blaine Amendments was to disallow tax dollars to go towards any religious training, while the intended spirit of the law was to hurt Catholics that were trying to obtain state funds to establish their own schools. Some may perceive the intention as discriminatory, while others find the Blaine Amendments a necessary element to keep the church and state separation (Hamburger, 2002).

In summary, the potential impact of the Supreme Court's decision in *Locke v. Davey* on Higher Education and the Blaine Amendments that were challenged by Davey were identified and presented.

Does the Opinion of Justice Rehnquist in *Locke v. Davey* indicate that he uses the judicial decision making template prescribed by Benjamin Cardozo in his book *The Nature of the Process*?

In trying to understand the impact of the Supreme Court's decision, it is equally important to understand how Justices make their decisions. In the book

The Nature of the Judicial Process, Benjamin N. Cardozo outlines a template for the judicial-decision making process for judges. Originally given as a series of lectures, Cardozo describes methods that guide a Judge when contemplating a judicial decision. A Judge must understand what areas of judicial decision making provide more weight than others do. Justice Cardozo summarizes the methods that guide judicial decision making as follows:

My Analysis of the judicial process comes then to this, and little more: logic and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination share the progress of law.

Benjamin Cardozo (1921 p. 108)

In order to do this, Cardozo contends that a judge must use logic and infuse their philosophy with it. Doing so, the judge will have a basis for proper judicial decision-making. Other areas Judges must regard include the spirit of the law, history or customs and past court rulings. Finally, the judge must attend to whether his/her decision serves the principle of justice (Cardozo, 1921). Each of these foundations for judicial decision making will be discussed.

When a judge examines a challenge to a law or statute, the judge must determine what the letter of the law is compared to the spirit of the law. Spirit of the law refers to the intended purpose the law was conceived by the elected governing body. In *Locke v. Davey*, the letter of the law stated no public funding should be applied toward ministry training. The spirit of the law, in this case, dictates that same intention. However, Davey could have easily circumvented the

letter of the law by accepting the Promise Scholarship and not declared a pastoral ministry major while using scholarship funds. However, he could then have taken all the classes in the pastoral ministry major, while being undeclared or declared under a different major. In this case, the spirit of the law would have been violated as Davey's original intent was to become a minister. This is an example of how a judge must take into account the intentions of the legislation and law (Cardozo, 1921).

When taking into account the history of things or what the normal custom is, a judge is really trying to identify how things have been and whether or not this is an acceptable practice based on the law. The Supreme Court majority opinion did this with the *Locke v. Davey* ruling as it examined the history of public funding in the United States (Cardozo, 1921).

Court precedent is an important factor as well. It is similar to looking at history in that a judge looks at the history of past court rulings in making a decision. An attorney's job is to present to a judge past court rulings that support arguments or those that disarm other arguments. In the case of *Locke v. Davey*, the Supreme Court considered many cases and presented opinions into whether or not the cases applied to the *Locke* case. (Cardozo, 1921).

Finally, a judge must examine the outcome of a case and see if justice has been served. This is in part due to society's expectations that a judgment serves justice. A judge is expected to protect society by providing judgments that serve the greater good of humanity. (Cardozo, 1921).

The template of judicial decision making presented by Cardozo can be likened to laying a brick wall. A judge needs to have layers—or “bricks”—of knowledge to be successful in presiding over cases. These layering of bricks would include those skills mentioned earlier, such as logic infused with a judge’s own philosophies or the spirit of the law versus the letter of the law. History or customs involved and past court rulings or precedence and prevalence of justice would also be considered bricks to create a strong base for legal rulings. (Cardozo, 1921).

Opinions that come from the Supreme Court require much in the way of introspective thinking. These opinions can have dramatic impacts and, as such, Justices take much precaution and interest in each case argued. The Justices must have years of experience and knowledge before they can be selected to sit on the Supreme Court. Thus their continual education and experience becomes a theoretical wall of bricks: strong and solid.

A careful analysis of Chief Justice Rehnquist’s decision making style in *Locke v. Davey* confirms that the Chief Justice followed the Cardozo template on judicial decision making. An independent evaluator, professor David L. Shapiro, in 1976 wrote a preliminary review in the *Harvard Law Review* on then Associate Justice Rehnquist’s decision making. The study provided insight into the Chief Justice’s decision making style. Professor Shapiro wrote that one of the most notable aspects of Chief Justice Rehnquist’s career was his consistency. He specifically identified three basic elements of the Rehnquist judicial philosophy: conflicts between the individual and the government should be resolved against

the individual; conflicts between state and federal authority should be resolved in favor of the states; and questions of the exercise of federal jurisdiction should be resolved against such exercise (Shapiro, 1976).

When examining the Chief Justice's decision in *Locke v. Davey*, one can make an argument that Chief Justice Rehnquist was indeed consistent with his judicial rulings. Davey was the individual who had a conflict with the government and the conflict was resolved against the individual. Just as Shapiro wrote about Chief Justice Rehnquist in 1976.

In viewing the *Locke v. Davey* case in a micro view using Benjamin Cardozo's text in *The Nature of the Judicial Process* (2005), the researcher could identify how Chief Justice Rehnquist came to his opinion based on his years of experience at the bench. In particular, one can compare the *Locke v. Davey* case outcome to the 1976 article that outlined Chief Justice Rehnquist's judicial philosophy in that he favored government over the individual.

How does the Supreme Court's decision in *Locke v. Davey* fit with the theory proposed by Jeffrey Rosen in his book *The Most Democratic Branch* regarding the role of the Supreme Court in our system of government?

In the book *The Most Democratic Branch* (2006), Jeffrey Rosen makes the argument that while the Supreme Court is perceived as an independent entity making rulings based strictly on Constitutional interpretation instead of political or popular views, in truth it has strayed from this conventional wisdom. Rosen contends that the Supreme Court has often rendered decisions based on the

political views of the country's majority opinion on important issues instead of constitutional analysis.

In support of his theory, Rosen cites the case of *Korematsu v. United States* (323 U.S. 214, 1944). The *Korematsu* case addressed the constitutionality of placing U.S. citizens of Japanese ancestry in fortified encampments during World War II. Rosen explains that due to the fears of the general American public inflamed by the attack on Pearl Harbor and those not of Japanese ancestry, the internment order issued by President Roosevelt's executive order was generally supported by the American public and upheld by the Supreme Court.

Rosen reasons that there are other cases that show that the Supreme Court does not act as an aloof independent institution but does tap on pulse of the politics at the present time.

Another case that Rosen uses as an example is *Lawrence v. Texas* (539 U.S. 558 2003). The Court was revisiting the constitutionality of the sodomy laws in Texas. The laws on the books in Texas made sodomy illegal for homosexuals. Rosen asserts that society has become more accepting of homosexuality as he wrote that America has a "shift in national attitudes toward homosexual conduct." (Rosen, 2006 p. 108) In his opinion, Justice Anthony Kennedy cited numerical evidence that the number of repeals of Sodomy laws in the nation was evidence of a public shift in attitudes towards homosexuals. (Rosen, 2006)

With the Supreme Court using collected data from public attitude such as in the Lawrence v. Texas case in their opinions, one can see that Rosen's theory gains support.

In the case of Locke v. Davey, the researcher is convinced by careful analysis that the Supreme Court's decision steers away from the mainstream thinking that set court precedent to date; thus, Rosen's theory on the Supreme Court decision making unsupportable. When the Locke v. Davey case emerged in 2003, President George W. Bush, a Republican, had an approval rating 63%. In 2003 USA Today reported that this was one of the highest ever for a President. (Benedetto, 2003) With such a high approval rating for a republican President one can conclude that conservative viewpoint was being favored in America. Thus one can further conclude that such public support for a sitting President who had an amicus brief submitted for the United States in support of Davey might in fact, under Rosen's theory, persuade the Court to rule with public opinion.

The Courts had already set a judicial precedent on issues that face discrimination up to this point were subject to the neutrality principal as earlier argued. Cases such as Rosenberger v. Rector (515 U.S. 819,1995), Widmar v. Vincent (454 U.S. 263,1981) and Zellman v. Simmons-Harris, 536 U.S. (2002) show that precedence being shaped. For this case, according to established precedent, discrimination based on religion was illegal.

However, the Court opinion on Locke v. Davey did not reflect the public sentiment presented at the time. Thus, it can be argued that Rosen's theory

should be rejected in the Locke v. Davey case. Given that a number of cases don't fit Rosen's theory, the theory should be debunked.

But, there is also a persuasive argument to be made regarding the Locke v. Davey case that can actually support Rosen's theory to be applicable. Rosen's theory is that the Supreme Courts' decision making is public sentiment oriented, meaning that the Supreme Court's decision making seems to align itself with the majority view of the American people. In the Locke v. Davey case, the Promise Scholarship was enacted by the State of Washington legislature. When Davey, who earned the scholarship award, brought suit claiming his First Amendment rights had been violated, there was no uproar from the State of Washington legislature. There is no evidence that a Bill was ever presented to the legislature to amend the State of Washington's constitution regarding the prohibition of funding ministerial studies. In addition, the State of Washington constitution, which includes written text that mirrors the Blaine Amendment, was ratified in 1889 through an election by the citizens of the proposed state by an overwhelming margin of 40,152 to 11,879 (Washington Secretary of State Sam Reed, 2008). Therefore, one may conclude, the Supreme Court is in fact making their decision in favor majority opinion. Furthermore, since no amendment had ever been introduced to counter the Washington code that prohibited the public funding of religious training, one can properly infer that this is the current majority view in the State of Washington (Washington Secretary of State Sam Reed, 2008).

According to the Merriam – Webster Dictionary, theory is defined as “a hypothesis assumed for the sake of argument or investigation or an unproved assumption”. (Webster, 1981 p. 1200) Applying this definition, it goes to demonstrate that the Locke v. Davey case raises questions as to Rosen’s general theory on the foundation of Supreme Court decision making. It follows that Rosen’s theory is too imprecise when applied to the Locke case since plausible arguments can be made supporting and refuting the basis of the theory. A theory, such as his, should be applicable to all cases. There is no clear tool or application that can prove Rosen’s attempt to show that the Supreme Court decides by taking public sentiment or political pressure. More guidance from Rosen is necessary in order to gain confidence in the general nature of the theory he has proposed. In addition, it is hard to gauge public sentiment in a time period of history in the past. We have limited documentation—and even less objective documentation—that can reveal historical public sentiment as a majority in the U.S. We can make assumptions based on historical records and writing but no opinion polls can be found that relate directly to past historical decisions by the Supreme Court.

Summary

Chapter 4 presented the findings of the study. Specifically, each of the research questions were answered. The major arguments in the judicial process that influenced the United States Supreme Court’s decision in the Locke v. Davey case were thoroughly analyzed. Chief Justice Rehnquist wrote for the

majority opinion and concluded that the State of Washington did not violate the Establishment clause or the Free Exercise clause of the U.S. Constitution.

Justice Rehnquist based his decision in this case on the concepts of the Fourteenth Amendment (state's rights) and the Free Exercise clause. Chief Justice Rehnquist found a tension between the Establishment and Free Exercise clauses and looked to the "play in the joints between them" in order to resolve the issue in this case (*Locke v. Davey* 540 U.S. 712, 2004) . Rehnquist acknowledged, however, that this "play in the joints" would also allow a state to fund pastoral studies without violating the Establishment clause.

Justice Scalia and Justice Thomas wrote the dissenting opinion. Justice Scalia wrote that the U.S. Supreme Court does not dispute that the Free Exercise clause places some limits on public benefits programs, but the court does not find any here based on the contention of "play in the joints" as, under law, a municipality cannot discriminate. Justice Scalia points out in his example of how municipality cannot discriminate against Black Americans, nor can it hire in favor of them then argue "play in the joints" when sued. The religion clause must be neutral as well (*Locke v Davey* 540 U.S. 712, 2004).

Justice Scalia continued by pointing out that throughout history, states have provided financial means to fund religious education. The State of Virginia, for example, had a bill in its legislature that provided for the support of Christian teachers. Other states have similar laws that have allowed for the funding of clergy from state funds. While funding such endeavors from federal coffers has been hostile, such funding from state coffers is not barred. Justice Scalia pointed

out that, “no one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church!” (Locke v Davey 540 U.S. 712, 2004).

The outstanding issues that remain regarding the Dave v. Locke case include the addressing the legality of the language in state constitutions that appear to be similar to the language of the proposed Blaine Amendment. This was never addressed by the Supreme Court in this case. The other issue still outstanding is the concern on state’s power. This raises questions such as did the decision grant states the power to exclude religious providers from state-financed programs for education or social service if the provider’s activities include some form of religious instruction? Can a state be free to exclude faith-intensive drug treatment programs from a state-financed voucher arrangement for substance abuse treatment? These questions may have to be answered in future Supreme Court opinions (Lupu & Tuttle, 2004).

The implications of the *Locke v. Davey* case were minimal when the Justices ruled in favor of Governor Locke. States may refuse to fund from public coffers religious training; however, the reverse is true, too as states may choose to fund religious training. The ruling premise is similar to the *Zelman v. Harris* (536 U.S. 639,2002) ruling that, according to the opinion of the Supreme Court, states may choose to or choose not to fund school vouchers consistent with the First Amendment.

Had the Supreme Court ruled in favor of Davey, some implications could have surfaced. An example one can envision would be in using the philosophy of

viewpoint neutrality, as many writers and scholars expected the outcome of the case to be decided on the merits of viewpoint neutrality. Many state constitutions have language in them that forbid the spending of public monies on religious training could have had legal claims brought against them.

CHAPTER 5

SUMMARY, RECCOMENDATIONS & CONCLUSIONS

Summary of the Locke v. Davey Case

The *Locke v. Davey* decision established a boundary line to the Court's use of viewpoint neutrality in court cases regarding religion. The Supreme Court's ruling in support of a state's right to decide to fund or not to fund religious training appears to conflict with the Supreme Court's past precedents of viewpoint neutrality towards religion. The court rejected Davey's argument that because the program is not facially neutral, it was presumptively unconstitutional. Chief Justice Rehnquist disagreed because it "would extend the Lukumi line of cases beyond not only their facts but their reasoning" (*Locke v. Davey*, U.S. 540 U.S. 712 2004 p. 720). In the decision on *Church of Lukumi Babalu Aye v. City of Hialeah* (508 U.S. 520, 1993), the Supreme Court held that the law sought to suppress the customs of a particular religion, while the burden involved here is "far milder" (*Lukumi*, 508 U.S. at 535). Specifically, the court found that the Promise Scholarship program "does not require students to choose between their religious belief and receiving a Government benefit" (*Locke v. Davey*, U.S. 540 U.S. 712 2004 p. 713).

The United States Supreme Court held that a "devotional theology exclusion from an otherwise inclusive aid program does not violate the Free Exercise clause of the First Amendment" (*Locke v. Davey*, U.S. 540 U.S. 712 2004 p. 719). In a 7-2 decision, Chief Justice Rehnquist was joined by Justice John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, David Souter,

Ruth Bader Ginsburg, and Stephen Breyer. Justice Antonin Scalia filed a dissenting opinion, in which Justice Clarence Thomas joined. The court held, based on the state's substantial interest in avoiding establishment problems and the absence of any animus toward religion, that prohibiting application of a government scholarship toward vocational religious instruction imposes a relatively minor burden and is not "inherently constitutionally suspect" (Locke v. Davey, U.S. 540 U.S. 712 2004 p. 733).

Chief Justice Rehnquist found a tension between the Establishment and Free Exercise clauses and looked to the "play in the joints between them" in order to resolve the issue in this case (Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669, 1970). Rehnquist acknowledged, however, that this "play in the joints" would allow a state to fund religious education without violating the Establishment clause. A state may fund religious education and other states may chose not to fund religious education. (Locke v. Davey, U.S. 540 U.S. 712 2004)

The majority opinion rejected Justice Scalia's argument that generally available government benefits should be part of the "baseline against which burdens on religion are measured" (Locke v. Davey, U.S. 540 U.S. 712 2004 p. 732). The court asserted that religious and secular education are fundamentally different. Since training a minister is a "religious endeavor" that is motivated by a "calling" and involves an issue explicitly addressed in the U.S. and state constitutions, Rehnquist considers it reasonable that the State of Washington would treat this education differently from its secular counterpart (Locke v.

Davey, U.S. 540 U.S. 712 2004 p. 720). To demonstrate the extent of anti-establishment concerns, Rehnquist referenced revolts provoked by taxes collected to support church leaders and numerous state statutes prohibiting the use of government funds to support the ministry.

Dismissing the possibility that hostility toward religion motivated the law by pulling the allocated funding for the scholarship, the court found that the Promise Scholarship program actually “goes a long way toward including religion” (Locke v. Davey, U.S. 540 U.S. 712 2004 p. 721). Since Northwest College, an eligible institution under the Promise Scholarship program, has a Christian perspective and requires its students to take at least four devotional classes, the program is considered by the majority to accommodate religion.

The court held, based on the state’s substantial interest in avoiding establishment problems and the absence of any animus toward religion, that prohibiting application of a government scholarship toward vocational religious instruction imposes a relatively minor burden and is not “inherently constitutionally suspect” (Locke v. Davey, U.S. 540 U.S. 712 2004 p. 722)

The Supreme Court also did not address the arguments in regards to the Blaine Amendments that Davey argued were unconstitutional. The Blaine Amendment wording was included in state constitutions in the early part of the 20th century to prohibit funding from state public funds to private sectarian schools. Scholars have argued that the inception of Blaine Amendments were a result of an anti-Catholic movement in which private Catholic schools were seeking state and local funding support from public coffers.

The Supreme Court's decision in *Locke v. Davey* was that the Free Exercise clause of the First Amendment did not require a state to fund religious instruction, even if it provided college scholarships for secular instruction. The court sent a clear message that failure to fund religious activity is not the same as religious discrimination. Although there is a right to practice religion, there can be no valid demand for the government to pay for it.

When the opinion on *Locke v. Davey* by the U.S. Supreme Court was rendered, this researcher was surprised by the court's opinion. The case looked as if it clearly violated the neutrality principle. An examination of the cases that the Supreme Court ruled on in the past one would draw such a conclusion that the court would rule that it violated the neutrality principle. The following are cases that pertain to the principle of neutrality:

In 1981, the case of *Widmar v. Vincent* (454 U.S. 263, 1981) was the first case in a string of cases that addressed viewpoint neutrality with religion. The University of Missouri at Kansas City ruled that its facilities could not be used by student groups for purposes of religious worship or religious teaching. The school believed that the action was required under the Establishment clause. A student religious group that had previously been permitted to use the facilities sued the school after being informed of the change in policy. They asserted that their First Amendment rights to religious free exercise and free speech were being violated.

The court ruled that the Establishment clause not only did not require state universities to limit access to their facilities by religious organizations, it prohibited discrimination. The university had generally permitted its facilities to be

used by student organizations and therefore it must demonstrate that its restrictions are constitutionally permitted. An equal access policy would not necessarily violate the Establishment clause. The three-pronged Lemon test would not be violated by such a policy. It would have a secular legislative purpose and not foster excessive government entanglement. The third part, that the policy's primary effect would advance religion, is what the university claimed. Any such benefit at UMKC would be incidental, as the state does not necessarily approve of all groups who use the open forum, and the forum is open to non-religious as well as religious groups (*Widmar v. Vincent*, 1981).

In 1981, the case of *Rosenberger v. Rector and Visitors of the University of Virginia* (515 U.S. 819, 1995) the Supreme Court ruled that the University of Virginia inappropriately denied funding to Wide Awake Productions. In its *Lamb's Chapel* decision, the court decided that the government may not regulate speech based on its substantive content or the message it conveys. It is also impermissible for the government to favor one speaker over another or impose financial burdens on certain speakers because of their expression's content. The court also makes a distinction between content discrimination and viewpoint discrimination. In *Rosenberger v. Rector*, the university did not exclude religion as a subject matter for publications receiving funding. Rather, it selected for disfavored treatment those student journals with religious editorial viewpoints. In other words, the university barred the perspective, but not the general subject matter. It would be proper for the school to engage in viewpoint discrimination if it was the one doing the speaking. However, Wide Awake was an independent

organization and contributed to the diversity of viewpoints that the Student Activities Fund (SAF) was meant to foster. The granting of funds does not violate the Establishment clause because the money was not raised by taxes. The mandatory contributions to the SAF are held to be substantively different from tax contributions. The money is meant to reflect the diversity of the student body and is given to private contractors. The use of public facilities that was permitted in Lamb's Chapel involves government expenditures for the upkeep of the facilities, in the same way that such funds are involved in this case. Finally, the student publication is neither a religious institution nor a religious organization. This decision extended the Lamb's Chapel ruling that allowed public facilities to be used for religiously-motivated presentations. In the Rosenberger decision, money could be given directly to University organizations and publications conveying a religious message (*Rosenberger v. Rector*, 1995).

In 2002, the Supreme Court heard the case of *Zelman v. Simmons-Harris*, 536 U.S. (2002), Ohio's Pilot Project Scholarship Program provides tuition aid in the form of vouchers for certain students in the Cleveland City School District to attend participating public or private schools of their parents' choosing. Both religious and nonreligious schools in the district participated. Tuition aid was distributed to parents according to financial need, and where the aid was spent depended solely upon where parents chose to enroll their children. In the 1999-2000 school year, 82 % of the participating private schools had a religious affiliation and 96 % of the students participating in the scholarship program were enrolled in religiously affiliated schools. Sixty percent of the students were from

families at or below the poverty line. A group of Ohio taxpayers sought to enjoin the program on the ground that it violated the Establishment clause. The Ohio District Court granted them summary judgment, and the Ohio Court of Appeals affirmed.

The question presented to the Supreme Court was did the Ohio's school voucher program violate the Establishment clause. The Supreme Court responded with a closely divided opinion that it did not. In a 5-4 opinion delivered by Chief Justice William H. Rehnquist, the court held that the program did not violate the Establishment clause. The court reasoned that, because Ohio's program is part of the state's general undertaking to provide educational opportunities to children, government aid reaches religious institutions only by way of the deliberate choices of numerous individual recipients and the incidental advancement of a religious mission, or any perceived endorsement, is reasonably attributable to the individual aid recipients and not the government. Chief Justice Rehnquist wrote that the "Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice" (Zelman v. Harris, 2002).

In all three of these cases government action was judged by the viewpoint neutrality principle. The Locke v. Davey case seemed to follow the similar sequence; a student's funding was withdrawn only because he chose to pursue a

degree in pastoral ministries.

Another point this researcher found difficult to understand is that the Supreme Court stated that the value of the scholarship was of little or no impact to Davey. This researcher disagrees with the Supreme Court in that any time funds that are withheld due to a student's choice in major reduces that student's ability to make a choice, especially since there was no such stipulation in the original write-up of the Promise Scholarship. Davey lost \$2,700 in state aid by losing this scholarship. The cost to attend Northwest College (a private college) was approximately \$15,000 a year. The scholarship selection criteria were based on a student's academic performance and financial need. Davey's family was already strapped for funding for him to attend college as predetermined by the scholarship application (Berg & Laycock, 2004).

In summary, the *Locke v. Davey* case decision was reviewed and compared to three other similar cases that had been decided by the Supreme Court on the basis of the principle of view point neutrality. The researcher had expected the case outcome to follow the neutrality principle that the Supreme Court had established. The decision that was rendered seems to have put the brakes on the viewpoint neutrality principle since the Court determined that states should be the ones determining if religious education be paid by public coffers.

Recommendations for Further Study

The Supreme Court did not address the Blaine Amendments in its decision on *Locke v. Davey*. Do the Blaine Amendments give states the ability to be treat religion differently when it comes to the principle of viewpoint neutrality? Further research into the history and intention of the Blaine Amendments and their impact on society can result in a better understanding of their purpose.

Further studies should examine Supreme Court opinions using the general theory proposed in *The Most Democratic Branch* (2006) by Jeffery Rosen as a macro view explain the role of the Court in our system of governance.

Using Benjamin Cardozo's book, *The Nature of the Judicial Process* (2005), further studies should be conducted comparing the judicial decision making template explained by Cardozo.

Conducting additional studies using a macro and micro lens will either validate of the general theory proposed by Rosen and illuminate the decision making style of various justices.

It is recommended by this researcher that further research be done focused on the Chief Justices words "play in the joints" exploring the nature and scope of the phrase as it relates to proper understanding between the Free Exercise clause and the Establishment clause of the Constitution.

Chief Justice Rehnquist wrote in his opinion:

The "play in the joints" between the two religion clauses allows states — but does not require them — to support divinity studies. The state's interest in not funding the pursuit of devotional degrees is substantial and

the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here.

Chief Justice William Rehnquist

(Locke v. Davey, 2004 U.S. Lexis 1626)

Such research could result in putting together a judicial test in which the “play in the joints” applies. The test could be used as a proactive measure to aid elected officials to resolve future issues.

Also, does providing state funded scholarship money for a student pursuing a degree in pastoral ministries or religious training identify a state as one that supports religion? What harm really comes about to a state or even a community that does provide funding for religious training? A study should be conducted to identify the pros and cons of public funds sponsoring religious training. Can crime rates be reduced or perhaps can a decrease in prisoner recidivism rates be a correlated result?

Further study should be conducted on the impact of scholarships on students when it comes to making choices on college majors. Will offering scholarship money to someone to study physics encourage more students to study physics? The reverse question can also be explored, does denying scholarship money to students because they have chosen a specific major result in students choosing another major?

Conclusions

In chapter one, Introduction to the Study, the case of *Locke v. Davey* was presented and examined using the petitions submitted, an overview of the First Amendment, including history and sample cases that have helped the courts to define its meaning. The history and evolution of the separation of church and state as well as an overview of the Blaine Amendments were also presented. The research problem, research questions, and the significance of the study were presented. The methodology of this study was introduced and a definition of terms was presented.

In chapter two, significant court decisions associated with the Free Exercise and Establishment clauses of the First Amendment of the United States Constitution were reviewed and analyzed. A history of the First Amendment, Fourteenth Amendment, and the Blaine Amendments was presented and analyzed. Also included were the amicus briefs and the oral arguments of the case.

The U.S. Supreme Court granted a writ of certiorari to the *Locke v. Davey* case. The issue in this case was whether the Free Exercise clause of the First Amendment required a state to fund religious instruction if it provides college scholarships for secular instruction. Supporters of the question argued that the principle of viewpoint neutrality, claiming that if secular instruction gets funding then so should religious instruction. The opponents of the question argued that a state's constitution that prohibits such funding should be allowed to not fund religious instruction.

In chapter three, the research design was explained and procedures of the legal analysis were presented. Resources were identified that helped in the understanding and examining the Free Exercise clause of the First Amendment and the funding of religious training by public coffers.

An internal evaluation was conducted on all relevant cases to determine the similarity of facts and the relationship of these facts to the research problem. The legal significance and impact of each case was related to the research problem.

A complete case analysis was also conducted on the amicus briefs, petitions, oral arguments, and all relevant cases of the *Locke v. Davey* case. The cases were arranged in brief format to make the case analysis more efficient and guard against research bias.

The researcher also attended the oral arguments of the case and used the transcripts of the oral arguments to better understand the legal significance of the case. In chapter four, the major arguments in the judicial process that influenced the Supreme Court's decision in the *Locke v. Davey* case were examined and thoroughly analyzed. Chief Justice Rehnquist wrote the majority opinion and concluded that Washington's exclusion of the pursuit of a devotional theology degree from its otherwise-inclusive scholarship aid program does not violate the Free Exercise clause. This case involves the "play in the joints" between the Establishment and Free Exercise clauses. Chief Justice Rehnquist based his decision on the history the United States has had in regards to not funding religious training with public funds, and that a state has the right under the

Fourteenth Amendment to not fund religious training but conversely could if it so chose to.

Justice Scalia wrote that if there were any “play in the joints” it would not be implicated by this case as the Promise Scholarship program does not present a “close call,” since the program is not neutral on its face. He argued that, assuming there is some threshold harm requirement Davey certainly met it when he was unable to apply his Promise Scholarship to the course of study he wished to pursue. Justice Thomas wrote his own dissent to note that the statute implementing the Promise Scholarship program does not define a degree in theology. Were the term construed broadly to apply to devotional and non-devotional study of theology, this would raise a different Constitutional question.

The implications the Locke v. Davey case holds for the future of public funding of religious training will depend on individual states and in how their state constitution supports it. Those states with Blaine Amendments may have to pursue constitutional amendments to remove the Blaine Amendments if the state wishes to fund religious training. There are 37 states with language in their constitutions that resembles the Blaine Amendments. What does the future hold in store for them?

In chapter four all research questions were answered. A detailed and extensive analysis of opinions of the Justices was performed. The major arguments that were presented in the Locke v. Davey case were discussed. Outstanding issues that surround the results of the case were identified and discussed. An analysis of the Judicial decision making model by Benjamin

Cardozo in his book *The Nature of the Judicial Process* (2005) was applied to Chief Justice Rehnquist's decision in the *Locke v. Davey* case. A similar analysis was done of the Supreme Courts' opinion in the *Locke v. Davey* case by applying the written work of Jeffery Rosen in his book, *The Most Democratic Branch* (2006).

In chapter five, the researcher summarized the case and examined the intent of the neutrality principle by discussing three cases that the neutrality principle was applied when the Supreme Court made their decisions on those cases. Recommendations for further study were shared.

EPILOGUE

Since the Supreme Court's decision in *Locke v. Davey* in 2004, a number of court cases have used the precedent in the *Locke v. Davey* decision. In this section, the researcher will examine the current legal landscape in regards to the *Locke* decision and present cases that used its precedent. In addition, the researcher will examine what if anything the State of Washington has done since the case was decided and if Northwest University made any changes to their institution's financial aid distribution. The researcher will also update the current status of the parties in the litigation.

Court Cases since *Locke v. Davey*

Eulitt v. State of Maine (386 F 3d 344 1st Cir 2004)

In the case of *Eulitt v. State of Maine*, (386 F 3d 344 1st Cir 2004) we find that the U.S. Court of Appeals for the First Circuit ruled that the state of Maine's law that allows local school districts to provide free public education by paying for tuition expenses to private non sectarian schools but not to private sectarian schools does not violate the equal protection rights under the Fourteenth Amendment of the U.S. Constitution. The case was brought forward originally by parents of children attending Catholic schools. Addressing the parents' claim that the law discriminated on the basis of religion, the court rejected the parents' attempt to use the claim in terms of Equal Protection rather than Free Exercise of religion. Using the *Locke v. Davey* 2004 opinion, the U.S. Court of Appeals noted, "the Free Exercise Clause's protection of religious beliefs and practices

from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity. “ (Locke v. Davey, 540 U.S. 712 (2004) Maine’s refusal to provide public funds for religious education does not interfere with parents’ fundamental right to choose religious education for their children. Applying the factors in Locke v. Davey, the U.S. Court of Appeals also rejected the parents’ contention that the statute’s exclusion of sectarian institutions demonstrates animus against religion. The court points out that the law does not impose criminal or civil sanctions on religious practice, inhibit political participation, or require state residents to surrender their religious convictions in order to receive the benefit offered by the state, in this case secular education. (Eulitt v. State of Maine, 386 F 3d 344 1st Cir 2004)

Anderson v. Town of Durham (549 US 1051 2006) cert denied

In the case of Anderson v. Town of Durham (549 US 1051 2006) cert denied, the state of Maine had an interesting dilemma. Some of Maine’s school districts do not operate a high school. The state of Maine normal practice would be to then pay for students in those specific school districts to attend private non sectarian high schools. Sectarian high schools would not be eligible for those funds. To address the alleged impropriety of the Maine statute, a bill was introduced in Maine’s state legislature to repeal the section of the state’s tuition payment statute that prohibited school districts from paying for sectarian schools. The legislative effort failed however and the group of parents filed a law suit in

federal court. The U.S. Court of Appeals, First Circuit heard the case and relied on the Supreme Court's ruling in *Locke v. Davey*, 540 U.S. 712 (2004), concluding "the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity." The U.S. Court of Appeals concluded that the U.S. Constitution does not require Maine to fund tuition at sectarian schools. (*Eulitt v. State of Maine*, 549 US 1051 2006 cert denied)

Addressing the same statute, a group of parents seeking to enroll their children in private, sectarian high schools alleged that the section of the statute barring the use of public funds for private, sectarian high schools violated the First Amendment's Establishment and Free Exercise clauses and the Fourteenth Amendment's Equal Protection Clause and brought suit in state court against three municipalities. The trial court granted summary judgment in favor of the municipalities. The case went on to be heard in the state of Maine's Supreme Judicial Court who affirmed the lower court's decision. The State of Maine's Supreme court reviewed both the state and federal court decisions regarding the Maine statute and concluded that regardless of whether the rulings were made prior to or after the *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) decision, the section of Maine's tuition payment statute prohibiting payments to private sectarian schools did not infringe on parents' free exercise of religion rights or violate the Establishment Clause. The court also failed to find any equal

protection violation because the "statute does not infringe upon the fundamental right to free exercise of religion in a constitutionally significant manner."

(Anderson v. Town of Durham 549 US 1051 2006 cert denied)

Bush v. Holmes (886 So. 2d 340 2006)

In the case of Bush v. Holmes, (886 So. 2d 340 2006) (Fla. Jan. 5, 2006) the State of Florida offered residents a voucher program called the Opportunity Scholarship Program (OSP). Originally, the program that was implemented offered students who attended or who were assigned to attend failing public schools allowing the option to choose a higher performing public school or a participating private sectarian school. (Bush v. Holmes, 886 So. 2d 340 2006)

The Florida Supreme Court ruled 5-2 that the state's Opportunity Scholarship Program, a private school voucher program, violated the Florida constitution's requirement that the state provide "a uniform, efficient, safe, secure, and high quality system of free public schools." (Ibid p.4) The court concluded that the OSP violates that provision because it "diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children." (Ibid p.4) Locke v. Davey relates to this case as it involves the Blaine Amendments. Had the Locke v. Davey addressed the constitutionality of Blaine Amendments as its original intent, this particular case may not have had to come this far.

Colorado Christian University v. Weaver (534 Fed 3rd 1245, 2008)

In the case of Colorado Christian University v. Weaver, (534 Fed 3rd 1245, 2008) the Colorado Commission on Higher Education (CCHE) used a set of criteria to establish whether or not an applying institution to its scholarship program was sectarian. Private school students attending religious schools were eligible except if the institution was deemed “pervasively sectarian.” When Colorado Christian University (CCU) applied to participate in the state’s financial aid programs, it was rejected on ground that it is a “pervasively sectarian” institution.

To determination if an institution was sectarian the CCHE used six criteria. There were: “(a) The faculty and students are not exclusively of one religious persuasion. (b) There is no required attendance at religious convocations or services. (c) There is a strong commitment to principles of academic freedom. (d) There are no required courses in religion or theology that tend to indoctrinate or proselytize. (e) The governing board does not reflect nor is the membership limited to persons of any particular religion. (f) Funds do not come primarily or predominantly from sources advocating a particular religion.” The Colorado Commission on Higher Education (CCHE) found that CCU failed to meet at least three of criteria: a, b, and d. (Colorado Christian University v. Weaver, (534 Fed 3rd 1245, 2008 p.7)

CCU filed suit in federal district court alleging that state’s decision to exclude CCU from participation in its financial aid programs based on the finding that CCU is “pervasively sectarian” (Ibid p.7) violates the Free Exercise of

Religion, Establishment, and Equal Protection Clauses both facially and as applied. The district court granted the state's motion for summary judgment. It relied on the U.S. Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), that if "there is no manifest evidence that a challenged statute is motivated by hostility towards religious beliefs or practices," discrimination against religion need only be justified by a rational basis. Applying the rational basis test, the district court concluded the state "had a legitimate interest in 'vindicating' a provision of the Colorado Constitution that forbids appropriating public money to aid religious institutions." (Ibid p.13) (*Locke v. Davey*, 540 U.S. 712 2004)

The U.S. Court of Appeals for the Tenth Circuit ruled that Colorado's scholarship programs for college and university students attending public and private institutions within the state violated the First Amendment's Establishment and Free Exercise of Religion Clauses because of the exclusion of "pervasively sectarian" institutions. Colorado provides scholarships for eligible students attending public and private colleges and university in the state of Colorado.

Laskowski and Cook v. Spellings and University of Notre Dame
(546 Fed 3rd 822 2008)

In the case of *Laskowski and Cook v. Spellings and University of Notre Dame* (546 Fed 3rd 822 2008) two tax payers, Joan Laskowski and Daniel M. Cook, brought suit to the Secretary of Education Margaret Spelling and the University of Notre Dame over a \$500,000 grant that was issued to University of

Notre Dame that was used to for a program called Alliance for Catholic Education (ACE). This was a congressional one time appropriation for fiscal year 2000. The appropriation was \$500,000 to be given Notre Dame for redistribution to several other religious colleges in order to enable them to replicate the ACE program on their own campuses. (Laskowski and Cook v. Spellings and University of Notre Dame 546 Fed 3rd 822 2008).

The taxpayers alleged that the grant violated the First Amendment's prohibition against Congress's creating religious establishments, a prohibition that the Supreme Court has interpreted to encompass any direct financial support by the government of religious activities. The ACE program is a program designed for training teachers in Catholic schools. It has three parts—professional development, community life, and spiritual growth. The first part consists of both teacher-training courses and field experience teaching at Catholic elementary and secondary schools. The second consists of the teachers' residing in faith-based communities while doing apprentice teaching in those schools. The third is encouragement of the teachers to live and work in accordance with the tenets of the Catholic faith. Thus, the program has both secular and religious components. However, the program is not training attendees to be priests or nuns. (Ibid)

The district court dismissed the suit as moot because the University of Notre Dame had received and spent the grant, a one-time appropriation and the likelihood of a future such earmark was too remote to warrant injunctive relief. (Ibid) This case brings up the question of federal funds like the Pell grant. Can a

student who receives a Pell grant attend Northwest University and study pastoral ministries. The answer is yes, as the courts consider this as direct student aid (going to the student to be used for education expenses) versus direct student aid (Going to the institution for the institution to distribute). The Pell grant is awarded to students to use towards accredited institutions for the sole purpose of their education based on financial need. While the Promise Scholarship in the State of Washington that was awarded to Davey falls under the same guidelines, except that it was merit based (specific ranking in high school required while the Pell grant does not ask for ranking or grades.) However, the awarding of the Promise Scholarship depended on the student's financial need (the student had to be from a lower socio economic level) similar to the Pell grant. Why then can one be used and the other not? The answer may be that the Pell grant is funded at the Federal level that has no real stipulations on the use of funds and is issued to the individual not the institution. A state may have more rules and guidelines to adhere to, mainly its state constitution as well as the U.S. Constitution.

The current legal landscape around the use of funds from public coffers to fund religious education or even education that is not directly religious in nature but is provided by a religious entity is still not clear. As in the last case discussed, *Laskowski and Cook v. Spellings and University of Notre Dame* (546 Fed 3rd 822 2008) the courts decided that since the money is already gone, no need to rule on whether or not the appropriation was legal. It seems that the courts are looking to avoid tackling the issue and this leaves the question on the appropriation of state funds for religious education still unanswered by the courts.

The Status of the Promise Scholarship

The Promise Scholarship offered by the State of Washington was a legislated scholarship. The legislative appropriation is still on the books in the State of Washington but was no longer funded by the legislature. Washington's higher Education Board has not posted a reason as to why, only to say that it ended on the June 30, 2006.

The Status of Northwest College Financial Aid Policy

Northwest College is now Northwest University. Northwest University's mission as an Assembly of God higher education institute is still prominent. However, applicants that imply they are interested in pursuing a pastoral ministry major are now treated differently by the financial aid office. The Northwest University's financial aid office now only offers institutional funds (private scholarships, etc.) and aid to students who state they will major in pastoral ministries at the University. All state and federal aid is withheld for those seeking that pastoral studies major but still used for those students studying other majors.

Joshua Davey

Joshua Davey graduated summa cum laude from Northwest University in 2003 and attended Harvard Law School soon after graduating in 2006. He currently works for the Firm of McGuire Woods in Charlotte, North Carolina. Davey's area of legal experience is in areas of intellectual property litigation, business torts, security litigation, products liability and collection actions.

Gary Locke

In July of 2003, Governor Gary Locke announced he would not seek a 3rd term in office. He was quoted say, “Despite my deep love for our state, I want to devote more time to my family.” (Governors Communication office memo, July 21, 2003)

Upon leaving the office, Locke joined the Seattle office of international law firm, Davis Wright Tremaine LLP, in their China and Governmental-relations practice groups. During the lead up to the 200 Democratic presidential primary, Governor Locke signed on as Washington co-chairman of Democratic candidate Hilliary Clinton’s bid for President. Gary Locke currently serves as President Obama’s Secretary of Commerce.

Summary

In this epilogue, a number of court cases were discussed that followed the Locke v. Davey (2004) case. The cases all presented here involved the challenge of using public funds for secular education. An update on the status of the Promise Scholarship was presented. Northwest Universities Financial Aid Policy was discussed and the changes they implemented to avoid such issues in the future. Finally, the current status of the parties tot eh litigation was presented.

APPENDIX

4626 Viareggio Court
Las Vegas, Nevada 89147
H (702) 221-5862 C (702) 234-6451
W (702) 895-2507 F (702) 895-2518

October 24, 2003

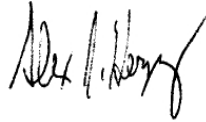
Clerk of the Court
U.S. Supreme Court

Dear Clerk of the Court;

My name is Alex Herzog and I am pursuing my Educational Doctorate in Educational leadership from the University of Nevada, Las Vegas. I have completed my course work and am currently working on my dissertation. My dissertation topic is the on the case to be argued at the U.S. Supreme Court on December 2, 2003, *Davy v. Locke Docket # 02-1315*. I am very interested in attending these arguments, and I would like to request a pass to attend.

I look forward to hearing back from you and I appreciate your time and energy with this request.

Sincerely,



Alex Herzog

Office of the Marshal
Supreme Court of the United States
Washington, D. C. 20543

202-479-3333

October 24, 2003

FAX
202-479-2971**VIA FACSIMILE**

Alex Herzog
4626 Viareggio Court
Las Vegas, NV 89147

Dear Mr. Herzog:

Thank you for your letter dated October 24, 2003. I am pleased to reserve one seat for you for the oral argument in Locke v. Davey scheduled for December 2, 2003 at 10:00 a.m.

Please see one of the assistants in the Marshal's Office by 9:30 that morning and we will see that you are seated in the Courtroom.

Please note that cellular phones, pagers, tape recorders, cameras and other electronic devices are not allowed in the Courtroom. Guests should leave electronic devices in the Checkroom (coin operated lockers are available) before coming to the Marshal's Office to check in for reserved seating. Enclosed for your information is a copy of the *Visitors' Map*. If you have any further questions, please call Sharron DuBose, Deputy Marshal, Administrative Support, at 202-479-3333.

Sincerely,



Pamela Talkin
Marshal

Enclosure

EMERGENCY RULES

State Need Grant, State Work Study, Promise Scholarship

June 2002

BACKGROUND

Legislation adopted during the 2002 Legislative Session requires that the Washington Administrative Code (WAC) for the State Need Grant, State Work Study, and Promise Scholarship programs be amended. At its June 11 meeting, the Board will be asked to adopt emergency rules so that the statutory amendments can be implemented for the 2002-2003 academic year.

Following is a summary of the changes needed to comply with those adopted by the Legislature.

STATE NEED GRANT

Substitute Senate Bill 5166 expands the definition of "institutions of higher education" to include branches of out-of-state institutions that meet the following criteria:

- The parent institution must be a member institution of an accrediting association recognized by rule of the Board;
- It must be eligible to participate in federal financial aid programs;
- The institution must have operated as a nonprofit college or university delivering on-site classroom instruction in Washington for a minimum of 20 years;
- It must have an annual enrollment of at least 700 full-time-equivalent students; and
- Like all other institutions, it must agree to, and comply with, all program rules and regulations.

It appears that only one institution, Antioch University – Seattle, currently meets the amended statutory requirements. The North Central Association of Colleges and Schools has accredited Antioch.

State Need Grant rules currently recognize one of the six regional accrediting associations (the Northwest Association of Schools and Colleges), and all of the specialized associations that accredit career colleges in Washington. To extend State Need Grant eligibility to students attending Antioch – Seattle, the agency must modify its rules to recognize the North Central Association of Colleges and Schools.

However, because institutions accredited by other regional associations may become eligible in the future to participate in the State Need Grant program, staff propose that the State Need Grant rules be amended to recognize all six regional accrediting associations. There is little to distinguish one regional association from another, and referencing each in the rules eliminates the need to make future amendments on a case-by-case basis.

STATE WORK STUDY

Substitute Senate Bill 5166 also amends “eligible institution” for purposes of the State Work Study program. The amendatory language is essentially the same as in the revision to the State Need Grant statute, except that it does not specify that institutions qualifying under this amendment must enroll a minimum of 700 full-time-equivalent students to participate in the State Work Study program.

For the reasons cited above, staff propose that the State Work Study rules be amended to recognize each of the six regional accrediting associations.

PROMISE SCHOLARSHIP PROGRAM

Prior to the 2002 Legislative Session, language authorizing the Promise Scholarship program had been included in the 1999-01 and 2001-03 biennial budget bills, but the program had not been created in statute. The HECB adopted administrative rules implementing program provisions as specified in the budget bills.

House Bill 2807, enacted by the 2002 Legislature, established the Promise Scholarship program in statute and modified some program features. Staff propose the following changes to bring the Promise Scholarship rules into compliance with the new statute:

- **Academic Eligibility Criteria.** Program rules should be amended to indicate that, to be considered for a Promise Scholarship, an otherwise eligible student must have:
 - Graduated from a public or private high school in Washington in the top 15 percent of his or her graduating class;
 - Attained a cumulative score of 1,200 or better on the Scholastic Achievement Test I (SAT I) on the first attempt; or
 - Attained a cumulative score of 27 or better on the American College Test (ACT) on the first attempt.
- **Eligible Institutions.** Staff propose amending the rules to address two issues:
 - HB 2807 authorizes use of the scholarship by recipients attending Oregon institutions that are part of the border county higher education opportunity project when those institutions offer programs not available at accredited institutions of higher education in Washington.
 - The border county legislation does not identify institutions that are eligible for that project. However, it does list counties in Oregon whose residents may attend college in Washington at reduced tuition rates. Staff have contacted policymakers to confirm that the intent of HB 2807 is to allow Promise Scholarship recipients to use the award at accredited colleges, universities and career schools in the Oregon counties that border Washington and whose residents are eligible for the border county tuition discount. The proposed rules will list those counties.

- Staff have contacted policymakers to confirm the following approach will be used to determine whether a program is not offered in Washington:
 - Students who wish to use their Promise Scholarships to attend college in Oregon will be required to make an application to the HECB for this purpose. These applications will be judged on a case-by-case basis, and students will have the opportunity to appeal the administrative decisions to the executive director of the HECB.
 - A program offered by an Oregon institution located in a county that borders Washington will be deemed to be “not available” if such a program is not offered by any accredited higher education institution in Washington.
- For consistency with the State Need Grant and State Work Study programs, staff propose that Promise Scholarship rules be amended to recognize all six regional accrediting associations.
- **Standard for Satisfactory Progress.** SHB 2807 allows the Higher Education Coordinating Board to establish satisfactory progress standards for scholarship renewal. Staff propose that Promise Scholarship rules require recipients to be in good standing at the institution they attend, in order to renew their scholarships.

Proposed amendatory language for the State Need Grant and State Work Study programs is attached. Proposed revisions to Promise Scholarship program regulations will be drafted following guidance from policymakers on the issues noted above. Proposed language will be sent to Board members and posted on the agency’s Website prior to the June 11 meeting.

PROPOSED RULEMAKING PROCESS

Staff will file the required forms with the State Code Reviser’s office to authorize adoption of emergency rules after the Board’s approval and to begin the process to adopt permanent rules at the Board’s September meeting.

Adoption of the proposed emergency rules, which are effective for up to 120 days, will authorize immediate implementation of statutory changes. In the case of the State Need Grant and State Work Study programs, adopting emergency rules will authorize staff to determine which institutions are eligible and allow newly eligible institutions to apply to participate in the program(s), and to make awards to their students for the upcoming academic year.

Adopting emergency rules will allow Promise Scholarships to be awarded to students who meet the expanded eligibility criteria, as awards are processed this summer. As a result, scholarship recipients and college administrators can take the award into account in planning financial resources for the new academic year.

The Board will be asked to adopt permanent rules at its meeting in September. Before that meeting, the public will be invited to comment on the proposed permanent rules, in writing, and at a formal hearing convened to solicit public comment on the proposed rules.

Chapter 250-80 WAC
WASHINGTON PROMISE SCHOLARSHIP RULES

WAC 250-80-010 Purpose.

The Washington promise scholarship program recognizes and encourages the aspiration for superior academic achievement of high school students who attend and graduate from Washington high schools. The program offers a two-year scholarship for eligible students that may be used at any accredited institution within the borders of the state. The scholarship may also be used at certain Oregon institutions offering programs not offered in Washington.

[Statutory Authority: Chapter 28B.80 RCW and 1999 c 309 § 611(6). 00-08-082, § 250-80-010, filed 4/4/00, effective 5/5/00.]

WAC 250-80-020 Definitions. (1) "Board" means the higher education coordinating board.

(2) "OSPI" means the office of the superintendent of public instruction.

(3) "High school" means a secondary institution in Washington state identified by the office of the superintendent of public instruction as qualified to confer high school diplomas to a graduating senior class.

(4) "Parent(s)" mean the biological or adoptive parent of the student applicant and the spouse of a biological or adoptive parent. In cases of divorce or separation the parent for purposes of reporting income and family size is the biological or adoptive parent who provided more than one-half of the applicant's support in the previous twelve months. The term parent does not include either foster parents or legal guardians.

(5) "Family size" is the number of people for whom the applicant's parent(s) provided more than one-half of the support in the previous twelve months.

(6) "Income," in most cases means the applicant parent's adjusted gross income (AGI) as reported on the previous calendar year's federal tax return. For the independent student, income means the student's adjusted gross income as reported on the previous calendar year's federal tax return.

(7) "Independent student" means a student whose biological parents are both deceased and there is no adoptive parent, or the student is a "ward of the court," or the student has been legally emancipated by court order. The board may also recognize a student as independent due to exceptional circumstances as recognized by the appeal committee.

(8) "Appeals committee" means a committee convened by the board to review petitions and requests by students for consideration of individual exceptional circumstances.

(9) "Median family income (MFI)" means the median income for the state of Washington, by family size, as compiled by the federal Bureau of the Census and reported annually in the Federal Register.

(10) "Income cutoff" means one hundred thirty-five percent of the median family income.

(11) "Academic year" means the fall, winter, and spring quarters or the fall and spring semesters between July 1st and June 30th.

- (12) "Eligible student" means a person who:
- (a) Graduates from a public or private high school located in the state of Washington; and
 - (b) ~~(Is in the top ten percent of his or her 1999 graduating class; or~~
 - ~~(c))~~ Is in the top fifteen percent of his or her ~~(2000))~~ graduating class; or
 - (c) Attained a cumulative score of 1200 or better on the Scholastic Assessment Test I (SATI) on the first attempt; or
 - (d) Attained a cumulative score of 27 or better on the American College Test (ACT) on the first attempt; and
 - ~~(e)~~ Has a family income less than one hundred thirty-five percent of the state's median; and
 - ~~(e)~~ Enrolls at least half time in an eligible postsecondary institution in the state of Washington; and
 - ~~(f)~~ Is not pursuing a degree in theology.
- (13) "Eligible postsecondary institution" means:
- (a) A public institution authorized by the Washington legislature and receiving operating support through the state general fund; or
 - (b) A postsecondary institution, whose campus or branch campus is physically located in the state of Washington, and who is accredited by a nationally recognized accrediting body. The recognized accrediting bodies are:
 - (i) The Northwest Association of Schools and Colleges or a similar regional accrediting body as determined by the board;
 - (ii) The Accrediting Bureau of Health Education Schools;
 - (iii) The Accrediting Council for Continuing Education and Training;
 - (iv) The Accrediting Commission of Career Schools and Colleges of Technology;
 - (v) The Accrediting Council for Independent Colleges and Schools;
 - (vi) The National Accrediting Commission of Cosmetology Arts and Sciences;~~(and)~~
 - vii. The Middle States Association of Colleges and Schools, Commission on Higher Education;
 - viii. The New England Association of Schools and Colleges;
 - ix. The North Central Association of Colleges and Schools;
 - x. The Southern Association of Colleges and Schools;
 - xi. The Western Association of Schools and Colleges; or
 - (c) An accredited Oregon postsecondary institution that offers a program not offered in Washington and is located in either Columbia, Gilliam, Hood River, Multnomah, Clatsop, Clackamas, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco or Washington county. The institution must be accredited by one of the accrediting bodies listed above. And,
 - (d) Agrees to administer the program in accordance with the applicable rules and program guidelines.
- (14) "Authorized use period" means the period of time the eligible student has to complete using his or her scholarship. The board will determine the authorized use period for each class of graduating high school seniors.

[Statutory Authority: Chapter 28B.80 RCW and 1999 c 309 § 611(6). 00-08-082, § 250-80-020, filed 4/4/00, effective 5/5/00.]

WAC 250-80-060 Grant disbursement. (1) Eligible students must enroll on at least a half-time status and be in good academic standing with the institution in order to receive a scholarship disbursement.

(2) Grants to students will be disbursed in equal payments, once per term, across the three quarter or two semester academic year.

(3) State of Washington public colleges and universities may request payment for funds up to the limit of the per term award for each enrolled eligible student. The state public college or university may apply the proceeds of the scholarship to any outstanding debt owed by the student to the institution. The institution must disburse any remainder directly to the eligible student.

(4) Nonstate institutions may request that checks be written to eligible students attending their schools. The board will write individual warrants payable to each eligible student and delivered to the school for disbursement.

(5) The independent university and the private vocational school must disburse the warrant once the student's half-time or greater enrollment has been verified. The school may not withhold or delay disbursement for any reason other than for less than half-time enrollment. The school has thirty days to either disburse the warrant or return it to the board.

[Statutory Authority: Chapter 28B.80 RCW and 1999 c 309 § 611(6). 00-08-082, § 250-80-060, filed 4/4/00, effective 5/5/00.]

RESOLUTION NO. 02-28

WHEREAS, The Higher Education Coordinating Board is directed by House Bill 2807 to administer the Washington Promise Scholarship Program and to adopt rules as necessary to implement the program; and

WHEREAS, Prior to the 2002 Legislative Session, language authorizing the Promise Scholarship program had been included in the 1999-01 and 2001-03 biennial budget bills; and

WHEREAS, House Bill 2807 established the Washington Promise Scholarship program in statute and modified some features of the program; and

WHEREAS, It is necessary to amend Chapter 250-80 WAC to bring the Promise Scholarship program into compliance with the new statute by including reference to expanded academic eligibility criteria, use of the scholarship at certain Oregon institutions providing programs not offered in Washington, recognition of all six regional accrediting associations, and the satisfactory progress requirement for scholarship renewal; and

WHEREAS, It is the Board's intention that the expanded eligibility criteria be used to determine awards for the 2002-2003 academic year;

THEREFORE, BE IT RESOLVED, That the Higher Education Coordinating Board adopt permanent rules implementing the Washington Promise Scholarship Program.

Adopted:

September 25, 2002

Attest:

Bob Craves, Chair

Pat Stanford, Secretary

200.05 D

1999 Washington Promise Scholarship

FYI

An overview from the Higher Education Coordinating Board - May 1999

The 1999 Legislature and Governor Gary Locke created a new college scholarship program for low- and middle-income students who achieve an excellent academic record throughout their high school careers. For 1999, the scholarship is available to graduating high school students in the top 10% of their senior class who meet certain family income limits. The scholarship will be available this fall and may be renewed for one additional year. There is no guarantee that the scholarships will be available after June 30, 2001. Students should apply for and use these funds prior to June 30, 2001.

Who Is Eligible?

To be eligible you must meet these criteria:

1. Be designated by your high school as in the top 10% of the 1999 graduating senior class.
2. Have a family income that is equal to or less than 135% of the state's median. See the income chart below.
3. Attend an accredited public or private university, college or other accredited post-secondary institution in the state of Washington.

What Are the Income Cutoffs?

To qualify for the monetary award, your family income must be equal to or less than the income cutoffs on this chart. The number of family members means the number of people for whom your parent(s) or guardian(s) provide more than one-half of the support.

| Family Size | Adjusted Gross Income | Family Size | Adjusted Gross Income |
|-------------|-----------------------|--|-----------------------|
| 1 | \$36,100 | 5 | \$80,600 |
| 2 | \$47,200 | 6 | \$91,700 |
| 3 | \$58,400 | 7 | \$93,800 |
| 4 | \$69,500 | Add \$2,100 for each additional family member. | |

How Much is the Award Worth? Can It Be Renewed?

The value of the award depends on how many eligible students qualify for the scholarship. The maximum award is \$1,585 per year. The exact value of this year's award will be determined around mid-September 1999. The scholarship may be renewed for one additional year, but does not extend beyond June 30, 2001.

How Do I Apply? When Will I know if I Qualify?

To apply simply complete the application on the back of this fact sheet and return it to the Higher Education Coordinating Board. We encourage you to return the application as soon as possible, but it must be received by the deadline of September 1, 1999. Students who qualify will be notified this fall. The first disbursements will be available during the fall term.

How will my family's income be verified?

The family income must be verified. Please enclose a photocopy of page 1 and page 2 of your parent(s) 1998 federal tax return form (1040/1040A/1040EZ) with the application. If no tax return has been filed, please call the Higher Education Coordinating Board to request an "income verification" form.

For more information:

Higher Education Coordinating Board, 360-753-7801
 Governor's Executive Policy Office, 360-902-0577



Lana Walter

From: SFAADMIN-owner@u.washington.edu on behalf of John Klacik [JohnK@HECB.WA.GOV]
Sent: Monday, September 27, 1999 11:29 AM
To: WA State Financial Aid Std Employment
Subject: WA Promise - Online Lists of Eligible Students Available

September 27, 1999

To: All Student Aid and Scholarship Administrators
FROM: John Klacik
RE: The Washington Promise Scholarship Program

As you know the Washington Promise Scholarship program is beginning its first year of operation. The program will soon be ready to disburse funds to eligible students. Approximately 2,300 students will receive awards in 1999-2000. The scholarships will be worth \$1,125 for this academic year. Schools will be able to begin requesting funds as early as October 1.

Starting today, schools may access a list of eligible students posted to the password-protected section of the Board's website. As of today there are over 2,100 eligible students. We estimate that an additional 200 students will establish their eligibility within the next few weeks. The on-line list is updated in real time, as students are approved.

The web address is <<http://www.hecb.wa.gov/hecblogin/login.asp>> <<http://www.hecb.wa.gov/hecblogin/login.asp>>. This is the same site where the Board has begun placing its SNG Archive List and the SWS Employer list. Remember this address because there is no link to it from the HECB home page.

The site requires the user to register. If you have not already registered you must do so on your first visit. It will take a less than one business day before you are approved for access. If you have already registered, but do not find a link to the Promise Scholarship materials after logging-on, then you did not request, or were not granted permission to access that particular program. If this is the case please send me an email or call me at (360) 753-7851.

After you have logged-in click the link to the Promise Scholarship program. You will be offered the opportunity to "filter" the list by student, school, or date. This allows you to request just one student, or a list of students who indicated that they intended to enroll at your school, or in subsequent visits, to select only the new entries to the list. You may also request the complete list of all students by placing a "*" in the student SSN/Name field and selecting all institutions. This option, however, may take several minutes to complete, depending upon your computer and download speed.

Once you have the list of students you may "block and copy" it to a more convenient application such as WORD or EXCEL.

Remember that information on this list may be used only for the purpose of determining eligibility for the Promise scholarship program. It may not be used for research purposes. If you have any questions about the proper use of any HECB list made available on the website, please call us at 360-753-7850.

Instructions for claiming payments for eligible WA Promise students and for disbursing the awards will be forthcoming today or tomorrow. In the meantime, if you have other questions about the list, or you have trouble accessing the list, please call me at 360-753-7851.

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Table 280. Federal Student Financial Assistance: 1995 to 2009

[For award years July 1 of year shown to the following June 30 (35,477 represents \$35,477,000,000). Funds utilized exclude operating costs, etc., and represent funds given to students]

| Type of assistance | 1995 | 2000 | 2005 | 2006 | 2007 | 2008, est. | 2009, est. |
|---|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| FUNDS UTILIZED (mil. dol.) | | | | | | | |
| Total | 35,477 | 44,007 | 72,634 | 77,191 | 82,817 | 90,706 | 94,286 |
| Federal Pell Grants | 5,472 | 7,956 | 12,693 | 12,817 | 14,381 | 16,428 | 18,180 |
| Academic Competitiveness Grants | (X) | (X) | (X) | 340 | 350 | 440 | 490 |
| SMART ¹ Grants | (X) | (X) | (X) | 310 | 230 | 260 | 270 |
| Federal Supplemental Educational Opportunity Grant | 764 | 907 | 1,084 | 1,080 | 1,068 | 959 | (X) |
| Federal Work-Study | 764 | 939 | 1,050 | 1,042 | 1,063 | 1,171 | 1,171 |
| Federal Perkins Loan | 1,029 | 1,144 | 1,593 | 1,618 | 1,383 | 1,103 | (X) |
| Federal Direct Student Loan (FDSL) | 8,296 | 10,348 | 12,930 | 12,677 | 13,022 | 14,103 | 14,867 |
| Federal Family Education Loans (FFEL) | 19,152 | 22,712 | 43,284 | 47,307 | 51,320 | 56,242 | 59,308 |
| NUMBER OF AWARDS (1,000) | | | | | | | |
| Total | 13,667 | 15,043 | 21,317 | 22,304 | 23,036 | 23,858 | 22,947 |
| Federal Pell Grants | 3,612 | 3,899 | 5,167 | 5,165 | 5,428 | 5,578 | 5,764 |
| Academic Competitiveness Grants | (X) | (X) | (X) | 400 | 456 | 559 | 643 |
| SMART ¹ Grants | (X) | (X) | (X) | 80 | 72 | 79 | 85 |
| Federal Supplemental Educational Opportunity Grant | 1,083 | 1,175 | 1,419 | 1,417 | 1,450 | 1,255 | (X) |
| Federal Work-Study | 702 | 713 | 710 | 694 | 697 | 792 | 792 |
| Federal Perkins Loan | 688 | 639 | 727 | 725 | 650 | 503 | (X) |
| Federal Direct Student Loan (FDSL) | 2,339 | 2,739 | 2,971 | 2,841 | 2,764 | 2,857 | 2,961 |
| Federal Family Education Loans (FFEL) | 5,243 | 5,878 | 10,323 | 10,982 | 11,519 | 12,235 | 12,702 |
| AVERAGE AWARD (dol.) | | | | | | | |
| Total | 2,596 | 2,925 | 3,407 | 3,461 | 3,595 | 3,802 | 4,109 |
| Federal Pell Grants | 1,515 | 2,041 | 2,456 | 2,482 | 2,650 | 2,945 | 3,154 |
| Academic Competitiveness Grants/SMART ² Grants | (X) | (X) | (X) | 850 | 768 | 787 | 762 |
| SMART ¹ Grants | (X) | (X) | (X) | 3,875 | 3,194 | 3,291 | 3,176 |
| Federal Supplemental Educational Opportunity Grant | 705 | 772 | 764 | 762 | 736 | 764 | (X) |
| Federal Work-Study | 1,088 | 1,318 | 1,478 | 1,500 | 1,524 | 1,478 | 1,478 |
| Federal Perkins Loan | 1,496 | 1,790 | 2,190 | 2,231 | 2,125 | 2,190 | (X) |
| Federal Direct Student Loan (FDSL) | 3,547 | 3,778 | 4,352 | 4,462 | 4,711 | 4,936 | 5,021 |
| Federal Family Education Loans (FFEL) | 3,653 | 3,864 | 4,193 | 4,308 | 3,941 | 4,597 | 4,669 |
| COHORT DEFAULT RATE² | | | | | | | |
| Federal Perkins Loan | 12.6 | 9.9 | 8.1 | 7.8 | 8.3 | (NA) | (NA) |

NA Not available. X Not applicable. ¹ National Science and Mathematics Access to Retain Talent. ² As of June 30. Represents the percent of borrowers entering repayment status in year shown who defaulted in the following year. Source: U.S. Dept. of Education, Office of Postsecondary Education, unpublished data.

Table 282. Institutions of Higher Education—Charges: 1985 to 2008

[In dollars. Estimated. For the entire academic year ending in year shown. Figures are average charges per full-time equivalent student. Room and board are based on full-time students]

| Academic control and year | Tuition and required fees ¹ | | | Board rates ² | | | Dormitory charges | | | | | |
|---------------------------|--|----------------|----------------|--------------------------|------------------|----------------|-------------------|---------------------|------------------|----------------|----------------|-------|
| | All institutions | 2-yr. colleges | 4-yr. colleges | Other 4-yr. schools | All institutions | 2-yr. colleges | 4-yr. colleges | Other 4-yr. schools | All institutions | 2-yr. colleges | 4-yr. colleges | |
| Public: | | | | | | | | | | | | |
| 1985 | 971 | 584 | 1,386 | 1,117 | 1,241 | 1,302 | 1,276 | 1,201 | 1,196 | 921 | 1,237 | 1,200 |
| 1990 | 1,356 | 756 | 2,035 | 1,608 | 1,635 | 1,581 | 1,728 | 1,561 | 1,513 | 962 | 1,561 | 1,554 |
| 1995 | 2,057 | 1,192 | 2,977 | 2,499 | 1,949 | 1,712 | 2,108 | 1,866 | 1,959 | 1,232 | 1,992 | 2,044 |
| 2000 | 2,506 | 1,338 | 3,768 | 3,091 | 2,364 | 1,834 | 2,628 | 2,239 | 2,440 | 1,549 | 2,516 | 2,521 |
| 2003 | 2,903 | 1,483 | 4,686 | 3,668 | 2,669 | 2,164 | 2,895 | 2,580 | 2,930 | 1,954 | 3,023 | 3,032 |
| 2004 | 3,319 | 1,702 | 5,363 | 4,141 | 2,823 | 2,233 | 3,084 | 2,724 | 3,107 | 2,086 | 3,232 | 3,198 |
| 2005 | 3,629 | 1,849 | 5,939 | 4,512 | 2,931 | 2,353 | 3,222 | 2,809 | 3,304 | 2,174 | 3,427 | 3,413 |
| 2006 | 3,874 | 1,935 | 6,399 | 4,765 | 3,035 | 2,306 | 3,372 | 2,899 | 3,545 | 2,251 | 3,654 | 3,672 |
| 2007 | 4,102 | 2,018 | 6,842 | 5,020 | 3,191 | 2,390 | 3,498 | 3,083 | 3,757 | 2,407 | 3,875 | 3,881 |
| 2008, prel. | 4,307 | 2,063 | 7,171 | 5,291 | 3,329 | 2,408 | 3,669 | 3,217 | 3,941 | 2,495 | 4,076 | 4,069 |
| Private: | | | | | | | | | | | | |
| 1985 | 5,315 | 3,485 | 6,843 | 5,135 | 1,462 | 1,294 | 1,647 | 1,405 | 1,426 | 1,424 | 1,753 | 1,309 |
| 1990 | 8,147 | 5,196 | 10,348 | 7,778 | 1,948 | 1,811 | 2,339 | 1,823 | 1,923 | 1,663 | 2,411 | 1,774 |
| 1995 | 11,111 | 6,914 | 14,537 | 10,653 | 2,509 | 2,023 | 3,035 | 2,362 | 2,587 | 2,233 | 3,469 | 2,347 |
| 2000 | 14,081 | 8,235 | 19,307 | 13,361 | 2,882 | 2,922 | 3,157 | 2,790 | 3,224 | 2,808 | 4,070 | 2,976 |
| 2003 | 16,383 | 10,651 | 22,716 | 15,416 | 3,206 | 3,870 | 3,602 | 3,071 | 3,752 | 3,232 | 4,724 | 3,478 |
| 2004 | 17,327 | 11,546 | 24,128 | 16,298 | 3,364 | 4,432 | 3,778 | 3,222 | 3,945 | 3,581 | 4,979 | 3,647 |
| 2005 | 18,154 | 12,122 | 25,643 | 17,050 | 3,485 | 3,728 | 3,855 | 3,370 | 4,171 | 4,243 | 5,263 | 3,854 |
| 2006 | 18,862 | 12,450 | 26,954 | 17,702 | 3,647 | 4,726 | 4,039 | 3,517 | 4,380 | 3,994 | 5,517 | 4,063 |
| 2007 | 20,048 | 12,708 | 28,580 | 18,848 | 3,785 | 3,429 | 4,166 | 3,672 | 4,606 | 4,613 | 5,691 | 4,302 |
| 2008, prel. | 21,113 | 13,172 | 30,260 | 19,798 | 3,994 | 4,089 | 4,373 | 3,877 | 4,808 | 4,812 | 6,007 | 4,467 |

¹ For in-state students. ² Beginning 1990, rates reflect 20 meals per week, rather than meals served 7 days a week.

Source: U.S. National Center for Education Statistics, *Digest of Education Statistics*, annual.

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Brief for the Respondents, Joshua Davey No. 02-1315

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