CONSTITUTIONAL LAW—FIRST AMENDMENT—A NON-NEUTRAL LAW PROSCRIBING RELIGIOUS ANIMAL SACRIFICE THAT IS NOT GENERALLY APPLICABLE IS NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENT INTEREST WHERE SUCH LAW FAILS TO PROHIBIT NON-RELIGIOUS CONDUCT RESULTING IN SIMILAR HARMS SOUGHT TO BE ADDRESSED—*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993).

The Free Exercise Clause of the First Amendment expressly grants every individual the right to practice her religion freely.[1] Although the words of the clause are absolute, their interpretation is not.[2] The United States Supreme Court has limited the scope of

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[1] U.S. CONST. amend. I. The First Amendment declares, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.* The United States Supreme Court has sometimes looked at the historical background of the First Amendment for guidance in interpreting the religion clauses. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1158 (2d ed. 1988). An historical analysis of the First Amendment reveals that three different schools of thought influenced the construction of the religion clauses. *Id.* at 1158-59. The first was the evangelical view, associated with colonist Roger Williams, that separation was largely "a vehicle for protecting churches against the state." *Id.* This viewpoint, referred to as "positive toleration," recommends "imposing on the state the burden of fostering a climate conducive to all religion." *Id.* at 1159.

The second viewpoint, identified with Thomas Jefferson, perceived separation as a method of "protecting the state from the church." *Id.* Jefferson believed that free choice among political viewpoints could be achieved only by complete elimination of religious influence from politics. *Id.*

James Madison, on the other hand, "believed that both religion and government could best achieve their high purposes if each were left free from the other within its respective sphere." *Id.* Madison felt that religious and secular interests would be advanced by "diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one." *Id.*

These theories resulted in the two fundamental principles that, according to the Supreme Court, give life to the First Amendment: "voluntarism and separatism." *Id.* at 1160. Voluntarism implies that the Free Exercise Clause guarantees "freedom of conscience by preventing any degree of compulsion in matters of belief." *Id.* (citations omitted). Separatism, on the other hand, reflects Madison's view that "both religion and government function best if each remains independent of the other." *Id.* at 1161.

[2] *See generally* Stephen Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309. According to Pepper, the open language of the Free Exercise Clause offers a wide range of alternative interpretations. *Id.* at 310. Pepper first noted that the term "exercise" is not limited to any specific type of action. *Id.* Moreover, the term is used in conjunction with "religion," another word without distinct boundaries. *Id.* Thus, Pepper recognized that the Court's free exercise jurisprudence is an attempt "to simplify[ ] and isolate that which is inherently complex and inextricably connected to the fabric of human existence." *Id.* at 354. Furthermore, the subject matter of religious freedom and tolerance "remains a volatile and prominent social concern." *Id.* at 310. Pepper contended that religious beliefs are strongly

free exercise by narrowing the interpretation of what type of governmental action constitutes an impermissible burden on religion and broadening the determination of when the government can legitimately impose such a burden.[3] The Court has struggled with

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held by, and of particular significance to, the believer. *Id.* at 354. Moreover, these beliefs cannot be substantiated or verified by any rational process "such as voting or scientific investigation." *Id.*

Recognizing that constraints imposed by the Establishment Clause add further difficulty in the interpretation of the Free Exercise Clause, Pepper also stated: "[T]he general thrusts of the two commands is in inherent conflict. . . . One clause tends to proscribe preferences for religion; the other on its face incorporates such a preference." *Id.* at 345-46. Therefore, legislation protecting free exercise would be legislation "respecting an establishment of religion." *Id.*

Pepper next detailed three methods used by the Supreme Court to deal with this conflict. *Id.* at 346-52. The first method involves a neutrality theory which prohibits the "use of religious classifications 'for purposes of governmental action, whether that action be the confirmation of rights or privileges or the imposition of duties or obligations.'" *Id.* at 346 (quoting PHILIP B. KURLAND, RELIGION AND THE LAW 17-18 (1962)). According to Pepper, the Court in *United States v. Reynolds* used this analysis to develop a belief-action dichotomy. *Id.* at 347 (citing United States v. Reynolds, 98 U.S. 145, 166 (1878)).

Second, under the predominance theory, the Court would adopt one underlying value and resolve individual conflicts in terms of serving that primary value. *Id.* at 348-50; *see also* McDaniel v. Paty, 435 U.S. 618, 628-29 (1978) (concluding that values underlying free exercise are "of the highest order") (quotation omitted); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 318 (1963) (Stewart, J., dissenting) (balancing the right to free exercise of religion against the danger of coercion, and concluding that religious exercises in public schools would be constitutionally invalid only if there was no equally agreeable alternative provided for those who did not wish to participate).

According to Pepper, the third way the Supreme Court has handled the conflict between the religion clauses is through "independence and accommodation." Pepper, *supra*, at 350. Under this method two distinctly different doctrinal structures have developed. *Id.* First, Pepper noted, the Court would categorize free exercise as a preferred right, and, therefore, legislation infringing on this right must serve a compelling government interest. *Id.* at 350-51. On the other hand, legislation involved in Establishment Clause controversies is subject to a three part test: the legislation must have a secular purpose; the secular purpose must be the principal or primary purpose; and the legislation must not involve excessive government entanglement. *Id.* (citations omitted).

[3] *See generally* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989). Professor Lupu argued that the determination of what constitutes a burden is a determination of "where rights under the clause begin." *Id.* at 935. Lupu maintained that this determination is certain to have a profound effect on religious liberty. *Id.*; *see, e.g.*, Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1065 (6th Cir. 1987) (holding that public school reading curriculum did not sufficiently burden free exercise of students religion to trigger protection of the First Amendment; children were only required to read the material, not affirm the truth of what they read), *cert. denied*, 484 U.S. 1066 (1988).

According to Professor Lupu, *Mozert* stands for "the unattractive principle that compulsory exposure to ideas from which an individual is obliged by religion to dissociate does not even implicate the [F]ree [E]xercise [C]lause, much less violate it." Lupu, *supra*, at 944; *see also* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485

the formulation of these boundaries throughout the past century.[4]

At first, the Supreme Court did not address the issue of burden, but merely distinguished between "belief," which the Free Exercise Clause protected, and "actions," which were unprotected.[5] Rejecting this absolute distinction, the Supreme Court in the 1940s recognized that under certain circumstances the regulation of religious activity was unwarranted.[6]

U.S. 439, 451-52 (1988) (finding that although government action would have serious adverse impact on Native American religious practices, the challenged action did not constitute a legally cognizable burden on free exercise interests); Bowen v. Roy, 476 U.S. 693, 700-01 (1986) (holding that use by state agency of social security number did not impair Roy's ability to freely exercise his religion).

In *Lyng*, Justice Brennan argued that "by defining the Native Americans' injury as 'nonconstitutional,'" the Court bestowed on the dominant Western Culture the "unilateral authority to resolve all future [land use] disputes in its favor, subject only to the Court's toothless exhortation to be 'sensitive' to affected religions." *Lyng*, 485 U.S. at 473 (Brennan, J., dissenting). Similarly, Professor Lupu asserted that "*Lyng* blocks at the threshold all Indian free exercise claims involving tribal use of public lands for ritual observance." Lupu, *supra*, at 945-46.

[4] *See generally* TRIBE, *supra* note 1, § 14-2, at 1155-57. Professor Tribe observed that this difficulty in implementing the religion clauses is due partly to the fact that the Framers' purpose in writing the clauses "was to state an objective, not to write a statute." *Id.* at 1155 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)). Therefore, Tribe stated that the courts have been given the job of developing guidelines to realize the objectives of the religion clauses "without freezing them into an overly rigid mold." *Id.* at 1155-56. Professor Tribe asserted that the Framers saw the religion clauses as not only compatible but also mutually supportive. *Id.* at 1156. Thus, free exercise protection of individual religious choices helps to ensure that "church and state do not unite to create the many dangers and divisions often implicit in such an established union." *Id.* at 1157. Moreover, Tribe concluded, limiting the relationship between the church and the state through the Establishment Clause helps to ensure that the government does not unreasonably encroach upon religious freedom. *Id.*

Professor Tribe articulated that despite this compatibility, "serious tension has often surfaced between the two clauses." *Id.* For example, Professor Tribe noted that to spend federal funds to employ religious chaplains for the military might violate the Establishment Clause, "'[y]et a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.'" *Id.* (quoting *Abington Sch. Dist.*, 374 U.S. at 309 (Stewart, J., dissenting)). Therefore, concluded Professor Tribe, a pervasive difficulty in judicial interpretation of the religion clauses has been the struggle "'to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms and either of which, if expanded to a logical extreme, would tend to clash with the other.'" *Id.* (quoting *Walz*, 397 U.S. at 668-69).

[5] *Reynolds*, 98 U.S. at 166 (concluding that the First Amendment entitled religious belief to absolute protection, but actions were not protected if detrimental to social order). Professor Lupu noted that "[i]n the constitutional world defined by *Reynolds*, the concept of burden was an unnecessary one." Lupu, *supra* note 3, at 938.

[6] *See, e.g.*, Follett v. McCormick, 321 U.S. 573, 577-78 (1944) (invalidating license tax on religious sale of literature, and stating that "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint[ ]") (citations

The Court did not begin, however, to analyze how much of a burden the government could impose on religious conduct until the 1960s, when it found that if a law purposely or effectively impeded the observance of a religious practice, the law was constitutionally invalid.[7] The Court further expanded the scope of the Free Exercise Clause by applying a strict scrutiny standard of review.[8] Thus, the Supreme Court recognized religious liberty as a

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omitted); Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943) (holding that preaching religion through hand distribution of literature was a form of religious activity that had the same claim for constitutional protection as other First Amendment guarantees, such as freedom of the press and freedom of speech); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (recognizing a state's right to regulate religious conduct that threatened public safety, but stating that such power was not unlimited).

[7] Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("If the purpose or effect of a law is to impede the observance of one or all religions . . ., that law is constitutionally invalid even though the burden may be characterized as being only indirect."). The *Braunfeld* Court noted that the Sunday closing ordinance in question "simply . . . operate[d] so as to make the practice of [Orthodox Jewish storekeepers'] religious beliefs more expensive." *Id.* at 605. The Court declared that indirect burdens were prohibited if the state could achieve its purpose by alternate means not imposing such a burden. *Id.* at 607. Given the nature of the state's interest in Sunday closing laws, the Court concluded that no less restrictive alternative was available. *Id.* at 607-08. See *infra* notes 50-63 and accompanying text for further discussion of the *Braunfeld* decision; *see also* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (finding a burden on Sherbert's religious liberty which resulted from state's denial of unemployment benefits because Sherbert's religious convictions precluded her from working on Saturday). *Sherbert* held that free exercise protection involved not only those cases where the government imposed a direct cost but also where the state withheld an economic benefit. *Id.* at 403-04. In striking down a law that disqualified an employee from receiving unemployment benefits for failing to work without good cause, the Court noted: "[T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." *Id.* at 499-500 & n.5 (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

[8] *Sherbert*, 374 U.S. at 406 (finding that only a compelling state interest would justify the infringement on Sherbert's religious liberty); *cf. Braunfeld*, 366 U.S. at 607 (stating that a general law with the purpose of advancing secular goals was valid despite an indirect burden on religion, unless the state could accomplish this secular goal without imposing such a burden).

Generally, under due process analysis, courts have adopted a strict scrutiny standard when a statute impinges upon some fundamental right. DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 517 (1989). For example, when considering the right of privacy, the Supreme Court stated: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973) (citations omitted). In the equal protection context, strict scrutiny analysis is triggered by laws impinging on fundamental rights or suspect classes (e.g., race, alienage, and nationality). CRUMP, *supra*, at 595, 596.

preferred freedom deserving scrupulous protection by the courts.[9] This analysis guided many of the Court's free exercise decisions thereafter.[10]

In recent years, however, the Court has substantially narrowed the reach of free exercise protection by instituting a stricter determination of what constitutes a legally cognizable burden on religious conduct.[11] Specifically, the Court has focused on the effect a religious exemption would have on governmental affairs rather than on a specific individual's religious practices.[12] The Court has also narrowed the scope of religious protection by lowering the standard of review for free exercise claims.[13] In so doing, the

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9 *See* Pepper, *supra* note 2, at 350-51 (noting that free exercise of religion was categorized as a preferred right, and that legislation infringing on this right had to serve a compelling government interest).

10 *See, e.g.*, Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.") (citations omitted); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 832, 835 (1989) (stating that the Court had consistently invalidated a state's denial of unemployment compensation to an individual who refused to work because of religious convictions because such state regulations did not serve a compelling government interest) (citations omitted); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (holding that state denial of benefits, subjected to strict scrutiny, must be justified by proof of compelling state interest); United States v. Lee, 455 U.S. 252, 257-58 (1982) (declaring that a state must justify an infringement on religious liberty by demonstrating that the regulation is essential to achieve an overriding state interest); Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (asserting that a state must show that a regulation infringing upon religious liberty is the least restrictive means of attaining a compelling state interest).

11 Bowen v. Roy, 476 U.S. 693, 700-01 (1986) (holding that state use of social security numbers to identify welfare recipients did not significantly burden Roy's ability to freely exercise his religion); *see also* Lyng v. Northwest Indian Cemetery Protection Ass'n, 485 U.S. 439, 451-52 (1988) (finding that although government action would have serious adverse impact on religious practices, the challenged action did not constitute a legally cognizable burden on the free exercise rights of Native Americans).

12 *See Lyng*, 485 U.S. at 451 ("Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."); *Bowen*, 476 U.S. at 699 ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").

13 *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 883 (1990) (stating that "[i]n recent years we have abstained from applying the *Sherbert* test") (citations omitted). Professor Michael McConnell maintained that the compelling interest test in the free exercise jurisprudence has been a "misnomer" and that since 1963 the Supreme Court has not applied a true compelling interest test. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1127 (1990). Such a stringent test, argued McConnell, would allow the government interest to outweigh a religious objection "only in the most extraordinary

Supreme Court implicitly rejected religious freedom as a preferred freedom by stating that a neutral law of general applicability that incidentally burdened religious conduct was presumptively valid and not subject to strict scrutiny analysis.[14]

The Court reiterated this rule in the recent case *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[15] The *Church of the Lukumi Babalu Aye* Court held, however, that *non*-neutral legislation that burdened religious conduct was subject to strict scrutiny analysis.[16] Accordingly, the Court invalidated legislation that prohibited the religious practice of animal sacrifice because the legislation was not narrowly tailored to meet a compelling state interest.[17]

In April 1987, the Church of the Lukumi Babalu Aye, Inc. (Church) leased property in Hialeah, Florida and disclosed plans to establish a place of worship.[18] Ernesto Pichardo, the president of the Church, announced that the Church's goal in establishing this center was to bring into the open the Santeria religion and its rituals, which included animal sacrifice.[19] Pichardo's announcement distressed the Hialeah community, and on June 9, 1987, the city council of Hialeah held an emergency meeting to address the community's concerns.[20] At this meeting the city council adopted

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of circumstances." *Id.* For more information on the standard of review in free exercise cases see *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1703-40 (1987) (addressing the unsettled character of free exercise jurisprudence).

14 *Smith*, 494 U.S. at 879, 885. The *Smith* Court upheld the denial of unemployment benefits to two Native Americans who were fired from their jobs because they admitted to the ritual use of peyote in Native American religious ceremonies. *Id.* at 890. For a more detailed discussion of *Smith*, see *infra* notes 92-111 and accompanying text.

15 113 S. Ct. 2217, 2226 (1993).

16 *Id.*

17 *Id.* at 2233, 2234.

18 *Id.* at 2223. The Church announced that it would also establish a school, a cultural center, and a museum at the site. *Id.*

19 *Id.* With the importation of slaves from Africa came the introduction of the Santeria religion into Cuba. *Id.* at 2222. In Cuba, the traditional African religion incorporated significant elements of Roman Catholicism, creating the Santeria "way of the saints" religion. *Id.* Approximately 50,000 to 60,000 Santeria adherents live in South Florida today. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1470 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993). Because of persecution in Cuba and fear of discrimination in this country, most Santeria rituals are practiced in secret. *Id.* The basis of Santeria is the formation of a deep personal relationship with the "orishas" or spirits of the Santeria church through four principle Santeria rituals: divination, sacrifice, spirit mediumship, and initiation. 13 THE ENCYCLOPEDIA OF RELIGION 66 (Mircea Eliade ed., 1987). Santeria worshippers believe that the orishas depend upon animal sacrifice for continued life. *Id.* The ritual of the sacrifice with the associated symbolism of shared food is how the Santeria devotee shows a deepening relationship with an orisha. *Id.*

20 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2223. The state asserted that the

Resolution 87-66, which recognized these concerns and subsequently approved Ordinance 87-40, which incorporated, except as to penalty, the state's animal cruelty laws.[21]

After checking with the state attorney general to ensure that further action did not conflict with state law,[22] the city council passed a second resolution.[23] This enactment noted the residents' "great concern" regarding the possibility of public animal sacrifices and affirmed the City's intention to enforce prohibitions against such sacrifices.[24] The city council later adopted three more substantive ordinances that confronted the issue of ritual animal sacrifice.[25]

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residents were concerned for the welfare of the animals, fearing that the animals would unnecessarily suffer due to nonprofessional slaughter procedures. *Church of the Lukumi Babalu Aye*, 723 F. Supp at 1472-73. The state also expressed residents' concerns about health hazards from improper disposal of the carcasses, noting that residents had discovered remains of animals, together with religious paraphernalia, in public places. *Id.* at 1474. Finally the state argued that the Hialeah community could be harmed by the detrimental effect that the observation of animal sacrifice could have on a child's mental health, thereby resulting in an increase in aggressive and violent behavior. *Id.* at 1475.

21 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2223. Resolution 87-66 recognized the community concerns that certain religious practices "'are inconsistent with public morals, peace or safety'" and declared that "[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." *Id.* Ordinance 87-40, therefore, subjected to criminal punishment any person who "unnecessarily or cruelly . . . kills any animal." *Id.* (quoting FLA. STAT. ANN. § 828.12 (West 1993)).

22 *Id.* Florida law prohibited Hialeah from enacting animal cruelty legislation that conflicted with the provisions of Florida state animal cruelty laws. *Id.* The state law declared that "[n]othing in this act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group." FLA. STAT. ANN. § 828.22(3) (West 1976). The attorney general concluded that this religious exemption applied only to the religious slaughtering of animals for food. *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2223. Ritual animal sacrifice for other purposes was not a "necessary" killing, the attorney general concluded, and thus Florida's animal cruelty laws prohibited this conduct. *Id.*

23 *Lukumi Babalu Aye*, 113 S. Ct. at 2223. Resolution 87-90 noted the community concern "regarding the possibility of public ritualistic animal sacrifices" and the city's intention "to oppose the ritual sacrifices of animals." *Id.* at 2223-24.

24 *Id.* The resolution concluded with the declaration that "[a]ny individual or organization that seeks to practice animal sacrifice in violation of state and local law will be prosecuted." *Id.* app. at 2235-36.

25 *Id.* at 2224. The first additional ordinance, Ordinance 87-52, defined the word sacrifice as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited possession of animals for the purpose of slaughter or sacrifice. *Id.* app. at 2236. The ordinance limited application to any person or group who "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." *Id.* The ordinance contained an exemption for licensed establishments that slaughtered animals specifically raised for food purposes. *Id.* Second, Ordinance 87-71 provided that "[i]t shall be unlawful for any per-

Following the enactment of this legislation, the Church and Pichardo filed an action under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida.[26] The complaint alleged violations of the Church's free exercise rights and sought a declaratory judgment, injunctive relief, and monetary damages.[27] The Florida district court ruled in favor of the city, finding that the Hialeah ordinances did not violate the Church's rights under the Free Exercise Clause.[28] The court determined that the City of Hialeah had demonstrated a compelling government interest in the control of disease,[29] protection of children,[30] and animal welfare.[31] The court then balanced the prohibition of ritual animal sacrifice against these compelling interests to hold

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son, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." *Id.* app. at 2237. Finally, Ordinance 87-72 defined slaughter as "the killing of animals for food" and prohibited killing outside of districts zoned for slaughterhouses except for "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." *Id.* app. at 2238.

The city council passed all the ordinances by unanimous vote. *Id.* at 2224. Violations were "punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both." *Id.*

[26] *Id.* Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1992). For more information on § 1983, see generally Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985).

[27] *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2224.

[28] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1488 (1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

[29] *Id.* at 1485. The district court noted that animal carcasses were "often left in public places leading to an increased risk of disease." *Id.* The court also recognized that the animals were obtained from unregulated sources leading to an increased health risk. *Id.*

[30] *Id.* The district court noted the strong state interest in ensuring child welfare. *Id.* (citations omitted). The court determined that there was a correlation between a child's exposure to violence and the subsequent development of aggressive behavior by that child. *Id.* at 1475. Therefore, the court found that a child's presence at a ritual animal sacrifice could have a harmful effect on the child's mental health. *Id.* at 1475, 1486.

[31] *Id.* at 1486. The district court determined that courts had consistently held that the protection of animal welfare fell within the government's police powers. *Id.* (quoting C.E. America, Inc. v. Antinori, 210 So. 2d 443, 444 (Fla. 1968)). The court noted that prior to being sacrificed the animals were held in "filthy, overcrowded conditions" without food or water. *Id.* Furthermore, the court found that animals "perceive both pain and fear during the actual sacrificial ceremony." *Id.*

that the challenged ordinances did not unconstitutionally impinge upon the free exercise of the Santeria religion.[32] The Court of Appeals for the Eleventh Circuit affirmed, concluding that the ordinances were constitutional.[33]

The Supreme Court granted certiorari[34] and reversed, holding that the Hialeah ordinances impermissibly burdened the free exercise of the Santeria religious practices.[35] The Court found that because the city council pursued the asserted government interests only through the regulation of the Church's religious conduct, the ordinances had an impermissible object and were not of general applicability.[36] In so finding, the Court held that the purported governmental interests supporting the Hialeah ordinances were not compelling because the laws did not proscribe non-religious conduct that would result in similar harms.[37]

The Supreme Court first began to explore the scope of the Free Exercise Clause in *Reynolds v. United States*.[38] George Reynolds, a practicing member of the Mormon church, was convicted of bigamy,[39] a federal offense.[40] The Court held that Reynolds's reli-

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[32] *Id.* at 1487, 1488.

[33] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993). The Supreme Court observed that the court of appeals did not address the effect of the recent Supreme Court decision in *Employment Division, Department of Human Resources v. Smith* "because the District Court employed an arguably stricter standard." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2225 (1993).

[34] 112 S. Ct. 1472 (1992).

[35] *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2222.

[36] *Id.*

[37] *Id.* at 2234.

[38] 98 U.S. 145 (1878). For a discussion of *Reynolds*, see EDWIN B. FIRMAGE & RICHARD C. MANGRUM, ZION IN THE COURTS—A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900 151-59 (1988). Professors Firmage and Mangrum noted that "*Reynolds* began as a test case in which both the federal judiciary and the church presidency hoped to determine the constitutionality of the anti-polygamy statute." *Id.* at 151. Although the decision was a defeat for the Mormon Church, evidentiary difficulties and a short limitations period restricted the actual impact of the statute. *Id.* at 159.

[39] Bigamy is "[t]he criminal offense of willfully and knowingly contracting a second marriage (or going through the form of a second marriage) while the first marriage, to the knowledge of the offender, is still subsisting and undissolved. The state of a man who has two wives, or of a woman who has two husbands, living at the same time." BLACK'S LAW DICTIONARY 163 (6th ed. 1990). "Bigamy literally means a second marriage distinguished from a third or other; while polygamy means many marriages,—implies more than two." *Id.* at 1159. Polygamy was first acknowledged as part of Mormon doctrine in 1852. Edwin B. Firmage, *Religion & the Law: The Mormon Experience in the Nineteenth Century*, 12 CARDOZO L. REV. 765, 771 (1991). Professor Firmage noted that *Reynolds* "established that Congress had the power to punish polygamy, but the Morrill Act was a cumbersome weapon with which to do so." *Id.* at 775. For an excerpt of the relevant provision of the Morrill Act prohibiting polygamy

gious conviction was not a valid defense for the commission of a criminal act.[41] The Court distinguished Reynolds's "beliefs," which were entitled to absolute protection, from "actions," which could be prohibited if the conduct violated social duties or was detrimental to good order.[42]

Over sixty years later the Court refined this belief/action distinction in *Cantwell v. Connecticut*.[43] The trial court convicted Newton Cantwell and his two sons under a Connecticut statute that made it illegal to solicit for a religious cause without a license.[44]

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see *infra* note 40. Because of this power, Firmage explained, Congress subsequently enacted the Edmunds Act which created the offense of unlawful cohabitation (thus releasing prosecutors from the burden of proving that a polygamous marriage existed), permitted "joinder of polygamy and cohabitation charges," and effectively eliminated Mormons from juries in polygamy trials. *Id.* By 1893, after the Mormon Church officially ended the practice of plural marriage, and most prosecutions of plural marriage had ended, the courts had convicted 1004 Mormons for illegal cohabitation and only 31 for polygamy. *Id.* Professor Firmage noted that because practitioners of polygamy were, for the most part, Mormon leaders, the "conviction and imprisonment of polygamists served to paralyze Mormon society by removing its leadership." *Id.*

40 *Reynolds*, 98 U.S. at 146. Reynolds was convicted under § 1 of the Morrill Act, which states that "[e]very person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and . . . shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years . . . ." Morrill Act, ch. 126, § 1, 12 Stat. 501, 501 (1862) (codified at Rev. Stat. § 352).

41 *Reynolds*, 98 U.S. at 167.

42 *Id.* at 164; *see also* G. Michael McCrossin, Note, *General Laws, Neutral Principles, and the Free Exercise Clause*, 33 VAND. L. REV. 149, 150 (1980) (stating that *Reynolds* was the first time that the Court had made the belief/action distinction). The Court determined that polygamy and monogamy could not peacefully coexist in the same society. *Reynolds*, 98 U.S. at 165-66. The Court also noted the harmful effect polygamous relationships had on the "pure-minded women and . . . innocent children" involved in these relationships. *Id.* at 167-68. Finding that bigamy was subversive to social order, the Court cited Professor Francis Lieber, a prominent intellectual, for the principle that polygamy fostered a patriarchal form of society "which, when applied to large communities, fetters the people in stationary despotism . . . ." *Id.* at 166. Professor Lieber depicted the Mormon religion as "characterized by 'vulgarity,' 'cheating,' 'jugglery,' 'knavery,' 'foulness' and as bearing 'poisonous fruits.'" Carol Weisbrod & Pamela Sheingorn, Reynolds v. United States: *Nineteenth-Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 828, 851 n.126 (1978) (citation omitted).

43 310 U.S. 296 (1940). *Cantwell* expanded the Free Exercise Clause by making it applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Id.* at 303.

44 *Id.* at 300-02. The Cantwells were Jehovah's Witnesses who solicited literature on religious subjects from house to house. *Id.* at 300-01. The state charged Newton Cantwell with violating Connecticut General Statute § 6294, which stated: "No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, . . . unless such cause shall have been ap-

Reversing the conviction, the Court determined that the statute acted as a prior restraint on religion.[45] Reaffirming *Reynolds*, the majority reasoned that in general, all conduct must be subject to some regulation to protect society.[46] The Court warned, however, that this regulation had to be exercised without unduly infringing upon a protected freedom.[47] The Court then held that the Connecticut statute unconstitutionally infringed upon the free exercise of religion because the statute gave a public official discretionary power to decide whether a given cause was religious.[48]

The Supreme Court next confronted the issue, sidestepped in *Cantwell*,[49] of when a burden on religious conduct was constitutional.[50] In *Braunfeld v. Brown*,[51] the Court considered the burden

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proved by the secretary of the public welfare council." *Id.* at 300, 301-02 (quotation omitted). The statute left the determination of whether a given cause was deemed religious to this official. *Id.* at 302.

For more information on Jehovah's Witnesses, see R. LAURENCE MOORE, RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS 136-40 (1986). Professor Moore noted that to Jehovah's Witnesses, proselytizing or seeking converts was not only an attempt to "spread the word" but "was in part a ritual that aimed at creating shared feelings of isolation among those called to perform a thankless task." *Id.* at 138-39.

45 *Cantwell*, 310 U.S. at 306, 311. The Court cited *Near v. Minnesota* for the proposition that one of the First Amendment's guarantees was the prevention of prior restraints on the dissemination of information. *Id.* at 304 (citing Near v. Minnesota, 283 U.S. 697, 713 (1931)). In *Near*, the Court held that a statute prohibiting the publication of a newspaper that was "malicious, scandalous and defamatory" acted as a prior restraint on publication and was an infringement of the liberty of press guaranteed by the Fourteenth Amendment. *Near*, 283 U.S. at 712, 713, 722-23.

46 *Cantwell*, 310 U.S. at 304. For example, the Court noted, a general regulation of solicitation that did not include a religious test and that did not "unreasonably obstruct" the collection of funds would be constitutional, even if the collection was for religious purposes. *Id.* at 305.

47 *Id.* at 304.

48 *Id.* at 305. The Court further observed that the statute could not be validated by the fact that any arbitrary or capricious action by the public official was subject to judicial review. *Id.* at 306. The Court declared that "[a] statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action." *Id.*

49 *See* McCrossin, *supra* note 42, at 151. McCrossin noted that *Cantwell* could be read to hold that a reasonable burden arising from an otherwise valid law was constitutional. *Id.* McCrossin claimed, however, that the decision left unclear the meaning of the term "reasonable" when considering a general law that had an "incidental and unintended effect on the activity of a particular religious group." *Id.*

50 *Id.* at 152 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)). For a discussion of *Braunfeld*, see *id.* at 152-55; Pepper, *supra* note 2, at 330-32. Professor Pepper contended that *Braunfeld* stands for the proposition that free exercise protection "is simply an *ad hoc* judgment by a court as to whether the legislature behaved reasonably in light of the importance of its goals: religious liberty does not appear to require much in the way of detour or deference by the state." Pepper, *supra* note 2, at 331.

51 366 U.S. 599 (1961).

imposed by a Sunday closing law upon members of the Orthodox Jewish faith.[52] Abraham Braunfeld[53] claimed that because his faith required him to abstain from working on Saturday, the state's Sunday closing law imposed an impermissible burden on his free exercise of religion.[54]

In *Braunfeld*, Chief Justice Warren, writing for the plurality, balanced the state's secular purpose of providing workers a day of rest against the financial inconvenience resulting from observance of a religious belief.[55] Refusing to invalidate the generally applied Sunday closing statute, the Court determined that the burden upon Braunfeld's religious conduct was merely indirect.[56] Chief Justice Warren reasoned that a state law advancing secular goals was presumptively valid despite any indirect burden on religion, unless such goals could be accomplished without imposing such a

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52 *Id.* at 600-01, 603. The Pennsylvania statute in question, the Court pointed out, prohibited the retail sale on Sunday of certain commodities, including clothing and home furnishings. *Id.* at 600 (citation omitted). For an extensive history of Sunday closing laws, see McGowan v. Maryland, 366 U.S. 420, 431-40 (1961); *id.* at 470-511 (Frankfurter, J., concurring). In *McGowan*, decided on the same day as *Braunfeld*, the Court considered the Establishment Clause claims of store clerks who contended that Sunday closing statutes violated First Amendment guarantees respecting the establishment of religion. *Id.* at 422. The *McGowan* Court found that statutes providing for a uniform day of rest were not violative of the Establishment Clause merely because Sunday was of "particular significance for the dominant Christian sects." *Id.* at 445. The Court declined to decide the store clerks' free exercise claims, finding that the clerks did not have standing because they alleged only economic injury and did not claim an infringement on their religious freedom. *Id.* at 429.

53 Braunfeld was joined in the suit by a number of Philadelphia retailers who were Orthodox Jews engaged in the sale of items restricted by the law. *Braunfeld*, 366 U.S. at 601.

54 *Id.* at 601-02. Braunfeld claimed that Sunday closing would force him to quit his business and lose his capital investment. *Id.* at 601. Other Orthodox Jewish merchants claimed that the law would force them to give up their faith or continue business at a serious economic disadvantage. *Id.* at 602. The Orthodox merchants also claimed that this regulation would hinder the Orthodox Jewish faith from gaining new adherents. *Id.*

55 *Id.* at 605-06. In dissent, Justice Brennan argued that the real state interest was not ensuring that everyone rested one day a week but rather "the mere convenience of having everyone rest on the same day." *Id.* at 614 (Brennan, J., dissenting).

56 *Id.* at 606. The Chief Justice determined that the sole burden on Braunfeld's religious beliefs was an economic one, merely making the exercise of these beliefs more expensive. *Id.* at 605. For a further discussion of Sunday closing laws and cases, see generally James A. Kushner, *Toward the Central Meaning of Religious Liberty: Non-Sunday Sabbatarians and the Sunday Closing Cases Revisited*, 35 Sw. L.J. 557 (1981). Professor Kushner noted that Sunday closing laws have an adverse effect on people who choose to celebrate the Sabbath on some other day and concluded that in a country dominated by Christian tradition, special care must be taken to ensure free exercise of all religions. *Id.* at 558, 582 (citation omitted).

burden.[57] The Court rejected judicially imposed exemptions for the Jewish merchants because of administrative problems that might result.[58]

In dissent, Justice Brennan maintained that the involvement of fundamental First Amendment liberties required a compelling state interest to override the constitutional guarantee.[59] Justice Brennan contended that the only interest being served by a Sunday closing statute was the convenience of having all of the state's citizens rest on the same day.[60] Because the law had no exemptions for those who observed a different day of rest, however, Justice Brennan argued that the effect of the law would force an Orthodox Jew to choose between his religion and trade.[61] As a result, Justice Brennan asserted that the Court had exalted administrative convenience to a high enough level that made one's choice of religion economically disadvantageous.[62] Accordingly, Justice Brennan concluded that the Sunday closing law prohibited Braunfeld from freely practicing his religion.[63]

Two years later, a majority of the Court supported Justice Brennan's compelling state interest analysis in *Sherbert v. Verner*.[64]

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57 *Braunfeld*, 366 U.S. at 607 (citing Cantwell v. Connecticut, 310 U.S. 296, 304-05 (1939)).

58 *Id.* at 608. The Chief Justice noted the difficulty in enforcing different closing days for different businesses depending on the religious beliefs of the owner. *Id.* Chief Justice Warren further observed that allowing some stores to remain open on Sunday would provide those shopkeepers with an advantage over shopkeepers who observed a Sunday Sabbath. *Id.* at 608-09. Finally, the Chief Justice opined that if Sabbath observance dictated days of operation, store owners would hire employees whose Sabbath, and presumably religion, coincided with the owner's religion. *Id.* at 609. This, the Chief Justice decided, was contrary to state employment practices prohibiting religious discrimination. *Id.*

59 *Id.* at 612-13 (Brennan, J., dissenting). The Justice posited that First Amendment freedoms "'are susceptible of restriction only to prevent grave and immediate danger . . . .'" *Id.* at 612 (Brennan, J., dissenting) (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)).

60 *Id.* at 614 (Brennan, J., dissenting).

61 *Id.* at 613, 614-15 (Brennan, J., dissenting).

62 *Id.* at 616-17 (Brennan, J., dissenting). Justice Brennan noted that of the 34 states with Sunday closing laws, 21 managed to provide exemptions for religious groups whose beliefs mandated Saturday closing. *Id.* at 614 (Brennan, J., dissenting).

63 *Id.* at 610 (Brennan, J., dissenting).

64 374 U.S. 398 (1963). *Sherbert* has been called the "first and leading case in the Supreme Court's modern free exercise jurisprudence . . . ." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1412 (1990). For more information on *Sherbert*, see David B. Tillotson, Comment, *Free Exercise in the 1980s: A Rollback of Protection*, 24 U.S.F. L. REV. 505, 513-17 (1990). Tillotson noted that *Sherbert* was important because it was the first time the Supreme Court explicitly applied strict scrutiny to legislation that indirectly burdened religious practices. *Id.* at 516. Thus, by using an "infringement/compelling interest/

In *Sherbert*, the state of South Carolina denied unemployment compensation to Adell Sherbert, a member of the Seventh-day Adventist Church, who lost her job for refusing to work on Saturday.[65] Justice Brennan first determined that the denial of benefits imposed a burden on the free exercise of Sherbert's religion.[66] The Justice argued that a general regulation resulting in an incidental burden on the free exercise of a person's religion could only be justified by a compelling state interest.[67] The Court concluded, however, that the state had failed to advance a compelling interest to justify this burden on Sherbert's religion.[68] Moreover, the Justice continued, the state did not demonstrate that there was no less restrictive way to achieve the same ends.[69] Indeed, the Court noted that South Carolina expressly allowed a claimant to refuse Sunday employment.[70] Justice Brennan then distinguished the strong state interest of providing a uniform day of rest from the state's interest in preventing fraudulent unemployment claims based on religious

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least restrictive means test, the Court resolved the tension between government regulation and individual free exercise rights in favor of individual rights . . . ." *Id.*

65 *Sherbert*, 374 U.S. at 399-401. Prohibition of Saturday labor is a basic doctrine of the Seventh-day Adventist Church. *Id.* at 399 n.1.

66 *Id.* at 404. The Justice noted that the statute not only denied benefits to Sherbert due to the practice of her religion, but also placed unmistakable pressure on Sherbert to forego that practice. *Id.*

67 *Id.* at 406 (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)). The Justice stated that when religious exercise is substantially infringed "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice . . . ." *Id.*

68 *Id.* at 407. The Justice noted that the state had merely suggested the possibility that fraudulent claims by unprincipled persons claiming religious objections to Saturday employment could reduce the compensation fund and hamper an employer's ability to schedule necessary work. *Id.*

69 *Id.* The Court noted that numerous state supreme courts had allowed benefits to people who could not find suitable employment because of a religious conviction against Saturday employment. *Id.* at 407 n.7 (citations omitted); *see, e.g.*, *In re* Miller, 91 S.E.2d 241, 245, 246 (N.C. 1956) (holding that a Seventh-day Adventist who refused Friday night labor was eligible for unemployment benefits because "work which requires one to violate his moral standards is not ordinarily suitable work within the meaning of the statute"); Swenson v. Michigan Employment Sec. Comm'n, 65 N.W.2d 709, 710, 712 (Mich. 1954) (deciding that a Seventh-day Adventist's availability for full time employment—based on the pattern of work existing in the area at the time benefits were sought—entitled him to unemployment compensation); Tary v. Board of Review, 119 N.E.2d 56, 58-59 (Ohio 1954) (invalidating denial of benefits to Seventh-day Adventist because statute ordered administrator to consider the risk to claimant's morals in making a determination).

70 *Sherbert*, 374 U.S. at 406. The Court recognized that in times of a "national emergency," the State Commissioner of Labor allowed textile plants to operate on Sunday. *Id.* In this situation, the Court noted that state law prohibited an employer from requiring an employee, who was conscientiously opposed to working on Sunday, to work on that day. *Id.* (citation omitted).

objections, to hold that the state could not constitutionally force a worker to abandon the religious observance of a Saturday Sabbath.[71]

The Court later applied the *Sherbert* balancing test in *Wisconsin v. Yoder*.[72] The state trial court convicted Jonas Yoder, a member of the Old Order Amish religion, for violating Wisconsin's compulsory school-attendance law.[73] Yoder claimed that this law was antithetic to the Amish religion and could severely impact the religion's continued viability.[74]

The Court first determined that the Wisconsin law interfered with the practice of a legitimate religious belief.[75] The majority

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[71] *Id.* at 410. Justice Stewart's concurring opinion emphasized quantitative effects in comparing South Carolina's unemployment statute with the Sunday closing laws at issue in *Braunfeld*. *Id.* at 417 (Stewart, J., concurring). Justice Stewart believed that the infringement on Sherbert's religious freedom was "considerably less onerous" than the burden on Orthodox Jews permitted in the Sunday closing cases. *Id.* Thus, Justice Stewart concluded that *Braunfeld* should be overruled explicitly because of the Court's inconsistent reading of the Free Exercise Clause. *Id.* at 418 (Stewart, J., concurring). Justice Harlan, writing in dissent, stated unequivocally that *Sherbert* overruled *Braunfeld*. *Id.* at 421 (Harlan, J., dissenting). Justice Harlan reasoned that the secular purpose of the unemployment statute was even more clear than the Sunday closing law upheld in *Braunfeld* because the unemployment statute fostered financial integrity. *Id.*

[72] 406 U.S. 205, 215 (1972). *See generally* Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980) (examining problems in the application of the *Sherbert* balancing test since the *Yoder* decision).

[73] *Yoder*, 406 U.S. at 207, 213. The mandatory attendance regulation provided in pertinent part:

> any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.

Id. at 207 n.2 (quoting WIS. STAT. § 118.15(1)(a) (1969)). The Court noted that the requirement for compulsory schooling beyond the eighth grade was a comparatively recent development in the United States's history and was probably due, at least in part, to the enactment of child labor laws. *Id.* at 228.

[74] *Id.* at 209. Yoder claimed that secondary schools instilled values very different from the traditional Amish way of life and values. *Id.* at 210-11. For example, Yoder professed that the Amish people value goodness rather than intellect, "wisdom rather than technical knowledge," community welfare over competitiveness and worldly success, and separation from worldly society over social life with other students. *Id.* The Amish parents feared that exposing children to "worldly influences" in high school would result in Amish children leaving the faith and the ultimate collapse of their religious order. *Id.* at 211, 218.

[75] *Id.* at 218. Noting that the effect of the regulation was "not only severe, but inescapable," the Court asserted that the regulation threatened the very existence of the Amish community. *Id.* The majority also stated that to avoid criminal liability the Amish people would have to abandon their beliefs and be assimilated into the larger community or migrate to another, more tolerant, region. *Id.*

observed that, historically, courts had zealously guarded First Amendment religious protections.[76] The Court then declared that only paramount government interests, which could not be achieved by less restrictive means, would override a legitimate claim to the free exercise of religion.[77] The Court concluded that despite a strong commitment to further education, the state's interest did not outweigh the religious interest of the Amish.[78]

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[76] *Id.* at 214 (citations omitted); *see* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (stating that "in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'") (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)); *see also* McGowan v. Maryland, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("If the value to society of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose religious practices are curtailed by it . . ., the regulation cannot be sustained."); Prince v. Massachusetts, 321 U.S. 158, 165, 170 (1944) (upholding a child labor law as applied to children of Jehovah's Witnesses by balancing the interests of the children to exercise their religion against the secular interest of the state to protect the children's welfare).

[77] *Yoder*, 406 U.S. at 215 (citations omitted). To support this contention, the Court cited several cases where the decision was based on a finding of a paramount government interest. *Id.* at 214-15 (citing Lemon v. Kurtzman, 403 U.S. 602, 606-07, 613-14 (1971) (invalidating state aid grants for parochial school teachers notwithstanding the legislative determination of public interest and sound educational policy because of an "excessive entanglement between government and religion"); Tilton v. Richardson, 403 U.S. 672, 675, 678-79, 689 (1971) (upholding the granting of federal funds to sectarian institutions because of a strong state interest in fostering the higher education of future generations); Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947) (upholding a state statute reimbursing parents of parochial school children for bus transportation expense by relying on the state's interest in protecting all school children from "the very real hazards of traffic").

The dissent in *Yoder* maintained that the majority should also have considered the interests of the Amish children when balancing the rights of the parents with the rights of the state. *Yoder*, 406 U.S. at 241 (Douglas, J., dissenting). Justice Douglas maintained that if an Amish child wanted to attend high school and was mature enough to make that decision for himself, the state interest could override parental religious objections. *Id.* at 242 (Douglas, J., dissenting); *see also*, Debra D. McVicker, Note, *The Interest of the Child in the Home Education Question:* Wisconsin v. Yoder *Reexamined*, 18 IND. L. REV. 711, 728-29 (1985) (stating that it is not fair that a child can be denied the quality of education mandated by the state merely on the basis of the parent's religious beliefs). McVicker argued that the court should base any religious exemption from compulsory attendance statutes on a "best interests of the child" analysis. *Id.* at 728.

[78] *Yoder*, 406 U.S. at 227. The state specified two goals in requiring the additional years of formal education. *Id.* at 221. First, the state argued that two additional years of schooling would help individuals become more self-reliant and better able to make their way in the world. *Id.* The Court found that there was no evidence to show that the Amish vocational training failed to provide for their children's future independence. *Id.* at 224. Second, the state contended that two additional years of formal education were necessary to prepare individuals to participate effectively in the democratic process. *Id.* at 221. The Court determined that the Amish community had prospered for over 200 years without the benefit of the additional two years of schooling, and that their prosperity was strong evidence of their ability to fulfill social and

Therefore, the Court held that the First and Fourteenth Amendments prevented Wisconsin from compelling Amish children to attend formal school until the age of sixteen.[79]

More than a decade later, in *Bowen v. Roy*,[80] the Supreme Court began the constriction of free exercise jurisprudence by narrowing the determination of what constituted a burden on the practice of a religious belief.[81] Steven J. Roy, an Abenaki Indian, refused to supply the state with a social security number for his two-year old daughter, Little Bird of the Snow, because obtaining such a number conflicted with his Native American religious beliefs.[82] Accordingly, the state denied welfare benefits for the child.[83] The

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political responsibilities without compromising their religious freedom with compulsory education. *Id.* at 225.

79 *Id.* at 234. The Court narrowed this holding by determining that such a free exercise claim could be made by few other groups. *Id.* at 234-35. The Court noted that two factors weighing heavily in this decision were the strong interrelationship between the Amish way of life and religious beliefs, and the adequacy of the alternative education in meeting the state's interest. *Id.* at 235.

80 476 U.S. 693 (1986). For a further discussion of *Bowen v. Roy*, see Jamie A. Cole, Comment, *A New Category of Free Exercise Claims: Protection for Individuals Objecting to Governmental Actions That Impede Their Religions*, 135 U. PA. L. REV. 1557, 1559-83 (1987). Cole argued that "*Roy* represents an unjustified curtailment of free exercise protection" and maintained that "the courts should provide protection to individuals objecting to governmental actions that impede the ability of the individual to choose or follow a specific religion, even when no individual action is required or prevented." *Id.* at 1559.

81 *Bowen*, 476 U.S. at 700-01. Claims brought by Native Americans have played a large role in the Court's trend towards constricting free exercise rights. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451-52 (1988) (holding that although government action would have serious adverse impact on religious practices, the challenged action did not constitute a legally cognizable burden of the free exercise rights of Native Americans); *see also* Celia Byler, Comment, *Free Access in Free Exercise?: A Choice Between Mineral Development and American Indian Sacred Site Preservation on Public Lands*, 22 CONN. L. REV. 397, 410 (1990) (arguing that because of fundamental cultural differences, it is not easy for non-Indians to understand the religious significance of Native American sacred sites); Lupu, *supra* note 3, at 944 (noting that recent claims by American Indians have brought the burden issue to the forefront, and asserting that it appears as if the Court may be prepared "to narrow the set of conflicts that will produce injury cognizable under the free exercise clause"). Byler contended that is it difficult for American Indians to convey the significance of the asserted interest and for judges to comprehend the importance of religious practices that are unlike traditional Western religions. Byler, *supra*, at 413.

82 *Bowen*, 476 U.S. at 695.

83 *Id.* The statute required that a state Aid For Dependent Children (AFDC) plan "must . . . provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall* furnish to the State agency his social security account number." *Id.* at 699 (emphasis added) (quoting 42 U.S.C. § 602(a)(25) (Supp. II. 1982)). The Court also noted that the statute compels that "such State agency *shall utilize* such account numbers . . . in the administration of such plan." *Id.* (emphasis added) (footnote omitted).

Court first addressed the issue of whether government use of the child's social security number burdened Roy's free exercise of religion.[84] Declaring that the Free Exercise Clause did not give an individual the right to dictate the government's internal workings, Chief Justice Burger concluded that the state's use of the social security number did not impair Roy's ability to exercise his religious beliefs.[85]

The Court next reached the question of whether the government could constitutionally require Roy to provide his daughter's social security number in order to be eligible for benefits.[86] Chief Justice Burger, joined only by Justices Powell and Rehnquist,[87] found that the government should be given wide latitude in the enforcement of a neutral requirement for the management of welfare programs.[88] The Chief Justice maintained that the government only had to show that the challenged requirement for benefits was a reasonable way to promote a legitimate public interest.[89] The Chief Justice concluded that Congress's refusal to grant

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[84] *Bowen*, 476 U.S. at 699. Roy believed that obtaining and using this number as a unique identifier robbed his daughter of her spiritual identity and caused her to lose control of her personal uniqueness. *Id.* at 696.

[85] *Id.* at 699-701. Specifically, the Court ruled that a law which impeded an individual's religious beliefs was afforded no protection under the Free Exercise Clause if that law merely resulted in an action by the government and did not require or prevent any action by the individual. *Id.* at 699. Noting that historically no free exercise protection has ever been granted in this situation, the Court stated: "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id.* The Court further explained that an individual could not require the government to join in his or her religious practices, stating that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.*

[86] *Id.* at 701-12.

[87] *Id.* at 694.

[88] *Id.* at 707. Chief Justice Burger asserted that "we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications." *Id.* at 704. *But see* Sherbert v. Verner, 374 U.S. 398, 404-05 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . [C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms.") (citations omitted).

[89] *Bowen*, 476 U.S. at 707-08. A majority of the Court refused to endorse Burger's analysis. *Id.* at 694. Justices Blackmun and Stevens determined that because the government already had Little Bird of the Snow's social security number, the issue was probably moot as the government might not force Roy to resupply the number. *Id.* at 715 (Blackmun, J., concurring in part). Justice O'Connor, joined by Justices Brennan and Marshall, disagreed with Burger's analysis maintaining that "[s]uch a test has no

a special exemption did not violate the Free Exercise Clause because the government's use of social security numbers was a reasonable way to reduce fraud in government programs.[90]

The Supreme Court discarded the *Sherbert* compelling interest test[91] in the recent case of *Employment Division, Department of Human Resources v. Smith.*[92] Alfred Smith and Galen Black were discharged from their jobs because they ingested peyote[93] at a religious ceremony for sacramental purposes.[94] The state of Oregon denied

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basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides." *Id.* at 727 (O'Connor, J., concurring in part and dissenting in part). Justice White dissented believing that *Thomas v. Review Board* and *Sherbert* controlled. *Id.* at 733 (White, J., dissenting) (citing Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963)).

90 *Id.* at 709-10, 712. The Court noted the importance of social security numbers in computer matching techniques used for detecting fraudulent applications. *Id.* On the other hand, Justice O'Connor determined that although cross matching would have been more difficult without social security numbers, such matching could be done with the recipient's name, birth date, and the full name of the recipient's parents. *Id.* at 726 (O'Connor, J., concurring in part and dissenting in part) (quotation omitted). Therefore, Justice O'Connor argued: "'*The government's interest* in preventing Little Bird of the Snow from fraudulently receiving welfare benefits *can be satisfied without requiring a social security number* for Little Bird of the Snow.'" *Id.* at 726-27 (O'Connor, J., concurring in part and dissenting in part) (quotation omitted).

91 *See supra* notes 64-71 and accompanying text for a discussion of the *Sherbert* decision.

92 494 U.S. 872 (1990). The *Smith* decision was extremely controversial, spawning immediate petitions for a rehearing "joined by an unusually broad-based coalition of religious and civil liberties groups from right to left and over a hundred constitutional law scholars . . . ." McConnell, *supra* note 13, at 1111. McConnell declared that, in light of *Smith*, religious exercise is no longer a preferred freedom because formal neutrality only requires that religion be treated the same as commercial or any other secular activity. *Id.* at 1153. The Supreme Court denied the petition for rehearing. Employment Div., Dep't of Human Resources v. Smith, 496 U.S. 913 (1990).

For a detailed discussion of *Smith*, see James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 112-13 (1991) (contending that after the *Smith* decision the Free Exercise Clause has no meaning outside the unemployment compensation context, and that in the *Smith* Court's view, protection of minority religions is no longer the responsibility of the courts); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1, 53 (1991) (noting that in order to continue the Framers' search for religious liberty, courts must be willing to weigh competing interests and closely scrutinize government intrusions on religious matters).

93 *Smith*, 494 U.S. at 874. Peyote is a hallucinogen that comes from the plant *Lophophora williamsii Lemaire*, and is classified as a Schedule I controlled substance. *Id.* Justice Blackmun noted that the government, which created this classification, had also created an exemption for the "use of peyote in bona fide religious ceremonies of the Native American Church." *Id.* at 912 n.5. (Blackmun, J., dissenting) (quoting 21 C.F.R. § 1307.31 (1989)).

94 *Id.* at 874. The Oregon statute makes it unlawful for "any person knowingly or intentionally to possess a controlled substance unless the substance was obtained di-

Smith and Black unemployment compensation because their discharge for the use of peyote constituted "misconduct."[95] The Court framed the issue as whether Oregon could include religiously motivated use of peyote within the scope of a general criminal statute prohibiting the use of that drug.[96]

Justice Scalia, writing for the majority,[97] maintained that the Court had never allowed religious beliefs to exempt an individual from complying with a valid regulation.[98] The Justice explained

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rectly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice . . . ." OR. REV. STAT. § 475.992(4) (1991).

95 *Smith*, 494 U.S. at 874.

96 *Id.* Professor McConnell claimed that the Court had no jurisdiction to decide this issue. McConnell, *supra* note 13, at 1112-13. McConnell noted that the Oregon Supreme Court held that the criminality of the sacramental use of peyote was irrelevant in determining eligibility for unemployment benefits. *Id.* at 1112 (citing Smith v. Employment Div., Dept. of Human Resources, 721 P.2d 445, 449-50 (Or. 1986), *rev'd*, 494 U.S. 872 (1990)). According to McConnell, the Oregon court further held that although the state did not enforce the law against sacramental use of peyote, such an enforcement would violate the Free Exercise Clause. *Id.* (citing *Smith*, 721 P.2d at 148). Thus, the Supreme Court granted certiorari to decide a question that was "entirely hypothetical and, according to the highest court of Oregon, irrelevant to the outcome as a matter of state law." *Id.*

97 Four Justices agreed with Justice Scalia's analysis: Chief Justice Rehnquist, and Justices White, Stevens, and Kennedy. *Smith*, 494 U.S. at 873. Justice O'Connor concurred in the judgment but filed a separate opinion stating that the Court should have used the *Sherbert* compelling interest test. *Id.* at 891, 899 (O'Connor, J., concurring). Justices Brennan, Marshall, and Blackmun joined in Justice O'Connor's opinion without concurring in the judgment. *Id.* at 891. Justice Blackmun filed a dissenting opinion in which Justices Brennan and Marshall joined. *Id.* at 907 (Blackmun, J., dissenting).

98 *Id.* at 878-79. Justice Scalia asserted that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* In support of this proposition Justice Scalia cited *Minersville School District, Board of Education v. Gobitis*. *Id.* (citing Minersville Sch. Dist., Bd. of Educ. v. Gobitis, 310 U.S. 586 (1940)). In *Gobitis*, the Supreme Court upheld the expulsion of public school children who refused to salute the flag because of their religious convictions. *Gobitis*, 310 U.S. at 591, 600. The *Gobitis* Court maintained that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id.* at 594-95. In so holding, the Court asserted that saluting the flag was a means of instilling national unity, an underlying basis of national security. *Id.* at 595.

The Supreme Court, however, expressly overruled *Gobitis* in a later opinion. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (striking down mandatory flag salute in public schools). Justice Jackson, writing for the majority in *Barnette*, proclaimed: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* Professor McConnell asserted that *Barnette* was "one of the most celebrated of all opinions under the Bill of Rights[, and that] [r]elying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v. Ferguson* without mentioning *Brown v. Board of Education*." McConnell, *supra* note 13, at 1124 (footnotes omitted).

that a person's religious principles could not relieve that individual from compliance with a general law that was not aimed at the advancement or restriction of a religious belief.[99]

Next, Justice Scalia distinguished prior free exercise cases such as *Yoder* which seemed to hold to the contrary.[100] By designating these decisions as "hybrid cases,"[101] the Justice maintained that a neutral, generally applicable law would only be considered an unconstitutional bar to religiously motivated conduct when the free exercise claim was made in conjunction with another claim for constitutional protection.[102] Thus, Justice Scalia submitted, *Yoder* was not decided solely on a free exercise claim but also on the fundamental right of parents to raise their children.[103]

Justice Scalia further distinguished prior cases where the Court applied the *Sherbert* compelling interest test.[104] The Justice determined that the only time the Court had subsequently applied this test was in the context of unemployment compensation

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99 *Smith*, 494 U.S. at 879 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982); *Gobitis*, 310 U.S. at 595). To further support this proposition, Justice Scalia relied upon *Prince v. Massachusetts*, which held that the state could prosecute a mother under child labor laws for using her children to disseminate religious literature on the streets. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158, 160-61, 171 (1944)). The Court in *Prince*, however, relied on the principle that "[t]he state's authority over children's activities is broader than over like actions of adults" and conceded that the law in question could not be applied to adults. *Id.* at 168-69.

100 *Smith*, 494 U.S. at 881-82 (citations omitted); *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (asserting that in addition to free exercise concerns, the parental right to direct their children's education is significant) (citations omitted).

101 *Smith*, 494 U.S. at 882. *See generally* Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993) (analyzing the different results that are achieved when applying the hybrid doctrine to different areas of law, such as free speech, equal protection, or privacy claims). Fry concluded that although the effect of the hybrid doctrine was not to protect religion, the doctrine may enhance the protection offered in other areas of the law when coupled with a religious claim. *Id.* at 862.

102 *Smith*, 494 U.S. at 881. For example, Justice Scalia noted that *Cantwell v. Connecticut* was not decided solely on free exercise claims but was a hybrid of free exercise in conjunction with freedom of speech. *Id.* at 881 n.1 (citing Cantwell v. Connecticut, 310 U.S. 296, 307 (1940)). *See supra* notes 43-48 and accompanying text for a discussion of *Cantwell*. Justice O'Connor countered that both the *Yoder* and the *Cantwell* Courts expressly relied on a free exercise analysis in reaching their decisions. *Id.* at 896 (O'Connor, J., concurring).

103 *Id.* at 881. The Court relied on *Pierce v. Society of Sisters* for the proposition that parents have the right to "direct the education of their children." *Id.* (citing Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925)).

104 *Smith*, 494 U.S. at 883-84. The Court noted that under *Sherbert* "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Id.* at 883 (citing Sherbert v. Verner, 374 U.S. 398, 402-03 (1963)). *See supra* notes 64-71 for a discussion of *Sherbert*.

cases.[105] Justice Scalia expounded that under *Sherbert*, the government could not refuse to extend an existing system of individual assessment to claims of religious hardship without a compelling reason.[106] Justice Scalia claimed that the Supreme Court had only "purported" to apply the *Sherbert* test in non-unemployment situations and had always found the inquiry satisfied.[107]

Finally, Justice Scalia opined that although this nation has valued and protected religious diversity, the Court could not presume the invalidity of any restriction on conduct simply because the restriction did not protect a paramount government interest.[108] Citing a "parade of horribles,"[109] Justice Scalia asserted that applying

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[105] *Id.* (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138-39 (1987) (holding denial of benefits violated the Free Exercise Clause of the First Amendment when discharge was due to religious beliefs); Thomas v. Review Bd., 450 U.S. 707, 709, 720 (1981) (overruling denial of benefits to a Jehovah's Witness who quit his job because his religious beliefs prohibited his participation in the production of munitions)).

[106] *Id.* at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)). The *Bowen* Court declared: "If a state creates such a mechanism [of individualized exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent." *Bowen*, 476 U.S. at 708.

[107] *Smith*, 494 U.S. at 883 (citing United States v. Lee, 455 U.S. 252, 257-58, 258-59, 260 (1982); Gillette v. United States, 401 U.S. 437, 462 (1971)). In *Lee*, the Court held that the free exercise rights of a member of the Old Order Amish were not violated by government enforcement of social security taxes because it would be administratively difficult to provide religious exceptions to the tax system. *Lee*, 455 U.S. at 254-55, 260-61. The *Lee* Court explicitly noted that "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* at 257-58.

In *Gillette*, the Court determined that the free exercise rights of Gillette, who objected to the Vietnam War on religious grounds, were not violated by the Military Selective Service Act, given the government's substantial interest in procuring people to fight in the war. *Gillette*, 401 U.S. at 439-440, 462-63.

Justice O'Connor countered that simply because the Court rejected free exercise claims in these particular cases did not "call[ ] into question the applicability of First Amendment doctrine." *Smith*, 494 U.S. at 896 (O'Connor, J., concurring) (citations omitted). "Indeed," observed Justice O'Connor, "it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us." *Id.* at 897 (O'Connor, J., concurring). As evidence that the Court had not "declined to apply" the compelling interest test in recent cases, Justice O'Connor cited *Hernandez v. Commissioner of Internal Revenue* and *Hobbie*. *Id.* at 900 (O'Connor, J., concurring) (citing Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989); *Hobbie*, 480 U.S. at 141-42); *see Hernandez*, 490 U.S. at 699 ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."); *Hobbie*, 480 U.S. at 141-42 (holding that denial of benefits must be subjected to strict scrutiny, and must be justified by proof of a compelling state interest).

[108] *Smith*, 494 U.S. at 888.

[109] *Id.* at 888-89; *id.* at 902 (O'Connor, J., concurring). Justice Scalia's "parade of horribles" included compulsory military service, payment of taxes, health and safety

the compelling interest test would lead to a flood of claims for religious exemptions.[110] Thus, the *Smith* Court stated that if the burden on religious exercise was merely the incidental result of an otherwise valid, generally applicable law, the Free Exercise Clause was not offended.[111]

One of Justice Scalia's "parade of horribles" came before the Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[112] Writing for the Court, Justice Kennedy[113] first concluded that the threshold requirements for a free exercise claim had been met.[114] Specifically, the Justice found that Santeria was a religion;[115] that

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regulations, compulsory vaccination laws, drug laws, traffic laws, social welfare legislation, child labor laws, environmental protection laws, "laws providing for equality of opportunity for the races," and animal cruelty laws. *Id.* at 889. It was Justice O'Connor, referring to Justice Scalia's examples, who coined the term "parade of horribles" in her concurrence. *Id.* at 902 (O'Connor, J., concurring).

Justice Scalia, utilizing Justice O'Connor's "parade of horribles" language declared that it would be "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.* at 889 n.5. This reluctance to engage in such a balancing task has been criticized by numerous commentators. *See, e.g.*, Gordon, *supra* note 92, at 103-04 (stating that "the essence of judging is having to judge" and questioning "[w]hy should balancing be forbidden only in the free exercise area?"); McConnell, *supra* note 13, at 1144 (asserting that "in most areas of constitutional law . . . the majority of the Court does not hesitate to weigh the social importance of laws against their impact on constitutional rights[,]" and that "[u]nless *Smith* is the harbinger of a wholesale retreat from judicial discretion across the range of constitutional law, there should be some explanation of why the problem in this field is more acute than it is elsewhere").

110 *Smith*, 494 U.S. at 888. *But see* Lupu, *supra* note 3, at 947 (opining that such an argument is present in every free exercise claim because "[b]ehind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe").

111 *Smith*, 494 U.S. at 878. This decision has been criticized by a number of commentators. *See, e.g.*, Gordon, *supra* note 92, at 109 (stating that "*Smith* means that a legislative majority at any level of government—national, state, county, or city—can impose whatever changes on minority religions, or on any religion, that it desires").

112 113 S. Ct. 2217 (1993).

113 Chief Justice Rehnquist and Justices Stevens, Scalia, and Thomas joined this part of Justice Kennedy's opinion. *Id.* at 2221.

114 *Id.* at 2225-26.

115 *Id.* at 2225 (quoting Thomas v. Review Bd., 450 U.S. 707, 714 (1981) (stating that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection")). The *Thomas* Court noted, however, that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task" and then accepted a referee's finding that the appellant quit his job due to his religious convictions without elaborating on what made these convictions religious. *Thomas*, 450 U.S. at 714. For more on the Court's attempts to define religion, see George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519, 1520-33 (1983). Professor Freeman stated that the Supreme Court has historically said little about the interpretation of religion. *Id.* at 1524. Early definitions by the Court included reference to a

animal sacrifice could reasonably be an integral part of that religion;[116] and that a sincere religious belief motivated the sacrifice.[117]

The Court then pronounced that at a minimum the Free Exercise Clause pertained when a law discriminated against religious beliefs or regulated conduct because of the religious motivation for the conduct.[118] Justice Kennedy maintained that although a law specifically targeting religious beliefs would never be considered permissible,[119] a neutral and generally applicable law did not have to be justified by a compelling governmental interest.[120] The Court then posited that neutrality and general applicability are interconnected, and that generally the failure to fulfill one requirement may indicate that the other requirement has not been satisfied.[121]

Justice Kennedy first addressed the neutrality requirement.[122] The Justice maintained that if the purpose of the law was to restrict or prohibit conduct because the conduct was religiously motivated,

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"Creator." *Id.* (quoting Davis v. Beason, 133 U.S. 333, 342 (1890) ("The term 'religion' has reference to one's view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.")). The Court later broadened this definition to include "the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths." *Id.* (quoting United States v. Ballard, 322 U.S. 78, 86 (1944)); *see also* Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("It is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."). More recent Supreme Court decisions have taken an even more expansive view, including beliefs based on "moral, ethical, or religious principle." Welsh v. United States, 398 U.S. 333, 342-43 (1970).

116 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2225-26. The Court noted that the Santeria assertion that the ritual of animal sacrifice was a central part of their religion could not be termed "bizarre or incredible" given the historical relationship between animal sacrifice and religion. *Id.* (quoting Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 n.2 (1989)).

117 *Id.* at 2226. Sincerity of religious beliefs was an issue in *United States v. Ballard*, 322 U.S. 78, 86 (1944). The *Ballard* Court held that a jury should not make a factual determination as to the veracity of a party's religious beliefs. *Id.* Justice Douglas articulated this holding as follows:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

Id. at 86-87.

118 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2226.

119 *Id.* at 2227 (citing McDaniel v. Paty, 435 U.S. 618, 626 (1978)).

120 *Id.* at 2226 (citing Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 878-89 (1990)).

121 *Id.*

122 *Id.* at 2227.

the law was not neutral.[123] To ascertain a law's objective, Justice Kennedy posited, a court must initially examine the text of the law.[124] At a minimum, the Court asserted, a law is not neutral if it discriminates on its face.[125] The Court explained that a law lacked facial neutrality if it referred to a religious ritual or practice in language that had no discernable secular interpretation.[126] Rejecting the Church's argument that the ordinances lacked facial neutrality because of the strong religious connotations associated with "sacrifice" and "ritual," the Court found that these words also had nonreligious uses.[127]

The Court determined, however, that a facially neutral law could still improperly restrict or prohibit religiously motivated conduct.[128] The Free Exercise Clause, Justice Kennedy declared, looks beyond facial discrimination and protects against government animosity which is veiled as well as overt.[129] The Court found that although the words "sacrifice" and "ritual" did not force a conclusion of improper targeting, the choice of those words supported such a conclusion.[130]

The Justice contended that beyond looking merely at the text of a law, its effect could be further evidence of a discriminatory object.[131] Although adverse impact did not force a determination of impermissible targeting, the Court expounded, the design of the Hialeah ordinances was so structured as to result

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123 *Id.* (citing *Smith*, 494 U.S. at 878-79).

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.* (citation omitted). According to Webster's Dictionary, the definition of "sacrifice" includes "to suffer loss of, give up, renounce, injure, or destroy often for an ideal or belief or for an advantageous or beneficial end . . . to sell at a loss." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1996 (1981). The definition of "ritual" includes "any practice done or regularly repeated in a set precise manner so as to satisfy one's sense of fitness and often felt to have a symbolic or quasi-symbolic significance." *Id.* at 1961.

128 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2227.

129 *Id.* (citing Bowen v. Roy, 476 U.S. 693, 703 (1986); Gillette v. United States, 401 U.S. 437, 452 (1971) (stating that the Free Exercise Clause "forbids subtle departures from neutrality")).

130 *Id.* A reading of the ordinances, the Court continued, compelled the finding that their objective was the suppression of a fundamental element of the Santeria religion. *Id.* at 2227. Furthermore, Justice Kennedy declared, an improper attempt to target religious conduct was also indicated by the text of Resolution 87-66, which expressed residents' "concern" about certain religious practices and re-affirmed the city's commitment to deter such acts by religious groups. *Id.* at 2227-28. Never, chided Justice Kennedy, was it even suggested that the ordinances were intended for any other group but followers of the Santeria religion. *Id.* at 2228.

131 *Id.*

in a "religious gerrymander."[132]

Justice Kennedy further determined that the ordinances suppressed more religious conduct than absolutely necessary to achieve the asserted government interest.[133] The Court noted that the state interests in safeguarding the public health and protecting animal welfare could be met without an absolute interdiction against all Santeria sacrificial practice.[134] From this, the Court declared, it could be inferred that the restrictions sought to suppress

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[132] *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). The term "religious gerrymander" was used by Justice Harlan in *Walz* as follows: "[T]he critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Walz*, 397 U.S. at 696 (Harlan, J., concurring). Justice Kennedy determined that through careful drafting Ordinance 87-71 prohibited Santeria sacrifice and allowed other killings that were no more necessary or humane. *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2228. Ordinance 87-71 prohibited the sacrifice of animals but excluded from its definition of "sacrifice" almost all animal slaughter except those in a religious ceremony not for the primary purpose of food consumption. *Id.* This primary purpose requirement, Justice Kennedy noted, served as an exemption for Kosher slaughter. *Id.* Although this would seem to involve the question of differential treatment of religions, the Court stated that this issue did not need to be discussed. *Id.*

The Court next noted that Ordinance 87-52 was so narrowly drawn that it also only prohibited animal slaughter by Santeria adherents. *Id.* Ordinance 87-52 prohibited the keeping of any animal to be killed in "any type of ritual" if the intent was to use the animal for food regardless of whether the animal was ever actually consumed. *Id.* Exemptions included "any licensed [food] establishment" with regard to animals "specifically raised for food purposes." *Id.* at 2228. Justice Kennedy opined that this requirement clearly seemed to target Santeria adherents who usually consume the sacrificed animals, except after certain rituals. *Id.* at 2222. Again, observed Justice Kennedy, the exemption appeared to have been included to exclude Kosher slaughter from the operation of the statute. *Id.*

Justice Kennedy found that the problem with Ordinance 87-40 was in its application because only killings for religious reasons were deemed "unnecessary." *Id.* at 2229. The Court explained that hunting and fishing for sport, "eradication of insects and pests," euthanasia, and even the use of live rabbits for training greyhounds were not unnecessary under the Florida statute after which the ordinance was patterned. *Id.* Furthermore, because the determination of what was an unnecessary killing required an assessment of the particular justification, the Court stressed that the government could not refuse to extend an exemption to cases of religious hardship without a compelling reason. *Id.* (citing Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 884 (1990)).

Justice Kennedy concluded his assessment of the individual ordinances by finding that Ordinance 87-72, which confined the killing of animals to properly zoned slaughter houses, but did not target religious conduct individually, was infirm by association. *Id.* at 2230, app. at 2238. Justice Kennedy noted that this ordinance was enacted the same day as Ordinance 87-71 and in direct response to the Church announcement. *Id.* at 2230.

[133] *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2229.

[134] *Id.* For example, the Court noted, to protect the city from the harms of improper disposal, a general restriction on organic garbage disposal would meet the city's aims. *Id.* at 2229-30. Furthermore, if the city had concerns about the methods

certain religious conduct rather than effectuate the stated government interest.[135]

Moreover, Justice Kennedy maintained, a neutrality assessment could find additional support in an equal protection analysis.[136] Under equal protection, the Court articulated, a discriminatory object could be determined by the circumstances surrounding the enactment of the policy at issue.[137] As evidence of the city council's discriminatory intent, the Court pointed to the series of events leading to the enactment of the ordinances.[138] The Justice noted that the city had never tried to regulate animal sacrifice before the Santeria church announced its plans.[139] The Justice also found that the minutes of a city council meeting convened to discuss the opening of the Santeria Church evidenced animosity toward the Santeria religion by Hialeah residents and city officials.[140] Thus, Justice Kennedy asserted, the history revealed that the sole object of the ordinances was to target ritual animal sacri-

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used in the ritual sacrifice, the Justice opined, the city should have regulated the methods, not the sacrifice itself. *Id.* at 2230.

135 *Id.* at 2229. Justice Kennedy observed that "a law which visits 'gratuitous restrictions' on religious conduct, seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 520 (1961)).

136 *Id.* at 2230. Justice Kennedy declared that "[n]eutrality in its application requires an equal protection mode of analysis." *Id.* (quoting *Walz*, 397 U.S. at 696 (Harlan, J., concurring)). Only Justice Stevens joined this part of Justice Kennedy's analysis. *Id.* at 2221.

The Fourteenth Amendment requires that no person shall be denied equal protection under the laws of any state. U.S. CONST. amend. XIV. In other words, the Equal Protection Clause guarantees that similarly situated individuals will be treated in a like manner by the government. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 585, 586 (2d ed. 1983). The Fourteenth Amendment does not prohibit the creation of classifications within the law but it does "guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals." *Id.* Therefore, the mission of equal protection analysis is to ensure that the classification is properly drawn. *Id.* at 587. A court will test the law both on its face and in its application to ensure that the law meets this standard. *Id.*

137 *Church of Lukumi Babalu Aye*, 113 S. Ct. at 2230-31 (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

138 *Id.* at 2231.

139 *Id.* The Justice found this significant in light of the city's claim that animal sacrifice had been a problem before the Church had opened. *Id.*

140 *Id.* Justice Kennedy observed that at the council meeting members of the crowd cheered statements by council members that were critical of Santeria practices and interrupted the brief statement made by the Church's President with jeers. *Id.* For example, the Justice noted, the audience cheered when a councilman stated that "people were put in jail [in prerevolution Cuba] for practicing this religion." *Id.* The Justice also noted that the councilman then questioned: "[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" *Id.* The Court observed that other council members made similar statements. *Id.*

fice by Santeria adherents.[141] In sum, the Justice concluded, these ordinances were not neutral and the district court committed clear error by not reaching such a conclusion.[142]

Justice Kennedy next reached the question of whether the ordinances were generally applicable.[143] Defining the precise standard for general applicability was unnecessary, Justice Kennedy announced, because the ordinances clearly violated the minimum standard required to safeguard First Amendment rights.[144]

The Court declared that the ordinances were substantially underinclusive because the ordinances allowed a significant amount of non-religious conduct that either threatened the public health or harmed animals.[145] For example, the Court noted, the ordinances' only protection against animal cruelty was protection from the ritual sacrifice of animals by Santeria followers.[146] Further-

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141 *Id.*

142 *Id.*

143 *Id.* at 2231-32 (citing Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 879-81 (1990)). The Chief Justice and Justices White, Stevens, Scalia, and Thomas joined this part of Justice Kennedy's opinion. *Id.* at 2221.

144 *Id.* at 2232. Stating that "the general applicability requirement has parallels in our First Amendment jurisprudence," Justice Kennedy cited several First Amendment decisions supporting the contention that a generally applicable law was presumptively valid. *Id.* (citations omitted). *See, e.g.*, Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2518 (1991) (holding that a law of general applicability, which did not specifically target the press, did not offend the First Amendment where enforcement against the press had only an incidental effect on news gathering and reporting); University of Pa. v. EEOC, 493 U.S. 182, 201 (1990) (noting that "'the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability'") (quoting Branzburg v. Hayes, 408 U.S. 665, 682 (1972)); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (finding that "[w]hen the State imposes a generally applicable tax, there is little cause for concern"); Larson v. Valente, 456 U.S. 228, 245-46 (1982) ("'There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.'") (quotation omitted); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) (holding that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded").

145 *Church of Lukumi Babalu Aye*, 113 S. Ct. at 2232. Underinclusiveness has generally been used in equal protection analysis. *See, e.g.*, TRIBE, *supra* note 1, § 16-4, at 1446. According to Professor Tribe: "Underinclusive classifications do not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended government end." *Id.* at 1447. Professor Tribe noted that generally courts will defer to legislative judgment or classifications, even in the case of underinclusiveness. *Id.*

146 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2232. Justice Kennedy noted that fishing and hunting, extermination of rats and mice, euthanasia of "stray, neglected, abandoned, or unwanted animals," and infliction of pain "in the interest of medical science" were all permitted by either the city or Florida's anti-cruelty laws. *Id.*

more, the Court maintained, the health risks from improper disposal of animal remains were the same, regardless of the group endorsing such disposal, yet only Santeria practices were targeted under the ordinance.[147] Additionally, the Justice contended that the health risks from uninspected meat were only addressed in the context of religious sacrifice.[148] Thus, the Court found that each of the ordinances pursued the asserted governmental interests only against religiously motivated behavior.[149]

The Court concluded that because the Hialeah ordinances were not neutral and generally applicable, strict scrutiny applied.[150] Justice Kennedy repeated that the asserted interests could be achieved through narrowly tailored ordinances that hindered religion to a lesser degree.[151] The Justice then reiterated his finding that the City did not pursue the asserted interests with respect to comparable non-religious conduct.[152] The Court determined that when the government enacts legislation that restricts conduct shielded by the First Amendment and does not restrict conduct producing the same harm, the proffered interest is not compelling.[153] Therefore, Justice Kennedy reasoned, because the conduct regulated by the ordinances was solely the protected religious conduct of Santeria adherents, the asserted interests were not compelling.[154] Accordingly, the Court held that the ordinances violated the Free Exercise Clause.[155]

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147 *Id.* at 2233. For example, observed Justice Kennedy, the statute allowed hunters to bring home dead animals without regulating the disposal of the carcass. *Id.* Furthermore, despite substantial testimony that improper disposal of garbage by restaurants raised similar concerns, restaurants were beyond the reach of the ordinances. *Id.*

148 *Id.* Thus, declared Justice Kennedy, hunters and fishermen could consume their catch without undergoing government inspection. *Id.* Likewise, the statute did not require inspection of animals raised for home consumption. *Id.*

149 *Id.* Justice Kennedy asserted that this was the "precise evil" that the "requirement of general applicability is designed to prevent." *Id.*

150 *Id.* at 2233-34. Chief Justice Rehnquist, and Justices White, Stevens, Scalia, Souter, and Thomas joined Justice Kennedy in this part of the opinion. *Id.* at 2221. The Court reiterated the rule announced in *Smith* that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 2233.

151 *Id.* at 2234.

152 *Id.*

153 *Id.*

154 *Id.* Justice Kennedy noted that "[a] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (quoting The Florida Star v. B.J.F., 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in the judgment) (quotation omitted)).

155 *Id.*

Justice Scalia, writing separately, distinguished between Justice Kennedy's analysis of the *Smith* rule and his own.[156] Justice Scalia maintained that neutrality and general applicability were not only interrelated, but also substantially overlapped.[157] The Justice also disagreed with Justice Kennedy's equal protection analogy.[158] Justice Scalia argued that determining a single motive for a collective legislative body was impossible.[159] Furthermore, the Justice contended that even if the motivation could be determined, it would be immaterial.[160]

Justice Souter, concurring in part and in the judgment, disagreed that the *Smith* analysis was applicable to the resolution of this case.[161] First, Justice Souter distinguished the *Smith* rule, and its focus on neutral laws, from the earlier "noncontroversial principle" of free exercise jurisprudence involving non-neutral laws.[162]

Justice Souter next contended that the *Smith* rule embraced a specific, narrow conception of neutrality.[163] Justice Souter distinguished "substantive neutrality," which requires the state to accommodate religious differences, from "formal neutrality," which

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156 *Id.* at 2239 (Scalia, J., concurring in part and concurring in the judgment). The *Smith* Court held that if the burden on the exercise of religion was merely the incidental result of a generally applicable and otherwise valid law, the Free Exercise Clause was not offended. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 878 (1990).

157 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2239 (Scalia, J., concurring in part and concurring in the judgment). Neutrality, Justice Scalia claimed, concerned defects in the terms of the law, while general applicability involved defects in the design, construction, or enforcement of the law. *Id.*

158 *Id.*

159 *Id.* (citing Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting)). In *Edwards*, Justice Scalia argued that the secular purpose prong of the *Lemon* test had made such a "maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional." *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting).

160 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2240 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia opined that the prime inquiry in free exercise cases should be the law's effect rather than the legislative motives. *Id.* The Justice justified this assertion by hypothetically stating that if the Hialeah City Council had expressly attempted to promulgate a law to curtail the Santeria religion, but the law failed to achieve this discriminatory goal, the law would be valid because it would not effect an actual burden on free exercise. *Id.*

161 *Id.* (Souter, J., concurring in part and concurring in the judgment).

162 *Id.* Justice Souter stated that the "noncontroversial principle" to which he was referring was the proposition that the Court had previously held that free exercise is offended when a burden on religious exercise ensues from a law that is not neutral nor generally applicable. *Id.* The *Smith* rule, Justice Souter explained, maintained that the Free Exercise Clause is not offended if the burden on religion results from a neutral, generally applicable law. *Id.*

163 *Id.*

merely prohibits laws with a discriminatory purpose.[164] Justice Souter opined that if the Free Exercise Clause protected only against deliberate discrimination, formal neutrality would suffice.[165] The Justice maintained, however, that if the Free Exercise Clause protects the right to engage in religious conduct free from unwarranted governmental interference, the clause compelled substantive neutrality as well as formal neutrality.[166]

Justice Souter asserted that according to the *Smith* rule, formal neutrality, in conjunction with general applicability, met the requirements for constitutionality under the Free Exercise Clause.[167] The Justice stated that because the Hialeah ordinances were neither neutral under any definition, nor generally applicable, the *Smith* rule did not apply.[168] This case, the Justice contended, involved only the noncontroversial proposition that formal neutrality and general applicability are required for free-exercise constitutionality.[169] Therefore, Justice Souter observed, the Court correctly found that the ordinances did not reach that constitutional standard.[170]

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164 *Id.* (citation omitted); *see* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1990) (stating that the term formal neutrality stands for the proposition that a "government cannot utilize religion as a standard for action or inaction because [the Free Exercise and Establishment] clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden") (quoting Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1962)). Professor Laycock maintained that under formal neutrality, the exemption for sacramental wine in the National Prohibition Act was unconstitutional. *Id.* at 1000. The author further contended that, under formal neutrality, laws that give aid to secular schools but not to religious schools violate the First Amendment because the exclusion of religious schools is a classification on the basis of religion. *Id.* at 1001. This doctrine is inconsistent, argued Professor Laycock, with Supreme Court decisions. *Id.* Professor Laycock noted that in *Aguilar v. Felton* the Court invalidated a program providing funds for remedial math and English classes for low income pupils in private schools. *Id.* at 1007 (citing Aguilar v. Felton, 473 U.S. 402, 404-05, 406, 414 (1985)).

Professor Laycock argued that the term substantive neutrality stands for the proposition that "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." *Id.* at 1001. Under this definition, exemption for sacramental wine would be constitutional because an exemption would not encourage religion, but withholding such an exemption would severely discourage religious conduct. *Id.* at 1003.

165 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2242 (Souter, J., concurring in part and concurring in the judgment).

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.* Justice Souter contended that the Court should not have reached the issue of whether a nondiscriminatory law which burdens religious conduct violates the Free

Justice Souter propounded that because *Smith* changed the prior rule without explicitly overruling earlier cases, the result was free exercise jurisprudence in conflict with itself.[171] The concurring Justice noted that prior to *Smith*, the Court had addressed the concepts of neutrality and general applicability by indicating that the Free Exercise Clause embraced more than formal neutrality.[172] Therefore, the Justice continued, mere formal neutrality and general applicability did not reach the touchstone for free exercise constitutionality.[173] The Justice further reasoned that strict scrutiny had always applied, regardless of whether the burden on religious exercise resulted from the enforcement of generally applicable, formally neutral laws, or from laws that targeted religious conduct.[174]

Exercise Clause. *Id.* The Justice added that any discussion of this issue was dictum, and "[t]he question whether 'there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability,' is not before the Court in this case, and, again, suggestions on that score are dicta." *Id.* at 2242, 2243 (Souter, J., concurring in part and concurring in the judgment) (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

171 *Id.* at 2243.

172 *Id.* Justice Souter noted that just a few years before the *Smith* decision the Court had specifically rejected the contention that neutral, generally applicable requirements for government benefits only had to satisfy a reasonableness standard because "'such a test ha[d] no basis in precedent.'" *Id.* (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987)).

173 *Id.* The concurring Justice stated that the Court should look for a substantial burden on religious exercise, and if one was found strict scrutiny should apply. *Id.* (citations omitted).

174 *Id.* Justice Souter noted that "'only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.'" *Id.* at 2243-44 (Souter, J., concurring in part and concurring in the judgment) (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978) (quoting *Yoder*, 466 U.S. at 215)). The Justice found that heightened scrutiny had been required in a number of previous Court decisions. *Id.* at 2244 (Souter, J., concurring in part and concurring in the judgment) (citations omitted); *see* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.") (citations omitted); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 835 (1989) (holding that state denial of unemployment compensation was not justified by a compelling government interest); *Hobbie*, 480 U.S. at 141 (holding that state denial of benefits, subjected to strict scrutiny, must be justified by proof of a compelling state interest); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (finding that "[g]overnmental interest [in eradicating racial discrimination in education] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs"); United States v. Lee, 455 U.S. 252, 257-58 (1982) (declaring that a state must justify an infringement on religious liberty by demonstrating that the regulation is essential to achieve an overriding state interest); Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (deciding that the state must show that a regulation is the least restrictive

Justice Souter acknowledged that the *Smith* Court had distinguished prior case law but found the arguments unpersuasive.[175] First, Justice Souter rejected the "hybrid" characteristic proffered by the *Smith* Court to distinguish *Yoder* and *Cantwell*.[176] Neither *Yoder* nor *Cantwell*, the Justice declared, left any doubt that the basis for the decision in each case was religious freedom.[177] Next, Justice Souter repudiated the unemployment distinction offered as a justification for the holdings in *Sherbert* and its progeny.[178] Justice Souter also disputed the *Smith* Court's interpretation and use of precedent.[179]

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method of attaining some compelling state interest); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (stating that only a compelling state interest would justify the infringement on Sherbert's religious liberty); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (stating that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom").

175 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2244 (Souter, J., concurring in part and concurring in the judgment).

176 *Id.* In *Smith*, Justice Scalia opined that the Court only invalidated neutral, generally applicable laws when free exercise claims were asserted "in conjunction with other constitutional protection." Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 881 (1990) (citations omitted). This distinction, claimed Justice Souter, was indefensible because:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote-smoking ritual [at issue in *Smith*].

Church of the Lukumi Babalu Aye, 113 S. Ct. at 2244-45 (Souter, J., concurring in part and concurring in the judgment).

177 *Id.* at 2244 (Souter, J., concurring in part and concurring in the judgment). According to Justice Souter, the *Yoder* Court recognized that "fundamental claims of religious freedom [were] at stake." *Id.* (quoting *Yoder*, 406 U.S. at 221). Justice Souter also observed that the language quoted in *Smith* from the *Cantwell* decision did not come from the part of the opinion dealing with a neutral, generally applicable law, but was from the second part of the decision which involved a common law "breach-of-peace conviction for playing phonograph records." *Id.* at 2244 n.4.

178 *Id.* at 2245 (Souter, J., concurring in part and concurring in the judgment) (citations omitted). Justice Souter noted that the *Smith* Court sought to limit the free exercise exemptions granted in these cases to situations in which the government had in place a system of individualized exemptions. *Id.* (quotation omitted). Justice Souter argued that before *Smith*, however, the Court declined to accept that interpretation of the unemployment compensation cases. *Id.* (citing *Hobbie*, 480 U.S. at 142 n.7; Bowen v. Roy, 476 U.S. 693, 715-16 (1986) (Blackmun, J., concurring); *id.* at 727-32 (O'Connor, J., concurring); *id.* at 733 (White, J., dissenting)).

179 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2245 (Souter, J., concurring in part and concurring in the judgment). Justice Souter opined that *Smith's* interpretation of *Reynolds v. United States* was inconsistent with other Court decisions interpreting the *Reynolds*'s decision. *Id.* at 2245-46 (Souter, J., concurring in part and concurring in the judgment) (citations omitted). Moreover, the Justice noted that *Minersville School District, Board of Education. v. Gobitis*, which was relied upon in *Smith*, was explicitly

Justice Souter maintained that the *Smith* rule could be reexamined consonant with the precept of *stare decisis*.[180] The Justice explained that the *Smith* holding was not subjected to "full dress argument,"[181] and that established free exercise jurisprudence would have achieved the same result.[182] Therefore, Justice Souter concluded, the *Smith* Court violated a long-standing principle of restraint by announcing an unnecessary rule of law.[183] Justice Souter further noted that the Court could more easily reexamine recent cases because lower courts usually have not extensively relied upon such cases.[184] Finally, Justice Souter stressed that because *Smith* created a new rule without overruling the prior rule, courts would be faced with the question of which rule to apply, thus warranting a reexamination.[185]

Justice Souter elaborated that the Court not only should have looked at prior law when reexamining *Smith*, but also should have considered the language of the Free Exercise Clause and its his-

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overruled in *West Virginia Board of Education v. Barnette*. *Id.* at 2246 (Souter, J., concurring in part and concurring in the judgment) (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)). Thus, Justice Souter concluded that the Court had consistently applied compelling interest analysis in demanding exemptions for religious conduct from neutral, generally applicable laws, and that *Smith* did not fit with settled law. *Id.* Justice Souter then reminded the Court that the compelling interest test was applied as recently as a year before the *Smith* decision. *Id.* (citing Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 835 (1989) (holding state denial of unemployment compensation not justified by a compelling government interest)).

180 *Id.* at 2247 (Souter, J., concurring in part and concurring in the judgment).

181 *Id.* (citing *Mapp v. Ohio*, 367 U.S. 643, 676-77 (1961) (Harlan, J., dissenting)). Justice Souter contended that neither parties' brief in *Smith* addressed the issue of whether strict scrutiny and the Free Exercise Clause was applicable. *Id.* Additionally, Justice Souter argued that "[s]ound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense.'" *Id.* (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978)).

182 *Id.* The *Smith* Court, asserted Justice Souter, should have exercised judicial restraint and not have formulated "'a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (further quotation omitted)). Justice Souter noted that Justice O'Connor reached the same result as the majority in *Smith* by applying a strict scrutiny analysis. *Id.*

183 *Id.* Because this rule of law was unnecessary and was decided without being briefed by the parties, the Justice stated that the rule was akin to "'dicta . . . which may be followed if sufficiently persuasive but which are not controlling.'" *Id.* (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 627 (1935)).

184 *Id.* at 2248 (Souter, J., concurring in part and concurring in the judgment). Justice Souter noted that over time a decision "may be subject to reliance in a way that new and unexpected decisions are not," but because of the recent vintage of the *Smith* decision, it may not yet be "part of the tissue of the law." *Id.* (citations omitted).

185 *Id.*

tory.[186] The *Smith* Court, observed Justice Souter, did not state that the clause's text compelled that Court's decision, but only that it was a "permissible reading" of the clause.[187] Justice Souter commented that arguably the pre-*Smith* rule was a more permissible reading.[188]

Aside from not making an emphatic statement about the Free Exercise Clause's text, the *Smith* Court also failed to consider the clause's history, according to Justice Souter.[189] The Justice suggested that the original purpose of the Free Exercise Clause may have been to safeguard religious freedom by prohibiting any governmental encroachment.[190] Justice Souter concluded that although there were competing rules and interpretations set forth in *Smith* and pre-*Smith* cases, the case at bar was not the case to resolve the tension.[191] Accordingly, Justice Souter only concurred with the majority's result.[192]

Justice Blackmun, concurring in the judgment, wrote separately to reaffirm his conviction that *Smith* was incorrectly decided.[193] Justice Blackmun emphasized that the First Amendment's protection extended beyond those rare times when religion is explicitly targeted for disfavored treatment.[194] The Justice contended that the *Smith* decision disregarded the value of religious liberty as an affirmative individual right and reduced the Free Exercise Clause to a mere rule against discrimination.[195] Jus-

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186 *Id.* According to Professor McConnell, one of the criticisms about *Sherbert* and subsequent free exercise cases is that the Court did not look at the history of the Free Exercise Clause to support its decision. McConnell, *supra* note 64, at 1413. This flaw, according to McConnell, has left the Court's free exercise jurisprudence open to attack. *Id.*

187 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2248 (Souter, J., concurring in part and concurring in the judgment) (quoting Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 878 (1990)).

188 *Id.*

189 *Id.*

190 *Id.* at 2249 (Souter, J., concurring in part and concurring in the judgment). Justice Souter found strong evidence that "the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State." *Id.*

191 *Id.* at 2250 (Souter, J., concurring in part and concurring in the judgment).

192 *Id.*

193 *Id.* at 2250 (Blackmun, J., concurring in the judgment).

194 *Id.*

195 *Id.* In Justice Blackmun's *Smith* dissent, the Justice questioned the majority's characterization of free exercise as a "luxury" beyond the means of a well-ordered society by stating that "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty—and they could not have thought religious intolerance 'unavoidable,' for they drafted

tice Blackmun insisted that whenever a state passes legislation that burdens religiously motivated conduct, the state must justify the burden by demonstrating that the law is the least restrictive method of achieving a compelling state interest.[196] Justice Blackmun expounded that the legislation must actually advance the proffered compelling interest and cannot include more protected conduct than is necessary to achieve the legislative goal.[197]

In the instant case, asserted Justice Blackmun, the Hialeah ordinances were both overinclusive and underinclusive in relation to the purported state interests.[198] The Justice explained that the ordinances were overinclusive because the asserted government interests could be achieved without banning all Santeria sacrificial practices.[199] Conversely, Justice Blackmun expounded, the ordinances were underinclusive because despite the city's expressed interest in preventing animal cruelty, the Hialeah ordinances were carefully drafted to prohibit only those killings occasioned by Santeria sacrifice.[200]

Thus, argued Justice Blackmun, when laws specifically target religion, as did the Hialeah ordinances, such laws automatically fail strict scrutiny analysis under *Sherbert*.[201] The Justice, therefore, disagreed with the majority's conclusion that a non-neutral regulation that is not generally applicable had to be tested by strict scrutiny.[202] Instead, Justice Blackmun concluded that such regulations, which discriminate against religion in this manner, would always fail strict scrutiny.[203]

Although it may have been inappropriate for Justice Scalia to

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the Religion Clauses precisely in order to avoid that intolerance." Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 908-09 (1990) (Blackmun, J., dissenting).

196 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2250 (Blackmun, J., concurring in the judgment) (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981)).

197 *Id.* at 2250-51 (Blackmun, J., concurring in the judgment).

198 *Id.* at 2251 (Blackmun, J., concurring in the judgment).

199 *Id.*

200 *Id.*

201 *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 402-03 (1963)).

202 *Id.*

203 *Id.* Justice Blackmun noted that a harder question and one that he did not reach would be "whether the Free Exercise Clause would require a religious exemption from a generally applicable animal welfare law that sincerely pursued the goal of protecting animals from cruel treatment." *Id.* For more on animal rights and anti-cruelty legislation, see Tali H. Shaddow, Note, *Religious Ritual Exemptions: Sacrificing Animal Rights for Ideology*, 24 LOY. L.A. L. REV. 1367, 1393, 1395 (1991) (noting that "all fifty states currently have some form of criminal statute prohibiting cruelty to animals" and that an exemption for ritual slaughter of animals strongly undermines "our moral inclination that sentient beings have a right to be free from physical abuse").

mention the *Church of the Lukumi Babalu Aye* case in the *Smith* decision as an example of the "parade of horribles" that could subsequently come before the Court,[204] it is significant that a unanimous Court subsequently held that the Hialeah ordinances were a violation of the Free Exercise Clause.[205] Furthermore, it is noteworthy that both the district court and the court of appeals held that the Hialeah ordinances were constitutional.[206] Such inconsistencies demonstrate that not all courts have been zealous in protecting free exercise rights, and that the Supreme Court has an obligation to provide clear guidance to the lower courts in this area.

The guidance offered by the current majority of the Court is the recently articulated *Smith* rule.[207] This rule states that the Free Exercise Clause is not offended when the burden on religious conduct results from a neutral, generally applicable law.[208] Seemingly, in *Smith*, Justice Scalia decided that the effect the law had on religious conduct did not matter, so long as the law was couched in neutral, generally applicable terms.[209] Three years later, however, in *Church of the Lukumi Babalu Aye*, Justice Scalia noted that it is not the legislative intent that the Court is concerned with, but the ef-

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204 Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 888-89 (1990). In *Smith*, Justice Scalia stated that "[t]he rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—[including] ... animal cruelty laws, see, *e.g.*, *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 723 F. Supp 1467 (SD Fla. 1989) .... The First Amendment's protection of religious liberty does not require this." *Id.* (citations omitted).

Professor McConnell found it especially troubling that the Court included this case in its "parade of horribles" while the case was on appeal, "given that the reference might well prejudice the case in the appellate court." McConnell, *supra* note 13, at 1141 n.140. Indeed, noted McConnell, the appellee's brief to the Court of Appeals prominently quoted the *Smith* dictum. *Id.* (citation omitted).

205 *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2221.

206 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1487 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

207 *See, e.g.*, American Friends Serv. Comm. Corp. v. Thornburgh, 941 F.2d 808, 811 (9th Cir. 1991) (stating that *Smith* has "dramatically altered the manner in which we must evaluate free exercise complaints") (citation omitted); Yang v. Sturner, 750 F. Supp. 558, 558 (D.R.I. 1990) (holding that "[i]t is with deep regret that I have determined that [*Smith*] mandates that I recall my prior opinion"); United States v. Boyll, 774 F. Supp. 1333, 1341 (D.N.M. 1991) (stating that the Supreme Court recently "elected to abandon the compelling interest test in cases involving a 'neutral, generally applicable . . . law'") (citation omitted).

208 Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 878 (1990).

209 *Id.* In *Smith* Justice Scalia argued that "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.*

fect on religious conduct.[210] If a legislature intended to enact a neutral, generally applicable law that effectively burdened religious conduct, does a court look to the effect of the law and ignore the intent, or does a court look to the intent of the law and ignore the effect? The Supreme Court's guidance in this area is unclear.

The Court should return to the standard of heightened scrutiny that allows for religious exemptions as applied before the *Smith* decision. Indeed, with the recent enactment of the Religious Freedom Restoration Act,[211] even the federal legislature has recognized the need to restore the compelling interest test to justify restrictions on religious practices.[212] In so doing, any burden on an indi-

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210 *Church of Lukumi Babalu Aye*, 113 S. Ct. at 2240 (Scalia, J., concurring in part and concurring in the judgment). Specifically, Justice Scalia asserted: "The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted. . . ." *Id.* (quotation omitted).

211 The Religious Freedom Reformation Act (RFRA) provides in pertinent part:

> SECTION 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.
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> (a) FINDINGS.— The Congress finds that —
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> . . . .
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> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
>
> (b) PURPOSES.— The purposes of this Act are —
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

139 CONG. REC. H8713-14 (daily ed. Nov. 3, 1993).

212 Ronald B. Flowers, *Government Accommodation of Religious-Based Conscientious Objection*, 24 SETON HALL L. REV. 695, 731-32, 733 (1993). On November 16, 1993, President Clinton signed the Religious Freedom Restoration Act, which requires application of strict scrutiny review to alleged violations of the Free Exercise Clause. Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18. Mr. Steinfels noted that "even in cases where Government concerns like health or safety do justify infringements of religious practices, the new law requires the use of whatever means would be least restrictive to religion." *Id.* Professor Flowers noted that the enactment of RFRA resulted directly from the controversy caused by the *Smith* opinion. Flowers, *supra*, at 731. For example, Professor Flowers argued that as a result of *Smith*, religious-based objections to conforming to or participating in government programs such as military service, income taxes, or jury duty will no longer be permitted. *Id.* at 695, 697-708, 711-24. However, under RFRA, Flowers asserted that the government will now have to demonstrate that it has a compelling interest in interfering with religion and that no alternative means of serving that interest can be accomplished. *Id.* at 733-34. Thus, concluded Professor Flowers: "Once again, as it was prior to *Smith*, religious freedom will be the rule and governmental interference in religious behavior will be the exception." *Id.* at 734.

vidual's religious practices will now be weighed against the State's justification for the denial of a religious exemption.

Such an approach would apply a more historically correct reading of the Free Exercise Clause.[213] Prior to ratifying the First Amendment,[214] almost every state had enacted a constitution that defined religious liberty in terms of an individual believer's conscience and the actions that flowed therefrom.[215] Moreover, during this time period, the states had granted religious exemptions based on the needs of the individual sects.[216] Therefore, it can be argued that the country that ratified the Free Exercise Clause was

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213 McConnell, *supra* note 64, at 1455. Professor McConnell noted that although modern courts have relied upon the Jeffersonian doctrine that frowned upon the granting of religious exemptions, the evidence indicates that Madison's more liberal vision of religious liberty more closely reflected the popular view of the free exercise provision that appeared in both the Bill of Rights and state constitutions. *Id.* According to Professor McConnell, Madison professed that his duty to the Creator was "'precedent both in order of time and degree of obligation, to the claims of Civil Society,' and 'therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society.'" *Id.* at 1453 (quotation omitted). *But see* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 307 (1991) (contending that "any serious account of constitutional construction holds no place for the conduct exemption"); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) (arguing that in the late 18th century, Americans more likely believed that "the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws").

214 On September 25, 1789, Congress submitted the Bill of Rights to the states for ratification, and by December 15, 1791, the required number of states had ratified them. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 146 (1988).

215 McConnell, *supra* note 64, at 1455, 1458-59. A typical example was New York's 1777 Constitution which provided:

> [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this state, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

Id. at 1456.

216 *Id.* at 1468. Exemptions were created for Quakers who refused to take oaths and sects that refused to bear arms. *Id.* at 1467-68. McConnell noted that "[t]he language as well as the substance of this policy is particularly significant, since it recognizes the superior claim of religious 'conscience' over civil obligation." *Id.* at 1469. Exemptions were also granted for religious sects "conscientiously opposed to compelled tithes," for marriage ceremony requirements for Jewish citizens "who may be joined in marriage, according to their own usages and rites," and for Quakers who refused to take off their hats in court. *Id.* at 1469, 1471-72. McConnell noted that William Penn's arrest for failure to remove his hat was discussed during the debate over the Bill of Rights in the First Congress. *Id.* at 1472 & n.320.

acutely sensitive to the issues surrounding religious liberty and the need for religious exemptions for certain individual sects.

The United States is home to many diverse religions and cultures. This rich diversity should be cultivated and protected by the courts, not left to the mercy of majority rule. The courts must, at a minimum, ensure that a legislature cannot explicitly target specific religious practices, such as the Santeria ritual of animal sacrifice. Beyond that, however, the courts must protect the practices of minority religions from seemingly neutral laws. It is not enough for a court to rely upon the solicitude of the legislature because those who engage in religious rituals not widely practiced may, unfortunately, be disadvantaged.[217] Rather, judicially enforceable exemptions must ensure that nonconventional beliefs will receive the same protection afforded to popular, mainstream religions.

Finally, religion exists as much through conduct as through belief. The Free Speech Clause of the First Amendment fully protects freedom of belief or conscience.[218] Thus, unless some minority religious conduct offensive to the majority is protected by the First Amendment, the Free Exercise Clause is tautological and lacking in practical content.

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[217] Justice Jackson, in overruling *Minersville School District, Board of Education v. Gobitis*, wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[218] McConnell, *supra* note 13, at 1138. The Free Speech Clause provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. Professor McConnell noted that contrary to *Smith*, "exceptions from generally applicable laws are an established part of the protections for free speech and press under the First Amendment." *Id.*