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Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: A Reader's Companion to Contemporary Free Exercise Jurisprudence and the Right to Perform Ritual Animal Sacrifice

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COMMENTS

CHURCH OF THE LUKUMI BABALU AYE, INC. v. CITY OF HIALEAH: A READER'S COMPANION TO CONTEMPORARY FREE EXERCISE JURISPRUDENCE AND THE RIGHT TO PERFORM RITUAL ANIMAL SACRIFICE

> "No chapter in human history has been so largely written in terms of persecution and intolerance as the ones dealing with religious freedom."[1]

I. INTRODUCTION

The Supreme Court's traditional free exercise jurisprudence has recognized a meaningful distinction between religious beliefs and religious conduct for more than a century.[2] In *Cantwell v. Connecticut*,[3] for example, Justice Roberts explained that the First Amendment "embraces two concepts - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[4] Thus, while the Court has con-

1. Prince v. Massachusetts, 321 U.S. 158, 175 (1944) (Murphy, J., dissenting).

2. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 (1878) ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions. . . ."). This distinction is not, of course, unique to the Court's free exercise jurisprudence. The Court has similarly recognized a meaningful distinction between "pure speech" and "expressive conduct." *See generally* United States v. Eichman, 496 U.S. 310, 313-18 (1990) (holding that flag burning is protected expression); Texas v. Johnson, 491 U.S. 397, 402-06 (1988) (also holding that flag burning is protected expression); Spence v. Washington, 418 U.S. 405, 409-11 (1974) (holding that affixing peace symbol to flag is protected expression); United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that burning draft card is unprotected conduct).

3. 310 U.S. 296 (1940).

4. *Id.* at 303.

sistently held that the First Amendment flatly prohibits laws regulating religious beliefs,[5] it is well settled that the Free Exercise Clause[6] will tolerate some restrictions on religious conduct.[7]

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5. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 877 (1990), *reh'g denied*, 496 U.S. 913 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); Bowen v. Roy, 476 U.S. 693, 699 (1986) ("the freedom of individual belief . . . is absolute"); Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983) ("This Court has long held the Free Exercise Clause of the First Amendment an absolute prohibition against governmental regulation of religious beliefs."); 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."); Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door to the Free Exercise Clause stands tightly closed against government regulation of religious beliefs as such."); Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute."); *Cantwell*, 310 U.S. at 303 ("Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may chose cannot be restricted by law.").

"Religion" does not appear to be subject to a single definitive meaning. The Court has explained that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." Davis v. Beason, 133 U.S. 333, 342 (1890). And the Court has held that beliefs are adequately religious even if they are not "acceptable, logical, consistent, or comprehensible." Thomas v. Review Board, 450 U.S. 707, 715 (1981). But few decisions have been addressed specifically to this concern. For an example of one such decision, see Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (Maryland law requiring applicants for public office to declare belief in God invalid). Courts have rather focused mainly on whether putative religious beliefs are sincerely held. *Thomas*, 450 U.S. at 715 ("review in this context is limited to determining whether the plaintiff's convictions are honest"). The scope of the free exercise clause is not, however, unlimited. In *Thomas*, the Court suggested that some claims might be "so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.* Secular beliefs, whether "sincere and conscientious," similarly will not suffice. Michael W. McConnel, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990) [hereinafter McConnel, "*Origins of Free Exercise*"].

6. The free exercise clause commands that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend I. The amendment is similarly binding against the States. *See Cantwell*, 310 U.S. at 303.

7. *See, e.g., Roy*, 476 U.S. at 699 ("[T]he freedom of individual conduct . . . is not absolute."); *Brown*, 366 U.S. at 603 ("[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."); *see also Bob Jones Univ.*, 461 U.S. at 603; United States v. Lee, 455 U.S. 252, 257 (1982); *Sherbert*, 374 U.S. at 403; *cf. Smith*, 494 U.S. at 877-78 ("It would doubtless be unconstitutional . . . to ban the casting of 'statutes that are to be used for worship purposes,' or to prohibit bowing down before a golden calf.").

While widely accepted, the belief-action distinction is not without its critics. One commentator suggests that "[i]t appears to be somewhat incongruous to make such a distinction when the first amendment speaks in terms of protecting the *exercise* of religion, not simply beliefs held under the religion." Paul Marcus, *The Forum of Conscience: Applying Standards Under The Free Exercise Clause*, 1973 DUKE L.J. 1217, 1234 (emphasis original); *see also Smith*, 494 U.S. at 893 (O'Connor, J., concurring) ("Because the First Amendment does not distinguish between religious beliefs and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be

Indeed, as long ago as 1878, the Court rejected a free exercise challenge addressed to a federal law making bigamy a crime.[8]

Justice Roberts' *Cantwell* opinion highlights the significance of the belief-conduct distinction. Today, however, in the wake of the Court's decision in *Employment Division v. Smith*,[9] this distinction has assumed additional importance. Generally speaking, before *Smith*, laws imposing a substantial burden[10] on the free exercise of religious conduct had to be justified by a compelling interest.[11] But *Smith*, insulating neutral generally applicable regulations from even minimal scrutiny,[12] raises serious concern for whether the Court will continue to conduct any form of meaningful review. Precisely because the Court will now have to confront its *Smith* decision in *Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah*,[13] *Hialeah* may be the most impor-

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at least presumptively protected by the Free Exercise Clause."). History would appear to support this interpretation. The amendment originally referred to the "*rights of conscience*" rather than the "*free exercise of religion.*" McConnel, *Origins of Free Exercise*, *supra* note 5, at 1488. Professor McConnel, in explaining the significance of differences between these terms, suggests that "[t]he least ambiguous difference is that the term 'free exercise' makes clear that the clause protects religiously motivated conduct as well as belief." *Id.*

8. *Reynolds*, 98 U.S. at 166.

9. 494 U.S. 872 (1990), *reh'g denied*, 496 U.S. 913 (1990).

10. To establish a cognizable free exercise claim, the plaintiff must demonstrate that the challenged government action burdens the free exercise of religion. *See infra* notes 184-95 and accompanying text discussing the cognizable burden requirement.

11. *See infra* Section IV discussing the Court's free exercise jurisprudence prior to *Smith*. For the purpose of free exercise review, the Court has adopted various formulations of the compelling interest test. *See, e.g., Lee*, 455 U.S. at 257-58 ("The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Sherbert*, 374 U.S. at 406 (interference with religious liberty must be justified by a "compelling state interest"); *see also* Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989), *reh'g denied*, 492 U.S. 933 (1989); Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 141 (1987). Essentially though, the basic framework of free exercise doctrine is easily stated. Once the plaintiff demonstrates that government activity imposes a cognizable burden on religious exercise, the burden shifts to the government to prove that the activity is the least restrictive means of furthering a compelling secular interest. *Smith*, 494 U.S. at 905 (Blackmun, J., dissenting) (Government must carry the burden to show that an exemption "will not unduly interfere with fulfillment of [its] interest."). While the test is usually stringent, it has not always been fatal to legislation. *See, e.g., Lee*, 455 U.S. at 258 (nationwide interest in social security system compelling); *Bob Jones Univ.*, 461 U.S. at 595 (state's interest in eradicating racial discrimination compelling); *Brown*, 366 U.S. at 607 (state's interest in providing a uniform day of rest compelling).

12. *See Smith*, 494 U.S. at 885.

13. 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd without op.*, 936 F.2d 586 (11th Cir.

tant free exercise case in years.

Contemporary scholars have devoted ample attention to the Court's free exercise jurisprudence.[14] The scope of this comment is thus appropriately limited to consideration of the fundamental free exercise questions presented by *Hialeah.*

Although some review is obviously necessary, this comment is not intended as a comprehensive discussion of recent free exercise cases.[15] Principally, issues which remain unresolved in the wake of the Court's *Smith* decision will be addressed, including the following. Observing that "neutrality" is the cornerstone of the *Smith* decision, what evidence may properly be considered when making the neutrality assessment? Will facial-neutrality be dispositive?[16] Additionally, assuming that *Smith* is *not* controlling, are the challenged regulations appropriately subject to heightened review? Or will strict scrutiny be limited, as the *Smith* majority suggested,[17] to the specific context of unemployment compensation regulations?[18] As a related question, the Court should also speak to the issue of whether the government will be required to furnish "specific evidence" in support of any

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1991), *cert. granted*, 112 S. Ct. 1472 (1992).

14. *See, e.g.*, McConnel, *Origins of Free Exercise*, *supra* note 5 (analyzing free exercise doctrine from an historical perspective); Michael W. McConnel, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (analyzing the Supreme Court's recent *Smith* decision) [hereinafter McConnel, *"Free Exercise Revisionism"*]; PHILIP B. KURLAND, RELIGION AND THE LAW (1962) (arguing that when read together the religion clauses prohibit religion-specific policy); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978) (also arguing against religion-specific policy) [hereinafter Kurland, *"The Irrelevance of the Constitution"*]; WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976) (analyzing free exercise doctrine on originalist grounds); MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978) (also analyzing free exercise doctrine on originalist grounds).

15. For a more comprehensive review of the Court's free exercise decisions, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14 (2nd ed. 1988). For further useful discussion regarding recent free exercise decisions, see Roberto A. Torricella, Jr., *Babalu Aye Is Not Pleased: Majoritarianism and the Erosion of Free Exercise*, 45 U. MIAMI L. REV. 1061 (1991).

16. *See infra* notes 263-88 and accompanying text arguing that extrinsic evidence should properly be considered.

17. *See* Employment Div. v. Smith, 494 U.S. 872, 884-85 (1990), *reh'g denied*, 496 U.S. 913 (1990).

18. *See infra* notes 289-309 and accompanying text arguing that the challenged regulations should be subject to strict scrutiny.

interest asserted as compelling.[19] Resolution of this question would be useful in terms of reconciling the Court's opinions in the unemployment compensation cases (sensitive to the lack of specific evidence)[20] with its decisions elsewhere.[21]

This comment will be organized in the following manner. Section II examines the debate between two leading interpretations of the First Amendment: "accommodation" and "formal neutrality." This debate provides a useful point of departure because it highlights the significance of controversy surrounding contemporary free exercise doctrine. Section III next reviews the district court's *Hialeah* opinion. Particular emphasis is placed on the nature and origins of the Santeria faith. Turning to the Supreme Court's major free exercise cases, Section IV then explores the Court's opinions prior to, and including, *Smith*. Finally, focusing specifically on the facts of *Hialeah*, Section V attempts to resolve the questions set forth above.

Favoring a broad construction of the Free Exercise Clause, this comment ultimately argues that the municipal ordinances challenged in *Hialeah* must be subject to strict scrutiny and the Supreme Court's holding in *Smith* to a narrow interpretation if the protections guaranteed by the First Amendment are to retain any significant meaning. "[N]o liberty," Justice Stewart once declared, "is more essential to the continued viability of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth."[22]

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19. *See infra* notes 253-62 and accompanying text arguing that the Court should reinstate the specific evidence requirement.

20. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 407 (1978) (possibility of fraudulent claims insufficient to justify free exercise infringement where there was "no proof whatever to warrant such fears"); Frazee v. Unemployment Security Dept., 489 U.S. 829, 835 (1989) (also emphasizing absence of evidence supporting State's position); Thomas v. Review Bd., 450 U.S. 707, 719 (1981) (same).

21. *See, e.g.*, *Smith*, 494 U.S. at 911-12 (Blackmun, J., dissenting) (emphasizing conspicuous absence of evidence supporting State's position); Braunfeld v. Brown, 366 U.S. 599, 615 (1961) (Brennan, J., dissenting) (arguing that State's concerns were "more fanciful than real"); Prince v. Massachusetts, 321 U.S. 158, 224 (1944) (Murphy, J., dissenting) (to the same effect).

22. *Sherbert*, 374 U.S. at 413 (1963) (Stewart, J., concurring).

II. DEBATING FREE EXERCISE DOCTRINE: ACCOMMODATION AND FORMAL NEUTRALITY

The First Amendment commands that government shall not "prohibit" the free exercise of religion.[23] But should the Amendment be interpreted broadly to prohibit *severe interference* with religious exercise as well? An "accommodationist," like Professor McConnel, would say yes.[24] Conversely, Professor Kurland, who supports the doctrine of "formal neutrality," would say no.[25] While the former argues that the Free Exercise Clause "protects religious practices against even the *incidental* or *unintended* effects of government action,"[26] the latter posits that "[t]he primary purpose of the First Amendment is to keep government out of religious matters."[27]

Because the Court has never entertained a single definitive interpretation of the First Amendment, we do not know who is correct. We do know, however, that, as an historical matter, the Court has embraced both views.[28] Indeed, tension between accommodation and formal neutrality has largely shaped the Court's free exercise jurisprudence.[29] Recognizing this, we turn to a brief discussion of these positions here.

The debate between accommodation and formal neutrality centers mainly on the question of whether the First Amendment sanctions religion-specific policy.[30] The debate, in other words, is

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23. U.S. CONST. amend I.

24. *See generally* Michael W. McConnel, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 687-95 (1992) (presenting the affirmative case for accommodation) [hereinafter McConnel, *"Accommodation of Religion"*]; McConnel, *Origins of Free Exercise*, *supra* note 5, at 1416-21 (arguing that historical evidence supports an interpretation favorable to accommodation).

25. *See generally* Kurland, RELIGION AND THE LAW, *supra* note 14, at 112 (arguing that religion may not be used as a standard for governmental action or inaction); Kurland, *The Irrelevance of the Constitution*, *supra* note 14, at 24.

26. McConnel, *Origins of Free Exercise*, *supra* note 5, at 1418 (emphasis added).

27. Kurland, *The Irrelevance of the Constitution*, *supra* note 14, at 13.

28. *See* McConnel, *Origins of Free Exercise*, *supra* note 5, at 1416-21.

29. *See infra* notes 165-80 and accompanying text.

30. McConnel, *Accommodation of Religion*, *supra* note 24, at 689 ("The debate between accommodation and formal neutrality comes down to a question of means: Is the freedom of religion best achieved when the government is conscious of the effects of its action on the various religious practices of its people, and seeks to minimize interferences with those practices? Or is it best advanced through a policy of 'religious blindness' — keeping government aloof from religious practices and issues.").

marked by sharp disagreement on the issue of whether the government should treat religion like any other activity or institution.[31] In turn, and perhaps more importantly, these positions reflect fundamentally different conceptions of the threat government poses to religious liberty.[32] Formal neutrality, which teaches that religion-specific policy is inappropriate absent invidious discrimination, assumes that religious exercise will receive adequate protection in the political arena.[33] Accommodationists, on the other hand, reject the idea that a narrow interpretation of the Free Exercise Clause will adequately serve to protect religious exercise.[34] Instead, accommodationists argue that the government must necessarily be required to justify even incidental interference with religious exercise.[35]

A comprehensive discussion of this debate is clearly beyond the limited scope of this comment.[36] But a strong argument can be made in favor of accommodation. Professor Kurland insists that government must not meddle in religious affairs.[37] Yet "in the modern regulatory state, most activities and institutions are pervasively regulated."[38] Consequently, more than "religious

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31. *See* Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 848 (1992) (highly critical of the Court's recent movement towards formal neutrality) [hereinafter Laycock, "*Summary and Synthesis*"]; McConnel, *Accommodation of Religion*, *supra* note 24, at 689.

32. McConnel, *Origins of Free Exercise*, *supra* note 5, at 1418.

33. *Id.* at 1419-20.

34. *See, e.g.*, McConnel, *Accommodation of Religion*, *supra* note 24, at 693.

35. *See* McConnel, *Origins of Free Exercise*, *supra* note 5, at 1418 (emphasis added); *see also* Laycock, *Summary and Synthesis*, *supra* note 31, at 689 ("[T]he Free Exercise Clause includes the right to be left alone; whether or not other activities and institutions are let alone, save only where government has a compelling reason to interfere.").

36. For further discussion of accommodation, see Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Towards Religion*, 39 DEPAUL L. REV. 993 (1990); Michael W. McConnel, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1986); Michael W. McConnel, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; McConnel, *Origins of Free Exercise*, *supra* note 5, at 1419-20. For further discussion of formal neutrality, see Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373; Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988).

37. Kurland, *The Irrelevance of the Constitution*, *supra* note 14, at 9 ("religion was to be no business of the national government").

38. Laycock, *Summary and Synthesis*, *supra* note 31, at 848; *see also* McConnel, *Accommodation of Religion*, *supra* note 24, at 692 ("Government is too pervasive — touches too much — for a strategy of formal neutrality to work.").

blindness" would seem to be required.[39] "Religious exercise," Professor Laycock points out, "is not free when it is pervasively regulated."[40] Thus, while "[i]t is good to protect against persecution and overt religious discrimination . . . under the conditions of the welfare-regulatory state, it is necessary to do more — to take deliberate action to preserve the autonomy of religious life."[41]

For our purpose here, resolving the debate is unnecessary. Suffice it to say that there is credence to both positions. However, because tension between these competing views has largely shaped the Court's free exercise jurisprudence, recognizing that *striking differences* separate accommodation and formal neutrality is important. As a practical matter, the difference between accommodation and formal neutrality is the difference between a Court which is sympathetic to religious claims and one which is not.

III. CHURCH OF THE LUKUMI BABALU AYE, INC. v. CITY OF HIALEAH

A. The Basic Dispute

On April 1, 1987, plaintiffs, the Church of the Lukumi Babalu Aye, Inc. (the "Church"), and Ernesto Pichardo, President of the Church ("Pichardo"),[42] instituted measures to commence operation of a Santeria church on property located within the City of Hialeah, Florida.[43] These measures included, *inter alia*, filing the requisite zoning and licensing applications[44] and

39. McConnel, *Accommodation of Religion*, *supra* note 24, at 692.

40. Laycock, *Summary and Synthesis*, *supra* note 31, at 848

41. McConnel, *Accommodation of Religion*, *supra* note 24, at 693.

42. Church of the Lukumi Babalu, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd without op.*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992). Pichardo testified that within his Church, he held the rank of "Italero," which is the second highest rank in Santeria. *Id.* at 1470 and 1470 n.8. The highest rank in Santeria is "Babalawo." *Id.* at 1470 n.8. Pichardo testified further that he did not know if anyone within his Church held the rank of Babalawo. *Id.*

43. *Id.* at 1477. Church members also planned to build a school, cultural center and museum. *Id.* at 1476.

44. Pichardo eventually completed the application for licensing and zoning approval on May 29, 1987. *Id.* at 1477. He did so after first having been informed by a City official that the Church was operating in violation of the licensing requirement. *Id.* at 1477 n.42. Although the Church fully intended to perform ritual animal sacrifice on Church property, the application failed to disclose this. *Id.* at 1477 n.43. Prior to trial, however, the

physically preparing the property.[45] The goal was "to bring Santeria into the open as an established and accepted religion."[46]

Shortly thereafter, the Hialeah City Council enacted several ordinances prohibiting animal sacrifice.[47] The first ordinance, Ordinance No. 87-40 (adopting the State's anti-cruelty law),[48] was enacted on June 9, 1987.[49] The three remaining ordinances followed during September.[50] In turn, the Church filed suit in federal district court pursuant to 42 U.S.C. § 1983 "to enjoin, declare unconstitutional, and recover damages for the alleged deprivation of [its] constitutional rights, under the First, Fourth and Fourteenth Amendments."[51] The Church alleged further constitutional violations based on the City's "process of discouragement, harassment, threats, punishment, detention, and threats of prosecution."[52] According to the district court, the Church was specifically "seeking the right of the Church to perform animal sacrifices on Church premises, and for the right of

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Church did apply for an occupational license authorizing them to operate their property as a slaughterhouse. *Id.* at 1477.

45. The property, having formerly served as a used car lot, was apparently in need of significant work. "There was oil on the ground and car parts lying around; windows were broken; the grass was high; and the buildings needed repair work before they could be occupied." *Id.* at 1477 n.38.

Church premises later failed three inspections: fire, electrical and plumbing. *Id.* at 1478. These inspections furnished the substance of the Church's claim of discriminatory treatment, which the court rejected. *Id.* The court found that the failures were not the result of discrimination on the part of the inspectors or any City official. *Id.* The Church also complained of two instances of alleged increased law enforcement scrutiny. The court rejected this complaint as well. *Id.* at 1478-79. The first instance involved the establishment of a police perimeter when the Church held its first outdoor mass. The second instance involved an uneventful episode where police stopped Pichardo. The court found that in both instances, the police were simply carrying out their duties. *Id.* at 1479.

46. *Id.* at 1476. During trial, Dr. Lisandro Perez, a sociologist, questioned whether or not permitting the Church to practice its rituals openly would in fact facilitate this objective. He testified that "[t]here may be a lot of Santeros who may not wish to place their beliefs on a public sort of marketplace." *Id.* at 1470 n.7.

47. *Id.* at 1476.

48. *See infra* notes 144-48 and accompanying text setting forth the text of Ordinance No. 87-40.

49. *Hialeah*, 723 F. Supp. at 1476. *See also infra* notes 142-64 and accompanying text detailing the challenged ordinances.

50. *Hialeah*, 723 F. Supp. at 1476.

51. *Id.* at 1469.

52. *Id.*

Church members to perform sacrifices in their own homes."[53]

B. The District Court's Analysis

The district court conducted a bench trial lasting nine days.[54] Jurisdiction was found pursuant to 28 U.S.C. § 1331 (providing that federal courts have original jurisdiction over all civil actions arising under the Constitution and laws of the United States) and 28 U.S.C. § 1343 (providing for jurisdiction of actions brought pursuant to 42 U.S.C. § 1983).[55] The proceedings were clearly intended to be comprehensive,[56] and warrant review here.

1. *Factual Findings*

a. Santeria

Santeria is an ancient religion which originated almost 4000 years ago with the Bantu people of West Africa.[57] In a fashion similar to most religions, Santeria provides for days of worship, a sabbath, and for religious holidays.[58] "There are ceremonies for life cycle events such as child birth, marriage and death rites."[59] There is no centralized authority.[60] Rather, Santeria continues to be based on interpretation of an oral tradition.[61] Beliefs and practices, however, have apparently remained fairly constant throughout the centuries.[62]

Modernly, the Yoruba people of West Africa have adopted

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53. *Id.*

54. *Id.* The trial ran from July 31 to August 15, 1989. *Id.*

55. *Id.*

56. *See id.* at 1482.

57. *Id.* Santeria is one of the common names for the Lukumi religion. *Id.* Lukumi is also known as Yoba or Yoruba. *Id.* For a comprehensive discussion of Santeria, see Migene Gonzales-Wipples, Santeria: The Religion (1989).

58. *Hialeah*, 723 F. Supp. at 1470.

59. *Id.*

60. *Id.* The district court additionally observed that no written code or tradition appears to exist. *Id.* Prior to trial, Pichardo did prepare a "Code of Beliefs" and "Code of Ethics." *Id.* at 1470 n.9. Yet while Pichardo testified that these documents were intended to correctly set forth the oral tradition, the district court voiced some concern that the documents were prepared in anticipation of the litigation. *Id.* at 1470 and 1470 n.9.

61. *Id.* at 1470.

62. *Id.*

the religious traditions of the Bantu people, and Santeria is practiced openly today in Southern Nigeria.[63] Outside of Africa, however, Santeria has historically been regarded as an "underground" religion.[64] In fact, "for 400 years, Santeria was an underground religion practiced mostly by slaves and the descendants of slaves."[65]

Santeria is still not socially accepted in countries other than Africa.[66] Instead, "Santeria has remained an underground religion because most practitioners fear that they will be discriminated against."[67] In contrast to Nigeria, the practice of Santeria outside of Africa has thus "taken on a private, personal tone."[68] This appears to be true in the United States as well, where there are approximately 50,000 to 60,000 adherents in South Florida alone.[69]

b. The Sacrificial Ceremony

Animal sacrifice is an integral part of Santeria rituals and ceremonies.[70] These sacrifices include, but are not limited to,

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63. *Id.* at 1469.

64. *Id.* at 1470. Santeria was originally brought to Cuba when, during the 16th, 17th and 18th centuries, large numbers of Yoba practitioners were enslaved by the Spanish government. *Id.* at 1469.

65. *Id.* at 1470. The Spanish government often justified slavery as the "business of saving souls," and captured slaves, who were frequently baptized, were expected to become Christians. *Id.* at 1469 and 1469 n.3. Yet while the practice of Santeria was generally prohibited, Santeria survived. This was possible because the slaves began to express their faith through the use of Catholic saints and symbols. "For example, because Saint Peter was associated with iron, the keys to heaven, Yoba practitioners saw Saint Peter as Shango, the god of lightening and thunder." *Id.* at 1469-70 and 1470 n.4.

66. *Id.* at 1470.

67. *Id.* The district court also noted that Santeria has lost some contact with its own past in Cuba. *Id.* The court explained that this has resulted from the fact that "[t]here is little or no intermingling of the groups, and few practitioners know others outside their own group that practice Santeria." *Id.*

68. *Id.*

69. *Id.* Santeria arrived in the United States with the Cuban exiles who fled from the Castro regime in the late 1950's and early 1960's. *Id.*

70. *Id.* at 1471. The district court provided the following details relating to the sacrificial ceremony.

> In the Yoba religion, divination is based on the *ifa* divination cycle. *Ifa* is made up of 256 *odus* or principles. Each *odu* is further subdivided in groups of 16. Divination through *ifa* is usually performed by the casting of shells or stones. The pattern is then read and interpreted as communication from the various deities.

goats, sheep, chicken, doves and other small fowl.[71]

Priests perform the sacrificial ceremony. These priests are trained through oral apprenticeship.[72] Apprentice priests are not trained to determine whether or not sacrificial animals are disease-free.[73] Animals are expected to be clean and healthy.[74] Priests who perform the actual sacrifice do not otherwise participate in obtaining, maintaining, preparing, butchering, cooking or disposing of the sacrificial animals.[75] Ideally, only trained priests conduct the ceremony.[76]

Sacrificial animals are dispatched by use of a knife.[77] The number of sacrifices is dictated by the number of deities involved in the particular ceremony.[78] For example, in an initiation ceremony, anywhere from 24 to 56 animals are sacrificed to between 6 and 13 deities.[79] Pichardo testified that he had no idea of the average number of sacrifices performed each week within Hialeah.[80] He did estimate, however, that as many as 600

> Through divination, *ifa* mandates the type of animal to be sacrificed and the use to which the sacrifice should be put. It is the individual priests, however, who interpret, or misinterpret, the basic principles of *ifa*.

Id. at 1471 n.14. Animal sacrifice is also apparently practiced by a number of other Afro-Caribbean religions, like Voo-doo, Macumba, and Palo Mayombe. *Id.* at 1470.

71. *Id.* at 1471. Sacrificial animals are usually obtained from a "botanica," a store specializing in the sale of religious articles. *Id.* at 1474 and 1474 n.8.

72. *Id.* at 1471. Pichardo testified that apprentice priests begin learning through observation. *Id.* Eventually, the apprentice graduates to practical training. "The teacher and the student both hold onto the knife and the teacher guides the student through the killing stroke a number of times." *Id.* at 1472 n.15. When the teacher is satisfied that the apprentice can adequately perform the ceremony, the student is allowed to kill the animal without assistance. *Id.* at 1472.

73. *Id.* at 1471.

74. *Id.*

75. *Id.* Although priests who perform the actual sacrifice do not participate in the other stages of preparation, other priests do in fact participate. "For example, there are those who clean-up after the sacrifice; a person who actually handles the animal - inspects the animal to see that it is healthy and clean and then brings that animal to the place where it is to be sacrificed; . . . a person who removes the carcass; a butcher or butchers; a person who takes the butchered animal to be cooked; a cook or cooks." *Id.* at 1471 n.12.

76. *Id.* at 1471.

77. *Id.* at 1472. Usually the knife is approximately 4 inches long. *Id.* at 1472 n.17.

78. *Id.* at 1473 n.21.

79. *Id.* at 1474.

80. *Id.* at 1471 n.13.

initiation ceremonies are performed annually in Dade County.[81] Based on this testimony, the court concluded that "between 12,000 and 18,000 animals are sacrificed in initiation rites alone" each year.[82]

The sacrificial procedure is as follows. The animal is first placed on a table with its head facing away from the priest.[83] The priest then punctures the right-hand side of the animal's neck, inserting the knife into the vein area just behind the throat, but not the actual throat itself.[84] The objective of the procedure is to sever both of the animal's main arteries.[85] Blood from the animal is drained into clay pots placed underneath the animal's head.[86] When the draining is completed, the animal is decapitated and removed from the area.[87] Though perhaps uncommon, the blood may be placed on the adherents, consumed, or left in the pots for long periods of time.[88] Until the carcass is removed, the blood is placed before the deities.[89] The blood is later disposed of.[90] Again, the priest who performs the actual sacrifice is not involved in this procedure.

There appear to be no rules governing disposal of animal carcasses.[91] Animal burial or incineration are similarly not prohibited.[92] Prior to trial, discarded carcasses had been discovered in public places.[93] For example, carcasses had been discovered near rivers and canals, by stop-signs, and on the lawns or doorsteps of homes.[94] The court emphasized that improperly discarded carcasses present a health hazard. The court explained that "[a]nimal remains are . . . a health hazard because the remains attract flies, rats and other animals. Both vectors and res-

81. *Id.* at 1473 n.22.
82. *Id.*
83. *Id.* at 1472.
84. *Id.*
85. *Id.*
86. *Id.* at 1473.
87. *Id.*
88. *Id.* at 1473 n.21. At least one witness testified that he had been offered blood to drink as a child, but refused. *Id.*
89. *Id.* at 1473.
90. *Id.*
91. *Id.* at 1471.
92. *Id.*
93. *Id.* at 1474.
94. *Id.* at 1474 n.29.

ervoirs are created around such animal remains because the rats, flies and other animals that are attracted may themselves carry and exchange diseases and thus the risk of the spread of disease to humans is increased."[95]

Significantly, though, at the time of trial no instances of infectious disease originating from animal remains had been documented.[96]

Pichardo testified that most, but not all, animals are consumed after they are sacrificed.[97] He testified further, however, that he was never involved in the disposal of animal carcasses and that he had no knowledge of what is actually done with the animal remains, whether or not any part of the animal is consumed.[98] He did speculate that the remains of sacrificed animals were probably placed in the garbage of private homes.[99]

c. Evidence of Inhumane Slaughter and Danger to the Psychological Welfare of Children

At trial, the City offered expert testimony to establish that the sacrificial killing was not humane. Specifically, the City's expert, Dr. Fox, vice-president of the Humane Society, testified that the method of killing was not humane, because there was no guarantee that both carotid arteries could be severed simultaneously.[100] Dr. Fox testified further that animals would experience pain, fear and stress both before and during the actual sacrifice.[101] Based on this testimony, the court concluded that the

95. *Id.* at 1474-75.

96. *Id.* at 1474.

97. *Id.* at 1471. Animals used in healing rites (usually a single animal) are apparently almost never consumed. *Id.* at 1471 n.11. The illness is apparently considered to have passed to the animal, and "[t]he animal is not eaten, but is either placed on the altar of the deity for several hours, or is disposed of entirely." *Id.* at 1474. In death rites (usually requiring the sacrifice of one four legged animal and two fowl) the animals are similarly not consumed. *Id.* at 1474 n.26.

98. *Id.* at 1471. In fact, "[n]o witness could recall ever seeing how a carcass was disposed of." *Id.* at 1474 n.27.

99. *Id.* at 1471 n.13.

100. *Id.* at 1472. The City's expert also testified that because chickens have four such arteries, it was even less likely that all of the animal's arteries could be severed at once. *Id.*

101. *Id.* at 1473. Dr. Fox testified further that slaughtering chickens in this manner would be dangerous to humans. He explained that stress and fear lead to the increased

ceremony was not a "reliable or painless" method for sacrificing animals.[102]

The City also introduced expert testimony that children, when accompanied by an adult, are permitted to attend sacrificial ceremonies, and that observing sacrificial ceremonies would be detrimental to the mental health of such children.[103] The City's expert, Dr. Raul Huesmann, a research psychologist, testified that exposing a child to animal sacrifice "would be likely to increase the probability that the child [will] behave aggressively and violently, not just against animals but against humans."[104] Dr. Huesmann explained that "the observation would be likely to produce psychological processes that promote greater tolerance of aggressive violent behavior," specifically desensitization, tolerance and imitation.[105] He explained further that because priests are perceived as persons of high status, the effect might well be aggravated.[106] Imitation, he suggested, would be more likely.[107] Dr. Huesmann apparently based his testimony on research relating to the development of aggressive and violent behavior in children and adults.[108] No reference is made in the opinion to specific examinations or interviews conducted by Dr. Huesmann personally or by other psychologists.

B. The Underlying Dispute

1. *Standing and Ripeness*

As a preliminary matter, the district court expressed concern for whether the Church had standing to bring suit. Specifically, the court expressed concern for whether the dispute presented an "actual controversy," as required by the Declara-

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growth of bacteria in the chicken's immune system, especially salmonella, and that this danger could not be detected by visual inspection. *Id.*

102. *Id.* at 1472.

103. *Id.* at 1474 n.24.

104. *Id.* at 1475. The court rejected expert testimony disputing this correlation. *Id.* at 1476. This testimony was furnished by Dr. Angel Velez-Diaz, a clinical psychologist. Dr. Velez-Diaz agreed that children exposed to animal sacrifice would be desensitized towards violence, but did not believe that negative effects would occur because children witnessing animal sacrifice are usually prepared for the event. *Id.* at 1476.

105. *Id.* at 1475.

106. *Id.*

107. *Id.*

108. *See id.* at 1475-76.

tory Judgment Act, 28 U.S.C. § 2201.[109] The court reasoned that even assuming the challenged ordinances were invalid, state law (which was not challenged) still prohibited inhumane slaughter.[110]

The court was further concerned with the ripeness issue. The court emphasized that no attempts to enforce the ordinances were made by the City prior to trial.[111]

Despite these concerns, the court proceeded to the merits of the case. Notably, though, the court expressly limited the range of issues to be considered. In particular, the court refused to address the "abstract question of whether all laws restricting animal sacrifice for religious purposes are unconstitutional, or whether [church members] could practice animal sacrifice if they were in an area zoned for a slaughterhouse."[112]

2. *State Statutory Preemption*

The Church raised several preemption arguments. Mainly, the Church argued that the challenged ordinances were invalid because state law exempted ritual animal slaughter.[113] According to the Church, the ritual slaughter exemption was intended to "preempt municipalities from legislating any regulations whatsoever on ritual slaughter. . . ."[114] The court rejected this argument reasoning that because the Hialeah ordinances only banned slaughter performed outside of the regulatory requirements of

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109. *Id.* at 1479.

110. *Id. See also infra* note 146 and accompanying text setting forth the text of the Florida prohibition.

111. *Hialeah*, 723 F. Supp. at 1479. The court did not, however, discuss whether or not Church members had actually attempted to sacrifice any animals on the premises.

112. *Id.*

113. *Id.* at 1480. At that time, Florida animal cruelty law provided that "in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the" prohibition against inhumane slaughter. FLA. STAT. ANN. Ch. 828, § 828.22(3) (West 1987). For the purpose of Section 828.22(3), "ritual slaughter" was defined as slaughter by a "humane method," in turn defined as "[a] method in accordance with ritual requirements of any religious faith whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument." FLA. STAT. ANN. Ch. 828, § 828.23(7)(b) (West 1987).

114. *Hialeah*, 723 F. Supp. at 1480.

both local and state laws, no conflict existed.[115]

The Church also argued that the ordinances were invalid because they provided for criminal sanctions while state law only provided for civil penalties.[116] The court similarly rejected this argument. The court reasoned that the ordinances, as primarily zoning regulations, did not conflict with the state law, addressed to preventing animal cruelty.[117]

3. *First Amendment Challenge*

Having determined that animal sacrifice was an integral part of the Santeria faith, the court concluded that the challenged regulations "burdened" the Church's religious practices.[118] Notwithstanding this finding, the court, though sensitive to the nature of the challenge,[119] rejected the Church's free exercise claim.

The court recognized that ultimately the issue of whether the interests asserted by the City were sufficiently compelling to justify the ban on animal sacrifice would largely be dispositive.[120] According to the court, however, resolution of two threshold questions was first necessary. The first question concerned whether the ordinances regulated religious conduct rather than religious belief.[121] The court concluded that this requirement was clearly satisfied because the ordinances regulated the *performance* of animal sacrifice.[122] The second question was whether the ordinances served a secular purpose.[123] The court similarly concluded that the ordinances satisfied this require-

115. *Id.* at 1481.

116. *Id.*

117. *Id.* The court explained that while one of the secular purposes of the challenged ordinances was to prevent cruelty to animals, the ordinances were "first and foremost zoning ordinances" and were not "in and of themselves, 'ordinances related to animal control or cruelty.'" *Id.*

118. *Id.* at 1485. *See also infra* notes 183-94 and accompanying text discussing the cognizable burden requirement.

119. While the court did not discuss the history of the first amendment at length, the opinion suggests that the court was sensitive to the nature of the Church's claim. *See Hialeah*, 723 F. Supp. at 1482-83.

120. *See id.* at 1483 and 1484.

121. *Id.* at 1483.

122. *Id.*

123. *Id.*

ment. While observing that "the Church's announcement triggered the legislative action," the court emphasized that the ordinances were "not aimed solely at [the Church], but were an attempt to address the issue of animal sacrifice as a whole."[124] The court stressed further that absent the requisite neutrality, the ordinances were still valid. "Strict religious neutrality," the court remarked, "is not required by the First Amendment."[125]

Having determined that both threshold requirements were satisfied, the court next turned to the task of balancing the governmental and religious interests. The court identified three governmental interests: safeguarding the health, welfare and safety of the community; safeguarding the psychological welfare of children; and preventing cruelty to animals.[126] The court concluded that each interest was sufficiently compelling to justify the ban.[127]

With regard to the City's interest in safeguarding the community's health, welfare and safety, the court held that the City had sustained its burden to prove that animal sacrifice posed a substantial health risk.[128] Emphasizing evidence that animal remains pose a health hazard, the court concluded that there was a risk of physical harm to both church members and the public from disease and infestation.[129]

The court held further that the ban on animal sacrifice was justified by the City's interest in protecting the welfare of children.[130] Remarking that the City had a "particularly strong" in-

124. *Id.* While recognizing that the ordinances made frequent use of terms having largely religious significance, terms such as "sacrifice," "ritual" and "ceremony," the court concluded that the ordinances did not *on their face* violate the secular purpose test. The court explained that the ordinances were not intended to "single out persons engaged in ritual sacrifice, but to put those persons on notice that the state exemption for ritual slaughter only applied to commercial ritual slaughter, done in slaughterhouses." *Id.* at 1484. The court explained further that the ordinances were intended to reach not only "demonstrably bona fide religious conduct," but also "the killing of animals by groups that would probably not enjoy First Amendment protection, such as satanic cults." *Id.* Significantly, the court's inquiry here was limited to the statutory language.

125. *Id.*

126. *Id.* at 1485.

127. *Id.* at 1486.

128. *Id.* at 1485.

129. *Id.*

130. *Id.* at 1486.

terest here,[131] the court stressed the significance of evidence that children witnessing animal sacrifice might become more aggressive and violent, and thus that the child's behavior might become "detrimental to the community."[132]

Finally, the court held that the City's interest in preventing cruelty to animals was sufficiently compelling.[133] The court emphasized evidence that the method of killing sacrificial animals was inhumane, and that animals experience fear, pain and stress both before and during the sacrificial ceremony.[134]

The court further rejected the Church's argument for a religious exemption.[135] Explaining that "[i]t is often difficult, if not impossible, to tell who is responsible for a particular sacrifice," the court held that an exemption would "defeat the City's valid and compelling interests."[136] The court was concerned that an "exception would, in effect, swallow the rule."[137]

4. *Section 1983 Claim*

The court also rejected the Church's Section 1983 claim.[138] To maintain a successful claim, the court observed, the Church was required to prove more than a single incident of discrimination or harassment.[139] The court rejected the Church's claim reasoning that the Church failed to meet this burden.[140]

Having determined that each of the claims brought by the Church failed, the court entered judgment in favor of the City.[141]

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131. *Id.* at 1485.
132. *Id.* at 1475.
133. *Id.* at 1486.
134. *Id.*
135. *Id.* at 1486-87.
136. *Id.* at 1487.
137. *Id.*
138. *Id.* at 1488.
139. *See id.* at 1487.
140. *Id.* at 1488.
141. *Id.*

C. TEXT OF THE ORDINANCES

This subsection sets forth the text of the challenged ordinances. The district court rejected the Church's argument that these ordinances were discriminatory. The court concluded rather that the ordinances were intended to address the issue of animal sacrifice as a whole.[142] Two additional observations by the court are relevant here as well. First, that the Church's announcement triggered the legislative action. Second, that there was some evidence supporting the Church's argument, specifically that "[t]here was testimony to the effect that the council meetings that took place concerning the Church were done in a mob atmosphere and that the council members intended to discriminate against the Church and to stop the Church."[143]

1. *Ordinance No. 87-40*

The City enacted Ordinance No. 87-40 on June 9, 1987.[144] The ordinance simply adopts Florida's statutory prohibition against animal cruelty.[145] The Florida statute provides that:

> [w]hoever unnecessarily overloads, overdrives, tortures, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhumane manner, shall be guilty of a misdemeanor of the first degree. . . .[146]

Ordinance No. 87-40 did not adopt the portion of the Florida statute relating to penalties.[147] The penalty for violating the ordinance was rather fixed at "a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the court."[148]

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142. *Id.* at 1483.
143. *Id.* at 1478.
144. *Id.* at 1476.
145. HIALEAH ORD. 87-40(1) (1987).
146. FLA. STAT. Ch. 828, § 828.12 (West 1987).
147. *See* HIALEAH ORD. 87-40(1) (1987).
148. HIALEAH ORD. 87-40(3) (1987).

2. *Ordinance No. 87-52*

Ordinance No. 87-52 was adopted on September 8, 1987.[149] Subject to zoning and licensing exemptions,[150] the ordinance prohibits the possession, sacrifice, or slaughter of animals for food purposes.[151] Subsection 2 provides further that the prohibition applies "to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh of the animal is to be consumed."[152] Sacrifice is defined as the act of "unnecessarily killing, tormenting, torturing, or mutilating an animal in a public or private ritual or ceremony not for the primary purpose of food consumption."[153] Slaughter is defined as the "killing of animals for food."[154] Comparable sanctions are available.[155]

3. *Ordinance No. 87-71*

Ordinance No. 98-71 was enacted on September 22, 1987.[156] The ordinance prohibits animal sacrifice within the City's corporate limits.[157] Ordinance No. 87-71 defines the terms "sacrifice" and "animal" in the same manner as Ordinance No. 87-52.[158] The preamble explains that animal sacrifice "is contrary to the public health, safety, welfare and morals of the community."[159] Comparable sanctions are again available.[160]

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149. *Hialeah*, 723 F. Supp. at 1476.

150. Ordinance No. 87-52 provides that "nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture." HIALEAH ORD. 87-52, § 6-9(3) (1987).

151. HIALEAH ORD. 87-52, § 6-9(1) (1987). An animal is defined as "any living dumb creature." HIALEAH ORD. 87-52, § 6-8(1) (1987).

152. HIALEAH ORD. 87-52, § 6-9(2) (1987).

153. HIALEAH ORD. 87-52, § 6-8(2) (1987).

154. HIALEAH ORD. 87-52, § 6-8(3) (1987).

155. *See* HIALEAH ORD. 87-52, § 6-9(3) (1987).

156. *Hialeah*, 723 F. Supp. at 1476.

157. HIALEAH ORD. 87-71 (1987).

158. *See* HIALEAH ORD. 87-71 §§ (1) and (2) (1987).

159. HIALEAH ORD. 87-71 (1987).

160. *See* HIALEAH ORD. 87-71(7) (1987).

4. *Ordinance No. 87-72*

Ordinance No. 87-72 was also adopted on September 22, 1987.[161] The ordinance prohibits animal slaughter on premises within Hialeah, "except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for operation of a slaughter house."[162] The slaughter of livestock in accordance with state law is exempted.[163] Available sanctions also include a fine or jail sentence, together or separately.[164]

IV. THE EMERGENCE OF FREE EXERCISE DOCTRINE

The Supreme Court has traditionally drawn an important distinction between religious beliefs and religious conduct. Chief Justice Waite first articulated the justification for this distinction in *Reynolds v. United States*.[165] There, rejecting the notion that religious conduct would *never* be subject to regulation, he reasoned that "[t]o permit this would be to make the professed doctrines of religious beliefs superior to the laws of the land, and in effect permit every citizen to become a law unto himself."[166] He reasoned further that "[g]overnment could exist only in name under such circumstances."[167]

While consistently adopting Chief Justice Waite's reasoning in *Reynolds*,[168] subsequent decisions have focused mainly on in-

161. *Hialeah*, 723 F. Supp. at 1476.

162. HIALEAH ORD. 87-72(3) (1987). "Slaughter" is again defined as "the killing of animals for food." HIALEAH ORD. 87-72(1) (1987).

163. HIALEAH ORD. 87-72(6) (1987).

164. *See* HIALEAH ORD. 87-72(8) (1987).

165. 98 U.S. 145 (1878).

166. *Id.* at 166-67.

167. *Id.*

168. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988) ("[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires."); United States v. Lee, 455 U.S. 252, 259 (1982) ("To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."); Braunfeld v. Brown, 366 U.S. 599, 604 (1961) ("[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."); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 652 (1940) (Frankfurter, J., dissenting) ("The constitutional protection of religious freedom terminated disabilities,

terpreting the practical significance of the belief-conduct distinction. Reconciling these decisions can be difficult. Most claims have triggered strict scrutiny.[169] Thus, one of the Court's more recent opinions counseled that "[t]he free exercise inquiry asks whether [the] government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[170] But modernly, the Court has favored a far less discriminating standard of review.[171] Moreover, the Court has expressly determined that where generally applicable neutral regulations

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it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (Religious "[c]onduct remains subject to regulation for the protection of society."); Davis v. Beason, 133 U.S. 333, 342-43 (1890) ("However free the exercise of religion may be, it must be subordinate to the criminal laws of the country. . . ."); *see also* Employment Div. v. Smith, 494 U.S. 872, 888 (1990), *reh'g denied*, 496 U.S. 913 (1990); Bowen v. Roy, 476 U.S. 693, 708 n.15 (1986); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

The Court has suggested that Thomas Jefferson similarly contemplated this concern when he said:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other than his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make "no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Brown, 366 U.S. at 604 (quoting 8 WORKS OF THOMAS JEFFERSON 113).

169. Strict scrutiny was applied in each of the four unemployment compensation regulation cases. *See infra* notes 204-17 and accompanying text. Prior to *Smith*, however, strict scrutiny was not expressly limited to this context. *See, e.g.*, Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989), *reh'g denied*, 492 U.S. 933 (1989); Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983); *Lee*, 455 U.S. at 257; Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). Professor McConnel argues that in practice, even while purporting to apply the compelling interest test, the Court actually applied a more relaxed standard of review. McConnel, *Free Exercise Revisionism*, *supra* note 14, at 1109. He suggests that "[t]he Court generally found either that the free exercise right was not burdened or that the government interest was compelling." *Id.*

170. *Hernandez*, 490 U.S. at 699.

171. *See, e.g.*, O'Lone v. Shabazz, 482 U.S. 342, 349 (1987) (deferential review of prison regulations); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (deferential review of military regulations); *Roy*, 476 U.S. at 707-08 (plurality opinion) (deferential review of challenge to federal food stamp program regulations).

or government conduct relating to its own internal affairs are concerned, even minimal scrutiny is unnecessary.[172]

At first blush, these developments suggest that the Court's free exercise jurisprudence has largely been characterized by an *ad hoc* approach to constitutional adjudication. To some extent, this assessment may be accurate.[173] Arguably, though, some sense can be made of the Court's decisions. This can be accomplished by examining the cases with reference to the forces which have shaped the Court's free exercise jurisprudence: tension between the need to safeguard the free exercise of religion and the need to preserve government autonomy, and tension between formal neutrality and accommodation.

To begin with, the Court has never entertained a single definitive interpretation of the First Amendment. When *Reynolds* was decided in 1878, the Court embraced formal neutrality, interpreting the First Amendment to prohibit only overt religious discrimination.[174] Justice Brennan later turned to an interpretation favorable to accommodation in *Sherbert*,[175] but by no means did *Sherbert* resolve the issue. To the contrary, *Smith* has signaled the Court's return to formal neutrality.[176]

The rise of formal neutrality has profound implications. As Professor McConnel has explained, "[t]he difference between the two views is the difference between a Free Exercise Clause that is a major restraining device on government action that affects religious practices and a Free Exercise Clause that will rarely have practical application."[177] What is important to recognize here, however, is that tension between these competing views has played a vital role in the development of the Court's free exercise jurisprudence. Recognizing this is important, because given the fundamental differences between accommodation and formal neutrality, the Court's decisions begin to make

172. With regard to the former, see *Smith*, 494 U.S. at 884. *See also infra* notes 240-51. With regard to the latter, see *Lyng*, 485 U.S. at 448. *See also infra* notes 184-95.

173. *See* Marcus, *supra* note 7, at 1239-40.

174. McConnel, *Origins of Free Exercise*, *supra* note 5, at 1411-12.

175. *Id.* at 1412.

176. *See* McConnel, *Accommodation of Religion*, *supra* note 24, at 696; Laycock, *Summary and Synthesis*, *supra* note 31, at 848. *See also infra* notes 235-51 and accompanying text discussing the Court's *Smith* opinion.

177. McConnel, *Accommodation of Religion*, *supra* note 24, at 689.

some sense.

Appreciating the depth of the Court's concern for preserving government autonomy is also useful in attempting to explain the Court's decisions. Free exercise claims are addressed to the constitutionality of legislation. Such claims necessarily require the Court to balance religious freedom on the one hand against the need to protect government autonomy on the other. The Court has been willing to intervene on behalf of the former. For example, plaintiffs have prevailed in each of the four principal cases involving unemployment compensation regulations.[178] Beginning with *Reynolds*, however, the Court has consistently rejected claims posing, at least from the Government's perspective, a potential threat to the latter.[179] Indeed, the Court has become increasingly sensitive to this concern. Accordingly, by examining the cases with reference to the *relative strength* of these competing interests, the Court's decisions similarly appear to be less incongruous. The likelihood that the Court will intervene on behalf of the plaintiff (by applying strict scrutiny) plainly diminishes in direct proportion to the strength of the government's interest.[180]

Having identified the forces which continue to shape the Court's free exercise jurisprudence, the remaining portion of this section briefly reviews the Court's major free exercise decisions. These decisions, it is submitted, offer useful guidance regarding both which claims will trigger free exercise review and, assuming review is triggered, whether heightened review is appropriate.

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178. *See infra* notes 204-17 and accompanying text discussing the unemployment compensation cases.

179. With the exception of claims involving unemployment compensation regulations, the Court has, in fact, rejected all free exercise challenges since 1972. McConnel, *Free Exercise Revisionism*, *supra* note 14, at 1109.

180. Tension between these interests also helps to explain why the Court's free exercise decisions appear to turn on case-specific facts. Clearly the government's interest in maintaining order is stronger under some circumstances than others. For example, the government has an especially strong interest where military or prison regulations are at issue. *See, e.g.*, O'Lone v. Shabazz, 482 U.S. 342, 349-50 (1987) (involving prison regulations); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (involving military regulations). Case-specific facts have thus been important because the strength of the government's interest derives mainly from them.

A. Free Exercise Review?

1. *Defining the Contours of Religious Activity*

After *Reynolds*, it was well settled that the First Amendment would tolerate some restrictions on religious conduct.[181] As a more fundamental question, however, the Court was left to determine whether religious conduct would *ever* be protected. Although this question remained unresolved for the better part of a century, it was eventually answered in the affirmative when, in *Cantwell v. Connecticut*,[182] Justice Roberts finally declared that "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[183]

Cantwell, responsive to an important inquiry, was thus a landmark decision. However, the Court's opinion raised an important question: precisely which claims trigger free exercise review. Most of the significant free exercise cases are addressed to this inquiry. In turn, considerable attention has also been devoted to the question of when heightened review is required.

2. *The Cognizable Burden Requirement*

Even where the government has imposed a burden on the free exercise of religious conduct,[184] free exercise claims do *not*

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181. *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1978).

182. 310 U.S. 296 (1940).

183. *Id.* at 304

184. The imposition of such a burden is a threshold requirement. *See, e.g.*, Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989), *reh'g denied*, 492 U.S. 933 (1989); United States v. Lee, 455 U.S. 252, 256-57 (1982); Sherbert v. Verner, 374 U.S. 398, 403 (1978).

The requirement can be satisfied by several types of regulations. "A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the *severest* manner possible, for 'it results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.' " Employment Div. v. Smith, 494 U.S. 872, 897 (1990), *reh'g denied*, 496 U.S. 913 (1990) (O'Connor, J., concurring) (quoting Braunfled v. Brown, 366 U.S. 599, 605 (1961)) (emphasis added). This requirement is additionally satisfied where "the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of other the price of an equal place in the civil community." *Id.* With respect to the latter, the Court has recently explained that "[w]here the state conditions

always trigger constitutional review. A "substantial" burden is required.[185] This proposition clearly emerges from the Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n.*[186] But *Lyng* is also important in an additional respect. The Court held that even where imposing a substantial burden on religious conduct, laws regulating the "internal affairs" of the government do not trigger free exercise review.[187] In other words, *Lyng* reveals that the Court will now consider the *form* as well as the *severity* of the burden. Before discussing *Lyng* it is first necessary to briefly consider the Court's opinion two years earlier in *Bowen v. Roy*,[188] arguably foreshadowing the *Lyng* Court's holding.

In *Roy*, the plaintiffs, Native Americans, challenged a federal law requiring participants in a food stamp program to furnish Social Security numbers for each household member receiving benefits. The plaintiffs argued that the regulation was unconstitutional because it required them to violate their Native American religious beliefs. The plaintiffs argued specifically that furnishing the requisite information on behalf of their minor daughter would "rob her spirit" and "prevent her from attaining

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receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id.* (quoting Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981)); *see also* Frazee v. Illinois, 489 U.S. 829, 832 (1989); Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 141 (1987); Sherbert v. Verner, 374 U.S. 398, 403 (1978). For a scholarly analysis of the burden requirement, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise Clause*, 102 HARV. L. REV. 953 (1989).

For an example of a decision where the Court rejected the plaintiff's claim at this stage in the analysis, see Tony & Susan Almo Foundation v. Secretary of Labor, 471 U.S. 290 (1985), where the Court held that the burden imposed by federal wage and hour requirements was insufficient to trigger free exercise review. *Id.* at 304. The Court reasoned that employees having religious objections to receiving wages could simply return them to their employer. *Id.*

185. *Hernandez*, 490 U.S. at 699; *see also Smith*, 494 U.S. at 896; Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). The Court has also discussed the distinction between *direct* and *indirect* burdens. *See, e.g., Lyng*, 485 U.S. at 450; *Brown*, 366 U.S. at 605-07. This distinction, however, has been expressly rejected as immaterial. *See Sherbert*, 374 U.S. at 406 (discriminatory regulations may be invalid "even though the burden may be characterized as being only indirect").

186. 485 U.S. 439, 449 (1988) (implying that free exercise scrutiny is only required where there is coercive government conduct or where religious activity is penalized).

187. *Id.*

188. 476 U.S. 693 (1986).

greater spiritual power."[189] The Court rejected the challenge.

Chief Justice Burger announced the necessary inquiry. "Absent proof of an intent to discriminate against particular religious beliefs or against religion in general," he declared, "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.*"[190] "The Free Exercise Clause," Chief Justice Burger explained, "simply cannot be understood to require the Government to conduct *its own internal affairs* in ways that comport with the religious beliefs of particular citizens."[191]

In *Lyng*, the Court carried Chief Justice Burger's reasoning one step further. There, the plaintiffs, again Native Americans, claimed that the U.S. Forest Service's plan to build a road on government land traditionally used by several Indian tribes for sacred rituals violated the Free Exercise Clause. The Court observed that the plan would "have severe adverse effects" on the plaintiffs' free exercise of religion.[192] But the Court nonetheless rejected the challenge. And, most notably, in contrast to *Roy*, the Court did not even purport to apply deferential review.[193] Rather, stressing Chief Justice Burger's language in *Roy*, the Court, in one swift stroke, exempted Government conduct relating to its own internal affairs from the protective mantle of the First Amendment.[194]

Clearly, if the underlying activity is within the scope of the Court's decision in *Lyng*, no further inquiry is necessary: the burden, even where substantial, is not constitutionally significant. Under *Smith*, "generally applicable neutral" laws regulating religious conduct similarly do not trigger constitutional review.[195] Discussing *Smith*, requiring an analogous threshold

189. *Id.* at 696.

190. *Id.* at 707-08 (emphasis added).

191. Bowen v. Roy, 476 U.S. 693, 699 (1986) (emphasis added). Justice O'Connor expressly sanctioned the Court's statement in *Roy* in *Lyng*. *See Lyng*, 485 U.S. at 448-49.

192. *Lyng*, 485 U.S. at 447.

193. *See generally id.* at 439-58.

194. *Id.* at 448.

195. *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990), *reh'g denied*, 496 U.S. 913 (1990).

determination, would thus seem appropriate here. However, because the full significance of the Court's *Smith* decision requires an appreciation for the development of the Court's pre-*Smith* free exercise jurisprudence, and for the Court's gradual movement away from accommodation, our discussion of *Smith* must be momentarily postponed.

B. The Movement Away from Strict Scrutiny: Deferential Review of Prison and Military Regulations

Two recent cases, decided within a year of each other, suggest that deferential review is appropriate where the underlying dispute involves either *prison* or *military* regulations. The first of these cases, *Goldman v. Weinberger*,[196] involved a military regulation prohibiting the wearing of "headgear indoors except by armed security guards."[197] The plaintiff, an Orthodox Jew and ordained rabbi, was serving in the Air Force reserves. He challenged the law after being reprimanded for wearing his yarmulke in violation of the regulation. His claim was rejected. Speaking for the Court, Justice Rehnquist announced that "[o]ur review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[198] He explained further that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."[199]

The following year in *O'Lone v. Shabazz*,[200] the Court similarly rejected a challenge brought by Islamic prison inmates against prison policies preventing them from attending Jumu'ah, a Muslim congregational service held on Friday afternoons. Again speaking for the Court, Justice Rehnquist held that deferential review was appropriate. "[P]rison regulations alleged to infringe on constitutional rights," he remarked, "are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional

196. 475 U.S. 503 (1986).
197. *Id.* at 505.
198. *Id.* at 507.
199. *Id.*
200. 482 U.S. 342 (1987).

rights."[201]

In both *Weinberger* and *Shabazz*, the Court was clearly sensitive to the government's interest in maintaining order. Thus, in *Shabazz*, Justice Rehnquist explained that deferential review of prison policies was necessary because it "ensures the ability of corrections officials to anticipate security problems of prison administration and avoids unnecessary intrusion of the judiciary into problems particularly ill suited to resolution by decree."[202] The decisions thus further support an argument that, to large measure, this concern will dictate the outcome of a particular controversy.

C. Heightened Review?

Assuming both that free exercise review is triggered and that the plaintiff's claim is not within the scope of the Court's decisions in *Weinberger* and *Shabazz*, heightened review is ostensibly appropriate.[203] The Court's decisions at this stage of the inquiry, however, are not entirely consistent. Strict scrutiny still appears to be the rule. But just how "strict" strict scrutiny is remains to be seen.

1. *Conditioning Government Benefits*

Since 1963, when *Sherbert* was decided, it has been well settled that regulations conditioning receipt of government benefits upon conduct conflicting with an individual's religious beliefs trigger strict scrutiny.[204] Speaking for the Court in *Hobbie*, Jus-

201. *Id.* at 349.

202. *Id.* at 349-50 (citations omitted).

203. *See, e.g.*, Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989), *reh'g denied*, 492 U.S. 933 (1989); Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 141 (1987); United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd., 450 U.S. 707, 718 (1981); McDaniel v. Paty, 435 U.S. 618, 626-29 (1978) (plurality opinion); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Gillette v. United States, 401 U.S. 437, 462 (1971); Sherbert v. Verner, 374 U.S. 398, 406 (1963); *see also* Employment Div. v. Smith, 494 U.S. 872, 907 (1990), *reh'g denied*, 496 U.S. 913 (1990) (Blackmun, J., concurring); Bowen v. Roy, 476 U.S. 693, 723 (1986) (O'Connor, J., concurring in part and dissenting in part).

204. *See, e.g., Smith*, 494 U.S. at 884 ("[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."); *see also Roy*, 476 U.S. at 702.

tice Brennan declared that:

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious beliefs, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[205]

Accordingly, where implicated, the government must demonstrate either that disqualification of the plaintiff as a potential beneficiary "represents no infringement by the State of [the individual's] constitutional rights of free exercise, or that any incidental burden on the free exercise of religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.' "[206]

There are four principal cases in this area. In each case, the plaintiff prevailed. We briefly review them here, chronologically.

In *Sherbert v. Verner*,[207] the plaintiff, a Seventh-day Adventist, was discharged by her employer because she refused to work on Saturdays, the Seventh-day Adventist Sabbath. When she was similarly unable to secure alternative employment, also because she refused to work on Saturdays, she filed for state unemployment compensation benefits. After her request for benefits was denied, based expressly on the fact that she was available for Saturday work, she brought a free exercise challenge against the State. The Court sustained her challenge. Applying strict scrutiny, the Court rejected the State's argument that preventing fraudulent claims was a sufficiently compelling interest.[208]

In *Thomas v. Review Board*,[209] the plaintiff, a Jehovah's Witness, quit his job at a foundry when, after an initial transfer,

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205. *Hobbie*, 480 U.S. at 141 (quoting *Thomas*, 450 U.S. at 717-18).

206. *Sherbert*, 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1962)).

207. 374 U.S. 398 (1963).

208. *Id.* at 403.

209. 450 U.S. 707 (1981).

he was assigned to a division responsible for producing weapons. He was also denied unemployment compensation benefits based on a determination that a "personal philosophical choice rather than a religious choice" was involved.[210] The Court sustained his free exercise challenge reasoning that the disqualifying provision of the State's unemployment compensation scheme could not be justified either by its asserted interest in protecting the financial integrity of its unemployment compensation fund, or in avoiding "detailed probing by employers into job applicants' religious beliefs."[211]

In *Hobbie v. Unemployment Appeals Commission*,[212] the plaintiff, also a Seventh-day Adventist, was similarly discharged when refusing to work Saturday shifts as assistant manager of a retail jewelry store. In contrast to *Sherbert*, the plaintiff had converted to the Seventh-day Adventist Church *after* commencing her employment. The Court dismissed this distinction as immaterial. "The First Amendment," proclaimed Justice Brennan, "protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired."[213]

Finally, in *Frazee v. Illinois*,[214] the Court again sustained the plaintiff's free exercise challenge. Here, the plaintiff, a Christian, refused to work on Sundays, "the Lord's day."[215] He was denied unemployment compensation based on his admission that he was not a member of a particular religious sect. Also rejecting this distinction as immaterial, the Court sustained the plaintiff's challenge. The Court expressly rejected "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[216]

Beyond requiring strict scrutiny, two additional aspects of the respective cases are important. The first is that each of the

210. *Id.* at 714.
211. *Id.* at 719.
212. 480 U.S. 136 (1987).
213. *Id.* at 144.
214. 489 U.S. 829 (1989).
215. *Id.* at 830.
216. *Id.* at 834.

regulations at issue provided that benefits would be denied to an applicant refusing suitable work without good cause. This is important because later cases have explained that heightened review was warranted based on the fact that the "good cause" standard "invited consideration of the particular circumstances" of each case.[217] Suffice it to say for our purposes here that because the "necessity" standard incorporated in Ordinance No. 87-52 and Ordinance No. 87-71 would seem to require an analogous determination, an argument can be made that strict scrutiny should be extended beyond the context of the unemployment compensation cases. Discussion of this matter is appropriately postponed.

Moreover, the fact that in each of the respective cases the Court emphasized the lack of evidence supporting the state's asserted interest is also important. This emphasis is important because *Hialeah* presents a comparable situation, and thus further supports an argument that the Hialeah ordinances are inconsistent with the Free Exercise Clause.

2. *The Tax Cases*

The Court's concern for government autonomy is perhaps nowhere more apparent than in the area of tax regulations, where, with the exception of cases in which the challenged regulation effectively operated as a prior restraint,[218] most claims have failed.

In *United States v. Lee*,[219] the plaintiff, a member of the Old Order Amish, challenged the constitutionality of the imposition of social security taxes. Specifically, the plaintiff, who owned a small carpentry shop, refused to file quarterly social security tax returns, withhold social security tax from his employees, or pay his social security taxes. The Court, while recognizing that compulsory participation in the social security system interfered with the plaintiff's religious beliefs, rejected the plaintiff's free exercise challenge. The Court reasoned that the govern-

217. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 884 (1990), *reh'g denied*, 496 U.S. 913 (1990).

218. *See, e.g.*, Follett v. McCormick, 321 U.S. 573, 577 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 113-14 (1943).

219. 455 U.S. 252 (1982).

ment's interest in maintaining the social security system, and in particular mandatory participation in the system, was paramount to the plaintiff's interest in the free exercise of the Amish faith.[220] "Because the social security system is *nationwide*," the Court explained, "the government interest is apparent."[221]

In *Hernandez v. Commissioner of Internal Revenue*,[222] members of the Church of Scientology brought suit against the government claiming that regulations prohibiting deductions for "training" sessions (meetings between participants and Church officials intended to enhance spiritual awareness) violated the Free Exercise Clause.[223] The Court recognized that the regulations imposed a substantial burden on the free exercise of religion. Notwithstanding this determination, however, the Court rejected the plaintiffs' claim. The Court again reasoned that the government's interest in maintaining the tax system was superior to the plaintiffs' interest in the free exercise of Scientology.[224]

Most notably, for the purpose of generally applicable tax regulations, the Court appears to have recently abandoned the compelling interest test applied in *Lee* and *Hernandez* in *Jimmy Swaggart Ministries v. Board of Equalization*.[225] There, suit was filed after the State Board of Equalization informed the plaintiff, a religious organization, that religious materials it was selling were not exempt from state sales tax. The Court, developing the distinction between a "flat license tax" (potentially constituting a prior restraint) and a "flat sales tax" (which do not), rejected the challenge.[226] Emphasizing that the tax "merely decreased the amount of money the plaintiff had to spend on religious activities," a unanimous Court held that the burden imposed on the plaintiff's free exercise of religion was not "con-

220. *Id.* at 258-59. The Court concluded further that an exemption would "unduly interfere with fulfillment of the governmental interest." *Id.* at 259 (quoting Braunfled v. Brown, 366 U.S. 599, 605 (1961)).

221. *Id.* at 258 (emphasis added).

222. 490 U.S. 680 (1989), *reh'g denied*, 492 U.S. 933 (1989).

223. The plaintiffs claimed that they should be allowed to deduct the fee charged for training sessions as a charitable deduction.

224. *Hernandez*, 490 U.S. at 698-700.

225. 493 U.S. 378 (1990).

226. *See id.* at 385-90.

stitutionally significant."[227] The respective decisions suggest that absent the situation where a given tax regulation can be characterized as a prior restraint, free exercise review is inappropriate. But the cases are also important because, from a jurisprudential perspective, they serve to illustrate the proposition that free exercise cases are resolved mainly with reference to the competing interests at issue. Simply put, the Court has determined that the government's interest in maintaining the financial integrity of the nationwide tax system outweighs most, if not all, burdens on religious conduct.

3. *Criminal Prohibitions*

While the Court's jurisprudence with respect to the unemployment compensation and tax cases has been consistent, the same cannot be said where criminal prohibitions have been concerned. Perhaps this may be explained by the fact that there are extremely strong interests on both sides. But the shift in Court personnel during the period discussed below is also important. This shift in Court personnel was accompanied by what we now know was a corresponding shift in free exercise doctrine as well.

Following *Reynolds*, the first significant case raising questions regarding the validity of criminal prohibitions burdening the free exercise of religion was *Cantwell v. Connecticut*,[228] decided in 1940. There, the plaintiffs, Jehovah's witnesses, were arrested for soliciting religious contributions (by going house to house and playing an anti-Catholic record for willing listeners) without having first obtained the requisite state certificate.[229] The Court reversed the convictions. While sensitive to the State's interest in preserving both the public peace and the public order,[230] the Court held that the certification requirement

227. *Id.* at 391.

228. 310 U.S. 296 (1940).

229. The plaintiffs, Newton Cantwell and his two sons, Jesse and Russel, were also arrested for committing a breach of the peace, this charge also stemming from their house to house solicitation.

230. *Cantwell*, 310 U.S. at 306-07. Language in the opinion reveals that the Court, while willing to intervene on behalf of the plaintiffs, was clearly sensitive to the State's interest in maintaining order. "Nothing we have said," cautioned the Court, "is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct." *Id.* at 306. And perhaps most revealing is the Court's statement that "Even the exercise of religion may be at some slight inconvenience in order that the State may

posed a "forbidden burden" on the plaintiffs' free exercise of religion.[231]

Notably, the Court did not specifically discuss the issue of whether the challenged regulation could be justified by a compelling interest. The latter portion of the Court's opinion, however, suggests that the Court was in fact applying heightened review. The decision, speaking of "narrowly drawn" statutes and "substantial" state interests,[232] is thus significant because it signaled an important development in the Court's free exercise jurisprudence: the arrival of strict scrutiny.[233]

The next major case appears to have been *Braunfeld v. Brown*,[234] which followed roughly twenty years later. There, orthodox Jewish merchants challenged Sunday closing laws arguing that because their religious beliefs prohibited Saturday work, the laws impaired their ability to "earn a livelihood."[235] The Court rejected the challenge. This time expressly applying heightened scrutiny, the Court held the regulation was justified by the State's interest in providing a general day of rest.[236] The decision's significance was thus twofold. On the one hand the Court recognized heightened review as established doctrine; on the other, that heightened review would not always be fatal to legislation.

A decade later, the Court again addressed this issue in *Wisconsin v. Yoder*,[237] where Amish parents challenged their conviction under a State statute requiring compulsory school attendance.[238] The Court acknowledged the strength of the State's

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protect its citizens from injury." *Id.*

231. *Id.* at 307.

232. *Id.* at 311.

233. The Court's emphasis on the absence of evidence that the plaintiffs' conduct posed any threat to the public good is additionally important. *See id.* at 310. The significance of this aspect of the opinion is discussed *infra* notes 253-62 and accompanying text.

234. 366 U.S. 599 (1961) (plurality opinion). Chief Justice Warren authored the opinion. He was joined by Justices Black, Clark and Whittaker.

235. *Id.* at 601.

236. *Id.* at 607 ("we cannot find a State without the power to provide a weekly respite from all labor").

237. 406 U.S. 205 (1972).

238. The Wisconsin statute provided that children were required to attend school until the age of 16. The plaintiffs, Jonas Yoder, Wallace Miller and Adin Yutz, refused to enroll their children after they completed the eighth grade, and were subsequently fined

interest in universal education. However, the Court held that the State had failed to adduce sufficient evidence in support of its position. The Court observed specifically that there was no "basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problems as might exist."[239] Accordingly, the Court reversed the convictions.

Together the Court's decisions reveal that criminal prohibitions burdening the free exercise of religion trigger heightened review. This much is plain to see. More importantly, though, the Court's decisions reflect the fundamental tension which has shaped the Court's free exercise jurisprudence: tension between the need to promote the free exercise of religion and the need to preserve government autonomy, and tension between formal neutrality and accommodation.

D. Neutrality and the Smith Decision

The Court's *Smith* decision represents a dramatic, though not entirely unexpected,[240] departure from the Court's tradi-

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$5 each pursuant to the statute.

239. *Yoder*, 406 U.S. at 224.

240. In *Yoder*, the Court was already discussing the concept of neutrality. There, the Court expressly declared that "[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." 406 U.S. at 220. And while the Court ultimately disregarded this language in *Smith*, the neutrality argument was clearly beginning to gather support when the Court decided Bowen v. Roy in 1986. The plurality there observed that "a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition . . . ." 476 U.S. at 704. *See also* Thomas v. Review Bd., 450 U.S. 707, 723 (1981) (Rehnquist, J., dissenting) (When "a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not . . . require that the State conform that statute to the dictates of religious conscience of any group.") (cited in McConnel, *Origins of Free Exercise*, *supra* note 5, at 1417-18); United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) (There "is virtually no room for a 'constitutionally required exemption' on religious grounds from a valid . . . law that is entirely neutral in its general application.") (cited in McConnel, *Origins of Free Exercise*, *supra* note 5, at 1418); *but see* McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) ("[G]overnment [may] take religion into account . . . to-exempt, when possible, from generally applicable government regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish.") (cited in McConnel, *Accommodation of Religion*, *supra* note 24, at 688).

tional free exercise jurisprudence.[241] Regardless of whether the Court was applying a watered-down version of the compelling interest test before *Smith* was decided,[242] most free exercise claims at least triggered heightened review. Yet from the Court's "long history of free exercise precedents," the *Smith* majority extracted the single categorical rule that generally applicable neutral laws regulating religious conduct do not impose a cognizable burden on the exercise of religion.[243]

Briefly, in *Smith*, the plaintiffs, Native Americans, challenged the constitutionality of an Oregon law prohibiting the use of peyote. Both plaintiffs were fired from their positions at a drug rehabilitation clinic for ingesting the hallucinogen at a Native American Church ceremony. Suit was filed shortly after the State denied their claim for unemployment benefits.

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241. *See, e.g.*, American Friends Service Committee Corp. v. United States, 951 F.2d 957, 960 (9th Cir. 1991) (*Smith* "dramatically altered the manner in which we must evaluate free exercise" claims). Professor McConnel similarly suggests that while "there was no shortage of free exercise cases or closely divided opinions," free exercise doctrine was relatively stable before *Smith*. McConnel, *Free Exercise Revisionism*, *supra* note 14, at 1109. He suggests further that after *Smith*, "[f]ree exercise is no longer wanting for controversy." *Id.* at 1111. Justice Blackmun's dissenting opinion in *Smith* directly supports this conclusion. There, he remarked that the Court's holding "effectuate[d] a wholesale overturning of settled law concerning the Religion Clause . . . ." Employment Div. v. Smith, 494 U.S. 872, 908 (1990), *reh'g denied*, 496 U.S. 913 (1990) (Blackmun, J., dissenting). And Justice O'Connor, while concurring in the majority opinion, was insensitive to these developments. Describing the result reached by the majority as "sweeping," she was highly critical of both the Court's "strained reading of the First Amendment" and disregard for established precedent. *Id.* at 892 (O'Connor, J., concurring).

The considerable commentary generated in response to the Court's decision further attests to its significance. *See generally* Laycock, *Summary and Synthesis*, *supra* note 31, at 841 (1992) ("Smith creates the legal framework for persecution."); Douglas Laycock, *The Supreme Court's Assault On Free Exercise, And The Amicus Brief That Was Never Filed*, 8 J.L. & REL. 99 (1990) ("The opinion appears to be inconsistent with the original intent, inconsistent with the constitutional text, inconsistent with the doctrine under the constitutional clauses, and inconsistent with precedent. It strips the free exercise clause of independent meaning."); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Michael W. McConnel, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329 (1991); McConnel, *Free Exercise Revisionism*, *supra* note 14. And for an interesting discussion of the *Smith* decision from a cultural perspective, see The Supreme Court, 1989 Term: Leading Cases: I. Constitutional Law (1990) (arguing that Native Americans have suffered at the expense of the Court's free exercise jurisprudence).

242. *See* McConnel, *Free Exercise Revisionism*, *supra* note 14, at 1109.

243. *Smith*, 494 U.S. at 892 (O'Connor, J., concurring). Justice O'Connor challenged this aspect of the majority's holding. She countered that "[t]here is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws 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." *Id.* at 901.

Emphasizing that the regulation was neutral and generally applicable, the Court rejected the plaintiffs' claim without subjecting the challenged regulation to even minimal scrutiny.[244] The Court explained that the *Sherbert* compelling interest test was "inapplicable," Justice Scalia reasoning that "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' — permitting him, by virtue of his beliefs, 'to become a law unto himself' — contradicts both constitutional tradition and common sense."[245]

The Court's holding in *Smith* thus stands for the proposition that generally applicable neutral laws effectively regulating religious conduct do not trigger constitutional scrutiny.[246] Ac-

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244. *See generally id.* at 883-90.

245. *Id.* at 885 (citations omitted). In rejecting the argument that the Court should apply strict scrutiny, Justice Scalia attempted to distinguish *Smith* from *Sherbert* and its progeny. Specifically, he explained that the *Sherbert* test "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884. He explained further that "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances . . . . " The good cause standard created a mechanism for individualized exemptions.' " *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

Justice Scalia also attempted to distinguish cases applying strict scrutiny not involving unemployment compensation regulations, such as Wisconsin v. Yoder and Cantwell v. Connecticut, from *Smith*. He did so by characterizing these opinions as "hybrid" decisions, raising more than one constitutional claim. "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Id.* at 881. He further acknowledged that cases involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections," might be subject to different treatment. *Id.* at 881-82.

Justice O'Connor was highly critical of this argument. She maintained rather that there was "no denying that both [*Cantwell* and *Yoder*] expressly relied on the Free Exercise Clause." *Id.* at 896 (O'Connor, J., concurring) (citations omitted).

246. *Smith*, 494 U.S. at 885; *see also* Respondent's Brief at 10, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd without op.*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S.Ct. 1472 (1992) [hereinafter "Respondent's Brief"]; Petitioner's Brief at 11, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd without op.*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S.Ct. 1472 (1992) [hereinafter "Petitioner's Brief"]. The Church also advanced two other interpretations of the Court's holding. First, that "laws specifically directed at a litigant's religious practices are subject to stringent review." Petitioner's Brief at 11. Second, that "if the legality of a regulated act depends upon the actor's motives, religious motives must be included among the motives that are legally permitted." *Id.*

The Ninth Circuit appears to be the only federal circuit court having interpreted the

cordingly, because no further inquiry is necessary if the challenged regulation is characterized in this manner, *Smith*, like *Lyng*, reinforces the importance of the cognizable claim inquiry. The precise scope of the Court's holding, however, is unclear. Neutrality served as the cornerstone for the majority's analysis. Yet the opinion offers little guidance regarding the substance of the distinction between neutral laws and laws targeting particular religious practices.[247] The Court most likely granted certiorari in *Hialeah* to address specifically this concern.

The Court's decision is also important because, while the opinion suggests that heightened scrutiny is properly limited to the context of the unemployment compensation cases,[248] the Court did not expressly make this determination. Rather, the Court rejected the plaintiffs' claim without proceeding to resolve the issue of whether the Oregon statute served a compelling interest. After *Smith*, the question of whether a criminal prohibition regulating religious conduct targeting particular religious practices is still subject to heightened review thus remains unresolved. *Hialeah* will probably address this issue as well.

Additionally important is language in the majority's opinion reflecting the Court's troubling interpretation of the Free Exercise Clause. One passage in the opinion is particularly revealing. In explaining why granting an exemption for the religious use of peyote was improper, Justice Scalia declared that:

> [i]t 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 pre-

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significance of the Court's *Smith* decision to date. The court's interpretation, however, similarly supports this conclusion. In American Friends Service Committee Corp. v. United States, 951 F.2d 957 (9th Cir. 1991), the plaintiffs, a Quaker organization employing approximately 400 persons, brought suit against the government claiming that provisions of the Immigration Reform Control Act, 8 U.S.C. § 1324a(a)(1), requiring, generally, that employers verify the legal immigration status of their employees, violated the free exercise clause. After determining that *Smith* was controlling, the court rejected the claim. The court reasoned that the regulations were "not aimed at suppressing the free exercise of religion," and were thus valid under *Smith*. *Id.* at 961.

247. The Court's failure to do so is probably explained by the fact that the Oregon regulation was not challenged as an attempt to regulate religious beliefs. *Smith*, 494 U.S. at 882.

248. *See id.* at 882-86.

> ferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[249]

This language is troubling, because it signals the Court's return to formal neutrality,[250] which, Professor McConnel reminds us, "confines protection of the Free Exercise Clause to persecution or overt discrimination against religion," and thus has little practical significance.[251] Whether formal neutrality will continue to prevail in *Hialeah* will be an issue of significant interest.

V. RITUAL ANIMAL SACRIFICE AND THE FUTURE OF FREE EXERCISE: ANALYSIS AND APPLICATION

Hialeah squarely raises two of the fundamental free exercise questions which remain unresolved in the wake of the Court's *Smith* decision. The first, concerning the precise substance of the neutrality assessment, is essentially an evidentiary issue: whether *Smith* contemplates the admissibility of extrinsic evidence, or whether facial neutrality should be dispositive. The second, and perhaps more fundamental, is whether free exercise claims will continue to trigger heightened scrutiny. This section explores the significance of these questions, both in the abstract and specifically with respect to *Hialeah*.

As a preliminary matter, we turn to a brief discussion regarding the need to reinstate the specific evidence requirement given voice in *Wisconsin v. Yoder*[252] and the unemployment compensation cases. We begin here, because this requirement

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249. *Id.* at 890 (emphasis added). Justice O'Connor expressly challenged this conclusion in her concurring opinion. She emphasized in particular that "[o]ne'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." *Id.* at 903 (O'Connor, J., concurring) (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). Professor McConnel similarly adds that "[t]he 'disadvantaging' of minority religions is not 'unavoidable' if the courts are doing their job. Avoiding certain 'consequences' of democratic government is ordinarily thought to be the very purpose of the Bill of Rights." McConnel, *Free Exercise Revisionism*, *supra* note 14, at 1129.

250. Whether the free exercise clause should in fact be given a broad or narrow interpretation is one of the issues raised by the Court's *Smith* decision. *See* McConnel, *Free Exercise Revisionism*, *supra* note 14, at 1111.

251. McConnel, *Accommodation of Religion*, *supra* note 24, at 691.

252. 406 U.S. 205 (1972).

should play an important role in *Hialeah*.

A. The Need for Specific Evidence

In his dissenting opinion in *Smith*, Justice Blackmun stressed both that the plaintiffs' claim triggered free exercise review and that Oregon's prohibition against the use of peyote was invalid.[253] With regard to the latter, Justice Blackmun emphasized that "evidence the religious use of peyote ever harmed anyone" was absent.[254] Yet while the "dearth of evidence"[255] was important to Justice Blackmun, the Court's decisions do not clearly reveal whether or not the state must furnish "specific evidence"[256] in support of assertedly compelling interests.

Several decisions suggest that such evidence is required. In *Yoder*, for example, the Court sustained the plaintiffs' free exercise claim reasoning specifically that the State's evidence was insufficient.[257] The unemployment compensation cases were similarly sensitive to this concern.[258] But elsewhere, specific evidence has not been required. Thus, in *Prince v. Massachusetts*[259] the Court sustained the constitutionality of a law prohibiting the distribution of religious literature by children despite the absence of evidence of any danger to "the state or to the health, morals or welfare of the child."[260]

Even after *Smith*, this issue remains yet unresolved. However, the answer would seem to be clear. The Court should reinstate the specific evidence requirement in order to safeguard against the possibility that mere pretense will serve to justify religious discrimination.[261] "Religious freedom," Justice Murphy

253. *See generally* 494 U.S. 872, 911-12 (1990) (Blackmun, J., dissenting).

254. *Id.*

255. *Id.* at 912 n.4.

256. *Yoder*, 406 U.S. at 224.

257. *Id.*

258. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 407 (1963); Frazee v. Illinois, 484 U.S. 829, 835 (1989); Thomas v. Review Bd., 450 U.S. 707, 719 (1981).

259. 321 U.S. 158 (1944).

260. *Id.* at 174 (Murphy, J., dissenting).

261. The Court has sanctioned this concern in a related context. For example, in Mississippi Univ. for Women v. Hogan, 458 U.S. 178 (1982), the Court sustained an equal protection challenge to the State's policy of excluding men from the Mississippi University for Women School of Nursing reasoning that "although the State recited a 'benign compensatory purpose,' it failed to establish that the alleged objective is the

once declared, "is too sacred a right to be restricted or prohibited in any degree *without convincing proof* that a legitimate interest of the state is in grave danger."[262]

B. NEUTRALITY

1. *Analysis*

Prior to *Smith*, the Court's free exercise jurisprudence appeared to be well settled: regulations imposing a substantial burden on the free exercise of religious conduct triggered constitutional scrutiny. Today, however, this may no longer be the case.[263] Even where the substantial burden requirement is satisfied, free exercise review may no longer be necessary.

The Court's opinion poses an interesting problem. From an evidentiary perspective, the opinion is susceptible to two interpretations. The first, advanced by the City, is that facial neutrality is dispositive.[264] Courts, in other words, may not look beyond statutory language. The second, advanced by the Church, is that neutrality can be assessed with reference to extrinsic evidence.[265] For the purpose of *Hialeah*, this interpretation would sanction consideration of both the legislature's motives and dominant effect of the challenged regulations. Arguably, the latter interpretation should prevail.

Because neutral generally applicable laws do not have to be justified by a compelling interest,[266] neutrality represents a fundamental threshold inquiry. Recognizing this, it becomes clear

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actual purpose underlying the discriminatory classification." *Id.* at 730. Writing for the majority, Justice O'Connor emphasized in particular that the State had made "no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the [University] opened its doors or that women currently are deprived of such opportunities." *Id.* at 731.

262. *Prince*, 321 U.S. at 175 (emphasis added).

263. *See supra* notes 184-95 and accompanying text revealing that the Court will now look to the *form* as well as *severity* of the burden.

264. Respondent's Brief at 11 ("The language of the ordinances should be definitive.").

265. *See* Petitioner's Brief at 12-14 ("Two of the ordinance overtly discriminate against religion. All of them were enacted for the sole purpose of suppressing a religious practice, and that is almost their only effect. All of them recognize good and bad reasons for killing animals, and classify religious reasons as bad.").

266. *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990), *reh'g denied*, 496 U.S. 913 (1990).

that the fate of the Free Exercise Clause hinges largely on how neutrality is to be defined.[267] If given an expansive definition, few claims will continue to trigger free exercise review.[268] "[F]ew states," Justice O'Connor observed in her concurring opinion in *Smith*, "would be so naive as to enact laws directly prohibiting or burdening religious practices as such."[269] Conversely, a narrow definition would serve to rejuvenate, or at least restore, the viability of the Court's free exercise jurisprudence. Given that *Smith* has led to the "near and total loss of any substantive constitutional right to practice religion,"[270] the latter interpretation would appear to be more consistent with the deep logic underlying the First Amendment. "As the language of the Clause itself makes clear, an individual's free exercise of religion is a *preferred* constitutional activity."[271]

This interpretation would also be more consistent with established precedent. In *Roy*, for example, the Court, while speaking to this concern, considered evidence that "Congress made no provision for individual exemptions to the requirement in the two statutes in question."[272] And in a related context the Court has counseled that "[d]etermining whether invidious discriminatory purposes [are] a motivating factor demands a *sensitive* inquiry into such circumstantial and direct evidence as may be available."[273]

2. *Application*

The district court rejected the Church's free exercise claim

267. Indeed, as observed by Justice O'Connor in her concurring opinion in *Smith*, the "free exercise cases have *all* concerned generally applicable laws that had the effect of significantly burdening a religious practice." *Id.* at 894 (O'Connor, J., concurring) (emphasis added).

268. *See, e.g.*, Petitioner's Brief at 11 ("*Smith* leaves precious little protection for the free exercise of religion. If this Court permits even that protection to be evaded by *clever drafting* and a mere pretense of neutrality, then it has indeed repealed the Free Exercise Clause.") (emphasis added).

269. 494 U.S. at 894 (O'Connor, J., concurring); *see also generally* Fowler v. Rhode Island, 345 U.S. 67 (1953); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Guinn v. United States, 238 U.S. 347 (1915); Yick Wo v. Hopkins, 118 U.S. 256 (1886).

270. Laycock, *Summary and Synthesis*, *supra* note 31, at 848.

271. *Smith*, 494 U.S. at 901-02 (O'Connor, J., concurring) (emphasis added).

272. Bowen v. Roy, 476 U.S. 693, 708 (1986).

273. Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977) (emphasis original).

reasoning that the ordinances were intended to prohibit all animal sacrifice rather than to target specifically the practice of Santeria.[274] Even assuming, however, that facial neutrality is dispositive, the challenged regulations are *not* neutral.

Facial neutrality provides a useful point of departure. Each ordinance is laden with terms having religious significance. For example, the ordinances are replete with textual references to "sacrifice," "ritual" and "ceremony." If the ordinances are truly neutral, these references must serve a secular purpose. But they do not. The City claimed the use of these terms was intended to place residents of Hialeah on *notice* of the prohibited conduct.[275] In light of the fact that the City failed to introduce evidence that animals are killed in secular rituals or ceremonies, the City's argument amounts to a tacit admission that terms such as "sacrifice" are largely synonymous with religion.[276] Given that the statutory language is directed at religious practices, it follows that the ordinances target primarily the religious practice of animal sacrifice, and thus cannot properly be characterized as neutral. The district court implicitly reached this conclusion when it explained that an exemption "would, in effect, swallow the rule."[277] For, after all, the court's reluctance to grant a religious exception can only be explained by the fact that "the rule has only religious applications."[278]

The absence of the requisite neutrality also becomes apparent when extrinsic evidence is considered. To begin with, the district court expressly found that the Church's announcement "triggered" the legislative action.[279] This evidence is not, of course, dispositive. However, it at least supports an inference of anti-religious intent.[280]

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274. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 723 F. Supp. 1467, 1488 (S.D. Fla. 1989), *aff'd without op.*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992).

275. Respondent's Brief at 13.

276. *See, e.g.*, Petitioner's Reply Brief at 41, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd without op.*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992) [hereinafter "Petitioner's Reply Brief"].

277. *Hialeah*, 723 F. Supp. at 1487.

278. Petitioner's Brief at 16.

279. *Hialeah*, 723 F. Supp. at 1483.

280. *E.g.*, *Arlington Heights*, 429 U.S. at 267 ("specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's

Also revealing is the fact that Hialeah recognizes a broad range of acceptable secular killings. For example, Hialeah permits the extermination of "undesirable" animals.[281] These exceptions strongly suggest that "suppression of religion is virtually the only effect of the ordinances."[282] The Church correctly points out that "[a]ny resident of Hialeah can kill an unwanted pet in his yard or home, so long as he does not do so in a ritual or ceremony." Again, while relevant, this evidence is probably not dispositive. But taken together, this evidence reveals that the ordinances are not neutral and, accordingly, that the challenged regulations are properly subject to the compelling interest test.[283]

Also militating in favor of heightened review is the fact that Santeria is an "underground," or minority, religion.[284] The First Amendment, in recognition that "[n]o chapter in human history has been so largely written in terms of persecution and intolerance as the ones dealing with religious freedom,"[285] contem-

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purpose").

281. *See* FLA. STAT. § 482.021(17) (West 1987), incorporated into HIALEAH ORD. 87-40 (1987). Ordinance No. 87-40 also effectively incorporated a myriad of other exemptions. *See generally* Petitioner's Brief at 12-13.

282. Petitioner's Brief at 11.

283. Heightened review would also seemingly be compelled by the fact that the ordinances fail to provide for a religious exception. In *Smith*, the Court observed that *Sherbert* and its progeny stand for the proposition that "where the State has in place a system of individualized exceptions, it may not refuse to extend that system to cases or 'religious hardship' without compelling reason." 494 U.S. at 884. There is, however, a slight problem here. While the Court did not determine whether strict scrutiny was properly limited to the context of the unemployment cases, the Court did expressly declare that "these decisions at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct." *Id.* Implicitly, *Smith* would thus appear to *preclude* consideration of evidence of this nature at this stage of the inquiry. The question becomes one of interpretation. If the Court intended to articulate an evidentiary restriction, evidence that the City provides for secular but not religious exemptions would be inadmissible. Arguably, though, this was not the Court's purpose. This passage appears in the portion of the opinion where the Court was distinguishing *Smith* from the unemployment compensation cases. Hence, the Court was not focusing on the substance of the neutrality assessment, but rather on the standard of review question. *See id.* Assuming this interpretation is correct, heightened review would appear to be required.

284. *See supra* notes 57-69 and accompanying text discussing the historical origins of Santeria.

285. Prince v. Massachusetts, 321 U.S. 158, 175 (1944) (Murphy, J., dissenting); *see also* Bowen v. Roy, 476 U.S. 693, 703 ("historical instances of religious persecution and intolerance gave concern to those who drafted the Free Exercise Clause"); United States v. Ballard, 322 U.S. 78, 87 (1944) ("The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They

plates free exercise of just this character.[286] Indeed, "[t]he very purpose of the Bill of Rights was to withdraw certain subject from the vicissitudes of political controversy, to place beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[287] Heightened review is required if the Court is to remain faithful to these principles.[288]

C. Heightened Review After Smith?

1. *Analysis*

Justice Scalia's *Smith* opinion strongly suggests that the *Sherbert* compelling interest test should properly be limited to the context of the unemployment compensation decisions.[289] The Court, however, did not specifically address this question, and thus the precise issue of whether criminal prohibitions burdening the free exercise of religious conduct are properly subject to heightened scrutiny remains unresolved. Providing the challenged regulations are not characterized as neutral and generally applicable, the Court will now have to confront this question in *Hialeah*.[290] Contrary to Justice Scalia's suggested conclusion in *Smith*, heightened review is arguably appropriate.[291] Indeed, *Smith* itself compels this conclusion.

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fashioned a charter of government which envisaged the widest possible toleration of conflicting views.").

286. "[T]he First Amendment was enacted to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." *Smith*, 494 U.S. at 901 (O'Connor, J., concurring).

287. *Id.* at 903 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

288. "The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society." *Id.*

289. *See id.* at 882-86.

290. Because the challenged regulations provide for criminal sanctions, the cognizable burden requirement should not present a serious issue. Criminal prohibitions burden the individual's free exercise of religion in the "severest manner possible." *Smith*, 494 U.S. at 898 (O'Connor, J., concurring); *see also* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988); Braunfeld v. Brown, 366 U.S. 599, 605 (1961).

291. In their separate opinions in *Smith*, both Justice O'Connor and Justice Blackmun similarly reached this conclusion.

2. *Application*

In *Smith*, the majority highlighted the fact that the *Sherbert* test was developed in a context where consideration of the "particular circumstances" was necessary.[292] More importantly, the majority distinguished *Smith* from *Sherbert* based expressly on this distinctive feature of the unemployment programs. Similar considerations serve to distinguish *Hialeah* from *Smith*. Ordinance No. 87-52 and Ordinance No. 87-71 prohibit the "unnecessary" killing of animals.[293] In this respect, the challenged ordinances are analogous to the unemployment compensation regulations: both standards require a *fact-intensive* inquiry. Accordingly, the rationale serving to justify heightened scrutiny in *Sherbert* extends to *Hialeah*, and heightened review is therefore appropriate.

The more difficult question is, perhaps, whether assuming that the ordinances are not neutral, the ban on animal sacrifice can be justified by any of the three interests asserted by the City. Arguably, the ban cannot be justified.

a. Community Health, Welfare and Safety

For the better part of a century, the Court has recognized that under the police power, states have authority to enact regulations to protect "the public health and the public safety."[294] Thus, there is some credence to the City's argument here. Yet the absence of evidence that animal sacrifice poses such a threat is fatal to the City's claim. The trial court found that "[t]he evidence at trial revealed a risk of physical harm to members of both the [Church] and the public from disease and infestation."[295] However, the Court also found that prior to trial, "*no instances* [had been] documented of any infectious disease originating from the remains of animals being left in public

292. *Smith*, 494 U.S. at 884; *see also* Bowen v. Roy, 476 U.S. 693, 708 (1986).

293. *See* HIALEAH ORD. § 87-52, 6-8(2) (1987); HIALEAH ORD. § 87-71(1) (1987).

294. Jacobson v. Massachusetts, 197 U.S. 11, 24 (1905); *see also Smith*, 494 U.S. at 872 (O'Connor, J., concurring); Sherbert v. Verner, 374 U.S. 398, 403 (1978); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

295. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1485 (S.D. Fla. 1989), *aff'd without op.*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992).

places."[296] This is precisely the constitutional infirmity identified in *Yoder*[297] and consistently highlighted in the unemployment compensation cases.[298]

b. Psychological Welfare of Children

The Court has long recognized that the states have a strong interest in looking after the welfare of minor children. In *Prince*, for example, the Court held that this interest outweighed the right of parents to use their children as street proselytizers for their faith.[299] This concern also led the Court to conclude in *Jehovah's Witnesses v. King County Hospital*[300] that parents could not, on religious grounds, withhold a blood transfusion from their child where necessary to save the child's life. And the Court has similarly expressed concern for the welfare of children in other areas.[301] Although most cases have involved principally threats of physical harm, the Court has expressly validated concern for the *psychological* welfare of children.[302]

Yet while the City's interest here is clearly viable, there is, again, the troubling lack of any specific evidence in support of the City's position. Evidence that children are permitted to attend sacrificial ceremonies was proffered.[303] But no evidence was offered documenting expert testimony that witnessing animal sacrifice would tend to promote aggressive behavior. To the contrary, the City's expert "did not testify that observation of violence would lead inalterably to violent behavior; just that such

296. *Id.* at 1474 (emphasis added).

297. *See Yoder*, 406 U.S. at 224.

298. *See supra* notes 204-17 and accompanying text.

299. *See* Prince v. Massachusetts, 321 U.S. 158, 169-70 (1944). The Court explained that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full mature citizens, with all that implies. It may secure this against the impending restraints and dangers, within a broad range of selection." *Id.* at 168.

300. 390 U.S. 598 (1968) (per curiam).

301. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (Powell, J., concurring) (arguing that the FCC could properly consider whether unsupervised children would be exposed to potentially offensive radio broadcasts for regulatory purposes); Ferber v. New York, 458 U.S. 747, 756-58 (1982).

302. *See, e.g., Prince*, 321 U.S. at 170 (propagandizing may create possible emotional, psychological or physical injury).

303. *Hialeah*, 723 F. Supp. at 1474 n. 24.

observation was more likely to promote such behavior."[304] Moreover, the City's expert appears simply to have been speculating.[305]

c. Animal Cruelty

The district court, relying on expert testimony that procedures used by the Church for maintaining and killing sacrificial animals were inhumane, concluded that the ban could be justified by the City's interest in the prevention of animal cruelty.[306] This portion of the court's holding is also without merit. Admittedly, prevention of animal cruelty is a legitimate interest. But plainly this interest is not compelling. A single analogy is sufficient to demonstrate why. In *Yoder*, the Court rejected the argument that the compulsory school-attendance law at issue could be justified by the State's interest in universal education.[307] As a matter of common sense, the City's interest in preventing animal cruelty cannot be paramount to Wisconsin's interest in promoting universal education, "education perhaps the *most important* function of state and local governments."[308] As recently explained by Justice Scalia in *Smith*, "if 'compelling interest' really means what it says, . . . *many* laws will not meet the test."[309]

Even assuming these interests are compelling, the ordinances would still be unconstitutional. To justify the ordinances, the City also had to prove that its asserted interests could not be "otherwise served."[310] Suffice it to say that the City could accomplish its objectives by prohibiting the improper disposal of animal remains - that is, of course, unless the practice of

304. *Id.* at 1475.

305. *See supra* notes 103-08 and accompanying text discussing Dr. Huesmann's testimony.

306. *Hialeah*, 723 F. Supp. at 1486-87.

307. *See supra* notes 237-39 and accompanying text.

308. San Antonio School Dist. v, Rodriguez, 411 U.S. 1, 15 (1973) (quoting Brown v. Board of Education, 347 U.S. 483, 495 (1954)) (emphasis added); *see also* Plyler v. Doe, 457 U.S. 202, 225 (1982) (education plays a "fundamental role in maintaining the fabric of our society").

309. Employment Div. v. Smith, 494 U.S. 872, 888 (1990), *reh'g denied*, 496 U.S. 913 (1990) (emphasis added). Of course the Court did recognize Pennsylvania's interest in providing a uniform day of rest as compelling in Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion). *See supra* notes 234-36.

310. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). *See also supra* note 10.

Santeria is what the ordinances really target.

VI. CONCLUSION

In *Hialeah*, the Court will have to confront several difficult free exercise issues raised, but not resolved, by *Smith*. In particular, resolution of the question of whether facial neutrality will be dispositive under *Smith* will be of considerable significance. More importantly, though, *Hialeah* will now call on the Court to decide whether disadvantaging minority religious practices, like Santeria, is, in fact, an "*unavoidable consequence*"[311] of democratic government. *Hialeah*, in other words, involves nothing short of the fate of free exercise.

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311. *Smith*, 494 U.S. at 890 (emphasis added).

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