University of Miami Law Review

Volume 45 | Number 5 Article 6

5-1-1991

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Recommended Citation

Roberto A. Torricella Jr., *Babalu Aye Is Not Pleased: Majoritarianism and the Erosion of Free Exercise*, 45 U. Miami L. Rev. 1061 (1991)
Available at: https://repository.law.miami.edu/umlr/vol45/iss5/6

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COMMENTS

Babalu Aye Is Not Pleased: Majoritarianism and the Erosion of Free Exercise

> [S]uch phrases as 'self-government,' and 'the power of the people over themselves,' do not express the true state of the case. The 'people' who exercise the power, are not always the same people with those over whom it is exercised; and the 'self-government' spoken of, is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means, the will of the most numerous or the most active *part* of the people;

> the majority, or those who succeed in making themselves accepted as the majority: the people, consequently, *may* desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power.[1]

I. INTRODUCTION

A. *The Ritual*

A man stands outside a dimly lit, strangely, yet extravagantly adorned room. He is wearing a white robe, a white cap, and a necklace of multi-colored beads. Some are purple; some are yellow; some are white. Splitting half a coconut into four pieces, he begins chanting. The man drops the coconut pieces behind his head onto the grass and they land with the white coconut meat face up. Babalu Aye is pleased—the ritual continues.

The man, a priest, enters his apartment. An altar draped in red cloth stands prominently before an array of religious figurines, rusty metal cauldrons, candles, cups, fruits, tree branches, and ornamental chickens. The pots are filled with a mixture of water, wine, alcohol, coconut milk, dried fish, peppercorns, honey, and chicken blood. The priest takes a hand-carved ebony knife from the altar and begins tapping the side of one of the pots. He starts to chant. Shortly thereafter, he dips a cup fashioned from a coconut into the mixture and drinks the liquid. The priest bathes the figurines and ornamental chickens in the liquid as the chanting continues.

Another man brings the first live chicken into the apartment. He brushes it across the priest's chest and back. Still another man places the bird upon the altar and holds down its feet. The chicken, overcome by fear, begins to struggle vainly. Raising the bird's head, the priest begins to pluck its feathers, sprinkling them haphazardly over the pots and the altar. He bows silently before the altar, praying to Babalu Aye. Taking the knife from one of the cauldrons, the priest slits the chicken's throat, severing the carotid arteries. A short stream of blood shoots from the laceration, and the bird dies.

The priest and his assistant drip blood over the objects adorning the altar. They then decapitate the chicken and place its head on a pot. One of the men bites into the breast bone of the bird's now headless body and rips the animal open with his teeth. He stuffs the open chest of the chicken with various herbs, tobacco, and bits of dried fish. After bathing the carcass in liquid from one of the cauldrons, he wraps it in a brown paper bag and places it outside the apartment.

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1. J.S. MILL, ON LIBERTY 12 (2d ed. 1859).

Later, the carcass will be buried near a cemetery. The ceremony is repeated with two more chickens, two roosters, a pigeon and a small goat. Finally, the priest informs the participants that the ceremonies have ended—Babalu Aye is pleased.[2]

B. *The Problem in Context*

"Religious freedom is guaranteed everywhere throughout the United States . . . ."[3] The first amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[4] The objective of the free exercise clause is to preserve individual freedom in the choice and manner of religious worship from the overbearing influence of government.[5] "[A]n individual's free exercise of religion is a preferred constitutional activity."[6] A preference for free exercise, however, does

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2. The story is a general description of a Santeria ritual loosely based on Chavez, *Santeria: A Cult of Sacrifice*, UPI, Oct. 11, 1981, *available in* LEXIS, Nexis Library, Omni File, and, to a lesser degree, on Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1469 (S.D. Fla. 1989). Babalu-Aye, a Santeria god, is the patron of the sick. Chavez, *supra*. St. Lazarus is the Christian symbol for this god. *Id.* Since Santeria is primarily an underground religion practiced in individual homes by small groups unconnected to each other, individual rituals may differ.

3. Reynolds v. United States, 98 U.S. 145, 162 (1878).

4. U.S. CONST. amend. I. The free exercise clause is applicable to the states by incorporation into the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

5. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 222-23 (1963) (noting that the free exercise clause "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion" and that "[i]ts purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority").

6. Employment Div. v. Smith, 110 S. Ct. 1595, 1612 (1990) (O'Connor, J., concurring in judgment); *see also* Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1218 (indicating that first amendment freedom of religion "occupies a 'preferred position' in the constitutional hierarchy of protected rights"). Marcus notes that the concept emerged from footnote four of Justice Stone's opinion in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Marcus, *supra*, at 1218 n.5. The footnote provides:

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes

not make that first amendment right absolute.[7]

In protecting both the choice and manner of religious worship, the free exercise clause recognizes two critical components of religious activity: religious belief and religious conduct.[8] When governmental regulation of religious belief is involved, the protections afforded by the first amendment are absolute.[9] The government may not, for example, compel affirmation of religious belief[10] or punish the expression of religious doctrines it does not favor.[11] "The free exercise clause was at the very least designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief."[12]

"The freedom to act, unlike the freedom to believe, cannot be absolute."[13] When governmental regulations impinge upon religious conduct, courts extend only qualified protection.[14] The government must justify any regulation which substantially burdens religious conduct "by a compelling state interest and by means narrowly tailored

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ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Prods. Co., 304 U.S. at 152 n.4 (citations omitted).

7. *See* Marcus, *supra* note 6, at 1230.

8. *See* Reynolds v. United States, 98 U.S. 145 (1878).

9. *See* McDaniel v. Paty, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."); Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969) ("[T]he [First] Amendment . . . commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine."); Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such."); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1183 (2d ed. 1988) (noting that the Supreme Court has often indicated that the constitutional protection of religious belief is absolute).

10. Torasco v. Watkins, 367 U.S. 488, 496 (1961) (invalidating under the first amendment a Maryland constitutional provision requiring a declaration of belief in the existence of God as a test for office).

11. *See Ballard*, 322 U.S. at 86 (holding that a jury may not consider the truth or falsity of an individual's religious beliefs or doctrines in federal mail fraud prosecution).

12. L. TRIBE, *supra* note 9, § 14-3, at 1160.

13. *Smith*, 110 S. Ct. at 1608 (O'Connor, J., concurring in judgment); *see also Reynolds*, 98 U.S. at 163 ("it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order") (quoting An Act for Establishing Religious Freedom, ch. XXXIV (1786), in 12 HENING'S STATUTES AT LARGE 84, 85 (1823)).

14. Sherbert v. Verner, 374 U.S. 398 (1963); *see also* L. TRIBE, *supra* note 9, § 14-6, at 1183 (stating that the Supreme Court has often indicated that qualified protection is extended where regulations impinge upon religious actions).

to achieve that interest."[15] Courts apply a strict scrutiny standard to free exercise claims involving religious conduct because "belief and action cannot be neatly confined in logic-tight compartments."[16] Often, however, a clash arises between the rights sought to be protected by application of the strict scrutiny standard and governmental promulgation of generally applicable regulations prohibiting conduct that happens to be an act of worship for an individual or particular group. This clash of interests came to the fore in *Employment Division v. Smith*[17] and in *Church of the Lukumi Babalu Aye v. City of Hialeah*.[18]

1. *EMPLOYMENT DIVISION v. SMITH*

A private drug rehabilitation organization fired two counselors, both members of the Native American Church, for ingesting peyote, a hallucinogenic drug that was used for sacramental purposes during a church ceremony.[19] The Employment Appeals Board of Oregon denied the counselors' applications for unemployment compensation[20] under a state law disqualifying employees fired for work-related misconduct.[21] The Oregon Court of Appeals reversed, finding that the denial of benefits to persons discharged for engaging in religious acts constituted an impermissible burden upon the right of free exercise of religion in violation of the first amendment.[22] The Oregon Supreme Court affirmed, dismissing as constitutionally irrelevant the state's argument that the denial of unemployment benefits is permissible because peyote consumption is a crime.[23]

The United States Supreme Court granted certiorari.[24] Upon

15. *Smith*, 110 S. Ct. at 1608 (O'Connor, J., concurring in judgment); *see also* Hernandez v. Commissioner, 490 U.S. 680 (1989); Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); *Sherbert*, 374 U.S. 398.

16. *Yoder*, 406 U.S. at 220.

17. 75 Or. App. 764, 709 P.2d 246 (1985), *aff'd as modified*, 301 Or. 209, 721 P.2d 445 (1986), *vacated*, 485 U.S. 660 (1988), *reaff'd*, 307 Or. 68, 763 P.2d 146 (1988), *rev'd*, 110 S. Ct. 1595 (1990), *reh'g denied*, 110 S. Ct. 2604 (1990), *acq. in result*, 310 Or. 376, 799 P.2d 148 (1990).

18. 723 F. Supp. 1467 (S.D. Fla. 1989).

19. *Smith*, 110 S. Ct. at 1597-98.

20. *Smith*, 301 Or. 209, 211, 721 P.2d 445, 446 (1986).

21. *Id.* at 21, 721 P.2d at 448. For the text of the state law, see *infra* note 187.

22. 75 Or. App. 764, 709 P.2d 246 (1985) (per curiam) (reversing and remanding the case for reconsideration in light of its decision in Black v. Employment Div., 75 Or. App. 735, 707 P.2d 1274 (1985) (holding that the denial of unemployment benefits to a claimant for his ingestion of peyote at a religious ritual did not serve a compelling state interest by the least restrictive means and, therefore, violated the free exercise clause)).

23. 301 Or. 209, 218-19, 721 P.2d 445, 450 (1986); *see also infra* note 185 (describing Oregon's laws against peyote consumption).

24. 480 U.S. 916 (1987).

review, the Court found the illegality of peyote consumption constitutionally relevant, indicating that if a state may prohibit certain religiously motivated conduct through criminal laws which do not offend the first amendment, it may impose a lesser burden, such as the denial of unemployment compensation benefits, on persons who engage in criminal conduct.[25] Due to the uncertainty regarding the legality of the religious use of peyote in the State, the Supreme Court vacated the judgment of the Oregon Supreme Court and remanded the case for a determination on that issue.[26]

On remand, the Oregon Supreme Court found that the state's criminal prohibition of peyote use extends to sacramental as well as recreational use of the drug.[27] It held, however, that such a restriction violated the free exercise clause of the first amendment.[28] The United States Supreme Court again granted certiorari[29] and reversed, holding that a denial of unemployment compensation benefits resulting from the ingestion of peyote, in violation of an otherwise constitutionally valid state prohibition against such use of the drug, does not constitute an impermissible burden on the right of free exercise of religion.[30]

2. *CHURCH OF THE LUKUMI BABALU AYE v. CITY OF HIALEAH*

A religious group brought suit against the City of Hialeah, alleging, in part, that city ordinances regulating the ritual sacrifice of animals violated the free exercise clause of the first amendment.[31] The Church of the Lukumi Babalu Aye and its members practice Yoruba, commonly known as Santeria, an ancient African religion in which the sacrifice of chickens, pigeons, doves, ducks, guinea fowl, goats, sheep, and turtles is an integral part of religious observance.[32]

In an effort to bring the practice of this religion into the open,[33] the Church occupied land in Hialeah and began to take the steps nec-

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25. 485 U.S. 660, 670 (1988). Referring to Reynolds v. United States, 98 U.S. 145 (1879), the Court noted that "[i]f a bigamist may be sent to jail despite the religious motivation for his misconduct, surely a State may refuse to pay unemployment compensation to a marriage counselor who was discharged because he or she entered into a bigamous relationship." *Smith*, 485 U.S. at 671.

26. *Smith*, 485 U.S. at 673-74.

27. 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988).

28. *Id.* at 76, 763 P.2d at 150.

29. 489 U.S. 1077 (1989).

30. 110 S. Ct. at 1606.

31. Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467, 1469 (S.D. Fla. 1989).

32. *Id.* at 1471; *see infra* notes 234-36 and accompanying text.

33. *See infra* note 236.

essary to allow it to function as an established church.[34] Shortly thereafter, the City adopted four ordinances aimed at restricting the ritual sacrifice of animals.[35] The Church filed a suit which sought to establish "the right of the Church to perform animal sacrifices on Church premises, and . . . the right of Church members to perform sacrifices in their own homes."[36] The United States District Court for the Southern District of Florida held that city ordinances restricting the ritual sacrifice of animals do not impermissibly infringe upon free exercise rights in violation of the first amendment.[37]

C. *Focus of the Comment*

This Comment examines application of the free exercise clause in cases where governmental regulations restrict conduct motivated by sincere religious belief. It highlights the genesis of modern free exercise jurisprudence and the established dichotomy between religious belief and religious conduct. It focuses on *Employment Division v. Smith* and its retreat from the judicial standards articulated in *Sherbert v. Verner*,[38] which courts have applied in reviewing free exercise claims involving religiously motivated conduct restricted by governmental regulation.[39] Through *Smith* and *Church of the Lukumi Babalu Aye v. City of Hialeah*, this Comment constructs a permeable boundary dividing an individual's free exercise rights and a government's need to regulate for the health, safety, and welfare of its citizenry.

This Comment takes the position that "conduct motivated by sincere religious belief, like the belief itself, must . . . be at least presumptively protected by the Free Exercise Clause."[40] It argues that within the majoritarian construct underlying constitutional jurisprudence,[41] protection of an individual's free exercise rights can only be achieved through faithful application of a strict scrutiny standard of judicial review to all challenges to regulations implicating those rights. Without a sufficiently compelling interest, government should,

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34. *Church of the Lukumi*, 723 F. Supp. at 1476. The City required the Church to obtain an occupational license and "provide an original certificate of incorporation from the State of Florida for the Church." *Id.* at 1477.

35. *Id.* For a general description of the ordinances at issue, see *infra* note 239.

36. *Church of the Lukumi*, 723 F. Supp. at 1469.

37. *Id.* at 1488.

38. 374 U.S 398 (1963) (holding that a governmental regulation which burdens religious conduct must be justified by a compelling state interest which cannot be achieved through less restrictive means).

39. *See supra* note 15 and accompanying text.

40. *Smith*, 110 S. Ct. at 1608 (O'Connor, J., concurring in judgment).

41. *See infra* notes 287-99 and accompanying text.

therefore, grant exemptions from generally applicable legal duties which curtail religiously motivated conduct.

The Supreme Court in *Smith* refused to apply a strict scrutiny standard of review to the challenged legislation.[42] This Comment suggests that the Supreme Court decided *Smith* incorrectly and that the District Court decided *Church of the Lukumi* correctly, although each court held that the governmental restrictions at issue did not violate the first amendment. This Comment presents *Church of the Lukumi* as a vehicle for properly resolving the conflict in *Smith* and elucidating one border dividing permissible and impermissible governmental infringements upon an individual's free exercise rights.

II. FREE EXERCISE JURISPRUDENCE IN PERSPECTIVE

The establishment and free exercise clauses aim "to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end."[43] Essentially, the religion clauses tend toward the ultimate goal of liberty of conscience.[44] The Supreme Court has recognized the unique importance of such a liberty to a nation built upon a proud heritage of diversity and independence.[45] The full scope of the liberty established by these clauses has, to some degree, always been at issue throughout their jurisprudential history.[46]

A. Reynolds v. United States: *Free Exercise and the Dichotomy Between Belief and Action*

Free exercise protections embrace two fundamental religious concepts: freedom of religious belief and freedom of religious conduct or action.[47] While the free exercise clause protects religious belief

42. 110 S. Ct. at 1603.

43. Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

44. *See* Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1598-1604 (1989) (identifying liberty of conscience as the central ideal arising from the early struggles for religious freedom); *see also* L. TRIBE, *supra* note 9, § 14-2, at 1156-57 (indicating that each of the religion clauses functionally protects the interests sought to be protected by the other); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 677 (1980) (noting that "a central purpose of the [religion clauses] was to protect religious liberty—to prohibit the coercion of religious practice or conscience, a goal that remains paramount today").

45. *Schempp*, 374 U.S. at 214.

46. *See* L. TRIBE, *supra* note 9, § 14-2, at 1155-57. Issues regarding the breadth of the liberty protected by the establishment clause are beyond the scope of this Comment.

47. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

absolutely,[48] religious conduct is not similarly protected.[49] Laws that target a particular religious act solely for its religious aspect would likely violate the first amendment.[50] Secular laws which incidentally impinge upon religious practices may pass constitutional muster.[51] The Supreme Court first recognized the distinction between belief and action in *Reynolds v. United States*.[52]

As a member of the Church of Jesus Christ of Latter-day Saints, commonly known as the Mormon Church, George Reynolds practiced polygamy.[53] This practice, a duty of male members of the Mormon Church,[54] violated a federal law prohibiting that practice in the territories of the United States.[55] Reynolds challenged the statute, and his resulting conviction thereunder, as unconstitutional restrictions on his free exercise rights.[56]

Noting the dangers inherent in allowing religious motivations to excuse positive acts which violate the law,[57] the Supreme Court found

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48. *See, e.g.*, Employment Div. v. Smith, 110 S. Ct. 1595, 1599 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); Sherbert v. Verner, 374 U.S. 398, 402 (1963) (stating that the free exercise clause prohibits "governmental regulation of religious *beliefs* as such"); *Cantwell*, 374 U.S. at 303 (indicating that the freedom to believe is absolute); Reynolds v. United States, 98 U.S. 145, 166 (1878) (indicating that laws may not interfere with religious beliefs).

49. *See supra* notes 13-15 and accompanying text.

50. *See Smith*, 110 S. Ct. at 1599 (indicating that regulations banning acts or abstentions solely when performed for religious reasons would be "prohibiting the free exercise [of religion]").

51. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); Braunfeld v. Brown, 366 U.S. 599 (1961).

52. 98 U.S. 145 (1878).

53. *Id.* at 161.

54. According to the tenets of the Church of Jesus Christ of Latter-day Saints, this duty stemmed from various books, including the Holy Bible, which members of the church believed to be of divine origin. *Id.* The members also believed that

> the practice of polygamy was directly enjoined upon the male members [of the church] thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of [the] church; that failing or refusing to practice polygamy by [the] male members of [the] church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.

Id.

55. *Id.* at 146. The regulation stated:

> [E]very person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall . . . be adjudged guilty of bigamy, and . . . shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term of not exceeding five years.

12 STAT. 501 (1862) (REV. STAT. § 5352).

56. *Reynolds*, 98 U.S. at 153, 161-67.

57. *Id.* at 166-67 ("Can a man excuse his practices [contrary to the law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief

the statute at issue constitutional and upheld the conviction.[58] In its holding, the Court explicitly recognized the dichotomy between belief and action: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[59] Under *Reynolds*, therefore, religiously motivated conduct could be proscribed by secular governmental regulations enacted in pursuit of valid legislative goals.[60] One commentator described the state of free exercise law after *Reynolds* as follows:

> [G]enerally when Congress or a state legislature, in the exercise of some constitutional power, enacts a statute which requires or prohibits some action, and makes that violation a criminal offense, there is no requirement inherent in the First Amendment that religious beliefs shall constitute a sufficient excuse or justification for noncompliance with the terms of the statute.[61]

B. *The Rise of Strict Scrutiny Review*

The standards established in *Reynolds* remained essentially unchanged for almost a century.[62] Laws aimed at valid, secular goals which imposed burdens on religious conduct required no other justification for their validity.[63] In the early 1960's, however, the Supreme Court decided two cases which dramatically altered the standards set forth in *Reynolds*:[64] *Braunfeld v. Brown*[65] and *Sherbert v. Verner*.[66]

1. *BRAUNFELD v. BROWN*

Abraham Braunfeld, a retail merchant, sold clothing and home furnishings from a small store located in Philadelphia.[67] He was "a member of the Orthodox Jewish faith, which requires the closing of

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superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

58. *Id.* at 166, 168.

59. *Id.* at 166.

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

61. M. KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE 46 (1957).

62. Lupu, *supra* note 60, at 939; *cf.* Note, *Burdens on the Free Exercise of Religion: A Subjective Alternative*, 102 HARV. L. REV. 1258, 1261 (1989) (indicating that the erosion of the *Reynolds* standard began in 1940 with the Supreme Court's decision in Cantwell v. Connecticut, 310 U.S. 296 (1940)).

63. Lupu, *supra* note 60, at 940 ("Under *Reynolds*, the state was free to create such [state-erected] impediments [to religious action] as long as its policy served secular goals.").

64. Marcus, *supra* note 6, at 1220 (noting that the law of free exercise, in the ten years following *Sherbert*, "changed remarkably").

65. 366 U.S. 599 (1961).

66. 374 U.S. 398 (1963).

67. *Braunfeld*, 366 U.S. at 601.

. . . places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday."[68] In order to comply with the tenets of his faith, he closed his store as required and opened it on Sundays in order to make up for some of the lost revenues.[69] In doing so, however, Braunfeld violated a Pennsylvania criminal statute prohibiting the retail sale of various commodities on Sundays.[70] He challenged the constitutionality of the statute on free exercise grounds and sought a permanent injunction against its enforcement.[71] Braunfeld asserted that enforcement of the statute would either compel him to give up observance of his Sabbath or place him at a serious economic disadvantage.[72]

Writing for the plurality, Chief Justice Warren recognized the dichotomy between belief and action established in *Reynolds*.[73] He distinguished *Reynolds*, however, by noting that the federal law prohibiting bigamy made a religious practice of the Mormon Church illegal.[74] The Pennsylvania statute did not make observance of the Jewish Sabbath unlawful.[75] Thus, enforcement of the statute only burdened those Orthodox Jews who found it necessary to work on

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68. *Id.*

69. *Id.* at 611 (Brennan, J., dissenting). Justice Brennan noted that Braunfeld did "a substantial amount of business on Sunday" and made up "some, but not all of the business . . . lost" by closing on Saturday. *Id.*

70. *Braunfeld*, 366 U.S. at 600. The Pennsylvania criminal statute at issue read, in pertinent part:

> Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.
>
> Each separate sale or offer to sell shall constitute a separate offense.

1959 PA. LAWS 660 (codified as amended at PA. STAT. ANN. tit. 18, § 4699.10 (Purdon Supp. 1960)).

71. *Braunfeld*, 366 U.S. at 601. The suit included equal protection and establishment clause claims as well. *Id.* The Court, however, considered only the free exercise challenges since it had already disposed of similar equal protection and establishment clause claims in Two Guys from Harrison-Allentown, Inc., v. McGinley, 366 U.S. 582 (1961). *Braunfeld*, 366 U.S. at 601.

72. *Braunfeld*, 366 U.S. at 602.

73. *Id.* at 603-04 ("[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.").

74. *Id.* at 605. For the text of the federal law at issue in *Reynolds*, see *supra* note 55.

75. *Braunfeld*, 366 U.S. at 605.

Sunday.[76] The plurality found this indirect burden to be markedly different from the burden imposed by a law forcing an individual to choose between "abandoning his religious principle or facing criminal prosecution."[77] In so distinguishing *Reynolds*, the plurality recognized the burden concept in the free exercise realm.[78]

Though upholding the Pennsylvania statute, the plurality raised the level of judicial scrutiny involved in assessing free exercise challenges to governmental regulations burdening religious practices.[79]

> If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid *even though the burden may be characterized as being only indirect.* But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden.*[80]

Braunfeld thus broadened the scope of free exercise protection of religiously motivated conduct in two important ways. First, it recognized indirect burdens on religious conduct as within the ambit of the clause's concerns.[81] Second, it raised the standard by which a court must review a challenged state regulation.[82] The plurality left to *Sherbert* the task of completing the process *Braunfeld* commenced.

2. *SHERBERT v. VERNER*

Adell Sherbert worked as a spool tender in a South Carolina textile mill, Monday through Friday from 7:00 a.m. until 3:00 p.m.[83] She was a member of the Seventh Day Adventist Church, which teaches that a member should perform no work or labor between sundown on Friday and sundown on Saturday.[84] Her employer notified her that she would be required to work on Saturdays.[85] Refusing to

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76. *Id.*

77. *Id.*

78. *See* Lupu, *supra* note 60, at 939-40.

79. *Id.* at 940.

80. *Braunfeld,* 366 U.S. at 607 (emphasis added).

81. Lupu, *supra* note 60, at 940 ("Although its result seemed inhospitable to free exercise, *Braunfeld* . . . significantly widened the clause's potential scope by both including indirect harms to religion and increasing the state's difficulty in satisfying the standard of review.").

82. Lupu, *supra* note 60, at 940.

83. Sherbert v. Verner, 240 S.C. 286, 125 S.E.2d 737 (1962), *aff'd*, 374 U.S. 398 (1963).

84. *Id.* at 288-89, 125 S.E.2d at 738.

85. *Id.* at 288, 125 S.E.2d at 737-38. Prior to that time, the mill allowed Saturday work on a voluntary basis. *Id.* at 288, 125 S.E.2d at 738. Sherbert did not work on any Saturday after becoming a member of the Seventh Day Adventist Church. *Id.* Apparently, the operations of

work on her Sabbath day, Sherbert failed to report to the mill on the next six successive Saturdays.[86] Her employer subsequently discharged her.[87]

The South Carolina Employment Security Commission denied Sherbert's claim for unemployment compensation, stating that the mill discharged her because she was unavailable for work.[88] Under South Carolina law, such a finding precludes an individual from securing unemployment compensation benefits.[89] Sherbert challenged the law as an unconstitutional violation of her free exercise rights.[90]

Writing for the Court, Justice Brennan focused on the same issues present in *Braunfeld*: the burden on religious practice and the governmental interest at stake.[91] First, the Court decided that the denial of benefits imposed a burden upon Sherbert's free exercise of religion.[92] Comparing the burden resulting from the denial of benefits to a fine imposed against Sherbert for her Saturday worship, the Court described the burden as forcing her to "choose between follow-

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practically all textile plants in the area included six-day work schedules. *Id.* at 289, 125 S.E.2d at 738. Such a situation resulted in the unavailability of other suitable work for Sherbert. *Id.*

86. *Id.* at 288, 125 S.E.2d at 738.

87. *Id.*

88. *Id.* at 289, 125 S.E.2d at 738.

89. *Id.* at 290-91, 125 S.E.2d at 739. The 1952 Code of Laws of South Carolina, provided, in pertinent part:

> Section 68-113. An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:
>
> (1) He has made a claim for benefits with respect to such week in accordance with such regulations as the Commission may prescribe;
>
> (2) He has registered for work . . .
>
> (3) He is able to work and is available for work . . . .

1955 S.C. Acts 488.

> Section 68-114. Any insured worker shall be ineligible for benefits:
>
> (1) 'Leaving work voluntarily.' If the Commission finds that he has left voluntarily without good cause his most recent work prior to filing a request for determination of insured status . . .
>
> (2) 'Discharge for misconduct.' If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year . . .
>
> (3) 'Failure to accept work.' If the Commission finds that he has failed, without good cause, (a) either to apply for available suitable work, when so directed by the employment office or the Commission, (b) to accept available suitable work when offered him by the employment office or the employer . . . .
>
> (a) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals . . . .

1955 S.C. Acts 489-90.

90. *Sherbert*, 374 U.S. at 401.

91. *Id.* at 403; *see supra* text accompanying notes 80-82.

92. *Sherbert*, 374 U.S. at 403.

ing the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[93]

Second, the Court decided no compelling state interest existed that would justify the substantial infringement of Sherbert's free exercise rights.[94] Although the Court found that Pennsylvania established a strong interest in providing a uniform day of rest from labor in *Braunfeld*,[95] South Carolina advanced no interest of this magnitude.[96] Under such circumstances, the Court held that states may not constitutionally apply the eligibility provisions for unemployment compensation benefits so as to force a worker to abandon religious convictions.[97]

In phrasing the inquiry in terms of compelling state interests, the Court raised the standard of review in free exercise challenges to governmental regulations, as established in *Braunfeld*, to a strict scrutiny level.[98] Significantly, the Court indicated that even if the state asserted a compelling interest, it would still have to "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[99] Thus, after *Sherbert*, a governmental regulation that imposed a burden upon religiously motivated conduct had to be justified by a compelling state interest that could not be achieved through less restrictive means.[100]

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93. *Id.* at 404.

94. *Id.* at 407-09.

95. 366 U.S. at 607.

96. *Sherbert*, 374 U.S. at 407. South Carolina argued primarily that providing a religious exemption to Sherbert and others raised the specter of fraudulent claims for unemployment compensation benefits. *Id.*; *see also* Marcus, *supra* note 6, at 1225.

97. *Sherbert*, 374 U.S. at 410.

98. *Id.* at 406 ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice"). The Supreme Court previously described strict scrutiny analysis as follows:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960). Justice Powell noted, in a 1982 lecture, that most commentators recognize footnote four from United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), "as a primary source of strict scrutiny judicial review." Powell, Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1088 (1982). For the text of the footnote, see *supra* note 6.

99. *Sherbert*, 374 U.S. at 407.

100. *See* Lupu, *supra* note 60, at 934. The test developed by the Supreme Court can be divided into three prongs:

> 1. Does the governmental regulation result in a burden upon the free exercise of the claimant's religion?

C. *Development of the* Sherbert *Standard*

Although the *Braunfeld* and *Sherbert* decisions established the standard applicable in challenges to governmental regulations implicating free exercise rights, they did little to clarify the operation of the standard.[101] Two decisions, *Wisconsin v. Yoder*[102] and *United States v. Lee*,[103] highlight the development of *Sherbert* and the application of the strict scrutiny standard in free exercise cases. *Lee* also marks the Court's weakening of the ends and means components of strict scrutiny analysis, a significant doctrinal change in free exercise jurisprudence.[104]

1. *WISCONSIN v. YODER*

Jonas Yoder, a member of the Old Order Amish religion, lived in Green County, Wisconsin.[105] According to the tenets of his faith, a child's attendance at high school endangers the salvation of both the child and his parents and exposes the entire family to church censure.[106] Accordingly, he refused to send his fifteen year-old daughter to high school after she completed the eighth grade.[107] Convicted of violating Wisconsin's compulsory school-attendance law,[108] he chal-

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2. Does the regulation serve a compelling interest?

3. Does the regulation serve that interest through the use of the least restrictive means available?

Note, Lyng v. Northwest Indian Cemetery Protective Association: *A Form-Over-Effect Standard for the Free Exercise Clause*, 20 LOY. U. CHI. L.J. 171, 172-73 (1988).

101. *See* Lupu, *supra* note 60, at 942.

102. 406 U.S. 205 (1972).

103. 455 U.S. 252 (1982).

104. *See* L. TRIBE, *supra* note 9, § 14-13, at 1260-62 ("*Lee* seems to weaken both aspects of the required state showing.").

105. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

106. *Id.* at 209. The Amish do not object to formal education through the first eight grades. *Id.* at 212. "They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period." *Id.* Formal high school education, however,

> is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life.

Id. at 211.

107. *Id.* at 207.

108. *Id.* The statute provided:

> (1)(a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child

lenged the statute and his conviction on free exercise grounds.[109]

The Supreme Court, applying the *Sherbert* standard, affirmed the Wisconsin Supreme Court's decision overturning the criminal conviction.[110] Chief Justice Burger described the burden placed upon Yoder's religious practices as severe and inescapable, indicating that the "law affirmatively compel[led him], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs."[111] The Court, therefore, focused primarily on the effect of the law on religion, not the governmental action in question.[112] Further, although finding the state's interest in compulsory education "admittedly strong," the Court held that the state's interest did not rise to a level sufficient to outweigh Yoder's interest in the free exercise of his religion.[113]

The Court's balancing of the sufficiency of Wisconsin's interests against Yoder's free exercise rights exemplified the level of scrutiny mandated by *Sherbert*.

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for

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> should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age . . .
>
> (5) Whoever violates this section . . . may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both.

WIS. STAT. § 118.15(1), (5) (1969). The statute granted exemptions for good cause, as determined by the school board of the child's district of residence, for a physical or mental condition making attendance inappropriate, or for completion of the full four-year high school course. WIS. STAT. § 118.15(3) (1969). Wisconsin law allowed for substitute instruction, as approved by the state superintendent, at a location other than a school, provided that the instruction substituted was substantially equivalent to that given to children attending school in the child's district of residence. WIS. STAT. § 118.15(4) (1969).

109. *Yoder*, 406 U.S. at 207.

110. *Id.* at 234.

111. *Id.* at 218. The Chief Justice noted that the statute "carrie[d] with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent" because the Amish "must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." *Id.*

112. *See* Note, *supra* note 100, at 185 (observing that the Court in *Yoder* "did not specifically address the question of whether a *non-coercive* government action which has an impact on free exercise is unconstitutional" but stating that the language of the opinion demonstrates the Court's concern with the regulation's impact rather than its form).

113. *Id.* at 235-36. The Court observed that the Amish

> convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.

Id. at 235.

> compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.[114]

The Court also expressed some hostility regarding categorization of religious claims under the dichotomy between belief and action, stating that "belief and action cannot be neatly confined in logic-tight compartments."[115] Chief Justice Burger maintained that the Court had rejected the idea that religiously motivated conduct is always outside the scope of free exercise protections.[116] Significantly, the Court noted that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."[117]

2. *UNITED STATES v. LEE*

Edwin Lee, a farmer and carpenter, "failed to file the quarterly social security tax returns required for employers, withhold social security tax from his employees, or pay the employer's share of social security taxes" during the years 1970 to 1977.[118] The Internal Revenue Service assessed employment taxes in excess of $27,000 in 1978.[119] After remitting $91, representing payment for the taxes for the first quarter of 1973,[120] Lee filed for a refund.[121] Upon denial of his claim, he sued the United States, seeking declaratory and injunctive relief from payment of the tax, and alleging that payment of the tax was a violation of his free exercise rights.[122] Lee and his employees were members of the Old Order Amish religion.[123] According to his faith, it was sinful to accept social security benefits or contribute to the social security system.[124]

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114. *Id.* at 221.

115. *Id.* at 220.

116. *Id.* at 219-20.

117. *Id.* at 220. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Id.*

118. United States v. Lee, 455 U.S. 252, 254 (1982).

119. *Id.*

120. *Id.* at 254-55. The lower court's opinion indicates that the $91 payment represented "the assessment for the first quarter of 1977." Lee v. United States Gov't, 497 F. Supp. 180, 181 (W.D. Pa. 1980).

121. *Lee*, 497 F. Supp. at 181.

122. *Id.*

123. *Id.*

124. *Id.* at 181-82. Lee indicated that "it is a sin to fail to provide for or to allow another to provide for your own people." *Id.* at 181. His belief stemmed from a biblical passage: "But if any provide not . . . for those of his own house, he hath denied the faith and is worse than an infidel." *Id.* (quoting I *Timothy* 5:8).

After determining that Lee did not qualify for a statutory exemption,[125] the Court turned to the existence of a constitutionally required exemption.[126] Writing for the Court, Chief Justice Burger first assessed the burden imposed by the regulations at issue.[127] Noting that payment or receipt of social security benefits violates Amish religious beliefs, the Court found that "compulsory participation in the social security system" constituted a burden upon Lee's free exercise rights.[128] The Chief Justice also noted, however, that "the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system [was] very high."[129]

Finally, the Court addressed accommodation of the Amish beliefs.[130] Chief Justice Burger phrased the issue as "whether accommodating the Amish belief will *unduly interfere* with fulfillment of the governmental interest."[131] Applying this standard, the Court held that because the governmental interest was very high and granting an exemption would serve as a functional impediment to the sound operation of the tax system, the Constitution did not compel the granting of a religious exemption from the challenged regulations.[132]

Lee represents a doctrinal shift away from *Sherbert* and its progeny.[133] The decision seemed to broaden the first prong of *Sherbert*, the compelling interest requirement, by allowing the state to advance more generalized interests, rather than the narrowly defined interests

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125. *Lee*, 455 U.S. at 256. The statutory exemption provided:

> Any individual may file an application . . . for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

26 U.S.C. § 1402(g) (1982). The Court noted that Lee did not qualify for the exemption because he was not a self-employed individual. 455 U.S. at 256 n.5.

126. *Id.*

127. *Id.* at 256-57.

128. *Id.* at 257. The Chief Justice indicated that because "[i]t is not within 'the judicial function and judicial competence' . . . to determine whether appellee or the Government has the proper interpretation of the Amish faith," the Court accepted "appellee's contention that both payment and receipt of social security benefits [was] forbidden by the Amish faith." *Id.* (quoting Thomas v. Review Bd., 450 U.S. 707, 716 (1981)).

129. *Id.* at 258-59. The Court noted that the size and design of the social security system mandated compulsory participation by employers and employees. *Id.* at 258.

130. *Id.* at 259-61.

131. *Id.* at 259 (emphasis added).

132. *Id.* at 260.

133. *See* L. TRIBE, *supra* note 9, § 14-13, at 1260.

previously required.[134] *Lee* also seems to lower the means analysis required from a "least restrictive alternative" standard to an "unduly interfere" standard.[135] As courts have subsequently noted, the "unduly interfere" standard is looser than a "closely tailored" or "least restrictive alternative" standard.[136]

D. *Narrowing the Burden Concept*

The dramatic increase in the level of scrutiny applied to free exercise claims in the *Sherbert* line of cases expanded the scope of religious practices deemed protected.[137] Recently, a new vision of the free exercise clause has led the Court to significantly restrict its recognition of legally cognizable burdens, thereby reducing the protections afforded by the clause.[138] Two cases, *Bowen v. Roy*[139] and *Lyng v. Northwest Indian Cemetery Protective Association*,[140] exemplify this trend and set the stage for *Employment Division v. Smith*.

1. *BOWEN v. ROY*

Stephen J. Roy, a member of the Abenaki Indian Tribe,[141] sued to prevent the State of Pennsylvania "from requiring [him] to provide a social security number for [his] daughter, Little Bird of the Snow, as a condition for obtaining food stamps and welfare benefits."[142] According to his religious beliefs, governmental use of such a number would rob his daughter of her spirit.[143] Roy instituted an action

134. *Id.* at 1261. In *Lee*, the interest advanced by the United States involved "assuring mandatory and continuous participation" in the social security system as a whole. *Lee*, 455 U.S. at 259; *see also* L. TRIBE, *supra* note 9, § 14-13, at 1261.

135. L. TRIBE, *supra* note 9, § 14-13, at 1261.

136. *See infra* note 256 and accompanying text.

137. Lupu, *supra* note 60, at 937.

138. *Id.* The Supreme Court developed a two-prong test to aid in determining when a governmental action burdens religious conduct. *See* Casenote, 20 ST. MARY'S L.J. 427, 432-33 (1989). Under the first prong of the test, established in Sherbert v. Verner, 374 U.S. 398, 403-06 (1963), the claimant must show that the governmental action penalized his religious practices or compelled him to perform acts which violate his religious beliefs. The Court established the second prong in Wisconsin v. Yoder, 406 U.S. 208, 215-16 (1972), which required a claimant to prove that his beliefs are sincere, rise from a deep religious conviction, and are shared by an organized group.

139. 476 U.S. 693 (1986).

140. 485 U.S. 439 (1988).

141. *Bowen*, 476 U.S. at 696.

142. *Id.* at 712 (Blackmun, J., concurring in part). The requirements of the Aid to Families with Dependent Children Program and the Food Stamp Program direct state agencies to require, as a condition of eligibility for participation in the programs in question, that each aid recipient furnish his or her social security number to the appropriate state agencies. The regulations instruct state agencies to use social security numbers in the administration of the programs. 42 U.S.C. § 602(a)(25) (1982); 7 U.S.C. § 2025(e) (1982).

143. *Id.* at 696. Roy testified to his belief that

against the State of Pennsylvania seeking an exemption, on free exercise grounds, from the Social Security number requirement.[144]

The Court rejected Roy's claim, stating that "[t]he Free Exercise Clause cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[145] Chief Justice Burger noted that the statutory requirement did not, by threat of sanctions, affirmatively compel individuals to refrain from religiously motivated conduct.[146] Characterizing the requirement as neutral and uniformly applicable, the plurality found the regulations distinguishable from the regulations at issue in *Sherbert*.[147]

The Chief Justice refused to apply a strict scrutiny analysis, opting instead for a less rigid and exacting standard.[148]

> Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.[149]

The plurality described the governmental interest in preventing fraud as both legitimate and important.[150] It also found the regulatory requirement to be "a reasonable means of promoting that goal."[151] Significantly, the plurality held that although the state may choose, as a matter of legislative policy, to grant an exemption upon religious grounds, refusal to do so does not violate the free exercise clause.[152]

> technology [was] 'robbing the spirit of man.' In order to prepare his daughter for greater spiritual power, therefore, [he] testified . . . that he must keep her person and spirit unique and that the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control, [would] serve to 'rob the spirit' of his daughter and prevent her from attaining greater spiritual power.

Id.

144. *Id.* at 695.

145. *Id.* at 699. The Court held that the statute requiring a state agency to utilize Social Security numbers in administering the programs at issue does not violate the First Amendment. *Id.* at 701.

146. *Id.* at 703 (plurality opinion).

147. *Id.* at 708.

148. *Id.* at 707 ("The test applied in cases like *Wisconsin v. Yoder* is not appropriate in this setting. . . . The Government should not be put to [that] strict test . . . .") (citations omitted).

149. *Id.* at 707-08.

150. *Id.* at 709.

151. *Id.* at 710.

152. *Id.* at 712 ("[A] legislature might decide to make religious accommodations to a general and neutral system of awarding benefits, '[b]ut our concern is not with the wisdom of legislation but with its constitutional limitation.' ") (quoting Braunfeld v. Brown, 366 U.S. 599, 608 (1961)).

In order to reach this conclusion, the Chief Justice found that although the statutory requirements at issue constituted a burden upon Roy's religious practice, that impediment could not be characterized as a legally cognizable burden upon his free exercise rights:[153] "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual the right to dictate the conduct of the Government's internal procedures."[154] The regulations forced "a choice between securing a governmental benefit and adherence to religious beliefs."[155] These regulations, the plurality noted, are distinguishable from those which criminalize religiously motivated conduct or compel an individual to act contrary to his religious beliefs.[156] Since Roy failed to establish the existence of a legally cognizable burden upon his religious practices, the protections of the free exercise clause did not reach those practices and the Court did not have to apply the *Sherbert* standard.[157]

2. *LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION*

The Native American faith, rather than rely on doctrines or creeds as do many western religions, finds its religious impetus in the use of land itself.[158] "For at least 200 years and probably much longer, the Yurok, Karok, and Tolowa Indians have held sacred an approximately 25 square-mile area of land situated in what is today the Blue Creek Unit of Six Rivers National Forest in northwest California."[159] In the early 1970's, the United States Forest Service began preparing a management plan for this area.[160] The primary focus of the plan involved harvesting trees in the Blue Creek Unit[161] and building a seventy-five mile road linking the towns of Gasquet and Orleans

153. *See id.* at 701-04; *see also* Lupu, *supra* note 60, at 944.

154. *Bowen*, 476 U.S. at 700.

155. *Id.* at 706.

156. *Id.* at 703-05.

157. *See id.* at 707.

158. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 460-61 (1988) (Brennan, J., dissenting). Native Americans view the land itself as a living being. *Id.* at 461. Central to this view of land and its significance in religious ceremonies is its uniqueness. *Id.* "For respondent Indians, the most sacred of lands is the high country where, they believe, prehuman spirits moved with the coming of humans to the earth." *Id.*

159. *Id.* at 459. This area, the Chimney Rock section of Six Rivers National Forest, is known to those tribes as the "high country," an area of critical religious significance. *Id.* at 442.

160. *Id.* at 462 (Brennan, J., dissenting).

161. *Id.* A central aspect of the plan involved "the harvesting of 733 million board feet of Douglas fir over an 80 year period." *Id.*

in California.[162] The Forest Service planned to construct a six-mile section of that road through the Chimney Rock area,[163] primarily "to provide a route for hauling timber harvested under the management plan."[164] An Indian organization[165] challenged these portions of the management plan alleging, in part, that they violated the free exercise rights of its members.[166]

Writing for the majority, Justice O'Connor indicated that the burden placed upon the religious practices at issue was not "heavy enough to violate the Free Exercise Clause."[167] She characterized the claim as indistinguishable from the challenge in *Roy*,[168] noting that the governmental actions involved in each case, while interfering with an individual's ability to practice his or her faith, did not coerce individuals to violate their religious beliefs or penalize their religious conduct.[169] The Court maintained that "[t]he crucial word in the constitutional text is 'prohibit' "[170] and stated "that indirect coercion or penalties on the free exercise of religion, not just outright prohibi-

162. *Id.* at 442. The Forest Service labelled this portion of the project "the G-O road." *Id.*

163. *Id.* In order to assess the effects of the plan, the Forest Service prepared a draft environmental impact statement ("EIS"), issued in 1977, which discussed the proposed road upgrade. *Id.* The Forest Service, in response to comments on the draft EIS, "commissioned a study of American Indian cultural and religious sites in the area." *Id.* The study, completed in 1979, identified the areas in question as integral and indispensable in their religious significance. *Id.* It concluded that the proposed construction would cause irreparable harm to these sacred areas and recommended that the Forest Service not undertake construction of the road. *Id.* "In 1982, the Forest Service decided not to adopt this recommendation, and it prepared a final [EIS] for construction of the road." *Id.* at 443. The government rejected alternative sites for various reasons, including that the alternative sites would have intruded upon sacred areas. *Id.*

164. *Id.* at 462 (Brennan, J., dissenting). Construction of the road would also "enhance public access to the Six Rivers and other national forests, and allow for more efficient maintenance and fire control by the Forest Service itself." *Id.*

165. In addition to the Northwest Indian Cemetery Protective Association, the original parties to the suit included the Sierra Club, the Wilderness Society, California Trout, the Siskiyou Mountains Resource Council, the Redwood Region Audubon Society, and the Northcoast Environmental Center (non-profit corporations and nature organizations); the State of California acting through its Native American Heritage Commission; Jimmie James, Sam Jones, Lowana Branter, and Christopher H. Peters (individuals of American Indian heritage); and Timothy McKay and John Amadio (individual members of Sierra Club). Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 590 (N.D. Cal.), *later proceeding*, 589 F. Supp. 921 (N.D. Cal. 1983), *aff'd in part and vacated in part*, 764 F.2d 581 (9th Cir. 1985), *on reh'g*, 795 F.2d 688 (9th Cir. 1986), *rev'd and remanded sub nom.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

166. *Lyng*, 485 U.S. at 443.

167. *Id.* at 447.

168. *Id.* at 449 ("The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*.").

169. *Id.* at 450-51.

170. *Id.* at 451.

tions, are subject to scrutiny under the First Amendment."[171] Justice O'Connor, however, was careful to limit these statements asserting that

> [they do] not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.[172]

Citing its inability to determine the truth of religious beliefs, the Court declared that it could not weigh and compare the adverse effects of governmental actions in different cases.[173] The location of the line dividing unconstitutional prohibitions of free exercise from legitimate governmental conduct of its own affairs "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[174] The Court, therefore, focused on the form and not the effect of the governmental burden on religious conduct.[175]

Finally, Justice O'Connor insisted that government could not operate efficiently, if at all, if it were forced to satisfy the religious needs of every citizen.[176]

> The First Amendment must apply to all citizens alike, and it can give none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.[177]

In order to faithfully serve the competing interests at stake, the Court held that "government actions do not violate the free exercise clause unless they directly or indirectly operate to coerce . . . individuals to violate their religious beliefs."[178]

III. THE EROSION OF FREE EXERCISE

By narrowing the scope of legally cognizable burdens on free

171. *Id.* at 450.

172. *Id.* at 450-51. The Court distinguished cases like Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), on this basis. *Lyng*, 485 U.S. at 450.

173. *Id.* at 449-50.

174. *Id.* at 451.

175. *Id.* at 467 (Brennan, J., dissenting).

176. *Id.* at 452.

177. *Id.*

178. Note, *supra* note 100, at 179.

exercise rights, *Lyng* quietly began to degenerate a central portion of the constitutional bedrock underlying the free exercise clause. At the very least, the decision manifests "a distressing [majoritarian] insensitivity to Indian spiritual patterns."[179] "A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar."[180] If the erosion of free exercise occasioned by *Lyng* may be characterized as quiet, that engendered by *Smith* is nothing short of deafening.

A. Employment Division v. Smith

Alfred Smith, a sixty-six year-old Klamath Indian, was a member of the Native American Church.[181] He worked as a drug counselor for the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment ("ADAPT").[182] According to ADAPT's written policy, " 'misuse of alcohol and/or mind-altering substances by a staff member' is grounds for termination."[183] ADAPT discharged Smith after he ingested peyote at a church ceremony.[184] Peyote is classified as a controlled substance in Oregon, the possession and use of which constitutes a felony.[185] Smith subsequently applied for unemployment compensation benefits, which the state denied.[186] Characterizing his action as "work-related misconduct," the Employment Appeals Board found approval of Smith's application inapposite

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179. Lupu, *supra* note 60, at 945.

180. Goldman v. Weinberger, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting).

181. Smith v. Employment Div., 301 Or. 209, 211, 721 P.2d 445, 446 (1986).

182. *Id.*, 721 P.2d at 445.

183. *Id.*, 721 P.2d at 446 (quoting ADAPT's written personnel policy).

184. *Id.* at 212, 721 P.2d at 446.

185. *Smith*, 110 S. Ct. 1595, 1597 (1990).

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by ORS 475.005 to 475.285 and 475.991 to 475.995. Any person who violates this subsection with respect to:
>
> (a) A controlled substance in Schedule I, is guilty of a Class B felony.

OR. REV. STAT. § 475.992(4)(a) (Supp. 1990). A controlled substance is defined as "a drug or its immediate precursor classified in Schedules I through V under the Federal Controlled Substances Act, 21 U.S.C., Sections 811 to 812, as modified under ORS 475.035." OR. REV. STAT. § 475.005(6) (Supp. 1990). In Oregon, "Schedule I contains the drug peyote, a hallucinogen derived from the plant Lophophorawilliamsii Lemaire." *Smith*, 110 S. Ct. at 1597 (citing OR. ADMIN. R. 855-80-021(3)(s) (1988)).

186. *Smith*, 110 S. Ct. at 1598.

to statutory restrictions.[187] Smith challenged the statute as violative of his first amendment rights.[188]

In *Smith*,[189] the Supreme Court held that because Oregon could constitutionally prohibit the ingestion of peyote, the state may deny unemployment compensation benefits to individuals discharged for using that drug without violating the free exercise clause.[190] Setting the opinion in terms of the *Reynolds* dichotomy between belief and action, Justice Scalia stated that "the right of free exercise does not relieve an individual of the obligation to comply" with an otherwise valid law prohibiting conduct a state may freely regulate.[191] He distinguished cases in which the free exercise clause barred application of a neutral, generally applicable law to religiously motivated conduct as hybrid cases involving operation of "the Free Exercise Clause in conjunction with other constitutional protections."[192]

The Court refused to review the regulation at issue under the

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187. *Id.*; *see also Smith*, 301 Or. at 214-15, 721 P.2d at 448. Oregon law provided:

> An individual shall be disqualified from the receipt of benefits until the individual has performed service in employment subject to this chapter, or for an employing unit in this or any other state or Canada or as an employe of the Federal Government, for which renumeration is received which equals or exceeds four times the individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred, if the authorized representative designated by the assistant director finds that the individual:
>
> (a) Has been discharged for misconduct connected with work . . . .

OR. REV. STAT. § 657.176(2)(a) (1987).

> [M]isconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employe. An act that amounts to a wilful disregard of an employer's interest, or recurring negligence which demonstrates wrongful intent is misconduct. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct for purposes of denying benefits under ORS 657.176.

OR. ADMIN. R. 471-30-038(3) (1986).

188. *Smith*, 301 Or. at 213, 721 P.2d at 447. Smith also relied upon his "freedom of worship" and "freedom of religious opinion" rights as protected by the Oregon Constitution. *Id.* at 212-13, 721 P.2d at 446-47. Those sections provide:

> Section 2. Freedom of Worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience.

OR. CONST. art. I, §§ 2, 3.

189. The *Smith* case reached the Supreme Court on two separate occasions. For a description of the procedural history of *Smith*, see *supra* notes 20-30 and accompanying text.

190. *Smith*, 110 S. Ct. at 1606.

191. *Id.* at 1600.

192. *Id.* at 1601.

Sherbert strict scrutiny analysis.[193] Indicating that the Court developed *Sherbert* "in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct," Justice Scalia stated that *Sherbert* should not apply outside the unemployment compensation field, restricting that decision to its narrow holding.[194] He specifically excluded from *Sherbert*'s domain free exercise challenges involving neutral, generally applicable criminal prohibitions on particular forms of conduct.[195] Such situations, he insisted, are properly analyzed under the *Reynolds* standard.[196]

Justice Scalia also criticized application of the compelling governmental interest requirement as producing, in this case, a "private right to ignore generally applicable laws."[197] He labelled this result "a constitutional anomaly" and asserted that application of this requirement cannot be limited to situations involving prohibitions of conduct central to an individual's religion.[198] As the Court has often insisted, judges should not involve themselves in deciding exactly which practices are central to a particular religion.[199]

Justice Scalia maintained that values which are protected in the Bill of Rights are not, therefore, removed from the political process.[200] He asserted a strong preference for political resolution of questions involving exemptions for religiously motivated conduct which violates generally applicable laws.[201]

> [T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of

193. *Id.* at 1603. "Almost a dozen Supreme Court cases in the last twenty-five years have applied the test articulated in *Sherbert v. Verner* . . . ." *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 200 (1990) [hereinafter *Leading Cases*].

194. *Smith*, 110 S. Ct. at 1603. Stated narrowly, "*Smith* holds that the free exercise clause is never violated by laws that do not regulate religious beliefs as such, are generally applicable, implicate fewer than two constitutional rights, and punish conduct that a state has chosen to criminalize." *Leading Cases*, *supra* note 193, at 201.

195. *Smith*, 110 S. Ct. at 1603.

196. *Id.* at 1602; *see also supra* text accompanying notes 60-61.

197. *Id.* at 1604.

198. *Id.*

199. *Id.*

200. *Id.* at 1606.

201. *Id.*

all laws against the centrality of all religious beliefs.[202]

Justice O'Connor concurred in the Court's judgment, but disagreed with Justice Scalia's opinion, declaring that it "dramatically departs from well-settled First Amendment jurisprudence."[203] Noting that the first amendment makes no distinction between religious belief and conduct, she challenged the *Reynolds* dichotomy between belief and action.[204] Justice O'Connor argued that the free exercise clause must at least presumptively protect religious conduct as well as religious belief.[205] For Justice O'Connor, presumptive protection can best be guaranteed by application of a strict scrutiny standard to free exercise challenges to governmental regulations which burden religiously motivated conduct.[206]

The concurrence also challenged the Court's narrow reading of the free exercise clause.[207] Specifically, Justice O'Connor cited *Cantwell* and *Yoder* for the proposition that the free exercise clause may forbid the "application of a generally applicable prohibition to religiously motivated conduct."[208] She asserted that those cases the Court labelled as hybrid, including *Cantwell* and *Yoder*, expressly based their holdings on the free exercise clause.[209]

Justice O'Connor described relief from a governmentally imposed burden upon religious conduct as "the essence of a free exercise claim."[210] She maintained that the political process is not an appropriate forum in which to exclusively accommodate disfavored religious beliefs,[211] noting that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the

202. *Id.*

203. *Id.* at 1606 (O'Connor, J., concurring in judgment).

204. *Id.* at 1608 (recognizing that freedom to act cannot be absolute and that a strict scrutiny standard best respects the interests involved).

205. *Id.*

206. *Id.* at 1608-09. The *Sherbert* test "effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order.'" *Id.* at 1609 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

207. *Id.* at 1609; *see also id.* at 1600 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

208. *Id.* at 1609; *see also* Cantwell v. Connecticut, 310 U.S. 303, 304-07 (1940); Wisconsin v. Yoder, 406 U.S. 205, 214-34 (1972).

209. *Smith*, 110 S. Ct. at 1609 (noting that the Court rejected the claims after applying a balancing test).

210. *Id.* at 1610.

211. *Id.* at 1613.

courts."[212] The compelling interest test, criticized by the majority, serves to uphold the values implicit in the first amendment.[213]

Having established her theoretical basis, Justice O'Connor reviewed Smith's claim through the use of the *Sherbert* strict scrutiny test.[214] She phrased the inquiry as "whether exempting [Smith] from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.' "[215] Although she called the question "close," she found that the government's compelling interests in preventing the physical harm caused by the use of the controlled substance and in preventing the trafficking in such substances justified the burden placed upon Smith's religious practice.[216] She insisted that granting an exemption would seriously impair fulfillment of the state's compelling interests.[217]

The dissent, led by Justice Blackmun, characterized the Court's opinion as "effectuat[ing] a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."[218] Justice Blackmun agreed with Justice O'Connor's theoretical stance, but differed with the results of her analysis.[219] Primarily, he challenged the balancing undertaken by Justice O'Connor as "distort[ing] the weighing process in the State's favor."[220] He asserted that the state's interest must be narrowed to place it in proper perspective in relation to the individual interest at stake.[221] The state's interest involved in the balancing process, therefore, cannot be its broad interest in fighting a "war on drugs," but its "interests in refusing to make an exception for the religious ceremonial use of peyote."[222]

Justice Blackmum, noting that in order to be sufficiently compelling to outweigh a free exercise claim, a governmental interest cannot be merely abstract, symbolic, or speculative, characterized the state's asserted interests, properly narrowed, as both symbolic and speculative.[223] First, Oregon could not assert an interest in faithful applica-

212. *Id.* (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).
213. *Id.* at 1613.
214. *Id.* For a description of the *Sherbert* test, see *supra* note 100 and accompanying text.
215. *Smith*, 110 S. Ct. at 1614 (quoting United States v. Lee, 455 U.S. 252, 259 (1982)).
216. *Id.*
217. *Id.*
218. *Id.* at 1616 (Blackmun, J., dissenting).
219. *Id.*
220. *Id.* at 1617.
221. *Id.*; *see also* Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943) ("When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane . . . [or else] we may decide the question in advance in our very way of putting it.").
222. *Smith*, 110 S. Ct. at 1617 (Blackmum, J., dissenting).
223. *Id.* at 1617-18.

tion of its criminal prohibitions because it did not attempt to enforce its prohibition on religious use of peyote.[224] That interest, therefore, was merely symbolic.[225] Second, Oregon's asserted interests in protecting the health and safety of its citizens, in abolishing drug trafficking, and in enforcement of its drug laws were speculative[226] because the state failed to introduce evidence that the use of peyote in religious ceremonies was harmful or dangerous.[227] Further, there was "practically no illegal traffic in peyote."[228] Finally, Justice Blackmun noted that the Court has consistently rejected general claims regarding uniform, fair, and certain enforcement of laws.[229] He dismissed the state's fear that a flood of claims would follow from granting an exemption for religious peyote use because that dilemma had not arisen in states which had granted such exemptions.[230]

Having specified the state's asserted interests, Justice Blackmun concluded that those interests were not sufficiently compelling to justify the burden placed upon Smith's religious use of peyote.[231] He called attention to the federal policy, as established in the American Indian Religious Freedom Act, of safeguarding the religious freedom of Native Americans.[232] He maintained that the Court "must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be. Otherwise both the First Amendment and the stated policy of Congress will offer the Native Americans merely an unfulfilled and hollow promise."[233]

B. Church of the Lukumi Babalu Aye v. City of Hialeah

Members of the Church of the Lukumi Babalu Aye practice the

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224. *Id.* at 1617 ("Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote.").

225. *Id.*

226. *Id.* at 1618-21.

227. *Id.* at 1618.

228. *Id.* at 1620 ("Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.").

229. *Id.*

230. *Id.*; *see also infra* note 341 (listing states that have granted exemptions).

231. *Smith*, 110 S. Ct. at 1622.

232. *Id.* The policy established in the American Indian Religious Freedom Act states:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aluet, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996 (1988).

233. *Smith*, 110 S. Ct. at 1622.

Yoruba religion, which originated in Western Africa almost 4000 years ago and is commonly known as Santeria.[234] "Herbal medicine, prayer, protective charms, chants, magic, marriage and death rites, and food and animal offerings are a part of this religion."[235] While practiced openly in Nigeria even today, Santeria remains a stigmatized religion.[236] As a result, "[m]ost religious activity takes place in individual homes by extended family groups."[237]

In 1987 the Church bought land in a commercial area in the City of Hialeah in order to open a public place of worship for Santeria practitioners.[238] Shortly after the Church began preparing the land for occupancy, the city council passed four ordinances aimed at regulating animal sacrifice within city limits.[239] In response, the Church

234. Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467, 1469-70 (S.D. Fla. 1989). Yoruba came to the Western Hemisphere, primarily to the eastern region of Cuba, with slavery during the 16th, 17th, and 18th centuries. *Id.* at 1469.

235. Church of the Lukumi Babalu Aye v. City of Hialeah, 688 F. Supp. 1522, 1524 (S.D. Fla. 1988); *see also supra* note 2 and accompanying text.

236. *Church of the Lukumi*, 723 F. Supp. at 1469-70. The Spanish government persecuted practitioners of the Yoruba faith in the New World. *Id.* at 1469. In order to escape this persecution, and the stigma attached to the practice of a socially unaccepted religion, slaves began to express their faith through the use of Catholic saints. *Id.* at 1469-70. The Santeria religion developed from this blending of religious practices. *Id.* at 1470. The religion eventually came to the United States with refugees from the Cuban revolution in the late 1950's and early 1960's. *Id.* "Santeria remains an underground religion and the practice was not, and is not today, socially accepted by the majority of the Cuban population." *Id.* Due in large part to the fear of discrimination, the practice of "[t]he religion has taken on a private, personal tone that is very different than the way that it is practiced in Nigeria." *Id.*

237. *Id.* at 1470.

238. *Id.* at 1476.

239. *Id.* The first ordinance, passed as an emergency ordinance, adopted the language of FLA. STAT. §§ 828.02-.25, the Florida anti-cruelty statute, and established penalties for its violation. Hialeah, Fla., Ordinance 87-40 (June 9, 1987). The second ordinance prohibited the possession of animals intended for slaughter or sacrifice. It excepted any licensed establishments slaughtering animals for food purposes where such activity is properly zoned and otherwise permitted by state and local law. Hialeah, Fla., Ordinance 87-52 (Sept. 8, 1987). The third ordinance prohibited animal sacrifice within Hialeah city limits and empowered registered groups to investigate and assist in the prosecution of individuals or groups violating the ordinance. Hialeah, Fla., Ordinance 87-71 (Sept. 22, 1987). The fourth ordinance prohibited the slaughter of animals on any premises within the City of Hialeah, except those properly zoned as slaughterhouses, and empowered registered groups to investigate and assist in the prosecution of individuals or groups violating the ordinance. Hialeah, Fla., Ordinance 87-72 (Sept. 22, 1987).

The city also passed three resolutions concerning animal sacrifice and religious practices in general. The first resolution reiterated the City's "commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Hialeah, Fla., Resolution 87-66 (June 9, 1987). The second resoultion established the City's policy opposing the ritual sacrifice of animals and stated the City's intent to prosecute any individual or organization engaging in that practice. Hialeah, Fla., Resolution 87-90 (Aug. 11, 1987). The third resolution set forth the criteria for approval of animal protection associations seeking to register with the City in order "to participate in the investigation and

sued the City of Hialeah, the mayor, and the city councilmen alleging violations of its members' first, fourth, and fourteenth amendment rights.[240]

After dismissing state statutory preemption and section 1983 claims raised by the plaintiffs,[241] the district court, through Judge Spellman, addressed the Church's first amendment challenge to the ordinances.[242] The court recognized the *Reynolds* dichotomy by analogizing the requisite freedom of religion analysis to freedom of speech analysis where "the manner in which the religion is conducted rather than the beliefs of those seeking to exercise it" are at issue.[243] Judge Spellman adopted the analytical framework employed by the Eleventh Circuit, which provides that "[b]efore the Court balances competing governmental and religious interests, the government's action faces two threshold tests: the law must regulate conduct rather than belief, and it must have both a secular purpose and effect."[244]

The court found that the city met both threshold tests. First, in prohibiting animal sacrifice, the ordinances regulated conduct and not belief.[245] Further, the ordinances did not violate the secular purpose test because they were not aimed at the plaintiffs, but rather they attempted to "address the issue of animal sacrifice as a whole."[246]

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assist in the prosecution of violations of the animal cruelty ordinances." Hialeah, Fla., Resolution 87-109 (Sept. 22, 1987).

240. *Church of the Lukumi*, 688 F. Supp. at 1524. The Church sued the mayor and city councilmen in their individual capacities for various acts, including: calling a council meeting to discuss granting the Church a permit to use the acquired land as a place of worship, adopting ordinances relating to the ritual sacrifice of animals, and "publicly inciting persons to appear at a public hearing of the City Council for the purpose of presenting protests against the Santeria religion." *Id.* Plaintiffs also sought to impose liability for acts of the police, the city sanitation department, and Florida Power & Light. *Id.* at 1528. Finding that the mayor and city councilmen were "entitled to absolute legislative immunity in their individual capacities," the court held that these individuals could not be "held personally liable for monetary damages stemming from the allegedly unconstitutional activities." *Id.* at 1529.

241. The court dismissed plaintiffs' argument that the city ordinances conflicted with state animal cruelty statutes, FLA. STAT. §§ 828.02-.25, and were thus statutorily preempted. *Church of the Lukumi*, 723 F. Supp. at 1479-82. Further, after addressing the free exercise challenge to the statutory scheme, the court held that the plaintiffs failed to prove discrimination by the City and dismissed their claim under 42 U.S.C. § 1983 (1988). 723 F. Supp. at 1487-88.

242. *Id.* at 1482-88.

243. *Id.* at 1483.

244. *Id.* (quoting Grosz v. City of Miami Beach, 712 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984)).

245. *Id.*

246. *Id.* The City admitted that it enacted the ordinances in response to the opening of the Church, but the court found that the announcement merely triggered the legislative response. *Id.* The court indicated that the City responded instead to the plaintiff's plan to conduct animal sacrifices. *Id.* Judge Spellman also stated that "[t]he ordinances do not on their face violate the secular purpose test." *Id.*

They did not violate the secular effect test because, although they did have an impact on the Church's religious conduct, that effect was "incidental to the ordinances' secular purpose and effect."[247] Finally, before a balancing of the governmental and religious interests at stake, the plaintiffs had to show that the governmental regulations imposed a legally cognizable burden upon their religious practices.[248] Noting that animal sacrifice is an integral part of the practice of Santeria, the court found that the ordinances did burden the plaintiffs' religious practices and undertook the requisite balancing analysis, juxtaposing the plaintiffs' constitutional rights and the City's asserted interests.[249]

The court found the three separate interests the city asserted in support of the ordinances to be compelling.[250] First, the court noted that the ordinances protected the health and safety of the public and the members of the Church, which the religious practices threatened due to the possible spread of disease and infestation.[251] Second, the court found that the ordinances served to protect children from the adverse psychological effects which may result from exposure to animal sacrifice.[252] Finally, the court acknowledged the City's interest in preventing animal cruelty.[253] Judge Spellman also noted that the City had "a compelling interest in prohibiting the slaughter or

247. *Id.* at 1484.

248. *Id.* The court stated that the " 'balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity.' " *Id.* (quoting *Grosz*, 721 F.2d at 734). The court indicated, however, that the "[p]laintiffs must identify the costs on their religious activities imposed by the government, and these costs must be the consequence of legally cognizable infringements on religious freedom." *Id.*

249. *Id.* at 1485-87.

250. *Id.*

251. *Id.* at 1485. Individuals sometimes find animal carcasses, along with religious paraphernalia, in public places, generally "near rivers or canals, by four-way stop signs, under certain palms, and sometimes in people's lawns or on doorsteps." *Id.* at 1474 & n.29. The court indicated that animal remains "attract flies, rats and other animals" and that diseases can spread between animals, and to humans. *Id.* at 1474-75. Judge Spellman noted that courts have routinely upheld bans on religious conduct when that conduct posed a threat to public health and safety. *Id.* at 1485. The court, however, did state that "[t]here have been no instances documented of any infectious disease originating from the remains of animals left in public places." *Id.* at 1474.

252. *Id.* at 1485-86. The court accepted the presence of a "correlation between the observation of violence by children, especially when conducted by persons of perceived high status, and the likelihood of the development of violent and aggressive behavior." *Id.* at 1475. The court stated that the risk to the psychological well-being of children outweighs countervailing religious rights. *Id.* at 1486.

253. *Id.* at 1486. In labelling the plaintiffs' method of killing as inhumane, the court noted:

> Expert testimony established that the method of killing is unreliable and not humane, and that the animals, before being sacrificed, are often kept in conditions that produce a great deal of fear and stress in the animal. Often the animals are kept in filthy, overcrowded conditions, and sometimes are not given

sacrifice of animals within areas of the City not zoned for slaughterhouse use."[254]

Having identified the compelling governmental interests served by the ordinances, the court discussed the granting of a religious exception and the standard that it must apply in making such a determination.[255] "An ordinance will withstand constitutional challenge if an exception for religious purposes will 'unduly interfere with fulfillment of the governmental interest.' "[256] Judge Spellman, insisting that an "exception would, in effect, swallow the rule,"[257] stated that an exception would be unenforceable and would defeat the government's compelling interests.[258] The court balanced the interests at stake in the City's favor[259] and refused to require an exception for religious purposes.[260]

IV. ANALYZING *SMITH* AND *CHURCH OF THE LUKUMI*: REASSESSING THE MAJORITARIAN PARADIGM

The decisions in *Smith* and *Church of the Lukumi* represent interesting analytical counterparts. While both cases uphold neutral, generally applicable laws that proscribe religious conduct, they do so through application of markedly different methodologies. In *Smith* the Court refused to apply a strict scrutiny standard in reviewing the challenged governmental regulations,[261] but the District Court

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adequate food or water. Additionally, the animals perceive both pain and fear during the actual sacrifice ceremony.

Id.

254. *Id.* at 1486. The court indicated that the City's interest in prohibiting such slaughter in residential areas and private homes was particularly strong. *Id.*

255. *Id.* at 1486-87.

256. *Id.* at 1486 (quoting United States v. Lee, 455 U.S. 252, 259 (1982)). Judge Spellman noted that the "unduly interfere" standard is looser than a "closely tailored" or "least restrictive means" test. *Id.*

257. *Id.* at 1487.

258. *Id.* The court explained that any exemption would create administrative or enforcement problems, primarily because the practice of animal sacrifice is not limited to the Santeria religion. *Id.* Enforcement agencies would experience grave difficulties in determining responsibility for a particular sacrifice. *Id.* Finally, the court indicated that the plaintiffs did not prove that their proposed alternative would satisfy the governmental interests at stake. *Id.* at 1486.

259. *Id.* ("A balance of the compelling government interest served by the ordinances against the burden of Plaintiffs of not being allowed to ritually sacrifice animals, with all of the attendant risks to public health and animal welfare, must be resolved in favor of the City.").

260. *Id.* ("[A]ny effort to exempt purportedly religious conduct from the strictures of the City's laws would significantly hinder the attainment of those compelling interests.").

261. The Court limited strict scrutiny review of free exercise challenges to laws of general applicability to hybrid cases involving free exercise concerns raised in conjunction with other constitutional protections. Employment Div. v. Smith, 110 S. Ct. 1595, 1601 (1990); *see also supra* note 195 and accompanying text.

applied that standard in *Church of the Lukumi*.[262] At best, the Supreme Court's holding in *Smith* signals a "cutback on the scope of protection afforded by the First Amendment's Free Exercise Clause."[263] At its worst, "*Smith* reduces the free-exercise clause to a cautious redundancy."[264]

As indicated by Justice O'Connor in concurrence[265] and Justice Blackmun in dissent,[266] the downfall of *Smith* results from the Court's decision to turn a blind eye to *Sherbert* and its progeny.[267] In so doing, the Court effectively turned the free exercise clause on its head by emphasizing majoritarian interests in the political process rather than individual and minority interests in liberty of conscience. The Court's decision finds its theoretical basis in the majoritarian paradigm,[268] which dominates constitutional law and scholarship.[269] Although popular, reliance upon the majoritarian paradigm provides little protection for constitutionally guaranteed individual rights. The paradigm defines democracy as majority rule and establishes judicial neutrality and deference as the benchmark principles of constitutional jurisprudence.[270] By assuming this theoretical stance in questions of individual autonomy and carrying it to its logical conclusion, the Court essentially emasculates itself in an area where its passionate participation is indispensable.[271]

This Section will review the majoritarian paradigm and its effect on judicial review. Further, it will analyze *Smith* and *Church of the Lukumi* within the walls of the paradigm and suggest the application

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262. *See supra* notes 244-60 and accompanying text.

263. *Religious Liberty Claims in Minnesota Subject to Compelling State Interest Test*, 59 U.S.L.W. 1082 (Nov. 27, 1990).

264. Laycock, *Watering Down the Free-Exercise Clause*, 107 CHRISTIAN CENTURY, May 16-23, 1990, at 519, col. 2 (indicating that "[a]fter *Smith*, the free-exercise clause emphasizes that religious speech is important to the speech clause, that religious discrimination is important to the equal-protection clause, and that religious education is important to the unenumerated right of parents to direct their children's education").

265. *See supra* notes 207-13 and accompanying text.

266. *See supra* notes 218 & 233 and accompanying text.

267. *See* Minnesota v. Hershberger, 462 N.W.2d 393, 396 (Minn. 1990) (stating that the *Smith* holding "apparently does away with the traditional compelling state interest test for laws burdening the exercise of religion standing alone").

268. Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 61 n.77 (1989) (defining the majoritarian paradigm as "the philosophy . . . that American democracy means majority rule; that the legislatures and executives are majoritarian; but the Court is counter-majoritarian and that as a result, the Court should invalidate government actions only when they violate clear constitutional principles that exist apart from the preferences of the Justices").

269. *Id.* at 61.

270. *Id.* at 64-65.

271. *Id.* at 57 ("one obvious consequence of the [majoritarian] jurisprudence is that the government generally wins constitutional cases").

of a strengthened standard of review in free exercise challenges—a standard which will operate within the boundaries of the paradigm.

A. *The Evolution of the Majoritarian Paradigm*

Various legal scholars have characterized the nature of judicial review as anti-democratic.[272] "The power of judges to decide important questions of public policy seems to run counter to the democratic ideal that reserves such decisions to democratically elected representatives, either in the legislative or the executive branches of the government."[273] Two historical forces, "the demise of natural rights theory in constitutional decisionmaking and a shift in the concept of democracy," have served as the catalysts for the widespread adoption of a theory which views judicial review through majoritarian lenses.[274]

The framers of the United States Constitution "believed that individuals possess natural rights"—rights that existed before, and were embedded in, the Constitution.[275] Recognition of the existence of such rights impliedly limited the constitutional scope of legislative enactments.[276] Consequently, the Supreme Court expressed minimal concern over the "nature of judicial review."[277] Eventually, however, natural rights jurisprudence yielded to the theory of legal realism.[278] The judiciary and legal scholars came to view rights previously labelled "natural," as mere value choices more properly adopted in a majoritarian fashion.[279]

Through their writings, the framers also evinced a "considerable distrust of democracy and majoritarianism"[280] and designed the government accordingly.[281] "Under the original Constitution, the Presi-

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272. *Id.* at 62 (citing Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Horowitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987)).

273. Redlich, *Judges As Instruments of Democracy*, in THE ROLE OF COURTS IN SOCIETY 149 (S. Shetreet ed. 1988); *see also* Graglia, *"Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789, 798 (1987) ("Plato undertook to defend government by philosopher-kings. Our system of government by lawyer-kings in judicial robes, however, is openly defended by no one. It is in fact indefensible in the American context, in which notions of local autonomy and government by the consent of the governed retain strong appeal.").

274. Chemerinsky, *supra* note 268, at 64-65.

275. *Id.* at 65.

276. *Id.* at 65-66.

277. *Id.* at 66.

278. *Id.*

279. *Id.* at 89.

280. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 661 (1988) (noting that "[t]he terms of the Constitution and the writings surrounding its framing reveal" this distrust).

281. Chemerinsky, *supra* note 268, at 65.

dent was chosen by the electoral college, the Senate was comprised of two Senators elected by each state legislature, and the federal judiciary was selected by the President, was approved by the Senate, and was assured life tenure."[282] Over time, however, popular conceptions of American democracy, which defined the system by majority rule, faded and were replaced by a pluralistic conception of the system, which established majoritarianism as "an end in itself."[283] Under this definition, institutional decisions lacking a majoritarian flavor are undemocratic.[284] Judicial invalidation of legislation enacted by the more representative branches, when coupled with the belief that no true values exist, compels the conclusion that "judicial review is nothing but the substitution by unelected judges of their values for those of the popularly elected legislatures."[285]

B. *Strict Scrutiny: A Product of the Paradigm*

Within the majoritarian framework, jurists and scholars have developed various methods by which to define the judicial role and assess the proper scope of judicial review.[286] A most celebrated method traces its origin to Justice Stone's famous footnote four in *Carolene Products*,[287] the birthplace of strict scrutiny review.[288] The method espoused by the footnote "offered a way to define the judicial role that seemed consistent with a commitment to majoritarian democracy."[289] The theory underlying the method generally addresses the dual concerns animating current constitu-

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282. *Id.*

283. *Id.* at 67.

284. *See* Sadurski, *Judicial Protection of Minorities: The Lessons of Footnote Four*, 17 ANGLO-AM. L. REV. 163, 165 (1988) ("[I]f open-ended clauses of the constitution require substantive value judgments, why should the nine unelected, unrepresentative and life-tenured lawyers be entrusted with the right to replace the value judgments of the duly elected representatives of the people?"). As Judge Gibbons notes:

> For [those who criticize judicial review as inconsistent with democrary], democracy is not seen as an unfolding historical reality, to be understood at each point in its evolution, but as an eternal absolute defined in terms of majority will. This abstract and pure conception is seen as a value to be upheld at all costs in all circumstances. The object of all government, for such purists, is the attainment of that value in preference to any other. That being the case, any instrumentalities of government that frustrate the attainment of that value must be suspect, if not downright evil.

Gibbons, *Keynote Address*, 56 N.Y.U. L. REV. 260, 260 (1981).

285. Chemerinsky, *supra* note 268, at 68.

286. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938); R. BERGER, GOVERNMENT BY JUDICIARY (1977); J. ELY, DEMOCRACY AND DISTRUST (1980).

287. *Carolene Prods. Co.*, 304 U.S. at 152 n.4; *see also* Powell, *supra* note 98, at 1089. For the text of the footnote, see *supra* note 6.

288. *See supra* note 98.

289. Chemerinsky, *supra* note 268, at 68.

tional jurisprudence: the demise of natural law and judicial countermajoritarianism.[290]

The theory holds that "[o]ur democracy rests on the fundamental proposition that governmental actions derive their legitimacy from the consent of the governed or, more specifically, from the consent of a majority of those governed."[291] Various groups, however, cannot participate effectively in the political process and, therefore, the process cannot be trusted to ensure their protection.[292] Thus, the judiciary must function in a countermajoritarian[293] fashion in protecting the individual rights of members of those groups.[294] The judiciary's function in this capacity serves to ameliorate the dysfunctional results of the otherwise legitimate majoritarian system.[295] Accordingly, the judiciary

> has two special missions in our scheme of government:
>
> First, to clear away impediments to participation, and ensure that all groups can engage equally in the political process; and
>
> Second, to review with heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect

290. *See supra* notes 272-85 and accompanying text. The *Carolene Products* method addresses "natural law" concerns by noting that judicial review corrects defects in the process through which the legislature makes its substantive judgments, not the judgments themselves. Sadurski, *supra* note 284, at 166. The *Carolene Products* method addresses judicial countermajoritarianism concerns by indicating that judicial review serves as a check upon the functioning of the majoritarian system. *Id.* "[T]he only statutes which can be truly legitimate are those which are the product of a genuine majority will *and* where no group is ignored merely because it lacks adequate access to democratic decision-making." *Id.* (emphasis in original).

291. Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 589 (1985); *see also* Powell, *supra* note 98, at 1088-89 ("Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and the state legislatures should be allowed to do as they choose.").

292. Powell, *supra* note 98, at 1089. These are the groups Justice Stone labelled "discrete and insular minorities." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

293. While courts are generally viewed as acting in a countermajoritarian capacity in this area, some scholars differ sharply from this position.

> Judges are part of the democratic dialogue. They are not alien countermajoritarians roaming over the majoritarian political landscape. They are not removed from democracy but are an essential component of it, and in many instances more representative of the popular will than the other branches. All are partners in the common endeavor of representative government.

Redlich, *supra* note 273, at 156.

294. *Id.*; *see also* Conkle, *supra* note 291, at 590 ("For the Court to recognize constitutional rights is for it to annul the challenged legislative or executive actions, actions taken, at least presumptively, with majoritarian consent.").

295. Chemerinsky, *supra* note 268, at 68 ("The judiciary's task was to facilitate effective democratic decisionmaking by ensuring full participation and preventing incumbents from frustrating electoral accountability."); *see also* Sadurski, *supra* note 284, at 166.

themselves in the legislative process.[296]

Viewed in this light, "[t]he *Carolene Products* philosophy of judicial review accept[s] the premises that democracy means majority rule and that a democratic society cannot accept value imposition by judges."[297]

C. *Majoritarianism and Strict Scrutiny*

The Supreme Court seems increasingly committed to operating primarily within an institutional framework erected upon a majoritarian substructure.[298] While searching for an objective wall upon which to hang the Constitution, the Court has, in a sense, repainted the canvas by framing its language in a way that excludes the moral inspiration that served as the impetus for its creation. "Without judicial enforcement, the Constitution is little more than the parchment that sits under the glass in the National Archives."[299] After *Smith*, however, responsibility for the protection of minority interests, at least in the area of freedom of religious conduct, falls, not upon the judiciary, but upon the "majoritarian"[300] institutions which failed the minority in the first place.[301] Even in a society grounded upon a majoritarian definition of democracy, such an institutional posture is, if anything, absurd.

1. THE NEED FOR STRICT SCRUTINY REVIEW

> Lawyers have a responsibility to point out the very basic fact that, in determining whether an individual has a right to express him- or herself in a particular way, what the majority thinks about such expression is largely irrelevant. That is the essential heart of

296. Powell, *supra* note 98, at 1089. Justice Powell indicated that he did not "embrace this theory one hundred percent" but neither did he condemn it. *Id.*

297. Chemerinsky, *supra* note 268, at 69.

298. *Id.* at 61-62; *see also* Texas v. Johnson, 110 S. Ct. 2533, 2555 (1989) (Rehnquist, C.J., dissenting).

> Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.
>
> Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case."

Id. (citation omitted).

299. *Id.* at 97.

300. For interesting discussions concerning the characterization of the politically accountable branches as "majoritarian," see *id.* at 77-83, and Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974).

301. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1606 (1990).

> the Bill of Rights—protection against government acting not on its own initiative but at the behest of a tyrannical majority.[302]

It is "[p]recisely because the Court is not a majoritarian institution [that] it has a constitutional responsibility to carefully scrutinize majority-passed legislation that directly impinges upon the exercise of . . . rights by minorities."[303] Although the *Smith* Court correctly noted that values protected in the Bill of Rights are not thereby removed from the political process,[304] the Court failed to recognize that these values should not be resigned solely to that process. "The objective of bills of rights is to give special protection for rights which are felt to be of fundamental importance."[305] The judicial branch must be entrusted with the duty of providing special protection where fundamental rights are at stake. Within a majoritarian framework such protection can only come from strict scrutiny review.

The Court dismissed this duty in *Smith* by focusing on the neutral, generally applicable nature of the regulations involved.[306] There is, however, nothing talismanic about neutral, generally applicable laws.[307] "[L]aws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[308] The danger may be greater because "no legislature would be naive enough openly to suppress a religious group without using a facially neutral gerrymander."[309]

The Court recognized that its holding placed unpopular religious practices at a relative disadvantage, but dismissed this result as an "unavoidable consequence" of democracy.[310] The Court's justification for this position stemmed from its fear that a contrary holding would allow each conscience to become a "law unto itself,"[311] although there is no guarantee that the Court's holding prevents such

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302. Simeonidis, *The Last Word on Freedom*, NAT'L L.J., Feb. 18, 1991, at 14, col. 2.

303. C. DUCAT & H. CHASE, CONSTITUTIONAL INTERPRETATION 67 (4th ed. 1988). That a law indirectly impinges upon those rights does not alter this responsibility because a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement." Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

304. *Smith*, 110 S. Ct. at 1606.

305. Rumble, *James Madison on the Value of Bills of Rights*, in NOMOS XX: CONSTITUTIONALISM 122, 124 (J. Pennock & J. Chapman eds. 1979). "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

306. *Smith*, 110 S. Ct. at 1602-04.

307. *Id.* at 1612 (O'Connor, J., concurring in judgment).

308. *Id.*

309. Laycock, *supra* note 264, at 519, col. 2.

310. *Smith*, 110 S. Ct. at 1606.

311. *Id.*

a result. An individual may just as likely obey either the laws of his god or the laws of society when these two conflict. The free exercise clause must be read to eliminate, as far as possible, the emergence of such a conflict.

Strict scrutiny review, though not perfect,[312] is the best way to effectuate such a reading of the clause. The standard inquires into the goals of legislative enactments and the means pursued in achieving those goals. When applicable, it requires that the goals of the challenged regulation be substantially important or compelling and then requires that the means employed to attain those goals be those least restrictive of the individual interest at stake.[313] The standard thus forces the government to justify any infringement upon individual interests deemed worthy of this level of protection. As such, it promotes sensitivity to minority interests in the legislative process, as well as creative legislative methods. The alternative standard, adopted in *Smith*, allows the "criminal punishment of the central religious ritual of an ancient faith"[314] without requiring any justification. This resurrection of *Reynolds* marked not only the entombment of *Sherbert*, but of free "exercise" as well.

Although the *Smith* Court required no governmental justification for the religious burden imposed by the Oregon law prohibiting ceremonial use of peyote,[315] the district court forced the City of Hialeah to justify the ordinances restricting animal sacrifice in *Church of the Lukumi*.[316] Examining the differences between the two cases provides stark evidence of the protections afforded by strict scrutiny review. Characterizing the Hialeah ordinances as neutral both in purpose and effect, Judge Spellman nonetheless found a legally cognizable burden upon the free exercise rights of members of the Santeria religion.[317] Because the regulations burdened a fundamental right, the court undertook a strict scrutiny analysis.[318] In order to justify the burden imposed by the ordinances, the city advanced three interests: animal welfare, public health, and protection of children.[319] The court found these interests compelling, found any exception unenforceable, and, after balancing the governmental interests against the burdened right,

312. *See* Laycock, *supra* note 264, at 518, col. 2.

313. *See supra* note 98.

314. Laycock, *supra* note 264, at 518, col. 1.

315. *Smith*, 110 S. Ct. at 1608 (O'Connor, J., concurring in judgment).

316. Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467, 1483-87 (S.D. Fla. 1989).

317. *Id.* at 1484-85.

318. *Id.* at 1484-87.

319. *Id.* at 1485.

found that the former outweighed the latter.[320] While the result in both cases was the same, the analytical methods employed by each court demonstrate the vast difference between the two modes of analysis and the critical need for judicial review of all laws which cognizably burden fundamental rights.

2. A HEIGHTENED STRICT SCRUTINY

Courts must faithfully apply an exacting strict scrutiny standard when reviewing claims based on infringement of free exercise rights through governmental regulation of religious conduct. Cases arising under the free exercise clause require courts to determine when the legitimate claims of government or society must prevail over the constitutional rights of individuals.[321] "For religious minorities, what is at stake is often the ability to obey their conscience, sometimes on issues they believe essential to salvation."[322] The *Sherbert* test, while necessary to the maintenance of adequate protection for free exercise rights and the proper resolution of the clash of competing interests, is nonetheless incomplete.

While protecting individual freedom to a great degree, strict scrutiny analysis generally assumes that a governmental interest identified as compelling is superior to the individual rights it burdens.[323] Consequently, strict scrutiny analysis becomes overly deferential to compelling governmental interests, while at the same time, it fails to provide the utmost protection to the individual freedoms enshrined in the first amendment.

In order to serve these competing concerns more properly, courts must create a new balance between compelling governmental interests and first amendment rights. While recognizing the importance of governmental interests, this balance should strive to weigh these interests on a scale which properly juxtaposes the significant value of the burdened individual freedoms. This balance should redefine the boundary between these competing concerns. The boundary, while not absolute, as no boundary in this area can or should be, will respect both concerns. It will, however, favor the values constitutionally recognized as fundamental. The balance, therefore, presupposes the constitutional necessity of granting exemptions for religious conduct when that conduct violates a law of general applicability. In order to

320. *Id.* at 1486-87.

321. Marcus, *supra* note 6, at 1231.

322. Laycock, *supra* note 264, at 519, col. 1.

323. *See* Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U.L. REV. 917, 922 (1988).

assure individuals the greatest degree of religious freedom, it places the burden upon the government in all appropriate circumstances.

A heightened strict scrutiny analysis would involve application of a four-part test. As a whole, the test would entail the use of a post-*Lee* strict scrutiny analysis followed by a balancing test.[324] The balancing test corrects the noted defect of strict scrutiny—the standard's natural deference toward governmental interests identified as compelling.[325] While there are dangers in judicial balancing that affect free exercise rights,[326]

> most constitutional jurisprudence involves some overt or covert comparison between individual rights and governmental interests. A principled inquiry into the legitimacy and significance of interests is essential to distinguish—in any formulation requiring a comparison between rights and interests—those cases in which interests prevail from those in which rights prevail. Absolute solutions are obviously impossible.[327]

The final step in the process requires application of the "unduly interfere" standard as espoused in *United States v. Lee*.[328] This step should only apply to those cases where the governmental interest is compelling and outweighs the burdened constitutional right. In such cases, the court should allow an exemption only where it would not unduly interfere with the governmental interest. Where the constitutional right outweighs the compelling governmental interest, however, the court should require an exemption, and the *Lee* test need not be applied, regardless of the resulting infringement on the governmental interest. In sum, the four-part test is as follows:

1. Does the governmental regulation at issue burden an individual's free exercise of religious conduct?
2. Does the regulation at issue pursue a compelling governmental interest?
3. Does the compelling governmental interest outweigh the constitutionally protected right with which it conflicts?
4. Would granting an exemption for the burdened religious conduct unduly interfere with fulfillment of the compelling interest pursued by the governmental regulation at issue?

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324. *See* Marcus, *supra* note 6, at 1245-47.

325. *Id.* at 1245.

326. The added step might render free exercise standards less predicatable. Moreover, these kinds of cases "do not lend themselves to the relatively unyielding contours of definitional balancing." *Id.* at 1245-46.

327. Gottlieb, *supra* note 323, at 924.

328. 455 U.S. 252, 259 (1982).

3. REVISITING *SMITH* AND *CHURCH OF THE LUKUMI*

To recognize or create standards "is hardly to appreciate" their true impact.[329] Application of the proposed standard to *Smith* and *Church of the Lukumi* produces an interesting result. The governmental regulations fail the test in one instance, but not in the other. Application of the standard, therefore, highlights one border dividing permissible and impermissible governmental intrusions upon the liberty of conscience in matters of religion. This border is based upon the internal and external effects of the religious practice at issue.[330] Activities such as the ceremonial consumption of peyote, whose effects are entirely internalized within the ceremony and are of the sort which the state has no real interest in preventing,[331] may not be restricted—even by laws of general applicability. Activities, such as the ritual sacrifice of animals, which contain both external and internal effects which the state has an interest in preventing, may be restricted.

Because of the coercive nature of the regulations at issue in *Smith* and *Church of the Lukumi*, both meet the first prong of the test as adopted in *Lyng*.[332] This Section will therefore only discuss the application of the final three prongs of the proposed standard.

a. The Ceremonial Consumption of Peyote

> "To forbid the use of peyote is to remove the theological heart of Peyotism."[333]

The governmental regulation at issue in *Smith* fails to meet the

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329. *See* Marcus, *supra* note 6, at 1247.

330. *See* MILL, *supra* note 1, at 21-22.

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

Id.

331. Examples of ceremonies containing only internalized effects that the state has an interest in preventing include ceremonies involving animal sacrifice without more, ceremonies involving human sacrifice where the sacrificed individual is a willing participant (if any exist), and ceremonies involving illegal drug consumption where the drug is proven to be dangerous or of the kind in which illegal trafficking exists.

332. *See supra* notes 167-78 and accompanying text. Both the unemployment compensation laws in *Smith*, which indirectly implicated the criminal prohibition against possession or consumption of peyote, and the ordinances outlawing animal sacrifice in *Church of the Lukumi*, coerce individuals, either directly or indirectly, to violate their religious beliefs.

333. People v. Woody, 61 Cal. 2d 716, 722, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964). In *Woody*, the California Supreme Court held that a state law criminalizing possession and use of peyote violated the free exercise rights of members of the Native American Church. *Id.* at 720, 394 P.2d at 816, 40 Cal. Rptr. at 72.

proposed standard at any of the three remaining stages. Oregon's interest in restricting the ceremonial consumption of peyote does not qualify as compelling. Oregon presented no evidence establishing any physical harm from peyote use.[334] In fact, considerable evidence refutes the existence of any such harm.[335] Sacramental use of peyote, as undertaken by members of the Native American Church, poses no threat of harm to those who do not use the drug.[336] Certain institutionalized safeguards employed in ceremonies of the Church assure that the effects of the drug subside before these ceremonies end.[337]

The state's only arguably compelling interest involves the prevention of illegal trafficking of peyote. "There is, however, practically no illegal traffic in peyote."[338] In addition, because peyote consumption is an unpleasant experience, use of the drug is self-limiting.[339] Even if the state's interest in restricting peyote use was compelling, and that interest outweighed the individual interest in the free exercise of religion, the granting of a religious exemption for peyote use would not unduly interfere with fulfillment of the governmental interest. The minimal illegal traffic in peyote and the internal regulations of the Native American Church "adequately protect against nonreligious peyote distribution."[340] Furthermore, twenty-three states and

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334. *Id.*, at 1618 (Blackmun, J., dissenting). In fact, "the State never asserted this health and safety interest before the Oregon courts . . . ." *Id.* at 1618 n.4.

335. *Id.* at 1618-19 (noting acceptance of the apparent safety of peyote among experts and courts); *see also* Bergman, *Navajo Peyote Use: Its Apparent Safety*, 128 AM. J. PSYCHIATRY 695 (1971) (describing the general lack of harmful effects of peyote consumption as undertaken by members of the Native American Church); *Leading Cases*, *supra* note 193, at 207 (discussing "[t]he complete lack of evidence establishing any physical harm from peyote use and the abundant data refuting the existence of such harm").

336. *See Leading Cases*, *supra* note 193, at 207-08.

337. *See* Bergman, *supra* note 335, at 698. The formal part of a peyote ceremony "begins at sunset and ends at sunrise." *Id.* at 696. Custom dictates that no one leave a meeting early. *Id.* at 698. Further, participants make considerable efforts to prevent those who consumed peyote "from going off alone into the night." *Id.* Finally, a customary activity, which occurs on the morning following the meeting, is socializing until well after the effect of the drug has passed. *Id.*

338. *Smith*, 110 S. Ct. at 1620 (Blackmun, J., dissenting); *see* Olsen v. DEA, 878 F.2d 1458, 1463, 1467 (D.C. Cir. 1989) (nationwide DEA peyote seizures between 1980 and 1987 amounted to 19.4 pounds whereas such seizures for marijuana amounted to over 15 million pounds).

339. *Smith*, 110 S. Ct. at 1619 (Blackmun, J., dissenting). "[T]he eating of peyote usually is a difficult ordeal in that nausea and other unpleasant physical manifestations occur regularly. Repeated use is likely, therefore, only if one is a serious researcher or is devoutly involved in taking peyote as part of a religious ceremony." *Id.* (quoting E. ANDERSON, PEYOTE: THE DIVINE CACTUS 161 (1980)).

340. *Leading Cases*, *supra* note 193, at 207 (citing *Smith*, 110 S. Ct. at 1618-19 (Blackmun, J., dissenting)); *see also Olsen*, 878 F.2d at 1464 ("for members of the Native American Church, use of peyote outside the ritual is sacrilegious"); Slotkin, *The Peyote Way*, in TEACHINGS FROM THE AMERICAN FAITH 96, 104 (D. Tedlock & B. Tedlock eds. 1975)

the federal government have created exemptions from their drug laws for the ceremonial use of peyote.[341] In addition, "the availability of peyote for religious use, even if Oregon were to allow an exemption, . . . would still be strictly controlled by federal regulations . . . and by the state of Texas, the only state in which peyote grows in significant quantities."[342] These combined factors mandate a constitutional exemption from drug laws of general applicability which burden the free exercise rights of Native Americans that consume peyote in religious ceremonies.

b. The Ritual Sacrifice of Animals

> To forbid animal sacrifice is to remove the theological heart of Santeria.

The governmental regulations at issue in *Church of the Lukumi* survive all three of the remaining prongs of the proposed test. First, the government established three compelling interests as justification for the enactment of ordinances restricting the ritual slaughter of animals: prevention of animal cruelty,[343] the welfare and safety of the community,[344] and the protection of children.[345] Second, the scale

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(indicating that the Native American Church "vigorously opposes the sale or use of Peyote for non-sacramental purposes").

341. *Smith*, 110 S. Ct. at 1618 n.5. The federal government exempts religious peyote use from its drug laws. *See* 21 CFR § 1307.31 (1990). At least 23 states provide similar exemptions for religious peyote use, either expressly or by reference to the federal exemption. *See* ALASKA STAT. § 11.71.195 (1989); ARIZ. REV. STAT. ANN. § 13-3402(B) (1989); COLO. REV STAT. § 12-22-317(3) (1990); IOWA CODE ANN. § 204.204.8 (West 1987); KAN. STAT. ANN. § 65-4116(c)(8) (Supp. 1989); MINN. STAT. ANN. § 152-02, subd. 2(4) (West 1989); MISS. CODE ANN. § 41-29-111(d) (1981); MONT. CODE ANN. § 50-32-203 (1987); NEV. REV. STAT. § 453.541 (1987); N.J. STAT. ANN. § 24:21-3(c) (West Supp. 1990); N.M. STAT. ANN. § 30-31-6(D) (Supp. 1987); N.C. GEN. STAT. § 90-88(d) (1985); N.D. CENT. CODE § 19-03.1-02.4 (Supp. 1989); R.I. GEN. LAWS § 21-28-2.01(c) (1989); S.D. CODIFIED LAWS ANN. § 34-20B-14(17) (Supp. 1990); TENN. CODE ANN. § 39-17-403(d) (Supp. 1990); TEX. HEALTH & SAFETY CODE ANN. § 481.111(a) (Vernon 1991); UTAH CODE ANN. § 58-37-3(3) (1990); VA. CODE ANN. § 54.1-3443(D) (1988); WASH. REV. CODE § 69-50.201(d) (Supp. 1991); W. VA. CODE § 60A-2-201(d) (1989); WIS. STAT. § 161.115 (1989); WYO. STAT. § 35-7-1044 (1988).

342. *Smith*, 110 S. Ct. at 1620 (citations omitted).

343. Florida has recognized that laws aimed at protecting animals from harassment and ill-treatment are valid exercises of police power. *Church of the Lukumi*, 723 F. Supp. at 1486 (citing C.E. America, Inc. v. Antinori, 210 So. 2d 443, 444 (Fla. 1968)). The Court noted that the method employed by members of the Church is both "unreliable and not humane." *Id.*

344. The government may regulate conduct which poses a clear danger to the health of the public. *Id.*; *see also* State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 109 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (upholding bans on ritual snake handling). The practices of the Church expose both its members and the public to possible disease and infestation. *Church of the Lukumi*, 723 F. Supp. at 1485. The government has an indisputably compelling interest in controlling disease. *Id.*

345. *Church of the Lukumi*, 723 F. Supp. at 1485. "[E]xposure to the ritual sacrifice of animals imperils the psychological well-being of children and increases the likelihood that a

incorporated in the next prong of the test, by which the competing individual and governmental interests at stake are balanced, tips in favor of the governmental interests.[346] Finally, granting an exemption for the ritual sacrifice of animals would unduly interfere with fulfillment of the compelling governmental interests.[347] Having satisfied all the requirements of the proposed test, the government would not be constitutionally required to grant an exemption for the ritual sacrifice of animals.

V. CONCLUSION: FREE EXERCISE AND THE POLITICAL PROCESS

> In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of [individuals and groups to practice their religions freely].[348]

"[I]n pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority."[349] The *Sherbert* standard, while not perfect, "was critical to the religious liberty of small faiths."[350] It ensured countermajoritarian involvement, and thus protection, in concerns of fundamental significance to individuals—concerns that should not be resigned to the insensitive realm of the political process.

In our constitutional landscape, the first amendment stands as a barrier, protecting the firm ground of individual freedom in matters of conscience from the rising sea of majoritarian insensitivity. Courts

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child will become more aggressive and violent." *Id.* at 1486. The Supreme Court has held that this interest outweighs any countervailing religious interests. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Jehovah's Witnesses v. King County Hospital, 278 F. Supp. 488, 504-05 (W.D.N.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968)).

346. The effects of the religious practice at issue are both external and internal. While the free exercise of religion is a preferred constitutional activity, that individual right cannot be preferred to the protection of the health, safety, and welfare of the public, a governmental interest of the first magnitude.

347. *Church of the Lukumi*, 723 F. Supp. at 1486-87. Any exemption would simply be unenforceable, would not satisfy the governmental concerns, and "would, in effect, swallow the rule." *Id.* A primary problem in this regard is the fact that the Church sought, for its members, the right to perform animal sacrifices in their own homes. *Id.* at 1469. When coupled with the fact that Santeria is basically an underground religion, this additional right makes any exemption unenforceable. *Id.* at 1487 n.59.

348. People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821-22, 40 Cal. Rptr. 69, 77-78 (1964).

349. Goldman v. Weinberger, 475 U.S. 503, 523-24 (1986) (Brennan, J., dissenting).

350. Laycock, *supra* note 264, at 518, col. 2.

must proceed cautiously in any endeavor which may reshape or erode this protective wall lest we all be engulfed by the wave of intolerance to follow. Within the dominant majoritarian framework, a strengthened strict scrutiny standard constitutes the next step in protecting religious freedoms from such an ominous fate. Unfortunately, after the Supreme Court's step backwards in *Smith*, questions involving the free exercise of various religious rituals implicate not the first amendment,[351] but the political process—and Babalu Aye is not pleased.

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351. *Id.* at 518, col. 1.