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Constitutional Law—Free Exercise Clause—Sacrificial Rites Become Constitutional Rights on the Alter of Babalu Aye

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CONSTITUTIONAL LAW—FREE EXERCISE CLAUSE—SACRIFICIAL RITES BECOME CONSTITUTIONAL RIGHTS ON THE ALTAR OF BABALU AYE.

I. INTRODUCTION

The Free Exercise Clause of the First Amendment to the United States Constitution states that "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . ."[1] Although this passage appears to clarify the Constitutional requirements with respect to religious freedom, it has not prevented the government from burdening religiously motivated conduct. Since its inception, the Free Exercise Clause has undergone various interpretations and applications by the courts and the government. This variation has called into question the protection the Free Exercise Clause provides a person whose religious freedom has been burdened by a governmental action. Most such governmental action has taken the form of neutral and generally applicable laws which by their operation have placed a substantial burden on certain religious activity.[2] Rarely have laws purposely placed a special burden upon particular religious conduct.[3]

Facially neutral laws of general applicability that only incidentally burden religious conduct have historically been upheld by the courts even though these laws undermined the religious freedom of particular groups.[4] Not until 1963, when the Supreme Court first implemented the "compelling interest" test, did the Free Exercise Clause provide substantive protection from governmental interference with religious exercise.[5] For almost three decades, and with minimum

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1. U.S. CONST. amend. I.

2. For example, in Wisconsin v. Yoder, 406 U.S. 205 (1972), members of the Amish religion challenged a state compulsory school attendance law, which was a neutral and generally applicable law, because it burdened their religion by requiring Amish children to attend high school when their religion required them to be at home learning the Amish way of life.

3. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) (holding invalid a city ordinance that prohibited killing animals in religious rituals, but allowed the killing of animals in almost all other circumstances).

4. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding a state regulation prohibiting the selling of merchandise in public by minors as applied to a child who was distributing religious literature); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (upholding a state regulation that required students to salute the flag even though this practice was contrary to a particular student's religious beliefs); Reynolds v. United States, 98 U.S. 145 (1879) (upholding a state prohibition on polygamy as applied to a Mormon who claimed polygamy was an integral part of his religious exercise).

5. Sherbert v. Verner, 374 U.S. 398 (1963). Under the balancing test applied

exceptions, the Supreme Court applied the compelling interest test to free exercise cases.[6]

In 1990, however, free exercise jurisprudence underwent a sudden and unexpected change when the Supreme Court abandoned the compelling interest test and held that neutral and generally applicable laws will be upheld regardless of the burden placed upon religion.[7] As a result of this decision by the Court, the future of Free Exercise Clause protection looked questionable. However, in 1993, the United States Congress and President Clinton restored the protection the Free Exercise Clause had once provided religious observers when they enacted the Religious Freedom Restoration Act,[8] which in effect reinstated the compelling interest test to all free exercise claims.[9] As a result of this Act and the Court's holding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[10] any law that burdens religious conduct whether neutral or directly discriminatory, must undergo strict scrutiny before it can be held constitutionally valid. Today, religious freedom in the United States has once again attained the constitutional protection it so appropriately relished in the past.

II. FACTS

The Church of the Lukumi Babalu Aye, Inc. ("the Church") is a non-profit organization incorporated under Florida law in 1973.[11] The Church practices the Santeria religion, which was brought to

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in *Sherbert*, the claimant had to show that the challenged law imposed a substantial burden on the free exercise of his religion; thereafter, the burden shifted, and the state had to prove that the burden was justified by some compelling state interest. *Id.* at 403-09.

6. *See* Hernandez v. Commissioner, 490 U.S. 680 (1989) (applying the compelling interest test to uphold the denial of a charitable deduction for payments made to the Church of Scientology for "training services"); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); United States v. Lee, 455 U.S. 252 (1982) (applying the compelling interest test to uphold the denial of an exemption to the payment of social security taxes); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (applying the compelling interest test to grant an exemption to the conditions for unemployment compensation); Wisconsin v. Yoder, 406 U.S. 205 (1972) (applying the compelling interest test to create an exemption to a compulsory school attendance law); Gillette v. United States, 401 U.S. 437 (1971) (applying the compelling interest test to uphold the denial of an exemption to the Military Service Act).

7. Employment Div. v. Smith, 494 U.S. 872 (1990).

8. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (Supp. V 1993)).

9. The primary purpose of the Act was to restore the compelling interest test. *Id.*

10. 113 S. Ct. 2217 (1993). The Court in *Babalu Aye* held that laws that are not neutral but directly discriminatory must undergo the compelling interest test.

11. *Id.* at 2223.

the United States by exiles from the Cuban Revolution.[12] It teaches that every individual has a destiny from God that is fulfilled with the aid and energy of the Santeria spirits known as the *orishas*.[13] The Santeria religion is based upon a personal relationship with the *orishas*, and animal sacrifice is one of the principal forms of expressing devotion to these spirits.[14] According to Santeria teaching, the *orishas* depend upon this sacrifice for survival.[15]

Sacrifices are performed at the time of birth, marriage, death, at the initiation of new members and priests, during annual celebrations, and to cure the sick.[16] Sacrificial animals include chickens, doves, pigeons, ducks, goats, guinea pigs, sheep, and turtles.[17] Only trained priests can perform the animal sacrifice.[18] The priests kill

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12. *Id.* Santeria adherents in Cuba faced widespread persecution. *Id.* at 2222-23. As a result, they practiced their religion and its rituals in secret. *Id.* Even today, the open practice of the Santeria religion remains infrequent in the United States and Cuba. *Id.* at 2223. However, there are presently an estimated 50,000 practioners of the Santeria faith in south Florida. *Id.* Because Santeria remains an underground religion, most religious activity takes place by extended family groups in individual homes. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1470 (S.D. Fla. 1989). There is little intermingling between these groups, and few practitioners know adherents outside their own group. *Id.* Fear of discrimination by outsiders is the principal reason why the adherents practice the religion secretly. *Id.* Ernest Pichardo, the Church's priest, believes that if the Church were permitted to practice its rituals openly, the religion would become more open and accepted. *Id.*

13. *Babalu Aye*, 113 S. Ct. at 2222. The Santeria religion originated when hundreds of thousands of the Yoruba people were brought as slaves from eastern Africa to Cuba. *Id.* While in Cuba, the Yoruba's native religion of Santeria was forbidden, and they were expected to become Christians. *Babalu Aye*, 723 F. Supp. at 1469. To escape harsh penalties, discrimination, and social stigma, they began to express their faith through the use of Catholic saints and symbolism, and, as a result, their traditional African religion absorbed significant elements of Roman Catholicism. *Id.* at 1469-70. By blending the two religions, the Yoruba were able to practice Santeria while appearing to practice Catholicism. *Id.* at 1470. The resulting fusion was the Santeria, "the way of the saints." *Babalu Aye*, 113 S. Ct. at 2222.

14. *Babalu Aye*, 113 S. Ct. at 2222.

15. *Id.*

16. *Id.*

17. *Id.* Most of the animals are bought either from *botanicas*, stores specializing in selling religious articles, or from local farms that breed animals specifically for sacrifice. *Babalu Aye*, 723 F. Supp. at 1474.

18. *Babalu Aye*, 723 F. Supp. at 1471. The ritual surrounding the killing of the animal is learned through an apprenticeship. *Id.* at 1472. The apprentice observes an experienced priest and learns where and how the knife should be inserted. *Id.* In time, the apprentice becomes familiar with the technique and participates in the sacrifice by holding the knife as the priest guides the apprentice through the killing stroke several times. *Id.* When the priest is satisfied that the apprentice is fully capable of performing the sacrifice, the apprentice is allowed to kill the animal without assistance. *Id.*

the animals by cutting the carotid arteries located in the animals' necks.[19] Thereafter, the sacrificed animal is usually cooked and eaten; however, if the sacrifice is performed during a healing or death ritual, the animal is not consumed.[20]

In April of 1987, the Church leased land in the city of Hialeah, Florida and subsequently announced its plans to establish a house of worship as well as a cultural center, school, and museum.[21] Ernesto Pichardo, the Church's priest, also announced the Church's goal to bring the practice of the Santeria faith into the open, including its ritual of animal sacrifice.[22]

This announcement of the Church's plans prompted the Hialeah City Council to hold an emergency public session on June 9, 1987.[23] At this meeting and a subsequent meeting, the city council passed several overlapping ordinances and resolutions that were specifically devised to prohibit animal sacrifice practiced only by the Santeria adherents.[24] All ordinances and resolutions passed the city council by unanimous vote.[25]

Subsequent to the enactment of the ordinances, the Church and Pichardo filed an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida.[26] The

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19. *Babalu Aye*, 113 S. Ct. at 2222. The priest places the sacrificial animal on its left side on a table while the apprentice holds the animal's legs. *Babalu Aye*, 723 F. Supp. at 1472. The priest stands on the other side of the animal and with his left hand holds the animal's head, which is facing away from the priest, high in the air. *Id.* At the same time, the priest holds a four-inch knife in his right hand. *Id.* Within moments after the animal is placed on the table, the priest punctures its neck with the knife, which is thereafter pushed all the way through the neck. *Id.* This knife does not actually cut the throat of the animal because the knife goes directly into the vein area that is just behind the throat and in front of the vertebrae. *Id.* Ideally, this severs both of the main arteries in the neck, and the animal dies within seconds. *Id.*

After the animal is killed, its blood is drained into clay pots that are placed directly below the animal's head. *Id.* at 1473. The animal is then decapitated, and its head is removed from the area. *Id.* After the blood is placed before the deities, it is supposedly removed and disposed of along with the carcass of the animal, although it is not known what is actually done with either. *Id.* There was, however, credible testimony at trial that at times the blood is actually drunk, poured on individuals, or left for long periods of time in the clay pots, although Pichardo testified that those would be deviant practices. *Id.* at 1473 n.21.

20. *Babalu Aye*, 113 S. Ct. at 2222. On such occasions, the sickness is believed to have passed into the animal, and the animal is not eaten. *Babalu Aye*, 723 F. Supp. at 1474.

21. *Babalu Aye*, 113 S. Ct. at 2223.

22. *Id.*

23. *Id.*

24. *Id.* at 2223-24; *see infra* note 208 and accompanying text.

25. *Babalu Aye*, 113 S. Ct. at 2224.

26. *Id.*

Church named as defendants the city of Hialeah, its mayor, and its city council members in their individual capacities.[27] The plaintiffs alleged violations of their rights under the Free Exercise Clause of the First Amendment and prayed for injunctive and monetary relief as well as for a declaratory judgment.[28] The district court granted summary judgment for the individual defendants because they had absolute immunity for acts performed in their legislative capacities.[29] The district court further held, contrary to the plaintiffs' allegations, that the ordinances and resolutions adopted by the city council did not amount to an official policy of harassment.[30]

After a nine-day bench trial, the district court ruled in favor of the city, holding that there was no violation of the plaintiffs' rights under the Free Exercise Clause.[31] The district court acknowledged that the ordinances were not religiously neutral.[32] The court further recognized that the concern expressed by the city with respect to animal sacrifices was "prompted" by the Church's announcement to bring its religion and accompanying rituals into the open.[33] However, the court concluded that the purpose of the ordinances was not to directly discriminate against the Church, but rather to end the practice of animal sacrifice within the city regardless of the identity of the practitioners.[34] The district court noted that specifically regulating religious conduct that is inconsistent with the public health and welfare does not violate the First Amendment.[35] The district court concluded that the compelling governmental interests in protecting the health and safety of the public, in preventing emotional injury to children witnessing such killings, in protecting animals from cruel and unnecessary killing, and in restricting the slaughter or sacrifice of animals to areas specifically zoned for slaughterhouse use fully justified the burden on the plaintiffs' religious conduct.[36] The court further stated that a religious exemption from the ordinances would defeat the city's compelling interests and would be difficult to enforce due to the large number of Santeria church

27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* The plaintiffs alleged that the defendants' "discouragement, harassment, threats, punishment, detention, and threats of prosecution" violated the plaintiffs' constitutional rights. *See Babalu Aye*, 723 F. Supp. at 1469.
31. *Babalu Aye*, 113 S. Ct. at 2224.
32. *Babalu Aye*, 723 F. Supp. at 1476.
33. *Id.* at 1479.
34. *Id.* at 1479, 1483.
35. *Id.* at 1484.
36. *Id.* at 1485-86.

members in the municipality.[37] Moreover, the court determined that such an exemption would have to extend to all religions, which in effect would swallow the rule.[38]

The United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) affirmed the district court's decision in a one-paragraph per curiam opinion.[39] Choosing not to rely on the district court's compelling interest test, the Eleventh Circuit simply stated that the challenged ordinances were consistent with the Constitution.[40] The Supreme Court granted the plaintiffs' petition for writ of certiorari.[41] The Supreme Court reversed, holding that the non-neutral ordinances were unconstitutional as violative of the Free Exercise Clause because they were not justified by a compelling governmental interest.[42] Furthermore, the Court stated that the discriminatory laws could not be upheld even if there was some compelling state interest because the ordinances were not narrowly tailored to meet such interests.[43]

III. Historical Development Of The Free Exercise Clause

A. General Intent of the Framers

Prior to the adoption of the Constitution, there were attempts made throughout the colonies and the states to regulate religion.[44] Historical episodes of religious persecution and intolerance concerned the drafters of the Free Exercise Clause.[45] The intent of the framers in drafting the Free Exercise Clause was to separate church and

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37. *Id.* at 1487.

38. *Id.*

39. *Babalu Aye*, 113 S. Ct. at 2225; Church of Lukumi v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991).

40. *Church of Lukumi*, 936 F.2d at 586.

41. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 112 S. Ct. 1472 (1992).

42. *Babalu Aye*, 113 S. Ct. at 2226.

43. *Id.* at 2218.

44. Reynolds v. United States, 98 U.S. 145, 162 (1878). The government taxed the people against their will for the support of religion, regardless of whether they subscribed to the tenets and beliefs of the particular religion they were forced to support. *Id.* In addition, people were punished for failing to attend public worship services or for expressing heretical opinions. *Id.* at 162-63.

45. *Babalu Aye*, 113 S. Ct. at 2226; *See also Developments in the Law—Religion and the State*, 100 Harv. L. Rev. 1606, 1704 n.2 (1987) [hereinafter *Developments*].

state[46] and thereby prevent the government from interfering with individual values of religion and conscience.[47] The Court has recognized that the framers of the Constitution were conscious of the varied and sometimes extreme views of numerous religious sects and of the disagreement among them.[48] Furthermore, the Court has noted that when the framers fashioned a charter of government, they envisioned the broadest possible tolerations of conflicting views.[49]

The framers realized that the right to freely exercise one's religion is a necessary element to a stable society.[50] The state would lose its claim of legitimacy, as well as the moral underpinnings of the law, if it compelled an individual to choose between his religion and fundamental property or liberty interests.[51] Therefore, free religious exercise was incorporated into the Constitution in an attempt to separate the individual's right to freely exercise his religion and the government's inherent right to rule.

B. Substance and Interpretation

The Free Exercise Clause of the First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion.[52] The Free Exercise Clause was applied to the states by

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46. *See Reynolds*, 98 U.S. at 163-64. After the adoption of the First Amendment, Thomas Jefferson stated:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,-I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the Free Exercise thereof,' thus building a wall of separation between church and State.

8 Works of Thomas Jefferson 113.

47. *See* Sharon W. Murphy, Note, *Free Exercise of Religion: A Luxury Our Nation Can No Longer Afford?—Employment Division v. Smith*, 16 U. DAYTON L. REV. 435, 441 (1991).

48. United States v. Ballard, 322 U.S. 78, 87 (1944) (explaining that the Free Exercise Clause was created in order to ensure that even the most incomprehensible religious views would receive full constitutional protection).

49. *See id.*

50. *See Developments*, *supra* note 45, at 1704. "The free exercise clause of the first amendment may simply reflect the framers' recognition of the political truth that to deny religious freedom is to encourage outright revolt." *Developments*, *supra* note 45, at 1704.

51. *Developments*, *supra* note 45, at 1703.

52. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

incorporation into the Fourteenth Amendment.[53] First and foremost, the Court has stated that free religious exercise includes the right to believe and profess whatever religious doctrines that one desires.[54] The Court has held that when the government attempts to regulate religious belief, the protections afforded by the First Amendment are absolute.[55] The Court has further held that the government cannot require affirmation of religious belief,[56] utilize its taxing power to restrict the dissemination of particular religious views,[57] impose special disqualifications on the basis of religious belief,[58] or punish the expression of religious doctrines that it believes to be false.[59] However, the Court has recognized that the "exercise" of religion usually involves not only the profession of one's beliefs, but also the performance of certain physical acts.[60] This physical conduct can take the form of assembling for worship service or participating in the sacramental use of bread and wine.[61] It is when the state, through

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53. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment).

54. Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (explaining that religious belief may not to any extent be regulated by the state).

55. Sherbert v. Verner, 374 U.S. 398, 402 (1963) (explaining that the Free Exercise Clause door remains tightly closed to any governmental regulation of religious beliefs); Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (explaining that the freedom to express religious opinions and beliefs is absolute); Cantwell v. Connecticut, 310 U.S. 296, 303 (1939) (explaining that freedom of religion includes the absolute right to one's own religious beliefs); Reynolds v. United States, 98 U.S. 145, 166 (1878) (explaining that governmental actions and laws may not interfere with religious belief),

56. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (holding that a state requirement to declare one's belief in God as a condition to holding public office violated the Free Exercise Clause).

57. Follett v. McCormick, 321 U.S. 573 (1944) (holding invalid under the First Amendment a municipal ordinance which imposed a license tax on book agents as it was applied to a minister); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding invalid under the First Amendment a municipal ordinance that required persons to pay a license tax as a condition to solicit or distribute religious materials).

58. *See* McDaniel v. Paty, 435 U.S. 618 (1978) (holding that a state statute prohibiting members of the clergy from serving as delegates to the state constitutional convention violated the Free Exercise Clause); Fowler v. Rhode Island, 345 U.S. 67 (1953) (holding that a municipal ordinance prohibiting Jehovah's Witnesses, but not preachers from other denominations, from preaching in a public park violated the Free Exercise Clause); *cf.* Larson v. Valente, 456 U.S. 228 (1982) (holding that a state statute favoring certain denominations over others violated the Establishment Clause).

59. *See* United States v. Ballard, 322 U.S. 78 (1944) (holding that the First Amendment does not require a determination of the truth or falsity of the professed religious belief).

60. Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

61. *Id.*

its laws, burdens this religiously motivated conduct that the issue of Free Exercise Clause protection comes into question.

To invoke the protection of the Free Exercise Clause, a person must hold a sincere religious belief that prevents him from complying with the law,[62] since only those beliefs that are rooted in religion warrant protection.[63] Views that are purely secular in nature do not suffice.[64] However, the Court has made it clear that religious beliefs need not be acceptable, comprehensible, or logical to others in order to merit First Amendment protection.[65] Although the Supreme Court has not attempted to define religion or what constitutes a religious belief,[66] it has held that a religious belief does not have to be based on a tenet, belief, or teaching of an established religious sect or church.[67] It is generally for the trial court to determine if the religious belief is sincerely held;[68] however, the sincerity of the belief is usually not at issue.

Commentators have noted that the majority of free exercise claims involve requests for exemptions from laws that burden the religious conduct of a group or individual.[69] Typically, these challenged laws are neutral, generally applicable, and constitutional in every

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62. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 21.6, at 528-29 (2d ed. 1992).

63. Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 713 (1981) (explaining that the Free Exercise Clause gives special protection to those beliefs that are religious in nature); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (explaining that in order to deserve the protection of the religion clauses the claim must be connected to religious belief).

64. *Yoder*, 406 U.S. at 215-16 (explaining that beliefs based on purely secular considerations may not rise to the demands of the religion clauses); United States v. Seeger, 380 U.S. 163, 178-79 (1965) (explaining that "a valid conscientious objector claim . . . must be based solely on 'religious training and belief'" and not on social, political, or philosophical grounds).

65. *Thomas*, 450 U.S. at 714 (holding that the claimant's religious belief against working in a factory that produced weapons was protected under the Free Exercise Clause even though it was a personal religious belief and somewhat illogical in nature).

66. *See* ROTUNDA & NOWAK, *supra* note 62, § 21.6, at 528-29.

67. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 (1989) (holding that the claimant's religious beliefs were protected under the Free Exercise Clause even though those beliefs were not attributable to any particular church or religious sect).

68. *See Frazee*, 489 U.S. at 833. "States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause. We do not face problems about sincerity or about the religious nature of Frazee's convictions, however. The courts below did not question his sincerity, and the State concedes it." *Id.*

69. William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 357-58 (1989-90).

respect except for the fact that they incidentally burden certain religious practices.[70] Such laws raise the issue of whether the government should be required to grant an exemption from an otherwise valid regulation to a person whose religious conduct is burdened by compliance with the law.[71] It has recently been stated that "[t]he jurisprudence of free exercise . . . is the jurisprudence of the constitutionally compelled exemption."[72]

C. The Beginning of Free Exercise Jurisprudence: The Belief-Action Distinction

In 1878, the United States Supreme Court rendered its first interpretation of the Free Exercise Clause in *Reynolds v. United States*.[73] The Court in *Reynolds* upheld the conviction of George Reynolds, a Mormon, for violating a federal anti-polygamy statute,[74] even though the practice of multiple marriages was central to the Mormon religion.[75] The Court distinguished between the freedom to profess one's religious beliefs and opinions and the freedom to engage in religiously inspired conduct.[76] While acknowledging that the government could not interfere with religious belief and opinion, the Court recognized that the government could prohibit and regulate religiously motivated conduct if such regulation served an otherwise secular goal.[77]

The holding in *Reynolds* signified the beginning of the belief-action distinction in free exercise jurisprudence.[78] As a consequence of that case, as long as the state's regulation of religiously motivated actions reflected a secular policy, the courts would not grant an exemption to the law even though it resulted in the burden of an

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70. *Id.*

71. *Id.* at 358; ROTUNDA & NOWAK, *supra* note 62, § 21.6, at 521.

72. Marshall, *supra* note 69, at 358.

73. 98 U.S. 145 (1878).

74. *Id.* at 168.

75. *Id.* at 161. The Mormon Church believed that the male members of the church had a duty to practice polygamy. *Id.* The members further believed that this duty was placed directly upon the male members by God and that failing to perform that duty was punishable by damnation in the afterlife. *Id.*

76. *Id.* at 166.

77. *See id.* at 166-67. The Court concluded that Reynolds's choice to take more than one wife could legally be punished without violating the Free Exercise Clause because the prohibition served the secular policy of alleviating the evil behind multiple marriages. *Id.* at 167-68.

78. *See* Ira C. Lupu, *Where the Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 938 (1989).

individual's religious freedom.[79] *Reynolds* drained the Free Exercise Clause of its primary constitutional protection because the freedom to speak was already protected by the Free Speech Clause of the First Amendment.[80] As a result, as long as state secular policies and laws remained on the action side of the belief-action dichotomy, *Reynolds* would protect such laws from constitutional attack.[81] In 1940[82] and 1944,[83] the Supreme Court adhered to this belief-action distinction when deciding the validity of state laws in cases arising under the Free Exercise Clause.

D. The Hybrid Cases of the 1940's

During the 1940's, a number of laws that restricted certain religious practices were invalidated by the Supreme Court primarily because the laws interfered with the First Amendment's free speech protection.[84] These cases also involved free exercise claims, thereby earning them the label of "hybrid" cases.[85] However, because another constitutional right was involved, it was difficult to assess the independent strength of the Free Exercise Clause's protection.[86]

The most important of the hybrid cases is *Cantwell v. Connecticut*.[87] In *Cantwell*, the Court invalidated a licensing system for religious and charitable solicitations whereby the Secretary of Public Welfare had discretion to deny a license if he determined

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79. *Id.* at 938. The Court in *Reynolds* expressed concern that excusing a man from a law because it was contrary to his religious belief would make the "professed doctrines of religious belief superior to the law of the land, and in effect . . . [would] permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds*, 98 U.S. at 167.

80. Lupu, *supra* note 78, at 938.

81. Lupu, *supra* note 78, at 938.

82. In Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), the Supreme Court upheld a state regulation that required students in public schools to salute the flag, even though this practice was contrary to certain religious beliefs, because the goal of the statute was secular and therefore the burden on religion was justified.

The Court overruled *Minersville* in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), in which the Court invalidated the flag statute on free speech grounds alone. *Id.*

83. In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court upheld a state law prohibiting the public sale of merchandise by minors because the secular policy behind the law justified the burden on the claimant's religion. In that case, the claimant's child had been distributing religious literature in public.

84. ROTUNDA & NOWAK, *supra* note 62, § 21.7, at 534.

85. *See* Employment Div. v. Smith, 494 U.S. 872, 882 (1990).

86. Philip Spare, *Free Exercise of Religion: A New Translation*, 96 DICK. L. REV. 705, 711 (1992).

87. 310 U.S. 296 (1940). "The most important of [the hybrid] cases was *Cantwell v. Connecticut* . . . ." ROTUNDA & NOWAK, *supra* note 62, § 21.7, at 534.

that the solicitation was not for a religious cause.[88] This determination was based upon the Secretary's subjective belief of what constituted a religious message.[89] The Court invalidated the statute on constitutional grounds because it violated the Free Speech and Free Exercise Clauses of the First Amendment.[90]

Cantwell is also notable because it represents the first departure from the belief-action distinction laid down in *Reynolds*.[91] The Court was consistent with previous decisions when it recognized that the First Amendment is comprised of two concepts: freedom to believe and freedom to act.[92] Freedom of belief is absolute, but in order to protect society, conduct remains subject to regulation.[93] However, the Court proceeded to state that any regulation of conduct must be exercised so as to not "unduly infringe" upon religious conduct.[94] Although the Court primarily based its holding upon free speech analysis, it did imply that consideration must be given to the extent which the regulation infringes upon religious conduct.[95]

Two additional hybrid cases followed *Cantwell*: *Murdock v. Pennsylvania*[96] and *Follett v. McCormick*.[97] In both cases the Supreme Court held unconstitutional a licensing tax upon distributors of merchandise on the basis that the tax violated the Free Speech, Press, and Religion Clauses.[98] The Court stated that to levy a tax against the enjoyment of rights already granted by the United States Constitution was invalid.[99]

As of 1960, no Supreme Court case had invalidated a government regulation solely on the basis that it negatively affected the free exercise of religion.[100] If the challenged law had a significant secular goal or policy underlying it, the Court would uphold the law despite

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88. *Cantwell*, 310 U.S. at 302-03.
89. *Id.*
90. *Id.* at 297, 307. "The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." *Id.* at 307.
91. *See* Murphy, *supra* note 47, at 442.
92. *Cantwell*, 310 U.S. at 303.
93. *Id.* at 303-04.
94. *Id.* at 304.
95. *See* Murphy, *supra* note 47, at 443.
96. 319 U.S. 105 (1943).
97. 321 U.S. 573 (1944).
98. *Murdock*, 319 U.S. at 108-10; *Follett*, 321 U.S. at 575. In both cases the claimants were Jehovah's Witnesses who had distributed religious literature without paying the tax.
99. *Murdock*, 319 U.S. at 113.
100. ROTUNDA & NOWAK, *supra* note 62, § 21.7, at 536.

any incidental restrictions on religiously motivated conduct.[101] The Court would invalidate the law only when the law interfered with religious belief or opinion or interfered with free speech as well as free religious exercise.[102]

E. 1961-The Beginning of the Balancing Era in Free Exercise Jurisprudence

In *Braunfeld v. Brown*,[103] the Supreme Court upheld the application of Sunday closing laws to those persons whose religion required them to observe a day other than Sunday as the Sabbath.[104] The Court refused to grant the claimants an exemption to the law, even though this meant they would suffer the economic disadvantage of closing their businesses two days instead of one.[105] The plurality in *Braunfeld* followed the belief-action distinction recognized in *Reynolds*.[106] However, *Braunfeld* appeared to introduce the first balancing process for evaluating free exercise claims.[107] The Court characterized the effect of the law on the Jewish merchants as an "indirect" burden.[108] The Court recognized that if the purpose or effect of a law resulted in discrimination against certain religions, the law was constitutionally invalid even though the religion was only indirectly burdened.[109] However, if the purpose of the law was

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101. ROTUNDA & NOWAK, *supra* note 62, § 21.7, at 536.

102. ROTUNDA & NOWAK, *supra* note 62, § 21.7, at 536.

103. 366 U.S. 599 (1961), *reh'g denied*, 368 U.S. 869 (1961).

104. *Id.* at 609. The claimants, a group of merchants who were Orthodox Jews, were required by their faith to close their places of business from "nightfall each Friday until nightfall each Saturday." *Id.* at 601. However, the Sunday closing laws required them to close on Sundays also, thereby limiting them to five working days per week while other merchants were open six days a week. *Id.* at 601-02. As a result, the claimants argued that the law violated the free exercise of their religion and that they should be granted an exemption. *Id.* at 608.

105. *Id.* at 608. The Court stated that providing such an exemption would undermine the state's goal of providing one day that was free from the noise and activity of the commercial world. *Id.*

106. *Id.* at 604-05. "[L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion." *Id.* at 603-04.

107. *Id.* at 605-09. The Court balanced the burdens placed upon the claimants' religion by the law against society's interest in upholding the law. *Id.*

108. *Id.* at 606. The Court characterized the law as an indirect burden because it did not prohibit the religious practices of the claimants but merely operated to make the practice of their religion more expensive. *Id.* at 605. According to the Court, this indirect burden was markedly different from the burden imposed by a law forcing an individual to choose between abandoning his religious principles or complying with the challenged law. *Id.* at 605-06.

109. *Id.* at 607.

to advance a secular goal, the law was valid even if it placed an indirect burden upon certain religions, unless the state's purpose could be attained by means not imposing such a burden.[110]

The Court found that the state had a secular goal in setting aside one day of "rest, repose, recreation, and tranquility."[111] In addition, the Court found that the state would encounter substantial enforcement difficulty if it permitted the requested exemption.[112] Some commentators have viewed *Braunfeld* as the starting point for broadening the scope of free exercise protection for religiously motivated conduct.[113] This view is based on *Braunfeld's* recognition that indirect burdens placed on religious conduct by a state law could be violative of the Free Exercise Clause.[114]

F. 1963-1990: The *Sherbert* Balancing Test: A New Era in Free Exercise Jurisprudence

In 1963, two years after *Braunfeld* was decided, the Court in *Sherbert v. Verner*[115] made a significant departure from the belief-action distinction that had originated almost a century earlier and, for the first time in free exercise history, applied a true balancing test.[116] In *Sherbert*, an employer fired a Seventh-Day Adventist for refusing to work on Saturdays because it was contrary to her religion.[117] Because she was subsequently denied unemployment compensation under the state unemployment compensation statute, she sued, claiming that the statute violated the free exercise of her religion.[118]

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110. *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 304-05 (1940)).

111. *See id.* at 607.

112. *Id.* at 608-09. For example, some people might assert that their religion compelled them to close their businesses on what had previously been their least profitable day in order to remain open on Sunday, which would be a more profitable day. *Id.* at 609. To allow such exemptions would lead the state down the path of testing the sincerity of an individual's religious beliefs, a practice which itself might conflict with the spirit of constitutionally protected religious guarantees. *Id.* Furthermore, the exempted employers would probably have to hire only those employees who qualified for the exemption, a practice which would be contrary to a state's general policy of eliminating religious discrimination in hiring. *Id.*

113. *See* Lupu, *supra* note 78, at 940.

114. *See* Lupu, *supra* note 78, at 940.

115. 374 U.S. 398 (1963).

116. *Id.* at 403-09.

117. *Id.* at 399. Sherbert was a member of the Seventh-Day Adventist Church, which teaches that a member should perform no work or labor on Saturday. *Id.* at 399 n.1. After she refused to work on Saturday, her employer fired her. *Id.* at 399.

118. *Id.* at 401. Sherbert was denied unemployment compensation because the Employment Security Commission found that her refusal to work on Saturdays,

In order to determine the constitutionality of the statute under the Free Exercise Clause, the Court applied a balancing test.[119] The initial burden was placed on the claimant to show that the challenged law substantially burdened the free exercise of her religion.[120] If she succeeded, then the state had to prove that the burden on the claimant's religion was justified by some compelling state interest.[121] Furthermore, even if the state's interest was compelling, the law had to be the least restrictive means of achieving that interest.[122] The Court found that the challenged statute could not survive this strict scrutiny, and it therefore granted an exemption from the challenged law to the claimant.[123]

The decision in *Sherbert* breaks all ties with the *Reynolds* belief-action dichotomy and secular justification standard.[124] According to *Sherbert*, even if a state law has a secular purpose, it can still violate the Free Exercise Clause if the burden on religion is not justified by a compelling state interest or if the challenged law is not the least restrictive means of advancing that interest.[125] This new standard of review for free exercise cases created the major shift in free exercise jurisprudence by permitting the Free Exercise Clause to become a source of judicial protection of religious liberty against government insensitivity and hostility.[126]

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even for religious reasons, brought her within the statutory provision that denied benefits to those workers who failed to "accept suitable work when offered . . . by the employment office or the employer" without good cause. *Id.* (quoting S.C. CODE ANN. § 68-114(3) (Law. Co-op. 1962)).

119. *Id.* at 403-09.

120. *Id.* at 403-06.

121. *Id.* at 406-09. It is not enough to merely show "a rational relationship to some colorable state interest." *Id.* at 406. Only the "gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.* (citation omitted).

122. *Id.* at 407-09.

123. First, the law burdened the claimant's practice of her religion because it forced her to choose between receiving state benefits or following her religious beliefs. *Id.* at 404. The Court recognized that the choice imposed on her by the government "put[] the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." *Id.*

Second, the state did not prove that it had a compelling or overriding interest. *Id.* at 407. The state did argue that an exemption would give rise to fraudulent claims by people alleging that they quit their jobs for religious reasons when no such reasons actually existed. *Id.* However, the Court stated that even assuming a threat of fraud existed, in order for the law to withstand strict scrutiny the state was required to demonstrate that no alternative means of regulation would remedy such abuses without infringing upon First Amendment rights. *Id.*

124. *See* Lupu, *supra* note 78, at 941-42.

125. Lupu, *supra* note 78, at 941-42.

126. Lupu, *supra* note 78, at 942.

G. Cases Applying the *Sherbert* Balancing Test and Finding the Burden Unjustified

In 1972, the Court strengthened the protection afforded to religious freedom by applying the *Sherbert* test to create an exemption to a compulsory school attendance law for Amish children whose parents claimed that the law violated the free exercise of their religion.[127] The Court balanced the burden placed upon the claimants' religion[128] against the interests of the state in having the law.[129] However, the state failed to show how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.[130] Therefore, the Court held that the state compulsory education law could not withstand strict scrutiny under the *Sherbert* balancing test.[131]

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127. Wisconsin v. Yoder, 406 U.S. 205 (1972).

128. The Amish parents claimed, and the Court agreed, that the enforcement of the compulsory education law which required children to attend school until the age of sixteen would gravely endanger, if not destroy, the free exercise of their religious beliefs. The Amish claimants argued that formal high school education beyond the eighth grade was inconsistent with Amish beliefs. *Id.* at 211. Because high school emphasizes competition and pressure to conform, forcing Amish children to attend high school would place Amish children in an environment hostile to Amish beliefs. *Id.* Attending high school also took the children away from the Amish community during the crucial period of their adolescent lives when they were expected to learn the roles of Amish farmer or housewife. *Id.* The claimants alleged that the compulsory education law threatened the entire religious training of the Amish children and, therefore, burdened their religion. *Id.*

129. The state argued that it had an interest in educating children to become effective and intelligent participants in the American political system. *Id.* at 221. However, the record revealed that "the Amish community . . . [was] a highly successful social unit within . . . society, even if [their lifestyle was] apart from the conventional 'mainstream.'" *Id.* at 222. The state next argued that it had an interest in the education of children because education prepares individuals to be self-reliant and self-sufficient, and, if the Amish children chose to leave the community later on, they would be ill-equipped for life without a high school education. *Id.* at 221, 224. The Court recognized two flaws in this reasoning: First, there was no specific "evidence of the loss of Amish adherents by attrition;" second, there was no evidence "that upon leaving the Amish community the Amish children . . . would [subsequently] become burdens on society because of educational shortcomings." *Id.* at 224. The state also falsely assumed that Amish parents do not educate their children after the eighth grade. *Id.* The state last argued that it had a special interest in the children's health and well-being, since most Amish children were workers on family farms. However, the Court recognized that the Amish employment of children on their farms was not in any way harmful to the children's health because they were well cared for and well trained. *Id.* at 229.

130. *Id.* at 236; *see supra* note 129.

131. In 1990, in Employment Div. v. Smith, 494 U.S. 872, 881 (1990), the Court described *Yoder* as a decision that was based on both the Free Exercise Clause and a parent's right to direct the education of his children, which is protected by

In the 1980's, the Court reaffirmed *Sherbert* in three additional unemployment compensation cases.[132] In all three cases, the Court granted an exemption to the conditions for unemployment compensation based upon the *Sherbert* balancing test.[133] The Court again found that the denial of unemployment benefits to persons because of their religious beliefs violated the Free Exercise Clause and could not withstand strict scrutiny.[134]

H. Cases Applying the *Sherbert* Balancing Test and Finding the Burden Justified

Except for unemployment compensation cases, the Supreme Court has not applied the balancing test to invalidate or create exemptions to neutral, generally applicable laws under an independent free exercise challenge. Although the Court has applied the balancing test in a few free exercise cases outside the unemployment compensation field, the Court has always found the test satisfied.[135]

The first of those cases was *Gillette v. United States*.[136] The claimant in *Gillette* argued that he should be exempt from the Military Service Act because his religious beliefs prohibited him from

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the Due Process Clause of the Fourteenth Amendment. Therefore, this case could also be classified as a "hybrid" decision wherein the Court decides a person's rights under both the Free Exercise Clause and some other constitutional provision. Thus viewed, *Yoder* seems to only create a narrow exception from compulsory attendance laws for "families who can base their claim for an exemption on shared religious beliefs as well as on a general due process-liberty argument." ROTUNDA & NOWAK, *supra* note 62, § 21.8, at 548.

132. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989) (applying the compelling interest test to grant an exemption to the requirements for receiving unemployment compensation to a claimant who refused to work on Sunday because of his religious beliefs); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (applying the compelling interest test to grant an exemption to the requirements for receiving unemployment compensation to a claimant whose religion prevented her from working on Saturdays); Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707 (1981) (applying the compelling interest test to grant an exemption to the requirements for receiving unemployment compensation to a claimant who refused to work in a factory department that produced weapons because it was contrary to his religious beliefs).

133. *See* cases cited *supra* note 132.

134. In all three cases, the denial of unemployment benefits put substantial pressure on the claimants to violate their religious beliefs or be denied unemployment benefits, thereby causing a burden on their religion. *See, e.g., Thomas*, 450 U.S. at 718. Moreover, there was no compelling state interest to justify such a burden. *See, e.g., Frazee*, 489 U.S. at 835.

135. That is, the governmental interest justified the burden placed upon religion.

136. 401 U.S. 437 (1971).

participating in the Vietnam war because it was unjust.[137] The claimant further argued that failure to allow this particular exemption from the Act violated the Free Exercise Clause because making him participate in an unjust war was contrary to his religious beliefs.[138] However, the Court applied the balancing test and held that the incidental burdens felt by persons in the claimant's position were strictly justified by substantial governmental interests.[139]

In *United States v. Lee*,[140] the Court again applied the balancing test but denied an Amish employer of Amish workmen an exemption from mandatory payment of social security taxes, even though the payment was forbidden by the Amish faith.[141] The Court found that the burden placed upon the claimant's religion by complying with the law was justified by a compelling governmental interest and that any exemption would interfere with the achievement of that interest.[142]

In 1989, the Supreme Court applied the *Sherbert* balancing test for what apparently was the last time in *Hernandez v. Commissioner*.[143] The Court held that the action of the Commissioner of Internal Revenue did not violate the Free Exercise Clause when he denied

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137. The Act stated that no person would be subject to "service in the armed forces of the United States who, by reason of religious training or belief, [was] conscientiously opposed to participation in war *in any form*." *Id.* at 441 (emphasis added). Because the claimant did not object to all wars, but rather just to the Vietnam war, he did not fit within this exception. *Id.* at 439.

138. *Id.* at 461.

139. *Id.* at 454-63. The government had two compelling interests — to procure the manpower necessary for defense and to maintain a fair system for determining who should serve. *Id.* at 455. As to the latter interest, the Court noted that conscientious objections are claims of "uncertain dimensions, and that granting the claim in theory would involve a real danger of erratic or even discriminatory decisionmaking in administrative practice." *Id.* The Court noted that there is a virtually limitless variety of beliefs included under the umbrella statement "objection to a particular war." *Id.* The Court further noted that "over the realm of possible situations, opposition to a particular war may more likely be political and non-conscientious" than an objection that has its roots in conscience and religion. *Id.* The difficulties of distinguishing the two would be considerable, and there exists the impossibility of producing fair and consistent results. *Id.* at 455-56.

140. 455 U.S. 252 (1982).

141. *Id.* at 255, 260-61.

142. *Id.* at 258-61. The government had an interest in providing and maintaining a sound tax and social security system. *Id.* at 258. The Court recognized that it would be difficult to accommodate this comprehensive system if exemptions were granted for a wide variety of religious beliefs. *Id.* at 259-60. It would disrupt the functioning of the tax system if people were allowed to challenge the payment of taxes as violative of their religious beliefs. *Id.* at 260. The Court concluded that because of the extensive public interest in maintaining a sound tax system, "religious belief in conflict with the payment of taxes affords no basis for [an exemption]." *Id.* at 260.

143. 490 U.S. 680 (1989).

the claimants a charitable deduction for payments they made to the Church of Scientology as a fixed contribution for certain services.[144] Although the Court had doubts as to whether the burden placed upon the claimants was substantial,[145] it held that even a substantial burden would be justified by the "broad public interest in maintaining a sound tax system."[146]

I. Recent Cases That Abstain From Applying the *Sherbert* Balancing Test

There have been four cases in recent years in which the Court has virtually abandoned the application of strict scrutiny where freedom of religion is involved. The first case to abandon the *Sherbert* balancing test was *Goldman v. Weinberger*.[147] In *Goldman*, the Court held that the Air Force's refusal to allow an Orthodox Jew to wear his yarmulke[148] while on duty and in uniform did not violate the Free Exercise Clause.[149] The Air Force regulation at issue prohibited on-duty and in-uniform personnel from wearing any nonregulation items of clothing.[150] Although the claimant argued that the Court should analyze his case under the *Sherbert* balancing test,[151] the Court declined to do so and instead based its reasoning on the fact that the military is a "specialized society separate from civilian society."[152] Therefore, the courts give more deference to military regulations than to civilian regulations that are challenged on First

144. *Id.* at 700. The IRS allows a taxpayer the right to take a deduction from gross income for contributions that are charitable in nature. I.R.C. § 170 (1994). However, if the taxpayer receives services in return, the contributions are not deductible in full. *Id.* The claimants made a fixed donation to the Church of Scientology and, in return, were required to take training and auditing sessions. *Hernandez*, 490 U.S. at 685. The claimants argued that disallowance of these donations as deductions violated their right to freely exercise their religion by placing a heavy burden on the practice of Scientology. *Id.* at 698.

145. *Hernandez*, 490 U.S. at 699. The Scientology faith forbids neither the payment nor the receipt of taxes. *Id.* Therefore, any burden imposed as a result of the denial of the deduction is that the claimants have less money available to contribute for the church services. *Id.*

146. *Id.* at 699 (quoting United States v. Lee, 455 U.S. 252, 260 (1982)).

147. 475 U.S. 503 (1986).

148. A yarmulke is a skullcap worn by Orthodox and Conservative Jewish males in the synagogue and the home. WEBSTER'S NEW WORLD DICTIONARY 1366 (9th college ed. 1983).

149. *Goldman*, 475 U.S. at 504.

150. *Id.*

151. *Id.* at 506.

152. *Id.*

Amendment grounds.[153] The Court concluded that the First Amendment does not dictate that the military must accommodate religious practices that would detract from the uniformity which the dress regulations seek to uphold.[154]

In the same year as *Goldman*, the Court retreated once again from the balancing test by holding in *Bowen v. Roy*[155] that a parent did not have a free exercise right to prevent the state from using his child's social security number to identify the child.[156] The Court stated that the Free Exercise Clause simply could not require the government to conduct its affairs in ways that are consistent with particular citizens' religious beliefs.[157] Furthermore, the Court noted that the government's use of the child's social security number did not in any degree restrict the claimant's "freedom to believe, express, and exercise" his religion.[158]

In *O'Lone v. Estate of Shabazz*,[159] the Court's abstention from *Sherbert* continued when the Court applied a reasonableness test in holding that a prison's refusal to excuse Islamic inmates from work so that they could attend worship services did not violate the Free Exercise Clause.[160] In so holding, the Court stated that the prison's policies[161] were reasonably related to legitimate penological interests

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153. *Id.* at 507. "In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Id.*

154. *Id.* at 509-10. In his dissent, Justice Brennan stated: "The First Amendment requires that burdens on free exercise rights be justified by independent and important interests that promote the function of the agency. The only independent military interest furthered by the visibility standard is uniformity of dress. And, that interest . . . does not support a prohibition against yarmulkes." *Id.* at 522 (citations omitted).

155. 476 U.S. 693 (1986).

156. *Id.* at 712. The child was issued a social security number at birth. The claimants argued that use of the number to identify the child would violate their Native American religious beliefs because it would rob the child of her spirit. *Id.* at 696. However, the state needed the number to furnish the claimants state benefits. *Id.* at 695.

157. *Id.* at 699. "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700.

158. *Id.*

159. 482 U.S. 342 (1987).

160. *Id.* at 349-52. To ensure deferential treatment to prison officials, the Court determined that a less restrictive reasonableness test, rather than the strict scrutiny standard, should be applied in determining the constitutionality of prison regulations. *Id.* at 349. "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* (citation omitted).

161. There were two prison policies that prevented the claimants from attending

in institutional order and security.[162] The Court also based its holding on the fact that the policies did not deprive the claimants of all forms of religious exercise, but instead allowed participation in a number of Muslim ceremonies.[163] Furthermore, there were no alternatives because any exemptions to the policies would have adverse effects on the institutional population.[164]

In 1988, the Court did not apply the compelling interest test to a free exercise claim instituted by a tribe of Native Americans.[165] In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[166] the Court held that the construction of a paved road through government lands that were sacred to certain American Indian tribes did not violate the Free Exercise Clause, despite the fact that the road would impose a significant burden on the practice of their religion.[167] When the claimants argued for a strict scrutiny analysis, the Court reasoned that the strict scrutiny of *Sherbert* did not and could not imply that the government must have a compelling interest every time the implementation of one of its programs makes the practice of certain religions more difficult.[168] Comparing this case to *Bowen v. Roy*,[169] the Court concluded that the government could not effectively function

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worship services: First, the claimants were required to work outside the buildings in which they were housed, which was the same building in which the worship services were held; second, inmates assigned to outside work were prohibited from returning to those buildings during the day. *Id.* at 346-47. Thus, the claimants were prevented from attending worship services during the day. *Id.* at 347.

162. *Id.* at 350-51.

163. *Id.* at 352.

164. *Id.* at 352-53. Exceptions to the policies would threaten prison security, would require extra supervision, and would create a perception of favoritism among the other inmates. *Id.*

165. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

166. *Id.*

167. *Id.* at 447, 451. The government did not dispute the claim by the Native Americans that the building of the road would have devastating effects on their religious practices. *Id.* at 451. Those practices were closely connected to the unique features of the area. *Id.* The tribe believed that some of the practices in the area were vitally important in promoting the welfare of the tribe. *Id.* The Native Americans used this area to conduct rituals that were aimed at accomplishing their religious goals. *Id.* Those rituals would not have been as effective if performed at other sites. *Id.*

168. *Id.* at 450-51.

169. "The building of a road . . . cannot meaningfully be distinguished from the use of a Social Security number in *Roy*. In both cases, the challenged government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449.

if it were required to satisfy the religious needs of all of its citizens.[170]

As of 1990, the Supreme Court's decisions implicating the Free Exercise Clause were consistent. For the most part, the Court applied strict scrutiny when a governmental law burdened a person's religion. The only time the Court departed from strict scrutiny was if a government, military, or prison regulation was involved. In the latter cases, one could argue that the Court did not find a burden, thus it did not have to apply strict scrutiny. However, in 1990 the Supreme Court made a radical and unexpected departure from precedential free exercise cases when it decided *Employment Division v. Smith*.[171]

J. 1990: The End of Sherbert in Free Exercise Jurisprudence: *Smith*

In the 1990 case of *Employment Division v. Smith*,[172] the Supreme Court changed twentieth-century free exercise jurisprudence. The Court held that under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability.[173] This holding destroyed the protection the Free Exercise Clause had once given, because as long as a law did not specifically target a religion or a certain religious practice, the law would be upheld regardless of the burden placed upon religion.

Smith involved two individuals, Alfred Smith and Galen Black, who were denied unemployment compensation benefits under an Oregon state law because they had been fired for work-related misconduct.[174] Smith and Black had been fired from their positions as drug and alcohol rehabilitation counselors because they had ingested peyote[175] during a religious ceremony at their Native American church.[176] Although the possession and use of peyote was banned by an Oregon state law,[177] Smith and Black claimed that the Free

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170. *Id.* at 452.
171. 494 U.S. 872 (1990).
172. *Id.*
173. *Id.* at 878-79.
174. *Id.* at 874.
175. Peyote is a hallucinogenic drug derived from the plant *Lophophora williamsii Lemaire*. *Id.*
176. *Id.*
177. *Id.* The Oregon drug statute provided:

> Oregon law prohibits the knowing or intentional possession of a controlled substance unless the substance has been prescribed by a medical practioner. Ore. Rev. Stat. § 475.992(4) (1987). The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled

Exercise Clause protected their use of peyote because it was part of their religious ceremony.[178]

Had the Oregon statute provided an exemption for the sacramental use of peyote,[179] the Court could have avoided the free exercise issue.[180] However, since the statute did not provide such an exemption, the Court had to determine whether the state's denial of unemployment compensation to persons who participated in religious conduct that was criminalized under state law violated the Free Exercise Clause.[181]

Justice Scalia's majority opinion recognized two basic Free Exercise Clause principles that have endured throughout the history of the constitutional provision: First, the government is prohibited from regulating religious beliefs;[182] and second, the government is prohibited from regulating actions because of their religious connotations.[183] If prohibiting or burdening the exercise of religion is merely the incidental effect of an otherwise neutral and generally applicable law, the First Amendment has not been violated.[184] The Court reasoned that to allow an exemption from an otherwise valid law to a person because his religious beliefs conflict with the law would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . [would] permit every citizen to become a law unto himself."[185]

Substances Act, 21 U.S.C. §§ 811-12, as modified by the State Board of Pharmacy. Ore. Rev. Stat. § 475.005(6) (1987). Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." 475.992(4)(a). As compiled by the State Board of Pharmacy . . . Schedule I contains the drug peyote. . . .

Id.

178. *Id.* at 878.

179. ROTUNDA & NOWAK, *supra* note 62, § 21.8, at 538. A number of states have provided an exemption to their drug laws for the sacramental use of peyote, including Arizona, Colorado, and New Mexico. *Smith*, 494 U.S. at 890.

180. ROTUNDA & NOWAK, *supra* note 62, § 21.8, at 538. The Supreme Court had to remand the case to the Oregon Supreme Court for a determination of whether the use of peyote in connection with a religious ceremony fell within the prohibition of the Oregon statute. *Smith*, 494 U.S. at 875-76. On remand, the Oregon Supreme Court held that religious use of peyote fell within the prohibition of the statute, because the statute made no exception for sacramental use of the drug. *Id.* at 876 (citing Employment Div. v. Smith, 763 P.2d 146, 148 (Or. 1988)).

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

182. "[T]he First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'" *Id.* at 877 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963).

183. *Id.* at 877. "It would be true . . . (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.*

184. *Id.* at 878.

185. *Id.* at 879. "Subsequent decisions have consistently held that the right of

The Court distinguished *Smith* from previous decisions by stating that the only cases in which it had held that a neutral, generally applicable law violated the First Amendment involved not only the Free Exercise Clause, but the Free Exercise Clause in connection with some other constitutional protection.[186] The Court, in making this distinction, was referring to the hybrid cases which involved the rights of freedom of speech and press[187] or the right of parents to direct the education of their children.[188] However, the Court recognized that *Smith* did not involve such a hybrid situation, but rather it was a claim based only upon the Free Exercise Clause.[189]

Although the claimants argued that their right to an exemption should be evaluated under the *Sherbert* balancing test, the Court reasoned that it had never used the balancing test to invalidate any governmental action except the denial of unemployment compensation.[190] The Court further stated that, although it had sometimes purported to apply the *Sherbert* test in contexts other than unemployment compensation, it had always found the test satisfied.[191] Moreover, the Court noted that in the years immediately preceding *Smith*, it had abstained from applying *Sherbert* outside the unemployment compensation field.[192]

The Court noted that the *Sherbert* test was developed in the unemployment compensation context where an individual who quit or refused available work could receive unemployment benefits if he could prove that it was for "good cause."[193] This good cause

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free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

186. *Id.* at 881-82.

187. *See* Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

188. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

189. *Smith*, 494 U.S. at 882. "There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls." *Id.*

190. *Id.* at 882-83; *see* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

191. *Smith*, 494 U.S. at 883; *see* Hernandez v. Commissioner, 490 U.S. 680 (1989); United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971).

192. *Smith*, 494 U.S. at 883; *see* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986).

193. *Smith*, 494 U.S. at 884.

requirement created a system for individualized exemptions.[194] Therefore, the Court concluded that its decisions in the unemployment compensation cases stand for the proposition that if a state system creates individual exemptions, the state cannot deny an exception to cases of religious hardship unless there is a compelling justification for doing so.[195] However, the Court did not completely invalidate the *Sherbert* analysis. The Court stated that even if it were tempted to "breathe into *Sherbert* some life beyond the unemployment compensation field," it would not apply such a balancing test to compel exemptions from an otherwise valid criminal law.[196] The Court concluded by stating that to make an individual's duty to comply with a neutral and generally applicable law conditional upon the law coinciding with his religious beliefs, unless justified by a compelling state interest, "contradicts both constitutional tradition and common sense."[197] Accordingly, the Court held that the denial of unemployment compensation to the claimants for ingesting peyote in violation of a state criminal statute did not offend the Free Exercise Clause, even though that action was religiously inspired.[198]

In 1993, the Supreme Court reaffirmed *Smith* when it decided *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[199] Although *Babalu Aye* did not involve a neutral and generally applicable law, the Court nevertheless expressed its adherence to the rule that neutral laws will be upheld regardless of the burden on religion.[200]

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194. *Id.*

195. *Id.* The Court noted that whether the decisions in the unemployment compensation cases were in fact that limited, they in no way addressed conduct that was prohibited by a criminal statute. *Id.* The criminality of the statute violated in *Smith* is what sets it apart from the other unemployment compensation cases. If the claimants had not violated a criminal law, then the Court conceivably might have applied the balancing test.

196. *Id.*

197. *Id.* at 885.

198. *Id.* at 890. Justice O'Connor concurred in the result but stated that the state should be required to justify any substantial burden on religiously motivated conduct by showing that it has a compelling state interest and that the law imposing the burden is narrowly tailored to achieve that interest. *Id.* at 898-903 (O'Connor, J., concurring). However, she agreed with the majority opinion because she found that the burden placed on the claimants' religion was justified by the state's compelling interest in preventing drug abuse and related harm. *Id.* at 903-07 (O'Connor, J., concurring).

Justice Blackmun dissented. Although he agreed with Justice O'Connor's rule, he reasoned that the state did not have a compelling interest that would justify the burden on the claimants' religion (because the state offered no evidence showing that the sacramental use of peyote had ever harmed anyone). *Id.* at 909-19 (Blackmun, J., dissenting).

199. 113 S. Ct. 2217 (1993).

200. *Id.* at 2226.

Babalu Aye provided the Court with its first opportunity to review a law that appeared to fall within an exception to the *Smith* rule.[201] At issue in *Babalu Aye* were city ordinances that were not neutral or generally applicable, but directly discriminatory toward Santeria adherents.[202] Instead of holding that such discriminatory laws were automatically invalid, the Court applied the same compelling interest test that it had previously applied to neutral and generally applicable laws in order to determine their constitutionality.[203] Therefore, "even under the *Smith* doctrine these ordinances deserved strict scrutiny. . . ."[204]

IV. THE COURT'S REASONING IN *BABALU AYE*

The Court began its analysis in *Babalu Aye* by reaffirming the rule enunciated in *Smith* that a neutral and generally applicable law that incidentally burdens a particular religious practice need not be justified by a compelling governmental interest.[205] The Court recognized that if a law is not neutral and of general applicability, it must be justified by a compelling governmental interest and be the least restrictive means of advancing that interest.[206] The Court noted that general applicability and neutrality are interrelated, and failure to satisfy one often indicates that the other is also unsatisfied.[207]

In order to determine if the Church's free exercise rights had been violated, the Court focused on the content and effect of the four ordinances and two resolutions that were passed by the city of Hialeah.[208] The Court turned first to the question of neutrality.

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201. *See* J. Brent Walker, *Free Exercise of Religion: A Right, Not a Luxury*, 6 FLA. B.J., Dec. 1992, at 22, 26.

202. *Babalu Aye*, 113 S. Ct. at 2227-33.

203. *Id.* at 2226.

204. *See* Walker, *supra* note 201, at 26.

205. *Babalu Aye*, 113 S. Ct. at 2226.

206. *Id.*

207. *Id.*

208. 1. Resolution 87-66 (adopted June 9, 1987) - this enactment noted the city's concern with religious practices which were contrary to public morals, peace, and safety, and stressed the city's commitment to prohibit such practices. *Id.* at 2223.

2. Ordinance 87-40 (adopted June 9, 1987) - this was an emergency ordinance that incorporated Florida's animal cruelty laws, which punish any person who cruelly or unnecessarily kills any animal. *Id.*

3. Resolution 87-90 (adopted August 11, 1987) - this enactment expressed the city's deep concern with respect to animal sacrifices performed in public and declared that any person or organization performing such ritualistic sacrifices would be prosecuted. *Id.* at 2223-24.

4. Ordinance 87-52 (adopted September 8, 1987) - this ordinance defined the word "sacrifice" to mean any unnecessary killing, mutilation, or torture of any

The Court explained that if the purpose of the ordinances was to prohibit or restrict religious practices because of their religious inspiration, they were not neutral.[209] The Court further noted that if the ordinances were not neutral, they were unconstitutional unless justified by a compelling interest and were narrowly tailored to advance that interest.[210]

To determine if the ordinances satisfied the neutrality requirement, the Court began with the text, since the minimum requirement of a neutral law is that it not facially discriminate against the practice of religion.[211] The Court looked to the words "sacrifice" and "ritual," words with strong religious connotations which are used in three of the ordinances.[212] The Court recognized that, although such words have a religious origin, they were used in the ordinances for their secular meaning.[213] Furthermore, the Court noted that the ordinances defined "sacrifice" in secular terms without any connection to religious practices.[214] However, the Court found that there were other aspects of the ordinances' text which disclosed that the ordinances on their face were not neutral.[215] Therefore, the Court concluded that the ordinances did not pass the requirement of facial neutrality.[216]

The Court explained, however, that even if the ordinances were facially neutral, they could still violate the requirement of neutrality

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animal in any ritual or ceremony, whether public or private, if food consumption was not the primary purpose. *Id.* at 2224. It exempted licensed slaughtering houses that kill animals that are raised specifically for food. *Id.*

5. Ordinance 87-71 (adopted September 22, 1987) - this enactment stated that it would be unlawful for any association, corporation, or person to sacrifice any animal within the city limits. *Id.*

6. Ordinance 87-72 (adopted September 22, 1987) - this final enactment defined "slaughter" as the killing of any animal for food consumption. *Id.* It prohibited such slaughter outside those areas specifically zoned for slaughterhouse use but exempted hogs and cattle that were slaughtered or processed for sale according to state law. *Id.*

Any violation of the ordinances was punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both. *Id.*

209. *Id.* at 2227.

210. *Id.*

211. *Id.* "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Resolution 87-66 expressly stated that the city was deeply concerned with certain religions that engaged in religious practices that were inconsistent with the peace, safety, and morals of the public. *Id.* at 2223. The Court noted that it could not plausibly be suggested that the city officials had another religion besides the Santeria in mind when they enacted the ordinances. *Id.* at 2228.

216. *Id.*

if they targeted religious conduct in their operation.[217] The Court stated that without regard to the text, the effect of a law is strong evidence of its purpose.[218] When the Court considered the operation of the ordinances, it became apparent that their main objective was the suppression of the principal element of the Santeria worship service.[219] The Court noted that even though the ordinances expressed concerns unrelated to religious animosity,[220] when the ordinances were considered as a whole, they disclosed a goal far remote from the legitimate objectives.[221] The Court pointed out that the ordinances' various definitions, prohibitions, and exemptions demonstrated that they were carefully "gerrymandered" to exclude almost all other animal killings except those performed by the Santeria church members.[222] The Court also recognized that the ordinances

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217. *Id.* at 2227-28. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 2227.

218. *Id.* at 2228.

219. *Id.*

220. *Id.* at 2228. Such legitimate objectives were to alleviate suffering and mistreatment of the sacrificed animals and to prevent the health hazards related to improper disposal. *Id.*

221. *Id.*

222. *Id.* Ordinance 87-71 prohibited the sacrifice of any animal but defined sacrifice as the unnecessary killing of an animal in a ritualistic ceremony in which food consumption was not the primary purpose of the sacrifice. *Id.* The Court recognized that such a definition and prohibition excluded virtually all animal killings except those performed for a religious reason. *Id.* Furthermore, the requirement that the killings not be for the primary purpose of food consumption exempted Kosher slaughter. *Id.* The Court stated that the end result of this ordinance was that only Santeria sacrifice was prohibited because it occurred during a ritual and the primary purpose was to make an offering to the *orishas* and not for food consumption. *Id.*

Similar in effect was Ordinance 87-52, which prohibited the slaughter, sacrifice, or possession of any animal with the intent to use the animal for food, unless the possessor was a licensed food establishment where animals was specifically raised for food. *Id.* The Court recognized that Santeria adherents alone bore the burden of this ordinance: The ordinance did not apply if there was no intent to use the animal for food; or if the animal was to be used for food, then it did not apply if the sacrifice occurred during a ritual; or if the animal was to be used for food and the sacrifice occurred during a ritual, then it still did not apply if the sacrifice was performed by a licensed food establishment and the animals were of a type raised for food. *Id.* at 2228-29. "A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander." *Id.* at 2229.

The Court also looked at Ordinance 87-40, which incorporated Florida's animal cruelty law and prohibited the unnecessary killing of animals. *Id.* While religious killings were deemed unnecessary, killings such as hunting, euthanasia of stray animals, and eradication of pests and insects were deemed necessary. *Id.* The ordinance obviously deemed religious killings to be of less importance than non-religious killings. *Id.* Therefore, the Court concluded that the Santeria practice was being discriminated against because of its religious motivation. *Id.*

restricted much more religious conduct than was necessary in order to achieve the city's interests.[223] The Court reasoned that the legitimate governmental interests in preventing animal cruelty and protecting the public health could be accomplished by restrictions stopping far short of a strict prohibition on all Santeria sacrifice.[224]

In order to determine the object of the ordinances, the Court also looked to the historical background of the challenged law, the events leading up to the enactment, as well as the legislative and administrative history, including statements made by members of the city council.[225] The Court's insight into the history disclosed that the ordinances targeted only religiously motivated animal sacrifice by the Santeria worshippers motivated.[226] In sum, the neutrality analysis led to only one conclusion for the Court: The ordinances had as their objective the suppression of the Santeria religion.[227]

The Court turned next to the second requirement of the Free Exercise Clause, that the law burdening religious activity be of general

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223. *Id.*

224. *Id.* The Court noted that the city's interest in protecting animals could be achieved by a more narrow regulation. *Id.* at 2230. Regulation of the treatment of animals without regard to why the animal is kept is more narrowly related to the city's interest. *Id.* Furthermore, if the city is concerned with animal cruelty, the focus of the ordinances should be on how the animal is killed and not on who performs the killing. *Id.*

Similarly, the Court stated that the city's interest in protecting the public health could be accomplished by regulations that did not impose a flat prohibition on all Santeria sacrifices. *Id.* at 2229. For instance, if the city is concerned with the improper disposal of the dead animals, it could regulate the disposal of those animals. *Id.* at 2229-30. The city attorney even conceded that Santeria sacrifices would not be prohibited if they occurred in inspected and licensed slaughterhouses. *Id.* at 2230. Therefore, the Court concluded that the ordinances were overbroad for their stated purposes. *Id.*

225. *Id.* at 2230-31.

226. *Id.* at 2231. The record revealed that the city council had not made any attempt to address its interests before the Church's announcement. *Id.* The taped excerpts and minutes of the June 9, 1987 meeting disclosed a significant hostility by city residents and city council members toward the Santeria practice of animal sacrifice and the religion itself. *Id.* The residents that attended the meeting made statements that were critical of the Santeria religion, and several persons taunted Pichardo when he spoke. *Id.* Furthermore, the president of the city council asked, "What can we do to prevent the Church from opening?" *Id.* Similar comments were made throughout the meeting. *Id.*

In his concurrence, Justice Scalia agreed with the result reached by the majority, but he did not agree with the portion of the opinion that considered the subjective motivation of the lawmakers in constructing the law. *Id.* at 2239 (Scalia, J., concurring). He did not think that the First Amendment permitted the Court to evaluate whether the Hialeah City Council actually intended to disfavor the Santeria religion, but rather required the Court to look only at the effect of the law. *Id.* at 2239-40.

227. *Id.* at 2231.

applicability.[228] The Court noted that this requirement ensures that in the government's pursuit of legitimate interests, it does not selectively impose special burdens on conduct only because of its religious motivation.[229] The Court did not have to precisely define the standard needed in order to determine whether a law is of general application, since the Court recognized that the ordinances fell far below the minimum standard necessary to ensure protection of First Amendment rights.[230] The Court pointed out that each of the ordinances only pursued the city's interests against actions inspired by religious belief, and, therefore, they did not meet the requirement of general applicability.[231]

Because the ordinances were neither neutral nor generally applicable, the Court turned next to the question of whether the ordinances advanced interests of the highest order and whether the ordinances were narrowly tailored in pursuit of those interests.[232] The Court found that the ordinances could not withstand this strict scrutiny, for even if the city's interests were compelling,[233] the ordinances were not tailored in narrow terms to achieve those interests.[234] The Court concluded by stating, "A law that targets religious

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228. *Id.* at 2231-32.

229. *Id.* at 2232.

230. *Id.*

231. *Id.* at 2233. "The underinclusion is substantial, not inconsequential." *Id.* at 2232. The Court stated that the ordinances were underinclusive with respect to the city's interests in protecting the public health and preventing cruelty to animals. *Id.* The Court looked to the fact that the ordinances failed to prohibit nonreligious conduct that undermined these interests as much or to a greater extent than Santeria sacrifices did. *Id.* For example, the Court noted that health risks resulting from improper disposal of animal carcasses are the same whether it is a religious or a nonreligious killing. *Id.* at 2233. Similarly, animal killings not prohibited by law, such as the infliction of pain and suffering in order to promote medical science or the euthanasia of stray or neglected animals, results in the same level of cruelty as Santeria sacrifices do. *Id.* at 2232. The Court concluded by stating that the ordinances appeared to represent a restriction that society is not prepared to impose upon itself, but only upon the Santeria worshippers. *Id.* at 2233. "This precise evil is what the requirement of general applicability is designed to prevent." *Id.*

232. *Id.* "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.*

233. The city had not demonstrated that its governmental interests were compelling. *Id.* at 2234. "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Id.*

234. *Id.*; *see supra* note 224 and accompanying text. The stated objectives were not pursued in regard to similar nonreligious conduct, and such interests could have been accomplished by narrower regulations that burdened religion to a far lesser extent. *Id.* at 2234. The Court concluded that this "absence of narrow tailoring suffice[d] to establish the invalidity of the ordinances." *Id.*

conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."[235]

In his separate concurrence, Justice Souter agreed with the Court's holding, but he disagreed with the Court's reaffirmance of the *Smith* rule because he was doubtful as to whether *Smith* warranted adherence.[236] He suggested that *Smith* was not germane to this case because it did not involve a neutral and generally applicable law.[237] Therefore, he stated that the Court's discussion of *Smith* was only dicta, and it was this part of the opinion that he did not join.[238] He stated that this case involved the noncontroversial principle repeated by the *Smith* Court that general applicability and formal neutrality are necessary conditions for a law to be upheld as not violative of the Free Exercise Clause.[239] He concluded by stating, "Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. The case before us is rightly decided without resolving the existing tension, which remains for another day when it may be squarely faced."[240]

V. SIGNIFICANCE

Babalu Aye is significant in that it is one of the rare cases in which a law had as its main objective the suppression of a certain religious practice. It is also significant because it reaffirmed the rule announced in *Smith* that a law that is neutral and of general application need not be justified by a compelling governmental interest regardless of the burden on religion.[241] Although *Smith* did not apply in *Babalu Aye* because the city ordinances at issue were

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235. *Id.* at 2233. In a separate concurrence, Justice Blackmun stated that if a law has as its object the suppression of some religion, it automatically fails strict scrutiny. *Id.* at 2251 (Blackmun, J., concurring). He disagreed with the majority, which stated that such a law must undergo strict scrutiny and will only be upheld if it is justified by some compelling governmental interest and is narrowly tailored to meet that interest. *Id.* at 2250-51 (Blackmun, J., concurring).

236. *Id.* at 2240 (Souter, J., concurring).

237. *Id.* (Souter, J., concurring).

238. *Id.* at 2242 (Souter, J., concurring).

239. *Id.* (Souter, J., concurring).

240. *Id.* at 2250 (Souter, J., concurring).

241. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993). "[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.*

not neutral or generally applicable, the mere affirmation of *Smith* by the Court put the future of the Free Exercise Clause in serious jeopardy. However, this speculation as to the future of religious violation claims under the Free Exercise Clause was put to an end on November 16, 1993, when President Clinton signed the Religious Freedom Restoration Act, hereinafter "Act," which in effect overruled *Smith*.[242]

The Act was developed in response to the *Smith* decision and the uncertainty that decision created with respect to future free exercise claims.[243] The Act recognized that *Smith* essentially eliminated the requirement of any governmental justification for neutral and generally applicable laws that burdened religious conduct by virtue of their operation.[244] Consequently, the Act reinstated the compelling interest test as set forth in *Sherbert v. Verner*[245] and *Wisconsin v. Yoder*.[246] The Act further noted that this is a "workable test for striking sensible balances between religious liberty and competing prior governmental interests."[247] In general, the government now cannot substantially burden a person's exercise of religion, except when the burden is in furtherance of a compelling governmental interest and the law is the least restrictive means of furthering that interest.[248] That is, such laws must undergo strict scrutiny. The Act guarantees application of the compelling interest test in all cases where religious freedom is substantially burdened by a neutral and generally applicable law.[249] A person whose religious exercise has been burdened in violation of the Act may assert that violation as a claim or defense in a judicial proceeding and obtain the appropriate relief against the government.[250]

The Act would not have affected the outcome in *Babalu Aye* because the governmental laws at issue were neither neutral nor generally applicable. However, the Court in *Babalu Aye* set forth the same compelling interest test to apply to directly discriminatory laws.[251] This is significant because prior to *Babalu Aye*, the Court

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242. 42 U.S.C. § 2000bb (Supp. V 1993).
243. S. REP. No. 111, 103d Cong., 1st Sess. 1 (1993).
244. 42 U.S.C. § 2000bb(a)(4) (Supp. V 1993).
245. *See supra* notes 115-26 and accompanying text.
246. 42 U.S.C § 2000bb(b)(1) (Supp. V 1993); *see supra* notes 127-31 and accompanying text.
247. 42 U.S.C. § 2000bb(a)(5) (Supp. V 1993).
248. 42 U.S.C. § 2000bb-1(a) to -1(b) (Supp. V 1993).
249. *Id.*
250. 42 U.S.C. § 2000bb-1(c) (Supp. V 1993).
251. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct.

had stated that if a law directly targeted a religious practice for discriminatory treatment, the law was constitutionally invalid.[252] Now the Court is stating that such a discriminatory law is subject to the compelling interest test and is not unconstitutional per se. This, in effect, means that the government could pass a law that purposely discriminates against a religious practice that could be upheld if the government could show that it was narrowly tailored to advance some compelling interest.

The Act does not specifically address non-neutral, non-generally applicable laws, but rather states that a burden placed upon a person's religion that results from a law of "general applicability" will not be upheld unless it satisfies strict scrutiny.[253] Although *Babalu Aye* holds that laws that are not neutral must undergo strict scrutiny in order to be upheld, it is inconceivable that the Court would ever uphold a law that directly discriminates against a person's religion regardless of the compelling state interest or how narrowly designed it is. However, until *Babalu Aye* is overruled, either by a subsequent Supreme Court case or by legislative act, such discriminatory laws will receive the same treatment as laws that are neutral and of general application.

Historically, the Court has given prison and military regulations deferential treatment when challenged under the Free Exercise Clause.[254] Instead of applying the compelling interest test to those claims, the Court made an exception and applied the rational relation test.[255] In effect, this lowered the burden of proof placed upon the governmental body because it only required that the challenged law

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2217, 2226 (1993). "A law failing to satisfy [neutrality and general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.*

252. "It would be true . . . that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." Employment Div. v. Smith, 494 U.S. 872, 877 (1990). "[T]he free exercise clause would invalidate a law that appeared to be religiously neutral on its face, if it could be shown that the purpose of the . . . that passed the law had done so for the sole purpose of prohibiting or regulating an act because of its religious significance." ROTUNDA & NOWAK, *supra* note 62, § 21.8, at 539.

253. S. REP. No. 111, 103d Cong., 1st Sess. 3 (1993).

254. "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

255. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding that the challenged regulation was reasonably related to legitimate penological interests); Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that the challenged regulation reasonably regulated dress in the interest of the military's interest in uniformity).

be reasonably related to legitimate governmental interests. However, pursuant to the Act, courts must now review free exercise claims challenging prison and military regulations under the compelling interest test.[256] Although some might view this as undermining the authority and expertise of the prison and military officials, the Committee on the Judiciary "recognizes that religious liberty claims in the context of prisons and the military present far different problems for the operation of those institutions than they do in civilian settings. Ensuring the safety and orderliness of penological institutions, as well as maintaining discipline in our armed forces, have been recognized as governmental interests of the highest order."[257]

Since the courts will now apply strict scrutiny to all laws that substantially burden a person's religious freedom, the courts will first have to determine what type of burden is substantial enough to warrant the application of the compelling interest test. The Committee on the Judiciary expects the courts to look to free exercise cases prior to *Smith* for guidance in determining whether a particular religious exercise has been substantially burdened.[258] *Smith* alleviated the need for finding a burden if the law was neutral and generally applicable because such a law was automatically valid. Now, however, the courts will essentially have to determine if there is a burden on a case-by-case basis, the way it did prior to the *Smith* decision.

Pre-*Smith* case law makes it clear that only those governmental actions that place a "substantial burden" on the exercise of religion must satisfy the compelling interest test.[259] Therefore, the state is not required to justify every action that might have some incidental effect on religious exercise.[260] Furthermore, pre-*Smith* case law also makes it clear that strict scrutiny is not applicable to those governmental actions which only involve the management of internal governmental affairs or the use of the government's own property or resources because the resulting religious restrictions do not constitute a substantial burden.[261] Therefore, the decisions in *Bowen v. Roy*[262] and *Lyng v. Northwest Cemetery Protective Association*[263] remain good law. As long as the courts determine that the challenged

256. H.R. REP. No. 88, 103d Cong., 1st Sess. 6 (1993).
257. *Id.* (emphasis added).
258. S. REP. No. 111, 103d Cong., 1st Sess. 7 (1993).
259. *Id.*
260. *Id.*
261. *Id.* at 7, 22 n.19.
262. *See supra* notes 155-58 and accompanying text.
263. *See supra* notes 165-70 and accompanying text.

law does not impose a substantial burden on the particular claimant's religious exercise, the constitutional inquiry is at an end.

The broader implications of applying strict scrutiny to all laws that burden a person's religious freedom are that the courts will now spend considerably more time weighing and balancing the compelling governmental interest against the burden on religion. It is usually not a difficult task for the government to maintain that it has some type of compelling interest in enacting a law when that law is challenged on constitutional grounds. Therefore, the legitimation of the challenged law will usually turn upon whether the law is the least restrictive means of achieving the stated compelling interest. It is in this context that the difference between a neutral, generally applicable law and a directly discriminatory law will be relevant. Courts will be more inclined to hold that a directly discriminatory law, such as the ones in *Babalu Aye*, is not the least restrictive means, while neutral and generally applicable laws will receive more judicial deference.

VI. Conclusion

From 1963 until 1990, claims that certain laws violated the First Amendment's Free Exercise Clause were given substantive protection by the courts through application of the compelling interest test. However, from 1990 until 1993, free exercise protection almost became nonexistent due to the Court's holding in *Employment Division v. Smith*. Although the Religious Freedom Restoration Act injected some stability into the future of free exercise cases, it has by no means made those cases predictable. Instead of having a bright line rule like *Smith* to guide them, courts are now headed down the case-by-case path of weighing the importance of the challenged law against the significance of certain religious practices. That task might prove to be far more tedious than the courts expect. That the President of the United States felt the need to overrule a United States Supreme Court case relating to the protection of religious exercise sends a message that undue interference with religious freedom will not be tolerated.

Allison J. Cornwell