

Locke v. Davey: What It Says, and What It Doesn't Say

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What was the Locke v. Davey decision about?

On February 25, 2004, the U.S. Supreme Court decided the case of Locke v. Davey. By a 7-2 vote, the Court upheld the State of Washington's decision to exclude "devotional theology" majors from the state's Promise Scholarship Program.

Under the Promise Scholarship Program, students who are academically talented and financially needy are eligible to receive state grants for their first two years of college study. The scholarship money can be used for any educational expenses -- including tuition, fees, room and board, and transportation -- while attending any accredited college in the State of Washington.

Promise Scholars can take any courses they desire. Moreover, they can declare any major whatsoever -- or no major at all -- with one exception. Anyone declaring a major in "theology" is disqualified from receipt of a Promise grant, if -- but only if -- the theology major is taught from a "religious" perspective (i.e., from the point of view of actually believing what is being taught).

Joshua Davey, then a high school student in Washington, met the eligibility criteria for the scholarship. He applied for and was accepted into the Promise program. He enrolled at Northwest College, an eligible, accredited institution in Washington affiliated with the Assemblies of God denomination. Davey declared a double major in Pastoral Ministries and Business Management and Administration. Because the Pastoral Ministries major was deemed to be "theology," Davey's declaration led to the forfeiture of over \$2,600 in Promise Scholarship money for his first two years of college.

Davey brought suit in federal court, challenging the state's exclusionary policy as blatantly anti-religious and viewpoint-discriminatory.

A federal district court in Washington rebuffed Davey's claims, but the U.S. Court of Appeals for the Ninth Circuit, by a 2-1 vote, reversed. The appeals court ruled that the state's explicit discrimination against students' choice of a religious major violated the Free Exercise Clause of the First Amendment to the U.S. Constitution.

At the request of the State of Washington, the Supreme Court then agreed to review the case. That Court reversed, concluding that there was no denial of the right to the free exercise of religion.

The Washington policy was obviously discriminatory. Why did the Supreme Court say that was okay?

The Supreme Court, looking to our national history, perceived a 200-year-old tradition of “formal prohibitions against using tax funds to support the ministry.” In other words, objections to using tax funds for clergy and clergy training were part of our nation from its founding. The State of Washington, as the Court noted, incorporated this concern into its state constitution: “No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction . . .” “Given this historic and substantial state interest,” the Supreme Court explained, “we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.”

Does the Locke v. Davey decision mean that states must deny funding to students pursuing religious degrees?

Absolutely not. To the contrary, the Supreme Court declared that there is “no doubt” that the state could, if it wishes, “permit Promise Scholars to pursue a degree in devotional theology.” The Court only ruled that a state does not have to do so.

Does this decision authorize other kinds of government discrimination against religion?

No. The Supreme Court carefully limited its decision to the unique historical context of objections to tax-funding clergy training. As the Court explained, “the only interest at issue here is the State’s interest in not funding the religious training of clergy.” “In fact,” the Court said, “we can think of few areas in which a State’s antiestablishment interests come more into play.” In short, this decision dealt with a special case: tax-funded clergy training.

What about voucher programs? Do they now have to exclude religious schools?

No. The Supreme Court has already ruled (in Zelman v. Simmons-Harris (2002)) that voucher programs that include religious schools are entirely constitutional. The Court specifically referenced the Zelman case in its Locke v. Davey opinion, noting that the “independent and private choice” of grant recipients properly eliminates any alleged unconstitutional “link between government funds and religious training.”

But after Locke v. Davey, can states exclude religious schools from voucher programs that otherwise include private schools?

Not necessarily.

States are free to set religion-neutral parameters for their grant programs. Thus, for example, a state can require schools to satisfy certain accrediting or curricular requirements (e.g., requiring schools to

teach math and science); schools that do not meet those neutral eligibility requirements can be excluded from a voucher program, even if they are religious schools.

But if a school in all other respects completely satisfies the eligibility criteria the state has set for the voucher program, and yet the state nevertheless categorically disqualifies the school solely because it is religious in nature, this would be unconstitutional anti-religious discrimination.

In Locke v. Davey, the Court specifically noted that Washington did not exclude even “pervasively religious schools” from its Promise program, and that students who receive Promise funds could still “take devotional theology courses,” so long as that was not their major. Indeed, the Court observed, the college Davey attended required all its students to take “at least four devotional courses,” yet the college was nevertheless an eligible institution for state-funded Promise Scholars.

Finally, it bears emphasis that the Locke v. Davey decision did not purport to overrule any prior cases, including those articulating the general constitutional rule that government cannot discriminate against religion.

Does Locke v. Davey affect equal access cases, like those involving student Bible clubs or other use of government facilities after hours for religious activities?

No. Equal access cases typically deal with unconstitutional discrimination against private religious speech. The Supreme Court in Locke v. Davey said that the “cases dealing with speech forums” were “simply inapplicable,” because here the state neither denied Davey access to a speech forum nor excluded him from a funding program designed “to encourage a diversity of views from private speakers.”

Did the Court uphold the constitutionality of anti-Catholic “Blaine Amendments”?

No. The Supreme Court said that the state constitutional provision underlying Washington’s exclusion of theology majors was not a “Blaine Amendment,” and thus the constitutionality of such amendments “is simply not before us.”

Can states repeal discriminatory laws and policies that deny financial aid to those pursuing religious studies?

Yes. Just because a state may discriminate against needy students like Joshua Davey does not mean that it must -- or should -- do so.